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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF SAN FRANCISCO

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

22 Plaintiffs,
v.

23 STATE OF CALIFORNIA, DELAINE
24 EASTIN, State Superintendent of Public In-
struction, STATE DEPARTMENT OF
25 EDUCATION, STATE BOARD OF
EDUCATION,

26 Defendants.
27
28

No. 312236

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY
ADJUDICATION OF THE STATE'S DUTY
TO ENSURE EQUAL ACCESS TO
INSTRUCTIONAL MATERIALS FOR ALL
CALIFORNIA'S PUBLIC SCHOOL
STUDENTS**

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INTRODUCTION

The State¹ has violated its duty to operate an oversight system to ensure equal access to instructional materials for all California public school students. The State's own documents, as well as numerous independent sources, reflect substantial numbers of students struggling to learn without textbooks in class, much less to use at home for homework, for years on end. These shortages persist even now that the State's academic content standards and High School Exit Examination explicitly presuppose access to these absent instructional materials and the State's accountability system proposes to penalize students for failure to master the precise subject areas these missing instructional materials would cover. By contrast, the vast majority of California's public school students are not denied access to this most fundamental educational tool.

Four separate independent sources show that consistently since at least 1994, hundreds of thousands of students have lacked textbooks to use in class without sharing and at home for homework. (PLTF 62076-62077; PLTF 79834²; Center for the Future of Teaching and Learning survey data; Harris Survey Report, Welch Decl. at Exhs. A-C.) The State documents reflect students so hungry to learn in schools without enough books for homework and study that "they had to sneak textbooks from class to take home" (DOE 137063),³ and note, for example, the existence of "a [d]istrict practice to provide one text for social studies for every two students" such that "students must share social studies texts in class" and "[t]exts are not available for students to take home." (DOE 53585.) The State documents also reveal schools in which close to half — and in some instances, more than half — the students and teachers report not having enough textbooks in such core subjects as language arts, science, and social science and schools in which no English Language Development instructional materials were provided at all for English Language Learner students. (E.g., DOE 37014, 37015, 37378, 38917, 51860, 67357.) In addition to these independent and State documentations, plaintiffs' evidence discloses entire classes without textbooks today, at the end of this

¹ For ease of reference, this memorandum refers to all defendants as "the State."

² All cited PLTF documents are attached. (Declaration of Leecia Welch ("Welch Decl.") at Exh. A.)

³ All cited DOE documents are attached. (Welch Decl. at Exh. D.)

1 2002-2003 school year, and classes taking instruction in core academic subjects with textbooks that
2 are 15 years old, among other current shortages of instructional materials throughout the State.

3 In spite of these dire instructional materials shortages, the State continues to assume the posi-
4 tion in this litigation — a position it has implemented through inaction over the years and today —
5 that it need not ensure equal provision of instructional materials to all of its public school students.
6 The State takes this position nearly three years after this Court held that “Plaintiffs’ allegations, if be-
7 lieved, would demonstrate that, despite the State’s legal obligations with respect to public education,
8 these plaintiffs do not enjoy the level of educational opportunity to which they are entitled.” (Nov.
9 14, 2000 Order (“Order”) at 2.) In addition, the State takes the position of nonresponsibility despite
10 explicit agreement both that instructional materials are critical to learning opportunity and that all
11 students should have access to them. The State’s position is wholly indefensible. Worse: it has dis-
12 astrous consequences, that cannot be compensated, for hundreds of thousands of California public
13 school students — overwhelmingly students of color and poor students — struggling without equal
14 access to curriculum content right now, resulting in a dual system of educational opportunity state-
15 wide.

16 This Court and the California Supreme Court both have already held that the State itself bears
17 responsibility to ensure provision of equal educational opportunity. (*See* Order at 1 (“The State of
18 California has taken it on itself through its Constitution, statutes, and regulations to provide universal
19 public education and to do so on a basis that satisfies basic standards of equality, among other legal
20 requirements.”)); *Butt v. State*, 4 Cal. 4th 668, 681 (1992) (“the State itself has broad responsibility to
21 ensure basic educational equality under the California Constitution”). But these strong judicial prom-
22 ises have nonetheless proved illusory in practice for far too many public school students because the
23 State has failed to satisfy its obligations.

24 The salient issues in this motion are the importance of instructional materials to learning, the
25 fundamental and chronic inequality in access to these instructional materials, and the State’s duty to
26 intervene to “prevent or discover and correct” this fundamental inequality. (Order at 2.) Plaintiffs
27 seek summary adjudication that the State lacks a legally adequate system of oversight and manage-
28 ment with respect to the availability of textbooks and instructional materials, as evidenced both by

1 the gross inequalities in the availability of textbooks shown in this motion and by the State's conces-
2 sion that it has no system to prevent or discover and correct inequalities in access to instructional ma-
3 terials. The Court can issue the requested order under Code of Civil Procedure section 437c. It per-
4 mits summary adjudication of an issue of duty without fully resolving either the entire case or a cause
5 of action. The Court should therefore resolve once and for all the question of the State's responsibil-
6 ity to its students, at least with respect to their instructional materials needs. Doing so will dramati-
7 cally truncate the issues left to be tried and advance considerably toward a State system that can cor-
8 rect the appalling textbook deficiencies in the students' schools today.

9 ARGUMENT

10 I. THE STATE HAS THE DUTY TO OPERATE A SYSTEM OF OVERSIGHT 11 THAT WILL EITHER PREVENT OR DISCOVERY AND CORRECT DEPRIVATIONS OF EQUAL ACCESS TO INSTRUCTIONAL MATERIALS.

12 The State's legal duty with respect to provision of instructional materials for education is al-
13 ready abundantly clear. As this Court and the California Supreme Court have repeatedly explained,
14 the State's duty to ensure provision of public education on a fundamentally equal basis cannot be
15 delegated to any other entity: "The State itself, as the entity with plenary constitutional responsibility
16 for operation of the common school system, had a duty to protect District students against loss of
17 their right to basic educational equality." *Butt v. State*, 4 Cal. 4th 668, 704 (1992); *see also* (Order at
18 1-2 ("That the State has chosen to carry out certain of its obligations through local school districts
19 does not absolve the State of its ultimate responsibility.")).⁴

20 ⁴ Indeed, these holdings rest on more than a hundred years of decisions from our state courts recog-
21 nizing the State's responsibility for education. *See Salazar v. Eastin*, 9 Cal. 4th 836, 858 (1995) ("the
22 state has ultimate responsibility for the constitutional operation of its schools"); *Kennedy v. Miller*, 97
23 Cal. 429, 431 (1893) ("Article IX of the constitution makes education and the management and con-
24 trol of the public schools a matter of state care and supervision."); *see also San Francisco Unified*
25 *Sch. Dist. v. Johnson*, 3 Cal. 3d 937, 951 (1971) ("Education, including the assignment of pupils to
26 schools, is plainly a state function."); *Hall v. City of Taft*, 47 Cal. 2d 177, 181 (1956) ("[t]he public
27 school system is of statewide supervision and concern"); *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664,
28 669 (1924) (Public schooling "is in a sense exclusively the function of the state which cannot be
delegated to any other agency. The education of the children of the state is an obligation which the
state took over to itself by the adoption of the constitution."); *City of El Monte v. Comm'n on State*
Mandates, 83 Cal. App. 4th 266, 278-279 (2000) ("[E]ducation is the ultimate responsibility of the
state. The principle is undeniable . . ."); *California Teachers Ass'n v. Hayes*, 5 Cal. App. 4th 1513,
1534 (1992) ("In this state, education is a matter of statewide rather than local or municipal con-
cern."); *Johnson v. San Diego Unified Sch. Dist.*, 217 Cal. App. 3d 692, 698 (1990) (same); *Tinsley v.*
Palo Alto Unified Sch. Dist., 91 Cal. App. 3d 871, 903 (1979) ("[I]t is clear that in California, . . . the
responsibility for furnishing constitutionally equal educational opportunities to the youth of the state
is with the state, not solely in the local entities it has created.").

