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

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

Plaintiffs,

23 v.

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

27 Defendants.
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 DAYS FOR ALL
CALIFORNIA'S PUBLIC SCHOOL
STUDENTS**

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INTRODUCTION

“I would love to get rid of Concept 6,” then-Superintendent of Public Instruction Delaine Eastin admitted, of the school calendar that provides significantly reduced educational opportunities to approximately 355,000 California public schoolchildren. Expert Report of Jeannie Oakes re: Concept 6 Calendar (“Oakes Report”) at 3, 9. (Declaration of Leecia Welch (“Welch Decl.”) at Exh. A.) Superintendent Eastin continued, “schools didn’t move to it because they were trying out some educational innovation. It was out of desperation.” *Id.* at 7. Indeed, as conceded in the State’s¹ own documents, when schools resort to Concept 6, “the education process and the children in it suffer.” (PLTF-XP-JO 18399.)² Children and their educations suffer because, as State documents admit, the truncated Concept 6 calendar poses “a significant barrier to student achievement” and is “not conducive to a learning environment that promotes student achievement.” (DOE 38186-87, 36408-09.)³

The State’s admission that students and their educations suffer when forced to attend Concept 6 schools is hardly a surprising one. Concept 6 was neither designed nor adopted with pedagogical concerns in mind. It is, simply put, a scheme used as a stopgap measure to house as many students as possible in existing school facilities. Under this scheme, three tracks or groups of teachers and students take turns using two sets of classrooms. Through a complicated rotation that puts two groups in school and a third on vacation throughout the year, Concept 6 boosts school enrollment capacity by 50%, an increase larger than what any other multi-track calendar can achieve, but it does so at the cost of 17 days, or approximately 4 weeks, of instruction. It is the need to house large numbers of students in excess of school capacity, and no other reason, that explains the use of Concept 6. In fact, no school has ever adopted this stopgap measure for educational reasons, nor would it make sense to do so.

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

² All cited PLTF, PLTF-XP-JO, and PLTF-XP-RM documents are attached. (Welch Decl. at Exh. B.)

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

1 Concept 6 poses a significant barrier to learning and achievement, producing myriad
2 undisputed impacts on education not experienced by students who attend schools operating on the
3 traditional school calendar: (1) it segregates students across tracks denying some equal access to
4 high-level courses and experienced teachers, diminishing their achievement and post-secondary
5 opportunities; (2) it provides 17 fewer days of instruction, which are not compensated by
6 additional minutes tacked onto each school day; (3) it requires disruptive classroom rotations that
7 further reduce the quantity and compromise the quality of instruction; (4) it impedes the provision
8 of vital intervention services to struggling students, who don't receive the equivalent
9 opportunities afforded by summer school; (5) it fails to coincide with the traditional school year,
10 limiting access to enrichment and other programs; (6) it leads to increased use of combination-
11 grade classes (i.e., classes combining students from different grade levels) that result in lower
12 teacher morale and reduced student achievement; and (7) it disrupts communication and
13 fragments development at schools staffed disproportionately with the least qualified and
14 experienced teachers. Perversely, the children least able to cope with the calendar's impacts are
15 disproportionately subjected to Concept 6. The vast majority of these students are low-income
16 and Latino, most of whom are learning the English language. Expert Report of Dr. Ross Mitchell
17 ("Mitchell Report") at 13-16.⁴ (Welch Decl. at Exh. D.)

18 The calendar's impacts on education are confirmed by the appallingly low achievement of
19 Concept 6 schools relative to all other schools in the State. There is a tremendous disparity in
20 achievement between schools operating on different calendars, with Concept 6 schools lagging at

21 _____

22 ⁴ Even within LAUSD, which runs most of the Concept 6 schools, there are significant
23 differences between Concept 6 schools and traditional calendar schools. At the elementary
24 school level, between 1999 and 2001, Hispanics represented 57.3% to 58.5% of enrollment in
25 traditional calendar schools but represented 87.5% to 88.5% of enrollment in Concept 6 schools.
26 (STATE-EXP-CB 0423.) Over the same period, white students constituted 17.2% to 16.7% of
27 enrollment in traditional calendar schools but constituted only 2.1% to 1.8% of enrollment in
28 Concept 6 schools. (*Id.*) English learners accounted for 41.2% to 37.7% of students at traditional
calendar schools while accounting for 73% to 69.5% of students at Concept 6 schools. (STATE-
EXP-CB 0425.) Finally, students participating in the free or reduced meal program constituted
72.3% to 69.8% of enrollment in traditional calendar schools but constituted 95.6% to 89.6% of
enrollment in Concept 6 schools. (STATE-EXP-CB 0428.) (All cited STATE and STATE-EXP-
CB documents are attached, Welch Decl. at Exh. E.)

1 the very bottom. Even after controlling for background characteristics, Concept 6 schools are the
2 most consistently low-performing, lagging one full rank behind on the State’s rankings. The
3 disparity in achievement is particularly evident for students on track B, the least desirable of the
4 calendar’s three tracks.

5 Yet the State has expressly authorized Concept 6, encouraged its proliferation, and refused
6 to phase it out or fund its elimination. The State thus has relegated hundreds of thousands of
7 students, most of whom are low-income and Latino children, to schools that have a significant
8 and appreciable impact on their education. In *Butt v. State*, 4 Cal. 4th 668, 687-88 (1992), the
9 California Supreme Court held that the uncompensated closure of schools six weeks before the
10 scheduled end of the year – a desperate response to the district’s impending insolvency – would
11 cause extreme disparity in educational service and progress. Here, due to its significant impacts
12 on teaching and learning, which are reflected in its reduced levels of achievement, the desperate
13 resort to Concept 6 likewise causes an extreme disparity in educational service and progress.
14 This motion seeks summary adjudication that the State has the duty to prevent or discover and
15 correct the deprivation of equality in education occasioned by Concept 6 and that the State has
16 breached its duty.

17 ARGUMENT

18 I. THE STATE HAS A DUTY TO OPERATE A SYSTEM OF OVERSIGHT THAT 19 WILL EITHER PREVENT OR DISCOVER AND CORRECT THE 20 DEPRIVATIONS OCCASIONED BY USE OF CONCEPT 6.

21 The State has “responsibility” “to provide ‘equal educational opportunity to the youth of
22 the state’ and ‘has a duty to intervene to prevent unconstitutional discrimination’ in its schools.”
23 *Butt*, 4 Cal. 4th at 684-85 (citation omitted). In *Butt*, the Court held that the State had a duty to
24 intervene because the uncompensated loss of six weeks from the school year, resulting from the
25 threatened early closure of schools, would have a real and appreciable impact on the right to basic
26 educational equality. *Id.* at 687-88. The State here has a duty to intervene to prevent the
27 unconstitutional discrimination occasioned by use of the Concept 6 calendar, as the un rebutted
28 evidence demonstrates.

1 **A. The Vast Majority of California’s Public School Children Attend Schools**
2 **Offering 180 Days of Instruction; the Vast Majority of Children Subjected to**
3 **the Truncated Concept 6 Calendar are Low-Income and Latino English**
4 **Learners, Most of Whom are Learning the English Language.**

5 Virtually all California public school children are spared the reduced educational
6 opportunities of the Concept 6 calendar. As of the filing of this lawsuit, only four California
7 public school districts (out of more than 1,000) had been forced to adopt it: LAUSD, Lodi,
8 Palmdale, and Vista. As of 2001, the State enrolled 6,050,895 students. (*See* DOE 95188.) All
9 told, approximately 4.7 million children attended schools operating on a traditional calendar,
10 while 355,000 children attended 239 schools operating on the Concept 6 calendar. Oakes Report
11 at 5, 9. That number has decreased only somewhat as Vista and Palmdale have recently dropped
12 it at approximately 37 schools, leaving 202 schools in LAUSD and Lodi with approximately
13 300,000 students (or less than 6% of all students) on the Concept 6 calendar. (*See* PLTF-XP-RM
14 089-143.)⁵ There are no other schools in the State and the nation currently using it.

15 The vast majority of children subjected to the Concept 6 calendar are low-income and
16 Latino children, most of whom are learning the English language. In 2001, Plaintiffs’ expert,
17 Dr. Ross Mitchell, found, without rebuttal, that the median Latino enrollment at Concept 6
18 schools was 84% compared to 34% statewide; the median white enrollment at Concept 6 schools
19 was 1% compared to 36% statewide; the median enrollment of English learners was 53% at
20 Concept 6 schools compared to 17% statewide; and the median enrollment of students qualified
21 for the National School Lunch Program, a measure of socio-economic status, was 99% at
22 Concept 6 schools compared to 46% statewide. Mitchell Report at 13-16.⁶

23 ⁵ LAUSD and Lodi also are seeking to eliminate Concept 6, opting, when possible, to use
24 calendars that provide children the standard 180 days of instruction. Plaintiffs welcome the
25 recent reduction in Concept 6 schools and efforts to reduce them further. However, the State’s
26 failure to operate a proper system of oversight and management means that there is no mechanism
27 in place to ensure that LAUSD and Lodi will eliminate Concept 6 or, even if this should
28 eventually occur, to prevent schools in these districts, or any others for that matter, from having to
29 use it in the future. Indeed, the State seeks to preserve their discretion to do so.

