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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ELIEZER WILLIAMS, a minor, by Sweetie Williams, his guardian ad litem, *et al.*, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

STATE OF CALIFORNIA, DELAINE EASTIN, State Superintendent of Public Instruction, STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION,

Defendants.

No. 312236

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION OF THE STATE'S DUTY TO ENSURE EQUAL ACCESS TO INSTRUCTIONAL MATERIALS

Hearing:	September 17, 2003
Time:	3:30 p.m.
Department:	20, Hall of Justice
Judge:	Hon. Peter J. Busch
Date Action Filed:	May 17, 2000
Trial Date:	August 30, 2004

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INTRODUCTION

The State[1] and school districts concede the essential facts that give rise to this motion. Students in some, but far from most, California public schools have "no textbooks at all." (State Opp'n at 17.)[2] Instructional materials are fundamental for learning. (CSBA Opp'n at 5 n.4.) And the State has no system that ensures equal access to instructional materials for all California public school students. (*Id.* at 7.) The rest of the sound and fury that drags through so many pages in the opposition briefs truly signifies nothing in the face of these undisputed facts.

This Court and the California Supreme Court have already resolved much of what the State attempts to relitigate in its defense to this motion. The question whether the State has an affirmative duty to intervene to prevent unconstitutional discrimination in its schools is not open; the Court squarely decided it against the State in *Butt v. State*, 4 Cal. 4th 668, 685 (1992). The question whether the State's duty can be fully delegated to school districts to carry out likewise has already been decided against the State in *Butt*. *Id.* at 685; *see also* (Nov. 14, 2000 Order ("Nov. 14 Order") at 1-2 ("That the State has chosen to carry out certain of its obligations through local school districts does not absolve the State of its ultimate responsibility.").). Nonetheless, the State and school districts' oppositions to this motion confirm the pressing need for this Court's determination that the State in fact has a duty to ensure equal access to instructional materials for its public school students and that the duty has been breached.

The State's very insistence that no such duty is fairly encompassed within the California Constitution and its interpretation in *Butt* and preceding cases underscores the need for the determination sought in this motion. Moreover, the State and districts' stunningly cavalier responses to the injury suffered by students who undisputedly chronically lack instructional materials in their schools make the case for the immediate need for relief. Notably, the State and the school districts fail to dispute the conclusions of plaintiffs' experts, former New York State Commissioner of Education Dr. Tho-

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[1] The State Agency Defendants joined the State's opposition to this motion and filed their own separate opposition as well. For ease of reference, plaintiffs refer to all defendants as the "State" except where specifically referring to the State Agency Defendants by name.

[2] San Francisco Unified School District ("SFUSD") joined the California School Boards Association ("CSBA") and Los Angeles Unified School District ("LAUSD") oppositions to this motion. For ease of reference, citations to "CSBA," "LAUSD," and "the districts" incorporate the SFUSD joinder.

mas Sobol and Dr. Michelle Fine, that students whose schools do not provide them instructional materials learn the necessary lessons of discrimination and institutionalized assignment of low personal value—but the State and the districts nonetheless oppose any exercise of State "ultimate responsibility," *Butt*, 4 Cal. 4th at 681, 684, to prevent or discover and correct this fundamental discrimination. Expert Report of Thomas Sobol at 8-9 (Declaration of Leecia Welch in Support of Plaintiffs' Motion for Summary Adjudication ("Welch Decl.") at Exh. K.); Expert Report of Michelle Fine at 35-37 (Welch Decl. at Exh. J.). Finally, the State and State Agency Defendants' claim that the State is functionally judgment-proof—which is the ineluctable point behind the State Agency Defendants' assertion that the State is nothing more than "that abstract entity" "given voice by the California Legislature," (SAD Opp'n at 2), and the State's argument that neither the Governor himself nor the Legislature is the "State" for purposes of making binding admissions on behalf of the State, (State Obj. at 7; State Sep. Stmt. at 1-2, 44-45) — foregrounds the arguments the State has made throughout this case that if constitutional deprivations occur in schools then certainly no one at the State level bears any responsibility or duty to act. This Court should put an end, finally, to the finger-pointing exercise to ensure that the constitutional promise of equal education, at least with respect to instructional materials, is a lived reality for California's public school students.

The crux of the dispute among the parties about the State's duty is whether deprivation of instructional materials, standing alone among other conditions present in a student's educational program, could deprive the student of basic educational equality. (*See* LAUSD Opp'n at 15.) None of the parties has the temerity to ask this Court to be the first court anywhere to hold that instructional materials are not fundamental to education. Instead, the State and the districts argue, notably without any support whatsoever, that denial of instructional materials cannot by itself deprive students of basic educational equality within the meaning of *Butt*. (State Opp'n at 2, 34; CSBA Opp'n at 2-3; LAUSD Opp'n at 1, 7, 15.) Plaintiffs demonstrate on the undisputed facts in this motion, including the undisputed fact that State content standards require use of textbooks and other instructional materials, that instructional materials deprivation not only can deprive students of basic educational equality but has and continues so to do.

As this Court knows, plaintiffs have not changed theories with this motion; every filing and argument in the case has consistently advanced exactly the same legal theory.[3] This Court explained correctly in the first order issued in this case that "[t]he specific deficiencies that take up so much of the Complaint are evidence of an alleged breakdown in the State's management of its oversight responsibilities." (Nov. 14 Order at 2; *see also* State Opp'n at 4 (quoting Nov. 14 Order); July 10, 2003 Order at 2 ("Plaintiffs allege that the State's failure has resulted in their being deprived of qualified teachers, adequate facilities, sufficient textbooks, and other essentials necessary to learning. These deprivations, however, are not themselves the alleged wrongs. . . . Plaintiffs seek state-level relief to remedy the alleged deficiencies in the State's oversight and management system.").) The State attempts, in its opposition, to invalidate this Court's reasoning in that initial order: "When the proof of plaintiffs' claim that the oversight system is defective is the very fact that unacceptable conditions exist, then this case is not in any meaningful sense about identifying and applying a constitutional standard to which the State's oversight and management system must conform." (State Opp'n at 5.) But this Court has already spoken on that question; the State's latest effort to transmogrify this case into the straw man it most wants to knock down is therefore irrelevant to the issues raised in this motion.

ARGUMENT

I. INSTRUCTIONAL MATERIALS UNDISPUTED FUNDAMENTAL IMPORTANCE TO EDUCATION IS DISPOSITIVE

In its opposition to this motion, the State completely ignores its many admissions regarding the fundamental importance to education of instructional materials and the fact that "[t]he authorities are virtually unanimous in characterizing textbooks as having a central place in the educational mission of a school." *Cal. Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 811 (1981). The admissions are, of course, binding on the State and therefore fatal to its defense. "'The admissions of a party receive an unusual deference in summary judgment proceedings. An admission is binding unless there is a credible explanation for the inconsistent positions taken by a party.'" *Le Bourgeois v. Fireplace*

[3] Indeed, footnote 8 of the State's brief, which cites to plaintiffs' interrogatory responses and liability disclosure statement for further support for the arguments plaintiffs advance in this motion, underscores the consistency with which plaintiffs have advanced the same argument in this litigation. (State Opp'n at 21 n.8.)