1 The *Butt* Court approved the premise that “[i]n view of the importance of education to soci-
2 ety and to the individual child, the opportunity to receive the schooling furnished by the state must be
3 made available to all on an equal basis.” 4 Cal. 4th at 680 (quoting *Jackson v. Pasadena City Sch.*
4 *Dist.*, 59 Cal. 2d 876, 880 (1963)). Therefore, *Butt* held that where an educational deprivation
5 “would have a real and appreciable impact on the affected students’ fundamental California right to
6 basic educational equality,” the State “has a duty to intervene to prevent unconstitutional discrimina-
7 tion’ in its schools.” *Id.* at 688, 685 (quoting *Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d
8 871, 904 (1979)).

9 Deprivation of textbooks unquestionably has a real and appreciable — indeed, devastating —
10 impact on students’ fundamental right to educational equality. The integral necessity of textbooks is
11 such a core value that the State has already conceded it in this litigation: “the State agrees with plain-
12 tiffs that every student in every public school should have a textbook.” (Mem. P. & A. State Demur-
13 rer at 14.) The California Department of Education also has made the admission that textbooks are
14 critical to student learning. In a September 2001 report auditing one of the consistently lowest-
15 performing schools, the CDE Scholastic Audit Team reported that each teacher should have a

16 complete classroom set of adopted course texts for use by students in class. In
17 addition to books that are checked out to students for their use at home, after
18 school tutorials or study hall, core teachers must have a stationary set of state-
board approved standards-based, text books and a class set of age-appropriate
dictionaries for student use.

19 (DOE 137032.) The State would be hard-pressed to avoid that admission; every authority to consider
20 the question—from the courts to the State legislature to the State’s own expert—has agreed that text-
21 books are fundamentally important to learning.

22
23 **A. California Courts And Other State Courts Have Recognized The
Centrality Of Textbooks To Education.**

24 The California Supreme Court has recognized that “[t]he authorities are virtually unanimous
25 in characterizing textbooks as having a central place in the educational mission of a school.” *Cal.*
26 *Teachers’ Ass’n. v. Riles*, 29 Cal. 3d 794, 811 (1981). As the Court noted, textbooks “have been
27 called ‘a basic educational tool’ [and] it has been said that they . . . ‘are the most essential tool of
28 education since they contain the resources of knowledge which the educational process is designed to

exploit.” *Id.* (citations omitted). The other courts that have considered the value of textbooks for learning have reached the same necessary conclusion. *See Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (“[t]extbooks are necessary elements of any school’s activity”); *Cardiff v. Bismarck Pub. Sch. Dist.*, 263 N.W.2d 105, 113 (N.D. 1978) (“[I]t is difficult to envision a meaningful educational system without textbooks. No education of any value is possible without school books.”) (citation omitted); *Randolph County Bd. of Educ. v. Adams*, 467 S.E.2d 150 (W. Va. Ct. App. 1995) (textbooks and materials are “an ‘integral [and] fundamental part of the elementary and secondary education’” and “hindering access to necessary materials would make the educational process nearly meaningless”) (citing *Bond v. Ann Arbor Sch. Dist.*, 178 N.W.2d 484, 488 (Mich. 1970)). According to all these courts, textbooks are “necessary,” “essential,” and “fundamental” to “education of any value.”

B. The State Legislature Has Declared Textbooks To Be Fundamental To Learning.

Like the courts, the State Legislature has declared the fundamental importance of providing each student with a textbook:

The Legislature finds and declares that the California Supreme Court, in its 1976 decision, *Serrano v. Priest* (18 Cal. 3d 728), reaffirmed the principle that education is a fundamental interest which is secured by the state constitutional guarantee of equal protection under the law, and held invalid a school financing system that resulted in disparate educational opportunity. 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 educational opportunity is impaired.

A.B. 2600, 1993-1994 Reg. Sess. (Cal. 1999) (Welch Decl. at Exh. E.); *see also* (PLTF 79785 (“The basics of education are quality school personnel, safe and conducive facilities and sufficient quality instructional materials for each student.”)). The Legislature’s Joint Committee to Develop a Master Plan for Education—Kindergarten through University recently reaffirmed this declaration:

[t]he State must also assure that every school has current textbooks, technology, and/or other instructional materials that are aligned with the content expected to be taught to each student, in sufficient quantity for each student to have access to these materials for home use. This requirement is of fundamental importance.

(PLTF 78022.) Likewise, the Human Resources Research Organization, with whom the California Department of Education contracted to evaluate the California High School Exit Exam, confirmed the

ubiquitous use of textbooks in 2002, reporting that 87 percent of surveyed teachers stated they “do work from textbooks” and 85 percent “do work from supplemental materials.” (PLTF 77846.)⁵

C. Both The State’s Experts And Plaintiffs’ Experts Agree That Textbooks Are Essential Learning Tools.

The expert reports prepared in this case — both by plaintiffs and by the State itself — confirm the fundamental importance to student learning of instructional materials. For example, State expert Margaret Raymond wrote: “the State agrees with plaintiffs’ central argument that every student deserves . . . adequate instructional materials. . . .” Report of State Expert Margaret Raymond (“Raymond Report”) at 2. (Welch Decl. at Exh. G.) Similarly, plaintiffs’ expert Dr. Jeannie Oakes testified without rebuttal that “[i]t is universally acknowledged that textbooks and instructional materials are fundamental and essential to education.” Expert Report of Dr. Jeannie Oakes (“Oakes Textbook Report”) at 5 (Welch Decl. at Exh. H.); *see also* (Oakes Depo. at 250:1-4 (“I think there would be very little disagreement among scholars that materials that provide students access to knowledge are an essential part of the educational process.”)).⁶

Without attempting to do proper justice to the 120-page report Dr. Oakes prepared to catalogue the significance of instructional materials for learning, suffice it here to highlight the following: Dr. Oakes detailed what every student⁷ and teacher knows, “[t]extbooks and instructional materials (including technology and other equipment) are the primary tools that teachers use to organize their lessons and make content knowledge and skills available to students. These textbooks and materials contain the content that students are expected to learn, and most teachers focus their instruction on the material included in the books they use.” Oakes Textbook Report at 7 (citation omitted). Profes-

⁵ This same organization revealed this year that 20.2 percent of teacher survey respondents from 298 California high schools and 173 middle-grade feeder schools believe that their students’ results on the High School Exit Exam were limited by “[l]ack of [m]aterials.” HumRRO, *Independent Evaluation of the California High School Exit Examination (CAHSEE)*, AB 1609 Study Report, vol. 1 at i & vol. 2 at C-28. (Welch Decl. at Exh. F.) This legislatively ordered study confirms the legislature’s declaration that limited access to instructional materials impairs educational opportunity.

⁶ All cited deposition excerpts are attached. (Welch Decl. at Exh. J.)

⁷ For examples of students’ grasp of the importance of instructional materials, see the comments from focus group participants whom plaintiffs’ expert Michelle Fine reviewed. For example, when asked what an ideal school would look like, one girl answered “I mean, first of all there would be enough books for the students.” Expert Report of Dr. Michelle Fine (“Fine Report”) at 7. (Welch Decl. at Exh. I.)

1 sor Oakes thus reviewed scholarly research on the use and impact of textbooks on teaching and learn-
2 ing, summarizing the results as having documented that

3 the textbook is the central tool in almost all forms of schooling. “Research evi-
4 dence indicates that textbooks are ubiquitous and widely used in classrooms.” A
5 wide range of studies indicate that textbooks are extensively used in U.S.
6 schools.

7 (*Id.* at 6.) (citations omitted). Accordingly, “textbooks and curriculum materials, in large part, deter-
8 mine what students do and do not learn.” (*Id.* at 7.)

