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13
 14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 16 WESTERN DIVISION
 17

18 **MATTHEW BRACH, et al.,**

19 Plaintiffs,

20 v.

21 **GAVIN NEWSOM, in his official**
 22 **capacity as the Governor of**
California, et al.,

23 Defendants.

Case No 2:20-cv-06472 SVW (AFMx)

**SUPPLEMENTAL
 MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 OPPOSITION TO PRELIMINARY
 AND/OR PERMANENT
 INJUNCTION (Dkt. 28)**

Date: September 10, 2020
 Time: 1:30 p.m.
 Courtroom: 10A - Telephonic
 Judge: The Honorable Stephen
 V. Wilson
 Trial Date: Not set
 Action Filed: 7/21/2020

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INTRODUCTION

The Court requested supplemental briefing on two issues: (1) whether Plaintiffs have Article III standing; and (2) whether Plaintiffs Christine Ruiz, Z.R., Brian Hawkins, Marianna Bema, and Ashley Ramirez’s claims under the Individuals with Disabilities Education Act (IDEA) fall within exceptions to the exhaustion mandate described in *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303-1304 (9th Cir. 1992). See ECF No. 48. The Court also requested that the parties submit any further evidence on whether a preliminary and/or permanent injunction should issue.

Plaintiffs lack Article III standing to bring their claims challenging Governor Newsom’s Executive Order N-60-20 and the July 17, 2020 Order by the California Department of Public Health regarding school openings (collectively, “State Order”). Defendants’ Request for Judicial Notice, Exs. E, F, ECF No. 36. Specifically, the parent-Plaintiffs lack standing because they fail to show that they suffered a particularized injury in fact as a result of the State Order. All Plaintiffs fail to show that there is a causal connection between the alleged injury of their schools offering distance learning and the State Order. Moreover, Plaintiffs have not shown it is likely that, even if the Court were to enjoin the State Order, the Court’s action would redress their alleged injury, since their children’s schools would not necessarily re-open for in-person instruction as a result.

In addition, the claim for violation of the IDEA and related federal-disability statutes, brought by four plaintiff-parents and one child, fails because none of these plaintiffs exhausted their administrative remedies—as they themselves concede—and no exception to the exhaustion requirement applies.

PLAINTIFFS FAIL TO MEET THE REQUIRED ELEMENTS TO ESTABLISH ARTICLE III STANDING

To state a case or controversy under Article III, a plaintiff must establish “standing.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 536 U.S. 125, 133, 131 S.Ct.

1 1436, 179 L.Ed.2d 523 (2011); accord *Lujan v. Defs of Wildlife*, 504 U.S. 555, 560,
2 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (“standing is an essential and unchanging
3 part of the case-or-controversy requirement of Article III”). Standing requires three
4 elements: (1) an “injury in fact;” (2) “a causal connection between the injury and
5 the conduct complained of;” and (3) the likelihood “that the injury will be
6 ‘redressed by a favorable decision.’ ” *Lujan*, 504 U.S. at 560-61; *Ariz. Christian*
7 *Sch. Tuition Org.*, 536 U.S. at 134. This standing inquiry must be “especially
8 rigorous” when reaching the merits of the dispute would force a court to decide
9 whether actions taken by the executive or legislative branches are unconstitutional.
10 *Raines v. Byrd*, 521 U.S. 811, 819-20, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

11 **I. THE PARENT-PLAINTIFFS CANNOT ESTABLISH A PARTICULARIZED**
12 **INJURY-IN-FACT**

13 To establish Article III standing, Plaintiffs must identify a “concrete and
14 particularized” injury to themselves and may not assert claims on behalf of
15 others. *Lujan*, 504 U.S. at 560. Plaintiffs here are, with one exception, the parents
16 of students, rather than the students themselves, and the parent-plaintiffs cannot
17 show that they, personally, have been “injured” by the State Order. Although case
18 law has recognized parental standing in certain school-related contexts,¹ standing
19 has not been extended to parents where, as here, the challenge is to methods of
20 instruction. For example, in *Caldwell v. Caldwell*, 545 F.3d 1126, 1133 (9th Cir.
21 2008), the Ninth Circuit held that a parent of public school children lacked standing

