

**No. 23-55714**

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**In the United States Court of Appeals for the Ninth Circuit**

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CHAYA LOFFMAN AND JONATHAN LOFFMAN, ET AL.,  
Plaintiffs-Appellants,

v.

CALIFORNIA DEPARTMENT OF EDUCATION, ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court  
for the Central District of California  
Hon. Josephine L. Staton  
(2:23-cv-01832-JLS-MRW)

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**EXCERPTS OF RECORD VOLUME 1 OF 1**

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JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHAYA LOFFMAN and JONATHAN  
LOFFMAN, on their own behalf and on  
behalf of their minor child M.L., et al.

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
EDUCATION, et al.

Defendants.

CASE NO. 2:23-cv-01832-JLS-MRW

**JUDGMENT OF DISMISSAL**

**ER-003**

1 On August 9, 2023, the Court issued an Order (Doc. 50) granting Defendants'  
2 Motions to Dismiss (Docs. 29, 31) and dismissing Plaintiffs' Complaint (Doc. 1). The  
3 Court gave Plaintiffs Jean & Jerry Friedman Shalhevet High School and Samuel A. Fryer  
4 Yavneh Hebrew Academy ("School Plaintiffs") 21 days to file an amended complaint and  
5 noted that failure to file an amended complaint in a timely manner would result in  
6 dismissal of this action. (Order at 51.) Although more than 21 days have passed, School  
7 Plaintiffs have not filed an amended complaint. Accordingly, a JUDGMENT OF  
8 DISMISSAL is hereby entered.

9  
10 DATED: September 19, 2023



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HON. JOSEPHINE L. STATON  
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHAYA LOFFMAN and JONATHAN  
LOFFMAN, on their own behalf and on behalf  
of their minor child M.L.; FEDORA NICK and  
MORRIS TAXON, on their own behalf and on  
behalf of their minor child K.T.; SARAH  
PERETS and ARIEL PERETS, on their own  
behalf and on behalf of their minor child N.P.;  
JEAN & JERRY FRIEDMAN SHALHEVET  
HIGH SCHOOL; and SAMUEL A. FRYER  
YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
EDUCATION; TONY THURMOND, in his  
official capacity as Superintendent of Public  
Instruction; LOS ANGELES UNIFIED  
SCHOOL DISTRICT; and ANTHONY  
AGUILAR, in his official capacity as Chief of  
Special Education, Equity, and Access,

Defendants.

CASE NO. 2:23-cv-01832-JLS-MRW

**ORDER: (1) GRANTING  
DEFENDANTS' MOTIONS TO  
DISMISS CASE (Docs. 29, 31); AND  
(2) DENYING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION (Doc. 28)**

Before the Court are: (1) a Motion to Dismiss Case filed by Defendants Anthony Aguilar and Los Angeles Unified School District (the “LAUSD Defendants”) (LAUSD Mot., Doc. 29); and (2) a Motion to Dismiss Case filed by Defendants California Department of Education and Tony Thurmond (the “CDE Defendants”) (CDE Mot., Doc. 31; CDE Mem., Doc. 31-1). Plaintiffs Jean & Jerry Friedman Shalhevet High School, Samuel A. Fryer Yavneh Hebrew Academy (collectively, the “School Plaintiffs”), M. L., Chaya Loffman, Jonathan Loffman, K.T., Fedora Nick, Morris Taxon, N. P., Ariel Perets, and Sarah Perets, (collectively, “Plaintiffs”) opposed, and the LAUSD Defendants and CDE Defendants (collectively, “Defendants”) replied. (MTD Opp., Doc. 37; LAUSD Reply, Doc. 42; CDE Reply, Doc. 43.) Also before the Court is a Motion for Preliminary Injunction filed by Plaintiffs. (MPI, Doc. 28; MPI Mem., Doc. 28-1.) Defendants opposed Plaintiffs’ Motion for Preliminary Injunction, and Plaintiffs replied. (LAUSD MPI Opp., Doc. 36; CDE MPI Opp., Doc. 37; MPI Reply, Doc. 44.) Having considered the parties’ briefs and pleadings and having held oral argument, for the reasons set forth below, the Court GRANTS Defendants’ Motions and DENIES Plaintiffs’ Motion.

## **I. BACKGROUND**

### **A. The Legal Framework**

#### **1. Children’s and Parents’ Rights Under the IDEA**

“The Individuals with Disabilities Education Act [(“IDEA”)] offers States federal funds to assist in educating children with disabilities.” *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017) (citations omitted). The IDEA lists as one of its primary purposes “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further

1 education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). According  
 2 to the Supreme Court, Congress’s intent in enacting the IDEA was “to bring previously  
 3 excluded handicapped children into the public education systems of the States and to  
 4 require the States to adopt procedures which would result in individualized consideration  
 5 of and instruction for each child.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.,*  
 6 *Westchester Cnty. v. Rowley*, 458 U.S. 176, 189 (1982) (emphasis deleted). The IDEA’s  
 7 aim, that is, “was more to open the door of public education to handicapped children on  
 8 appropriate terms than to guarantee any particular level of education once inside.” *Id.* at  
 9 192.

10 To receive IDEA funds, States “must provide a free appropriate public education—  
 11 a FAPE, for short—to all eligible children.” *Endrew F.*, 580 U.S. at 390 (citing 20 U.S.C.  
 12 § 1412(a)(1)). “A FAPE . . . includes both ‘special education’ and ‘related services.’” *Id.*  
 13 (quoting 20 U.S.C. § 1401(9)). “Special education” means “specially designed  
 14 instruction . . . to meet the unique needs of a child with a disability” and “related services”  
 15 are support services “required to assist a child . . . to benefit from that instruction.” *Id.*  
 16 (quoting 20 U.S.C. §§ 1401(26), (29)). “A State covered by the IDEA must provide a  
 17 disabled child with such special education and related services ‘in conformity with the  
 18 [child’s] individualized education program,’ or IEP.” *Id.* at 390–91 (quoting 20 U.S.C. §  
 19 1401(9)(D)).

20 “The IEP is ‘the centerpiece of the statute’s education delivery system for disabled  
 21 children.’” *Id.* at 391 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)). “A  
 22 comprehensive plan prepared by a child’s ‘IEP Team’ (which includes teachers, school  
 23 officials, and the child’s parents), an IEP must be drafted in compliance with a detailed set  
 24 of procedures.” *Id.* (quoting 20 U.S.C. § 1414(d)(1)(B)). “These procedures emphasize  
 25 collaboration among parents and educators and require careful consideration of the child’s  
 26 individual circumstances.” *Id.* (citing 20 U.S.C. § 1414). “The IEP is the means by which  
 27 special education and related services are ‘tailored to the unique needs’ of a particular  
 28 child.” *Id.* (quoting *Rowley*, 458 U.S. at 181).

1 Each child’s IEP “is prepared at a meeting between a qualified representative of the  
 2 local educational agency [(“LEA”)], the child’s teacher, the child’s parents or guardian,  
 3 and, where appropriate, the child[.]” *Rowley*, 458 U.S. at 182. The IEP is a written  
 4 document that contains the following:

5 (A) a statement of the present levels of educational performance of such  
 6 child, (B) a statement of annual goals, including short-term instructional  
 7 objectives, (C) a statement of the specific educational services to be provided  
 8 to such child, and the extent to which such child will be able to participate in  
 9 regular educational programs, (D) the projected date for initiation and  
 10 anticipated duration of such services, and (E) appropriate objective criteria  
 11 and evaluation procedures and schedules for determining, on at least an  
 12 annual basis, whether instructional objectives are being achieved.

13 *Id.* (quoting 20 U.S.C. § 1401(19)). An IEP should also include a statement of “academic  
 14 and functional goals designed to . . . [m]eet the child’s needs that result from the child’s  
 15 disability to enable the child to be involved in and make progress in the general education  
 16 curriculum[.]” 34 C.F.R. § 300.320(a)(2)(i)(A). LEAs “must review, and where  
 17 appropriate revise, each child’s IEP at least annually.” *Rowley*, 458 U.S. at 182 (citing 20  
 18 U.S.C. § 1414(a)(5)).

19 When an LEA develops an IEP for an eligible child to receive a FAPE, it “must  
 20 consider ‘the strengths of the child’; ‘the concerns of the parents for enhancing the  
 21 education of their child’; ‘the results of the initial evaluation or most recent evaluation of  
 22 the child’; and ‘the academic, developmental, and functional needs of the child.’”  
 23 *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1130 (9th Cir. 2021), *cert. denied sub*  
 24 *nom. S.W. on Behalf of B. W. v. Capistrano Unified Sch. Dist.*, 143 S. Ct. 98 (2022). The  
 25 IDEA provides parents with the right to participate in the development of their children’s  
 26 IEP, but “[p]arents’ participation does not require school authorities automatically to defer  
 27 to their concerns.” *Id.* at 1134. Furthermore, the IDEA requires State agencies to develop  
 28 an IEP that provides an education “reasonably calculated to enable the child to receive

1 educational benefits”—not “a potential-maximizing education.” *K.M. ex rel. Bright v.*  
2 *Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1095 (9th Cir. 2013) (first quoting *Rowley*, 458  
3 U.S. at 206–7; and then quoting *id.* at 197 n.21).

4 The IDEA contemplates some families will choose to place their children in private  
5 schools, including religious schools. Indeed, the IDEA requires LEAs to locate “parentally  
6 placed private school children” and spend a proportionate share of their IDEA funds on  
7 providing those children with a special education and related services “after timely and  
8 meaningful consultation with representatives of private schools[.]” See 20 U.S.C.  
9 § 1412(a)(10)(A)(i); 34 C.F.R. §§ 300.133–34.

10 LEAs’ obligations and families’ rights under the IDEA will differ depending on  
11 whether the family has chosen to send the child to a public school or a private school. “No  
12 parentally-placed private school child with a disability has an individual right to receive  
13 some or all of the special education and related services that the child would receive if  
14 enrolled in a public school.” 34 C.F.R. § 300.137(a). Parentally placed private school  
15 children, that is, do not have an individually enforceable right to receive a FAPE. See 20  
16 U.S.C. § 1412(a)(10)(C)(i) (stating that the IDEA “does not require a local educational  
17 agency to pay for the cost of education, including special education and related services, of  
18 a child with a disability at a private school or facility if that agency made a free appropriate  
19 public education available to the child and the parents elected to place the child in such  
20 private school or facility”). Instead, children with a disability who attend private schools  
21 are entitled to “equitable services” that must be “secular, neutral, and nonideological”—  
22 even when provided in religious schools. 20 U.S.C. § 1412(a)(10)(vi). LEAs do not  
23 create IEPs for children who attend private schools, but instead create a “services plan”  
24 describing the special education services that the LEA will provide “in light of the services  
25 that the LEA has determined” that it will make available to parentally placed private  
26 school students, based on its mandatory consultation with private school officials and  
27 parents. 34 C.F.R. §§ 300.137(b)–(c), 300.138(b).

1 When parents reject the LEA’s offer of a FAPE for their eligible child on the  
2 ground that the LEA has failed to make a FAPE available to the child—regardless of  
3 whether the LEA previously provided the student with special education and related  
4 services through an IEP or the LEA simply failed to offer the student a FAPE—they may  
5 unilaterally place the child in a private school and seek reimbursement from the LEA  
6 through an administrative due process hearing. *See, e.g., Forest Grove Sch. Dist. v. T.A.*,  
7 557 U.S. 230, 241–45 (2009); *see also* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R.  
8 § 300.148(c). “[A] court or a hearing officer may require the [LEA] to reimburse the  
9 parents for the cost of that enrollment” upon finding “that the agency had not made FAPE  
10 available to the child in a timely manner prior to that enrollment and that the private  
11 placement is appropriate.” 34 C.F.R. § 300.148(c).

12 When an LEA provides a FAPE to a child with a disability, it does so in accordance  
13 with the State’s public curriculum and under the direction and supervision of the State’s  
14 public educational agencies. *See* 20 U.S.C. § 1401(9) (a FAPE must be “provided at  
15 public expense, under public supervision and direction, and without charge; meet the  
16 standards of the State educational agency;” and be “provided in accordance with the  
17 [child’s IEP]”); *see also* 34 C.F.R. § 300.600 (providing that the State must monitor  
18 implementation of the IDEA by LEAs). Furthermore, LEAs must ensure that each child  
19 with a disability receives a FAPE “in the least restrictive environment”—*i.e.*, that children  
20 who receive a special education spend as much time as possible in the same classroom as  
21 children who do not receive such an education. 34 C.F.R. § 300.600(d)(1). LEAs must  
22 ensure, that is, that “to the maximum extent appropriate” children with disabilities are  
23 “educated with children who are nondisabled” and that learning outside the LEA’s regular  
24 classes “occurs only if the nature or severity of the disability is such that education in  
25 regular classes with the use of supplementary aids and services cannot be achieved  
26 satisfactorily.” 34 C.F.R. § 300.114(a).

27 Given the broad range of disabilities and special needs children can have, LEAs  
28 must “ensure that a continuum of alternative placements is available” to meet those varied

1 needs, and alternative placements may include “private institutions.” 34 C.F.R.  
 2 §§ 300.115, 300.118, 300.325. In such a scenario, the LEA may offer the child placement  
 3 at a private school as a FAPE through the IEP process. 34 C.F.R. §§ 300.115–16. LEAs  
 4 have an obligation to ensure that all placement decisions comply with the requirement that  
 5 children with disabilities be educated with nondisabled children to the maximum extent  
 6 possible and in the least restrictive environment. 34 C.F.R. § 300.116. Moreover,  
 7 alternative placements must be based on the child’s IEP; keep children as close as possible  
 8 to their home; and, if possible, provide that “the child is educated in the school that he or  
 9 she would attend if nondisabled.” *Id.*

10 In the context of alternative placements in private institutions, the decision is made  
 11 by the LEA, not the child’s parents. *Compare* 20 U.S.C. § 1412(a)(10)(B) (“Children  
 12 placed in, or referred to, private schools by public agencies”), *with id.* § 1412(a)(10)(A)  
 13 (“Children enrolled in private schools by their parents”). When an LEA chooses to place a  
 14 child in a private institution, it remains responsible for adequately implementing the  
 15 IDEA’s requirements: “Even if a private school or facility implements a child’s IEP,  
 16 responsibility for compliance . . . remains with the [State and local agencies].” 34 C.F.R.  
 17 § 300.325(c). Further, the State must ensure that private institutions chosen for an  
 18 alternative placement “meet standards that apply to State educational agencies and local  
 19 educational agencies and that children so served have all the rights the children would have  
 20 if served by such agencies.” 20 U.S.C. § 1412(a)(10)(B)(ii). The State “must . . .  
 21 [m]onitor compliance” with those standards “through procedures such as written reports,  
 22 on-site visits, and parent questionnaires[.]” 34 C.F.R. § 300.147.

23 When parents challenge the LEA’s alternative placement, courts must focus their  
 24 review “primarily on the [LEA’s] proposed placement, not on the alternative that the  
 25 family preferred” and “must uphold the appropriateness of the [LEA’s] placement if it was  
 26 reasonably calculated to provide [the child] with educational benefits.” *Gregory K. v.*  
 27 *Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). Additionally, courts reviewing  
 28 the appropriateness of an LEA’s IEP “are not free “to substitute [their] own notions of



1 sound educational policy for those of the school authorities which [they] review.” *Amanda*  
2 *J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001) (quoting  
3 *Rowley*, 458 U.S. at 206). “Because Congress intended states to have the primary  
4 responsibility of formulating each individual child’s education, [courts] must defer to their  
5 ‘specialized knowledge and experience’ by giving ‘due weight’ to the decisions of the  
6 states’ administrative bodies.” *Id.* (quoting *Rowley*, 458 U.S. at 206–8.) At least one  
7 United States Court of Appeals has held that a family’s religious and cultural needs do not  
8 require an LEA to include any religious or cultural instruction as part of an IEP. *See M.L.*  
9 *v. Smith*, 867 F.3d 487, 497–98 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 752 (2018).

10 When an LEA determines that it is appropriate to involve a private contractor in a  
11 child’s public education, the LEA and the private contractor are bound by federal  
12 regulations prohibiting the use of IDEA funds for “[r]eligious worship, instruction, or  
13 proselytization.” 34 C.F.R. § 76.532; *see also M.L.*, 867 F.3d at 496 (“[F]ederal  
14 regulations support the conclusion that states may not use IDEA funds to provide religious  
15 and cultural instruction.”). Even when LEAs provide services to “parentally-placed  
16 private school children” whose families have chosen to enroll in a private school, including  
17 a religious school, the IDEA requires that funds be used only for education that is  
18 “secular” and “neutral,” and to benefit the eligible children, as opposed to the private  
19 school itself or its general student population. *See, e.g.*, 20 U.S.C. § 1412(a)(10)(A)(vi)  
20 (“Special education and related services provided to parentally placed private school  
21 children with disabilities, including materials and equipment, shall be secular, neutral, and  
22 nonideological.”); 34 C.F.R. § 300.141(a) (“An LEA may not use [IDEA] funds . . . to  
23 finance the existing level of instruction in a private school or to otherwise benefit the  
24 private school.”).



## 2. California's "Nonsectarian" Requirement

California participates in the IDEA and has devised a statutory and regulatory framework for implementing and complying with the IDEA. Responsibility for implementing and ensuring compliance with the IDEA lies with the California Department of Education, which also administers IDEA funds to local agencies. *See, e.g., Los Angeles Cnty. Off. of Educ. v. C.M.*, 2011 WL 1584314, at \*3 (C.D. Cal. Apr. 22, 2011), *aff'd*, 550 F. App'x 387 (9th Cir. 2013).

The California Education Code provides that, "services provided by nonpublic, nonsectarian schools . . . and nonpublic, nonsectarian agencies . . . shall be made available . . . under contract with the [LEA] to provide the appropriate special educational facilities, special education, or designated instruction and services required by the individual with exceptional needs if no appropriate public education program is available." Cal. Educ. Code. § 56365(a). California Department of Education regulations define "nonsectarian" as "a private, nonpublic school . . . that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility and whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group." Cal. Code Regs. tit. 5, § 3001(p).

These provisions of the California Education Code and implementing regulations apply only when a child has been referred to or placed in a private school or facility to receive a FAPE—when the LEA, not the child's parents, decides that alternative placement in a private institution is appropriate. *See* Cal. Educ. Code. § 56365(a) (providing that services rendered by nonsectarian, nonpublic institutions must be in accordance with 34 C.F.R. § 300.146, which sets forth State agencies' obligations when they place a child in a private institution). California's provision for "nonsectarian, nonpublic schools" applies,

1 that is, only in situations where a family has chosen to accept a FAPE from their LEA—  
 2 not when parents have invoked their right to obtain a private education for their children.

