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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHILDREN'S HEALTH DEFENSE-CALIFORNIA CHAPTER, a California 501(c)(3) non-profit corporation, on its own and on behalf of its members, and PROTECTION OF THE EDUCATIONAL RIGHTS OF KIDS (P.E.R.K.), a California 501(c)(3) non-profit corporation, on its own behalf and on behalf of its members,

Petitioners,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, a local educational agency and school district for the County of Los Angeles; MEGAN REILLY, in her official capacity as Superintendent of Los Angeles Unified School District; GEORGE MCKENNA, in his official capacity as a member of the LAUSD Board of Education; MONICA GARCIA, in her official capacity as a member of the LAUSD Board of Education; SCOTT SCHMERELSON in his official capacity as a member of the LAUSD Board of Education; NICK MELVOIN, in his official capacity as a member of the LAUSD Board of Education; JACKIE GOLDBERG, in her official capacity as a member of the LAUSD Board of Education; KELLY GONEZ, in her official capacity as a member of the LAUSD Board of Education; TANYA ORTIZ FRANKLIN, in her official capacity as a member of the LAUSD Board of Education;

Respondents.

Case No.: 21STCP03429

PETITIONERS' OPPOSITION TO RESPONDENTS' DEMURRER TO PETITIONERS' FIRST AMENDED PETITION; MEMORANDUM OF POINTS AND AUTHORITIES

[Request for Judicial Notice, Declaration of Nicole C. Pearson filed concurrently herewith]

Date of Hearing: April 8, 2022
Time: 9:30 a.m.
Dept.: 86
Judge: Mitchell L. Beckloff

Complaint Filed: October 13, 2021
Amended Complaint Filed: February 1, 2022
Trial Date: None set

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I. INTRODUCTION

LAUSD's COVID-19 injection mandate is unprecedented. Knowing they are not authorized to add COVID-19 as a required vaccination, Respondents claim their mandate is permissible because "admission" to LAUSD is not conditioned upon it. In this way, Respondents believe they are allowed to force children without a COVID-19 injection into at-home independent study. They are wrong. The Legislature has fully occupied the area of vaccinations and the education of children, preempting Respondents from enforcing their COVID-19 injection mandate. Under the Health & Safety Code, students who have otherwise complied with the Legislature's vaccination laws, must be granted "unconditional admittance" to school, which means an in-person education with full access to extracurricular activities. In addition, the Education Code dictates that at-home independent study cannot be forced.

On demurrer, this Court is not being asked to adjudicate on the merits. Rather, the Court, accepting as true the facts pled in the complaint, need only determine if Petitioners sufficiently state a claim for preemption, and sufficiently allege Respondents have violated the rights of LAUSD children without any justification or consideration for the grave harm inflicted upon them. Petitioners have done both.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The COVID-19 injection has not been added by the Legislature or the CDPH to the list of mandatory vaccines for children. (FAP, ¶37). Nevertheless, on September 9, 2021, Respondents held a special board meeting with less than forty-eight hours' notice, to adopt a district-wide COVID-19 injection requirement for all Los Angeles Unified School District ("LAUSD") students as a condition to receiving in-person education and services. ("Resolution") (Id., ¶7). Students not in compliance would be denied complete access to on-campus school and extracurricular activities, and would be forced to enroll in at-home independent study. (Ibid.). The Resolution did not allow for personal belief exemptions. (Id., ¶69).

At the meeting, Respondents allowed only three parents to voice their objections to the mandate, and ignored numerous written objections submitted by parents. (FAP, ¶¶64-66). The only "administrative record" in this case is attached as Exhibit B to Petitioners' complaint. (Id., ¶68). The administrative record

is short and reflects that Respondents did not consider a number of relevant factors, including the fact that all COVID-19 injections are experimental and still under an emergency use authorization, that none of them prevent transmission, that children are at very little risk of severe COVID-19 and are at a statistically zero risk of death from the virus, that many of the students already possess natural immunity, or that the injections have already caused significant adverse effects, including increased risk of myocarditis and death in LAUSD students' cohort. (Id., ¶¶92, 93, 104, 117, 122). Despite this, and the fact the injections provide dubious health benefits or immunity, if any, Respondents nevertheless enacted the Resolution, enabling it to continue to receive billions of dollars in ESSER Covid Relief Funds. (Id., ¶¶124-126).