22 ¹ See, e.g., *Valley Forge Christian College v. Am. United for Separation of*
23 *Church & State*, 454 U.S. 464, 486 n.22 (1982) (parents’ children subjected to
24 unwelcome religious exercises); cf., *Sch. Dist. of Abington Twp. v. Schempp*, 374
25 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (parents standing to raise
26 First Amendment challenge to public school prayer policy); *Grove v. Mead Sch.*
27 *Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) (parent standing where
28 challenged policy affects right to religious training of child); See also
Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718-19,
127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (parent standing to challenge policies
impacting school admissions based on race; *Liddell v. Special Admin. Bd. of*
Transitional Sch. Dist. of City of St. Louis, 894 F.3d 959, 965–66 (8th Cir. 2018)
(parent standing to challenge policies school funding).

1 to challenge the University of California’s instruction on evolution. *See also Shaw*
2 *v. Stroud*, 13 F.3d 791, 805 (4th Cir. 1994) (lack of parental standing to sue over
3 governmental action that affected family relationship only incidentally).

4 Here, the educational harm parent-Plaintiffs allege—which Defendants
5 dispute—does not extend to the parents: the State Order’s directives guide the
6 school instruction that their children will receive. They therefore cannot establish
7 an injury that affects *them*, as opposed to their children, “in a personal and
8 individual way” in any event. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02
9 (1983). “Abstract injury is not enough. The plaintiff must show that he ‘has
10 sustained or is immediately in danger of sustaining some *direct* injury’ as the result
11 of the challenged official conduct and the injury or threat of injury must be both
12 ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *Id.* (emphasis added)
13 (citations omitted).² The parent-Plaintiff declarations confirm that their claimed
14 “injury” is, in fact, their worry that their *children* are being adversely impacted by
15 the lack of social interaction and direct teacher contact, not that they, themselves,
16 are being personally harmed by distance-learning requirements. See, e.g., Brach
17 Decl. ¶¶ 7-8, ECF No. 28-23; Petrilla Decl. ¶ 15, ECF No. 28-24; Beaulieu Decl. ¶¶
18 14-16, ECF No. 28-25. Because the parent-Plaintiffs cannot establish that they are
19 being imminently threatened with an injury-in-fact, they lack standing to sue.

20 **II. PLAINTIFFS CANNOT ESTABLISH A CAUSAL CONNECTION BETWEEN**
21 **THEIR ALLEGED INJURY AND THE CHALLENGED STATE ORDER, OR**
22 **THAT THEIR ALLEGED INJURY WILL BE REDRESSED BY THE INJUNCTIVE**
23 **RELIEF THEY SEEK**

24 Even if the parent-Plaintiffs had alleged a cognizable injury-in-fact, all
25 Plaintiffs fail to establish that the State Order precluding in-person instruction in
26 schools in counties on the State’s monitoring list, absent a waiver, caused the

26 ² Where, as here, parent-Plaintiffs seek declaratory relief, they must similarly
27 establish standing by showing “that there is a substantial controversy, between
28 parties having adverse interests, of sufficient immediacy and reality to warrant
issuance of a declaratory judgment.” *Scott v. Pasadena Unified Sch. Dist.*, 306
F.3d 646, 658 (9th Cir. 2002) (citations omitted).

1 alleged “injury” of their children receiving distance-learning at their schools.
2 Plaintiffs also cannot show that, even if this Court enjoins the State mandates on
3 distance learning, affected children will be permitted to return to school for in-
4 person learning. Specifically, none of the Plaintiff-parent declarations submitted
5 establish—nor could they—that their specific school or school district would return
6 to offering solely in-person instruction during the Fall semester of the 2020-2021
7 school year. To the contrary, the evidence available to date suggests the opposite.