Mfg., Inc., 68 Cal. App. 4th 1049, 1060 n.12 (1998) (quoting *FPI Dev., Inc. v. Nakashima*, 231 Cal. App. 3d 367, 396 (1991)); *see also* Cal. Evid. Code § 1222 (codifying the evidentiary value of admissions).

Thus, the State's tortuous efforts to minimize the effect of instructional materials deprivations shown in this motion cannot counter the State Legislature's commonsense admission on behalf of the State: "The Legislature further declares that, to the extent that every pupil does not have access to textbooks or instructional materials in each subject, a pupil's right to equal educational opportunity is impaired." A.B. 2600, 1993-1994 Reg. Sess. (Cal. 1999) (Welch Decl. at Exh. E.). The State likewise cannot detract from Governor Gray Davis's admission that "[n]o books for kids to take home" is one of "our problems in education" in California. (PLTF-XP-TS 54, Welch Decl. at Exh. N.)

The State utterly ignores these admissions and the many others like them cited in the opening papers,[4] (*see* Mem. P. & A. at 4, 5), and attempts instead to argue that it is conceivable that districts and schools might make pedagogical choices not to send textbooks home with students. (State Opp'n at 28.) But while that possibility is in fact conceivable — and may even exist in some schools and districts — the State's musings about alternative textbook choices are neither responsive nor relevant to the issues raised in this motion. In contrast, Governor Davis's admission on behalf of the State that book shortages exist and are harmful to students and the State Legislature's admission that "every" time any pupil does not have access to textbooks or instructional materials, "a pupil's right to

[4] Although the State makes no argument to this effect in its brief, the State's separately filed objections to evidence states that the Governor's statement is "not an admission of the State of California." (State Obj. at 7; *see also* State Sep. Stmt. at 44-45 ("The 'State' has not admitted that 'the lack of books for some students to take home has been and is a persistent problem.' The purported evidence cited by plaintiffs in support of this alleged material fact [which is a letter from Governor Gray Davis] does not support that defendant State of California made any such admission.").) The State also purports to dispute plaintiffs' statement that the State has admitted that access to instructional materials is integral and necessary to student learning, which plaintiffs support with the declaration from the Legislature, by saying that "[n]one of plaintiffs' purported evidence supports that the State made any such admission." (State Sep. Stmt. at 1-2.) Of course the State is mistaken. The Governor of the State of California and the Legislature of the State both can make admissions on behalf of the State. *Cf. O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 571-72 (1997) (holding there to be no question that the president of Mitsubishi and the senior managing director at Mitsubishi Electronics were authorized to make statements on behalf of the company); *see also Cruey v. Gannett Co.*, 64 Cal. App. 4th 356, 366 (1998) (holding that an employee's "'high rank within the hierarchy' of Gannett employees as general manager of the Los Angeles office probably is sufficient without more to establish that he was authorized to speak on behalf of the company").

equal educational opportunity is impaired," A.B. 2600, 1993-1994 Reg. Sess. (Cal. 1999) (Welch Decl. at Exh. E.), are not only directly responsive and relevant but also binding.

The State's eleventh-hour declaration from its expert Eric Hanushek does nothing to undermine the State's admissions. The Hanushek declaration offers conjecture that in some instances that are not presented here textbooks might not be necessary for learning opportunity: "in my opinion, a school or teacher could implement perfectly reasonable educational programs that called for textbooks to be used *either* in class *or* at home — but not necessarily both — *or*, in the alternative, not at all."[5] (Declaration of Eric Hanushek at ¶ 11.) Dr. Hanushek's supposition that schools might make pedagogical choices not to use textbooks specifically, as distinct from instructional materials generally (even Dr. Hanushek does not go so far as to surmise that other instructional materials in lieu of textbooks might be nonessential), is wholly unresponsive to the question presented in this motion whether instructional material shortages deprive students of educational opportunity that the State bears ultimate responsibility to protect. Thus, the Hanushek declaration does not undermine the State's admissions regarding precisely that question. And even if the Hanushek declaration did respond squarely to the question presented in this motion, the declaration could not erase the State's admissions because "'the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive.'" *Neiderer v. Ferreira*, 189 Cal. App. 3d 1485, 1503 (1987) (quoting *Leasman v. Beech Aircraft Corp.*, 48 Cal. App. 3d 376, 382 (1975)).

II. NONE OF THE PARTIES HAS PLACED MATERIAL FACTS IN DISPUTE

The State concedes both the prevailing statewide standard and the facts that support a finding of unconstitutional disparity from that standard: "the *undisputed* facts, as shown by a careful reading of plaintiffs' declarations and by the declarations filed by defendants and the intervenors, show very few situations where students had no textbooks at all." (State Opp'n at 17.) As the State thus ac-

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[5] Because this opinion is not encompassed within the expert report Dr. Hanushek prepared on behalf of the State, the State's reliance on this declaration also is procedurally improper. This Court's pretrial scheduling order required the parties to submit expert reports that "fairly summarize[] the opinions and testimony that the expert will present at trial." (Oct. 22, 2001 Pretrial Scheduling Order at ¶¶ 5-6.) To the extent that opinions of Dr. Hanushek are not encompassed within his expert report, those opinions are not admissible in this motion or at trial, and we accordingly object, in separately filed papers, to the tardy attempt to shore up the State's expert's position in the face of our motion.

knowledges, it is undisputed that most students do have the textbooks (and, presumably, other instructional materials) they need, but in some subset of the schools, textbooks are wholly lacking. The State and district declarations, along with the State's own documents, further shore up the undisputed evidence regarding instructional materials shortages in a minority of schools — serving, however, thousands of California public school students, each of whom is entitled to equal access to education, which the State has ultimate responsibility to protect, *Butt*, 4 Cal. 4th at 685 — in stark contrast to the provision of sufficient numbers of instructional materials in the vast majority of the State's public schools.

A. Undisputed facts show that instructional materials shortages in core subjects have hindered and continue to hinder students' learning opportunities.