On October 13, 2021, two non-profit children's advocate groups, Children's Health Defense – California and P.E.R.K., filed their Verified Petition for Writ of Traditional and Administrative Mandate against LAUSD, the Superintendent, and LAUSD's board members, on the basis that they lack legal authority to mandate a new vaccination requirement as a condition to students' in-person schooling. (FAP, ¶10). On December 8, 2021, Petitioners sought a preliminary injunction, which was denied by this Court. (Id., ¶83). On December 14, 2021, Respondents voted to "delay implementation" of their plan to force COVID-19 unvaccinated students into independent study until the fall of 2022. (Id., ¶11). In the interim, LAUSD students who have not received a COVID-19 injection continue to be excluded from extracurricular activities. (Id., ¶12).

On December 20, 2021, San Diego Superior Court Judge John Meyer, facing a near identical COVID-19 injection mandate enacted by San Diego Unified School District, ruled that school districts are not the proper authority to impose any new vaccination requirements on students as a condition to in-person instruction in California. (FAP, ¶87: Exhibit A). He ruled that any local vaccine mandate is fully pre-empted by the existing law, and enjoined SDUSD's unlawful attempt to mandate a COVID-19 injection. Pursuant to Evidence Code § 452(d), Petitioners request that this Court take judicial notice of the order.[1]

Petitioners filed a Verified First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("FAP") on February 1, 2022. (Pearson Decl., ¶3). Respondents filed

[1] Respondent SDUSD has filed an appeal to the trial court's ruling.

a demurrer as to every cause of action except the third on March 7, 2022. (Ibid.).

III. RESPONDENTS FAILED TO MEET AND CONFER

Before filing a demurrer, the demurring party must meet and confer at least five days before the responsive pleading is due either in person or by telephone. (Cal. Code Civ. Proc. § 430.41(a)). This did not occur. Instead, counsel for Respondents emailed a letter to Petitioners' counsel at 4:49 p.m. the last possible day for meeting and conferring, which they "deem[ed] to comply with the parties' meet and confer requirements under 430.41(a)." (Pearson Decl., ¶4, Exhibit A). Petitioners' counsel responded the same day, identifying the procedural requirements necessary to satisfy before filing demurrer, and explaining that Respondents' declaration of filing a demurrer was not an attempt to meet and confer, a fact highlighted by the fact that Respondents' counsel had emailed Petitioners' counsel multiple times in the weeks before to request discovery extensions. (Id. ¶5, Exhibit B). Respondents' counsel never replied and, instead, filed the Demurrer on Monday, March 7, 2022. (Id., ¶6.).

IV. ARGUMENT

A. Legal Standard on Demurrers

The sole issue raised by a demurrer is whether the facts pleaded state a valid cause of action, in which all pleaded facts are accepted as true. (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38-39). On demurrer, questions of a plaintiff's ability to prove the allegations are irrelevant; the plaintiff need only to plead facts showing it may be entitled to some relief. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496). The demurrer cannot be sustained if the complaint alleges facts sufficient to state a cause of action under *any* legal theory. (*McCall v. Pac. of Cal., Inc.* (2001) 25 Cal.4th 412, 415). On demurrer, the court may also consider matters which may be judicially noticed. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591).

A demurrer to a cause of action for declaratory relief, such as here, must be overruled as long as an actual controversy is alleged; the pleader need not establish it is also entitled to a favorable judgment. (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606). A general demurrer is not an appropriate method for testing the merits of a declaratory relief action "because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest." (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751). If the Court determines that any part of Respondents'

Demurrer has merit, Petitioners should be granted leave to amend. (*Quelimane, supra,* 19 Cal.4th at 39). Unless a complaint on its face is incapable of amendment, denial of leave to amend constitutes an abuse of discretion. (*McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304).

B. <u>The First Cause of Action Sufficiently Pleads a Claim of Preemption.</u>

1. <u>State Law Preempts the LAUSD Resolution.</u>

Petitioners' First Cause of Action alleges that, by enacting and enforcing the LAUSD vaccine mandate, Respondents exceeded their lawful "governing authority" because the LAUSD Resolution is fully preempted by and in direct conflict with the existing statutory scheme. (FAP, ¶¶132, 139, 141). The First Cause of Action incorporates by reference all preceding 129 paragraphs and repeats allegations of direct violations of the Health & Safety Code. (Id., ¶¶133-135, 137, 139, 140).[2] On demurrer, this Court is only being asked to determine if the facts in the FAP sufficiently plead a claim for preemption. This is a very different analysis than the previous preliminary injunction motion, where the court examined the likelihood of success on the merits. Even so, there is little doubt state law preempts the Resolution.