9 Elaborating on the importance of textbooks and instructional materials to student learning,
10 plaintiffs’ expert Thomas Sobol provided — without rebuttal — the benefit of his experience as
11 Commissioner of Education in New York State, testifying that instructional materials are

12 so obviously essential that you can’t think of the situation without them. The
13 kids and the teacher who have no history textbook are going to have a harder
14 time learning history than one that has one. . . . It’s sort of, for me, like the moon
15 and the sun. It’s so plain. There they are every day. They don’t require — we
16 rely on their appearance the following day with or without the benefit of a social
17 science study to . . . reassure us.

18 (Sobol Depo. at 89:6-21.) Dr. Sobol explained:

19 [W]hen students receive limited or out of date instructional materials, or no in-
20 structional materials at all, the students learn a different lesson: that society
21 doesn’t care enough about whether they learn to provide them books. Kids re-
22 spond to this lesson in different ways, but very often I have seen them feel alien-
23 ated and/or discouraged and/or hostile and/or apathetic.

24 Expert Report of Thomas Sobol at 8. (Welch Decl. at Exh. K.) Plaintiffs’ expert Michelle Fine sec-
25 onded Dr. Sobol, again without rebuttal: “[p]sychologically, the absence of books and materials, and
26 the recognition that students in ‘other schools’ have access to such materials, produces a sense of de-
27 spair about perceived social worth” Fine Report at 36.

28 Finally, independent of the ubiquitous usage of textbooks for instruction, Professor William
29 Koski documented in his expert report for plaintiffs that California’s content “standards for all four
30 core curriculum areas are replete with references to traditional textbooks, periodicals, and audio-
31 visual resources, as well as hands-on learning materials” and concluded that “the standards do require
32 specific educational resources and conditions in order for children to reach proficiency. . . .” Expert
33 Report of William Koski (“Koski Report”) at 17, 2. (Welch Decl. at Exh. L.) For example, Professor
34 Koski showed that “[i]n History-Social Science, 90 out of the 104 standards require, at a minimum, a

1 textbook or other written instructional material that provides the content of the standard.” (*Id.* at 14.)
2 Likewise, “[t]extbooks are integral to both mathematics and science instruction throughout every
3 grade level, and each adopted science instructional program includes text and workbooks.” (*Id.* at
4 17.) (citation omitted). Professor Koski explained that “[t]he missing ingredient in California’s rec-
5 ipe of high standards and strong accountability is the assurance that all children will receive the op-
6 portunities to achieve to the level of the state’s standards.” (*Id.* at 2.)

7 As Professor Koski demonstrated (again without rebuttal), the consequences of denial of nec-
8 essary textbooks and other instructional materials for any student with respect to the content standard
9 are large. In general terms, “[b]ecause the standards-based achievement test, as well as in-class in-
10 struction, is directly aligned with the content standards and curriculum frameworks, promotion and
11 retention can be inextricably bound with student mastery of the content set forth in the standards.”
12 (*Id.* at 8.) Further, as the State now has initiated a high school exit examination in language arts and
13 mathematics that is aligned with content standards, “the stakes for California’s high schoolers are
14 high and if they are not provided with the necessary educational resources and conditions for success,
15 many students will not receive a California diploma.” (*Id.* at 10.)

16 **D. School District Superintendents And Other School Practitioners**
17 **Confirm The Fundamental Importance Of Instructional Materials For**
Learning.

18 Like the State’s and plaintiffs’ experts and the courts and the California State Legislature,
19 school district superintendents and other school practitioners have acknowledged the fundamental
20 importance of instructional materials for learning. For example, Dennis Chaconas, Superintendent of
21 Oakland Unified School District, testified that “having a textbook is critical to a youngster’s educa-
22 tional opportunity.” (Chaconas Depo. at 57:14-16; *see also id.* at 61:12-13 (“I believe strongly that
23 kids need books . . .”).) Gloria Johnston, Superintendent of West Contra Costa Unified School Dis-
24 trict, testified similarly that “we want the students to have an opportunity to have access to the mate-
25 rials they need to learn the standards.” (Johnston Depo. at 130:8-11; *see also id.* at 130:17-24 (“no,
26 it’s not acceptable” that in the district “there have been classes in which because of lack of funds,
27 there were not sufficient textbooks to give every child, every student his or her own textbook for use
28 in class”).) Santa Paula Unified School District Superintendent William Brand testified that “every

1 student should have a textbook” and elaborated: “You obviously need a textbook for the class and if
2 at all possible, for the core classes, and the required textbook you need to finish homework and assist
3 you in assignments and so on.” (Brand Depo. at 123:18-19, 116:22-25.) The Chief Executive Offi-
4 cer of the Fiscal Crisis and Management Assistance Team, which is the organization the State Legis-
5 lature has authorized to provide oversight to districts with severe financial and management prob-
6 lems, testified that “[i]t’s common sense that students and staff members need current and sufficient
7 instructional materials to perform their responsibilities” in part because “it’s difficult to address the
8 state standards in instruction if we’re not utilizing textbooks that, at least in part, focus in on the ac-
9 countability standards.” (Henry Depo. at 174:21-24, 175:8-10.)

10 These varied and consistent authorities confirm the fundamental importance of textbooks and
11 instructional materials to learning opportunity. Likewise, the State’s failure seriously to challenge the
12 importance of instructional materials — even after receiving Dr. Jeannie Oakes’s 120-page report
13 detailing the value of instructional materials — concedes their constitutional significance.

14 **II. THE STATE HAS BREACHED ITS DUTY BY FAILING TO OPERATE A**
15 **SYSTEM OF OVERSIGHT AND MANAGEMENT GOVERNING**
16 **AVAILABILITY OF TEXTBOOKS AND INSTRUCTIONAL MATERIALS.**

17 The overwhelming evidence of grossly unequal access to instructional materials in California
18 public schools demonstrates the State’s breach of its duty to its public school students.

19 **A. Independent Sources Document Such Severe Inequality That**
20 **Hundreds Of Thousands of California Public School Students Have**
21 **Lacked Sufficient Numbers Of Textbooks Since At Least 1994 —**
22 **In Sharp Contrast With The Millions Of Students Who Have, And Have**
23 **Had, Access To Sufficient Numbers Of Instructional Materials.**

24 Four separate sources document that, for years on end, hundreds of thousands — of Califor-
25 nia’s total six million — students have struggled without instructional materials required for learning
26 in their classrooms and at home. In 1994, the Senate Committee on Education’s analysis of Assem-
27 bly Bill 2600, which was enacted that year to redress textbook needs, found that “[a]t least one-third,
28 and as many as two-thirds, of all public school students do not have adequate instructional materials.”
(PLTF 79834.) A survey from the Association of American Publishers (“AAP”) found that for the
1994-1995 school year 52.7% of California teachers did not have enough textbooks to send home
with their students, and that more than a fifth of California teachers did not have enough books for

1 each student to use in class. (PLTF 62076-62077.) Likewise, a 2001 survey of California public
2 school teachers conducted by the Center for the Future of Teaching and Learning at SRI International
3 showed that 24.6% of teacher respondents did not have “[e]nough print resources (e.g., books, photo-
4 copies) for every student in [the teacher’s] class.” (Center for the Future of Teaching and Learning
5 survey data, Welch Decl. at Exh. B.) Finally, in 2002, a Harris poll of nearly 1,100 California public
6 school teachers showed that 11.7% of teachers — teaching approximately 725,000 students — did
7 not have enough textbooks for their students to use in class, and 32% of teachers — teaching ap-
8 proximately 1.9 million students — did not have enough textbooks to send home with students for
9 homework.⁸ Harris Survey Report (Welch Decl. at Exh. C.) The Harris poll results also show that
10 the schools without textbooks tend to be schools in which students of color and poor students pre-
11 dominate. For example, 43 percent of responding teachers in schools with the most students eligible
12 for CalWorks reported that they lack books for their students to use at home, compared to 26 percent
13 in the schools with the fewest CalWorks eligible students.⁹ *Id.*

14
15 **B. State Documents Show Insufficient Instructional Materials
In Many California Public Schools.**

16 The State’s own documents confirm the breadth and severity of textbook shortages statewide.
17 Perhaps the most succinct example is Governor Davis’s frank acknowledgement in a recent campaign
18 letter identifying “no books for kids to take home” as one of the problems in education about which
19 politicians and educators in California have known for years.