3 An LEA’s placement of one of its students in a nonpublic school (“NPS”) allows  
 4 the LEA to receive state funding for that student because such students are “deemed to be  
 5 enrolled in public schools” for funding purposes. *Id.* § 56365(b). The LEA pays the NPS  
 6 pursuant to a contract between the LEA and the NPS. *Id.* § 56365(d). The “master  
 7 contract” for NPSs to provide special education and related services must incorporate  
 8 provisions concerning instruction, program development, staffing, documentation, IEP  
 9 implementation, and LEA supervision. *Id.* § 56366. Specifically, the master contract must  
 10 include an “individual services agreement” for each pupil “placed by” an LEA with the  
 11 NPS to cover the special education “specified in” the pupil’s IEP. *Id.* § 56366(a)(2). A  
 12 master contract must recognize that the NPS cannot make changes in the instruction or  
 13 services that it provides to any student under the contract unless those changes are based  
 14 on revisions made to the student’s IEP. *Id.* § 56366(a)(3)(A). Further, a master contract  
 15 must recognize that the NPS is subject to the state’s accountability system “in the same  
 16 manner as public schools” and that each pupil placed in the NPS by an LEA shall be tested  
 17 by qualified staff at the NPS in accordance with that system. *Id.* § 56366(a)(8). Last,  
 18 when a child placed by the LEA in a nonpublic school completes the IEP’s prescribed  
 19 course of study, “the public education agency which developed the IEP shall award the  
 20 diploma.” Cal. Code Regs. tit. 5, § 3070.

21 LEAs may enter into master contracts only with state-certified NPSs. Cal. Educ.  
 22 Code § 56366(d). To be certified, NPSs must apply with the Superintendent of Public  
 23 Instruction and meet several requirements. An applying NPS must certify that it will use  
 24 the State Board of Education (“SBE”)-adopted, standards-based core curriculum and  
 25 instructional materials for kindergarten and grades 1 through 8, and will use the state  
 26 standards-aligned core curriculum and instructional materials used by an LEA that  
 27 contracts with the NPS for grades 9 through 12. *Id.* § 56366.10(b); Cal. Code Regs. tit. 5,  
 28 § 3001(a). An application for certification must therefore describe, among other things,

1 the “SBE-adopted core curriculum (K-8) and standards-aligned core curriculum (9-12) and  
2 instructional materials used by general education students.” Cal. Code Regs. tit. 5,  
3 § 3060(c)(9).

4 Administrators and staff of the NPS must “hold a certificate, permit, or other  
5 document equivalent to that which staff in a public school are required to hold[.]” Cal.  
6 Educ. Code § 56366.1(n); Cal. Code Regs. tit. 5, § 3064(a). Accordingly, the NPS’s  
7 application for certification must include the names of its teachers with a credential  
8 authorizing service in special education, and copies of the credentials. Cal. Educ. Code  
9 § 56366.1(a)(3); Cal. Code Regs. tit. 5, § 3060(c)(4). An institution applying for NPS  
10 certification must also agree that it will “maintain compliance” with not only the IDEA,  
11 but other federal laws including the Civil Rights Act, Fair Employment Act, and Section  
12 504 of the Rehabilitation Act. Cal. Code Regs. tit. 5, § 3060(d). Applications for  
13 certification also need to include “a description of the special education and designated  
14 instruction and services provided to individuals with exceptional needs[.]” Cal. Educ.  
15 Code § 56366.1(a)(1).

16 The Superintendent is authorized to “certify, conditionally certify, or deny  
17 certification.” *Id.* § 56366.1(f). The Superintendent must conduct an initial “validation  
18 review” before granting “an initial conditional certification,” and then must conduct an  
19 “on-site review” within 90 days of that. Cal. Code Regs. tit. 5, § 3063(a).

20 When a nonpublic school applies for certification, it cannot petition for a waiver of  
21 the nonsectarian requirement. *See* Cal. Educ. Code § 56366.2 (permitting waiver of  
22 certain requirements, but not the certification requirements contained in § 56366.1). LEAs  
23 can petition for such waivers, however, certification requirements may be waived only if  
24 “approved by the [State Board of Education] pursuant to Section 56101.” *Id.* § 56366.2(b).  
25 Section 56101 permits a “public agency” to “request the [B]oard to grant a waiver of any  
26 provision of this code or regulations adopted pursuant to that provision if the waiver is  
27 necessary or beneficial to the content and implementation of the pupil’s individualized  
28 education program and does not abrogate any right provided individuals with exceptional

1 needs and their parents or guardians under [IDEA].” *Id.* § 56101(a). A “public agency”  
 2 includes “special education local plan area[s]” like LAUSD. *Id.* § 56028.5. The decision  
 3 whether to grant such a waiver lies with the Superintendent, however, not the public  
 4 agency. *Id.* § 56366.2(a).

5 Certified NPSs agree to continued oversight by the State, and to provide services  
 6 aimed at transitioning pupils to less restrictive environments in the pupils’ respective  
 7 LEAs. For example, a master contract must “include a description of the process being  
 8 utilized by the [LEA] to oversee and evaluate placements in [NPSs], as required by federal  
 9 law[,]” which must “include a method for evaluating whether each pupil is making  
 10 appropriate educational progress.” Cal. Educ. Code § 56366(a)(2)(B). Evaluations must  
 11 take place at least annually and must consider whether or not the needs of the pupil placed  
 12 in the NPS “continue to be best met” at the NPS, as well as whether changes to the IEP are  
 13 necessary, “including whether the pupils may be transitioned to a public school setting.”  
 14 *Id.* Moreover, the NPS must certify that its teachers and staff will provide instruction and  
 15 support “with the goal of integrating pupils into the least restrictive environment pursuant  
 16 to federal law.” *Id.* § 56366.10(c). In view of this goal, an applying NPS must describe its  
 17 “exit criteria for transition back to the public school setting.” Cal. Code Regs. tit. 5, §  
 18 3060(c)(8).

19 The Superintendent must conduct on-site reviews of certified NPSs at least every  
 20 three years. Cal. Code Regs. tit. 5, § 3063(a). On-site reviews must include “a review and  
 21 examination of files and documents, classroom observations and interviews with the site  
 22 administrator, teachers, students, volunteers and parents to determine compliance with all  
 23 applicable state and federal laws and regulations.” *Id.* § 3063(e)(2). On-site reviews are  
 24 followed by a written report detailing any noncompliance findings. *Id.* §§ 3063(e)–(h).  
 25 Further, when the Superintendent receives evidence of certain matters, such as “a  
 26 significant deficiency in the quality of educational services provided,” the Superintendent  
 27 is required to “conduct an investigation” and may conduct an unannounced on-site visit.  
 28 Cal. Educ. Code § 56366.1(i)(3). The Superintendent “may revoke or suspend the

certification” of a nonpublic school for any one of ten enumerated reasons, including: (a) violation of an applicable state or federal rule or regulation; (b) failure to comply with a master contract; (c) “[f]ailure to implement recommendations and compliance requirements following an onsite review”; and (d) failure to implement a student’s IEP. *Id.* § 56366.4.

Putting aside the Superintendent’s supervisory functions with respect to NPSs, LEAs that have placed one or more of pupils at a given NPS must conduct “at least” one on-site monitoring visit during each school year, which must include “a review of progress the pupil is making toward the goals set forth in the pupil’s [IEP],” “an observation of the pupil during instruction, and a walkthrough of the facility.” Cal. Educ. Code § 56366.1(e)(3).

## **B. Factual Background**

Plaintiffs are two Orthodox Jewish private schools—Jean & Jerry Friedman Shalhevet High School and Samuel A. Fryer Yavneh Hebrew Academy (the “Schools”)—and three pairs of Orthodox Jewish parents— Chaya and Jonathan Loffman, Fedora Nick and Morris Taxon, and Sarah and Ariel Perets—suing on their own behalf and on behalf of their respective children with disabilities. (Compl. ¶¶ 2–3, 19–34, Doc. 1.) According to Plaintiffs, “California discriminates against Jewish children with disabilities and Jewish schools that seek to provide an education for children with disabilities.” (*Id.* ¶¶ 1, 6.) Plaintiffs aver that California violates their rights guaranteed by the First Amendment’s Free Exercise Clause and the Fourteenth Amendment’s Equal Protection Clause because, by extending IDEA funds only to “nonsectarian” schools, it “will not allow a private school to access otherwise generally available funds for special education if the private school is religious.” (*Id.* ¶¶ 1, 7.) According to Plaintiffs, the “nonsectarian” requirement makes it “impossible for a child with a disability to be placed at a religious school and receive the same funding that he would otherwise be entitled to had his parents sent him to

1 a nonreligious school” and likewise “impossible for a private religious school to receive  
 2 the public funding necessary to provide critical services to children with disabilities.” (*Id.*  
 3 ¶¶ 8–9.) Plaintiffs claim that California “forces [parents] to choose between accessing  
 4 those services and giving their children a Jewish education.” (*Id.* ¶ 10.)

5 Plaintiffs Chaya and Jonathan Loffman (the “Loffmans”) have a four-year-old son  
 6 who has been diagnosed with high-functioning autism, M.L. (*Id.* ¶¶ 19–20, 79.) M.L.  
 7 currently receives educational services at Maor Academy, an Orthodox Jewish learning  
 8 center that supports students with special needs. (*Id.* ¶¶ 20, 78.) The Loffmans “believe  
 9 that they are obligated to send their children to Orthodox Jewish schools to maintain and  
 10 strengthen their family’s Jewish religious beliefs, culture, and heritage” and wish to enroll  
 11 M.L. in an Orthodox Jewish school. (*Id.* ¶¶ 82–83.) M.L. received behavioral,  
 12 occupational, and speech therapy at a Jewish preschool. (*Id.* ¶¶ 85–86.) The Loffmans  
 13 “opted to pay out of pocket for M.L.’s costly therapies” because they “wanted him to have  
 14 an Orthodox Jewish education.” (*Id.* ¶ 87.) The Loffmans “continue to pay weekly for  
 15 [M.L.’s] 25 hours of behavior therapy and 1 hour of occupational therapy out of pocket, as  
 16 well as his tuition” at Maor Academy. (*Id.* ¶ 88.) The Loffmans “recognize that M.L.  
 17 might be eligible for more services in public school as part of an IEP” but allege that they  
 18 have been “forced to forgo those services” because the nonsectarian requirement they  
 19 challenge would make it impossible for M.L. to receive a FAPE at an Orthodox Jewish  
 20 school. (*Id.* ¶ 90.) The Complaint does not allege that the Loffmans have ever sought a  
 21 FAPE from LAUSD or that M.L. has been evaluated by LAUSD personnel.

22 Plaintiffs Fedora Nick and Morris Taxon (the “Taxons”) have three children,  
 23 including their fourteen-year-old son Plaintiff K.T., who was diagnosed with autism at age  
 24 2. (*Id.* ¶¶ 91, 94.) The Taxons sent their two non-disabled children exclusively to  
 25 Orthodox Jewish schools. (*Id.* ¶ 92.) Like the Loffmans, the Taxons “believe that they are  
 26 obligated to send their children to Orthodox Jewish schools to maintain and strengthen  
 27 their family’s Jewish religious beliefs, culture, and heritage.” (*Id.* ¶ 98.) This is why they  
 28 have sent their two other children to Orthodox Jewish schools and desire to enroll K.T. in



1 an Orthodox Jewish school “where he can receive both a religious and secular education,  
2 as well as the services necessary to support his disability.” (*Id.* ¶¶ 99–100.)

3 The Complaint alleges that the Taxons have sought out opportunities for K.T. since  
4 he was in preschool but “have been unable to place K.T. in an Orthodox Jewish school due  
5 to California’s prohibition on using generally available special-education funding at  
6 private religious schools.” (*Id.* ¶ 101.) The Taxons are allegedly “unable to utilize funds  
7 for K.T. that would otherwise be available to them—unless they decide to forgo a religious  
8 education for K.T.” (*Id.* ¶ 103.) “From kindergarten through eighth grade, K.T. has  
9 received a mainstreamed classroom education in public school” but “performs below grade  
10 level academically.” (*Id.* ¶ 105.) As a public-school student, “K.T. has an IEP that  
11 includes 9 service providers, including a full-time aide, a supervisor for the aide, speech  
12 and occupational therapists, adaptive physical education, resource specialists for English  
13 and math, and a private reading tutor.” (*Id.* ¶ 106.) Those services are currently provided  
14 through LAUSD. (*Id.* ¶ 107.) The Taxons do not believe that K.T. is receiving a FAPE in  
15 public school because he misses out on needed special education and related services both  
16 for secular and religious holidays and is repeatedly served nonkosher food. (*Id.* ¶¶ 108–  
17 12.)

18 Sarah and Ariel Perets have six children, including their fourteen-year-old son  
19 Plaintiff N.P., who was diagnosed with autism at age 3 and a WAC gene mutation at age 6.  
20 (*Id.* ¶¶ 116, 119.) The Peretses sent their five nondisabled children exclusively to  
21 Orthodox Jewish schools. (*Id.* ¶ 117.) Like the Loffmans and the Taxons, the Peretses  
22 “believe that they are obligated to send their children to Orthodox Jewish schools to  
23 maintain and strengthen their family’s Jewish religious beliefs, culture, and heritage.” (*Id.*  
24 ¶ 122.) This is why they have sent their other five children to Orthodox Jewish schools  
25 and desire to enroll N.P. in an Orthodox Jewish school “where he can receive both a  
26 religious and secular education, as well as the services necessary to support his disability.”  
27 (*Id.* ¶¶ 123–24.)  
28

1       The Complaint alleges that the Peretses “have been unable to seek placement for  
 2 N.P. in an Orthodox Jewish school due to California’s prohibition on using generally  
 3 available special-education funding at private religious schools.” (*Id.* ¶ 125.) The Peretses  
 4 “attempted to enroll [N.P.] in Orthodox Jewish schools such as Emek Hebrew Academy  
 5 and Adat Ari El, but because the public school district would not pay for his services, the  
 6 costs of paying for his services out of pocket were prohibitive.” (*Id.* ¶ 128.) N.P.  
 7 “currently attends Sutter Middle School, a public middle school, where he has an IEP in  
 8 place.” (*Id.* ¶ 129.) N.P. receives “limited speech therapy” at Sutter Middle School. (*Id.*  
 9 ¶ 131.) According to Plaintiffs, “LAUSD’s speech therapists are prohibited from  
 10 administering therapy involving physical touch, which has slowed N.P.’s speech  
 11 progression.” (*Id.* ¶ 132.) Plaintiffs also allege that N.P. has been “placed in classes with  
 12 peers that the Peretses believe operate at a lower level of functioning than N.P.” and that  
 13 “[s]ince N.P. was removed from a mainstream setting, his academic progress and his  
 14 speech development has [sic] regressed.” (*Id.* ¶¶ 135–36.)

15       The Peretses do not believe that N.P. is receiving a FAPE in public school and  
 16 desire to enroll N.P. in an Orthodox Jewish school. (*Id.* ¶¶ 124, 130, 149.) The Complaint  
 17 alleges that “N.P. could receive prompted speech therapy in private schools.” (Compl.  
 18 ¶ 133.) It also alleges that “[t]he Peretses believe that the smaller class sizes available in  
 19 private schools would better meet N.P.’s needs and would enable him to be placed in a  
 20 classroom with peers who function at a similar level to N.P.” (*Id.* ¶ 137.) Plaintiffs also  
 21 allege that the public school is inadequately staffed and that the Peretses believe staffing  
 22 problems would not occur in private schools. (*Id.* ¶¶ 138–40.) Last, the Complaint alleges  
 23 that N.P.’s faith “imposes unique difficulties in public school” because N.P. “fails to  
 24 receive services not only when the public school is not in session, but also when he misses  
 25 school for religious observance.” (*Id.* ¶¶ 141–42.) And the Peretses often remind the  
 26 public school that N.P. cannot eat non-kosher food. (*Id.* ¶ 147.)

27       The Jean & Jerry Friedman Shalhevet High School (“Shalhevet”) and the Samuel  
 28 A. Fryer Yavneh Hebrew Academy (“Yavneh”) are co-educational, dual-curriculum



1 Orthodox Jewish schools in Los Angeles, California. (*Id.* ¶¶ 150, 161.) “[T]he inculcation  
 2 and transmission of Jewish religious beliefs and practices to children is the very reason that  
 3 Shalhevet and Yavneh exist.” (*Id.* ¶ 76.) Plaintiffs allege that “Shalhevet’s mission is to  
 4 promote the values of Jewish heritage, to live Torah values, to stimulate Torah learning,  
 5 and to develop a love of, and commitment to, the State of Israel.” (*Id.* ¶ 151.) It “seeks the  
 6 opportunity to qualify to provide a distinctively Orthodox Jewish education to children  
 7 with disabilities.” (*Id.* ¶ 152.) Yavneh “seeks to foster in its students a passion for Torah,  
 8 learning, hard work, joy, a respect for tradition, and a desire to be positive members of the  
 9 community.” (*Id.* ¶ 162.) It also “seeks the ability to qualify as a certified NPS.” (*Id.*  
 10 ¶ 165.)

11 The Complaint alleges “[o]n information and belief” that the School Plaintiffs  
 12 “either otherwise meet[] or [are] capable of meeting California’s other certification  
 13 requirements to become an NPS.” (Compl. ¶¶ 156, 166.) It also alleges that neither school  
 14 can “be considered for placement as part of a student’s FAPE for the sole reason that it is  
 15 religious, nor can it receive the reimbursement that would result from such a placement.”  
 16 (*Id.* ¶¶ 159, 169.) According to Plaintiffs, neither school can “provide its services and  
 17 religious education to all children with disabilities” because “California law prohibits the  
 18 use of generally available public funds at private religious schools.” (*Id.* ¶¶ 160, 170.)