Local school boards have been vested with much decision-making authority. This power, however, is not without limitation. School districts must abide by California Education Code § 35160, which states: "the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner **which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established**." (Emphasis added). Only the Legislature and the CDPH are permitted to add vaccinations to the required list delineated by Health & Safety Code § 120335, which Respondents now finally admit:

> "LAUSD does not contend that it is vested with CDPH's authority to add a new statewide vaccination requirement as a condition for the admission of students to public schools." (Demurrer, pg. 16: 7-9).

Respondents urge, however, that there is no preemption because LAUSD is not denying children

[2] While the First Cause of Action specifically references and repeats earlier allegations concerning violations of the Health & Safety Code, this cause of action incorporates all previous paragraphs in the FAP. However, unlike the Third Cause of Action (which Respondents do not challenge in the Demurrer), the First Cause of Action does not repeat the earlier paragraphs in the FAP containing the allegations of violations of the Education Code or Code of Regulations. If this Court would prefer, Petitioners can amend the FAP to repeat the FAP ¶¶47-58 allegations within the First Cause of Action.

"admission" to school for failure to get the COVID-19 vaccination. (Demurer, pg. 16). These unvaccinated children are "admitted," Respondents claim, but are simply denied access on campus and are instead relegated to at-home independent study. Respondents argue the Health & Safety Code covers only "admission" to school as it relates to the mandatory childhood vaccinations and does not dictate *how* school boards should offer said admission. While this Court appeared to agree when denying the preliminary injunction, perhaps because of the high threshold for preliminary injunctions and because the complete statutory scheme was not before the Court at that time, this Court did say that, "while the allegations are concerning in the context of the Resolution, the comparative educational quality of LAUSD's in-person learning and its independent study program is not before the court in this action" and "whether and to what extent, if at all, LAUSD's independent study program in practice complies with state law is not before the court and has not been raised by the petition." (Judge Beckloff's Order Denying Preliminary Injunction, pgs. 7, 8-9, fn. 11).

Since then, a sister court in San Diego has ruled that school boards are indeed preempted by state law from forcing children into independent study for refusal to comply with a COVID-19 injection mandate. Judge John Meyer in San Diego Superior Court, facing the exact same COVID-19 school board vaccination mandate as in this case, granted the petitions for writ of mandate on December 20, 2021:

> "The Legislature intended a statewide standard for school vaccination requirements and established a detailed scheme…The statutory scheme leaves no room for each of the over 1,000 individual school districts to impose a patchwork of additional vaccine mandates…SDUSD is required to admit students and allow their continued in-person attendance as long as they have received the 10 enumerated vaccines. SDUSD's attempt to impose an additional vaccine mandate and force students (both new and current) who defy it into non-classroom-based independent study directly conflicts with state law."

(FAP, ¶13: Ex. A, pgs. 3-4). Although Respondents are aware of Judge Meyer's recent decision, [3] they fail to mention it in their Demurrer and instead imply that this Court is the first in California to face a COVID-19 vaccination mandate for children, which it is not.[4]

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[3] Not only did Petitioners attach this San Diego decision as an exhibit to the FAP, but sections of Respondents' own Demurrer, in this case, are lifted verbatim from the briefs filed in the San Diego case.

[4] Respondents cite an out-of-state case involving college students, *Klaassen v. Trustees of Indiana University* (N.D. Indiana, July 18, 2021, 7 F.4th 592). That Indiana case is distinguishable: (1) Indiana University allowed for personal belief and medical exemptions; and (2) the court was influenced by the fact that college students could opt to attend a different college

Local ordinances or rules that conflict with state law are preempted and void. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897). A "conflict exists if the local legislation duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication." (*Id.*; *see also City of Los Angeles v. 2000 Jeep Cherokee* (2008) 159 Cal.App.4th 1272, 1276).

California's Health & Safety Code, Education Code, and Code of Regulations do not operate in a vacuum. Rather, they work in conjunction with one another to fully occupy the field of vaccination and education in this state.[5] These laws are pled in the FAP, and are listed below:

- H&S Code §§120325-120480: comprehensive statutory scheme for vaccinations and school codified in over 155 provisions. (FAP, ¶34).
- H&S Code § 120335(b): school districts must allow for "unconditional admittance" to all students who receive the 10 listed vaccines. (Id., ¶¶35-38, 43, 133, 134).
- H&S Code § 120335(b)(11): only the CDPH (and Legislature) can add a subsequent mandatory vaccine, and only after complying with comprehensive rulemaking procedures and standards. (Id., ¶¶35-38, 43, 133, 134).
- H&S Code § 120338: If the CDPH adds another required vaccination, medical and personal beliefs exemptions must be allowed. (Id., ¶¶39-40, 135, 140).
- Education Code § 35160: "the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is **not in conflict with or inconsistent with, or preempted by, any law** and which is not in conflict with the purposes for which school districts are established." (Id., ¶45).
- Education Code § 49405: "The control of smallpox is under the direction of the State Department of Health Services, and **no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities**." (Id., ¶33).

university with no vaccine mandates.