As documented in the attached Chart of Undisputed Facts, the State and school district declarations repeatedly confirm the existence of instructional materials shortages in at least 49 public schools in 27 different districts.[6] (*See* Attached Exemplar of Undisputed Facts.) For example, none of the parties can dispute the fact that external evaluators acting under the State's Immediate Intervention/Under-performing Schools Program ("II/USP") have repeatedly identified a lack of instructional materials as a barrier to student performance. (*See, e.g.*, DOE 37960, 46346, 48365; *see also* DOE 65551 (II/USP action plan identifying without dispute that "[o]utdated texts" were a barrier to student performance).)[7] While the State does purport to dispute the facts in the II/USP action plans, its dispute centers on whether the textbook shortages identified in the plans have since been corrected, not on whether the shortages harmed students at the time they were identified.[8] Responding,

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[6] Plaintiffs do not purport to have made a comprehensive, up-to-the-minute showing of all instructional materials shortages in the State. The State's admission that "[t]he extent of the availability of educational materials in all districts is unknown" underscores the difficulty of mounting such a showing where the State operates no system to monitor provision of instructional materials. (*See* State Agency Defs.' Responses Plfs.' First Set Special Interrogs. at 5, Welch Decl. at Exh. U.) The shortages shown in this motion document merely some of the egregious instructional materials needs that result from the State's failure to satisfy its ultimate responsibility for education.

[7] All cited DOE documents are attached. (Welch Decl. at Exh. D.)

[8] Often, the State's "disputes" do not challenge the shortage issue at all but instead sidestep to place an immaterial fact in supposed "dispute." For example, in response to its own II/USP external evaluator's finding about John H. Nuffer School that "[t]here is a District practice to provide one text for social studies for every two students," (DOE 53585), the State attached a declaration from the school principal stating that "we made the decision at Nuffer School to purchase fewer than one social studies book per student." (Declaration of Sherry Herrera at ¶ 6.) The fact, if it is correct, that the textbook shortage affecting Nuffer students to their detriment originated at the school site rather

for example, to the II/USP action plan from Helms Middle School, which listed among barriers to student performance: "*Lack of materials, current books and supplies*: Students, teachers and parents lament the absence of current and appropriate materials" (DOE 48365), the State merely cited to the deposition of the current Helms principal, where the principal noted that Helms then — nearly three years after the action plan was prepared — had enough textbooks for all its students. (State Sep. Stmt. at 64.) The principal's deposition does not dispute (and does not mention) the II/USP external evaluator's finding that "*[l]ack of materials, current books and supplies*" was a barrier to student performance at Helms Middle School.[9] (*See also, e.g.*, Declaration of Virginia Dale. at ¶¶ 4-5 (not disputing II/USP findings that at the time the external evaluator prepared the plan, "[t]here is clearly a critical lack of textbooks and curricular materials across all grade-levels and subject areas" (DOE 77551) at Cali Calmecac Charter School and that "in many classrooms there was not even one complete set of texts for the grade level" (DOE 77586.)); Declaration of Louise Bay Waters at ¶ 13 (not disputing II/USP finding that at the time the external evaluator prepared the plan, "there are inadequate quantities of books and tools" (DOE 46164) at Brookfield Village Elementary School).)

Similarly, the State's effort to categorize failures to send instructional materials home with students as "a matter of educational theory" about which reasonable minds can differ, (State Opp'n at 28), is wholly unavailing in light of its own declarations and undisputed II/USP action plans that identify either shortage or fiscal concern as the bases for decisions not to send instructional materials home. For example, the State does not dispute an II/USP action plan finding that "[t]he lack of books has created a hole in the instructional program because in some classes students spend instructional time hand copying definitions out of books so that they can utilize those [definitions] when

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than at the district is immaterial to the core issue that the students had only enough social studies textbooks for every other student. On this material issue, the principal merely confirms that the school in fact did suffer a textbook shortage because it had "purchase[d] fewer than one social studies book per student." (*Id.*)

[9] As discussed below, the subsequent correction of II/USP-identified shortages does not signal a functioning system of oversight and management. It is therefore not material, for purposes of this motion, that the textbook shortages mentioned in II/USP action plans have been corrected, if they have. The material—and undisputed—facts are that the schools suffered shortages and that the extent to which these shortages are discovered and corrected results from volunteering into a State program that categorically cannot and does not cover all schools in need. The undisputed fact, demonstrated below, that hundreds of II/USP-eligible low-performing schools are not subsumed into the program suggests that other schools with textbook shortages will leave those shortages undiscovered and unredressed.

they go home." (DOE 32733; *see also* Declaration of Norma Martinez at ¶ 4 (confirming II/USP finding).) The State filed a declaration confirming another II/USP finding that

> [c]ontent area classes requiring the use of a text have been supplied with classroom sets only. A minimal number are available for home checkout. It is currently beyond the scope of the budget to provide take-home copies for each student. Homework, projects, and test preparation has to be planned outside the use of a text.

(DOE 39327, Declaration of Leecia Welch in Support of Plaintiffs' Reply at Exh. F; Declaration of Edward Drenner at ¶¶ 4-10 (confirming II/USP finding).) Similarly, the parties do not dispute that the II/USP external evaluator found that at Vista Verde Middle School in Greenfield Union School District, "[t]here is a shortage of textbooks school-wide that has led to a great deal of frustration among teachers and parents. In multiple subject areas, there are not enough textbooks to provide a book for each student. As a result, texts are not available for students to take home for home study." (DOE 56012.) Indeed, the State attached a declaration that confirmed that "at that time there was a textbook shortage" at Vista Verde. (Declaration of Toni Ungs at ¶ 4.) The State thus confirmed that Vista Verde students' inability to use textbooks at home for homework did not result from a district or school pedagogical policy; instead, the undisputed evidence, confirmed by the State's declaration, is that the school suffered a book "shortage" "and as a result texts were not available for each and every student to take home for home study." (*Id.* at ¶ 4; *see also, e.g.*, Declaration of Helen A. Bauer at ¶ 6 (confirming II/USP finding that "[s]ome content areas only have classroom sets of textbooks" (DOE 37014-15.)) ; Declaration of Jan Mayer at ¶¶ 8-11 (confirming scholastic audit finding that students lacked access to a "complete set of instructional materials" and had "few resources available for students to use for in-home study" (DOE 136989.)).)

In those schools in which core instructional materials undisputedly arrived late, well into the school year, the State and districts do not dispute students' need for the instructional materials — because their teachers and schools' efforts to obtain the materials confirm their desire and need for the materials — but instead try to minimize the harm to the students as insignificant delay. For example, faced with deposition testimony from a San Francisco principal confirming that his school had insufficient numbers of social studies and English as a Second Language textbooks, SFUSD offered a declaration from the principal stating that the Social Studies text shortage was corrected "within about

two months" and that the English as a Second Language books took "several months" to arrive. (Declaration of Larry Alegre at ¶¶ 3-4; *see also* Declaration of Dr. Isaac Hammond at ¶ 3 (principal of Crenshaw High School in Los Angeles confirming that shortages of math, Advanced Placement biology, English, and Spanish texts were not filled until the second month of school during the 1999-2000 school year).) But the argument that months-tardy textbook delivery imposes no significant harm is particularly untenable after the *Butt* holding. Because, in *Butt*, deprivation of at most 30 school days triggered State intervention to prevent unconstitutional discrimination against students who would lose the six weeks of schooling, 4 Cal. 4th at 687, deprivation of those tools the State admits are essential for learning for extended periods of time necessarily also triggers State intervention to fulfill its ultimate responsibility for education.