30 ⁶ Even within LAUSD, which runs most of the Concept 6 schools, there are significant
31 differences between Concept 6 schools and traditional calendar schools. At the elementary
32 school level, between 1999 and 2001, Hispanics represented 57.3% to 58.5% of enrollment in
33 traditional calendar schools but represented 87.5% to 88.5% of enrollment in Concept 6 schools.

(Footnote continues on next page.)

1 **B. The State Has Admitted That Concept 6 Is a Facilities Strategy, Not An**
2 **Educational Calendar, and That It Harms Students and Their Educations.**

3 State officials and representatives have made admissions that the attempt to cope with
4 overcrowding through adoption of the Concept 6 calendar has harmed students and their
5 educations. Concept 6 is a facilities strategy that has been used improperly as a school calendar
6 to accommodate enrollment pressures. It is not a school calendar operated on a year-round basis
7 for pedagogical reasons. Indeed, it significantly reduces the days of instruction and students'
8 opportunities to learn.

9 According to Thomas Payne, the lead consultant on year-round education for the CDE,
10 ““There’s no school in California that would choose to do multitrack. Most of those poor schools
11 are packed to the gills.”” Oakes Report at 8. (citation omitted.) He concedes that “MTYRE
12 [multi-track, year-round education] is a facility strategy, a way to deal with overcrowding.”
13 (PLTF 05847.) As he admits, school administrators would not inquire about converting their
14 overflowing schools to multi-track, year-round calendars like Concept 6 if building new schools
15 were an option. (See Deposition of Thomas Payne (“Payne Depo.”) at 147:1-149:9, Welch Decl.
16 at Exh. F.) To him, it is “self-evident” that administrators would not make the inquiries if they
17 could build new schools; “[y]ou don’t ask for a Band-Aid if you’re not bleeding.” (*Id.* at 148:22,
18 149:6-7.)

19 This is all the more true of Concept 6, the most extreme multi-track calendar implemented
20 in response to overcrowding.⁷ The State’s proffered expert, Charles Ballinger, freely admits that

(Footnote continued from previous page.)

21 (See STATE-EXP-CB 0423.) Over the same period, white students constituted 17.2% to 16.7%
22 of enrollment in traditional calendar schools but constituted only 2.1% to 1.8% of enrollment in
23 Concept 6 schools. (See *id.*) English learners accounted for 41.2% to 37.7% of students at
24 traditional calendar schools while accounting for 73% to 69.5% of students at Concept 6 schools.
25 (STATE-EXP-CB 0425.) Finally, students participating in the free or reduced meal program
constituted 72.3% to 69.8% of enrollment in traditional calendar schools but constituted 95.6% to
89.6% of enrollment in Concept 6 schools. (See STATE-EXP-CB 0428.) (All cited STATE and
STATE-EXP-CB documents are attached, Welch Decl. at Exh. E.)

26 ⁷ Significantly, although resort to the calendar is justified as a response to the “problem”
27 of overcrowding, Expert Report of Charles Ballinger (“Ballinger Report”) at 43 (Welch Decl. at
28 Exh. G) – which, without question, negatively affects many classroom activities, instructional
strategies, and academic performance – schools on the Concept 6 calendar remain overcrowded.
Oakes Report at 16. Thus, the admitted harm Concept 6 purports to address is not necessarily

(Footnote continues on next page.)

1 no other state currently uses Concept 6 and that it is “prevalent [in California] because a large
2 number of schools . . . are severely over-crowded.” (Deposition of Charles Ballinger (“Ballinger
3 Depo.”) at 149:10-150:1, 153:24-25, Welch Decl. at Exh. H.) According to Ballinger, “Concept 6
4 is invariably put into place with severe over-enrollment.” (*Id.* at 426:9-12.) In fact, he “can’t
5 recall any case where it was introduced without that factor of severe over-enrollment.” (*Id.*
6 at 155:4-6.) Concept 6, he declares, is the only one that can be used when enrollment exceeds
7 140% of school capacity. (*See id.* at 154:2-6.)

8 Although Ballinger recognizes that the education program should drive the facilities
9 program, he admits that the opposite is true with Concept 6. (*See id.* at 361:4-21.) As he puts it,
10 “The charge from the State or the charge from the people in the state is to educate children. So
11 ideally, one would hope to have an idea of what the education program should be and then have
12 facilities that would meet the needs for that educational program.” (*Id.* at 361:15-19.) Yet he
13 admits Concept 6 is a “facility strategy” used only in response to severe over-enrollment (*id.*
14 at 154:21-25), and not a calendar designed for pedagogical reasons:

15 Q: Would you say that the Concept 6 was designed for educational purposes?

16 A: No. It was designed to address the problem of over-enrollment . . .
17 (*Id.* at 885:13-16.) Indeed, he is not aware of any school in the nation ever implementing the
18 Concept 6 calendar solely for the sake of its blocks of instruction and vacation, and without
19 increasing enrollment capacity. (*See id.* at 155:7-13); Rebuttal Expert Report of Dr. Jeannie
20 Oakes re: Concept 6 (“Oakes Rebuttal Report”) at 7. (Welch Decl. at Exh. I.)

21 A long-time member of the CDE’s Year-Round Education Advisory Committee, Ballinger
22 further admits that the committee long questioned “whether Concept 6 . . . provide[s] a quality
23 education because of the shorter school year.” (Ballinger Depo. at 140:3-4.) As he puts it,
24 “there’s always discussion about the Concept 6, because it’s the only calendar . . . [with] fewer
25 than a hundred and 80 days.” (*Id.* at 139:17-20.) Acknowledging its “shortfalls,” he would

26 (Footnote continued from previous page.)

27 ameliorated, even as it significantly disadvantages students in numerous other ways, as described
28 below.

1 counsel a district to assess whether it could implement any other multi-track calendar before
2 resorting to Concept 6. (*Id.* at 406:5-12, 426:9-427:6.)

3 The State Department of Toxic Substances Control, which has been called upon in the last
4 several years to support the effort to increase the construction of new schools, has recognized:
5 “Without enough new schools, *the education process and the children in it suffer. Students are*
6 *forced to attend multi-track schools with . . . fewer days per year.*” (PLTF-XP-JO 18399
7 (emphasis added).) The only multi-track calendar with fewer days of instruction per year is
8 Concept 6.

9 The Legislature’s Joint Committee to Develop a Master Plan for Education likewise
10 addressed the Concept 6 calendar without naming it, recognizing that it provides unequal
11 educational opportunities relative to all other school calendars. The Committee recommended
12 that the State “move aggressively to eliminate the use of multi-track year-round school schedules
13 that result in fewer calendar days of instruction.” (PLTF 78025.) As the Committee recognized,
14 “[i]t is . . . important to assure that flexible use of time is not improperly resorted to as a means of
15 accommodating enrollment pressures through multi-track, year-round school schedules *that have*
16 *reduced the numbers of calendar days of instruction and, hence, of students’ opportunities to*
17 *learn.*” (PLTF 78024 (emphasis added).) The only multi-track calendar that reduces the number
18 of instructional days is Concept 6.

19 The Joint Committee’s concern about the improper use of a school calendar “as a means
20 of accommodating enrollment pressures”, (*id.*), is seconded by the CDE, which warns against
21 “the educational calendar be[ing] facilities-based.” (DOE 95193.) Yet, as then-Superintendent of
22 Public Instruction Eastin recognized, districts have resorted to the Concept 6 calendar solely as a
23 means of accommodating overcrowding, and not for educational reasons. As she declared,
24 “[S]chools didn’t move to it because they were trying out some educational innovation. It was
25 out of desperation.” Oakes Report at 7. Enrollment pressures alone have dictated resort to the
26 Concept 6 calendar: “Concept 6 is the least desirable method of housing our students”;
27 “Concept 6 is a choice only when no other means of housing excess capacity students exist.” *Id.*
28 at 13. Accordingly, she “would love to get rid of [it].” *Id.* at 3.

1 **C. Unrebutted Evidence Establishes the Fundamental Inequality of Concept 6.**

2 The evidence here, confirmed by plaintiffs’ experts and undisputed by the State,
3 establishes that the Concept 6 calendar has a real and appreciable impact on plaintiffs’
4 fundamental California right to basic educational equality. *See Butt*, 4 Cal. 4th at 688.

