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 19
 20 **UNITED STATES DISTRICT COURT**
 21 **CENTRAL DISTRICT OF CALIFORNIA**

22 **MATTHEW BRACH**, an individual,
 23 *et al.*,
 24 Plaintiffs,
 25 v.
 26 **GAVIN NEWSOM**, in his official ca-
 27 pacity as the Governor of California, *et*
 28 *al.*,
 Defendants.

Case Number: 2:20-CV-06472-SVW-AFM

**SUPPLEMENTAL POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR PRELIMINARY
 INJUNCTION**

Judge: Hon. Stephen V. Wilson
 Courtroom: 10A

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1 Plaintiffs provide this supplemental briefing pursuant to the Court’s minute order
 2 issued on August 17, 2020. ECF No. 48. As explained below, Plaintiffs have demon-
 3 strated the required elements for Article III standing, and Plaintiffs asserting claims
 4 under the Americans with Disabilities Act (“ADA”), Rehabilitation Act, and Individu-
 5 als with Disabilities Education Act (“IDEA”) were not required to exhaust administra-
 6 tive remedies. Finally, Plaintiffs have submitted supplemental declarations from
 7 Charles Cicchetti, Sean Kaufman, and Dr. Jayanta Bhattacharya that highlight the Or-
 8 der’s irrationality and confirm that injunctive relief is warranted.

9 **I. PLAINTIFFS HAVE ARTICLE III STANDING**

10 The “irreducible constitutional minimum of [Article III] standing contains three el-
 11 ements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “First, the plaintiff
 12 must have suffered an ‘injury in fact’” that is “concrete and particularized” and “ac-
 13 tual or imminent.” *Id.* “Second, there must be a causal connection between the injury
 14 and the conduct complained of, such that the injury is fairly traceable to the action
 15 challenged.” *Id.* “Third, it must be likely, as opposed to merely speculative, that the
 16 injury will be redressed by a favorable decision.” *Id.* at 561.

17 Where multiple plaintiffs are involved, the “presence of one party with standing is
 18 sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. Forum*
 19 *for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006); *see also Juliana v.*
 20 *United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). Here, at least one Plaintiff has
 21 standing to assert each of the claims in the First Amended Complaint.

22 **A. Plaintiffs Have Demonstrated a Concrete Injury Traceable to De-**
 23 **fendants’ Actions**

24 The Governor’s Order prohibits every school located in a county on the state’s
 25 monitoring list—public or private—from opening for in-person education. As Plain-
 26 tiffs have demonstrated, the ban on in-person learning has had, and will continue to
 27 have, devastating consequences for their children. *See* ECF No. 28-1 at 3-9, 12-13.
 28 Most significantly, so-called “distance learning” does not provide an adequate mini-
 mum education, and the Order irrationally treats children who live in counties on the

1 state’s monitoring list differently than children who live in other counties. Defendants
 2 have thus deprived Plaintiffs and their children of their Fourteenth Amendment rights
 3 to due process and equal protection. *See Tourgeman v. Collins Fin’l Servs., Inc.*, 755
 4 F.3d 1109, 1114–15 (9th Cir. 2014) (the “injury required by Art. III” may exist either
 5 through statutory or constitutional violations); *see, e.g.*, Beaulieu Decl. ¶¶ 6–11;
 6 Hackett Decl. ¶ 8; Walsh Decl. ¶ 4; Onibokun Decl. ¶ 8. The Order inflicts other con-
 7 crete injuries as well. *See, e.g.*, Petrilla Decl. ¶¶ 6–8 (loss of social interaction); Brach
 8 Decl. ¶ 7 (depression), Mitrowke Decl. ¶¶ 5–6 (depression).¹

9 Several Plaintiffs are parents of disabled children with Individual Educational Pro-
 10 grams (“IEPs”) and thus have enforceable rights under the IDEA, ADA, and Rehabili-
 11 tation Act. *See, e.g.*, Ruiz Decl ¶ 15; Berma ¶ 12; *see also Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526 (2007). Because schools cannot pro-
 12 vide through distance learning the essential and legally required services these chil-
 13 dren need to thrive, the Order inflicts special injury on Plaintiffs’ disabled children.
 14 *See, e.g.*, Ramirez Decl. ¶¶ 5–6; Bema Decl. ¶ 12.