The shortages documented in these undisputed facts are themselves sufficient to support a finding that the State has, and has breached, a duty to ensure equal access to instructional materials for all California public school students. In addition to the State's own documentation in its II/USP action plans and to the declarations the parties filed for this motion, however, plaintiffs' expert Dr. Jeannie Oakes relied on multiple separate independent sources to conclude that severe instructional materials needs exist and long have existed in a subset of California public schools, in stark contrast to the rote provision of sufficient numbers of instructional materials in the majority of the State's public schools. Expert Report of Dr. Jeannie Oakes ("Oakes Textbook Report") at 22-24 (Welch Decl. at Exh. H.). The State's claim that one of the sources on which Dr. Oakes relies, the Harris survey, is "methodological nonsense," (State Opp'n at 19), is belied by the fact that Dr. Oakes corroborated its findings in other independent, contemporaneous sources. In addition, it is undisputed that the Senate Committee on Education itself confirmed the longstanding shortage: in its 1994 analysis of Assembly Bill 2600, the Senate Committee on Education concluded that "[a]t least one-third, and as many as two-thirds, of all public school students do not have adequate instructional materials." (PLTF 79834.) The State ignores these other sources entirely. Thus, the relevant information for purposes of this motion is that the parties do not dispute Dr. Oakes's finding, based on documentation in multiple independent sources, and corroborated in the Harris survey, that tens of thousands of California public school students lack essential instructional materials. Moreover, and dis-

positive for purposes of this motion, the State itself acknowledges that "the [Harris] survey shows that fully 88% of California teachers believe their students have adequate textbooks and instructional materials" — leaving fully 12% of California teachers believing that they do not have adequate textbooks and instructional materials. (*See* State Opp'n at 19.)

The isolated, specific shortages the State and districts put in dispute merely subtract from this Court's consideration some few instances of textbook deprivations (not because the deprivations are not in fact real but because, for purposes of summary adjudication, they are not undisputed). These disputes do not detract from the undisputed material fact that a nontrivial number of students in schools up and down the State lack instructional materials that are fundamental for learning because the State operates no system of oversight and management designed to ensure equal access to these instructional materials.

B. It is undisputed that the prevailing statewide standard in California public schools is to provide the instructional materials that are educationally necessary.

This Court is not faced with genuine dispute about the question of what the prevailing statewide standard with respect to provision of instructional materials is. As the State concedes in its Separate Statement, "[t]he State does not dispute that most public school students in California have access to 'sufficient' textbooks and instructional materials." (State Sep. Stmt. at 25.) The vigorous effort the State acknowledges it makes to select and approve textbooks and instructional materials only underscores the importance the State places on instructional materials and its expectation that all students will have them. (State Opp'n at 13-15 (discussing the State's "major role" regarding provision and selection of textbooks and instructional materials).) The State acknowledges, for example, that in 1998, the State "embarked on a massive four-year program making available $1 *billion* to districts for the purpose of supplying all public school children with textbooks and instructional materials that are aligned to the rigorous California standards" and that "[b]etween 1996 and 2002, the State has expended approximately $2.8 *billion* of categorical funding for textbooks." (*Id.* at 14 & n.5.) Given the conceded "purpose of supplying all public school children with textbooks and instructional materials" and the textbook-targeted expense of $2.8 billion dollars in six years, it could hardly be the

case that the prevailing statewide standard is anything short of having sufficient numbers of instructional materials. (*Id.*)

Moreover, none of the parties even attempts to dispute plaintiffs' expert Dr. William Koski's showing that California's rigorous content standards demand provision and use of textbooks and instructional materials, including for example that "[i]n History-Social Science, 90 out of the 104 standards require, at a minimum, a textbook or other written instructional material that provides the content of the standard." Expert Report of William Koski ("Koski Report") at 17, 2, 14 (Welch Decl. at Exh. L.); *see also* (Mem. P. & A. at 7-8.). Because all schools are judged by these content standards now, (State Opp'n at 11), schools necessarily must seek to satisfy them. The question the State challenges is thus not whether it is standard for students to have the textbooks and instructional materials they need, but what "sufficiency" of textbooks and instructional materials actually means in terms of whether pedagogy might support not using instructional materials in some specific instances. (*Id.* at 29, 33, 42.) That question goes to remedy, not to what is standard fare in California public schools, and therefore does not raise a genuine dispute about the prevailing statewide standard.

III. STUDENTS WHO LACK INSTRUCTIONAL MATERIALS IN CORE CLASSES ARE DENIED BASICALLY EQUAL EDUCATIONAL PROGRAMS, VIEWED AS A WHOLE, IN CONTRAVENTION OF THE PREVAILING STATEWIDE STANDARD

The State and the districts mistakenly argue that the question whether the State has provided "basically equal educational programs" cannot be answered simply by examination of whether some California public school students lack instructional materials whereas others do not. (State Opp'n at 2, 34; CSBA Opp'n at 2; LAUSD Opp'n at 1, 7, 15.) That argument is tautological, premised on the assumption that instructional materials are not fundamental to learning, which the State has admitted and the CSBA concedes. (CSBA Opp'n at 5 n.4.) The fundamental and essential importance of instructional materials categorically means that their absence denies students basically equal educational programs in comparison with students who do not lack these tools. That is what the State Legislature plainly meant when it admitted that "to the extent that every pupil does not have access to textbooks or instructional materials in each subject, a pupil's right to equal educational opportunity is impaired." A.B. 2600, 1993-1995 Reg. Sess. (Cal. 1999) (Welch Decl. at Exh. E.).

None of the parties has offered any evidence that anything could mitigate the damage to students of lack of access to concededly fundamental and essential learning tools. Instead, the oppositions to this motion ask this Court to imagine a circumstance, not presented by the evidence in this motion, in which schools make pedagogical choices not to use instructional materials, or not to send the instructional materials home with their students for homework, and to hold on the basis of that imagining that further analysis into the educational circumstances in these hypothetical schools is required. (*See* State Opp'n at 17-18, 31-32; LAUSD Opp'n at 7.) What is squarely presented to the Court, by contrast, are repeated circumstances, which the State and the districts do not dispute, in which students are and have been chronically deprived of instructional materials on which their teachers need to rely for imparting lessons. (*See* Reply Statement of Undisputed Facts; Attached Exemplar of Undisputed Facts.) The undisputed facts show, for example, an II/USP finding that "students without texts were generally unengaged, while in other grades, valuable instructional time was lost so that students could complete worksheets since there were not sufficient texts to bring home." (DOE 77586-87.) Moreover, the instructional materials deprivations shown in this motion arise in the undisputedly lowest-performing schools in the State, as measured by their Academic Performance Index and by their inclusion, where they have so volunteered and been selected, in the II/USP. (*See* Welch Decl. at Exh. T (chart showing Academic Performance Index ranks for declarants' schools).) It hardly seems believable — especially in a State whose academic content standards undisputedly mandate use of instructional materials, Koski Report at 2, 17 — that all these schools whose students test well below proficiency year after year are routinely embarked on compensatory alternatives to traditional instructional materials as means to boost their students' performance. Such a premise is so implausible indeed that among 49 attached declarations the State nonetheless did not offer any evidence that any of these schools operates such an innovative compensatory alternative program.