20 You don’t need a lecture about our problems in education. Politicians and edu-
21 cators have been talking about them for years. Crowded classrooms. Uncreden-
22 tialed teachers. No books for kids to take home. Inadequate funding. Low stan-

23 ⁸ This motion is not the forum to address State expert Richard Berk’s challenges to the reliability of
24 the Harris data. The merits—or, as we believe to be the case, lack thereof—to the challenge are ir-
25 relevant here for two critical reasons. First, as discussed above, three separate sources confirm the
26 Harris data showing. Second, because the State’s duty derives from fundamental departure from the
prevailing statewide norm, *Butt*, 4 Cal. 4th at 687, it is immaterial to the question of duty whether, for
example, one million, 100,000, 10,000, or 1,000 students suffer textbook shortages; the material in-
formation is that a nontrivial number of students lack instructional materials that are fundamental to
learning and to which most students in the State do have access.

27 ⁹ Plaintiffs’ expert Dr. Jeannie Oakes notes in her report that the Harris data shows that textbook
28 shortages tend to aggregate in schools with other fundamental educational deprivations as well. Ex-
cerpts from three of Dr. Oakes’s tables, reflecting the Harris data, demonstrate this aggregation and
are attached. (Welch Decl. at Exh. M.)

1 dards. Wasted taxpayer dollars. Schools that aren't held accountable for their
2 performance.

3 (PLTF-XP-TS 54, Welch Decl. at Exh. N.) Similarly, an independent and comprehensive study con-
4 ducted for the California Department of Education in 2001 revealed that more than half the participat-
5 ing high schools did not have instructional materials necessary to teach the State content standards
6 and to prepare students for the California High School Exit Exam. (PLTF 77536.)

7 The action plans from schools participating in the State's Immediate Intervention/ Underper-
8 forming Schools Program ("II/USP") document at greater length the textbook shortages students in
9 this subsample of underperforming schools suffer. (E.g., DOE 31092-93, 37948, 37960, 38920,
10 40254, 43202, 44535, 45081, 45095, 45153, 46164, 46346, 48257, 49552, 51333, 51432, 51860,
11 55605, 56012, 67278, 72518, 78990.) For example, the II/USP action plan for class representative
12 Moises Canel's school, Helms Middle School in San Pablo, listed among barriers to student perform-
13 ance: "*Lack of materials, current books and supplies*: Students, teachers and parents lament the ab-
14 sence of current and appropriate materials." (DOE 48365; *see also* DT-WC 4506 (Helms 2001-02
15 Textbook Analysis says that Helms did not have enough money to buy a book for every student); DT-
16 WC 7132-33 (January 2001 Helms Teacher Preference Form states that class needs to include "newer
17 math books").)¹⁰ Similar to Moises Canel's school, Sacramento High School in Sacramento City
18 Unified School District, suffered "a significant lack of materials in almost all classrooms" for English
19 Language Learner students. (DOE 60927.) The II/USP action plan for another school found that
20 "[t]here is clearly a critical lack of textbooks and curricular materials across all grade-levels and sub-
21 ject areas." (DOE 77551.) The action plan continued:

22 Teachers in early grades noted that the creation of small classes without adequate
23 resources for materials had forced them to spread leveled reading books very
24 thinly across classrooms. We also found very limited in-classroom collections of
25 books, reference materials, and periodicals in the 4th through 8th grades, and in
26 many classrooms there was not even one complete set of texts for the grade
27 level. (Reading and reference materials that were available in these grades were
28 often in poor condition.) As noted earlier, 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. Teachers in upper grades continue to use outdated textbooks, and some-
times rely on text-based assessments that are unaligned to standards or inappro-

¹⁰ All cited DT-WC documents are attached. (Welch Decl. at Exh. O.)

1 priate for the given grade level. Consistently, teachers and students in all focus
2 groups expressed the desire to have more and newer reading materials. . . . Ad-
3 ditionally, there were very few science manipulatives and no science equipment
4 seen in classrooms.

5 (DOE 77586-77587.)

6 The action plan for Vista Verde Middle School in Greenfield Union School District reveals
7 that “[t]here is a shortage of textbooks school-wide that has led to a great deal of frustration among
8 teachers and parents. In multiple subject areas, there are not enough textbooks to provide a book for
9 each student. As a result, texts are not available for students to take home for home study.”

10 (DOE 56012.) Similarly, at Frank Sparkes Elementary School in Winton Elementary School District,
11 the II/USP action plan found “[i]nadequate curricular materials to support math, science, spelling in-
12 struction.” (DOE 55605.) Likewise, at Orosi High School in Cutler-Orosi Joint Unified School Dis-
13 trict in Tulare County, the II/USP action plan reported that “[n]ot all classes have textbooks available
14 to students” and that “[s]tudents repeatedly cited a need for better materials. . . .” (DOE 78990.) At
15 Los Medanos Elementary in Pittsburg Unified School District, the action plan reported that
16 “[s]tudents need more books, not just handouts.” (DOE 48040.) At Laton High School in Fresno
17 County, “[t]eachers cite a lack of textbooks in the English department.” (DOE 49552.)

18 The II/USP action plans repeatedly document large percentage of teachers, parents, and stu-
19 dents reporting instructional material shortages. For example, according to the II/USP action plan for
20 Agua Caliente Elementary School in Palms Springs Unified School District:

21 [T]eachers reported that there is a total lack of materials such as books, over-
22 heads, and encyclopedias. The majority of teachers reported that more resources
23 would improve the school (83%). . . .

24 Some parents reported that their children have not been given a mathematics,
25 language arts, social science, or science textbook (~20%). Students in 4th and
26 5th grade were not consistent in their responses as to whether they have been
27 given a textbook. The lowest responses were for math (27%) and science (38%).
28 Teachers reported that some grades have no class sets of books for spelling, sci-
29 ence, or history. The majority of teachers reported that they have a classroom set
30 only or no books aligned to the CA content standards.

31 (DOE 41460.) Another action plan states:

32 Students reported that they have not been given a textbook or that they have a
33 textbook for class use only (~62%). Parents reported that their students do not
34 have a textbook or that they have one for classroom use only (~45%). . . . The
35 lack of books has created a hole in the instructional program because in some

1 classes students spend instructional time hand copying definitions out of books
2 so that they can utilize those [definitions] when they go home.
3 (DOE 32733.) According to the II/USP action plan for Farmersville Junior High School in Farmers-
4 ville Unified School District, “[n]o formalized instructional materials were observed for ELD [Eng-
5 lish Language Development]” and “only about a third of the students reported that they had language
6 arts, science, or social science books to take home. . . . Some content areas only have classroom sets
7 of textbooks. Having more books was requested by 48% of the students.” (DOE 37015, 37014.)
8 One action plan reported that “[o]n the faculty survey, almost 40% of the teachers say they do not
9 have the instructional materials available for the subjects they teach.” (DOE 38917.) Another action
10 plan reports that “[f]orty-one percent of the students and 43% of the staff say they do not have suffi-
11 cient books and materials.” (DOE 37378.) A survey of Margaret Heath Elementary School teachers
12 revealed that 40% of teachers disagreed with the statement that “[t]his school has adequate amounts
13 of resources such as texts, curriculum materials, and teaching aids.” (DOE 51860.) At Gompers
14 Secondary School in San Diego City Unified School District, “51% of students said there were not
15 enough books and supplies for all the students in their classes.” (DOE 67357.) At Perris High
16 School in Perris Union High School District in Perris, the II/USP action plan reported that parents
17 complained at a public meeting about “[n]o books (proper text),” noted that math “[w]orksheets don’t
18 provide enough learning possibilities,” and recommended that the school “[g]et proper textbooks.”
19 (DOE 58677-78.)