16 These injuries—which were imminent when Plaintiffs filed their complaint and are
 17 now actual given the start of the Fall term—are all traceable to the Governor’s Order.
 18 Before the Order was issued on July 17, 2020, each local educational agency (“LEA”)
 19 was free to decide whether and how to open for in-person education. According to
 20 guidance issued by the California Department of Education, “the final decision to reo-
 21 pen” was to “be made by each LEA working in close collaboration with local health
 22 officials and community stakeholders, including *families*.” Ex. A at 1 (emphasis
 23 added). Prior to the issuance of the Governor’s order, a number of schools voiced ten-
 24 tative plans to reopen, with the “most popular model” involving “a hybrid, or blended,
 25 model of instruction, which has students attending some classes on campus and doing
 26

27 _____
 28 ¹ It is well established that parents have standing to assert claims on behalf of their children. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976); *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007) (parental claims on behalf of their children under the ADA and Rehabilitation Act).

1 some work at home.”² Although some LEAs had not yet finalized their plans for the
 2 Fall, several of the schools attended by Plaintiffs’ children likely would have resumed
 3 in-person education. *See, e.g.*, Brach Decl. ¶ 9; Hackett Decl. ¶ 6. The only reason
 4 these schools, and many others, are not currently offering in-person education is that
 5 they are in counties currently on the state’s monitoring list. The concrete injuries
 6 Plaintiffs have asserted are thus directly traceable to the Governor’s July 17 Order.

7 **B. An Injunction Would Redress Plaintiffs’ Injuries**

8 Plaintiffs’ burden to establish *Lujan*’s third element is “relatively modest.” *Renee*
 9 *v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (citing *Bennett v. Spear*, 520 U.S.
 10 154, 171 (1997)). “Plaintiffs need not demonstrate that there is a ‘guarantee’ that their
 11 injuries will be redressed by a favorable decision.” *Id.* Instead, Plaintiffs need to show
 12 only “a substantial likelihood that the relief sought would redress the injury.” *Mayfield*
 13 *v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (citation omitted). Plaintiffs thus
 14 do not have the burden of demonstrating that their children *would* receive a basic min-
 15 imum education or receive identical education to children in other counties if this
 16 Court enjoins the Order—it is sufficient that an injunction would significantly in-
 17 crease the likelihood that their children would receive such an education by allowing
 18 their schools to reopen for in-person instruction. *See Regents of Univ. of Cal. v. Bakke*,
 19 438 U.S. 265, 280 n.14 (1978) (“[E]ven if Bakke had been unable to prove that he
 20 would have been admitted [to medical school] in the absence of the [challenged] spe-
 21 cial program, it would not follow that he lacked standing.”).

22 An injunction would also provide redress for the injuries suffered as a result of De-
 23 fendants’ violations of the IDEA, ADA, and Rehabilitation Act. Once the Order is en-
 24 joined, schools will be free to provide the legally required services mandated in Plain-
 25 tiffs’ IEPs—many of which require some type of in-person educational component,
 26

27 _____
 28 ² *See Shivani Patel, What we know: Ventura County school districts’ plan for fall*
2020 reopening, so far, VC Star (July 8, 2020), <https://tinyurl.com/y3zpwao> (stating
 that the “majority” of schools in Ventura County “are at least offering a hybrid of in-
 person/online and fully remote learning”).

1 *see* ECF No. 28-1 at 21–23—and make reasonable accommodations to ensure that dis-
2 abled children have the same educational opportunities as non-disabled children. Alt-
3 hough an injunction would not guarantee full compliance with Plaintiffs’ IEPs, it
4 would significantly increase the chance that schools will faithfully implement them.
5 *See Renee*, 686 F.3d at 1013–15.

6 Moreover, an injunction would restore the procedural safeguards guaranteed to
7 children and parents under Section 1415 of the IDEA. Under normal circumstances, if
8 a school or district fails to implement IEPs or otherwise fulfill their obligations under
9 the IDEA, affected parents and children can utilize the administrative procedures
10 guaranteed by the IDEA to remedy the issue. 20 U.S.C. § 1415.³ But, as explained be-
11 low, the Order renders these administrative procedures entirely useless. *Infra* pp. 9–
12 12. Enjoining the Order would restore the efficacy of these administrative procedures
13 and allow parents and children to once again use the administrative process to address
14 issues caused by these local decisions. *Cf. Bakke*, 438 U.S. at 280 n.14 (enjoining
15 program would “permit Bakke to compete” in application process).