8 “In cases where a chain of causation ‘involves numerous third parties’ whose
9 ‘independent decisions’ collectively have a ‘significant effect’ on plaintiffs’
10 injuries,” the Supreme Court and the Ninth Circuit have found the causal chain “too
11 weak to support standing at the pleading stage.” *Maya v. Centex Corp.*, 658 F.3d
12 1060, 1070 (9th Cir. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 759 (1984)); *see*
13 *also Shankar v. United States Dep’t of Homeland Sec.*, No. 13-CV-01490 NC, 2014
14 WL 523960, at *5 (N.D. Cal. Feb. 6, 2014) (standing turns on establishing injury-
15 in-fact that fairly can be traced to the challenged action of the defendant, and not an
16 injury resulting from the independent action of a third party.)

17 Like causation, redressability is difficult to demonstrate when the independent
18 actions of third parties affect the plaintiffs’ alleged injury, because pleading actions
19 by third party “would almost necessarily be conclusory and speculative.” *Levine v.*
20 *Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009); *see also Lujan*, 504 U.S. at 568-571
21 (plaintiffs failed to demonstrate redressability where third parties’ independent
22 actions could affect whether requested relief would remedy injury).

23 Here, there are numerous third parties not before the court with independent
24 authority to make decisions that impact whether a school opens for distance
25 learning or in-person instruction. Plaintiffs, therefore, cannot establish that the
26 State Order “caused” their complained-of injury or that enjoining the State Order
27 would redress their alleged harm. First, even in the absence of a State Order, local
28 public health officers have the authority to require schools to provide distance

1 instruction to address the COVID-19 pandemic. Cal. Health & Saf. Code,
2 §120175. Pursuant to that authority, in counties or cities with high rates of
3 COVID-19, such public health officers may decide to issue their own similar order
4 requiring schools to offer distance learning until COVID-19- rates in the area have
5 decreased. Plaintiffs have failed to establish that, in the absence of the State Order,
6 their local public health officer would permit in-person instruction.

7 Second, school districts, charter schools, and private schools retain the
8 authority to decide not to open for in-person instruction irrespective of a State or
9 local order. For example, on July 13, 2020, *before* the July 17, 2020 State Order
10 was issued, the Los Angeles and San Diego Unified School Districts had already
11 announced that they would be starting the 2020-2021 school year with distance-
12 only learning. Declaration of Darin Wessel Ex. TT. Additional school districts
13 followed, announcing that they would open the 2020-2021 school year with
14 distance-only learning, including San Francisco Unified, Sacramento Unified, Long
15 Beach Unified, Santa Ana Unified, and Oakland Unified, to name a few. *Id.*, Exs.
16 UU, VV. At least some of the plaintiff-parents have children who appear to attend
17 school at San Diego Unified and Long Beach Unified. See First Am. Compl. ¶¶ 9,
18 11, Beaulieu Decl. ¶ 3).³ Accordingly, parent-Plaintiffs have failed to demonstrate
19 that the State Order caused such districts to start the school year with distance
20 learning, or that the injunctive relief they seek will actually result in their children
21 immediately returning to entirely in-person instruction.⁴

22 ³ Because many of the Plaintiffs fail to allege which school district or school
23 their children are enrolled at, Defendants cannot establish with certainty at this time
24 which children are in schools that made the decision to start school with distance-
25 only learning regardless of the State Order.

26 ⁴ Plaintiffs have not submitted admissible evidence establishing that the
27 schools their children attend will, in fact, immediately reopen for in-person
28 instruction even if it were permitted. Although a couple of the parent-plaintiffs state
the desire for their schools to reopen, and that their school has taken steps to be
ready to safely reopen, they have not produced evidence beyond conclusory
assertions that schools are not open because of the State Orders and inadmissible
hearsay supporting that contention. *See, e.g.*, Brach Decl. ¶¶ 3, 9-13; Hackett Decl.
¶ 6; First Am. Compl. ¶ 14, ECF No. 9. At best, the First Amended Complaint

1 Because third parties, including local governments and schools, are authorized
2 to make independent decisions that will determine whether schools in the state are
3 able to open for in-person instruction, Plaintiffs cannot establish that the State
4 Order “caused” their injury. Similarly, Plaintiffs cannot establish that enjoining the
5 State Order would necessarily result in their children’s schools being immediately
6 re-opened for in-person instruction. Thus, Plaintiffs fail to meet the requirements
7 for Article III standing, and their claims should be dismissed.