19 Plaintiffs filed the instant lawsuit on March 13, 2023. (*See* Compl.) Plaintiffs are  
 20 suing the California Department of Education and the Superintendent of Public Instruction,  
 21 Tony Thurmond, as well as the Los Angeles Unified School District and its Chief of  
 22 Special Education, Equity, and Access, Anthony Aguilar. (*Id.* ¶ 11.) Plaintiffs bring suit  
 23 under 42 U.S.C. § 1983 (“Section 1983”) for alleged violations of their civil rights (*id.* ¶ 1)  
 24 as follows:

25 Count I: Defendants have categorically excluded Plaintiffs from otherwise  
 26 available government benefits in violation of the Free Exercise Clause of the  
 27 First Amendment (*id.* ¶¶ 171–83);  
 28

1        Count II: Defendants have allowed nonsectarian schools, but not religious  
 2        schools, to petition for waiver of certain statutory requirements for NPS  
 3        certification, also in violation of the Free Exercise Clause of the First  
 4        Amendment (*id.* ¶¶ 184–95);

5        Count III: Defendants have conditioned access to government funding on  
 6        nonsectarian status and refuse to waive the nonsectarian requirement for  
 7        Shalhevet’s and Yavneh’s NPS certification applications, also in violation of  
 8        the Free Exercise Clause of the First Amendment (*id.* ¶¶ 196–204);

9        Count IV: Defendants have discriminated against Plaintiffs on the basis of  
 10       religion, in violation of the Equal Protection Clause (*id.* ¶¶ 205–9);

11       Count V: Defendants have imposed unconstitutional conditions on the  
 12       School Plaintiffs by requiring them to give up their religious identity by  
 13       certifying themselves as nonsectarian in their applications for NPS status, in  
 14       violation of the Free Exercise Clause of the First Amendment (*id.* ¶¶ 210–  
 15       15);

16       Count VI: Defendants have interfered with Plaintiffs’ right to direct the  
 17       religious upbringing of their children by preventing them from sending their  
 18       children with disabilities to religious schools (*id.* ¶¶ 216–22).

19 Plaintiffs seek: (a) a declaration that the California Education Code’s requirement that  
 20 NPSs providing services pursuant to the IDEA be nonsectarian is unconstitutional; (b)  
 21 preliminary and permanent injunctive relief prohibiting Defendants from excluding  
 22 religious schools from eligibility as NPSs; (c) preliminary and permanent injunctive relief  
 23 preventing Defendants from requiring schools seeking NPS certification to indicate  
 24 whether they are religious or not; (d) actual and nominal damages in an amount to be  
 25 determined; and (e) attorneys’ fees. (*Id.* at 36–37, “Prayer for Relief.”)

26        On May 22, 2023, Plaintiffs moved for a preliminary injunction barring Defendants  
 27        from enforcing the nonsectarian requirement in Sections 56365 and 56366 of the  
 28        California Education Code. (*See* MPI at 2, 24.)

1 On May 23 and 24, the LAUSD Defendants and the CDE Defendants filed separate  
2 motions to dismiss Plaintiffs' Complaint. (*See* LAUSD Mot.; CDE Mot.; CDE Mem.)  
3 Defendants argue that: (a) Plaintiffs' causes of action against LAUSD and CDE are barred  
4 by Eleventh Amendment immunity (LAUSD Mot. at 17–19; CDE Mem. at 13–14); (b)  
5 Plaintiffs' claims for monetary relief are also barred by the Eleventh Amendment (LAUSD  
6 Mot. at 19; CDE Mem. at 14); (c) Plaintiffs all lack Article III standing to bring their  
7 claims (LAUSD Mot. at 19–27; CDE Mem. at 14–23); (d) Plaintiffs all fail to state claims  
8 for violations of the Free Exercise Clause and the Equal Protection Clause (LAUSD Mot.  
9 at 27–35; CDE Mem. at 23–40).

10 The Court held a hearing on the parties' Motions on July 21, 2023.

## 11 12 **II. LEGAL STANDARD**

### 13 14 **A. Rule 12(b)(1)**

15  
16 A defendant may move to dismiss an action for lack of subject matter jurisdiction  
17 pursuant to Federal Rule of Civil Procedure 12(b)(1). Fed. R. Civ. P. 12(b)(1). “Dismissal  
18 for lack of subject matter jurisdiction is appropriate if the complaint, considered in its  
19 entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction.”  
20 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984–85  
21 (9th Cir. 2008). When considering a Rule 12(b)(1) motion, the Court “is not restricted to  
22 the face of the pleadings, but may review any evidence, such as affidavits and testimony,  
23 to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United*  
24 *States*, 850 F.2d 558, 560 (9th Cir. 1988). “The party asserting [] subject matter  
25 jurisdiction bears the burden of proving its existence.” *Chandler v. State Farm Mut. Auto.*  
26 *Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

## B. Rule 12(b)(6)

“Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for ‘failure to state a claim upon which relief can be granted.’ Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174, 1180 (C.D. Cal. 2019) (citation omitted). In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all “well-pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts must also draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). Yet, “courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

“Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment.” *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1056 (9th Cir. 2007) (quoting *In re Daou Sys., Inc.*, 411 F.3d 1006, 1013 (9th Cir. 2005)); *see also Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (“Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility.”).

## III. DISCUSSION

### A. Sovereign Immunity Requires Dismissal of CDE and LAUSD

The Eleventh Amendment bars federal jurisdiction over suits by individuals against a State and its instrumentalities, unless either the State consents to waive its sovereign immunity or Congress abrogates that immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“[A]n unconsenting State is immune from suits

brought in federal courts by her own citizens as well as by citizens of another state.”)  
 (quoting *Emps. v. Mo. Public Health & Welfare Dep’t*, 411 U.S. 279, 280 (1973)  
 (Marshall, J., concurring)).

Eleventh Amendment immunity extends to a State’s agencies and to officials of  
 those agencies acting in their official capacity. *Krainski v. Nevada ex rel. Bd. of Regents  
 of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 967 (9th Cir. 2010). The Ninth Circuit has  
 held that California school districts are arms of the state entitled to sovereign immunity  
 under the Eleventh Amendment. *Sato v. Orange Cty. Dep’t of Educ.*, 861 F.3d 923, 934  
 (9th Cir. 2017) (concluding that “California school districts . . . remain arms of the state  
 and continue to enjoy Eleventh Amendment immunity” following passage of state  
 legislation that “reformed the financing and governance of California public schools”); *see*  
*also Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992) (“[U]nder  
 California law, the school district is a state agency that performs central governmental  
 functions. Thus, the school district is protected by the Eleventh Amendment.”).

To overcome the Eleventh Amendment bar to federal jurisdiction, the State’s  
 consent or Congress’s intent must be “unequivocally expressed.” *Pennhurst*, 465 U.S. at  
 99. Section 1983 “does not explicitly and by clear language indicate on its face an intent  
 to sweep away the immunity of the States; nor does it have a history which focuses directly  
 on the question of state liability and which shows that Congress considered and firmly  
 decided to abrogate the Eleventh Amendment immunity of the States.” *Quern v. Jordan*,  
 440 U.S. 332, 345 (1979). Accordingly, Section 1983 does not abrogate the States’  
 Eleventh Amendment immunity. *Id.* Nor has California “waived its Eleventh Amendment  
 immunity with respect to claims brought under § 1983 in federal court[.]” *Dittman v.  
 California*, 191 F.3d 1020, 1025–26 (9th Cir. 1999) (citation omitted); *accord Brown v.  
 California Dep’t of Corr.*, 554 F.3d 747, 752 (9th Cir. 2009).

Plaintiffs concede that Ninth Circuit precedent bars their claims against the  
 California Department of Education and the Los Angeles Unified School District. (MTD  
 Opp. at 12 n.1.) Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiffs’

1 claims against the California Department of Education and the Los Angeles Unified  
2 School District.

3  
4 **B. Sovereign Immunity Bars Damages Claims Against Thurmond and**  
5 **Aguilar**  
6

7 Although the Eleventh Amendment shields state officials from official-capacity  
8 suits, “[a] narrow exception exists ‘where the relief sought is prospective in nature and is  
9 based on an ongoing violation of the plaintiff’s federal constitutional or statutory rights.’”  
10 Krainski, 616 F.3d at 967–68 (quoting *Central Reserve Life of N. Am. Ins. Co. v. Struve*,  
11 852 F.2d 1158, 1160–61 (9th Cir. 1988)); *see also Quern*, 440 U.S. at 337 (“[A] federal  
12 court, consistent with the Eleventh Amendment, may enjoin state officials to conform their  
13 future conduct to the requirements of federal law, even though such an injunction may  
14 have an ancillary effect on the state treasury.”) (citation omitted). Thus, while courts may  
15 not award retrospective—*i.e.*, monetary—relief in official capacity suits, they may  
16 nevertheless issue injunctions or declaratory judgments to prevent a state official from  
17 violating a plaintiff’s federal rights. *Quern*, 440 U.S. at 337 (“The distinction between that  
18 relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman*  
19 was the difference between prospective relief on one hand and retrospective relief on the  
20 other.”).

21 Plaintiffs concede that they are barred from seeking damages from Defendants  
22 Tony Thurmond and Anthony Aguilar, whom they have sued in their official capacities.  
23 (MTD Opp. at 12 n.1). Accordingly, the Court DISMISSES WITH PREJUDICE  
24 Plaintiffs’ claims for damages against Thurmond and Aguilar.  
25  
26  
27  
28

### C. Article III Standing

“The Constitution grants Article III courts the power to decide ‘Cases’ or ‘Controversies.’” *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (quoting U.S. Const. art. III, § 2). The Supreme Court has “long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.” *Id.* (citations omitted). “The doctrine of standing implements this requirement by insisting that a litigant ‘prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.’” *Id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Standing has three elements: “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff “bears the burden of establishing standing as of the time he [brings his] lawsuit and maintaining it thereafter.” *Carney*, 141 S. Ct. at 499 (citations omitted); *see also Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 191 (2000) (standing is evaluated “at the time the action commences”); *id.* at 189 (“The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence[.]”) (citations omitted).

“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.” *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville* (“AGC”), 508 U.S. 656, 666 (1993). When a plaintiff alleges discrimination, the “injury in fact . . . is the denial of



1 equal treatment resulting from the imposition of the barrier, not the ultimate inability to  
2 obtain the benefit.” *Id.* (citation omitted).

3 Nevertheless, to establish standing plaintiffs challenging an allegedly  
4 discriminatory policy must show that they are “able and ready” to apply for the benefit that  
5 they seek. *Id.* The “able and ready” standard pertains to the first requirement of Article III  
6 standing, that a plaintiff has suffered a concrete and particular injury-in-fact. *Planned*  
7 *Parenthood of Greater Washington & N. Idaho v. U.S. Dep’t of Health & Hum. Servs.*, 946  
8 F.3d 1100, 1108 (9th Cir. 2020) (“It is a plaintiff’s ability and readiness to bid that ensures  
9 an injury-in-fact is concrete and particular; the requirement precludes the airing of  
10 generalized grievances.”) (citation omitted).

11 A court’s inquiry as to whether a plaintiff has shown the requisite ability and  
12 readiness to apply is a “highly-fact specific” undertaking and requires more than the non-  
13 applicant’s belief that they meet the “minimum qualifications” and are “able and ready.”  
14 *Carney*, 141 S. Ct. at 500–1 (concluding that the plaintiff lacked standing where the record  
15 did not show that he was “able and ready” to apply); *see also Faculty v. New York Univ.*,  
16 11 F.4th 68, 77 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2813 (2022) (holding that plaintiffs  
17 lacked standing because their complaint failed to include “any ‘description of concrete  
18 plans’ to apply” and indefinite “‘some day intentions’ . . . cannot ‘support a finding of []  
19 actual or imminent injury’”) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 496  
20 (2009)). A plaintiff sufficiently alleges injury when a discriminatory policy *has interfered*  
21 *with the plaintiff’s otherwise equal ability to compete for the program benefit.* *Dragovich*  
22 *v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1187 (N.D. Cal. 2011) (emphasis  
23 added). A mere affirmation that one is “able and ready to apply” is insufficient—concrete  
24 facts showing that readiness and ability are necessary. *Carney*, 141 S. Ct. at 501–2.  
25 “[T]he intent of the applicant may be relevant to standing in an equal protection  
26 challenge”—but facts must be adduced to support a finding of intent. *Carroll v. Nakatani*,  
27 342 F.3d 934, 942 (9th Cir. 2003) (citing *Gratz v. Bollinger*, 539 U.S. 244, 261 (2003)).  
28



1       The Ninth Circuit has illuminated the contours of “discriminatory barrier” standing  
 2 and the “able and ready” standard in a few key cases. In *Bras v. California Public Utilities*  
 3 *Commission*, 59 F.3d 869, 873 (9th Cir. 1995), the Ninth Circuit concluded that the  
 4 plaintiff had met his burden by stating in a declaration: “I *earnestly desire* to reinstate my  
 5 long term business relationship with Pacific Bell . . . in the future *and stand ready, willing*  
 6 *and able* to provide such services should I be given an opportunity to do so.” *Id.* at 874  
 7 (emphasis in original). The plaintiff there challenged a pre-qualification preference for  
 8 women- and minority-owned businesses, alleging that, due to the discriminatory  
 9 preference, he had lost out on the ability to continue providing architectural services to  
 10 Pacific Bell after he had done so for 20 years. *Id.* at 871. In addition to the plaintiff’s  
 11 declaration, Pacific Bell had also provided a declaration to the court stating that it was  
 12 pleased with the plaintiff’s past work and would consider him for future work. *Id.* at 874.

13       In *City of Los Angeles v. Barr* (“*Barr*”), 929 F.3d 1163 (9th Cir. 2019), the Ninth  
 14 Circuit concluded that a “thin” or “slight” injury was sufficient to establish so-called  
 15 “competitor standing.” *Id.* at 1073–74. There, Los Angeles argued that it was injured  
 16 when it submitted a grant application to the Department of Justice for law enforcement  
 17 funds without selecting an “illegal immigration focus” in the application or submitting a  
 18 certification related to illegal immigration. *Id.* at 1073. Los Angeles argued that by  
 19 declining to select an illegal immigration focus or submit the certification it was placed at  
 20 a competitive disadvantage to other applicants; its “inability to compete on an even playing  
 21 field” was the Article III injury. *Id.* The Ninth Circuit reasoned that “Los Angeles need  
 22 not prove that it would have received funding absent the challenged considerations” and  
 23 decided that Los Angeles’s “slight competitive disadvantage” was sufficient to confer  
 24 Article III standing “[d]espite the weakness of Los Angeles’s argument.” *Id.* at 1073–74.  
 25 There was no question whether Los Angeles was “able and ready” to apply in that case,  
 26 however, because Los Angeles *had* applied for the federal grants in question for two  
 27 consecutive years and submitted a declaration of its intent to apply in the next year. *Id.* at  
 28 1072–73.

1 By contrast, in *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003), the Ninth Circuit  
 2 concluded that the plaintiff had not met his burden under the “able and ready” standard  
 3 because he had done “essentially nothing to demonstrate that he is in a position to compete  
 4 equally” with other applicants. *Id.* at 942. There, the plaintiff alleged discrimination in a  
 5 loan program run by the Office of Hawaiian Affairs (“OHA”) accessible only to “native  
 6 Hawaiians” or “Hawaiians” as defined by Hawaii law. *Id.* at 938. Although the plaintiff,  
 7 Barrett, had submitted an application for a loan, the application was so “materially  
 8 deficient” that it failed to satisfy the “able and ready” standard:

9 Unlike the contractor cases[—*i.e.*, *AGC* and *Bras*], he has no work history  
 10 with small business copy shops or any other entrepreneurial endeavors that  
 11 might bolster his bona fides. Barrett did not respond to OHA’s request for  
 12 additional information to complete the application. His failure to respond to  
 13 the OHA’s request for additional information further illustrates that he is not  
 14 prepared to compete for the loan.

15 *Id.* at 942–43 (footnote omitted). Given these facts, the Ninth Circuit concluded that  
 16 “Barrett’s declaration of ‘interest’ in starting a copy shop, and submission of a meritless  
 17 application falls short of being ‘able and ready’ to compete” and standing had not been  
 18 established. *Id.* at 943.

19 While each of the above cases was decided at summary judgment, the Third Circuit  
 20 has explained more recently that, even at the pleading stage, “there are a wide variety of  
 21 factors that may bear on a plaintiff’s intent to pursue a benefit in the near future” and  
 22 “whether a plaintiff is ‘able and ready’ to apply for a benefit is not reducible to a strict  
 23 rule.” *Ellison v. Am. Bd. Of Orthopaedic Surgery*, 11 F.4th 200, 207 (3d Cir. 2021). Still,  
 24 “in most cases, a plaintiff will need to plead that he or she took some actual steps that  
 25 demonstrate a real interest in seeking the alleged benefit.” *Id.* (citing *Aaron Priv. Clinic*  
 26 *Mgmt. LLC v. Berry*, 912 F.3d 1330, 1337 (11th Cir. 2019) (holding that the plaintiff had  
 27 not established injury in fact where it failed to allege that it took any concrete steps to  
 28 found a methadone clinic, “such as selecting a clinic location, securing a lease option,

1 consulting with relevant government officials, applying for the necessary permits or  
 2 certifications, or associating with potential clients”); *Finkelman v. Nat’l Football League*,  
 3 810 F.3d 187, 195 (3d Cir. 2016) (holding that the plaintiff failed to allege injury in fact  
 4 where he “took no meaningful action” to pursue the alleged opportunity); *Pucket v. Hot*  
 5 *Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1161 (8th Cir. 2008) (“[I]f a plaintiff is  
 6 required to meet a precondition or follow a certain procedure to engage in an activity or  
 7 enjoy a benefit and fails to attempt to do so, that plaintiff lacks standing to sue because he  
 8 or she should have at least taken steps to attempt to satisfy the precondition.”)).

9       The case before the Third Circuit concerned a surgeon, Ellison, who wished to  
 10 move from California to New Jersey. *Ellison*, 11 F.4th at 202. Ellison challenged a New  
 11 Jersey medical board’s certification process on the ground that the board illegally restricted  
 12 applicants from becoming certified without first obtaining staff privileges at a local  
 13 hospital. *Id.* at 202–3. The surgeon, Ellison, had “not attempted to apply for medical staff  
 14 privileges or taken any concrete steps to practice in New Jersey,” however. *Id.* at 203.  
 15 Ellison allegedly believed that “the New Jersey hospitals where he desires to practice will  
 16 reject his application, as their bylaws provide that they generally grant privileges only to  
 17 physicians who are already board certified,” so that applying would be inadvisable and  
 18 futile. *Id.* at 203, 208. Although Ellison argued that “he did not need to plead that he took  
 19 any steps to practice in New Jersey, as it was a foregone conclusion that the hospitals he  
 20 identified would not hire him,” the Third Circuit rejected that argument. *Id.* at 208. Rather  
 21 than merely allege futility, Ellison needed to “plead something more to indicate that he  
 22 was positioned to practice at the hospitals he specified in the near future.” *Id.* What was  
 23 fatal to Ellison’s case is that his complaint “d[id] not allege that Ellison took any steps” to  
 24 position himself to practice and “allege[d] virtually no acts by Ellison apart from taking the  
 25 first part of [the board’s] certification exam.” *Id.* The scant allegations in Ellison’s  
 26 complaint were insufficient to establish Article III standing because they failed to show  
 27 that Ellison had more than “a hypothetical ‘some day’ interest in possibly” seeking board  
 28

1 certification. *Id.* at 208–9 (citations omitted). “Ellison’s alleged injury,” the Third Circuit  
 2 held, was “neither concrete nor imminent under the circumstances.” *Id.* at 209.