16 It is possible, of course, that various counties could issue their *own* orders prevent-
17 ing in-person education if the Governor’s Order is enjoined, but Plaintiffs’ standing
18 does not turn on hypothetical actions *other* government actors may take in the future.
19 Otherwise a plaintiff would be required to preemptively sue every government agency
20 that *might* injure him somewhere down the line. That is not the law. *See Vill. of Ar-*
21 *lington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261–62 (1977). And in
22 any event, there is no evidence in the record that any of the counties in which Plain-
23 tiffs reside are contemplating such a blanket prohibition.⁴

24
25 ³ In California, parents may file complaints with the State’s Department of Educa-
26 tion. Cal. Educ. Code § 56500.2; Cal. Code Regs. tit. 5, § 4670; *see also* Cal. Code
27 Regs. tit. 5, § 4650. The Legislature encourages parties to mediate these disputes to
28 reach a solution. Cal Educ. Code § 56500.3. Finally, parents and students are guaran-
teed an administrative hearing before a hearing officer. Cal. Educ. Code § 56505.

⁴ If Defendants present evidence that Counties *are* contemplating such orders (or have
already issued them), Plaintiffs should be given the opportunity to amend their com-
plaint to name relevant county officers as additional defendants.

1 To be sure, some LEAs have independently decided not to resume in-person in-
2 struction this Fall, and others may decide not to reopen even if the Order is enjoined.
3 But that possibility likewise does not defeat standing because several Plaintiffs send
4 their children to schools that *are* likely to open for in-person instruction if this Court
5 grants an injunction. Plaintiff Brach, for example, has “firsthand knowledge of the
6 steps that [his] district has taken to be able to safely reopen [the] sixteen schools for
7 the upcoming 2020-2021 school year.” Brach Decl. ¶ 9. “[A]n overwhelming amount
8 (65%) of parents in [his] district support[] returning the students to school, for in-per-
9 son learning,” suggesting that the district will likely open as soon as possible. *Id.* ¶ 13.
10 Similarly, Plaintiff Hackett’s children attend a private school in Los Angeles County
11 that made “huge investments of effort and money to comply with the CDC and health
12 directives, so that children can safely attend school in person.” Hackett Decl. ¶¶ 2, 6.⁵

13 Moreover, if the Order is enjoined, parents who currently send their children to
14 schools in districts that decide not to reopen—such as L.A. Unified—will have the op-
15 tion of sending their children to private schools or charter schools that are open for in-
16 person education. Furthermore, unlike the monitoring list, which Plaintiffs are power-
17 less to influence, school districts are required to take parents’ views into consideration
18 when deciding core educational issues, including whether to reopen for in-person in-
19 struction. For example, in 2016, the California Legislature adopted a statute that,
20 among other things, mandates “that a [school] district consult[] with its ... parents”
21 when developing plans for “[s]tudent [a]chievement.” *An Overview of the Local Con-
22 trol Funding Formula*, LEGISLATIVE ANALYST’S OFFICE (Dec. 2013),
23 <https://lao.ca.gov/reports/2013/edu/lcff/lcff-072913.pdf>; Cal. Educ. Code

24
25
26 ⁵ Plaintiffs have attested that they will send their children back to school for in-person
27 education as soon as it is available. *See* ECF No. 28-1 at 7–9; *see, e.g.*, Hackett Supp.
28 Decl. ¶ 10; Brach Supp. Decl. ¶ 5; Ziegler Supp. Decl. ¶ 8; Ruiz Supp. Decl. ¶ 7. In-
deed, Plaintiff Petrilla has already transferred his child to a private school that ob-
tained a waiver for in-person education. Petrilla Supp. Decl. ¶ 4. If public schools reo-
pen, he will immediately send his child back for in-person education. *Id.* ¶ 7.

1 §§ 42238.02, *et seq.* Indeed, “[p]arental [i]nvolvement” is one of the eight “priority ar-
2 eas” under California’s public education system. LEGISLATIVE ANALYST’S OFFICE, *su-*
3 *pra*, Fig. 8. Consequently, enjoining the Order would not leave Plaintiffs completely
4 at the mercy of independent actors because Plaintiffs can petition their school districts
5 to reopen for in-person instruction—a view widely shared by a majority of parents,
6 *see, e.g.*, Brach Decl. ¶ 13—the “practical consequence” of an injunction would thus
7 be to “significant[ly] increase the likelihood” that Plaintiffs’ schools will open for in-
8 person education this Fall. *Utah v. Evans*, 536 U.S. 452, 464 (2002).