[5] Legislative history confirms that the legislative purpose concerning childhood vaccine requirements is to "[t]o provide a statewide standard [that] allows for a consistent policy that can be publicized in a uniform manner, so districts and educational efforts may be enacted with best practices for each district." (Sen. Jud. Com. Analysis of Sen. Bill No. 277, 2015-2016 Reg. Sess., April 22, 2015, pgs. 13, 18). Furthermore, the Education Code expressly states that, "no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities." (Cal. Ed. Code § 49405; FAP, ¶¶33, 30, 159).

- Education Code § 51746: school districts… offering independent study shall provide appropriate existing services and resources … and shall ensure the **same access to all existing services and resources** in the school in which the pupil is enrolled pursuant to Section 51748 as is available to all other pupils in the school." (Id., ¶47).
- Education Code § 51747(g)(8): a local educational agency shall not receive funding for an independent study program unless independent study is an optional educational alternative in which "no pupil may be required to participate." (Id., ¶48).
- Education Code § 51749.5(a)(12): a "**pupil shall not be required to enroll in [independent study] courses**." (Id., ¶¶49-50).
- Education Code § 51749.6(a)(6): "enrollment in [independent study] is an **optional** educational alternative in which **no pupil may be required to participate**." (Id., ¶51).
- Code of Regulations, Title 5 §11700(d)(2)(A): independent study enrollment must not be coerced. (Id., ¶¶52, 53).

The Resolution violates state law in at least six ways, and Respondents' attempt to manipulate the definition of "admittance" to fit their agenda is nothing more than unlawful segregation. First, the California Health & Safety Code dictates that schools must provide "**unconditional admittance**" to all students who comply with the current mandatory vaccinations (10 required vaccines). (H&S § 120335(b) [emphasis added]). Students being denied access to school are not admitted at all, let alone unconditionally. Being admitted in LAUSD is absolutely meaningless if one cannot actually go to the school. Independent study is not a separate on-campus building and provides zero in-person instruction. Children are relegated to teaching themselves, by themselves, *at home*. This is precisely why independent study is not permitted to be forced or made mandatory. Second, the Health & Safety Code dictates that any vaccinations beyond the listed 10 subsequently added not through the legislative process can only be added by the CDPH. (H&S 120335(b)(11)). Respondents are not the CDPH and, therefore, cannot add any such requirements pursuant to the plain language of the statute. Third, the Health & Safety Code dictates that, if the CDPH does add another vaccination, personal belief and medical exemptions must be permitted. (H&S Code § 120338). Here, the LAUSD Resolution does not allow for personal belief exemptions. (FAP, ¶69). Fourth, the Education Code and Code of Regulations

dictate that **independent study cannot be forced** or made mandatory. (Ed. Code §§ 51749.5(a)(12); § 51749.6(a)(6); § 51747(g)(8); CA Code of Regulations Title 5 §11700(d)(2)(A)). LAUSD's Resolution is forced independent study. (FAP, ¶7). Forcing schoolchildren to make the Hobbesian "choice" between gnawing off their arm or gnawing off their leg is no choice at all. Fifth, the Education Code states that children in independent study must be given the same access to services and resources as in-person education. (Ed. Code § 51746). LAUSD's Resolution completely denies all access to athletics, band, music, theater, drill activities, after school on-campus enrichment programs and all on-campus programs and resources to children not injected with a COVID-19 shot. (FAP, ¶7). Sixth, the Education Code dictates that an independent study program must be at the same level of quality as in-person school. (Ed. Code §§ 51749.5(a)(4)(A); 51747(c)). There is no comparison between in-person school and independent study. (FAP, ¶¶12, 73, 74, 80, 81, 82, 86). One is free public education and the other is just an online unsupervised education program at home that cannot be said to meet those same standards. In fact, Respondents' justification in mandating the injections is how important in-person learning is, and how deleterious remote learning has been to LAUSD children.

In sum, the Legislature did not leave room for a "design your own dystopian public school" option for each of the approximately 1,000 school boards throughout California. Allowing Respondents to enforce the Resolution is a slippery slope which will give all school boards the green light to require new medicine "for the health and safety of its community" "to ensure in-person learning," and to unlawfully segregate students for any reason at any time in the future.