3 The cases cited above go to the first element of Article III standing: whether the  
 4 plaintiff has suffered an injury-in-fact. To establish Article III standing, however, a  
 5 plaintiff must also allege facts showing that the injury-in-fact is “is caused by the  
 6 challenged conduct and . . . is likely redressable by a favorable judicial decision.” *Juliana*  
 7 *v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020) (citing *Friends of the Earth*, 528  
 8 U.S. at 180–81.) “Causation can be established even if there are multiple links in the  
 9 chain, as long as the chain is not hypothetical or tenuous[.]” *Id.* (internal quotation marks  
 10 and citations omitted).

11 “To establish redressability, a plaintiff must show that it is ‘likely, as opposed to  
 12 merely speculative, that the injury will be redressed by a favorable decision.’” *M.S. v.*  
 13 *Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan*, 504 U.S. at 561). A plaintiff  
 14 does not need to show that it is certain that his or her injuries will be redressed by a  
 15 favorable decision, but only that there is “a substantial likelihood that the relief sought  
 16 would redress the injury[.]” *Id.* (internal quotation marks and citations omitted). “If,  
 17 however, a favorable judicial decision would not require the defendant to redress the  
 18 plaintiff’s claimed injury, the plaintiff cannot demonstrate redressability . . . unless she  
 19 adduces facts to show that the defendant or a third party are nonetheless likely to provide  
 20 redress as a result of the decision.” *Id.* (internal quotation marks and citations omitted).  
 21 “Finally, even where a plaintiff requests relief that would redress her claimed injury, there  
 22 is no redressability if a federal court lacks the power to issue such relief.” *Id.* (citing  
 23 *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017)).

24 The parties dispute whether the facts alleged here make this case more analogous to  
 25 cases like *AGC*, *Bras* and *Barr*, where the plaintiffs were “able and ready” to apply for and  
 26 receive the benefits at issue, or more analogous to the other cases—*Carney*, *Carroll*, and  
 27 *Ellison*—where the plaintiffs failed to meet their burden to establish Article III standing.  
 28 (See LAUSD Mot. at 19–27; CDE Mem. at 14–23; MTD Opp. at 12–20; LAUSD Reply at

10–16; CDE Reply at 5–11.) The parties also dispute whether California’s nonsectarian requirement is causing any of the Plaintiffs here to suffer a concrete harm that could be redressed by this action. (See LAUSD Mot. at 20–24; CDE Mem. at 19–23; MTD Opp. at 19–20; LAUSD Reply at 14–16; CDE Reply at 6–8.) For the reasons stated below, the Court concludes that neither the School Plaintiffs nor the Loffmans have pleaded sufficient facts to show Article III standing.

### 1. The School Plaintiffs Lack Standing

Defendants argue that the School Plaintiffs fail to establish standing under the “able and ready” standard because: (1) they have not alleged sufficient facts to show that they would be able and ready to apply for NPS certification were it not for the nonsectarian requirement; and (2) they have alleged facts showing that they likely would not be able to satisfy NPS certification requirements that are independent from the nonsectarian requirement. (LAUSD Mot. at 24–27; CDE Mem. at 15–19; LAUSD Reply at 14; CDE Reply at 5–6.)

Plaintiffs counter that that the School Plaintiffs satisfy the “able and ready” test because: (1) “they desire and intend to explore the NPS process as a means of meeting religious obligations to serve children with disabilities”; (2) they believe that they can satisfy NPS certification requirements; and (3) pursuing certification would be futile right now because they cannot certify that they are nonsectarian institutions. (MTD Opp. at 17; *see also* Compl. ¶¶ 152–60, 163–70.) According to Plaintiffs, at the pleading stage the School Plaintiffs can satisfy the “able and ready” standard by alleging that they intend to apply and that a discriminatory barrier—here, the nonsectarian requirement—prevents them from competing for benefits on an equal footing. (MTD Opp. at 16–18.)

The Court agrees with Defendants and concludes that the School Plaintiffs lack Article III standing. First, the Court considers the Complaint’s affirmative allegations regarding the School Plaintiffs’ ability and readiness to apply for NPS certification.

1 Instead of alleging specific facts showing either School Plaintiff’s ability and willingness  
2 to satisfy NPS certification requirements, the Complaint simply alleges:

3       On information and belief, Shalhevet either otherwise meets or is capable of  
4 meeting California’s other certification requirements to become an NPS.

5       . . . .

6       On information and belief, Yavneh either otherwise meets or is capable of  
7 meeting California’s other certification requirements to become an NPS.

8 (Compl. ¶¶ 156, 166.) The Complaint does not include any allegations about concrete  
9 steps the School Plaintiffs have taken to become certified as NPSs, and it does not explain  
10 on what grounds the schools believe that they would be able to meet the other certification  
11 requirements for becoming an NPS. As to Shalhevet, the Complaint alleges merely that it  
12 “seeks the opportunity to qualify to provide a distinctively Orthodox Jewish education to  
13 children with disabilities.” (*Id.* ¶ 152.) Yavneh similarly “seeks the ability to qualify as a  
14 certified NPS.” (*Id.* ¶ 165.) The Complaint includes no allegations related to the School  
15 Plaintiffs’ experience or efforts in educating children with disabilities.

16       Plaintiffs’ allegations fail to show that the School Plaintiffs are able and ready to  
17 apply for NPS certification. The statutory requirements for a school to achieve NPS  
18 certification in California are extensive. To obtain NPS certification, schools must provide  
19 “special education and designated instruction and services” from “appropriately qualified  
20 staff,” including an administrator with appropriate credentials. Cal. Educ. Code  
21 § 56366.1(a)(1)–(5). Moreover, NPSs must offer a “standards-based curriculum” with  
22 “standards-focused instructional materials” to implement students’ IEPs. *Id.*  
23 §§ 56366(a)(5), 56366.1(j), 56366.10(b). Schools applying to receive NPS certification  
24 must certify that they will use the State Board of Education (“SBE”)-adopted, standards-  
25 aligned core curriculum and instructional materials for kindergarten and grades 1 through  
26 8, and will use the state standards-aligned core curriculum and instructional materials used  
27 by the LEA that contracts with the NPS for grades 9 through 12. Cal. Educ. Code  
28 § 56366.10(b); Cal. Code Regs. tit. 5, § 3001(a). Schools applying for NPS certification



1 must also certify that their teachers and staff will provide instruction and support “with the  
2 goal of integrating pupils into the least restrictive environment pursuant to federal law.”  
3 Cal. Educ. Code § 56366.10(c).

4 Furthermore, implementing regulations require a school seeking NPS certification  
5 to describe the school’s “exit criteria for transition back to the public school setting.” Cal.  
6 Code Regs. tit. 5, § 3060(c)(8). Indeed, NPS placement entails extensive and ongoing  
7 state monitoring, evaluation, and direction of the NPS by the LEA, with the aim of  
8 transitioning a pupil back to less restrictive environments in public school. Cal. Educ.  
9 Code § 56366(a)(2)(B). Last, institutions applying for NPS certification must agree that  
10 they will “maintain compliance” with the IDEA and other federal laws, including the Civil  
11 Rights Act, Fair Employment Act, and Section 504 of the Rehabilitation Act. Cal. Code  
12 Regs. tit. 5, § 3060(d). And the California Education Code prohibits discrimination based  
13 on, among other things, religion in any program or activity conducted by an educational  
14 institution receiving or benefitting from state financial assistance. Cal. Educ. Code § 220.

15 Given the extensive requirements for achieving NPS certification outlined above,  
16 the Complaint’s vague, conclusory allegations that the schools “otherwise meet” or are  
17 “capable of meeting” other requirements for NPS certification lack sufficient factual  
18 content to be deemed plausible. *See Iqbal*, 556 U.S. at 678 (a complaint is insufficient “if  
19 it tenders ‘naked assertions’ devoid of ‘further factual enhancement’”) (quoting *Twombly*,  
20 550 U.S. at 557). Moreover, Plaintiffs do not allege that either School Plaintiff would  
21 follow the state curriculum and use state-adopted educational materials as required by  
22 California law, or that they would consent to continuous state monitoring and work with  
23 LAUSD to transition pupils with disabilities back to public school. Nor do Plaintiffs  
24 allege that the School Plaintiffs would comply with state and federal nondiscrimination  
25 requirements, as every NPS must. Instead, Plaintiffs allege that the School Plaintiffs offer  
26 “a distinctively Orthodox Jewish education” that combines religious and secular studies  
27 and that “the inculcation and transmission of Jewish religious beliefs and practices to  
28 children is the very reason that Shalhevet and Yavneh exist.” (Compl. ¶¶ 31–34, 76.)

1 Plaintiffs further allege that the School Plaintiffs specifically seek to serve *Jewish* families  
2 and children with disabilities. (*Id.* ¶¶ 3, 32, 34, 154.) These allegations do not raise a  
3 plausible inference that the School Plaintiffs are able and ready to apply for and obtain  
4 NPS certification.

5 Compare this case with *Carroll*, where the plaintiff had taken more steps to apply  
6 than the School Plaintiffs allege to have taken here—there, at least, the plaintiff had  
7 submitted a “materially deficient” and “meritless” application. 342 F.3d at 942–43. But  
8 the Ninth Circuit concluded that submitting a deficient application was not enough to  
9 establish standing. *Id.* at 943. Here, there is no allegation that the School Plaintiffs have  
10 even begun to prepare to apply or have any experience serving students with disabilities.

11 The lack of any allegations about steps that the schools have taken to apply for and  
12 receive NPS certification makes this case closely analogous to other cases where courts  
13 have found a lack of standing based on lack of concrete steps showing ability and  
14 readiness to apply. *See, e.g., Faculty v. New York Univ.*, 11 F.4th at 77 (concluding that  
15 plaintiffs lacked standing because their complaint failed to include “any ‘description of  
16 concrete plans’ to apply” and indefinite “‘some day intentions’ . . . cannot ‘support a  
17 finding of [] actual or imminent injury’”) (quoting *Summers*, 555 U.S. at 496); *Ellison*, 11  
18 F.4th at 208–9 (allegations failed to establish standing because they did not show that  
19 plaintiff had more than “a hypothetical ‘some day’ interest in possibly” seeking board  
20 certification). It also sets this case apart from the facts of the cases on which Plaintiffs  
21 rely: unlike in *AGC*, *Bras*, and *Barr*, where the plaintiffs either had actually applied for the  
22 benefits at issue or had a history of receiving those benefits, no facts are alleged here to  
23 show that either School Plaintiff is able and ready to apply for and receive NPS  
24 certification.

25 Plaintiffs do not need to prove that the School Plaintiffs would receive NPS  
26 certification but for the nonsectarian requirement. At this stage, they need only allege  
27 sufficient facts that, if proven, would show that the School Plaintiffs are able and ready to  
28 apply for NPS certification but are unable to do so because of the nonsectarian



1 requirement. Without that, they cannot show that they have suffered a concrete injury  
2 because of the nonsectarian requirement—*i.e.*, they cannot establish Article III standing.

3 For the above reasons, the Court concludes that Plaintiffs have not alleged sufficient  
4 facts to show that the School Plaintiffs have suffered or are suffering a concrete injury on  
5 account of the nonsectarian requirement challenged here. Accordingly, the Court  
6 DISMISSES the School Plaintiffs’ claims against Defendants for lack of Article III  
7 standing.

8 “[W]here a plaintiff fails to allege facts to support Article III standing, the  
9 complaint ordinarily is subject to dismissal, albeit with leave to amend.” *Greenpeace, Inc.*  
10 *v. Walmart Inc.*, 2022 WL 591451, at \*2 (N.D. Cal. Feb. 3, 2022); *see also Warth v.*  
11 *Seldin*, 422 U.S. 490, 501–2 (1975) (observing that with respect to “a motion to dismiss for  
12 want of standing,” “it is within the trial court’s power to allow or to require the plaintiff to  
13 supply, by amendment to the complaint or by affidavits, further particularized allegations  
14 of fact deemed supportive of plaintiff’s standing”). Because Plaintiffs represented to the  
15 Court during oral argument that they could allege additional facts to establish that the  
16 School Plaintiffs have Article III standing, dismissal is WITH LEAVE TO AMEND.

## 17 18 **2. The Loffmans Lack Standing**

19  
20 The LAUSD Defendants argue that Plaintiff M.L. and his parents, Plaintiffs Chaya  
21 and Jonathan Loffman, lack Article III standing because the Complaint fails to plead facts  
22 showing that M.L. is eligible to receive a special education and related services under the  
23 IDEA. (LAUSD Mot. at 20–21; CDE Mem. at 21–22; LAUSD Reply at 13.) The CDE  
24 Defendants further argue that the Loffmans have not asked LAUSD for an IEP for M.L.  
25 and that Plaintiffs allege that LAUSD is able to provide services such as “a full-time aide,  
26 a supervisor for the aide, speech and occupational therapists, adaptive physical education,  
27 resource specialists for English and math, and a private reading tutor.” (CDE Mem. at 21–  
28 22; Compl. ¶ 106.) In light of this, the Complaint fails to allege plausibly that M.L.’s

1 disability is so severe that LAUSD could legally place him in any NPS, which would first  
2 require an IEP to be developed for M.L. (CDE Mem. at 22.)

3       Plaintiffs counter that they have shown a sufficient injury at this stage by alleging  
4 that California’s nonsectarian requirement acts as a discriminatory barrier that prevents  
5 them from advocating for and seeking placement in a religious NPS. (MTD Opp. at 15–  
6 16.) According to Plaintiffs, they do not need to show that any of their children would be  
7 placed in an NPS but for the nonsectarian requirement, because the nonsectarian  
8 requirement already forces them to participate in California’s IDEA program on an  
9 unequal basis. (*Id.*) Plaintiffs further argued during the hearing that the students and  
10 families here have suffered an Article III injury analogous to the one recognized by the  
11 First Circuit in *Carson v. Makin* (“*Carson I*”), 979 F.3d 21 (1st Cir. 2020): the lost  
12 opportunity to find a religious secondary education that would qualify for public funding  
13 for their children. *Id.* at 30–31. For Plaintiffs, the nonsectarian requirement at issue here  
14 similarly injures the families and their children by preventing them from even advocating  
15 for placement in an otherwise qualifying religious NPS.

16       The Court agrees with Defendants that Plaintiffs have not alleged sufficient facts to  
17 show that M.L. and the Loffmans have suffered or continue to suffer a concrete injury that  
18 is traceable to the challenged nonsectarian requirement. Plaintiffs allege that M.L. was  
19 diagnosed with high functioning autism at age 3. (Compl. ¶¶ 20, 79.) They do not allege  
20 that the Loffmans have ever sought to enroll M.L. in public school or requested a FAPE  
21 from LAUSD. Rather, the Loffmans have only enrolled M.L. in private religious schools  
22 and “recognize that M.L. might be able for more services in public school as part of an  
23 IEP[.]” (*Id.* ¶¶ 84–90.) Because the Loffmans wish to send M.L. to an Orthodox Jewish  
24 school, however, they have opted to pay for M.L.’s special education needs and therapy  
25 out of pocket rather than seek a FAPE from LAUSD. (*Id.* ¶¶ 82, 84, 87–90.) According to  
26 Plaintiffs, the Loffmans are forced to pay out of pocket for special education services for  
27 M.L. “due to California law and Defendants’ practices.” (*Id.* ¶ 90.)  
28

1 The Complaint suggests that the Loffmans' claimed injury is that the challenged  
 2 nonsectarian requirement forces them to pay for M.L.'s special education and related  
 3 services: absent the nonsectarian requirement, M.L. could receive an education that is both  
 4 publicly funded and meets the family's religious needs. In their opposition brief and  
 5 during oral argument, however, Plaintiffs have argued that all three families have suffered  
 6 and continue to suffer an Article III injury because the nonsectarian requirement prevents  
 7 them from advocating for their children to be placed at a religious NPS. Regardless of  
 8 how they characterize their injury, however, Plaintiffs do not allege sufficient facts to  
 9 show that the challenged requirement is the cause of the Loffmans' alleged injuries.

10 First, the facts alleged do not show that M.L. could receive a publicly funded  
 11 Orthodox Jewish education if not for California's nonsectarian requirement. Again, it is  
 12 important to focus on the legal framework as described in Section I.A., *supra*. The  
 13 Complaint assumes that M.L. is eligible to receive a FAPE from LAUSD because of his  
 14 autism diagnosis, but an autism diagnosis does not equate to IDEA eligibility. Autism  
 15 makes a pupil eligible under the IDEA if it both "significantly affect[s] verbal and  
 16 nonverbal communication and social interaction" and "adversely affects a child's  
 17 educational performance." 34 C.F.R. § 300.8(c)(1)(1)(i). The Complaint alleges that M.L.  
 18 requires speech and behavior therapy, but it does not allege that M.L.'s autism adversely  
 19 affects his educational performance. More importantly, there is no allegation that the  
 20 Loffmans have ever sought a FAPE from LAUSD or that LAUSD has ever evaluated  
 21 M.L., who may or may not be entitled to receive a special education and related services  
 22 under the IDEA. *See* 20 U.S.C.A. § 1414(a)(1)(A) ("A State educational agency, other  
 23 State agency, or local educational agency shall conduct a full and individual initial  
 24 evaluation . . . before the initial provision of special education and related services to a  
 25 child with a disability under this subchapter.").

26 Plaintiffs do not allege sufficient facts to show that the Loffmans have been forced  
 27 to choose between a publicly funded special education and related services and an  
 28 Orthodox Jewish education for M.L. because they have not alleged enough facts to show

1 that M.L. is eligible to receive a FAPE under the IDEA. Because the Loffmans have not  
2 sought a FAPE from LAUSD and M.L. has not been evaluated, they cannot be said to have  
3 forgone services available to children with disabilities under the IDEA because of their  
4 desire to provide M.L. with a religious education.