5 **1. Concept 6 produces myriad harmful impacts.**

6 The Concept 6 calendar generates numerous harmful impacts not experienced by the
7 overwhelming majority of students, who attend schools operating on the traditional school
8 calendar: (1) it segregates students across tracks denying some equal access to high-level courses
9 and experienced teachers, diminishing their achievement and post-secondary opportunities; (2) it
10 provides 17 fewer days of instruction, which are not compensated by the additional minutes
11 tacked onto each day; (3) it requires disruptive classroom rotations that further reduce the
12 quantity and compromise the quality of instruction; (4) it impedes the provision of vital
13 intervention services to all at-risk students, who thus don’t receive the equivalent of summer
14 school; (5) it fails to coincide with the traditional school year, limiting access to enrichment and
15 recreational programs; (6) it leads to increased use of combination-grade classes (i.e., classes
16 combining students from different grade levels) that result in lower teacher morale and reduced
17 student achievement; and (7) it disrupts communication and development for staff who, because
18 of their relative lack of training and experience, most need it. These numerous undisputed
19 impacts of the Concept 6 calendar combine to deprive students of an “education basically
20 equivalent to that provided elsewhere throughout the State,” as confirmed by the appallingly low
21 achievement of students at Concept 6 schools relative to students at all other schools in the State.
22 *Butt*, 4 Cal. 4th at 685. Strikingly, this deprivation is visited disproportionately on the very
23 students least able to cope with it, low-income students who are still learning the English
24 language.

25 **a. Concept 6 fosters segregation of students on unequal tracks.**

26 The State recommends that schools “[b]alance tracks by ethnicity, ability, socio-economic
27 level, and educational need.” (DOE 95191; *see also* DOE 95192 (“Each track should mirror the
28 ethnic and socio-economic composition of the whole school population.”).) Yet Concept 6

1 schools fail to balance students across tracks and deny students equal access to high-level courses
2 and experienced teachers, thereby diminishing students' achievement and post-secondary
3 opportunities. *See* Oakes Report at 27.

4 The tracks on the Concept 6 calendar are not structured equally. The blocks of instruction
5 are different: A-track and C-track students attend school in two large blocks; they are in school 4
6 months, off for 2, and in for 4. *See* Oakes Report at 23-24. However, B-track students attend
7 school in three blocks; they are in school for 2 months, off for 2 months, in for 4 months, off for 2
8 months, and in for 2 months. *See id.* at 24. A significant result is that, on track B, one school
9 year ends and another begins “almost immediately – for example, over the course of a short
10 period, two, three, or four days.” *Id.* Thus, B-track students have little, if any, time to recover
11 from the end of one school year before they begin another, and B-track teachers have to begin the
12 new school year without adequate time to prepare for it. *See id.* The vacation periods also differ:
13 Track A is on vacation in July through August and January through February; track C is on
14 vacation May through June and November through December; and track B is on vacation
15 September through October and March through April. *See* Ballinger Report at 8. Due to its
16 herky-jerky schedule and abbreviated grade-level transitions, coupled with no vacation during the
17 summer months, track B is considered undesirable. *See* Oakes Report at 30.

18 LAUSD, which runs most schools on the Concept 6 calendar, has documented inequities
19 in the distribution of teachers and students across tracks at Concept 6 schools at all grade levels.
20 In a study assessing its Concept 6 schools, LAUSD found track A to be the most desirable and
21 track B the least desirable. (*See* STATE-EXP-CB 0408.) It found the highest percentage of full-
22 credential teachers to be on track A, with the lowest percentage on track B, and the most
23 experienced teachers on track A, with the least experienced teachers on track B. (STATE-EXP-
24 CB 0413-14.) It also found the lowest percentage of Hispanic students on track A, with the
25 highest percentage on track B, and the highest percentage of English-only students on track A,
26 with the highest percentage of English learners on track B. (STATE-EXP-CB 0415, 0424-25.)

27 As reported by plaintiffs' expert, Dr. Jeannie Oakes, “[LAUSD] School officials [have
28 admitted] they are often forced to stack high-achieving and low-achieving courses onto separate

1 calendars at crowded schools because they don't have the resources to spread them evenly”
2 Oakes Rebuttal Report at 11 (citation omitted). According to the principal of Los Angeles High,
3 a Concept 6 school, “It’s very difficult to have three equal systems. . . . We try very hard to make
4 them as equal as possible. It’s just impossible.” *Id.* ““Administrators [at Hollywood High, a
5 Concept 6 school,] freely acknowledge that the schedule creates inequities within the school.
6 They say B track is the biggest loser, even questioning whether it is academically sound.” Oakes
7 Report at 31 (citation omitted).

8 In 2002, State Senator Richard Alarcon, a member of the Senate Select Committee on
9 College and University Admissions and Outreach, introduced SB 1813 to require disaggregation
10 of student data by track. He did so because the Select Committee found segregation across tracks
11 in multi-track high schools, nearly all of which operate on Concept 6. As of 2000-01, there were
12 20 multi-track, year-round high schools in California – 17 (all in LAUSD) operating on the
13 Concept 6 calendar and enrolling more than 70,000 students. (*See* PLTF-XP-RM 89-143.) As
14 Senator Alarcon put it,

15 In looking at individual performance, [the Select Committee] found
16 that students . . . are often denied access to valuable resources that
17 are crucial to get into a university or state college. . . . [S]tudents on
18 different tracks become segregated and are often denied access to
the special programs, such as AP classes and college preparatory
courses that are critical for university admissions.

19 Oakes Report at 30 n.14 (citation omitted). LAUSD Superintendent Romer, who oversees all the
20 Concept 6 high schools in California, has admitted, for example, that AP classes are “not
21 distributed fairly across the tracks.” *Id.* at 29 (citation omitted).

22 Based on her review of AP course offerings, plaintiffs’ expert, Dr. Jeannie Oakes,
23 confirmed the unfair distribution of AP courses across tracks, with track A the big winner and
24 track B the big loser. “In 2001, at all LAUSD Concept 6 high schools, track A offered 225 AP
25 courses, track C offered 203, and track B offered 139. That breaks down to approximately 40%
26 on track A, 36% on track C, and 25% on track B.” Oakes Rebuttal Report at 11. Because
27 multiple sections or classes of the same course may be offered on each track, Dr. Oakes also
28 considered the number of sections offered on each track. She found: “The disparity in offerings

1 across tracks at Concept 6 high schools only grows if sections are considered: 329 AP sections
2 on track A, 296 on track C, and 187 on track B. That breaks down to approximately 42% on track
3 A, but only 24% on track B.” *Id.* at 11-12. Dr. Oakes found similarly stark disparities in 2002.
4 *See id.* at 12.⁸

5 State expert Ballinger cannot rebut the conclusion that Concept 6 schools foster harmful
6 tracking of students, nor can he rebut the conclusion that elective courses are not distributed
7 evenly at Concept 6 high schools. Indeed, in his report, Ballinger attempted to address only the
8 distribution of AP classes; he did not even mention any other type of elective course. Ballinger
9 Report at 30. Yet, even with respect to AP classes, Ballinger cited the number of AP courses
10 offered on each track at a single school, Bell Senior High. *See id.* He admitted that he did not
11 know how many AP courses were offered at each of the many other Concept 6 high schools, let
12 alone how many were offered on each track at those schools. (Ballinger Depo. at 490:23-491:9.)

13 **b. The lost 17 days go uncompensated.**

14 The Concept 6 calendar fails to provide the equivalent of 180 days of annual instruction
15 even though the daily hours have been extended to provide the same total number of annual
16 minutes.

17 “While minutes are added to the school day on the Concept 6 calendar in an effort to
18 compensate for the shortened school year,” plaintiffs’ expert Dr. Oakes explains, “this time is not
19 necessarily used to provide students with additional academic content.” Oakes Report at 20. A
20 1987 study prepared for LAUSD found that teachers “only sometimes used the additional minutes

21 ⁸ Although some schools may allow cross-tracking, Dr. Oakes concludes, this only
22 highlights the inequities of Concept 6. *See* Oakes Rebuttal Report at 12. Cross-tracking, which
23 permits a student on one track to enroll in a course only offered on another track, “presupposes
24 unequal course offerings; if there were equality in course offerings across tracks, there would be
25 no need for it.” *Id.* Cross-tracking comes at a price, however — attending school during what is
26 scheduled to be a vacation. Students at traditional calendar schools do not forego vacation time to
27 take AP courses. *See id.* More important, cross-tracking completely breaks up the flow of
28 learning. *See id.* As Ballinger admits, if B-track students want to take a course not offered on
track B, they may start the course on track A, during their September-October vacation, and
complete the course on track C, during their March-April vacation. (*See* Ballinger Depo.
at 563:20-564:11.) These students, unlike their peers at traditional calendar schools, thus not only
face a four-month long interruption in the course but also a change in teacher and classmates. *See*
Oakes Rebuttal Report at 12.