9 Because Plaintiffs easily satisfy the basic requirements for standing, there is no ob-
10 stacle preventing this Court from reaching the merits of Plaintiffs’ claims.

11 **II. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINIS-** 12 **TRATIVE REMEDIES BEFORE FILING SUIT**

13 While a plaintiff must generally exhaust administrative remedies before bringing
14 claims under the IDEA or otherwise seeking “adequate education for disabled youth”
15 under other laws, *Doe ex. rel. Brockhuis v. Arizona Dep’t of Educ.*, 111 F.3d 678,
16 680–81, 685 (9th Cir. 1997) (citing 20 U.S.C. § 1415(e)(2), (f)), there are exceptions
17 for both the ADA/Rehabilitation Act claims and the IDEA claims that apply here. *See*
18 *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302–03 (9th Cir. 1992).

19 *First*, when a plaintiff brings claims under federal laws other than the IDEA—such
20 as the ADA or Rehabilitation Act—they must exhaust the IDEA’s administrative rem-
21 edies *only* when they are “seeking relief that is also available” under the IDEA. 20
22 U.S.C. § 1415(l); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 (2017). “[T]he only
23 ‘relief’ the IDEA makes ‘available’ is relief for the denial of a [free and appropriate
24 public education or] FAPE.” *Id.* at 754–55. A free and appropriate education consists
25 of “special education” and “related services. 20 U.S.C. § 1401(9); *Andrew F. ex rel.*
26 *Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 994 (2017). “‘Special education’
27 is ‘specially designed instruction ... to meet the unique needs of a child with a disabil-
28 ity’; ‘related services’ are the support services ‘required to assist a child ... to benefit
from’ that instruction.” *Id.* (citing 20 U.S.C. §§ 1401(26), (29)).

1 Just because a plaintiff’s claims are “‘educational’ in nature” or “fall[] within the
2 general ‘field’ of educating disabled students” does not mean that they are subject to
3 the IDEA’s exhaustion requirement. *Fry*, 137 S. Ct. at 752 & n.3 (citing with ap-
4 proval *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir. 2011) (en banc)).
5 “[T]he IDEA guarantees individually tailored services, while Title II [of the ADA]
6 and § 504 [of the Rehabilitation Act] promise non-discriminatory access to public in-
7 stitutions.” *Id.* at 756. There may be “some overlap in [the] coverage” of these laws,
8 but these “statutory differences . . . mean that a complaint brought under Title II and
9 § 504 might [] seek relief for simple discrimination, irrespective of the IDEA’s FAPE
10 obligation.” *Id.* For example, a wheelchair-bound student need not exhaust the IDEA’s
11 administrative remedies before asking her school to install a ramp so that she can ac-
12 cess the school’s educational services. *Id.* Likewise, a student with an “expressive
13 communication disorder” may ask that he be allowed to utilize a “letter board” in class
14 without first exhausting the IDEA’s administrative remedies, *Duncan v. San Dieguito*
15 *Union High Sch. Dist.*, 2019 WL 4016450, at *1–*4 (S.D. Cal. Aug. 26, 2019).

16 The Supreme Court in *Fry* suggested “asking a pair of hypothetical questions” to
17 determine “whether the gravamen of a complaint against a school concerns the denial
18 of a FAPE, or instead addresses disability-based discrimination.” 137 S. Ct. at 756.
19 “First, could the plaintiff have brought essentially the same claim if the alleged con-
20 duct had occurred at a public facility that was *not* a school? And second, could an
21 *adult* at the school . . . have pressed essentially the same grievance?” *Id.* (emphasis in
22 original). If the answers are “yes,” then the complaint is “unlikely” to be about the de-
23 nial of a FAPE and therefore not subject to the IDEA’s exhaustion requirement. *Id.*

24 Here, Plaintiffs’ claims under the ADA and Rehabilitation Act are not subject to
25 the IDEA’s exhaustion requirement because those claims do not “seek[] relief for the
26 denial of a free and appropriate public education”—“special education” and “related
27 services,” 20 U.S.C. § 1401—but instead seek reasonable accommodations to permit
28 them to receive instruction on the same terms as non-disabled students. *Fry*, 137 S. Ct.
at 754–55. Plaintiffs’ ADA and Rehabilitation Act claims invoke the rule that when a

1 neutral policy “burdens [disabled] persons in a manner different and greater than it
2 burdens others,” that policy “discriminates against [those individuals] by reason of
3 their disability.” *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Thus, un-
4 der both the ADA and the Rehabilitation Act, “educational institutions are required to
5 provide a disabled student with reasonable accommodations to ensure that the institu-
6 tion’s requirements do not discriminate on the basis of the student’s disability.” *Zukle*
7 *v. Regents of Univ. of California*, 166 F.3d 1041, 1046 (9th Cir. 1999).