2. <u>The Resolution is Preempted by Federal EUA Law.</u>

Federal law is unmistakably clear that no person can be forced to take a product only *authorized* for emergency use and *not* approved by the Food and Drug Administration ("FDA"). (21 U.S.C. §360bbb-3). Products not fully-approved by the FDA are considered experimental and as such require informed consent and the right to refuse the product without coercion. (*See* Id.; 78 CFR 12951; 45 CFR 36390; 45 CFR 46.404; 45 CFR 46.408). Federal law preempts state law when the state law directly conflicts with the federal law. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814).

The FAP alleges that the only COVID-19 injection with full FDA approval is the BioNtech "Comirnaty" vaccine for ages 16 years and older, which is not available to the public in the United

States. (FAP, ¶¶3, 94). As such, all currently-available COVID-19 injections for any age are emergency-use-authorized, only. (Id., ¶¶3, 94). As experimental products, the FAP alleges that they cannot be mandated on anyone, let alone children. (Id., ¶¶55, 65, 90, 91, 96). Federal law prohibits it, and Respondents cannot avoid such prohibition by attempting to characterize the Resolution as an "educational placement determination," or that children are "choosing" not to take the shot and to enroll themselves in Respondents' failing independent study program that was the catalyst of the Resolution in the first place.

C. <u>Respondents' Decision to Enact the Resolution was Arbitrary and Capricious.</u>

Petitioners' Second Cause of Action contains two allegations: (1) Respondents did not have the power or authority to impose the LAUSD Resolution because their actions are preempted (FAP, ¶146); and (2) even if they did have the authority, they acted arbitrarily and capriciously because they failed "to follow a reasoned decision-making process that considered all relevant factors and evidence associated with their proposed action." (Id., ¶¶147, 148). As addressed in the previous section of this opposition, Petitioners have pled sufficient facts and laws showing both state and federal preemption. In addition to this, the FAP alleges several factors – all relevant – that were either not considered at all or given very little attention, by Respondents. The only question on demurrer is whether the FAP pleads sufficient facts of arbitrary and capricious behavior, which it does.

When assessing the validity of a quasi-legislative act in an action for mandamus under Code of Civil Procedure, section 1085, the appropriate inquiry is whether the decision is "arbitrary, capricious or without reasonable or rational basis." (*American Coatings Ass'n Inc. v. South Coast Air Quality District* (2012) 54 Cal.4th 446, 460) (citations omitted) ("American Coatings"). When inquiring into whether a regulation is arbitrary, capricious, or lacking in evidentiary support, "the court must ensure that an agency has adequately considered **all relevant factors**, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Id.* [emphasis added]; citing *Golden Drugs Co., Inc. v. Maxwell–Jolly* (2009) 179 Cal.App.4th 1455, 1466); (*see also Carrancho v. Calif. Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265).

Respondents would have this Court believe that they were not required to consider *any* relevant factors before making their decision that profoundly impacted over 600,000 children in its district. They

are wrong. The California Supreme Court demands the "all relevant factors" standard. (*See American Coatings, supra,*54 Cal.4th 446). Indeed, the authority cited by Respondents in the Demurrer actually confirms the "all relevant factors" standard. (*See* e.g. *Western States Petroleum Ass'n. v. Super. Ct.* (1995) 9 Cal.4th 559*,* 577 (distinguishing between state and federal standards in the context of the admissibility of extra-record evidence beyond the CEQA administrative record, which was 5,000 pages long); *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, 1369 (while official "findings" by an agency are not necessary in an action under C.C.P. § 1085, judicial review is appropriate where the agency's decision is "arbitrary, capricious or totally lacking in evidentiary support")).

The LAUSD Resolution is the only "administrative record" in this case and is perfunctory, at best. (FAP, ¶62: Exhibit B). One would expect and hope that with respect to a decision that enormously impacts the health and lives of over 600,000 students, the administrative record supporting that decision would be thorough – and certainly more than a few pages – and contain citations to the evidence relied on. The "administrative record" in this case is neither. Below is a complete list of all "findings," evidence, and factors "considered" by Respondents:

- "COVID-19 remains a material threat." (FAP, Ex. B: "Board of Education Report," pg. 1).
- "Children learn best when physically present in the classroom. But children get much more than academics at school. They also learn social and emotional skills at school, get healthy meals and exercise, mental health support and other services that cannot be easily repeated online." (Ibid. (quoting from the American Academy of Pediatrics)).
- "LAUSD is the second largest school district in the country, enrolling more than 600,000 students." (Ibid.).
- Vaccination "provides the strongest protection to the health and safety of all students and staff." COVID-19 injections "have been demonstrated to be effective in reducing the spread of COVID-19 as well as the severity of COVID-19 for breakthrough cases, preventing nearly all COVID-19 related hospitalizations. (Id., pg. 2; "Resolution," pg. 2).
- The State Superintendent of Public Instruction and the Los Angeles County Department of Public Health Director made statements "in support of COVID-19 vaccination," along with Dr. Anthony Fauci. ("Board of Education Report," pg. 2).