8 **NO EXCEPTION TO THE REQUIREMENT TO EXHAUST**
9 **ADMINISTRATIVE REMEDIES PRIOR TO BRINGING A CLAIM FOR**
10 **VIOLATION OF THE IDEA APPLIES HERE**

11 As explained in Defendants’ Opposition to Temporary Restraining Order, ECF
12 No. 35, Plaintiffs’ claim for violation of the IDEA, Americans with Disabilities Act
13 (ADA), and section 504 of the Rehabilitation Act fails because they did not exhaust
14 administrative remedies and no exception to the exhaustion requirement applies.
15 See *id.* at 22:15-24. There are three recognized exceptions to the requirement to
16 exhaust the due-process administrative remedy: (1) it would be futile to exhaust
17 administrative remedies, (2) the educational agency has adopted a policy or pursued
18 a practice of general applicability that is contrary to law, or (3) it is improbable that
19 adequate relief can be obtained by pursuing administrative remedies. *Doe v.*
20 *Arizona Dep’t of Educ.*, 111 F.3d 678, 681, 683-684 (9th Cir. 1997) (finding
21 exhaustion not excused); *Hoelt*, 967 F.2d at 1303 (same). Here, Plaintiffs argue
22 they are exempt from the exhaustion requirement under the first two exceptions.
23 Reply in Support of TRO at 10:9-18, ECF 40. But, as discussed below, those
24 exceptions do not apply here.

25 _____
26 alleges that the private school Roger Hackett’s son attends “is willing to offer both
27 in-person and distance learning options based on the preference of the parents”
28 First Am. Compl. at 8:4-5. But his declaration does not state that his son’s school
would immediately open for in-person instruction but for the State Order. See
Hackett Decl., ECF No. 28-30.

1 **I. EXHAUSTING ADMINISTRATIVE REMEDIES WOULD NOT BE FUTILE**
2 **HERE**

3 Plaintiffs first argue that it would be futile to file complaints *with the CDE*
4 because CDE could not grant their requested relief. Reply at 9:11-13. This
5 mischaracterizes IDEA's administrative exhaustion requirement, which mandates
6 completion of a formal, due-process hearing at the Office of Administrative
7 Hearings (OAH), not submission of an informal compliance complaint with CDE.
8 20 U.S.C. §1415(i)(2)(A).⁵ Plaintiffs' argument regarding CDE's alleged lack of
9 authority is thus irrelevant to the issue of futility.

10 Pursuing a due-process hearing *with OAH*⁶ would not be futile based on the
11 numerous well-established reasons that justify the exhaustion requirement in the
12 first place. Exhaustion of available administrative remedies is critically important
13 to the effective determination of claims and the scope of any remedy related to
14 individual harm: the exhaustion requirement serves the important purposes of
15 affording the parties and the courts the benefits of agency expertise in preliminarily
16 reviewing and ruling on a disputed matter, and ensuring the compilation of an
17 adequate record for potential judicial review—assuming judicial review is not
18 obviated by the administrative proceedings. See *Hoelt*, 967 F.2d at 1303; *Doe v.*
19 *Arizona Dep't of Educ.*, 111 F.3d 678 (9th Cir. 1997). Exhaustion permits a
20 determination in the first instance of fact-intensive issues critical to the ultimate
21 legal determination: whether the challenged facts support a finding of a denial of a
22 free appropriate public education (FAPE), and, if so, what student-specific remedies
23 are appropriate under the circumstances. (*Id.*) Without that type of detailed review

24 ⁵ The IDEA makes no provision for judicial review of such compliance
25 complaints at all, *Fairfield-Suisun Unified Sch. Dist. v. Cal. Dept. of Educ.*, 780
26 F.3d 968, 970-971 (9th Cir. 2015), so such proceedings do not fulfill the IDEA's
27 judicial review requirement. 20 U.S.C., § 1415(i)(2)(A).