8 Plaintiffs ask that they be given a reasonable accommodation allowing them to ac-
9 cess their education in person because, as a result of their disabilities, they are unable
10 to access their education online. The Order’s online-only education mandate burdens
11 Z.R. and other disabled children “in a manner different and greater than” other chil-
12 dren. *Crowder*, 81 F.3d at 1484; ECF No. 28-1 at 23–24. As Plaintiff Ruiz explained
13 in her declaration, because of his disability, Z.R. “cannot sit still and [] does not have
14 the ability to understand commands through an online format.” Ruiz Decl. ¶ 6.

15 Ramirez explained that, because of her child’s disability, he “cannot tolerate distance
16 learning and he basically shut down.” Ramirez Decl. ¶ 9. And Plaintiff Hawkins ex-
17 plained that, as a result of his son’s disability, “the online format [for instruction] was
18 difficult for him to follow and to comprehend, and he struggled a lot.” Hawkins Decl.
19 ¶¶ 5, 11. Thus, like the wheelchair-bound student seeking a ramp or the communica-
20 tion-impaired student seeking use of a letter board, Plaintiffs seek reasonable accom-
21 modation to ensure equal access to public education: namely, to access their instruc-
22 tion in person. This is “relief for simple discrimination, irrespective of the IDEA’s
23 FAPE obligation.” *Fry*, 137 S. Ct. at 756.

24 Application of *Fry*’s “hypothetical questions” confirms the conclusion that Plain-
25 tiffs seek relief other than for the denial of a FAPE. *Id.* A plaintiff could “have
26 brought essentially the same claim if the alleged conduct had occurred at a public fa-
27 cility that was *not* a school.” *Fry*, 137 S. Ct. at 756. For example, if state law required
28 local public libraries to provide their services only online, a disabled adult who was
burdened “in a manner different and greater than” others by this requirement could

1 seek in in-person access to the services under the ADA and Rehabilitation Act.
2 *Crowder*, 81 F.3d at 1484. Likewise, “an *adult* at the school” could “press[] essen-
3 tially the same grievance” as the Plaintiffs here. *Fry*, 137 S. Ct. at 756. If a disabled
4 teacher is burdened by the remote-instruction requirement “in a manner different and
5 greater than” other teachers, that teacher could bring a claim under the ADA and Re-
6 habilitation Act, albeit likely under the employment-related sections of those statutes.
7 *Crowder*, 81 F.3d at 1484. Thus, Plaintiffs’ ADA and Rehabilitation Act claims do not
8 “seek[] relief available under” the IDEA and are not subject to the IDEA’s exhaus-
9 tion requirement. *Fry*, 137 S. Ct. at 754–57.

10 **Second**, claims for relief normally available under the IDEA may nevertheless be
11 exempt from exhaustion. *See Hoeft*, 967 F.2d at 1302–03 (IDEA’s “exhaustion re-
12 quirement is not a rigid one, and is subject to certain exceptions.”). In determining
13 whether an exception applies, a court’s “inquiry is whether pursuit of administrative
14 remedies under the facts of a given case will further the general purposes of exhaus-
15 tion and the congressional intent behind the administrative scheme.” *Id.* at 1303.
16 These purposes are to “allow[] for the exercise of discretion and educational expertise
17 by state and local agencies, afford[] full exploration of technical educational issues,
18 further[] development of a complete factual record, and promote[] judicial efficiency
19 by giving these agencies the first opportunity to correct shortcomings in their educa-
20 tional programs for disabled children.” *Id.*

21 Courts recognize that “there are situations in which exhaustion serves no useful
22 purpose” and is therefore not required. *Hoeft*, 967 F.2d at 1303. First, exhaustion is
23 not required when “it would be futile to use the due process procedures.” *Id.* (citation
24 omitted). Second, exhaustion is not required when the challenged policy is one “of
25 general applicability that is contrary to the law.” *Id.* at 1303–04 (citation omitted).
26 Third, exhaustion is not required when “it is improbable that adequate relief can be
27 obtained by pursuing administrative remedies.” *Id.* at 1304 (citation omitted). “Ad-
28 ministrative remedies are generally inadequate where structural, systemic reforms are