- The CDC, the CDPH, and the LACDPH "have deemed the vaccine appropriate by unanimously recommending that all eligible persons be vaccinated, including children 12 years of age and older." (Id., pg. 3).
- "Recent CDC studies indicate that infection and hospitalization rates among unvaccinated persons were 4.9 and 29.2 times, respectively, than those in fully vaccinated persons and that authorized vaccines were protective against SARS-CoV-2 infection and severe COVID-19 during a period when transmission of the Delta variant was increasing." (Id., pg. 2).
- "According to a study published by the CDC using data from the Coronavirus Disease 2019-Associated Hospitalization Surveillance Network (COVID-NET), pediatric hospitalizations for adolescents aged 0-17 were evaluated from March 1, 2020-August 14, 2021, and showed that pediatric hospitalization rates were 5 times higher in August 2021 compared to June 2021, and further, that the hospitalization rate among *unvaccinated* adolescents (aged 12-17 years) was 10 times higher than that among fully vaccinated adolescents." (Ibid.).
- "Further studies have shown that emergency department visits and hospital admissions are higher in states with lower population vaccination coverage and emergency department visits and hospital admissions are lower in states with higher vaccination coverage (Siegel DA, Reses HE, Cool AJ, et al. Trends in COVID-19 Cases, Emergency Department Visits, and Hospital Admissions Among Children and Adolescents Aged 0-17 Years-United States, August 2020-August 2021)." (Ibid.).

With the exception of the "study" on emergency department visits for a mere 2-week period in August 2021, Respondents' "Board of Education Report" and Resolution contain no citations – only vague references – to the "CDC studies" they relied on. In fact, several statements in the "administrative record" are false and contradicted by Respondents' own cited source: the CDC. (FAP, ¶¶4, 5, 97, 99-100, 111). Specifically, one of the cited "CDC studies" claims that unvaccinated people are more likely to spread COVID-19 and be hospitalized than the vaccinated. ("Board of Education Report," pg. 2). This completely contradicts the CDC's *own* statements and findings on its website pre-dating the Resolution that suggest ***vaccinated*** people are not only more likely to spread the virus but also more likely to be hospitalized than the unvaccinated. (Id., ¶¶4, 5, 97, 99-100, 111).

Not only did Respondents fail to consider the requisite "all relevant factors," they failed to consider *any* relevant factors before mandating that LAUSD children be forced to take an experimental product that has caused more deaths than any other vaccine in the history of this country. (FAP, ¶¶122-123). The "administrative record" is silent about the risks of the COVID-19 injections, as well as the *actual* risk of the SARS-CoV-2 virus to children, natural immunity and other less restrictive means of achieving health and safety on campus. (Id., ¶¶15, 16, 91-93, 148). During the board meeting where Respondents adopted the Resolution, Respondents allowed only three parents to voice their opinions, and Respondents ignored the written objections submitted by numerous LAUSD families. (Id. ¶¶64-66). Perhaps all of this was irrelevant to Respondents in light of the billions of additional dollars they stand to receive in COVID-19 relief funding. (Id., ¶16). As individuals tasked with the responsibility of shaping and protecting the lives and well-being of hundreds of thousands of children in Los Angeles, Respondents cannot simply rest on vague interpretations of statements from the CDC and Dr. Fauci, neither of which has mandated COVID-19 injections for children. Respondents took it upon themselves to enact their dangerous requirements without any real thought about the consequences. There is no clearer case of arbitrary and capricious action.

D. <u>All Elements of a Right to Privacy Claim are Pled in the Fourth Cause of Action.</u>

To establish a claim of violation of privacy under the California Constitution, Article I, section 1, a plaintiff must show that defendants engaged in conduct which invaded the plaintiff's privacy interest, that plaintiff had a reasonable expectation of privacy as to the interests invaded, that the invasion was serious, and that the invasion caused plaintiff to suffer injury, damage, loss or harm. (*Hill v. Nat'l Collegiate Athletic Ass'n*, (1994) 7 Cal. 4th 1, 35-37).