20 The sheer number of II/USP action plans reporting textbook shortages confirms the break-
21 down in the State’s system of oversight regarding delivery of instructional materials in California
22 public schools. Some of the individual action plans are more comprehensive, however, documenting
23 for example that “[t]here is a [d]istrict practice to provide one text for social studies for every two
24 students. Currently students must share social studies texts in class. Texts are not available for stu-
25 dents to take home.” (DOE 53585.)

26 In addition to documenting textbook shortages, the II/USP action plans routinely identify in-
27 stances of out-of-date instructional materials and instructional materials in abysmal condition. The
28 action plan for Lee Richmond Elementary School in Kings County reported that “[s]tudents in the

1 focus groups all noted that their books are in very bad condition and that they can't take them home."
2 (DOE 51432.) At Abraham Lincoln Elementary School in San Bernardino City Unified School Dis-
3 trict, the II/USP action plan identified "[o]utdated texts and ad-hoc supplementals" as barriers to stu-
4 dent performance in mathematics. (DOE 65551.) At Roosevelt Elementary School, also in Kings
5 County, "the lack of up-to-date books and classroom resources was a chief concern": "Students in the
6 focus groups noted that many of their books are in bad condition and because there are not enough,
7 they can't take them home. This creates a problem when they are needed for homework reference."
8 (DOE 51333.) Roosevelt teachers agreed with their students: "Teachers feel they have a lack of in-
9 structional materials to support the standards implementation." (DOE 51303.)

10 Like the II/USP action plans, school assessments conducted pursuant to the State's Scholastic
11 Audits reflect severe instructional materials needs among the lowest performing schools in the
12 State.¹¹ These documents report, for example, that at Horace Mann Middle School in Los Angeles,
13 students lacked access to a "complete set of instructional materials" and had "few resources available
14 for students to use for in-home study." (DOE 136989.) Similarly, the CDE Scholastic Audit report
15 for Fremont High School in Los Angeles states that English Language Learners "lack materials and
16 resources in their primary language" and that "students do not have complete sets of instructional ma-
17 terials." (DOE 137037; *see also* DOE 137009 (at Sun Valley Middle School in Los Angeles,
18 "[c]urriculum and textbooks are not distributed equitably to provide all students with access");
19 137031 (at Gompers Middle School in Los Angeles, "[f]our weeks into the [2001-2002] school
20 year, . . . texts have not been signed out to students"); DOE 137073 (at Mount Vernon Middle School
21 in Los Angeles, "complete sets of textbooks were not consistently distributed throughout classes").
22 The report for Locke High School in Los Angeles revealed that students said "they had to sneak text-
23 books from class to take home" and that "[o]bservations and interviews indicate outdated textbooks, a
24 lack of textbooks . . . , materials, and supplies, and equipment." (DOE 137063, 137067.)

25
26
27 ¹¹ Scholastic Audits were performed in schools that failed to make progress in student performance
28 for four consecutive years but also did not participate in the II/USP program. CDE, *Title I Program Improvement in California Frequently Asked Questions* (<http://www.cde.ca.gov/iasa/titleone/faqs.html>) (last modified Jan. 24, 2003). (Welch Decl. at Exh. P.)

1 C. **District Documents And Plaintiffs' Evidence Confirm The Revelation Of**
2 **Gross Inequity In Access To Instructional Materials From The State's**
3 **Own Documents And Independent Sources.**

4 Separate from the independent sources and State-collected documents, district documents and
5 testimony taken in this litigation demonstrate severe textbook needs in California public schools. For
6 example, the assistant principal at class representative Silas Moultrie's middle school in San Fran-
7 cisco described a "dire need for textbooks" and noted that "[t]he textbook shortage is a serious prob-
8 lem at Burbank and many of our students are sharing textbooks. As the school works hard to im-
9 prove teaching and learning, it is imperative that we have an adequate supply of core materials in the
10 classrooms." (DT-SF 1166.)¹² School records from class representatives Delwin and D'Andre
11 Lampkin's school, Crenshaw High School in Los Angeles, reflect repeated responses from a textbook
12 room administrator that there were "none left" or "none available" or "no more" books when teachers
13 requested copies of *Catcher in the Rye* or *Black Boy* for English classes or math, Spanish, or biology
14 textbooks. (DT-LA 8092, 8137, 8141, 8174, 8186.)¹³ Similarly, in class representative Carlos Rami-
15 rez's school, Bryant Elementary School in San Francisco, where the principal confirmed that the
16 school had insufficient numbers of social studies textbooks as well as too few English as a Second
17 Language texts (Alegre Depo. at 207:24-208:3), Carlos's peers wrote telling essays about the impact
18 of textbook shortages:

18 when its time for language arts time, we need to share books like now. We need
19 to share with two or three people. The book we are sharing right now is a book
20 called Stone Fox. I don't like to share reading books. I am an independent per-
21 son so I like to have a book to myself. We don't have enough for everyone. My
22 teacher bought these for us, but she just didn't buy enough.

21 (DT-SF 81.) Another student wrote:

22 I think that if we aren't going to have enough materials then we shouldn't be
23 tought! I meen we should that is if we get more materials it will be better for
24 teachers and the kids. I feel sad right now that we don't have enough materials
25 because I am trying my best to learn but it just doesn't work.

26 (DT-SF 101; *see also* DT-SF 89, 92, 94, 96, 97, 99, 103, 104, 107, 108, 109, 111, 113, 117.) Leader-
27 ship Council minutes from class representative Cindy Diego's school — Fremont High School in Los

27 ¹² All cited DT-SF documents are attached. (Welch Decl. at Exh. Q.)

28 ¹³ All cited DT-LA documents are attached. (Welch Decl. at Exh. R.)

1 Angeles — report that in October 2000 classes in the Foreign Language department “have students
2 with no books” and in January 2001 “the Special Education department still needs books, especially
3 grammar and composition books.” (John C. Fremont High School Leadership Council Minutes (Oct.
4 9, 2000 & Jan. 8, 2001)—Hines Depo. Exh. 13, Welch Decl. at Exh. S.) Fremont’s principal and as-
5 sistant principal both confirmed the existence of textbook shortages as well: “I don’t think they
6 have — they [Fremont High School] meet the requirement that I just mentioned in terms of having a
7 complete classroom set as well as a book to take home.” (Roland Depo. at 59:2-5; *see also id.*
8 at 47:20-23, 101:7-9; Hines Depo. at 426:11-429:5 (testifying that one month into the 2001-2002
9 school year Fremont still did not have chemistry, reading literacy, and Spanish textbooks).)

10 These class representatives’ experiences are entirely consistent with other class members’ ex-
11 periences elsewhere in the State. For example, a January 1998 chart from Los Angeles Unified
12 School District shows 36 elementary schools reported that they did not have recent adequate books in
13 each of five core academic areas. (DT-LA 4675-77; *see also* J. Garcia Depo. at 48:9-23, 50:15-20;
14 Gonzales Depo. at 84:7-14; Perkins-Ali Depo. at 56:16-18, 63:7-16.) As one parent put it, “Some of
15 the students, they don’t have no books the whole school year. One of them was my son.” (Gonzales
16 Depo. at 79:9-10.) According to the 1999-2000 Coordinated Compliance Review for Oakland Uni-
17 fied School District, district parents complained that “[s]ome schools have operated for 3-5 years
18 without books.” (DOE 23201.) One student testified that in one of his English Language Develop-
19 ment classes, “[w]e didn’t have any books at all. We’ll work on photocopy materials that the teacher
20 prepared from other textbooks” and that in his ELD class the following year, he had to “share[] [a
21 book] with somebody” because “[n]obody really had one”; “[e]verybody shared with at least one.
22 Only some people in the back have to share with two.” (J. Garcia Depo. at 59:1-8, 83:3-24, 84:12-21,
23 85:13-16; *see also id.* 82:2-11.) When asked “how do you know that you were supposed to have a
24 textbook or use a book in your ELD classes?” this same student testified:

25 Well, it’s an English program and it’s sort of common sense ‘cause if this kid’s
26 trying to learn English and they’re supposed to do it faster who already are
27 speaking English because otherwise they will not be incorporated into the main-
stream English program. So it’s kind of obvious that they need a book. Besides
other schools have books for ELD programs.