On this set of facts, this Court is presented with deprivations of "the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit." *Cal. Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 811 (1981). Deprivation of "the most essential tool" because of shortage, and not because of some imagined pedagogical choice, alone must deprive students of basic educational equality "viewed as a whole," *Butt*, 4 Cal. 4th at 687, without need to

further examine educational circumstances. If the deprivation could be mitigated, then the tool would not be "most essential."

The State nonetheless argues that "[i]f students are getting an overall good education, there is no reason for courts to adjudicate whether all of the particular input resources are distributed equally." (State Opp'n at 32.) LAUSD seconds the State by claiming that *Butt* held the State has a duty to intervene only to remedy "a combination of conditions." (LAUSD Opp'n at 4.) But *Butt* nowhere held that the inquiry about an educational program "viewed as a whole," 4 Cal. 4th at 687, rested on the question whether students get "an overall good education," however that may be defined, or that only some combination of conditions could trigger the State's duty to intervene. The *Butt* court did not examine students' test scores in the Richmond school district in comparison with test scores elsewhere in the State. The *Butt* court did not examine high school graduation rates or dropout rates or college entrance rates; the *Butt* court did not assess student performance in any way in reaching its conclusion. Instead, the *Butt* court examined whether students in Richmond received an education basically equivalent to that other students elsewhere in the State received, based on the single circumstance of a threatened school closure. *Id.* at 687. Because, for example, Richmond government students would not learn about "the State's executive and judicial branches, and county and local government," whereas other students would cover these topics, the *Butt* court held that these students were denied equal protection without questioning, for example, whether the Richmond students' teachers were especially talented or creative in comparison to the teachers assigned to students in districts that would not close down early. *Id.* at 687 n.16. It is the elemental genius of *Butt* that the inquiry is not dependent on the State's assessment of whether students receive "an overall good education" but instead on whether students receive fundamentally equal educational opportunity measured by comparison with the prevailing statewide standard based on access to educational opportunity enjoyed by most students across California. *Id.* at 686-87.

The CSBA is quite correct that in *Butt*, deviation from a statutorily grounded minimum school term was not in itself sufficient to establish a constitutional violation. (CSBA Opp'n at 5.) But the claim presented in this motion is whether deviation from the prevailing statewide standard of provision of sufficient numbers of instructional materials, which are indisputably fundamental for student

learning, is in itself sufficient to establish a constitutional violation.[10] Whereas the length of the school year is "not constitutionally based" beyond the six-month minimum, *see Butt*, 4 Cal. 4th at 686, instructional materials themselves are fundamental to student learning.

IV. THE STATE, AND NOT THE DISTRICTS, IS CONSTITUTIONALLY OBLIGATED TO OPERATE AN OVERSIGHT SYSTEM TO ENSURE EQUAL ACCESS TO INSTRUCTIONAL MATERIALS AMONG ITS PUBLIC SCHOOL STUDENTS

The parties' pass-the-buck exercise in their oppositions to this motion demonstrates the need for a single State system of oversight regarding instructional materials needs. The State insists that neither the Governor nor the Legislature can make admissions on its behalf because they are not the "State." (State Obj. at 7; State Sep. Stmt. at 1-2, 44-45.) The State Agency Defendants insist that they are not the State and instead that the State is "that abstract entity created by the California Constitution and given voice by the California Legislature."[11] (SAD Opp'n at 2.) Taking these positions at face value would mean that the State does not exist except in the abstract, and also that the *Butt* Court's reaffirmation of the State's "ultimate responsibility" for education, 4 Cal. 4th at 681, is meaningless because it is unenforceable except on the specific circumstances at issue in *Butt*.

Such a nonsensical position cannot be — and in fact is not — the law. In *Butt*, the Court explicitly held that "the State's responsibility for basic equality in its system of common schools extends beyond the detached role of fair funder or fair legislator. In extreme circumstances at least, the State 'has a duty to intervene to prevent unconstitutional discrimination' at the local level."[12] *Id.*

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[10] Plaintiffs deliberately framed this case around deprivations only of the most fundamental elements of schooling, presenting a parallel—but if anything, stronger—case for violation of equal protection than presented in *Butt*, where the question whether essentials were provided while school was open was not presented. In the very first order in this case, this Court accepted the fundamental nature of the conditions that gave rise to the case: "The student Plaintiffs allege that they are required to try to learn under conditions that . . . include lack of sufficient textbooks, lack of sufficient trained teachers, and lack of adequate facilities. . . . Plaintiffs' allegations, if believed, would demonstrate that, despite the State's legal obligations with respect to public education, these plaintiffs do not enjoy the level of educational opportunity to which they are entitled." (Nov. 14 Order at 1-2.)

[11] The State Agency Defendants' argument that judgment cannot be had against them because "State Agency Defendants have only those powers and duties given them by the Constitution and the Legislature," (SAD Opp'n at 2), is roundly foreclosed by the second *Serrano* decision: "it is the general and long-established rule that in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative functions under the challenged statute are the proper parties defendant." *Serrano v. Priest*, 18 Cal. 3d 728, 752 (1976).