1 to cover more content than they would have during a traditional class period. . . . [T]eaching
2 more content ranked lowest among a variety of ways that teachers spent the additional minutes.
3 *Id.* (citation omitted). More recently, as Dr. Oakes notes, “Teachers [have] dismiss[ed] the
4 additional time as logistic sleight-of-hand with little educational value. Students, they say, can’t
5 concentrate through class periods that now run 62 minutes. ‘They chopped up the days and
6 minutes but weren’t thinking about the consequences,’ said chemistry teacher Patricia Barker.
7 ‘Just because you have a couple more minutes added onto class doesn’t mean you can do more.’”
8 *Id.* (citation omitted).

9 Moreover, as Dr. Oakes concludes, there is a fallacy in making the relevant unit of time
10 minutes, rather than days of instruction. *See* Oakes Rebuttal Report at 3.

11 “[N]ot all learning occurs in the classroom. A significant portion of
12 learning . . . occurs at home as students do their homework. A
13 novel, for example, is not read in the classroom. Students read the
14 novel at home and then come to class prepared to take a quiz or test
15 on it, or to discuss it. The instruction that occurs in the classroom is
16 built on the foundation of the work students have done at home,
elaborating what students have learned in completing their
homework assignments. Conversely, the work that students do at
home serves to reinforce what students have learned in the
classroom.”

17 *Id.* (quoting Declaration of Carlos Jimenez (“Jimenez Decl.”) at ¶ 9, Welch Decl. at Exh. J).
18 “Fewer school days translates into less homework and reduced coverage of the curriculum,”
19 Dr. Oakes explains, “because there is only so much homework that can and should be assigned
20 each night.” *Id.* at 4. Teacher Carlos Jimenez, for example, concludes that he “cover[s] much
21 less material on the Concept [6] calendar than [he] did when [he] was on a traditional calendar.”
22 *Id.* at 3 (citation omitted). “[W]hen [he] had nine months to run [his] class, [he] assigned and
23 covered the entire textbook plus three other books. On the Concept 6 calendar, [he] only
24 assign[s] two books in addition to the textbook because there’s no way to cover the third book
25 [he] used to assign.” *Id.* at 3-4 (citation omitted).

26 Gordon Wohlers, a former LAUSD Assistant Superintendent, concludes that the
27 Concept 6 calendar has significant detrimental “impacts on the District’s educational program.”
28 (Declaration of Gordon Wohlers (“Wohlers Decl.”) at ¶ 17, Welch Decl. at Exh. K.) In

1 particular, Wohlers admits that LAUSD has been unable to compensate “for the 17 instructional
2 days a year that students on these calendars lose.” (*Id.* at ¶ 38.) As he puts it, “Based on
3 educational theories, 180 days is better than 163 days.” Oakes Rebuttal Report at 18 (citation
4 omitted).⁹

5 Lodi Superintendent Bill Huyett likewise has concluded that the Concept 6 calendar
6 shortchanges students academically. *See id.* at 17-18. “He faults the Concept 6 calendar for
7 providing 10% fewer days of instruction than other school calendars and rejects the notion that it
8 can make up for the lost days with more minutes each day.” *Id.* at 18. As he puts it, “It really
9 affects learning. Adding a half-hour doesn’t compensate for the lost days.” *Id.* (citation
10 omitted).¹⁰

11 The judgment that the lost 17 days of instruction go uncompensated is confirmed by State
12 documents generated as part of its Immediate Intervention/Underperforming Schools Program
13 (“II/USP”). *See* Oakes Rebuttal Report at 2-3. For example, according to the II/USP Plan for
14 Barton Hill Elementary in LAUSD:

15 The Concept 6 school calendar presents a significant barrier to
16 student achievement. . . . The school is on a 163-day rather than the

17 ⁹ Vista Superintendent, Dave Cowles, announced the elimination of the Concept 6
18 calendar, stating: “Implemented in 1989, the complicated schedule was intended as a ‘stop-
19 gap’ Unfortunately . . . it wasn’t until 2002 that a comprehensive school bond was approved
20 by voters and a construction schedule adopted by the School Board to move our children into a
21 more normal educational calendar.” Oakes Rebuttal Report at 17. Vista Director of Facilities,
22 Mike Vail, has concluded that the Concept 6 calendar puts students at a disadvantage because
23 they attend school 17 fewer days and explained that the district’s reliance on the Concept 6
24 calendar “just shows you how desperate we’ve been.” *Id.* (citation omitted). As he put it, “You
25 have a situation where the facilities program is driving the education program. It should be the
26 other way.” Oakes Report at 13 (citation omitted).

27 ¹⁰ In announcing the elimination of Concept 6, Palmdale underscored the restoration of the
28 lost days of instruction:
Palmdale . . . is finally able to eliminate the year-round 3-track calendar and return
to a Traditional School Year!

* * *

Students will now be attending school **180 days** per year. That is an additional 17
days of instruction, up from the previous 163 . . . without any major interruptions!
In the course of a student’s K-8 attendance, this represents about a year and a half
of added beneficial instructional school days . . . !

Oakes Rebuttal Report at 16-17 (citation omitted).

1 normal 180-day year calendar. While the school day is elongated to
2 account for the 17 fewer days, teachers and experts agree that
3 adding a few minutes to each lesson is not the same as having the
4 equivalent calendar days. Thus, on the basis of the shortened
5 calendar alone, Barton Hill students . . . receive 17 fewer days of
6 “new” instruction a year or 102 days over the six years at Barton.
7 In short, these students receive almost two-thirds of year [sic] less
8 education than students do on regular school calendars.

9 (DOE 38186-87.) As stated in the II/USP Plan for Creekside Elementary in Lodi:

10 The kind of year round education (YRE) calendar implemented by
11 the Lodi School District has affected the learning climate of the
12 school. . . . Creekside operates on a three track, year round
13 education Concept 6 schedule. There are 163 instructional school
14 days as opposed to 180 days in other YRE and traditional school
15 schedules. Although Concept 6 allows the school to house (enroll)
16 more students, it is not conducive to a learning environment that
17 promotes student achievement.

18 (DOE 36408-09.)¹¹

19 As plaintiffs’ expert Dr. Oakes notes, the State long has acknowledged that “[a] major
20 disadvantage of the Concept 6 Plan is the matter of the fewer instructional days” Oakes
21 Rebuttal Report at 2 (citing STATE-EXP-CB 1203). The State itself has recognized that,
22 notwithstanding the equalized annual minutes of instruction, “the reduced number of in-class
23 school days inherent to the Concept 6 calendar (17 fewer than the average) *raises serious*
24 *reservations about its educational efficacy*. Most educators feel the school year should be longer,
25 not shorter.” Oakes Rebuttal Report at 2 (citation omitted) (emphasis added); (DOE 86996).
26 Indeed, the State characterizes as an advantage of other calendars that they provide more *days* of
27 instruction. Oakes Rebuttal Report at 2 (citation omitted); (DOE 95189). And, when the State
28 recently proposed reforms to improve education, it did not seek to add *minutes* to the school day;
it sought to add *days* to the school year. Oakes Rebuttal Report at 2. As the State reports:

29 _____
30 ¹¹ (See also DOE 36439 (II/USP Plan for Morada Middle School in Lodi) (“The Concept 6
31 year-round calendar presents significant challenges for the teachers to teach the curriculum.”));
32 DOE 36505 (II/USP Plan for Heritage Elementary School in Lodi) (same); see also DOE 36637
33 (II/USP Plan for Sutherland Elementary School in Lodi) (shorter school year); DOE 36603
34 (II/USP Plan for Oakwood School in Lodi) (same); DOE 36538 (II/USP Plan for Lawrence
35 Elementary in Lodi) (same); DOE 36572-73 (II/USP Plan for Leroy Nichols Elementary (same).)

1 “There is research to support lengthening of the school year by 20 to 30 days.” *Id.* (citation
2 omitted).

3 State expert Ballinger has advocated for a longer school year. (*See* Ballinger Depo.
4 at 135:18-21.) He concedes that that the “primary issue” with the Concept 6 calendar is “the
5 number of days of instruction,” and that, based on the reduced number of in-class school days on
6 the Concept 6 calendar, “it’s fair to ask the question are the students getting an equal education.”
7 (*Id.* at 186:13-14, 135:8-10.) More important, he does not dispute LAUSD Assistant
8 Superintendent Wohlers’s assessment that educational theory supports the notion that 180 days of
9 instruction is better than 163 (*see id.* at 412:2-17), or Wohlers’s conclusion that the attempt to
10 make up for the 17 fewer days provided on the Concept 6 calendar with longer classes has not
11 worked out. (*See id.* at 647:4-21).

12 The only students in the State offered 17 fewer days of instruction are those at Concept 6
13 schools. Over the course of twelve years, these students lose at least 204 days of instruction,
14 significantly more than one typical 180-day year of instruction.

15 **c. Concept 6 requires disruptive classroom rotations that further**
16 **reduce the quantity and compromise the quality of instruction.**

17 Students at Concept 6 schools not only begin with significantly fewer annual days of
18 instruction but also have their precious instructional days further reduced and compromised. *See*
19 Oakes Report at 21.