28 ⁶ During the COVID-19 pandemic, OAH has continued to hear due-process
claims for denial of FAPE, including based on issues related to distance learning.
Calomese Decl. ¶ 7. Thus, any contention by Plaintiffs that they have been
precluded from pursuing administrative remedies due to the pandemic is flatly
contradicted by the evidence.

1 and analysis from an examiner with subject-matter expertise on the relevant issues,
2 the parties and the Court would be hamstrung in their ability to meaningfully assess
3 and rule on Plaintiffs' claims.

4 Here, each Plaintiff failed to obtain an underlying determination by OAH that
5 a FAPE was denied to their child. Each asserts different allegations about their own
6 child's experience with distance learning and the alleged failure of their school to
7 provide required services under their Individualized Education Program (IEP).
8 Specifically, Z.R. and the relevant parents allege in the FAC and their declarations
9 that he/their students have IEPs and that their schools failed to provide certain
10 services required under their respective IEPs during distance learning in the Spring
11 of 2020. First Am. Compl. ¶¶ 15, 16, 18, 21; Ruiz Decl. ¶¶ 4-6, 8, 11-13, 15-18;
12 Hawkins Decl. ¶¶ 4-11; Bema Decl. ¶¶ 12; Ramirez Decl. ¶¶ 8-9. These allegations
13 are all factually different from each other, and each would thus require a unique
14 analysis by an administrative law judge (ALJ) of whether a FAPE was denied under
15 the particular circumstances alleged, and based on each student's IEP. *See id.*

16 Availing themselves of a due-process hearing would have been beneficial to
17 Plaintiffs for several reasons. Parents-Plaintiffs allege that their children were not
18 provided required services under their IEPs and that their children are unable to
19 access education through distance learning, and one of them alleges she had to pay
20 for private tutors for her sons. Ruiz Decl. ¶¶ 5, 9, 13-17; Ramirez Decl. ¶¶ 8-9;
21 Bema Decl. ¶¶ 11-12; Hawkins Decl. ¶¶ 4, 9-11. If Plaintiffs had pursued their
22 claims of denial of FAPE at an OAH hearing, they could have received individual
23 remedies that would have adequately addressed their particular concerns, including
24 reimbursement for private tutoring costs and/or provision of compensatory
25 education services. See 20 U.S.C. 1415(e)(2), 1415(i)(2)(C)(iii); *Forest Grove v.*
26 *T.A.*, 557 U.S. 230, 243-244 n. 11 (2009) (ALJ may award appropriate relief); *Sch.*
27 *Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 339-371 (1985)
28 (reimbursement); *Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1496 (9th

1 Cir. 1994) (compensatory education). Thus, any argument that adequate relief
2 cannot be obtained by pursuing administrative remedies fails given the undisputed
3 ability of an ALJ to award targeted relief to address their specific concerns about
4 their school district’s alleged denial of services required under their child’s IEP
5 during distance learning, including reimbursement and compensatory education.

6 Additionally, the U.S. Department of Education’s Office of Special Education
7 Programs (OSEP) provided two informal guidance letters in March 2020, which
8 state that school districts should attempt to provide FAPE “to the greatest extent”
9 possible during the COVID-19 pandemic, that this may include distance learning,
10 and that school districts should work closely with families to determine the
11 appropriate provision of IEP services. See Declaration of Heather Calomese, ¶¶ 6,
12 8, Exs. RR at 2, SS at 2. The OSEP guidance also recognizes that local education
13 agencies (LEAs) may be obligated to provide compensatory education to students
14 denied FAPE as a result of school closures. *Id.*, Exs. RR at 2-3, SS at 2-4. The
15 Supreme Court has held that when the IDEA is ambiguous—as it arguably is here
16 because it is silent on a means of providing FAPE during a pandemic—courts may
17 defer to such OSEP letters in interpreting school-district obligations. *Honig v. Doe*,
18 484 U.S. 305, 325 n. 8 (1988). Thus, an ALJ analyzing whether a student was
19 denied a FAPE during Spring 2020 would likely apply OSEP’s “to the greatest
20 extent possible” standard in making the individualized determination on a student’s
21 claim of denial of a FAPE.⁷