5        Reframing the injury as being prevented from advocating for placement in a  
6 religious school does not assist the Loffmans. Again, the allegations pertaining to the  
7 Loffmans and M.L. specifically do not suffice to show that the nonsectarian requirement  
8 has prevented or is preventing them from seeking an IEP that places M.L. in a religious  
9 school: there is no allegation that the Loffmans have ever sought publicly funded special  
10 education services from LAUSD, which means that they are not in a position to advocate  
11 for such placement even if the nonsectarian requirement were eliminated. Moreover, the  
12 purported loss of an opportunity to advocate for placement in a religious school in these  
13 circumstances is too amorphous and hypothetical to qualify as a concrete Article III injury:  
14 if any child or family could claim a legally cognizable interest in an advocacy opportunity  
15 without otherwise alleging eligibility under the IDEA and the denial of a FAPE, standing  
16 to challenge different aspects of the IDEA and States' implementation thereof would be  
17 essentially limitless. To challenge how California implements the IDEA, the Loffmans  
18 have to allege sufficient facts to show that the IDEA applies to their child; that they have a  
19 concrete interest in how the statute is implemented. The allegations in the Complaint, even  
20 if assumed to be true, fall short of showing that.

21        Based on the foregoing, the Court concludes that Plaintiffs have not put forth  
22 sufficient facts to show that the nonsectarian requirement has caused the Loffmans any  
23 injury. Accordingly, the Court DISMISSES the Loffmans' claims against Defendants for  
24 lack of Article III standing. Unlike the School Plaintiffs, the Loffmans cannot allege  
25 additional facts that would show that they had Article III standing at the time the  
26 Complaint was filed—the Loffmans have not sought a FAPE from LAUSD, and M.L. has  
27 not been evaluated to determine whether he is eligible to receive a special education under  
28

1 the IDEA. The dismissal is therefore WITHOUT PREJUDICE, but WITHOUT LEAVE  
2 TO AMEND.

### 3 4 **3. The Taxons' Allegations Establish Standing**

5  
6 Defendants argue that Plaintiff K.T. and his parents, Plaintiffs Fedora Nick and  
7 Morris Taxon, lack Article III standing because K.T. does not require placement in an NPS  
8 and the nonsectarian requirement has no bearing on his placement. (LAUSD Mot. at 22–  
9 23; CDE Mem. at 21; LAUSD Reply at 13, 23; CDE Reply at 6.) Defendants argue that  
10 the Complaint fails to allege that K.T. is “able and ready” to receive NPS placement  
11 because it admits that “from kindergarten through eighth grade, K.T. has received a  
12 mainstreamed classroom education in public school” and that LAUSD has provided,  
13 through an IEP, “a full-time aide, a supervisor for the aide, speech and occupational  
14 therapists, adaptive physical education, resource specialists for English and math, and a  
15 private reading tutor.” (CDE Mem. at 21; LAUSD Reply at 23; Compl. ¶¶ 105–7.)

16 According to the LAUSD Defendants, NPS placement is simply not on the table for  
17 K.T.’s IEP team and removing the nonsectarian requirement would not affect his  
18 placement. (LAUSD Mot. at 23.) They also observe that the Complaint does not allege  
19 that the Taxons have sought placement in an NPS and been denied. (LAUSD Reply at 23.)  
20 The CDE Defendants argue more generally that “the Complaint’s affirmative allegations  
21 about the children’s disabilities and the special education services that they have been  
22 receiving in LAUSD public schools for years, strongly suggest[] that no NPS placement is  
23 possible or likely at *any* time, let alone imminently[.]” (CDE Reply at 6.)

24 Plaintiffs’ counterargument is the same here: that they have shown a sufficient  
25 injury at this stage by alleging that California’s nonsectarian requirement acts as a  
26 discriminatory barrier that prevents them from advocating for and seeking placement in a  
27 religious NPS. (MTD Opp. at 15–16.)  
28

1       The Complaint alleges that K.T. was diagnosed with autism at age 2 and is now  
 2 fourteen years old. (Compl ¶¶ 91, 94.) The Taxons sent their two other, non-disabled  
 3 children to Orthodox Jewish schools and wish to provide K.T. with the same education as  
 4 his siblings. (*Id.* ¶¶ 92, 99–100.) Plaintiffs further allege that the Taxons have sought  
 5 opportunities for K.T. since he was in preschool but “have been unable to place K.T. in an  
 6 Orthodox Jewish school due to California’s prohibition on using generally available  
 7 special-education funding at private religious schools.” (*Id.* ¶ 101.) The Taxons are  
 8 allegedly “unable to utilize funds for K.T. that would otherwise be available to them—  
 9 unless they decide to forgo a religious education for K.T.” (*Id.* ¶ 103.) “From  
 10 kindergarten through eighth grade, K.T. has received a mainstreamed classroom education  
 11 in public school” but “performs below grade level academically.” (*Id.* ¶ 105.) As a  
 12 public-school student, “K.T. has an IEP that includes 9 service providers, including a full-  
 13 time aide, a supervisor for the aide, speech and occupational therapists, adaptive physical  
 14 education, resource specialists for English and math, and a private reading tutor.” (*Id.*  
 15 ¶ 106.) Those services are currently provided through LAUSD. (*Id.* ¶ 107.) The Taxons  
 16 do not believe that K.T. is receiving a FAPE in public school because he misses out on  
 17 needed special education and related services both for secular and religious holidays and is  
 18 repeatedly served non-kosher food. (*Id.* ¶¶ 108–12.) The Taxons believe that K.T.’s  
 19 absences during religious holidays have affected his progress in school and that absences  
 20 would not similarly affect K.T.’s progress if he were placed in an Orthodox Jewish school.  
 21 (*Id.* ¶ 111.)

22       Construing the allegations in the light most favorable to Plaintiffs, the Court is not  
 23 persuaded that the Taxons and K.T. lack Article III standing. Defendants assert that the  
 24 allegations in the Complaint establish that placement in an NPS would be clearly  
 25 inappropriate for K.T., who already receives ample services from LAUSD and receives  
 26 most of his instruction in a regular classroom. Defendants may be correct that it is  
 27 unlikely that K.T. would be placed in an NPS in light of his current situation as described  
 28 in the Complaint. But Plaintiffs also allege deficiencies in the FAPE that K.T. receives in

1 public school due to conflicts between how the school operates and the Taxons' religious  
 2 beliefs and observance: K.T.'s absences during religious holidays have slowed his progress  
 3 and the school regularly gives him non-kosher food. Even if it is unlikely that K.T.'s IEP  
 4 team would agree with the Taxons that placing K.T. in an Orthodox Jewish school is  
 5 necessary for him to receive a FAPE, Plaintiffs plausibly allege that the nonsectarian  
 6 requirement harms the Taxons by making it impossible for them to even suggest that  
 7 possibility. Due to the nonsectarian requirement, the Taxons are prevented from even  
 8 advocating for possible placement in an Orthodox Jewish school, regardless of whether the  
 9 ultimate decision resides with the IEP team and the LEA.

10 Contrary to Defendants' position, that the ultimate decisionmaker is the LEA does  
 11 not affect the injury analysis for the Taxons. Parents are undeniably involved in the  
 12 development of their children's IEP, even if they do not get a veto over the LEA's decision  
 13 about what is best for the child. Parents who have concerns about the special education  
 14 that their child is receiving at a public school and who believe that placement in a private  
 15 school would better suit their child can present that as a possibility to other members in the  
 16 child's IEP team. But the nonsectarian requirement prevents parents who think that  
 17 placement in a *religious* private school would better suit their child's needs from making  
 18 that argument, while allowing parents who prefer placement in a *secular* private school to  
 19 at least make the argument. Thus, the nonsectarian requirement disadvantages parents who  
 20 believe that a private religious school may be better equipped to provide their child with a  
 21 special education and related services because of their religion. *Cf. Carson I*, 979 F.3d at  
 22 30–31 (concluding that the plaintiff parents who challenged Maine's nonsectarian  
 23 requirement for tuition assistance had established an Article III injury because they had  
 24 "lost the 'opportunity' to find religious secondary education for their children that would  
 25 qualify for public funding" regardless of whether they could show that they would be able  
 26 to send their children to otherwise eligible religious schools absent the nonsectarian  
 27 requirement) (citation omitted). The loss of that opportunity to advocate for alternative  
 28 placement is enough to establish an Article III injury, notwithstanding genuine doubts as to



1 whether the Taxons would be able to secure placement in an Orthodox Jewish NPS if the  
2 nonsectarian requirement were eliminated.

3 The Complaint alleges sufficient facts for the Taxons and K.T. to establish Article  
4 III standing: the nonsectarian requirement makes it impossible for them to advocate for  
5 K.T.'s placement in an Orthodox Jewish NPS and eliminating the requirement would  
6 remove a significant barrier to their doing so. Accordingly, the Court declines to dismiss  
7 the Taxons' claims for lack of Article III standing.

#### 8 9 **4. The Peretses' Allegations Establish Standing**

10  
11 Defendants' arguments that Plaintiff N.P. and his parents, Plaintiffs Ariel Perets and  
12 Sarah Perets, lack Article III standing are the same as their arguments regarding K.T. and  
13 the Taxons. (LAUSD Mot. at 22–23; CDE Mem. at 21; LAUSD Reply at 13, 23; CDE  
14 Reply at 6.) Plaintiffs' counterarguments are the same as well. (MTD Opp. at 15–16.)

15 The Peretses are in materially the same situation as the Taxons with regard to  
16 Article III standing: they allege enough facts to show an injury that is caused by the  
17 nonsectarian requirement and can be redressed by its elimination—*i.e.*, the inability to  
18 advocate for N.P. to be placed in a religious NPS. Accordingly, the Court declines to  
19 dismiss the Peretses' claims for lack of Article III standing.

#### 20 21 **D. The Taxons and the Peretses Do Not State Viable Free Exercise** 22 **Claims**

23  
24 Defendants argue that none of the Plaintiffs in this action state viable claims for  
25 violations of their rights under the Free Exercise Clause of the First Amendment because  
26 they “cannot show an actual and substantial burden on their exercise of religion.” (CDE  
27 Mem. at 23; *accord* LAUSD Mot. at 27; CDE Reply at 11–12.) As the Court has  
28

1 dismissed the School Plaintiffs and the Loffmans for lack of standing, the Court analyzes  
2 Defendants’ argument only as it applies to the remaining Plaintiffs.

3 Plaintiffs argue that the nonsectarian requirement violates their rights to freely  
4 exercise their religion by making religious affiliation or identity a bar to receiving  
5 otherwise available public benefits. (MTD Opp. at 21–23.) According to Plaintiffs, the  
6 nonsectarian requirement is facially discriminatory against religion, which means that it is  
7 not a neutral and generally applicable law that incidentally burdens free religious exercise.  
8 (*Id.* at 23–28.) And because the nonsectarian requirement is not facially neutral and  
9 generally applicable, it is subject to strict scrutiny—which, according to Plaintiffs, the  
10 nonsectarian requirement cannot survive. (*Id.* at 28–33.)

11 The Free Exercise Clause of the First Amendment protects against “indirect  
12 coercion or penalties on the free exercise of religion, not just outright prohibitions.”  
13 *Carson v. Makin* (“*Carson II*”), 142 S. Ct. 1987, 1996 (2022) (quoting *Lyng v. Northwest*  
14 *Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988)). The Supreme Court has  
15 “repeatedly held that a State violates the Free Exercise Clause when it excludes religious  
16 observers from otherwise available public benefits.” *Id.* (citations omitted). In three  
17 recent cases, the Supreme Court has held unconstitutional state efforts that withheld  
18 “otherwise available public benefits from religious organizations.” *Id.*; *see also Trinity*  
19 *Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana*  
20 *Dep’t of Revenue*, 140 S. Ct. 2246 (2020). Barring otherwise eligible recipients from a  
21 public benefit—say, funding benefits such as grants or tuition assistance payments—  
22 “solely because of their religious character” imposes “a penalty on the free exercise of  
23 religion that triggers the most exacting scrutiny,” which is rarely satisfied. *See Espinoza*,  
24 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 582 U.S. at 462).

25 According to Defendants, there is no unconstitutional state effort to withhold  
26 otherwise available funding from religious organizations here because the nonsectarian  
27 requirement at issue does not withhold otherwise available public benefits from Plaintiffs.  
28 Because Plaintiffs are not being denied otherwise available public benefits, argue

1 Defendants, they cannot show that the nonsectarian requirement burdens their free exercise  
2 rights. And because there is no burden on the free exercise of religion, the nonsectarian  
3 requirement is constitutional. (*See* LAUSD Mot. at 27–31; CDE Mem. at 24–28; LAUSD  
4 Reply at 17–25; CDE Reply at 15–19.) As to students and their families, Defendants argue  
5 that the public benefit at issue is their right to a FAPE under the IDEA and that none of the  
6 Plaintiffs have been excluded from receiving that benefit because of their religion.  
7 (LAUSD Mot. at 28–29; CDE Mem. at 26–28; LAUSD Reply at 19–20, 22–23.)

8 According to Defendants, Plaintiffs simply mischaracterize the benefits that the IDEA  
9 extends to pupils with disabilities and their families and distort the purpose of California’s  
10 NPS system. As the CDE Defendants put it,

11       The NPS system is not a mechanism to subsidize private schools (religious  
12       or otherwise), or to create and bestow a public right to a free *private*  
13       education. Rather, it is a mechanism to allow the state to meet its obligation  
14       to give access to its free public (and secular) education to certain children  
15       with disabilities whose families had the option of enrolling in private  
16       religious school, but who enrolled in LEAs instead. The system  
17       accomplishes that through government contracts, which obligate the  
18       contractor to perform many specific tasks and that grant many specific rights  
19       to the state’s public educational agencies.

20 (CDE Mem. at 20.) The NPS system does not fund private schools to provide children  
21 with a private education, but it establishes a framework for certain private schools to  
22 contract with the State to provide the State’s public education. (*Id.* at 26.)

23       According to Plaintiffs, it is immaterial that NPSs contract with the State to provide  
24 a public education because they remain private institutions and are recognized as such  
25 under the California Education Code. (MTD Opp. at 26.) Plaintiffs argue that  
26 Defendants’ “public education” argument here is just as unavailing as the one rejected by  
27 the Supreme Court in *Carson II*, where Maine could not salvage a nonsectarian  
28 requirement for tuition assistance approval with the “magic words” of “public education.”

1 (*Id.*) As Plaintiffs see it, “California has not chosen to use the public school system to  
 2 provide a FAPE to all students with disabilities; instead, it contracts with private schools to  
 3 provide this service.” (*Id.* at 27.) For Plaintiffs, that means that California has made a  
 4 choice to subsidize the *private* education of children with disabilities in certain instances.  
 5 (*Id.*) Having made that choice, California cannot choose to condition said subsidizing on  
 6 nonsectarian status. (*Id.*)

7       How we define the benefit at issue here is critical for determining whether the  
 8 challenged nonsectarian requirement burdens the Taxons’ and the Peretses’ free exercise  
 9 rights. If Plaintiffs are correct that the NPS system subsidizes a private education for  
 10 children eligible for a FAPE under the IDEA, then this case is on all fours with *Carson II*  
 11 and the nonsectarian requirement here is unconstitutional. If, however, the NPS system is  
 12 not a program for subsidizing private education, then the scheme is not unconstitutional  
 13 under *Carson II*, *Espinoza*, and *Trinity Lutheran*.

14       Because California’s NPS system is a means of delivering benefits that are available  
 15 to students with disabilities under the IDEA, we begin with the federal statute. As stated in  
 16 Section I.A, *supra*, the IDEA aims “to bring previously excluded handicapped children  
 17 into the public education systems of the States” and “open the door of public education to  
 18 handicapped children on appropriate terms.” *Rowley*, 458 U.S. at 189, 192. To receive  
 19 IDEA funds, States “must provide a free appropriate public education—a FAPE, for  
 20 short—to all eligible children.” *Endrew F.*, 580 U.S. at 390 (citing 20 U.S.C. §  
 21 1412(a)(1)). But the IDEA also contemplates that some families will opt for private  
 22 education for their children and imposes on the States different obligations toward eligible  
 23 children depending on the type of school eligible children attend.

24       When parents choose to send their eligible children to private school—including a  
 25 religious school—rather than public school, those children—dubbed “parentally placed  
 26 children”—are entitled to “equitable services,” rather than the full range of benefits  
 27 available to eligible children at public schools. *See* 20 U.S.C. § 1412(a)(10)(vi) (children  
 28 with a disability who attend private schools are entitled to “equitable services” that must be

1 “secular, neutral, and nonideological” even if provided in religious schools); *id.*  
2 § 1412(a)(10)(C)(i) (the IDEA “does not require a local educational agency to pay for the  
3 cost of education, including special education and related services, of a child with a  
4 disability at a private school or facility if that agency made a [FAPE] available to the child  
5 and the parents elected to place the child in such private school or facility”); 34 C.F.R. §  
6 300.137(a) (“No parentally-placed private school child with a disability has an individual  
7 right to receive some or all of the special education and related services that the child  
8 would receive if enrolled in a public school.”).

9 Parents may also choose to place an eligible child in a private school after the LEA  
10 has failed to make a FAPE available to the child—so-called “unilateral placement.” *See*  
11 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c). When parents opt for unilateral  
12 placement because they believe that their child’s current placement is denying them a  
13 FAPE and that their child can receive a FAPE at a private school, they can obtain  
14 reimbursement from the LEA if they “can show both that the IEP offered by the [LEA]  
15 violated the IDEA and that the alternative private placement they chose was proper under  
16 the Act.” *D.R. by & through R.R. v. Redondo Beach Unified Sch. Dist.*, 56 F.4th 636, 647  
17 (9th Cir. 2022) (citation omitted). Reimbursement for the child’s education in that  
18 scenario “is a form of equitable relief,” which requires courts to “assess the reasonableness  
19 of both parties’ conduct to determine whether reimbursement is warranted.” *Id.* The  
20 reimbursement is to the parents to make up for the LEA’s failure to provide a FAPE, and it  
21 will be denied if the parents’ choice was not “proper and reasonable under the  
22 circumstances.” *Id.* In unilateral placement situations, that is, the parents may be entitled  
23 to reimbursement of the cost of seeking an appropriate education at a private school, but  
24 private schools do not receive any IDEA funds.

25 For their children to receive the full benefits of the IDEA—a FAPE with the support  
26 of an IEP—parents must work with the LEA in charge of the public schools their children  
27 would attend. As the Supreme Court has recognized, “[i]t is through the IEP that the free  
28 appropriate public education required by the Act is tailored to the unique needs of a

1 particular child.” *Endrew F.*, 580 U.S. at 401 (internal quotation marks and citation  
2 omitted). The IEP is a “comprehensive plan” prepared by the pupil’s “IEP Team,” which  
3 must include: (i) the child’s parents; (ii) at least one of the child’s regular education  
4 teachers; (iii) at least one special education teacher; and (iv) a representative of the LEA  
5 with knowledge of available resources and the general education curriculum. *See id.* at  
6 391; 10 U.S.C. § 1414(d)(1)(B).