20 The State concedes that teachers must pack and move everything after every session on
21 the Concept 6 calendar. (*See* DOE 95190, 95193; *see also* Ballinger Depo. at 211:2-10.) “At
22 traditional calendar schools, teachers and students typically move into a classroom at the
23 beginning of the school year and move out at the end of the school year.” Oakes Rebuttal Report
24 at 4. By contrast, teachers and students at Concept 6 schools must make additional moves as a
25 result of the classroom rotations the complicated schedule necessitates. *See id.* As explained by
26 LAUSD Assistant Superintendent Wohlers, “All teachers on Concept 6 have to pack up their
27 materials and move out of their classrooms when they go off track, in order to make room for the
28 incoming teacher and class.” (Wohlers Decl. at ¶ 39.) A-track and B-track students attend school

1 in two large blocks; they are in school 4 months, off for 2, and in for 4, so they must move in and
2 out twice. *See* Oakes Rebuttal Report at 4; Oakes Report at 23-24. B-track students attend school
3 in three blocks; they are in school for 2 months, off for 2 months, in for 4 months, off for 2
4 months, and in for 2 months, so they must move in and out three times. *See* Oakes Rebuttal
5 Report at 4; Oakes Report at 24. Depending on the track, then, teachers and students experience
6 either one (tracks A and C) or two (track B) *additional* dislocations, as compared to the traditional
7 calendar. *See* Oakes Rebuttal Report at 4.

8 The State further concedes that there must be teacher “rovers” on the Concept 6 calendar.
9 (DOE 95190, 95193; *see also* Ballinger Depo. at 245:19-247:9.) As LAUSD Assistant
10 Superintendent Wohlers has explained, at least one of every three teachers on Concept 6 must
11 “rove.” (Wohlers Decl. at ¶ 39.) “Roving teachers have to pack up their materials and move even
12 more frequently: They get bumped from classrooms as teachers permanently assigned to the
13 classrooms come back on track, and they move into the classrooms of teachers who are going off
14 track.” (*Id.*) Roving teachers and their students must make three *additional* sets of moves, as
15 compared to the traditional calendar. *See* Oakes Rebuttal Report at 4. Wohlers concludes that
16 “[t]he classroom dislocations that Concept 6 requires are disruptive and draining to the students”
17 and that students “are taught by teachers who are coping with a major additional distraction”; he
18 finds these effects to be “especially severe for those students whose teachers are ‘roving’ and thus
19 making the most frequent moves.” (Wohlers Decl. at ¶ 40.)

20 The State also concedes that the additional “start-ups” and “endings” – at the beginning
21 and conclusion of each two- or four-month session – pose disadvantages. (*See* DOE 95193.) The
22 disadvantages are plain to anyone who has experienced the difficulty of getting children to focus
23 after they have returned from a long vacation or when they are anticipating the start of a long
24 vacation.

25 As plaintiffs’ expert Dr. Oakes explains, “[f]or example, the weeks before the end of a
26 school session or instructional block are stressful for teachers, who must balance instruction with
27 the distraction of packing up and moving out to make way for the incoming teacher and class.”
28 Oakes Rebuttal Report at 5.

1 As reported by teacher Nelson Daza, “Book collection alone is a
2 significant administrative burden that disrupts classroom
3 instruction” Without textbooks, which are collected in the
4 weeks before the end of a session, teachers lack a main educational
5 tool and must make do with photocopied materials that may not be
6 tied to the curriculum. Parent Aureliano Alcaraz Cortes reported
7 that, in his children’s experience, books were collected a week or
8 two before vacation starts, a practice that inhibits learning. He
9 observed, “[O]nce the books are collected, the students start their
10 vacation. They know that that particular session is effectively over,
11 and it becomes much more difficult to keep them focused and
12 working.” He reported that “[his son] Aurelio feels that the session
13 has ended once the books are collected. He feels that the
14 worksheets they are then given are just to review and that they are
15 not as difficult as textbook problems.”

16 *Id.* (citations omitted). Accordingly, Dr. Oakes concludes, “at Concept 6 schools, students go
17 without textbooks, and receive a compromised quality of instruction, for significant stretches of
18 the school year.” *Id.*

19 More important, as Dr. Oakes finds, “although teachers may attempt to keep the packing
20 and moving from taking class time away from students, it proves difficult with the tight
21 transitions required by the Concept 6 calendar, which has classrooms in use on a year-round
22 basis.” *Id.* Teacher Irma Torres reports that ““the last two days of school before a break are lost
23 completely as teachers prepare to move out of the classroom.”” *Id.* (citation omitted). Likewise,
24 teacher Nelson Daza reports that ““[t]he last two days before a vacation are intense because the
25 time to move out has grown short Teachers often bring in their own VCRs and show videos
26 during parts of these last two days to free themselves up to finish packing.”” *Id.* (citation
27 omitted). Parents of students in Concept 6 schools confirm these losses of instructional time:

28 as reported by parent Felipe Aguirre, over the last two days before a
vacation, his daughter Maya and her classmates “receive only
limited instruction in the curriculum; instead they watch movies
that the children bring in, such as ‘George of the Jungle’ or ‘Dudley
Do-Right,’ or they help the teacher by cleaning their desks or
picking up trash.” As reported by parent Aureliano Cortes, his son
“Aurelio and his classmates also lose a few periods of instruction
over each of the last few days before the end of a session. He and
his classmates usually watch movies while the teacher packs.”
And, as reported by parent Lorena Jaramillo, the week before her
daughter Frances goes on vacation, “her teacher typically spends
much of the last two days packing. While the teacher packs, the
students play or . . . keep . . . out of the teacher’s way.”

1 *Id.* at 5-6 (citations omitted). Accordingly, Dr. Oakes concludes, “at the end of each school
2 session, when the classroom priority becomes packing up and moving out, students on the
3 Concept 6 calendar lose additional instructional days, which ‘only exacerbates the disadvantage
4 of having fewer days to begin with.’” *Id.* at 6 (citation omitted).

5 Conversely, instructional days are lost in the weeks after a long two-month vacation. *See*
6 Oakes Report at 22. Books and materials must be redistributed, which does not necessarily occur
7 on the first day; in the meantime, teachers must make do without them. *See id.* at 22-23.
8 “[S]tudents in one eleventh-grade English classroom at Hollywood High School spent the first
9 week back in school listening to their teacher’s description of her trip to Egypt, because their
10 copies of John Steinbeck’s *Of Mice and Men* had not arrived.” *Id.* at 23 (citation omitted).
11 Moreover, teachers cannot simply pick up where they left off: students who have been on
12 vacation for two months must be re-acclimated to school — to sitting in class and paying
13 attention for the entire school day — and material covered before the vacation but forgotten by
14 students must be reviewed before teachers can move on to new material. *See id.* at 22. As a
15 result of the calendar’s significant impacts on the quality and quantity of instructional days,
16 educational progress is slowed, making it more difficult to cover the entire curriculum or cover it
17 as thoroughly at a Concept 6 school as at a school operating on the traditional calendar. *See id.*
18 at 21.

19 The II/USP Plan for Lawrence Elementary in Lodi confirms the difficulty in getting
20 teachers and students ready following the long Concept 6 vacations.

21 Teachers expressed their concern that it takes them time to “track
22 back on.” There is an abundance of paperwork for teachers and
23 tremendous effort to get the students back into the mode of school
while the teachers also become acclimated to changes on campus
made during their absence.

24 (DOE 36538.) As noted in the II/USP Plan for Plummer Elementary in LAUSD, the Concept 6
25 calendar, with its classroom rotations and resulting moves,

26 affects the continuity and consistency of the overall instructional
27 program. The number of students and classrooms require large
28 numbers of instructional materials to be handled by the teachers and
administrators. Often times teachers and classes have to change
rooms when coming back on-track. . . . [T]he school is

1 experiencing difficulty in getting instructional materials to all
2 students and classrooms.

3 (DOE 43202.) As plaintiffs' expert, Dr. Oakes, concludes, "[T]he difficulty of coordinating the
4 distribution and collection of textbooks and instructional materials at the beginning and end of
5 sessions [alone] results in significant losses of quality instructional time." Oakes Report at 22.

6 Track B is "particularly disruptive for students" not only because of its two long vacations
7 and three "start-ups" and "endings." Oakes Report at 23. Students are in session only two
8 months before they go on a two-month long vacation. No other calendar or track offers two
9 months of instruction followed by two months of vacation. This makes it especially difficult to
10 establish and maintain momentum; as teachers establish rapport and settle into a rhythm, the
11 session ends. *See id.* at 23-24. Teachers, moreover, must spend a significant amount of time
12 making students readjust to school and reviewing the material covered during the initial two-
13 month session. *See id.* at 24. In addition, as noted above, B-track students and teachers begin a
14 new school year almost immediately after concluding the prior one; they are thus deprived of the
15 time needed to prepare for it, unlike students and teachers at traditional calendar schools who
16 have three months of vacation before the start of a new school year. *Id.*

17 Thus, students at Concept 6 schools, and particularly those on track B, suffer the
18 uncompensated loss of instructional days wasted moving in and out of the classroom and spent
19 reviewing material covered before the long vacation – which can only mean that portions of the
20 curriculum must be skipped altogether or given short shrift to make up for the lost time – and they
21 suffer from significantly reduced quality of instruction, as they are taught, for long portions of the
22 year, without textbooks and by distracted teachers.