Petitioners are not asking this Court to re-examine the line of cases addressing whether compulsory vaccination violates the right to privacy. This is well-settled in California, and throughout the United States. Here, LAUSD students have complied with current California law, which does *not* include COVID-19 on the list of compulsory childhood vaccines, and have a legally-protected privacy interest in their bodily integrity and medical information, as well as a fundamental right to refuse unwanted medical treatments. (FAP, ¶¶57, 177). LAUSD students' expectation of medical privacy, bodily autonomy, and freedom from bodily invasion is reasonable, as these students have already

complied with the Legislature's existing compulsory vaccination laws. (Id., ¶178). The Resolution seriously invades and violates these privacy rights, by forcing students to receive an experimental, dangerous product as a condition to accessing their constitutional right to education and to receiving in-person education and services. (Id., ¶¶74, 93, 179).

Balancing students' rights against LAUSD's interest in keeping schools safe, the FAP alleges that the Resolution is not justified, given that the COVID-19 injections do not prevent transmission, and do not lessen, mitigate, or slow the spread of COVID-19. (FAP, ¶¶4, 92, 99, 100). Indeed, the prevailing science suggests the opposite: that those vaccinated are more likely to spread the disease than the unvaccinated. (Id., ¶¶4, 92, 99, 100). These novel COVID-19 injections present a different formulation from traditional vaccines and are now understood to provide no immunity at all. (Id., ¶¶4, 92, 99, 100). Simply put, the FAP demonstrates that Respondents have no compelling interest that warrants these invasions of privacy. The FAP meets the pleading requirements for a right to privacy claim.

E. <u>Denial of Access to In-Person School is the Denial of Free Public Education.</u>

Article IX of the California Constitution dictates that the Legislature shall "provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year." Petitioners' Fifth Cause of Action alleges that Respondents violated sections 1 and 5 of Article IX by enacting and implementing the LAUSD Resolution, which excludes children from and denies them access and this right to receive a free, public-school education. (FAP, ¶190).

Respondents incorrectly argue that Article IX is only "aspirational." (Demurrer, pg. 22:21-22, citing *Campaign for Quality Ed. v. State of Calif.* (2016) 246 Cal.App.4th 896, 905-906) (involving claim that Legislature inappropriately distributed education funds).[6] While Respondents are correct that the *Campaign for Quality Education* court stated that Article IX includes "no constitutional mandate to an education of a particular standard of achievement or impose on the Legislature an affirmative duty to provide for a particular level of education expenditure," the case did *not* state that *both* sections 1 and 5 of Article IX are "aspirational." (Id. at 915). Rather, the court stated that section 1 is "aspirational" and section 5 is "more concrete – the assignment of a specific task with performance standards." (Id. at 908-

[6] Respondents also argue that Article IX does not include a private right of action. They cite no authority because this is an erroneous statement of law.

909). While Article IX does not specify the quality of the free education that must be provided in this state, actual exclusion from the classroom is a direct denial of Article IX's right to free education. (Id. at 914, fn. 8 (citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 607) ("surely the right to an education today means more than access to a classroom")). Moreover, the legislature intended for *one* public school system, not one for certain children and another for other children:

> "The term 'system' as in article IX, section 5, implies a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide a system of common schools means *one* system which shall be applicable to all the common schools within the state."

(*Campaign for Quality Ed., supra,* 246 Cal.App.4th at 909; *Serrano, supra* 5 Cal.3d at 595-596). The California Supreme Court is clear: "educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade." (*Serrano, supra* 5 Cal.3d at 596.)

The LAUSD Resolution denies children the right to free public school by denying access to in-person school and extracurricular activities. (FAP, ¶192). In doing so, Respondents have created two separate school systems and segregated students based upon criteria that Respondents themselves (not the Legislature (or any medical or scientific experts)) devised. Under this cause of action, Petitioners need only allege this undeniable fact, which they have. Furthermore, even Respondents' own cited case law agrees that this is a violation of Article IX.

F. <u>By Segregating the Unvaccinated, the Resolution Violates Equal Protection.</u>

Petitioners' Sixth Cause of Action alleges the LAUSD Resolution violates the Equal Protection Clause of the California Constitution. (Cal. Const., Art. I, § 7) (FAP, ¶202). The California Supreme Court has articulated the standard for Equal Protection claims:

> "in cases involving 'suspect classifications' **<u>or</u>** touching on '**fundamental interests**,' the court has adopted an attitude of active and critical analysis, subjecting the classification to **strict scrutiny**… the state 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."