7 A child may be placed in a private elementary or secondary school by an LEA as  
8 part of an IEP if the child’s IEP Team determines that a private school placement is needed  
9 to provide the child with a FAPE. *See* 20 U.S.C. § 1412(a)(10)(B). The decision to place  
10 a child in a private institution to implement the child’s IEP rests with the LEA—not the  
11 child’s parents—and the LEA is responsible for ensuring that the private institutions it  
12 chooses “meet standards that apply to State educational agencies and local educational  
13 agencies and that children so served have all the rights the children would have if served  
14 by such agencies.” *Id.* For their child to receive the maximum support that the IDEA  
15 requires the State to provide to eligible pupils, parents have to give up their ability to  
16 choose a private school and accept the LEA’s placement decision. In sum: accept the  
17 State’s offer of a FAPE, give up your choice of private school.

18 California’s nonsectarian requirement does not prevent the provision of equitable  
19 services at religious schools or bar reimbursement to parents when they unilaterally place  
20 their child in a religious school. The nonsectarian requirement only affects with what  
21 private institutions LEAs in California may contract to provide eligible children with a  
22 FAPE when placement in a private institution is necessary to implement the child’s IEP.  
23 *See* Cal. Educ. Code §§ 56365, 56366, 56505.2.

24 The Taxons and the Peretses do not—indeed, cannot—posit that the nonsectarian  
25 requirement stands in the way of either: (a) their children receiving equitable services if  
26 they were to attend an Orthodox Jewish school; or (b) being reimbursed the cost of their  
27 children’s education at an Orthodox Jewish school of their choice if they could show that  
28 K.T. and N.P. were not receiving a FAPE in public school and their choice of school was

1 proper under the IDEA. Rather, the benefit from which the Taxons and Peretses have  
2 allegedly been excluded on account of their Orthodox Jewish faith is their children's  
3 receipt of a FAPE from LAUSD.

4 But the Complaint does not allege that either the Taxons or the Peretses have been  
5 denied a FAPE because of their religion. Rather, the Complaint alleges that both families  
6 wish to provide their children with disabilities an Orthodox Jewish education (Compl.  
7 ¶¶ 99–100, 122–24); both families believe that neither K.T. or N.P. are receiving a FAPE  
8 in public school at least in part because they miss school during religious holidays and are  
9 repeatedly served non-kosher food (*id.* ¶¶ 108–12, 130–48); and they have been unable to  
10 place the children “in an Orthodox Jewish school due to California’s prohibition on using  
11 generally available special-education funding at private religious schools” and cannot  
12 “utilize funds for [their children] that would otherwise be available to them—unless they  
13 decide to forgo a religious education” for the K.T. and N.P. (*id.* ¶¶ 101, 103, 125–26). The  
14 benefit that the Taxons and the Peretses allege that they have been excluded from on  
15 account of their religion is generally available special-education funding for private  
16 schools.

17 When considering a motion to dismiss, the Court must assume that the factual  
18 allegations in a complaint are true, but it will not assume the correctness of the complaint's  
19 legal conclusions or statements of law. California's nonsectarian requirement for NPS  
20 certification is simply a limitation on the types of entities with which the State may  
21 contract to provide a FAPE to children with exceptional needs when a public school cannot  
22 meet those children's needs. California's NPS system is not a mechanism for subsidizing  
23 the education of IDEA-eligible children at private schools. Rather, it is a regime whereby  
24 the State contractually delegates its responsibility to educate eligible children to private  
25 institutions in accordance with IDEA requirements and the same State educational  
26 standards that apply to the LEA itself. Characterizing the NPS system as a mechanism for  
27 subsidizing private instruction of IDEA-eligible children is erroneous as a matter of law.  
28



1 Under federal regulations, LEAs that place children in private institutions—in  
 2 California, in a certified NPS—remain responsible for adequately implementing the  
 3 IDEA’s requirements: “Even if a private school or facility implements a child’s IEP,  
 4 responsibility for compliance . . . remains with the [State and local agencies].” 34 C.F.R.  
 5 § 300.325(c). Furthermore, the State “must . . . [m]onitor compliance” with its educational  
 6 standards “through procedures such as written reports, on-site visits, and parent  
 7 questionnaires[.]” 34 C.F.R. § 300.147(a). In California, NPSs are obligated to provide  
 8 the special education and related serviced “specified in each pupil’s [IEP].” Cal. Educ.  
 9 Code § 56366(a)(1). Accordingly, NPSs must provide each child placed with them by an  
 10 LEA with a special education that follows the State’s curriculum and standards. *Id.*  
 11 § 56366.10; Cal. Code Regs, tit. 5, § 3060(c)(9). A child’s enrollment in an NPS is  
 12 equivalent to enrollment in the State’s public education system, so that when a child  
 13 completes the education prescribed in his or her IEP “the public education agency which  
 14 developed the IEP shall award the diploma.” Cal. Code Regs. tit. 5, § 3070. California  
 15 provides funding to private schools acting as NPSs to meet its obligations under the IDEA,  
 16 and that funding is available under a regulatory and contracting scheme that obligates  
 17 NPSs to act as adjuncts of public education agencies. It is therefore a gross  
 18 mischaracterization to characterize NPS funding as subsidies for private education or  
 19 generally available special-education funding for private schools. In this respect, the  
 20 Complaint misstates the nature of the benefits at issue.

21 *Carson II* does not assist Plaintiffs. There, the Supreme Court rejected Maine’s  
 22 argument that schools eligible for its tuition assistance program had to be nonsectarian to  
 23 provide a “public education” in part because participating private schools did not actually  
 24 provide a public education. The Supreme Court explained that: “the curriculum taught at  
 25 participating private schools need not even resemble that taught in the Maine public  
 26 schools”; participating private schools were generally “exempt from many of the State’s  
 27 curricular requirements”; and had no obligation to hire state-certified teachers. *Carson II*,  
 28

1 142 S. Ct. at 1999. The benefit at issue there was nothing more than tuition assistance, not  
2 the provision of a public education or its equivalent. *Id.* at 1998–99.

3 Here, by contrast, the purpose of the NPS system *is* to deliver a public education—  
4 more specifically, a FAPE—to certain students, rather than to disburse tuition assistance  
5 payments. Unlike Maine’s tuition assistance scheme, California’s NPS system *does*  
6 obligate participating institutions to provide a public education that conforms to the State’s  
7 curriculum and standards. NPSs do not simply receive tuition assistance payments; they  
8 contract with the State to provide students with exceptional needs with a FAPE as detailed  
9 in their IEPs. And the NPS system certainly does not direct funding to parents of eligible  
10 children that the parents can utilize to fund a private education, as Plaintiffs allege. Thus,  
11 the nonsectarian requirement for NPS certification does not exclude the Taxons and the  
12 Peretses from access to funds that would otherwise be available to them if they wished to  
13 enroll their children in secular private schools.

14 Nor does the nonsectarian requirement preclude K.T. and N.P. from receiving a  
15 FAPE because of their religion. The Taxons and the Peretses have accepted LAUSD’s  
16 FAPE offers for their children, who receive a special education and related services in  
17 LAUSD public schools. (Compl. ¶¶ 104–7, 129, 131–36.) The Taxons and the Peretses,  
18 that is, have elected that their children receive a FAPE with the support of an IEP at public  
19 schools rather than the alternative available to them under the IDEA: enrolling the children  
20 in a private school of their choice where they can receive publicly funded equitable  
21 services.

22 Moreover, neither the Taxons nor the Peretses have removed K.T. or N.P. from  
23 their public schools for failing to provide a FAPE and enrolled them in Orthodox Jewish  
24 schools that they can show have provided an appropriate education. By electing to have  
25 their children receive a FAPE with the support of an IEP from LAUSD, the Taxons and the  
26 Peretses accepted the tradeoff between full benefits and school choice inherent in the  
27 IDEA itself. *Cf. Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19 (1st Cir.), *cert. denied*  
28 543 U.S. 988 (2004) (explaining that the plaintiffs were not being deprived of a generally

1 available public benefit because the IDEA benefits that they claimed that they were denied  
 2 under the First Amendment when seeking an education at a Catholic school “are benefits  
 3 the federal government has earmarked solely for students enrolled in the nation’s public  
 4 schools—benefits still available for [the child] were he sent to a public school, though not  
 5 otherwise”). Accepting an LEA’s FAPE offer limits all parents’ ability to enroll their  
 6 children in private school, regardless of whether their private school of choice is religious  
 7 or not. Under the IDEA, parents of eligible children do not get to accept the LEA’s FAPE  
 8 offer *and* choose that their child receive that FAPE at a private school.

9 California’s nonsectarian requirement for NPS certification is not what prevents the  
 10 Taxons and the Peretses from receiving a FAPE for their children. By their own  
 11 allegations, LAUSD has provided the special education and services to which their  
 12 children are entitled under the IDEA. What LAUSD has not provided are special  
 13 accommodations that take into account the families’ religious wants. But said  
 14 accommodations are not available under the IDEA, which contemplates that parents who  
 15 prefer private—including religious—school for their children will seek equitable services  
 16 or reimbursement rather than the full range of benefits available under the IDEA.

17 For the foregoing reasons, the Court concludes that Plaintiffs have failed to allege  
 18 that California’s nonsectarian requirement burdens the Taxons’ and the Peretses’ right to  
 19 freely exercise their religion. Accordingly, the Taxons’ and the Peretses’ claims under the  
 20 Free Exercise Clause—Counts I, II, III, and VI—are DISMISSED.<sup>1</sup> Because the Taxons’  
 21 and the Peretses’ claims fail as a matter of law, dismissal is WITH PREJUDICE.

---

22  
 23  
 24  
 25  
 26 <sup>1</sup> The Court interprets Count V, which is styled “Free Exercise Clause Unconstitutional  
 27 Conditions,” to apply to the School Plaintiffs only and not the Taxons or the Peretses because the  
 28 alleged unconstitutional condition is requiring schools to “give up their religious identity” to  
 certify their nonsectarian status and apply to become NPSs. (Compl. ¶ 213). That condition does  
 not apply to the families.

### **E. The Taxons and the Peretses Fail to State Equal Protection Claims**

Plaintiffs' Equal Protection claims are predicated on the same theory of discrimination against religion as their Free Exercise Claims. The Complaint states that Plaintiffs have been denied the equal protection of the laws because "California's Education Code prohibits Plaintiffs from utilizing generally available, public funds to send their children to private religious schools merely because those schools are religious." (Compl. ¶ 206.) But, as the Court has explained in the preceding Section, such a claim mischaracterizes the nature of the available benefits. Moreover, California's nonsectarian requirement applies to schools, not IDEA-eligible children and their parents.

The Court therefore concludes that the Taxons and the Peretses have failed to state a claim under the Equal Protection Clause. Accordingly, their claims under the Equal Protection Clause—Count IV—are DISMISSED WITH PREJUDICE.

### **F. Plaintiffs Are Not Entitled to a Preliminary Injunction**

"A preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 676 (2008) (internal quotations marks omitted). A district court should issue a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Because the Court concludes that the School Plaintiffs and the Loffmans have failed to allege sufficient facts to establish that they have Article III standing to bring their claims, Sections III.C.1–2, *supra*, and that the Taxons and the Peretses fail to state a claim upon which relief can be granted as a matter of law, Sections III.E–F, *supra*, a fortiori, Plaintiffs have failed to make a clear showing of entitlement to relief. Accordingly, Plaintiffs' Motion for a Preliminary Injunction is DENIED.

1           **IV.    CONCLUSION**

2

3           For the foregoing reasons, the Court DENIES Plaintiffs' Motion for a Preliminary

4 Injunction and GRANTS Defendants' Motions to Dismiss Case as follows:

- 5           • Plaintiffs' claims against the California Department of Education and the Los
- 6 Angeles Unified School District are DISMISSED WITH PREJUDICE.
- 7           • Plaintiffs' claims for monetary relief against Tony Thurmond and Anthony
- 8 Aguilar are DISMISSED WITH PREJUDICE.
- 9           • The School Plaintiffs' claims asserting violations of the Free Exercise Clause
- 10 and the Equal Protection Clause—Counts I through V—are DISMISSED
- 11 WITH LEAVE TO AMEND.
- 12           • The Loffmans' claims are DISMISSED WITHOUT PREJUDICE, but
- 13 WITHOUT LEAVE TO AMEND.
- 14           • The Taxons' and the Peretses' claims asserting violations of the Free
- 15 Exercise Clause—Counts I, II, III, and VI—are DISMISSED WITH
- 16 PREJUDICE.
- 17           • The Taxons' and the Peretses' claims asserting violations of the Equal
- 18 Protection Clause—Count IV—are DISMISSED WITH PREJUDICE.

19           Any amended complaint must be filed within twenty-one (21) days of the date of

20 this Order. Failure to timely file an amended complaint will result in the dismissal of this

21 action and closing of the case without further notice.

22

23 DATED: August 9, 2023

24

25 

26 \_\_\_\_\_

27 HON. JOSEPHINE L. STATON

28 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
HONORABLE JOSEPHINE L. STATON, U.S. DISTRICT JUDGE

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CHAYA LOFFMAN, et al.

Plaintiffs,

VS.

CALIFORNIA DEPARTMENT  
OF EDUCATION, et al.

Defendants.

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No. 2:23-CV-01832-JLS  
Appeal No. 23-55714

REPORTER'S TRANSCRIPT OF MOTION HEARING

LOS ANGELES, CALIFORNIA

FRIDAY, JULY 21, 2023

10:38 A.M.

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APRIL LASSITER-BENSON, RPR  
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UNITED STATES DISTRICT COURT  
350 WEST 1ST STREET, ROOM 4455  
LOS ANGELES, CALIFORNIA 90012  
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UNREDACTED TRANSCRIPT

**ER-056**

- A-P-P-E-A-R-A-N-C-E-S -

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1 FRIDAY, JULY 21, 2023; 10:38 A.M.

2 LOS ANGELES, CALIFORNIA

3 -----

4 **THE COURTROOM DEPUTY:** Calling Item Number  
5 cv-23-1832, Chaya Loffman, et al. vs. California  
6 Department of Education, et al.

7 Counsel, please state your appearances.

8 **MR. PROUTY:** Good morning, Your Honor. Tom  
9 Prouty for the State Defendants, California Department of  
10 Education and the state superintendent of public  
11 instruction.

12 **THE COURT:** Good morning.

13 **MR. REAVES:** Good morning. Nicholas Reaves on  
14 behalf of all plaintiffs.

15 **THE COURT:** Good morning.

16 **MR. RASSBACH:** Eric Rassbach on behalf of  
17 plaintiffs.

18 **MR. WINCHEL:** Brandon Winchel on behalf of  
19 plaintiffs.

20 **MS. EVANS:** Sue Ann Evans on behalf of LAUSD  
21 and also for Tony Aguilar.

22 I'm on the wrong side (indicating  
23 table).

24 **THE COURT:** You are.

25 All right. So, I want to focus you this

UNREDACTED TRANSCRIPT

**ER-058**

1 morning on one issue. I only hold hearings when I  
2 think there's an issue that I really want to ask  
3 questions about. The issue here is standing. And  
4 so, I would like to hear from the plaintiffs first,  
5 then I'll hear from defendants. But, if you would  
6 like to stand at the lectern, please.

7 Good morning. It's Mr. Reaves, correct?

8 **MR. REAVES:** Yes. Good morning, Your Honor.

9 **THE COURT:** I am going to ask you every time  
10 to repeat your name, because there are a number of you  
11 and that helps the court reporter.

12 All right. So, standing. Seems that  
13 the plaintiffs don't think that the able and ready  
14 standard really applies to the schools. Let's start  
15 with plaintiff's schools.

16 **MR. REAVES:** Certainly.

17 **THE COURT:** So, tell me what you think the  
18 standard is that I should be considering.

19 **MR. REAVES:** Yes, Your Honor. I believe this  
20 case is more similar to Los Angeles vs. Barr, and to the  
21 AGC cases, because, first, this is at the Motion to  
22 Dismiss stage, so we are looking at the allegations in  
23 the complaint.

24 The Carney case and some of the other  
25 cases that defendants have cited are summary

1 judgment cases where there was a full record.

2 **THE COURT:** You know, I understand that. I  
3 understand that -- I'm always talking to clerks and  
4 others about the different stages of the case, of course,  
5 right, pleadings versus summary judgment, factual  
6 development, all of that. But even the pleadings require  
7 that you allege facts that are sufficient. Not that you  
8 prove them. Not that we've decided what the true facts  
9 are and whether they're material facts at issue. But  
10 just that you've alleged them.

11 So, what do you think that you need to  
12 have alleged here to show standing? Just alleged,  
13 not shown.

14 **MR. REAVES:** Yes, Your Honor.

15 My reading of AGC and of Barr and of  
16 Carney, all go to the intent of the plaintiff. Does  
17 the plaintiff intend to engage in the action, and  
18 are they categorically barred from doing so?

19 **THE COURT:** So, do you think that's  
20 sufficient, just saying, "I intend. I intend. I would,  
21 but I'm barred"?

22 **MR. REAVES:** I do think the Court has  
23 mentioned this able and ready, but it's -- Your Honor,  
24 it's the able and ready to apply or to bid or to seek  
25 certification.

1           **THE COURT:** So you would have to at least  
2       allege facts that would show that.

3           So, here, for example -- let me just cut  
4       to the chase. I think that's probably the easiest.

5           Why wouldn't I need to see facts alleged  
6       that, but for the nonsectarian requirement, we would  
7       be prepared to seek certification? In other words,  
8       we would certify that we will use the State Board of  
9       Education adopted standards, aligned core curriculum  
10      and instructional materials for kindergarten and  
11      grades one through eight.

12           We would certify that we will use the  
13      State standards aligned core materials that an LEA  
14      uses when it contracts with a nonpublic school for  
15      grades nine through 12.

16           We would certify that our teachers and  
17      staff will provide instruction and support with the  
18      goal of integrating pupils into the least  
19      restrictive environment and transitioning them back  
20      into that least restrictive environment.

21           We will maintain compliance with the  
22      IDEA and other federal laws, including the Civil  
23      Rights Act, the Fair Employment Act, the  
24      Rehabilitation Act. And we will not discriminate in  
25      who comes into our school.

1                   So, we will comply with all of that.

2                   And we would, but for your requirement that  
3                   we -- that it be nonsectarian.

4                   **MR. REAVES:** Yes, Your Honor. Well, two  
5                   points.