23 **d. Concept 6 compromises vital intervention services.**

24 The Concept 6 calendar impedes the provision of vital services to struggling students at-
25 risk of failing to promote to the next grade level. Concept 6 schools cannot provide summer
26 sessions. "With the school in use heavily all year round, there is no summer vacation to use for
27 the kinds of academic intervention programs that can be used on traditional calendars for
28 struggling students." (Wohlers Decl. at ¶ 41.) Although students can, in theory, take

1 intervention or remediation classes during their vacations, students “often find that on the
2 extremely crowded and overused campuses where they go to school there are not enough
3 classrooms available to permit the school to provide these classes.” (*Id.*) As explained by
4 LAUSD Assistant Superintendent Wohlers,

5 when every classroom is a precious asset to the school, just to
6 handle regular classes all year round, an intersession class – which
7 brings back to the campus students who are “supposed” to be off –
8 becomes an undesirable step-child. It is impossible to encourage all
9 students who need intersession classes to take advantage of them
10 when there is so little room.

11 (*Id.*) Wohlers admits that the Concept 6 calendar “impedes the provision of vital intervention
12 services for struggling students,” and “[i]ntervention is, in effect, not being done for children on
13 the Concept 6 calendar.” (*Id.* at ¶¶ 17, 42)¹²

14 The State concedes that “[s]everal recent legislative initiatives are difficult to realize in
15 multitrack year-round education schools.” (DOE 95186.) For example, the State acknowledges
16 that “offering mandatory remediation sessions, when all classrooms are used all year, is . . . a
17 challenge.” (*Id.*) Moreover, state expert Ballinger admitted that he was in no position to dispute
18 the assessment that the Concept 6 calendar impedes vital intervention services and that
19 intervention is, in effect, not being done for children on the Concept 6 calendar. (*See* Ballinger
20 Depo. at 637:1-638:24, 645:6-17.)

21 The compromised ability to provide intervention services is all the more significant given
22 that low-income students represent virtually the entire enrollment at Concept 6 schools. They are
23 the very students who would most benefit from intervention services to keep from falling further
24 behind their peers. *See* Oakes Report at 34. Yet they disproportionately attend schools on the
25 Concept 6 calendar, which does not afford the flexibility necessary to provide the needed
26 interventions. *Id.*

27 ¹² (*See* DOE 43201 (“The lack of adequate space on campus prevents the school
28 [Plummer Elementary School in LAUSD] from implementing intervention classes”); *see*
also Deposition of Marcia Hines at 589:6-8, 629:13-19, 660:9-661:12 (“With intersession it’s
extremely difficult to find enough space. We are having intersession classes also in the
cafeteria.”), Welch Decl. at Exh. L); Deposition of Emilio Garcia at 111:25-112:4, 114:9-13
(same), Welch Decl. at Exh. M).)

1 e. **Concept 6 does not coincide with the traditional school year,**
2 **limiting access to enrichment programs.**

3 The State concedes that the Concept 6 calendar does not coincide with the traditional
4 school year calendar. (*See* DOE 95190.) At Concept 6 schools, students “find themselves out of
5 step, because so many programs and opportunities for children are premised on the traditional
6 calendar.” Oakes Report at 31. As Dr. Oakes explains,

7 Students on a traditional calendar can take advantage of many
8 camps, recreation programs, internships and jobs during their
9 summer breaks. But those are not so plentiful during schedules that
10 also put youngsters out of school for long stretches of time in the
fall, winter and spring. [Concept 6 vacations are two months long.]
In fact there is a painful shortage of programs to keep
schoolchildren busy during nonsummer vacations, parents and
teachers complain.

11 Oakes Report at 32 (citation omitted); (*see also* Deposition of Amy Salyer at 369:16-20 (“Our
12 children had to be out of school at times of the year when there were no other programs available
13 for them to participate in. They didn’t get to participate in summer sports leagues or summer
14 camps or summer art programs . . .”), Welch Decl. at Exh. N).)

15 The State also concedes that the Concept 6 calendar may cause family disruptions. (*See*
16 DOE 95193.) Disruptions occur when a family’s children have different vacation schedules. As
17 State expert Ballinger stated: “[E]lementary students may be on one calendar, secondary students
18 may be on [another], and so that may be a family disruption.” (Ballinger Depo. at 210:8-10.) As
19 Dr. Oakes notes, Aureliano Cortes, who has children at different Concept 6 schools, “had to work
20 ‘very hard at the start of the school year to make sure they were all on the same track and in
21 session at the same times during the year’ to avoid the ‘nightmare’ of having his four sons ‘on
22 vacation at different points throughout the year.’” Oakes Rebuttal Report at 10 n.54 (citation
23 omitted). Still, he reports finding it “‘difficult managing their time during their vacations,’
24 because ‘[i]t’s much harder to find safe and useful activities for them during the school year,
25 when they have their vacations, than it is over the summer.’” *Id.* (citation omitted). In particular,
26 he is concerned that, because of the long vacations, his sons “‘will forget much of what they have
27 learned and have a hard time readjusting to school if they have spent their vacations watching
28 television or playing video games.’” *Id.* (citation omitted).

1 The impact of a vacation schedule that does not coincide with the traditional school year
2 falls most heavily on low-income students. According to Ballinger, low-income students are the
3 “least likely to be able to afford structured learning experiences” over their vacations, which
4 explains why they fall behind their peers. *See* Ballinger Report at 13. Yet, because they are
5 disproportionately enrolled in Concept 6 schools, it is low-income students who not only must
6 find programs in the fall, winter, and spring, when they are less plentiful, but must find programs
7 twice a year for a total of four months, instead of once a year for three months.

8 **f. Concept 6 causes increased use of harmful combination classes.**

9 Concept 6 results in the use of harmful combination classes, which combine students from
10 different grade levels in the same classroom. The State admits that the calendar leads to increased
11 placement of children in combination classes. (*See* DOE 95193.) The division of a school into
12 tracks increases the odds of enrollment imbalances and the need for combination classes. *See*
13 Mitchell Report at 8. Teachers view combination classes as difficult assignments: they face the
14 problem of teaching two curricula, which not only requires additional planning time, but more
15 grouped instruction, something teachers would not ordinarily do, because it means less attention
16 for individual students as the teacher’s time is split between the two grade-level groups. (PLTF-
17 XP-RM 2350, 2354, 2401.) “Given these difficulties, most principals would not use combination
18 classes if they could be avoided.” (PLTF-XP-RM 2350.)

19 As explained by Linda Shinn, who teaches a combination fifth- and sixth-grade class, her
20 students’ educations suffer from being in a combination class:

21 Because as a teacher, I had to teach a divided curriculum at the
22 same time. . . . I was not able to help the children when I wanted to
23 or when I saw the need, because if I was doing an activity or a
24 lesson with my sixth grade students in literature or in science, or in
25 ancient history, the fifth grade students would be on their own and
would have to work on an independent activity. And I could not
come and work with them until I had finished working — I was
running from side to side in the class from the time I walked in in
the morning until I left at the end of the school day.

26 (Deposition of Linda Shinn at 185:20-186:24, Welch Decl. at Exh. O.)

27 Based on his review of the research literature studying the effects of combination classes,
28 Dr. Mitchell states: “The consequence of combination grade classes is *lowered overall student*

1 *achievement* and difficulty in maintaining teacher morale.” Mitchell Report at 8. State expert
2 Ballinger admitted he was in no position to dispute that Concept 6 leads to increased use of
3 combination classes, and he offers no rebuttal to Dr. Mitchell’s testimony on the research that has
4 been conducted on the effects of combination classes. (*See* Ballinger Depo. at 218:4-219:3.)