[12] As if *Butt* had never been decided, the State nonetheless argues that "it does not follow logically that a constitutional duty exists to set up a 'system of oversight and management' which will *prevent* constitutional violations, or will 'ensure' that they do not occur." (State Opp'n at 24-25.) But the

at 688 (quoting *Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d 871, 904(1979)). Contrary to the State and district oppositions to this motion, the *Butt* Court nowhere limited its holding of ultimate State responsibility to instances in which districts are incapacitated to act. (*See* State Opp'n at 3, 22, 40-42; LAUSD Opp'n at 17.) Instead, *Butt* held that "the State shares responsibility with 'the local entities it has created' to provide 'equal educational opportunity to the youth of the state'" but that "[t]he State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." 4 Cal. 4th at 684-85. Thus, *Butt* made clear that the State bears enforceable responsibility for equal education in its public schools.[13]

This conclusion is a logical and practical necessity: If the State were empowered to act only where districts lacked capacity, then the State's authority would be contingent and derivative instead of "ultimate." As cases discussing the law of agency have explained, an agent's principal may not defend on the basis that the agent alone is responsible. *See Srithong v. Total Inv. Co.*, 23 Cal. App. 4th 721, 727 (1994) (citing *Maloney v. Rath,* 69 Cal. 2d 442, 446 (1968), holding "the party charged with a nondelegable duty is 'held liable for the negligence of his agent'"); *see also Butt*, 4 Cal. 4th at 681 ("[l]ocal districts are the State's agents for local operation of the common school system") (citation omitted). It is immaterial that the agent may have been capable of satisfying the duty; the principal is liable simply because the agent failed to satisfy the obligation. The nondelegable duty rationale in *Butt* contradicts the State's contention that district incapacity — in addition to simple failure — is required for the State to be held accountable for equal educational opportunity.[14]

California Supreme Court did decide the *Butt* case, *Butt* did confirm precisely the constitutional assignment to the State of responsibility to "prevent" unconstitutional discrimination, 4 Cal. 4th at 684-85, 688, and that decision is binding on the State now.

[13] The State and LAUSD attempt to reframe the equal protection question raised in this motion as a question whether individual districts deprive their students of equal protection of the law by providing some of the students textbooks but not others. (*See* State Opp'n at 41-42; LAUSD Opp'n at 1 ("LAUSD's declarations create a triable issue as to whether the textbook situation *within LAUSD* is sufficiently 'extreme' under *Butt* to trigger the State's duty of intervention.") (emphasis added).) While such a question may be cognizable, it is not the question raised in this motion or in this litigation. Instead, the question in this motion is whether, on a statewide basis, some students have access to instructional materials whereas others do not, and whether the instructional materials to which only some students have access are fundamental for learning.

[14] Certainly the State may select altogether different intervention responses in instances in which districts lack capacity to act as compared with instances in which districts have the capacity to act but nonetheless have failed to do so. This selection among intervention responses goes to remedy, how-

The cases the State cites for the proposition that the State Legislature may elect how to carry out its duties do not undermine this point. (*See* State Opp'n at 26-27, 37-39.) These cases simply hold that in the absence of a constitutional violation, the courts may not override legislative delegations of authority. *See Salazar v. Eastin*, 9 Cal. 4th 836, 858 (1995) ("state defendants, who are bound by statutory law, may [not] take over a function expressly delegated by the Legislature to local districts, in the absence of a court order based on adjudicated constitutional violations"); *see also San Jose Teachers Ass'n v. Barozzi*, 230 Cal. App. 3d 1376, 1379-80 (1991) (same); *Comite de Padres de Familia v. Honig*, 192 Cal. App. 3d 528, 531-32 (1987) (same); *cf.* (State Opp'n at 22 ("[t]he issue in both *Butt* and *Tinsley* was whether, given a proven constitutional violation, a remedy was available against the State").) It is for precisely this reason that plaintiffs' counsel acknowledged at oral argument on the class certification motion that we do not seek imposition of standards for standards' sake but instead seek a functioning oversight system that will ensure compliance with the equal protection guarantees of the California constitution. (Sept. 20, 2001 Hearing Tr. at 40:5-15. *Contra* State Opp'n at 28-29 & n.12.)

The State's claim that "*Comite* is binding here" is therefore incorrect. (State Opp'n at 39.) In *Comite*, plaintiffs argued that particular statutory provisions created a freestanding requirement that the State monitor and enforce compliance with affirmative action programs even in the absence of any finding of a constitutional violation. 192 Cal. App. 3d at 531. The court of appeal employed standard statutory interpretation principles to conclude that, absent a constitutional violation, the legislative delegation to districts of responsibility for affirmative action compliance supersedes the State's authority to act. *Id.* at 532.

Whereas a State duty to monitor might not exist in the abstract, *Salazar*'s explanation of *Butt* is that, where adjudicated constitutional violations exist, the State must act to correct them notwithstanding particular statutory or regulatory delegations the State may have attempted. *See Salazar*, 9 Cal. 4th at 857-58; *see also Tinsley*, 91 Cal. App. 3d at 910 ("If, as we have indicated, the state au-

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ever, and not to whether the State has a duty to intervene in the first instance. *See Butt*, 4 Cal. 4th at 691-92 (noting that "[t]he State is constitutionally free to legislate against any recurrence of the Richmond crisis" and that the State had several options for how to do that but that the State is obliged to intervene to prevent unconstitutional discrimination).

thorities are under a constitutional mandate to alleviate segregation occasioned by the maintenance of arbitrary school district boundaries, neither the Legislature, nor the electorate, under power delegated by the Legislature, may thwart the granting of relief to those who have been deprived of equal educational opportunity."). Ignoring these holdings, the State asks rhetorically "[c]ould it conceivably be outside the Legislature's 'plenary' power to decide that the oversight system should be based primarily on student performance?" (State Opp'n at 27.) Of course it could, based specifically on the holdings of *Salazar* and *Butt*, which necessarily follow in the history of school desegregation decisions from the California and federal courts. *Tinsley* and the host of other school desegregation decisions in California stand specifically for the proposition that the State could not fulfill its obligations by monitoring student performance while simultaneously operating racially segregated schools. *Tinsley*, 91 Cal. App. 3d at 899 (noting "the California mandate to eliminate or alleviate segregation whenever it occurs within a district"). It follows just as naturally that the State cannot fulfill its "ultimate responsibility" for education, *Butt*, 4 Cal. 4th. at 681, merely by monitoring school performance while simultaneously operating schools that offer only some students but not others the essential tools required for learning.[15]

LAUSD argues equally mistakenly that the *Butt* Court's reference to State "duty" and "responsibility" derived only from the State's defense in *Butt* that it had a compelling basis to encourage local control that justified nonintervention to prevent early closure of the Richmond schools. (LAUSD Opp'n at 11.) That argument finds absolutely no support in *Butt* itself or in the preceding cases. *See Tinsley*, 91 Cal. App. 3d at 904 ("That the state has a duty to intervene to prevent unconstitutional discrimination is established by the *Serrano* cases."). The *Butt* Court framed the question it decided as "[w]hether the State has a constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems of a particular school district from depriving its students of 'basic' educational equality" and "affirm[ed] the trial court's determination that such a duty

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[15] This principle is not restricted to California constitutional jurisprudence. It is mandated as well by the Fourteenth Amendment. *See, e.g., Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) ("the Board had to do more than abandon its prior discriminatory purpose. The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'") (citations omitted).

exists under the California Constitution."[16] 4 Cal. 4th at 674. In fact, *Butt* referred to State "duty" and "responsibility" 12 times before the Court finally mentioned, 20 pages into the decision, "[t]he State's most vigorous contention" that its policy of local control justified nonintervention. *Id.* at 688.