6                   First, we have alleged that they're able  
7                   and ready to meet the remaining requirements. And I  
8                   do believe that a general allegation that they've  
9                   looked at the complaint or they've looked at the  
10                  application which we've submitted to the Court as  
11                  part of Exhibit 5 and 6, and that they are, on  
12                  information and belief, able to satisfy those, and  
13                  is sufficient. But I would like to take a step  
14                  back, Your Honor.

15                  I do think the case law is clear that  
16                  when plaintiffs are categorically barred from even  
17                  being able to apply, which is what we've alleged  
18                  here, they don't have to show they're able to meet  
19                  subsequent requirements, or that they ultimately  
20                  would be certified.

21                  **THE COURT:** Now, I definitely agree with you  
22                  that they don't have to show that they would ultimately  
23                  be certified, right. That's requiring too much. That  
24                  goes to -- I mean, that's addressed in a lot of the case  
25                  law.

1 But being in a position to be certified  
2 is different. Having the ability to be certified on  
3 nonsectarian -- on the requirements that are not  
4 related to the nonsectarian requirement.

5 **MR. REAVES:** Yes, Your Honor. I would first  
6 point to the allegations that we have made in the  
7 complaint about that, but second, I would say --

8 **THE COURT:** Well, so then -- I mean, that's a  
9 good point, because what I wasn't sure of was, if I found  
10 that your allegations were too vague, they weren't  
11 sufficient because they sounded too much like, yeah, we  
12 would intend to do this, generally, would you want me to  
13 amend -- to go back and allege that you would comply with  
14 all of these other requirements?

15 **MR. REAVES:** Yes, Your Honor, we would  
16 certainly like leave to amend, if that's the direction  
17 the Court is going. But I think there are a few reasons  
18 the Court doesn't have to go there.

19 One is the Carson case itself. And in  
20 Carson, only the parents there were plaintiffs. And  
21 the State of Maine made the same argument. In  
22 Carson, Maine specifically said, these two religious  
23 schools which you've identified, actually don't want  
24 to apply and might not even apply. And the Court,  
25 the First Circuit, and the District Court, which the

1 Supreme Court relied on their standing analysis,  
2 said even if it's unlikely that these schools would  
3 ever be approved for Maine's program, these parents  
4 still have standing, because the parents' injury is  
5 the lost opportunity to advocate for their child's  
6 placement in a school -- in a religious school that  
7 receives public funding. That's exactly what the  
8 First Circuit held.

9 I think, here, the standing of those  
10 individual parents and of the families, is more than  
11 sufficient. But as to the schools, I would point  
12 this Court back to Los Angeles vs. Barr, because in  
13 that case, the federal government argued that even if  
14 Los Angeles had complied and put the immigration  
15 priority into their application, the federal  
16 government said, you still would have been denied.  
17 And the Ninth Circuit said, that doesn't matter.  
18 That's not relevant. What matters is they weren't  
19 considered on an equal playing field. And that's  
20 all we're asking for here, too, Your Honor.

21 **THE COURT:** All right. As for the -- as for  
22 the parents, I think the problem that I have and what I'd  
23 want you to explore is the concreteness of the injury,  
24 the immediacy of the injury, because it has to be  
25 concrete and particularized. It can't be something in



1 the future. And it may have been sort of -- I'm not sure  
2 it's the proper way of addressing it by the defense,  
3 because it was raised as sort of an administrative  
4 exhaustion kind of issue. And maybe that is the way to  
5 think of it, or a causation issue.

6 So, for example, let me start with the  
7 Loffmans. Have they even sought placement in --  
8 have they even sought an IEP or anything like that  
9 from the school?

10 **MR. REAVES:** So, a few points on that, Your  
11 Honor. I actually think Footnote (5) of the AGC opinion  
12 is really helpful on this point, because in AGC the  
13 injury was being denied the opportunity to bid. And in  
14 the footnote, what the Court says is if that is the  
15 injury, if the injury is their total exclusion, then  
16 addressability and causation flow from that, because if  
17 the Court were to enjoin the nonsectarian restriction,  
18 that would have --

19 **THE COURT:** So, wait, what is -- I think I'm  
20 not understanding what you're saying the injury is.

21 What is the parents' injury?

22 **MR. REAVES:** The parents' injury is the  
23 inability to advocate for their child's placement in an  
24 Orthodox Jewish school, that would be -- that would  
25 qualify for NPS certification.

1           **THE COURT:** It sounds like you're changing the  
2 barrier into the benefit. And maybe I'll go back and  
3 reread some of the cases that you've cited, because you  
4 were referencing this earlier; the inability to advocate.  
5 I'm not sure it translates in every single circumstance  
6 just because that was the case elsewhere.

7           But the benefit is the program for the  
8 child. It's whether or not they can have the  
9 program that the parents -- well, I mean, I think  
10 this is even in dispute. The parents don't get to  
11 pick the program, right.

12           **MR. REAVES:** They do play a large role in the  
13 decision-making process.

14           **THE COURT:** They do, but first they have to go  
15 through several hurdles. There's not even any showing  
16 here that the children would be eligible for any  
17 nonpublic school, as far as I can tell, or even any --  
18 I'm not sure that there's any showing of any concrete  
19 injury, because they haven't tried for that.

20           They're not saying, look, the school  
21 can't serve. We would have -- and maybe they are.  
22 Maybe I'm missing this. The school can't provide  
23 what's needed. We've gone through that process that  
24 shows us that. And so, now, we would advocate for a  
25 nonpublic school that is sectarian. We would

1 advocate for the particular school we want, but we  
2 can't, because they're not eligible.

3 But how do we get to that point, because  
4 there's really no showing that that is the cause of  
5 the injury? There's not even an allegation, for  
6 example. We've been through this process. We know  
7 our child needs a nonpublic school.

8 **MR. REAVES:** Well, Your Honor, I'd point to a  
9 few things. First is, we have alleged in the complaint  
10 that the plaintiffs do qualify for IDEA benefits. And  
11 that's at Paragraph 80 for M.L., 96 for K.T., and 120 for  
12 M.P.

13 And I would say, Your Honor, we also  
14 alleged for each of these, especially for K.T. and  
15 M.P., that they are not receiving a FAPE in their  
16 current placement. And we've detailed this in the  
17 complaint, that the parents allege they've not  
18 received a sufficient education, and why it would be  
19 a better -- why it would better to place them in an  
20 Orthodoxed Jewish NPS.

21 I would also add, Your Honor, that it  
22 would be futile at this point for the parents to  
23 advocate for that, because there are no Orthodoxed  
24 Jewish schools.

25 **THE COURT:** So, the only nonpublic school that

1 the parents would advocate for would be an Orthodoxed  
2 Jewish school?

3 **MR. REAVES:** That's right, Your Honor.

4 **THE COURT:** Okay. So, they -- I guess I'm  
5 trying to say -- are they saying they need the services  
6 of a nonpublic school, or do they just want an Orthodoxed  
7 Jewish school, a religious -- there's a difference,  
8 right. There's a difference between saying -- because  
9 you're not entitled to just choose -- like, let's say you  
10 were a parent that wanted a nonsectarian school, right,  
11 and you can't come in and simply say, I want a nonpublic  
12 school, and you get it, right. You have to at least show  
13 that you would be eligible.

14 Isn't there some sort of -- how do I  
15 know there's any injury if the child is not even  
16 eligible for any nonpublic school?

17 **MR. REAVES:** Well, Your Honor, a few points.  
18 I really think Carson in the First Circuit's opinion, in  
19 particular, is extremely helpful here.

20 In Carson what the First Circuit said  
21 was, it's the lost opportunity. It's not even the  
22 benefit. It's the lost opportunity that is the  
23 First Amendment injury. And because the injury is  
24 the lost opportunity to even seek that placement,  
25 that's what they're alleging here. They're alleging

1 that, but for the nonsectarian requirement --

2 **THE COURT:** The first one was the Supreme  
3 Court case, right?

4 **MR. REAVES:** Yes, Your Honor.

5 **THE COURT:** And you're just citing back to the  
6 First Circuit now.

7 **MR. REAVES:** Right. For the standing  
8 analysis, which the Supreme Court found standing and  
9 relied on.

10 So I think we really are on all fours  
11 with Carson here, as to the individual plaintiffs.  
12 In Carson, it was even more clear that the schools  
13 would not likely -- that the schools they identified  
14 who weren't even plaintiffs, weren't likely to seek  
15 approval from the state. And even so, the parents  
16 had an injury, because they lost the opportunity to  
17 advocate for the placement of their child in a  
18 school that was approved by the state.

19 **THE COURT:** But there's no question in that  
20 case. What I'm trying to figure out is, in that case,  
21 the children had no public school available to them. And  
22 there was no question, but that they were -- they could  
23 be placed in a -- they could get the tuition placement,  
24 right, the tuition money to place them in a private  
25 school. And the only thing was, can it be a religious

1 school. And the answer was, you can't distinguish,  
2 right.

3 And so, but there was no issue -- did  
4 they even have the right. Are they even in the  
5 position. What if it had been a child who had a  
6 public school available and said, well, yes, but I  
7 would still like the opportunity to go to a private  
8 religious school.

9 Would there still be standing? Because  
10 that sounds more like what we have here. There's no  
11 showing that the children would be eligible for any  
12 nonpublic school, or not even like a factual  
13 allegation that we've gone far enough, or that we've  
14 exhausted our remedies, we would be put in a  
15 nonpublic school. But he or she is eligible for  
16 those services because the school can't provide  
17 them. But we have no choice.

18 We don't have to show, of course, that,  
19 if what you're saying is right -- maybe we could say  
20 we don't have to show that the religious school  
21 would likely be approved. That's not a showing.  
22 But don't you at least have to meet that first  
23 hurdle? This sounds like it's different from Carson  
24 in that way.

25 **MR. REAVES:** I would disagree, Your Honor. I

1 really think it's Carson and the AGC opinion. Because if  
2 you think about the parents, similar to the contractors  
3 in AGC, what they're saying is, we're prepared. We're  
4 able and ready to bid on the contracts. We're able and  
5 ready to advocate for and to seek placement. We don't  
6 know if we'll ultimately be placed, because that is a  
7 decision made by the IEP team. But we are parents and we  
8 are children who are eligible for benefits under the  
9 IDEA, and we've established that.

10 **THE COURT:** But that's a pretty generic  
11 statement; saying we're eligible for benefits under the  
12 IDEA is not the same as saying we are eligible to go to  
13 an NPS. Sort of like in Carson, we're in the position --  
14 we're not these urban kids -- we're not an urban family.  
15 We're this rural family. We would be eli- -- they're  
16 eligible to go to a private school. And you're telling  
17 us now that we can't go to a religious private school.

18 **MR. REAVES:** Your Honor, I --

19 **THE COURT:** We have standing.

20 Here, what you want to say is, it sounds  
21 like, we're eligible for the IDEA, generally. We  
22 may or may not be eligible for a nonpublic private  
23 school. So we don't really know whether our injury  
24 is because of the nonsectarian requirement or not.  
25 But because we're sort of somewhere in this process,



1 in the future, we may be barred from arguing that.  
2 That's sufficient for us to bring a case now.

3 **MR. REAVES:** Well, Your Honor, I think all  
4 children who are eligible for IDEA benefits would have  
5 the opportunity to advocate for placement in a nonpublic  
6 school, just because a small number of the children who  
7 are receiving IDEA benefits end up being placed in a  
8 nonpublic school, doesn't mean they're categorically  
9 alleging that they're somehow outside the realm of people  
10 who are ready and able.

11 I don't think there is much else that  
12 plaintiff parents can do, because there's no  
13 Orthodoxed Jewish NPS school that they can advocate  
14 for placement in now. There's -- I'm just not sure  
15 what else the plaintiff parents would be able to do.  
16 They've alleged that their current placement is not  
17 sufficient, that they're not getting a FAPE in their  
18 current school. They've alleged that if their child  
19 was placed in an Orthodoxed Jewish NPS, they  
20 wouldn't miss additional holidays, they wouldn't be  
21 forced to violate kosher. They would be able to  
22 both get an education and satisfy their FAPE  
23 requirements, which is part of the problem and the  
24 reason why they're not getting a FAPE in their  
25 current placement.

1           **THE COURT:** How does that run -- how do you  
2 deal with the Fourth Circuit case on that when you're  
3 talking about, you have an obligation to provide,  
4 essentially, not just an education based on the  
5 disability, but you have an obligation to provide the  
6 needed cultural aspects of an education as well?

7           **MR. REAVES:** Yes, Your Honor. That's not what  
8 we're seeking.

9           So, in the M.L. case, the arguments the  
10 plaintiffs were making there is that a public  
11 school, as part of its operations, has to provide  
12 Orthodoxed Jewish education and a cultural  
13 curriculum. We're not asking any public school to  
14 do that.

15           What we're saying is, if this child had  
16 the opportunity to receive their IEP at an  
17 Orthodoxed Jewish NPS, they would be in the  
18 community, they would be surrounded by those  
19 benefits in the school. But the problem with the  
20 M.L. decision is, the plaintiffs were trying to get  
21 the Government to engage in religious exercises to  
22 create a religious curriculum for them.

23           **THE COURT:** It's interesting. I think  
24 you're -- I mean, we're not there yet, because I'm still  
25 talking about standing. But it sounds like you're

1 bumping up against the -- what's interesting in the  
2 Sotomayor dissent in the Carson case, which is the -- her  
3 view was, the Supreme Court has been moving in a  
4 particular direction on the tension between the free  
5 exercise and the establishment clauses, right. And this  
6 was additional movement in the Carson case. But the  
7 Supreme Court is not saying that if the public school  
8 were to contract with a non -- a private school to  
9 provide services, that it would be required to contract  
10 with a religious school. And so, now, it's kind of  
11 interesting. This would be testing that, wouldn't it,  
12 because what you would be saying is, you don't have to  
13 provide it, but you do have to contract with a nonpublic  
14 school that would provide it, right.

15 **MR. REAVES:** A few --

16 **THE COURT:** We're not there yet, but ...

17 **MR. REAVES:** Yes, Your Honor. All I would say  
18 on that point is, I think the Fulton case makes very  
19 clear that the Government can be required to contract  
20 with religious organizations on the same grounds as it  
21 does other secular organizations. The Supreme Court  
22 rejected the argument that when the Government is in a  
23 managerial role, the contractors lose their First  
24 Amendment rights. And I do think that's an important  
25 theme in this case, because the NPS schools, the

1 nonpublic/nonsectarian schools are private actors. The  
2 State and the defendants aren't claiming that they're a  
3 part of the Government, or that they're subject to the  
4 First Amendment, that they're government actors. All  
5 they are is regulated private entities who have to comply  
6 with certain requirements to receive a benefit.

7           The exact same thing was true in Carson  
8 where Maine had to approve the private schools.  
9 Only approved private schools could receive funding.  
10 And Maine imposed numerous curricular and other  
11 requirements on those schools in order to be  
12 approved.

13           So I do think we're not really moving  
14 much at all. I wouldn't say we're moving beyond  
15 Carson at all. This really is, I think, a direct  
16 application of Carson, because California has  
17 imposed the same nonsectarian requirements that  
18 Maine imposed, and that the Supreme Court struck  
19 down.

20           **THE COURT:** All right. Anything further that  
21 you would like to address before I hear -- because I have  
22 another case after you, as well. Anything else on --  
23 really, again, standing is the area I'm focused on now.

24           **MR. REAVES:** Yes, Your Honor, very briefly on  
25 the additional standing cases that are cited.

1 I think Ellison is actually a good  
2 example. That's a Third Circuit case where a  
3 California doctor was seeking to practice in New  
4 Jersey. And there, the Third Circuit said, you  
5 don't have to be ready to submit an application the  
6 day after the case is over. And it's actually often  
7 a low bar, to show that you're able and ready to  
8 apply.

9 What the Third Circuit said is, after  
10 discovery, they showed that the doctor didn't really  
11 have the intent of seeking to practice in New  
12 Jersey. He hadn't taken any -- there were steps he  
13 could take and he hadn't taken any steps.

14 Here, plaintiffs are categorically  
15 barred from even beginning the application process.  
16 And that's in both of our -- the Shalhevet and the  
17 Yavneh declarations. We talk about how, even  
18 submitting the application would require them to  
19 certify that they are nonsectarian, which they can't  
20 do.

21 So I do think the cases, even the ones  
22 that state defendants and district defendant cite,  
23 all support a showing that they are able and ready,  
24 to the extent that that is the requirement this  
25 Court looks to, and that the focus of the able and

1 ready requirement is on the intent of the  
2 plaintiffs.

3 **THE COURT:** All right. Thank you.

4 **MR. REAVES:** Thank you, Your Honor.

5 **THE COURT:** And defense counsel, is it  
6 Mr. Prouty?

7 **MR. PROUTY:** Thank you, Your Honor.

8 The standard for standing in this case,  
9 with respect to the schools is from Carney vs.  
10 Adams, Supreme Court case (2020). And they have to  
11 show that it is likely that they are able and ready  
12 to be nonpublic schools in the reasonably imminent  
13 future, if it were not for the specific challenged  
14 nonsectarian requirement.

15 The cases that talk about "able and  
16 ready" -- and this is focused on in the State  
17 defendant's reply in their Motion to Dismiss. But  
18 it's not able and ready to be really interested in  
19 applying and performing if selected. And it is not  
20 able and ready to apply if there is no ability and  
21 readiness to perform if you are selected.

22 Your Honor was absolutely right that  
23 we've never made the argument, it's a strong man,  
24 that they need to show that the state superintendent  
25 of public instruction would exercise his discretion

1 to certify the schools, based on their review of  
2 their application. And we've never argued that they  
3 have to show that an LEA would then enter into a  
4 master contract. Both of those are possibilities.

5 But our argument is the complaint.  
6 Based on the affirmative allegations in the  
7 complaint, and that the things that are not in  
8 there, show that it's implausible that they can  
9 state, now, after seeing all the briefing, and that  
10 federal law prohibits religious instruction in an  
11 NPS, that they are able and ready, not just to  
12 apply, but if the nonsectarian requirement was wiped  
13 off the face of the earth, that they would fulfill  
14 and perform as an NPS, if the discretion is  
15 exercised to certify, that meant if an LEA does  
16 enter a master contract --

17 **THE COURT:** So, what do you think the  
18 difference is between the pleading stage and the summary  
19 judgment stage?