5 **g. Concept 6 disrupts communication among staff, resulting in**
6 **fragmented instruction and staff development.**

7 The State concedes that the Concept 6 calendar disrupts staff training and communication.
8 (*See* DOE 95193.) At a Concept 6 school, one group of students and teachers is on vacation at
9 any given point in the year. Various State documents confirm the disruption not only to
10 instruction, but to staff training and development, that results when one third of teachers are
11 always absent from the school. (*See, e.g.,* DOE 36409 (“One-third of the students and teachers
12 are always ‘off track’ at any one time. The staff does not receive training at the same [time].
13 There is no common planning time for grade levels teachers. As a result, instruction, programs,
14 and staff development are fragmented.”); DOE 36538 (“Concept 6 also presents significant
15 challenges for administration and teachers to operate cohesively. Maintaining on-going
16 communication with all staff is difficult since only 2/3 of the staff is on campus at the same time.
17 This also creates articulation issues with teachers coming on-track or going off-track. Both
18 teachers and administration expressed a deep sense of ‘fragmentation.’”); DOE 43201-02 (“Key
19 decision-making by members of the school leadership teams has been disjointed and without a
20 clear focus resulting in poor communication with the various school stake holders. There is a
21 need for the various leadership groups to spend concentrated times throughout the school year to
22 make decisions based on student assessment data and other identified needs. . . . Because one
23 track is always off, professional development occurs on an inconsistent basis for all teachers.”).)

24 **h. The students and teachers least able to cope with the calendar’s**
25 **disadvantages are found at Concept 6 schools.**

26 The Concept 6 calendar and its resulting disadvantages are visited precisely on those
27 students least able to cope with them. Because low-income children and English learners are
28 over-represented at Concept 6 schools, they disproportionately are subjected to four (as opposed
to three) months away from school. “For English learners,” as plaintiffs’ expert Dr. Oakes

1 concludes, “this means substantially less time to assimilate critical academic material and be
2 exposed to English language models.” Oakes Rebuttal Report at 9. In fact, as State expert
3 Ballinger recognizes, time “away from formal instruction hinders language acquisition,” because
4 the language away from schools is “the language of the family and community,” and English
5 learners come from families and communities where formal English is not the primary language.
6 (PLTF-XP-JO 18360.) “Equally important, moreover, is the loss of learning that occurs with
7 these many months away from school. Low-income children and English learners are more
8 disadvantaged by long periods away from school than others; these periods have a demonstrably
9 negative effect on their achievement.” Oakes Rebuttal Report at 9-10. Thus, as Dr. Oakes
10 concludes, the very students who need the most exposure to schooling are the most likely to
11 receive the fewest school days in California. *See id.* at 10.

12 Likewise, communication and development are disrupted at the very schools and for the
13 very staff with the greatest need for it. Concept 6 schools are overwhelmingly staffed with the
14 least experienced teachers in the State. As plaintiffs’ expert, Dr. Mitchell, found: “In over half of
15 the Concept 6 schools, at least one in four teachers does not have a full credential, while the
16 median value for . . . the traditional/single-track schools is less than one in fourteen teachers
17 without a full credential.” Mitchell Report at 16. Even within the same school district, teachers
18 at Concept 6 schools have a lower percentage of full credentials and fewer years of experience
19 than those at traditional calendar schools. (*See* STATE-EXP-CB 0423.) Thus, the least prepared
20 and experienced teachers not only must face the significant obstacles posed by the calendar,
21 including its disruptive classroom dislocations. *See* Oakes Report at 22. But they must do so
22 without effective staff development needed, first and foremost, to compensate for their lack of
23 training and experience.

24 Accordingly, students who attend Concept 6 schools are disadvantaged both directly by
25 the calendar’s long vacations and indirectly by its disruption of staff development.

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1 **2. Concept 6 schools are among the lowest-performing in the state.**

2 Not surprisingly, given its numerous, significant impacts on education, Concept 6 schools
3 yield the poorest achievement, as plaintiffs' un rebutted evidence demonstrates. This remains true
4 even after statistically controlling for student and school differences.

5 “A comparison of the cumulative results on the 2001 and 2002 spring administrations of
6 the High School Exit Exam (HSEE) reveals a significant difference in achievement between
7 students at Concept 6 schools and students at other schools.” Oakes Report at 36 (footnote
8 omitted). As Dr. Oakes explains, the comparison shows:

9 [T]he average HSEE Math test passing rate for Concept 6 schools is
10 31%, while non-Concept 6 schools have an average . . . passing rate
11 of 58%; and the average HSEE English Language Arts test passing
 rate for Concept 6 schools is 53%, while the non-Concept 6 schools
 have an average . . . passing rate of 78%.

12 *Id.* at 36-37.

13 Looking at the lowest Academic Performance Index (“API”) scores in the State, CDE
14 consultant Payne found that “[o]f 200 schools at the bottom of the API, 112 schools operate on a
15 multitrack year-round calendar” and “[m]ore than half . . . use the Concept 6 calendar”
16 Oakes Rebuttal Report at 14 (citation omitted). Concept 6 schools, however, represent only about
17 20% of multi-track schools. *See id.*

18 Analyzing the State’s API data, Dr. Mitchell found: “[T]he achievement gap between
19 schools utilizing the various attendance calendars is quite large, especially that between
20 traditional/single-track year-round schools and Concept 6 multi-track year-round schools.”
21 Mitchell Report at 26-27. He termed it “[a] tremendous disparity in achievement across calendar
22 types.” *Id.* at 20. Indeed, on the State’s ranking, which ranges from 1 to 10, the median score for
23 all schools is a 6, while the median for Concept 6 schools is a 2. *See id.* at Table 11. On the
24 Similar Schools Rank, which is supposed to equalize differences between schools, Concept 6
25 schools have a median score of 5, as compared to a statewide score of 6. *See id.* at Table 12.
26 Thus, even after controlling for the various background characteristics mandated by the Public
27 Schools Accountability Act, Dr. Mitchell found that Concept 6 schools are the most consistently

1 low-performing, lagging one full rank behind on the State’s rankings across virtually the entire
2 range of possible scores. *See id.* at 24; *id.* at Table 14.¹³

3 Last, Dr. Mitchell reported that the most popular tracks – those most like the traditional
4 calendar – “have the highest achieving students, while the least popular tracks have the lowest
5 achieving students,” and that, even after controlling for differences between tracks, the least
6 popular remain the lowest performing. *Id.* at 25. “‘B’ track is often the least popular and lowest
7 performing track.” *Id.* Indeed, as a subsequent LAUSD study found, placement on B-track has a
8 significant negative effect on achievement at elementary, middle, and high school levels. (*See*
9 STATE-EXP-CB 0412.) This means “that, at any school level, if an A-track student were placed
10 on track B, he or she would be expected to do worse.” Oakes Rebuttal Report at 15.

11 LAUSD Superintendent Roy Romer, who oversees most schools operating on the
12 Concept 6 calendar, believes that “quality goes out the door” with this calendar. *Id.* at 18
13 (citation omitted). The reduced instructional days and educational opportunities of the Concept 6
14 calendar, and in particular its B-track, result in substantially lower overall student achievement.

15 **D. The State Has A Duty To Intervene To Prevent the Discrimination That**
16 **Results from Concept 6.**

17 In *Butt*, the California Supreme Court held that the uncompensated loss of six weeks from
18 the school year had a real and appreciable impact on the right to basic educational equality,
19 because teachers would be unable to cover the entire curriculum, causing an extreme disparity in
20 educational service and progress. 4 Cal. 4th at 687-88. The Court nonetheless speculated that “a
21 planned reduction of overall term length might be compensated by other means, such as extended
22 daily hours, more intensive lesson plans, summer sessions, volunteer programs, and the like.” *Id.*
23 at 686. The Court added that a district’s efforts in this regard should be entitled to deference. *Id.*

24 The un rebutted evidence establishes that the Concept 6 calendar creates significant
25 obstacles that stand in the way of learning and achievement. Indeed, as admitted by the districts

26 ¹³ Dr. Mitchell found his analysis consistent with an LAUSD study, which found that
27 students do not perform equally across school calendars, with traditional calendar schools out-
28 performing Concept 6 schools. (*See* PLTF 06204.) Even after restricting the comparison to
demographically similar schools, it concluded there was still an achievement gap. (*Id.*)

1 using it, the calendar fails even to compensate for its substantial reduction in instructional days.
2 Unable to provide summer sessions, districts tried to compensate for the reduced school year by
3 extending the daily hours and providing remedial services during the vacations. These efforts
4 failed to compensate for the loss, let alone mitigate the calendar's many other disadvantages. The
5 calendar's repudiation by the LAUSD Superintendent and the districts that use it, the laundry list
6 of its undisputed disadvantages, and the consistent under-performance of Concept 6 schools,
7 bespeak the fundamentally unequal education students receive at Concept 6 schools relative to all
8 others in the State.

9 **II. THE STATE HAS ABDICATED ITS DUTY TO CORRECT THE** 10 **DEPRIVATIONS OCCASIONED BY USE OF CONCEPT 6.**

11 Despite its own admissions and overwhelming evidence that the Concept 6 calendar has
12 "a real and appreciable impact on the [plaintiffs'] fundamental California right to basic
13 educational equality," *Butt*, 4 Cal. 4th at 688, the State has failed to take corrective action.
14 Instead, the State has condoned and encouraged use of Concept 6.