V. THE STATE HAS BREACHED ITS DUTY: IT IS UNDISPUTED THAT THE STATE HAS NO SYSTEM OF OVERSIGHT AND MANAGEMENT TO ENSURE EQUAL ACCESS TO INSTRUCTIONAL MATERIALS

The State's description of its "accountability" system does not dispute the basic fact, demonstrated in our opening papers, that the State has no system designed to ensure that all its public school students have equal access to instructional materials. The State merely argues that it "pays attention" "generally, to whether students have textbooks," (State Opp'n at 2), and even that description of the State's activity regarding instructional materials is overgenerous in light of the evidence the parties have proffered on this motion. In fact, the undisputed evidence shows that the State "pays attention" only "[s]ometimes," in the State's own words, (*id.* at 16), to provision of textbooks and even then the State does not pay this attention based on student performance, as the State claims, but instead pays this attention only in a relatively small subset of the lowest performing schools.

For example, the chief component of the "system" the State touts, the Immediate Intervention/Underperforming Schools Program, is only a voluntary program, and it covers not even half of the schools the State deems eligible for participation by virtue of their students' low performance. The State offered a declaration from Wendy Harris, Director of the California Department of Education's School Improvement Division, which confirmed that "350 schools were randomly selected in

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[16] The fact that the Court referred in this quoted text and in some other instances in the opinion to comparison between one school district and all others for purposes of equal protection analysis in no way limits the scope of equal protection to inter-district review. The Court was careful to discuss "the affected students' fundamental California right to basic educational equality," 4 Cal. 4th at 688, thus confirming the truism that "access to a public education is a uniquely fundamental personal interest." *Id.* at 681. Indeed, just this term, the United States Supreme Court reaffirmed that equal protection is an individual, not a group, guarantee: "Because the Fourteenth Amendment 'protects *persons*, not *groups*,' all 'governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.'" *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337 (2003) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)); *see also Adarand*, 515 U.S. at 230 (stating that a "long line of cases understand[s] equal protection as a personal right"). Because of the long-recognized personal rights both to education and to equal protection, the *Butt* Court simply could not have so crabbed the equal protection clauses in the California Constitution that they would apply, in the education context, only to protection of district-to-district comparisons. The *Butt* Court's references to district comparisons thus derive simply from the factual context of a district-wide injury in which the case was decided.

1999 from the pool of schools that volunteered to participate" in the II/USP and that "[i]n 2000 and 2001, two subsequent cohorts, each with 430 schools in deciles 1-5 which failed to make API [Academic Performance Index] growth targets" participated in II/USP. (Declaration of Wendy Harris ("Harris Decl.") at ¶¶ 20-21; *see also* State Opp'n at 12 (noting that schools' "failure to meet growth targets *may* lead to intervention") (emphasis added).) The State's own expert, Susan Phillips, showed that fully 3145 schools were eligible to participate in the II/USP program during the first year, when Wendy Harris says only 350 schools were selected,[17] and that the 430 schools that participated during the third year of the program were only 34 percent of the 1,266 schools the State deemed eligible to participate by virtue of their students' low performance, and the 430 participating schools in the second year were only 46 percent of the 936 II/USP-eligible schools. Phillips Report at 22; *see also* (Mem. P. & A. at 22.) Even if the State "pays attention" to instructional materials needs in all of the schools that participate in its II/USP program, this attention is wholly deficient as an oversight system to ensure equal access to instructional materials even for students in the lowest performing schools, much less for all California public school students.

As a result, the State's effort to demonstrate that instructional materials shortages identified in II/USP plans have subsequently been corrected does nothing to establish the existence of a functioning State system of oversight and management regarding instructional materials. Assuming for purposes of this motion that the State is correct in each instance in which it attaches a declaration stating that the textbook shortages have since been corrected, the later correction of those few shortages the State finds out about shows only that the State can, if it acts, make a difference in ensuring basic equality in its schools, which it is constitutionally obligated to do. Subsequent correction does not, however, show that the State has a system or that that system is working. As the State's own declaration explains it, the State only acts on instructional materials shortages in that subset of schools that perform at the very bottom of the State, then volunteer into the II/USP program, and then are lucky

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[17] State expert Susan Phillips writes that 430 schools were selected to participate in II/USP during the first year of the program, whereas State declarant Wendy Harris testifies that 350 schools were selected. *Compare* Phillips Report at 22 with Harris Decl. at ¶ 20. Viewing the facts most generously to the State, if 430 schools were selected that first year, nonetheless, as Ms. Phillips shows, these selected schools were only 14 percent of the schools eligible to participate in the program. Phillips Report at 22.

enough to be "randomly selected" among the other bottom-performing schools that have volunteered to seek State assistance. (Harris Decl. at ¶ 20.) A system that is designed to be underinclusive categorically cannot be deemed a system of oversight and management to ensure equal access to instructional materials for all public school students.

Moreover, the State's repeated reference to the lack of common agreement about the meaning of "sufficient" textbooks for purposes of district certification under Education Code § 60119 underscores its failure to operate an oversight system designed to prevent or discover and correct inequalities in access to instructional materials. (State Opp'n at 29, 33, 42.) Education Code § 60119 requires district governing boards to hold a hearing once a year and notify classroom teachers and the public if the governing board determines that schools have "insufficient textbooks or instructional materials." If no common understanding even of numeric sufficiency is now mandated, no system of ensuring equality can follow. In implicit acknowledgement of this truth, the State does not respond to plaintiffs' showing that districts have certified that they have sufficient instructional materials within the meaning of § 60119 even though they in fact did not have enough books for every student, (*see* Mem. P. & A. at 20-21), except to charge that it is reasonable for the State to assume districts will not "commit fraud by making false certifications." (State Opp'n at 29.) But a district that certifies to sufficiency without any definition of sufficiency cannot be said to commit fraud. *See Lim v. The.TV Corp. Int'l*, 99 Cal. App. 4th 684, 694 (2002) (elements of a fraud claim are "(1) a representation, (2) that is false, (3) made with knowledge of its falsity, and (4) with an intent to deceive, coupled with (5) actual detrimental reliance and (6) resulting damage"). The State purports to defend a Kafkaesque system in which it refuses to define whether students should have instructional materials to use without sharing in class and at home for homework but then could charge its districts with misdeeds if students do not satisfy an undefined standard.

The State opposition to this motion does confirm, however, that it knows how to set up a measurable standard for provision of instructional materials — and that such a measurable standard is straightforward. As explained in the declaration of Bruce Gordon attached to the State's opposition, the State "Board of Education has adopted a standardized template to be used by school districts in reporting on" provision of instructional materials as part of their School Accountability Report Cards

("SARC"s). (Declaration of Bruce Gordon at ¶ 8.) According to the template, "if all students do not have access to textbooks and other instructional materials in each core subject area that are current and in good condition, schools must provide the reasons for that and describe what is being done or planned to provide them access." (*Id.* at ¶ 11.)