1 sought.” *Id.* at 1309. For example, when a policy is “enforced at the highest adminis-
 2 trative level, so that the only meaningful remedy is through the courts,” exhaustion is
 3 not required. *Id.* at 1305; *see, e.g., J.S. ex rel. N.S. v. Attica Cen. Schls*, 386 F.3d 107,
 4 115 (2d Cir. 2004); *New Mexico Ass’n for Retarded Citizens v. State of N.M.*, 678
 5 F.2d 847, 850–51 (10th Cir. 1982); *King v. Pine Plains Cent. Sch. Dist.*, 918 F. Supp.
 6 772, 781 (S.D.N.Y. 1996) (“administrative hearing officers . . . generally do not have
 7 the authority to set new policies or to alter existing ones,” so “requiring a parent to ex-
 8 haust his administrative remedies when he is challenging a generally applicable policy
 9 or procedure would be futile”); *Cordero by Bates v. Penn. Dept. of Educ.*, 795 F.
 10 Supp. 1352, 1362–63 (M.D. Penn. 1992); *Scaggs v. New York Dept. of Educ.*, No. 06-
 11 CV-0799, 2007 WL 1456221, at *6–*8 (E.D.N.Y. May 16, 2007) (collecting cases).⁶

12 Plaintiffs are exempt from the IDEA’s exhaustion requirement for multiple, inde-
 13 pendently sufficient reasons. As an initial matter, resort to administrative remedies
 14 here would not serve the purposes of exhaustion. *See Hoeft*, 967 F.2d at 1303. The Or-
 15 der is tantamount to a state law prohibiting nearly every school in the State of Califor-
 16 nia from providing in-person educational services to children: there is no room for the
 17 “discretion . . . by state and local agencies” and no ability for “these agencies . . . to
 18 correct shortcomings in their educational programs for disabled children.” *Id.* The Or-
 19 der is simply a blanket ban on all in-person educational services that no state or local
 20 agency may override. *See Jackie S. v. Connelly*, 442 F. Supp. 2d 503, 519 (S.D. Ohio
 21 2006) (exhaustion not required for challenge to administrative rule); *Jacky W. v. New*
 22 *York City Bd. of Educ.*, 848 F. Supp. 358, 361 (E.D.N.Y. 1994) (exhaustion not re-
 23 quired for challenge to state law); *see also Handberry v. Thompson*, 446 F.3d 335,

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 25 ⁶ *Doe* is consistent with this line of cases. In that case, the agency was unaware of the
 26 problems at its facility and, “[o]nce alerted to its oversight by the lawsuit, . . . took
 27 steps to begin to remedy it.” 111 F.3d at 682. Thus, *Doe* did not involve “issues of
 28 law or policy.” *Id.* at 683. Instead, the plaintiffs’ claims boiled down to numerous fac-
 tual disputes about whether, as to each individual plaintiff class member, the facility
 had denied him or her a FAPE. *Id.* Because there was no policy at issue, but rather
 only individualized determinations based on specific facts, the court held that plain-
 tiffs’ claims were not systemic and exhaustion was required. *Id.*

1 344 (2d Cir. 2006) (plaintiffs did not need to exhaust when alleging an “absence of
2 any services whatsoever”).