15 **A. The State Has Encouraged the Use of Calendars Like Concept 6.**

16 There has been a persistent lack of funding necessary to build schools to meet the pressing
17 need for additional capacity. State expert Ballinger concedes that "California has not invested
18 enough in education," including "new school construction." (Ballinger Depo. at 337:14-19.)
19 Based on its review of bond initiatives over the past five decades, the California Research Bureau
20 concluded, "It is clear that throughout this history [of school facilities financing] that there was
21 never enough state money available to school districts for facility construction or repair." Expert
22 Report of Robert Corley ("Corley Report") at 51 (Welch Decl. at Exh. P); (PLTF 60012).

23 Faced with "the need to 'ration' its aid to districts", Legislative Analyst's Office, *A New*
24 *Blueprint for California School Facility Finance* (2001) ("LAO Blueprint") at 5 (Welch Decl. at
25 Exh. Q), the State decided to encourage the growth in multi-track calendars like Concept 6 to
26 avoid or defer construction of the schools needed in some areas, while funding construction of
27 schools in others. Far from striving to eliminate them, as the LAO put it, California long has
28 provided incentives for districts to implement and operate calendars like Concept 6 "as an

1 alternative to constructing new school facilities.” (DOE 86942.) A 1998 report prepared by
2 school administrators concluded: “MTYRE calendars, while problematic, were seen as *the lesser*
3 *of several evils* by many school districts. The acceptance of an MTYRE calendar by school
4 districts was *facilitated by a series of legislatively approved incentives*.” (STATE 73350.)
5 Districts “responded to an extreme enrollment crisis by following regulations and incentives
6 prescribed by California law.” (*Id.*)

7 State expert Ballinger acknowledges that the State encouraged and facilitated the
8 transition to multi-track, year-round calendars through its financial incentives. (*See* Ballinger
9 Depo. at 109:7-12, 127:14-128:3.) In fact, according to CDE consultant Thomas Payne, besides
10 “growing facilities needs,” State laws, which “tied participation in the state school building
11 program to a substantial enrollment in multi-track year-round education,” caused the tremendous
12 growth in the enrollment at multi-track schools in California. (Payne Depo. at 222:18-223:11.)
13 As he explains, “[the State] gave priority status to those districts operating [or choosing to
14 operate] multi-track year-round education.” (*Id.* at 229:11-18, 230:5-7.) “The effect . . . was to
15 require any school district seeking State funding for school construction, to commit its schools to
16 implement an MTYRE calendar.” (STATE 73350; *see also* Deposition of Robert Corley at 14:15-
17 17 (“Basically, if you didn’t do multitrack, you didn’t get state funding. That’s the incentive
18 program.”), Welch Decl. at Exh. R.)

19 **B. The State Expressly Permits Concept 6 and Refuses to Phase It Out or**
20 **Provide the Funds Necessary to Eliminate It.**

21 Education Code § 37670 permits districts to operate multi-track, year-round schedules like
22 Concept 6 that provide as few as 163 days of instruction. On August 29, 2002, the Legislature
23 approved AB 207, a bill that would have repealed § 37670 effective July 1, 2008. On
24 September 19, 2002, the Governor vetoed AB 207. He explained that it “would result in
25 significant cost pressure at the state and local level to fund the costs associated with consequences
26 of eliminating Concept 6 [T]hose costs could result in hundreds of millions”
27 September 19, 2002 Veto Message of AB 207. (Welch Decl. at Exh. S.) He added that the bill
28 “would result in a significant loss of local flexibility for school districts operating a Concept 6 . . .

1 schedule . . . [and] that school districts should continue to have discretion in choosing their own
2 education program schedule.” *Id.*

3 In light of its real and appreciable impact on the fundamental right to basic educational
4 equality, the State’s rationale for continued support of Concept 6 must be compelling. *See Butt*, 4
5 Cal. 4th at 686, 688. The Governor’s veto message indicates that no compelling rationale exists.
6 Instead, the veto message makes clear that the State intends to consign students – primarily low-
7 income Latino students – indefinitely to schools with fewer days of instruction and fewer learning
8 opportunities for no reason other than unrelenting overcrowding disguised as local “discretion” –
9 a discretion districts don’t want. *See* LAUSD Board of Education Minutes (April 23, 2002)
10 (“express[ing] . . . strong support for AB 2027 and encourag[ing] . . . the California Legislature
11 and the Governor . . . to ensure that the bill is enacted in law”). (Welch Decl. at Exh. T.)

12 However, the history of State financial incentives to districts that operate multi-track,
13 year-round calendars like Concept 6 to avoid the costs of construction, coupled with the State’s
14 failure even to assess school facilities needs statewide,¹⁴ let alone to address them, confirms that
15 local “discretion” to operate schools on the Concept 6 calendar is an entirely constrained choice.
16 In any event, whether a constrained choice or not, the State’s interest in local discretion cannot
17 sanction a violation of basic educational equality. *See Butt*, 4 Cal. 4th at 688-89. “The legislative
18 decision to emphasize local administration does not end the State’s constitutional responsibility
19 for basic equality in the operation of its common school system.” *Id.*

20 The weight given to purported financial concerns as the reason not to phase out the
21 Concept 6 calendar, moreover, only underscores the problem with the State’s funding
22 mechanism: it does not target distribution of all available facilities funds to districts with the
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25 ¹⁴ In its 2000 report *To Build a Better School*, the Little Hoover Commission reported:
26 “The State has invested billions of dollars in K-12 school facilities, yet it does not have an
27 inventory detailing when schools were built, their attributes, or their condition. ithout such an
28 inventory, the State is unable to accurately forecast the demand for new facilities” Corley
Report at 30-31.

1 greatest need. *See* LAO Blueprint at 6.¹⁵ If there are insufficient funds available to meet
2 statewide school facilities needs, the State must prioritize the needs and ensure that the districts
3 and schools most in need receive funding.¹⁶ State expert Ballinger agrees: “those districts facing
4 the most over-enrollment should be first in line to receive their fair share of whatever moneys are
5 available.” (Ballinger Depo. at 419:10-13.) He recognizes, moreover, that the use of multi-track
6 calendars like Concept 6 is a symptom of severe over-enrollment. (*See id.* at 130:25-131:6
7 (recognizing direct relationship between multi-track, year-round enrollment and severity of
8 district’s over-enrollment).)

9 Yet the State refuses to eliminate resort to the demonstrably inferior Concept 6 calendar.
10 *See* Corley Rebuttal Report at 13 (“The current [school facilities funding] system will not
11 eliminate schools on multi-track year round education calendars (MTYRE), including those on
12 Concept 6 . . .”).) The State’s unwillingness to target available funds to address severe
13 overcrowding and eliminate the resulting reliance on the Concept 6 calendar, particularly given
14 the State’s history of under-funding school construction and encouraging use of calendars like it,
15 cannot outweigh the fundamental “rights of . . . blameless students to basic educational equality.”
16 *Butt*, 4 Cal. 4th at 689. The State can and must intervene to ensure that no district or school has
17 the need to resort to the Concept 6 calendar and harm children and their educations.

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21 ¹⁵ State expert Richard Berk has investigated the distribution of school construction funds,
22 studying the relationship between enrollment growth and funding allocations. (*See* Declaration of
23 Richard Berk (“Berk Decl.”) at ¶ 9, Welch Decl. at Exh. U.) He found State funding to be
“extremely capricious.” (Deposition of Richard Berk at 95:20-96:9, 97:23-98:6, Welch Decl. at
Exh. V.) He concluded: “for those districts that received allocations, the amount of those
allocations could not be determined by enrollment growth.” (Berk Decl. at ¶ 9.)

24 ¹⁶ State facilities infrastructure expert Thomas Duffy claims that “funding is not an issue
25 at this time.” Expert Report of Thomas Duffy at 25. (Welch Decl. at Exh. W.) As he puts it, the
26 State faces the prospect of an unprecedented \$25 billion becoming available for K-12 and higher
27 education school construction and repair – if the 2004 bond measure, the complement to the 2002
28 bond measure, were to be enacted. Yet “Duffy himself seems to acknowledge that the [bond’s
Critically Overcrowded Schools] program is not large enough to get all schools off Concept 6.”
Expert Rebuttal Report of Robert Corley (“Corley Rebuttal Report”) at 13 (citing Deposition of
Thomas Duffy at 645:12-646:24). (Welch Decl. at Exh. X & Y.)

1 CONCLUSION

2 For the foregoing reasons, plaintiffs respectfully request that the Court grant summary
3 adjudication that the State has a duty to ensure equal access to school calendars capable of
4 providing the prevailing number of annual days of instruction and that the State has breached that
5 duty. The undisputed evidence presented here demonstrates that the truncated Concept 6 calendar
6 has a real and appreciable impact on the fundamental right to basic educational equality; that
7 gross inequity persists today in California schools, as hundreds of schools must operate on
8 Concept 6; and that the State not only has no system of oversight to prevent or discover and
9 correct this fundamental inequality in California public schools, but, in fact, permits and
10 encourages it to exist.

11 Dated: September 23, 2003

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