If compliance with this template were statutorily required, the State would go far toward operating a system of oversight and management to ensure equal access to instructional materials for all California public school students. But it is undisputed that the State does not even operate this simple element of an oversight system. Instead, as plaintiffs' expert Dr. Jeannie Oakes has shown without dispute, LAUSD SARCs routinely report the identical, empty, text: "The Los Angeles Unified School District has set a priority on ensuring that a sufficient number of textbooks to support the school's instructional program is available. The instructional materials are chosen primarily from the textbooks adopted by the California Department of Education." Oakes Textbook Report at 87. This text does not satisfy the elements of the template described in Bruce Gordon's declaration; the text gives no information either about whether or about why particular schools do or do not have enough instructional materials for each student to use in class and at home without sharing.

LAUSD argues that the State and districts have shown "substantial progress toward solving the particular textbook problems" described in this motion. (LAUSD Opp'n at 1.) Even "substantial progress," if LAUSD were correct in that characterization, does not safeguard "the affected students' fundamental California right to basic educational equality." *Butt*, 4 Cal. 4th at 688. As the California Supreme Court recognized, "access to a public education is a uniquely fundamental *personal* interest in California." *Id.* at 681 (emphasis added). Substantial progress in the aggregate does not safeguard the personal interest of an individual student who lacks a textbook. Moreover, "progress" that falters over a period of years, as is undisputedly the case here, can hardly be called substantial. At Fremont High School in Los Angeles, for example, LAUSD promises that textbook shortages will be remedied "[b]y the end of 2003," (LAUSD Opp'n at 18) — even though the school year for this multi-track, year-round school began on July 1, fully six months before the end of 2003. (*See* Plaintiffs' Request for Judicial Notice at 3.) The undisputed evidence in this case also shows that students at this same school have suffered textbook shortages in core subjects at least for three consecutive

years, with repeated — and repeatedly broken — promises year after year that their textbook needs will be fulfilled in the not-too-distant future. At the end of the 2000-2001 school year, Fremont's then-principal testified that it was "accurate" that Fremont had "[n]ot enough textbooks" but that "come July 2nd [2001] we will be in compliance because . . . we have ordered books, and that was a directive of our small district superintendent that we order the books. As a matter of fact, they placed the orders themselves to assure that we had them." (Roland Depo. at 47:20-23, 59:17-25; *see also* John C. Fremont High School Leadership Council Minutes (Oct. 9, 2000 & Jan. 8, 2001) — Hines Depo. Exh. 13, Welch Decl. at Exh. S (reporting that in October 2000 classes in the Foreign Language department "have students with no books" and in January 2001 "the Special Education department still needs books, especially grammar and composition books").) But one month into the 2001-2002 school year (and one month after the principal had promised the books would be on campus), the assistant principal testified that Fremont still did not have chemistry, reading literacy, and Spanish textbooks. (Hines Depo. at 426:11-429:5.) One year later, during the 2002-2003 school year, students still lacked textbooks in core subjects, including both chemistry and Spanish, and their district does no more than promise that they should have the books they need halfway through the following school year. (Declaration of Laverne Brunt at ¶¶ 3, 5, 7; LAUSD Opp'n at 17-18.)

If LAUSD's promises now are kept, students who graduate from Fremont this year will have suffered core textbook shortages in their school for each of their four years of high school. This "progress," if it can be called that, toward ensuring basic educational equality with other students leaves these Fremont students firmly behind because they have never, in their entire high school experience, had the fundamental and essential instructional materials that are the core of how education is transmitted to students. As the attached chart of undisputed facts shows, Fremont's students are not alone. Students in schools up and down the State suffer core instructional materials shortages for which "substantial progress" without a system to ensure equal access is small comfort and certainly does not satisfy the constitutional standard.

As we explained in the opening papers, (Mem. P. & A. at 24), the question of remedy that so concerns the State and the school districts is not raised in this motion; the Court need not resolve now

how precisely the State should carry out its oversight duty regarding instructional materials to grant summary adjudication of the simple truth that the State in fact has that duty and has breached it.[18]

VI. THIS MOTION IS PROCEDURALLY SOUND

The State rightly did not challenge the procedural basis for this motion. Because LAUSD's procedural arguments for denying the motion assume a conclusion shown to be faulty above, the arguments present no impediment to consideration of this motion. (*See* LAUSD Opp'n at 3 n.1, 4.) LAUSD argues that "since the only free-standing duty of the State at issue in this case is the State's duty to intervene in order to remedy conditions which would result in a denial of equal protection, plaintiffs' motion would not completely dispose of an issue of duty." (*Id.* at 6.) As demonstrated above and in the opening papers, deprivations of instructional materials alone result in a denial of equal protection. This motion thus can completely dispose of an issue of duty presented in this litigation.

In addition, the fact that *Novak v. Low, Ball, & Lynch*, 77 Cal. App. 4th 278, 285 (1999), decided breach on a motion pursuant to California Code of Civil Procedure section 437c motion confirms this Court's authority to decide breach. *Cf. Ingham v. Luxor Cab Co.*, 93 Cal. App. 4th 1045, 1049 (2001) (deciding both duty and breach on a summary judgment motion). (*Contra* LAUSD Opp'n at 14.) LAUSD is simply incorrect that the *Novak* holding that "[t]hat duty clearly applied and was breached," 77 Cal. App. 4th at 285, was mere dicta. The *Novak* court conclusively determined both duty and breach but left open remaining elements of the plaintiff's causes of action: "we are mindful that Novak must still prove causation and damages." *Id.* Having thus set out which issues were decided — duty and breach but not causation and damages — the *Novak* court disposed of the case. That the Court noted that "[w]e reverse the judgment with instructions to enter an order granting summary adjudication that the issue of respondents' duty under section 2860, subdivision (f) has been established" no more meant that the trial court should not determine causation and damages on

[18] Certainly effectuation of the State's duty does not require the "micro-manage[ment]" LAUSD and other parties baselessly charge plaintiffs with seeking. (LAUSD Opp'n at 7.) But the choice of how to carry out its duty is the State's to make in the first instance. *See Serrano*, 18 Cal. 3d at 752 ("judgment is not intended to require, and is not to be construed as requiring, the adoption of any particular plan or system for financing the public elementary and secondary schools of the state").

remand than it meant that the question of breach had not been conclusively decided when the court of appeal stated "[t]hat duty clearly applied and was breached." *Id.* at 286, 285.

CONCLUSION

For the foregoing reasons, and those stated in the opening papers, plaintiffs respectfully request that this Court grant the motion for summary adjudication regarding the State's duty, and breach thereof, to ensure equal access to instructional materials for all California public school students.

Dated: September 8, 2003

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