(*Serrano, supra*, 5 Cal.3d at 597 (case involving the challenge of the public school financing system) (emphasis added)). The right to education in California is a fundamental interest. (Cal. Const., AIX; *Serrano, supra,* 5 Cal.3d at 608-609, 614 ("We are convinced that the distinctive and priceless function

of education in our society warrants, and indeed compels, our treating it as a 'fundamental interest.'")). The California Supreme Court has described the public school system as "doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities" and that "[t]hese are rights and privileges that cannot be denied." (*Serrano, supra,* 5 Cal.3d at 607). To that end, the Court held that courts must "unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education." (Id. at 606) (citations omitted).

To pass strict scrutiny, **Respondents must establish (1)** they have **a compelling interest that justifies the** Resolution and **(2) the** Resolution i**s necessary to further that interest; and (3) narrowly** tailored **to achieve that** interest. **(**FAP ¶¶209-212).[7] Here, the Resolution does not pass even rational basis scrutiny, let alone strict scrutiny. There is no distinction between COVID-19 injected and non-COVID-19 injected children that affects the health and safety of school. COVID-19 injected children are just as capable (if not more) of getting and spreading COVID-19. Therefore, children who have not received a COVID-19 injection are no more of a risk or health threat to the community – or, said differently, injected and uninjected children pose the same risk and threat to the community (none, but still the same) – and there is no justifiable – let alone compelling – interest in segregating them. (Id, ¶¶4, 5, 92, 99, 206, 214-217).

G. <u>The Resolution Unlawfully Discriminates Against Certain Students.</u>

Government Code § 11135 prohibits discrimination on the basis of, among other things, race, religion, and medical condition. As stated above, the Resolution unlawfully distinguishes between and excludes children who have not received a COVID-19 injection that are not members of one of the classes of children that LAUSD has specified as exempt from the Requirement. (FAP, ¶¶225-228). The Resolution exempts migrant children and children with medical conditions, and, thus, improperly discriminates based upon race, ancestry, national origin, ethnic group identification, and medical conditions. (Id., ¶226). The Resolution also unlawfully discriminates against those with sincerely held religious or personal beliefs that prevent them from being receiving a COVID-19 injection,

[7] To pass rational-basis review, a law need only bear a rational relationship to a legitimate governmental interest. (*Vacco v. Quill* (1997) 521 U.S. 793, 799)**.**

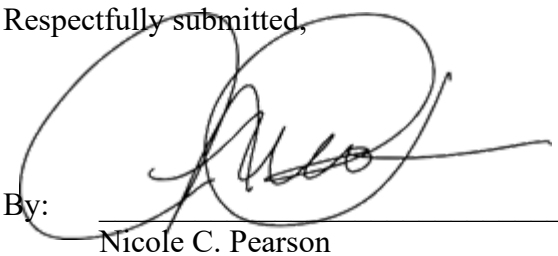
discriminating against them due to their religion. Id., ¶¶7, fn. 7, 74, 225-228). The Seventh Cause of Action is not simply a claim for "educational disparities," as Respondents suggest. (Demurrer, pg. 24). This is about an unnecessary and unjustified complete denial of access to in-person education for certain targeted students. There are few greater harms.

V. CONCLUSION

For the reasons stated hereinabove, Petitioners have more-than-sufficiently pled all of their causes of action in over 200 paragraphs and almost 50 pages of details. As such, Petitioners respectfully request that this Court deny Respondents' Demurrer in its entirety or, in the alternative, to the extent this Court finds the FAP is lacking, that Petitioners be granted leave to amend where they denied the opportunity to do so prior to Respondents' filing their Demurrer.

Dated: March 25, 2022

Respectfully submitted,



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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 3421 Via Oporto, Ste. 201, Newport Beach, California 92663.

On March 25, 2022, I served the following documents on all interested parties in the following manners(s): **PETITIONERS' OPPOSITION TO RESPONDENTS' DEMURRER TO PETITIONERS' FIRST AMENDED PETITION; MEMORANDUM OF POINTS AND AUTHORITIES**

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/X/ **Via Electronic Transmission.** ONLY BY ELECTRONIC TRANSMISSION. I caused to be transmitted a true and correct copy of the above-entitled document(s) to recipients noted via electronic service at the recipient's office. Electronic service is proper and authorized by California Rule of Court 2.251 and Code of Civil Procedure § 1010.6. Hard copies will not follow by mail, unless specifically requested.

/X/ **State.** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 25, 2022, in Newport Beach, California.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Michelle Cusumano