28 (*Id.* at 107:23-108:7.)

1 Finally, declarations attached to this motion illustrate examples of the currency of textbook
2 shortages in schools up and down the State, from Pittsburg to Richmond to Mira Loma, and be-
3 yond.¹⁴ These declarants identify appalling textbook shortages in schools that otherwise do not per-
4 form to State standards and that serve the State's lowest income students and student populations
5 comprised largely of students of color, as the attached table shows. (Welch Decl. at Exh. T.)

6 According to a teacher at Foothill Elementary School in Pittsburg, for this school year "[f]our
7 of the six third grade teachers have to share one class set of books for science and one class set of
8 books for social studies. Additionally, there are no books for students to take home for either sub-
9 ject. . . . I was told by the school administration that the school would not be ordering more books
10 due to lack of funding." (Declaration of Iris Contreras at ¶ 3.) An English Language Learner Rich-
11 mond High School student declares that this school year her English Language Development classes
12 have no books for students either to use in class or to take home, and that in addition to these short-
13 ages, her algebra class also had no books at all until December of this school year, and her biology
14 class does not have enough books for each student to be able to take a book home for homework.
15 (Declaration of Magaly de Loza at ¶¶ 3-5.) A student at Balboa High School in San Francisco reports
16 that "I have no books to take home in any of my classes this year" and that "we have to share them
17 [books] in [math] class because there aren't enough." (Declaration of Anthony Wesley at ¶¶ 3, 7; *see*
18 *also* Declaration of Fernando Lopez at ¶ 3 (student from Locke High School in Los Angeles testify-
19 ing that "In my English class, there are not enough textbooks for everyone. Often times, two students
20 are forced to share an English textbook with another student during class. We are not allowed to take
21 our English textbooks home to complete homework assignments.)) A teacher at Jurupa Valley High

22
23 ¹⁴ The State is of course free to challenge these declarations in depositions of the declarants; this mo-
24 tion does not depend on agreement or disagreement that specific students in specific schools lack
25 specific instructional materials. Instead, the motion depends on a showing that nontrivial numbers of
26 students suffer deprivations of instructional materials, which are a fundamental learning tool, because
27 the State does not operate a system of oversight to ensure equal access to instructional materials. *Butt*,
28 4 Cal. 4th at 686-87. In view of the excessive depositions of students in the past, however, plaintiffs
believe any depositions of these declarants should be limited to no more than three hours per witness.
After all, the only issue to be decided for purposes of this motion is whether the students in the re-
spective classrooms have books. Notwithstanding that the State has no system for detecting such
shortages as a matter of course, the State could now obtain that same information through less inva-
sive means than depositions of students, such as by surveying teachers and students in the subject
classrooms.

1 School in Mira Loma testifies that “[t]he textbooks in my Spanish II class are over 15 years old and
2 are in extremely poor condition. . . .” (Declaration of Carlos Moreno at ¶ 3; *see also* Declaration of
3 Araceli Perez ¶¶ 4-6 (attaching photographs of these books).) A student at South Gate High School
4 in South Gate reports that, for Advanced Placement Spanish Literature, “our class does not have text-
5 books” (Declaration of Julio C. Velez at ¶ 4; *see also* Declaration of Danitza Nunez ¶ 3 (testify-
6 ing that she also lacked textbooks in AP Spanish Literature at South Gate High School last year and
7 that this year “there are not enough copies of the novel[s] for all the students in my [English] class,
8 [so] I have had to buy my own novels.”).) Like the South Gate student, a student from Fremont High
9 School in Los Angeles testifies that she lacks textbooks “[i]n several of my classes”: “In my ad-
10 vanced placement (“AP”) Spanish language class we don’t have textbooks at all”; “[t]here is also a
11 serious book shortage in my geometry class”; “[w]e also lack textbooks in my biology class.” (Decla-
12 ration of Mayeli Avalos at ¶¶ 3-6; *see also* Declaration of Sandra Robles at ¶ 3 (Fremont student tes-
13 tifying that “I don’t have any books to take home in any class except for geometry” even though “I
14 am in geometry, English, AP Literature in Spanish, U.S. history, and chemistry this semester”); Dec-
15 laration of Clive Aden at ¶¶ 3-6 (Fremont student declaring that his U.S. history, chemistry, algebra
16 II, and Spanish 2 classes all lack sufficient numbers of textbook for students to be able to take them
17 home for homework); Declaration of Victoria Torres at ¶ 3 (Fremont student declaring that “[i]n my
18 chemistry class we only have one class set of textbooks that we share with the other chemistry classes
19 and we can’t take the books home”); Declaration of Jose Toribio at ¶ 4 (Fremont student declares
20 “[i]n Math class we don’t have enough books to take home”); Declaration of Megan Matheny at ¶ 3
21 (Fremont biology teacher declares “We have serious textbook shortages at Fremont. I don’t have
22 enough biology textbooks for my students to take them home. . . . For the past two years I have heard
23 the same answer every time: we don’t have enough but we are ordering more books. I am still wait-
24 ing for the books to arrive.”); Declaration of Jacqueline Courtiol at ¶ 3 (Fremont French teacher de-
25 clares “I have only 20 French textbooks that I share with my colleagues for French III classes. The
26 students cannot take the books home and my French III students sometimes have to share the books
27 in class, if they all come to class.”).) Similarly, a Locke High School freshman declares that “[w]e
28 don’t have homework in my English class and I think part of the reason is because we don’t have

1 books to take home.” (Declaration of Alfredo Vargas at ¶ 3; *see also* Declaration of Sandy Gonzales
2 ¶ 3-4 (Locke student testifying that “[i]n my American Literature class we only have a class set of
3 books and we can’t take the books home” and “[i]n my French class we don’t have any books”).)

4 **D. Notwithstanding The Severe Shortages Of Instructional Materials Many**
5 **Students Suffer, The Vast Majority of California Public School Students**
6 **Do Have Access To Sufficient Numbers of Instructional Materials.**

7 In stark contrast to the instructional material shortages the State’s documents, independent
8 sources, and plaintiffs’ documents reveal, the vast majority of California public school students do
9 have access to sufficient numbers of instructional materials for use in class and at home for home-
10 work and study. As shown by each of four separate independent sources — the Senate Committee on
11 Education’s 1994 analysis of Assembly Bill 2600, the 1994-1995 Association of American Publish-
12 ers survey, the 2001 Center for the Future of Teaching and Learning survey data, and the 2002 Harris
13 poll survey results — roughly four to five million students, and possibly more, do have the instruc-
14 tional materials necessary for learning opportunity, even if as many as one, or even two, million stu-
15 dents lack sufficient instructional materials to use in class and at home for homework. (PLTF 79834;
16 PLTF 62076-62077; Center for the Future of Teaching and Learning survey data; Harris Survey Re-
17 port, Welch Decl. at Exh. A-C.) Indeed, the State Agency Defendants acknowledged early in this
18 litigation — as they must — that provision of sufficient numbers of instructional materials is the pre-
19 vailing statewide standard: “Textbooks are part of the educational materials used by the districts to
20 educate school children.” (State Agency Defs.’ Responses Plfs.’ First Set Special Interrogs. at 3,
21 Welch Decl. at Exh. U.)

22 **III. THE STATE’S ACTIONS AND INACTIONS CONSTITUTE WHOLESALE**
23 **AND DELIBERATE ABDICATION OF ITS DUTY TO ENSURE EQUAL**
24 **ACCESS TO INSTRUCTIONAL MATERIALS.**

25 In this litigation, the State has conceded that “[t]he extent of the availability of educational
26 materials in all districts is unknown.” (State Agency Defs.’ Responses Plfs.’ First Set Special Inter-
27 rogs. at 5, Welch Decl. at Exh. U; *see also id.* (stating that State Agency Defendants are “not in
28 charge of monitoring the physical quality” of textbooks).) This candid and cavalier response to criti-
cal textbook needs is longstanding. Indeed, in 1997, when the Los Angeles Times published an arti-
cle about textbook shortages in Los Angeles Unified School District, the Times reported that

1 “Gov. Pete Wilson’s . . . administration views textbook shortages as each district’s problem.” (PLTF
2 81315.)