3 Exhaustion is not required here because “it would be futile to use the due process
4 procedures.” *Hoelt*, 967 F.2d at 1303. The issues created by the Order cannot be
5 solved by filing complaints with school districts or the State Department of Education,
6 as the entities have no authority to override the Order. *See* Cal. Educ. Code
7 §§ 56500.2; 56500.3.⁷ Likewise, “it is improbable that adequate relief can be obtained
8 by pursuing administrative remedies” because Plaintiffs’ IDEA claim is systemic,
9 *Hoelt*, 967 F.2d at 1304. Providing Plaintiffs relief requires an injunction barring De-
10 fendants from enforcing the Order, which is “structural relief that only a court can or-
11 der.” *Doe*, 111 F.3d at 683. Plaintiffs claim that the *entire educational regime* created
12 by the Order—online-only instruction and services—violates the IDEA because
13 schools simply cannot provide free and appropriate public education to disabled stu-
14 dents without *some amount* of in-person contact. *See* ECF No. 28-1 at 21–22.⁸ Physi-
15 cal and occupational therapy, explicitly required by the IDEA, 20 U.S.C. § 1401(26),
16 cannot be provided remotely. Nor can countless other kinds of “specialized” instruc-
17 tion. *E.R.K. ex rel. R.K. v. Haw. Dept. of Educ.*, 728 F.2d 982, 990 (9th Cir. 2013);
18 *see, e.g.*, Walker Decl. ¶¶ 4-5, 7.⁹ Thus, Plaintiffs’ claim that state law (in the form of
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20 ⁷ *Paul G. by & through Steve G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d
21 1096 (9th Cir. 2019), did not overrule Ninth Circuit precedent clearly holding that ex-
22 haustion is not required when “the hearing officer lacks the authority to grant the relief
23 sought.” *Hoelt*, 967 F.2d at 1304 (citation omitted). As *Hoelt* explained, this excep-
24 tion is spelled out explicitly in the legislative history of the IDEA. *Id.* (quoting
H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)).

25 ⁸ This challenge to a statewide policy asks “only questions of law,” *Hoelt*, 967 F.2d at
26 1305, specifically, whether an online-only education system fails, as a matter of law,
to comport with the requirements of the IDEA.

27 ⁹ While Plaintiffs have not asserted class claims, courts have held that claims were
28 systemic even when plaintiffs did not bring class actions. *See, e.g., King*, 918 F. Supp.
at 781–82; *Scaggs*, 2007 WL 1456221, *6–8; *see also J.S.*, 386 F.3d at 110, 113–15
(plaintiffs had withdrawn their motion for class certification pending appeal).

1 the Order) creates a system of special education that fails to comport with the IDEA
 2 falls squarely within the exceptions to the IDEA’s exhaustion requirements. *See Hoeft*,
 3 967 F.2d at 1302–04; *Handberry*, 446 F.3d 335; *J.S.*, 386 F.3d 107; *New Mexico*
 4 *Ass’n for Retarded Citizens*, 678 F.2d 847; *Jackie S.*, 442 F. Supp. 2d 503; *King*, 918
 5 F. Supp. 772; *Jacky W.*, 848 F. Supp. 358; *Cordero*, 795 F. Supp. 1352; *Scaggs*, 2007
 6 WL 1456221 (collecting cases).

7 III. EVIDENCE CONFIRMS THAT THE ORDER IS IRRATIONAL.

8 Recent evidence confirms that the criteria the state is using to place counties on the
 9 monitoring list are irrational. CDPH has never calculated the severity of influenza or
 10 other respiratory disease by focusing on positive test results. Kaufman Supp. Decl.
 11 ¶¶ 5-7. Yet nearly all of the counties on the monitoring list are included solely because
 12 they currently exceed the case rate of 100 per 100,000 residents over 14 days. *See Cic-*
 13 *chetti Supp. Decl.* ¶ 11. That metric is biased because it is directly correlated with the
 14 number of *tests performed*, not with risks posed to the wider community. *Id.* ¶¶ 6-7.
 15 Moreover, since the majority of people infected are asymptomatic, positive results do
 16 not indicate an increased burden on the healthcare system. Kaufman Supp. Decl. ¶ 11.
 17 Use of case counts is also irrational because a positive test does not indicate that a per-
 18 son is infectious—indeed, a person can test positive 80 days after contracting the dis-
 19 ease, long after they have ceased to be infectious—and the PCR test often yields posi-
 20 tive results when people have merely had *contact* with the virus but are neither sick-
 21 ened nor infectious. *Id.* ¶ 13. The only metric that reliably indicates whether the dis-
 22 ease is actually spreading dangerously is hospitalization rates. *Cicchetti Supp. Decl.*
 23 ¶ 12. But if that were the only metric used, *zero counties* would currently be on the
 24 monitoring list. *Id.* ¶ 13. And even if the state were to include the metrics measuring
 25 the availability of ICU beds and ventilators, only 7 counties would be on the list as of
 26 August 25, 2020. *Id.* ¶ 16. Because it is both irrational and cruel to deprive Plaintiffs’
 27 children of in-person education based on meaningless and biased data, this Court
 28 should issue a preliminary injunction barring Defendants from enforcing the Order,
 and return responsibility for school reopenings to local educators.

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Date: August 25, 2020

Respectfully submitted,
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