22 ⁷ Plaintiffs argue that a plaintiff need not exhaust administrative remedies
23 when alleging an “absence of any services whatsoever,” Reply at 15:14-15, citing
24 *Handberry v. Thompson*, 446 F.3d 335, 344 (2d. Cir. 2006). *Handberry* is
25 inapposite: it was a class-action filed on behalf of all adult inmates at Rikers Island
26 jail eligible for various educational services challenging “the absence of any
27 services whatsoever.” *Id.* Indeed, in reaching its conclusion, the court expressly
28 distinguished such class-wide systemic challenges from “challenges with respect to
the content of a particular student’s Individualized Education Plan.” *Id.* Here, in
contrast, Plaintiffs bring the claims in their individual capacities only and allege
their children did not receive all the services normally provided under their IEPs
during the school closures. See First Am. Compl. ¶¶ 15, 16, 18, 21; Ruiz Decl. ¶¶ 4-
6, 13; Hawkins Decl. ¶¶ 9-11; Bema Decl. ¶ 12; Ramirez Decl. ¶¶ 8-9. In light of

1 Finally, as this Court correctly recognized in denying Plaintiffs’ request for a
2 temporary restraining order, TRO Order at 12, under *Paul G. v. Monterey*
3 *Peninsula Unified Sch. Dist.* 933 F.3d 1096, 1101-1102 (9th Cir. 2019), seeking
4 relief at OAH against the respective school districts that Plaintiffs’ children attend
5 would not have been futile to their effort to pursue injunctive relief against
6 Defendants because a finding of denial of FAPE at OAH could potentially form the
7 predicate for a systemic claim in court in an appropriate case. And, as explained
8 below, absent a predicate finding by OAH that the students were, in fact, denied
9 FAPE, Plaintiffs are foreclosed from pursuing a broader claim for relief.

10 **II. THE “SYSTEMIC CLAIMS” EXCEPTION DOES NOT APPLY HERE TO**
11 **EXCUSE PLAINTIFFS FROM THE EXHAUSTION MANDATE**

12 Plaintiffs also argue that they are excused from exhausting available
13 administrative remedies because their claim is a “systemic” challenge to a practice
14 of general applicability that is contrary to the law, and thus allegedly not subject to
15 the exhaustion requirement. Reply at 10:13-18 (*citing Hoeft*, 967 F.2d at 1302–03).

16 As this court correctly recognized, TRO Order at 12-13, Plaintiffs’ reliance on
17 the “systemic” violation is foreclosed by Ninth Circuit precedent, for several
18 reasons. First, there has been no preliminary determination by an ALJ that any
19 student in this matter has been denied a FAPE by any school district. In *Paul G.*,
20 the Ninth Circuit held that the court was unable to determine if CDE’s alleged
21 systemic failure was contrary to law until an 18-to-22-year-old plaintiff could first
22 establish at OAH that he or she was denied a FAPE due to the denial of an in-state
23 residential placement. 933 F.3d at 1102. Second, a claim is only “systemic . . . if it
24 concerns the integrity or reliability of the IDEA dispute resolution procedures
25 themselves, or requires restructuring the education system itself in order to comply

26 _____
27 OSEP’s COVID-19-related guidance, if it was not possible for a school district to
28 provide certain in-person services due to health risks in the aftermath of emergency
school closures, the individualized determination of whether this violated FAPE in
a particular circumstance is appropriately determined by an ALJ, and exhaustion is
thus required.

1 with the dictates of the Act.” *Id.* (internal quotation omitted). Because Plaintiffs
2 failed to avail themselves of the administrative hearing process, they cannot
3 plausibly satisfy the first condition. Nor can they establish the second condition,
4 foremost because the obligation for schools to deliver FAPE remains in place and
5 the administrative process—as described above—is capable of redressing instances
6 where an individual student may be denied FAPE as a result of school closures.
7 *See Doe By & Through Brockhuis v. Arizona Dep’t of Educ.*, 111 F.3d 678, 682 (9th
8 Cir. 1997) (holding that a claim is not systemic if “it involves only a substantive
9 claim having to do with limited components of a program” and “the administrative
10 process is capable of correcting the problem”).