3 Although all of the independent and State documentations of the gross inequality in access to
4 instructional materials demonstrate that the majority of California public school students do in fact
5 have instructional materials to use in class and at home for homework, the State nonetheless has no
6 oversight system in place to “prevent or discover and correct” (Order at 2), the fundamental inequal-
7 ity suffered by the students who lack instructional materials. None of the State’s purported account-
8 ability systems is directly aimed at discovering whether each student has instructional materials to
9 use in school or at home for homework, much less at correcting failures to deliver instructional mate-
10 rials to any students. As plaintiffs’ experts Jeannie Oakes and Heinrich Mintrop detail, the State’s
11 systems at best merely touch on provision of instructional materials, and then ineffectively and
12 largely in passing, if at all. Dr. Oakes summarized her findings:

13 California’s oversight processes have not satisfactorily assessed students’ access
14 to adequate texts and materials. Neither has it worked to rectify problems related
15 to textbooks and instructional materials[] when they become evident. This fail-
ure is likely to be a function of the lack of state mandates requiring that students
have access to textbooks and instructional materials.

16 Oakes Textbook Report at 61.

17 Education Code § 60119 requires district governing boards to hold a hearing once a year and
18 notify classroom teachers and the public if the governing board determines that schools have “insuf-
19 ficient textbooks or instructional materials.” There is no standard for “insufficient” and, to the best of
20 our knowledge, no district has ever concluded in a § 60119 proceeding that its textbooks were insuf-
21 ficient under § 60119—but a number of districts have certified, without penalty, that they did have
22 “sufficient” textbooks when their students had to share books in class and could not take them home.
23 *See, e.g.*, Oakes Textbook Report at 82-84 (citing to the May 13, 2002 San Francisco Unified School
24 District Board meeting at which one Board member described the 60119 hearing process as
25 “Kafkaesque” because it put the Board in the position of having “to say . . . that we do have sufficient
26 textbooks and instructional materials” when, in fact, the district did not); Johnston Depo. at 144:8-17,
27 146:24-147:25 (West Contra Costa Unified School District Superintendent testimony that the district
28 “recently” certified that it had sufficient textbooks consistent with § 60119 even though the district’s

1 2001-2002 Textbook Analysis stated that the district did not have enough money to buy a book for
2 every student); *see also id.* at 136:20-23, 141:17-20 (testifying that “I don’t think it’s even clear in the
3 Ed Code [what “sufficiency” means as used in § 60119]. There’s no definition of that” and that “you
4 could probably line up ten teachers and ask them how they would interpret ‘sufficient textbooks’ and
5 they’ll all give you a different answer.”).

6 Dr. Oakes explains that § 60119 is flawed in four critical ways: “The most serious flaw with
7 60119 . . . is that even if a hearing is held, there is no mechanism for ensuring that the problems are
8 solved. Publicly reporting on textbook shortages does nothing, in itself, to trigger assistance or re-
9 sources.” *Id.* at 84. In addition, Dr. Oakes explains that § 60119 “only applies to districts applying
10 for textbook funds,” “does not make clear the meaning of ‘sufficient textbooks or instructional mate-
11 rials,’” and—assuming it did work—it would “allow[] students to endure this shortage for two
12 years.” *Id.*; *see also* Liability Disclosure at ¶¶ 650-662 (enumerating the flaws of § 60119).

13 In addition to the failures of section 60119, Dr. Mintrop explains that the State’s system for
14 monitoring compliance with State and federal law does not take account of delivery of instructional
15 materials: “[k]ey elements of a school’s core operation, such as availability of textbooks, teacher
16 qualifications, or facilities are not part of the CCR [Coordinated Compliance Review].” Expert Re-
17 port of Heinrich Mintrop (“Mintrop Report”) at 21 (Welch Decl. at Exh. V); *see also* Oakes Textbook
18 Report at 61. Dr. Oakes explains that School Accountability Report Cards (“SARCs”), which the
19 State requires school districts to complete each year for each school, do not necessarily report
20 whether each student has sufficient textbooks or instructional materials — in fact, each of the SARCs
21 Dr. Oakes reviewed from Los Angeles Unified School District reported identical — and content-
22 devoid — text: “The Los Angeles Unified School District has set a priority on ensuring that a suffi-
23 cient number of textbooks to support the school’s instructional program is available. The instruc-
24 tional materials are chosen primarily from the textbooks adopted by the California Department of
25 Education.” Oakes Textbook Report at 87. Similarly, Dr. Oakes and Dr. Mintrop both criticize the
26 Immediate Intervention/Underperforming Schools Program (“II/USP”) for its failure to require par-
27 ticipating schools to identify instructional materials needs, for its inclusion of only a limited number
28 of schools per year, and for its voluntary nature. *See id.* at 96-98; Mintrop Report at 11-12.

1 Dr. Oakes notes specifically that “II/USP action plans do not systematically address the issue of text-
2 book and instructional material availability.”¹⁵ Oakes Textbook Report at 96. Dr. Mintrop explains
3 that in the second year of II/USP, “only 430 or 45 percent of the eligible schools entered the pro-
4 gram” and in its third year, “only 33 percent of the eligible schools participated in the program.”
5 Mintrop Report at 12. In short, Dr. Mintrop criticizes:

6 the scope of the program is limited relative to the state’s own educational goals
7 as well as relative to felt needs as indicated by the number of unsuccessful appli-
8 cants. Not only does the program bypass schools that the system identified as in
9 need of support and scrutiny based on the state’s own accountability criteria, but
10 it also leaves unsupported a substantial number of schools that did feel the need
11 to apply.

12 *Id.*

13 The State’s experts make no effort to counter the assessment that its accountability systems
14 fail to ensure provision of instructional materials. Instead, the State’s experts adopt this assessment
15 themselves: State expert Margaret Raymond, for example, criticizes plaintiffs for making “[t]he claim
16 that textbooks . . . are the ‘right’ things to focus on” and defends — in explicit contrast to focus on
17 provision of textbooks — the State’s “choice to focus on outcomes rather than continuing the histori-
18 cal attention to inputs.”¹⁶ Raymond Report at 4. Raymond thus concedes that the State lacks a sys-
19 tem that to ensure that each public school student has necessary instructional materials, independent
20 of test-score performance. Similarly, State expert Herbert Walberg acknowledges that the State has
21 no system for ensuring equal access to instructional materials when he complains that “[i]f the state
22 were to mandate the budget for textbooks and instructional media for all schools plaintiff experts ar-
23 gue, it would amount to a lavish and unpromising experiment on some six million California children
24 and youth since the effects and costs are unestimated.” Report of State Expert Herbert Walberg
25 (“Walberg Report”) at 25 (Welch Decl. at Exh. W).

26 ¹⁵ Dr. Oakes also cites the finding in a study of a sample of II/USP action plans conducted by Univer-
27 sity of Arizona researchers that “[a]n overwhelming number of action plans reflected an inadequate
28 needs assessment for school sites.” Oakes Textbook Report at 97 (quoting McKnight & Sechrest,
Evaluation of the Quality Action Plans, Evaluation Group for the Analysis of Data (2001).

¹⁶ Raymond presumably agrees with Dr. Jeannie Oakes, therefore, that “[b]ecause the emphasis is on
raising scores rather than addressing the real needs and obstacles facing school sites, the State does
not look beyond or behind the scores to determine a school’s needs. While [II/USP] action plans are
intended to address certain issues that focus on educational inputs (*i.e.*, a discussion of students’ ac-
cess to instructional materials), the fact is only ‘outputs’ matter.” Oakes Textbook Report at 98.