11 Here, although Plaintiffs argue that their IDEA claim challenges the State
12 Order that affects “every student,” this claim is nonetheless brought by individual
13 plaintiffs who allege that *their children’s schools* did not provide them required
14 services under their IEPs during distance learning. Because this is a highly
15 individualized and fact-specific inquiry, the question of whether these children have
16 been denied a FAPE must be determined, in the first instance, by a hearing officer.
17 *Paul G.*, 933 F.3d at 1101-1102; *S.B. v. California Dep’t of Educ.*, 327 F. Supp. 3d
18 1218, 1256, 1258-59 (E.D. Cal. 2018). Furthermore, unlike *Hoelt*, this issue does
19 not involve a pure question of law that would not benefit from the development of a
20 complete administrative record. *Hoelt*, 967 F.2d at p. 1303. Plaintiffs’ argument is
21 further undermined by the fact that they have not alleged that all special education
22 students in the state have been denied a FAPE by their school districts during
23 distance learning. Nor could they, given the wide variety of needs of students with
24 disabilities, and the differing ways that different school districts provide IEP
25 services during distance learning. Calomese Decl. ¶¶ 7-9.

26 Finally, Plaintiffs cannot show they are entitled to prospective injunctive relief
27 against the State Order. The California of Department of Public Health recently
28 issued guidance specifying the conditions in which small “groups of children and

1 youth” may receive “in-person child supervision and limited instruction, targeted
 2 support services, and facilitation of distance learning” from adults “in controlled,
 3 supervised, and indoor environments.” Wessel Decl. Ex. XX. Schools otherwise
 4 prohibited from reopening for in-person instruction under the State Order are
 5 covered by the new guidance. *Id.*, Exs. XX, YY. Accordingly, under currently
 6 operative state health directives, schools otherwise prohibited from reopening for
 7 in-person instruction may serve students on-site if they maintain cohorts of no more
 8 than 14 children or youth and two supervising adults and prevent the cohorts from
 9 physically interacting, and may provide one-to-one specialized services outside
 10 those cohorts. *Id.*, Ex. XX.⁸ Plaintiffs rest their allegations of denial of a FAPE on
 11 the fact that their schools operated entirely remotely after closing last spring.
 12 Under the recent guidance, it is beyond dispute that the State Order authorizes
 13 schools to provide special education and related services in-person, on campus, if
 14 necessary to provide a FAPE under a child’s IEP.

15 **CONCLUSION**

16 For the reasons set forth above, Plaintiffs lack Article III standing and failed to
 17 exhaust their administrative remedies. Their lawsuit should be dismissed.

18 Dated: August 25, 2020

Respectfully submitted,

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 21 JENNIFER G. PERKELL
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27 ⁸ CDE guidance from Spring 2020 also addressed how schools can provide
 28 small group and one-on-one, in-person instruction to students with disabilities in
 certain circumstances, notwithstanding school closures. Calomese Decl. ¶¶ 7-9.

CERTIFICATE OF SERVICE

Case Name: Brach v. Newsom, et al. No. 2:20cv06472 SVW (AFMx)

I hereby certify that on August 25, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PRELIMINARY AND/OR PERMANENT INJUNCTION (Dkt. 28)**
2. **SUPPLEMENTAL DECLARATION OF JAMES WATT, M.D., M.P.H. (w/ Exhibits PP – QQ)**
3. **DECLARATION OF HEATHER CALOMESE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PRELIMINARY INJUNCTION AND/OR PERMANENT INJUNCTION (w/ Exhibits RR – SS)**
4. **DECLARATION OF DARIN L. WESSEL IN SUPPORT OF SUPPLEMENTAL OPPOSITION TO PRELIMINARY AND/OR PERMANENT INJUNCTION AND ATTACHED EXHIBITS (w/ Exhibits TT – YY)**
5. **DECLARATION OF RACHAEL MAVES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PRELIMINARY AND/OR PERMANENT INJUNCTION**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 25, 2020, at San Francisco, California.

N. Codling
Declarant

/s/ N. Codling
Signature