1 Whatever the merits or deficiencies of the State’s test-based accountability system, no one —
2 not even the State’s own experts — pretends that that system substitutes to satisfy the State’s duty to
3 ensure equal access to instructional materials for all California public school students. The State
4 must fulfill that duty now, regardless of whether and how it continues its test-based accountability in
5 parallel. Rather than following Herbert Walberg’s recommendation that it wait the “five or more
6 years to have substantial positive effects” shown (or not, as the case may be if we wait five years)
7 from the “present accountability system” the State now employs while ignoring its duty to operate a
8 system of oversight to ensure equal access to instructional materials for all its public school students,
9 *see* Walberg Report at 4, the State must fulfill its ultimate responsibility to ensure all its students en-
10 joy their “fundamental California right to basic educational equality.” *Butt*, 4 Cal. 4th at 688.

11 **IV. THIS COURT HAS THE POWER TO DETERMINE THAT THE STATE**
12 **HAS A DUTY AND HAS BREACHED THAT DUTY TO ENSURE EQUAL**
13 **ACCESS TO INSTRUCTIONAL MATERIALS FOR CALIFORNIA PUBLIC**
14 **SCHOOL STUDENTS PURSUANT TO CAL. CIV. PROC. CODE § 437C.**

15 Through this motion, plaintiffs seek summary adjudication of the State’s duty to operate a
16 system of oversight to ensure equal access to instructional materials for all California public school
17 students and of the State’s breach of that duty. California Code of Civil Procedure § 437c(f)(1) au-
18 thorizes parties to move for summary adjudication if a party contends “that one or more defendants
19 either owed or did not owe a duty to the plaintiff or plaintiffs” and authorizes the Court to grant
20 summary adjudication only if the motion “completely disposes of a cause of action, an affirmative
21 defense, a claim for damages, or an issue of duty.” The plain language of § 437c clearly permits
22 summary adjudication of the State’s duty to ensure equal access to instructional materials to all Cali-
23 fornia public school children. *See Novak v. Low, Ball & Lynch*, 77 Cal. App. 4th 278, 285 n.5 (1999)
24 (“it was Novak’s burden, as plaintiff moving for summary adjudication on the issue of duty, to ‘com-
pletely dispose[] of’ the issue of duty”) (quoting § 437c).¹⁷ Indeed, “[o]ur Supreme Court has de-

25 ¹⁷ Although a panel from the Fourth District Court of Appeal has held that issues of duty are not cogni-
26 zable under § 437c unless they fully resolve entire causes of action as well, *see Regan Roofing Co. v.*
27 *Super. Ct.*, 24 Cal. App. 4th 425, 435-36 (1994), the *Novak* case, 77 Cal. App. 4th at 285 & n.5,
28 squarely permitting summary adjudication of issues of duty pursuant to § 437c without resolving any
cause of action, postdates the *Regan Roofing* decision and is binding on this Court because *Novak* is a
First District opinion. *See McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4 (1987) (“a superior
court ordinarily will follow an appellate opinion emanating from its own district”). Moreover *Regan*
Roofing is a lone outlier decision that does not comport either with the express statutory language of

1 clared that “[d]uty, being a question of law, is particularly amenable to resolution by summary judgment.” *Ingham v. Luxor Cab Co.*, 93 Cal. App. 4th 1045, 1049 (2001) (quoting *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 465 (1997)).

4 Under *Novak* this Court can decide breach, as well as duty, under § 437c. The First District
5 decided that “duty clearly applied and was breached” even though “we are mindful that Novak must
6 still prove causation and damages.” 77 Cal. App. 4th at 285. The *Novak* plaintiff sued his liability
7 insurer and the liability insurer’s counsel for settling parts of a case without notifying plaintiff’s inde-
8 pendent counsel; Novak believed his insurer and its counsel owed him a duty of care and should not
9 have negotiated partial settlement to his detriment. *Id.* at 281. Serious factual questions remained
10 regarding whether the breach of duty of care to Novak caused Novak injury, and the extent of any
11 such injury, because the insurer retained a contractual right to settle its claims even if it had appropri-
12 ately notified Novak of settlement discussions rather than breaching its duty to Novak by not doing
13 so. *Id.* at 285.

14 As in *Novak*, even after this Court determines duty and breach here, disputed facts regarding
15 the specific causes of instructional materials deprivations and how to remedy them will remain.
16 Those issues — including precisely how many students lack instructional materials, in which schools
17 and districts; how many instructional materials are lacking and for how long; how many instructional
18 materials are outdated and how badly; and what specifically the State must do to ensure equal access
19 to instructional materials — are not material to the questions of duty and breach at issue in this mo-
20 tion, which depend only on a showing that nontrivial numbers of students suffer fundamental educa-
21 tional deprivations that the majority of students do not suffer, not specifically which students suffer
22 the deprivation and where and for how long. *See Butt*, 4 Cal. 4th at 686-87. While the State’s failure
23 to operate a system of oversight prevents plaintiffs from proving beyond dispute the specific identi-
24 ties of all students, and in which schools and districts they are located, who lack necessary instruc-

25
26 § 437c or with its legislative intent. The Second District Court of Appeal has noted that “[t]his lan-
27 guage from *Regan* . . . seems clearly at variance from the language of Code of Civil Procedure section
28 437c, subdivision (f). . . . A ruling which ‘completely disposes’ of an issue of duty as required by the
last sentence of the section, but which has no dispositive impact on other issues would appear to be
fully in conformance with legislative intent and the straightforward, unambiguous language of the sec-
tion.” *Linden Partners v. Wilshire Linden Assocs.*, 62 Cal. App. 4th 508, 519-20 (1998).

1 tional materials, and specifically which instructional materials are lacking for all of these students in
2 all of these locations (*see* State Agency Defs.’ Responses Plfs.’ First Set Special Interrogs. at 5 (“De-
3 fendants do not have this information. The extent of the availability of educational materials in all
4 districts is unknown.”), Welch Decl. at Exh. U), plaintiffs have established in this motion that the
5 desperate inequality in access to instructional materials has persisted over a long period of time and
6 continues today. The particular extent of the impact and the appropriate remedy therefore are pre-
7 cisely issues the *Novak* decision holds do not preclude summary adjudication of questions of duty and
8 breach and that in the *Ingham* case did not preclude summary judgment of the question of duty. *Ing-*
9 *ham*, 93 Cal. App. 4th at 593-94; *Novak*, 77 Cal. App. 4th at 285.

10 Because, as detailed above, it is undisputed that textbooks and instructional materials are fun-
11 damental to learning, that nontrivial numbers of California public school students lack these instruc-
12 tional materials, and that the State has no system directed to ensuring that students have equal access to
13 instructional materials, this Court is well positioned to decide both duty and breach on this motion.
14 The *Ingham* and *Novak* cases both hold that this Court may summarily adjudicate duty without resolv-
15 ing remedy and *Novak* demonstrates that the Court also may determine breach where no material facts
16 concerning breach remain. *Ingham*, 93 Cal. App. 4th at 1049; *Novak*, 77 Cal. App. 4th at 285 & n.5.

17 CONCLUSION

18 The persisting plight of students — overwhelmingly poor students and students of color —
19 who lack the textbooks and instructional materials to which most students in this State’s public
20 schools do have access, coupled with the State’s refusal “to ensure that its district-based system of
21 common schools provides basic equality of educational opportunity,” *Butt*, 4 Cal. 4th at 685, under-
22 score the critical need for a final determination that the State lacks a system of oversight and man-
23 agement with respect to the availability of textbooks and instructional materials. Plaintiffs have de-
24 tailed in this motion the fundamental importance of instructional materials for educational opportu-
25 nity, the gross inequality in access to instructional materials among public school students in Califor-
26 nia, and the lack of any State system that can prevent or discover and correct this unequal access.
27 These showings are more than sufficient to support summary adjudication of the State’s duty and its
28 breach of that duty.


1 Dated: June 9, 2003

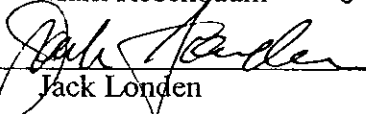
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