20 **MR. PROUTY:** Well, now we're at a stage where  
21 there's already a complaint where the schools have said  
22 that the reason they want to be certified is to provide a  
23 distinctively religious education to Orthodoxed Jewish  
24 students. And they've submitted declarations stating  
25 that they haven't even attempted to explore what the



1 other requirements are. So the declarations and  
2 submitted the motion for preliminary injunction  
3 make -- call the information and belief that is in the  
4 current complaint into question on --

5 **THE COURT:** That may be, but I'm not quite  
6 sure how to marry the preliminary injunction declarations  
7 and the complaint. I mean, I think that they're still  
8 entitled to the pleadings standard, when it comes to your  
9 motion on standing. So, I'm not -- I mean, it may cause  
10 one to scratch one's head and say, how can this be if  
11 that is, if you've already declared that, which is really  
12 why I ask whether or not the plaintiffs wanted leave to  
13 amend, because I could picture a circumstance in which, I  
14 thought, maybe the case was, you just wanted me to tell  
15 you you didn't have standing so you could appeal it, and  
16 you didn't want to amend.

17 So, you've said here today that you  
18 would like leave to amend. And so, you know, at  
19 least, I don't know why I wouldn't provide that. If  
20 it's inconsistent with what they've put in the  
21 declarations, then that could -- but it still then  
22 passes the pleading stage, then maybe we get to the  
23 discovery stage and then you come back on standing  
24 at a Motion for Summary Judgment.

25 Do you see my concern with trying to use

1 the preliminary injunction papers to decide the  
2 Motion to Dismiss?

3 **MR. PROUTY:** I do.

4 So, I think, looking at the first  
5 complaint, if leave to amend was granted -- and I'll  
6 touch on that in a second, but earlier -- if I had a  
7 tape recorder I would play it back, are you willing  
8 to certify that you would use LAUSD textbooks for  
9 high-schools or state board adopted textbooks for  
10 K-8. Would every teacher have a state credential,  
11 including the ones that require a special education  
12 credentialing for teaching special education  
13 students. Would you abide by that  
14 anti-discrimination language?

15 But very importantly, you would be  
16 agreeing to provide the state's public and secular  
17 public education. And you would also be agreeing  
18 that the state would be coming in and telling a  
19 school that has made it very clear, why they exist  
20 and what they're about, making sure that they're not  
21 doing the thing -- the very thing they exist for.  
22 So that raises another host of problems, right.

23 So, now we have -- I think that if they  
24 were going to amend all the certification  
25 requirements -- you know what, we actually don't

1 care about providing the religious part. We'll use  
2 the textbooks of LAUSD. We're going to make sure  
3 everyone's certified. But that's where you start  
4 running into a reasonably imminent future, and  
5 likely -- is this going to take three years?

6 **THE COURT:** Well, isn't that something,  
7 though, for -- that's where we start getting into summary  
8 judgment, though, to me. They can allege that. And  
9 then, what am I supposed to do, figure out just from my  
10 knowledge of public education and special education and  
11 all of that, how long it would take them to get up and  
12 ready? Would they hire someone from the outside? Would  
13 they -- that's not a Motion to Dismiss standard, really.

14 **MR. PROUTY:** Well, the Motion to Dismiss  
15 standard, all we have now, is very general on information  
16 and belief, without referencing any of what the  
17 requirements are. We either meet them or could meet  
18 them. It doesn't say even in the reasonably imminent  
19 future. But there's no recognition of what they are.  
20 And the thrust of the complaint is so focused on, we want  
21 to provide our private education. That affirmative  
22 allegation --

23 **THE COURT:** Well, you could explore how  
24 inconsistent that is with the allegation that they stand  
25 ready and able to do this. I think that's something that

1 gets explored, depending upon what happens in the -- what  
2 I will say my tentative is to require amended pleadings.

3 So, is there anything else you want to  
4 say before I --

5 **MR. PROUTY:** There's --

6 **THE COURT:** There's a lot you want to say, but  
7 anything else you would say, on standing?

8 **MR. PROUTY:** With respect to the parents, if I  
9 may?

10 In the Carson case, that was a  
11 100 percent pure parent choice program. The  
12 requirements that --

13 **THE COURT:** You didn't have to go through any  
14 steps to have that placement, other than, we choose.  
15 That's what -- if you were a -- and I'm agreeing with you  
16 here, I think. If you were a parent who wanted to put  
17 them in -- their children into a private nonsectarian  
18 school, you just filled it out and said, here, this is  
19 what we want. If you wanted to put them into a religious  
20 school, you did whatever the process was and said, here's  
21 what we want. And the response was, you can't do the  
22 second.

23 And so, it was clear that that -- you  
24 were already -- you were prevented from doing what  
25 you were otherwise entitled to do.

1           **MR. PROUTY:** Exactly. There's an independent,  
2           unchallenged legal barrier to the plaintiff children's  
3           placement in any NPS nonpublic school. If there was not  
4           a nonsectarian requirement in the law, and they made the  
5           pitch to LAUSD to put them in an NPS, based on my reading  
6           of the complaint, LAUSD would be violating federal law by  
7           placing the students in that NPS or any other NPS.  
8           Unchallenged -- they would be breaking unchallenged  
9           federal law.

10           **THE COURT:** All right. I'm going to take the  
11           matter under submission.

12                     Well, let me just ask Mr. Reaves, do you  
13           have anything? I'll give you a minute if you want  
14           to respond.

15           **MR. WINCHEL:** Sorry, Your Honor, did you want  
16           to hear from LA Unified?

17           **THE COURT:** Oh, I'm sorry. Yes, sovereign  
18           immunity or what.

19           **MS. EVANS:** I would like to speak to sovereign  
20           immunity, but I hear you only wanted to hear about  
21           standing --

22           **THE COURT:** Yes.

23           **MS. EVANS:** -- and I would like to say a few  
24           words on standing, because we're in a slightly different  
25           position than the State, in this regard.

1           **THE COURT:**   Okay.

2           **MS. EVANS:**   Thank you, Your Honor.

3           **THE COURT:**   I'm sorry.   I should have turned  
4   to you.

5           **MS. EVANS:**   No, no.   I appreciate the  
6   opportunity.

7                         Listening to you this morning I heard  
8   you speak to the concreteness of the injury, and  
9   that is entirely missing when it comes to LAUSD.  
10   What we have seen are plaintiffs -- I'll start with  
11   M.L.   The district has had no opportunity to engage  
12   with M.L. or M.L.'s parents.   "Non" is alleged in  
13   the complaint.   And we also have our declaration in  
14   opposition to the preliminary injunction that speaks  
15   to that fact.

16                        So there's been no denial of rights  
17   under the IDEA.   There's been no denial of any right  
18   to advocate for a particular NPS.   That just isn't  
19   alleged and hasn't happened.

20                        With regard to K.T. and N.P., they were  
21   both students in the district at this time and are  
22   operating under IEPs.   But both of these students  
23   are doing fine under their IEPs, as far as what is  
24   alleged.   They have said that there's a denial of  
25   FAPE in a single sentence, but that seems to be tied

1 to the lack of a religious instruction, as opposed  
2 to benefiting from --

3 **THE COURT:** So what are you saying they need  
4 to allege?

5 **MS. EVANS:** They need to allege that the  
6 district violated some duty, that the district took some  
7 action in some way, shape or form, to deny them their  
8 rights under the IDEA, or even under the free exercise  
9 clause of equal protection, that as it stands now, they  
10 have not alleged any actions by the district to meet  
11 those standards and show standing.

12 **THE COURT:** All right. So, let me go back,  
13 though, and ask you, on sovereign immunity, what's your  
14 position on that?

15 **MS. EVANS:** Our position is that sovereign  
16 immunity applies and we rely on this Court's case in the  
17 Sato vs. Orange County Department of Education, that it  
18 applies to both the district and to Mr. Aguilar, because  
19 there has been no connection made between the state  
20 official and the actions that are alleged in the  
21 complaint. We have no role in the certification process.  
22 He has no role in that process. No say over striking the  
23 statutes that are asked to be stricken in the relief.

24 So, our position is that the district  
25 and Mr. Aguilar are properly dismissed under 1983,



1 for sovereign immunity.

2 **THE COURT:** All right. Thank you.

3 **MS. EVANS:** Thank you.

4 **THE COURT:** So, let me just ask you, first,  
5 one sentence, on the district and Mr. Aguilar.

6 **MR. REAVES:** Yes, Your Honor. Our view is  
7 that Mr. Aguilar is under ex parte young, still an  
8 appropriate defendant since we are seeking  
9 forward-looking injunctive relief. The district is very  
10 involved in the certification process. They have an  
11 opportunity to review the application. They're the ones  
12 who ultimately would contract with and provide funds to  
13 NPS certified schools.

14 And if you were to think about this as,  
15 for example, a race discrimination case, the fact  
16 that the district is just following state law, it  
17 doesn't give them as a government actor, a pass on  
18 acting on an unconstitutional unlawful restriction.

19 **THE COURT:** So you don't think there's any  
20 11th Amendment bar to the claim?

21 **MR. REAVES:** As to Mr. Aguilar, yes. As to  
22 the CDE and to LAUSD, we acknowledged in a footnote in  
23 our response to the Motion to Dismiss, that Ninth Circuit  
24 case law does bar claims against them as to  
25 forward-looking relief, but we would like to just

1 preserve that issue for appeal.

2 **THE COURT:** All right. Thank you.

3 **MR. REAVES:** Can I speak very briefly to  
4 standing as well, Your Honor?

5 **THE COURT:** Yes, that's really why I had you  
6 stand back up anyways.

7 **MR. REAVES:** Yes. I think if this Court  
8 thinks about the injury as the inability to compete on an  
9 equal playing field, I think that clarifies a lot. And I  
10 do think the AGC cases is really on point.

11 Plaintiffs here are unable to advocate  
12 for placement. They're unable to begin the  
13 certification and application process at all.

14 **THE COURT:** Distinguish between the plaintiffs  
15 you're talking about. You're talking about the school  
16 plaintiffs now?

17 **MR. REAVES:** Sorry, Your Honor. I was talking  
18 about both.

19 The parent plaintiffs aren't unable to  
20 advocate for placement because there is no NPS  
21 school that would provide a better FAPE to their  
22 children.

23 **THE COURT:** But I guess the question is, don't  
24 they first have to show at least that there's an injury  
25 because they would be entitled to some NPS school, and

1 yet, they don't have the choice between -- they don't  
2 have the choice of advocating for the NPS school of their  
3 choice, a Jewish Orthodoxed school.

4 Otherwise, if they're not in the  
5 position of saying we would be entitled to an NPS  
6 school, here are the facts that show that we would  
7 otherwise be entitled, then how do they really  
8 differ from anybody else who says, essentially, if I  
9 had a child with a disability, or I have child who  
10 has a disability who may be entitled to IDEA, but if  
11 I were to go that route, then there's a possibility  
12 that the school wouldn't be able to provide. Then  
13 there's a possibility that an NPS would be the only  
14 appropriate alternative, and then I wouldn't have  
15 the opportunity to advocate for the one I want.

16 **MR. REAVES:** Your Honor, I think the two  
17 allegations that show they are in the position to  
18 advocate, if there were an NPS available, are that, two  
19 of them already have an IEP and that they qualify for  
20 IDEA benefits, and they allege that they're not receiving  
21 a FAPE in their current placement. And they've pointed  
22 to specific reasons why that's the case. I don't think  
23 there's more that they can do to show that they would be  
24 differently positioned to receive placement in an NPS. I  
25 think everyone agrees --

1           **THE COURT:** Wouldn't we have to -- let's say  
2 this got beyond standing. I said, yeah, that's enough,  
3 and then you go to discovery, are we going to be deciding  
4 here in this Court, whether, based on all the facts, they  
5 would otherwise even be entitled? Because at some point  
6 if they were not entitled to an NPS, then the idea that  
7 they were somehow harmed by not getting the NPS of their  
8 choice would go by the wayside. But they've never  
9 litigated that before. They've never engaged in that  
10 administrative process. So, we're going to, in this  
11 Court, make those decisions to see if they even have  
12 standing? Because if they wouldn't otherwise be entitled  
13 to it, they're not in the position of the Carson  
14 Plaintiffs who live in the rural area and are entitled to  
15 send their children to a school, and the only question is  
16 which one. Then how are we in a position to address that  
17 here at this point, when they haven't done anything to  
18 show they're entitled to a nonpublic school?

19           **MR. REAVES:** Your Honor, the entitlement to a  
20 nonpublic school is the benefit at the end of the day.  
21 In AGC, the Supreme Court said you don't have to show  
22 that you would get the benefit. You don't have to show  
23 that you're entitled to an NPS. You have to show that  
24 you'd ready and able to bid.

25           And here, that's what parents have

1     alleged. That's what parents are saying. They are  
2     in a position to advocate for placement. They're in  
3     a position to advocate for an IEP team to make the  
4     decision to place them in a nonpublic school.

5             We can't -- we don't want this Court to  
6     resolve where the appropriate placement would be.  
7     That's a decision for the IEP team.

8             **THE COURT:** No, not where the appropriate  
9     placement would be.

10            **MR. REAVES:** Or even if, Your Honor -- even if  
11     NPS placement were appropriate, we don't want this Court  
12     to resolve that. All we asked for in the preliminary  
13     injunction, the only relief we're seeking, is that this  
14     Court strike down the nonsectarian restriction, which  
15     would allow the schools to apply for certification. It  
16     would allow the parents to advocate for placement. And  
17     striking down that nonsectarian bar would be the relief  
18     that plaintiffs seek. That is the relief that was at  
19     issue in Carson, as well.

20            To go back to Carson, the First Circuit  
21     said that even if the two schools they identified as  
22     the schools that would be certified to provide the  
23     education, didn't seek approval from the state, the  
24     parents would still have standing. So, if you think  
25     about it, those parents would have standing, even

1     though there was nowhere for them to send their  
2     child, and that was because the Court said the  
3     injury is your complete bar. And if we remove that,  
4     that's redressability. That's causation right  
5     there. And that's exactly the position we're in  
6     here.

7                   **THE COURT:** All right.

8                   **MR. REAVES:** Just a few additional responses.

9                   **THE COURT:** Very quickly.

10                  **MR. REAVES:** Very quickly, Your Honor.

11                         First, the State addressed a federal law  
12     that they claimed would also bar relief. That  
13     same -- a couple points. That same restriction  
14     actually applies to parental placement, as well.

15                         So, California has alleged in their  
16     response and in the Aguilar declaration that they  
17     already are permitting parental placement in  
18     religious schools. And that's because the same  
19     federal regulation prohibits discrimination on the  
20     basis of religion and allows for religious  
21     applicants to seek funding. And this is something  
22     we would want to prove up for summary judgment, Your  
23     Honor, but it's our understanding that other states  
24     allow religious schools to provide an IEP. So,  
25     federal law is not a bar to placement in a religious

1 school.

2 And then, the final point I would make  
3 is that, a couple times state defendants were  
4 talking about how this is providing public, secular  
5 education. But that's exactly the argument that  
6 Maine made in Carson, and the Supreme Court rejected  
7 it, for a couple of reasons. One reason was that  
8 under statute --

9 **THE COURT:** I got you. You don't have to  
10 argue that.

11 **MR. REAVES:** Okay. I would just point Your  
12 Honor to the statute that is -- I'm sorry, Your Honor.  
13 It is California Education Code 56366. And that says  
14 that the state will make NPS schools available as a  
15 service to local education and agencies and parents. And  
16 that's exactly what Maine said as well.

17 **THE COURT:** All right. Thank you.

18 **MR. REAVES:** Thank you, Your Honor.

19 **THE COURT:** All right. Thank you to both  
20 sides. I appreciate the arguments and the papers on  
21 this. And the matter's taken under submission. The  
22 ruling will be posted on the docket. It probably won't  
23 be there by tomorrow. It will be a little bit. So,  
24 thank you.

25 **MS. EVANS:** Thank you, Your Honor.



1                   **MR. REAVES:**   Thank you.  
2                   (WHEREUPON, the foregoing proceedings were  
3                   adjourned at 11:23 a.m.)  
4                   (Adjournment).  
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UNREDACTED TRANSCRIPT

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C E R T I F I C A T E

I, April Lassiter-Benson, do hereby certify that the foregoing 38 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes in the matter of:

CHAYA LOFFMAN, et al.

vs.

CALIFORNIA DEPARTMENT OF EDUCATION, et al.

Dated this 17th day of October, 2023.

s/APRIL LASSITER-BENSON  
Official Court Reporter  
United States District Court  
Central District of California

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Los Angeles Unified School District and  
Anthony Aguilar

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHAYA LOFFMAN and  
JONATHAN LOFFMAN, on their  
own behalf and on behalf of their  
minor child M.L.; FEDORA NICK  
and MORRIS TAXON, on their  
own behalf and on behalf of their  
minor child K.T.; SARAH PERETS  
and ARIEL PERETS, on their own  
behalf and on behalf of their minor  
child N.P.; JEAN & JERRY  
FRIEDMAN SHALHEVET HIGH  
SCHOOL; and SAMUEL A.  
FRYER YAVNEH HEBREW  
ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
EDUCATION; TONY  
THURMOND, in his official  
capacity as Superintendent of Public  
Instruction; LOS ANGELES  
UNIFIED SCHOOL DISTRICT;  
and ANTHONY AGUILAR, in his  
official capacity as Chief of Special  
Education, Equity, and Access,

Defendants.

Case No. 2:23-cv-01832-JLS-MRW

**DECLARATION OF ANTHONY  
AGUILAR IN SUPPORT OF  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

**Judge: Hon. Josephine L. Staton**

Date: July 21, 2023  
Time: 10:30 a.m.  
Courtroom: 8A

**Complaint Filed: March 13, 2023**

**Trial Date: None**

**DECLARATION OF ANTHONY AGUILAR**

I, Anthony Aguilar, declare as follows:

1. I am employed by the Los Angeles Unified School District (“LAUSD”) as the Chief of Special Education, Equity, and Specialized Programs. I have personal knowledge of the facts stated within this Declaration, except where stated upon information and belief, and as to those facts, I believe them to be true, and if called upon to testify under oath concerning them, I could and would testify competently to such facts.

2. I am preparing this declaration in support of LAUSD and Anthony Aguilar (“Defendants”)’s Opposition to Plaintiffs’ Motion for Preliminary Injunction.

3. LAUSD is the largest school district in the state of California and serves about 440,608 students residing within 710 square miles, including the city of Los Angeles, Gardena, Huntington Park, Lomita, Maywood, San Fernando, Vernon, and West Hollywood, and portions of 25 other cities and unincorporated areas of Los Angeles County. About 1430 individual schools and centers are located in LAUSD.

4. LAUSD serves about 71,900 students who qualify under the Individuals with Disabilities Education Act (“IDEA”) as a child with a disability.

5. LAUSD functions as its own special education local plan area (“SELPA”) and is responsible for ensuring that the full continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services, as required by the IDEA.

6. In LAUSD, the continuum of available program options, from least to most restrictive, are as follows: general education, general education with resource specialist program (“RSP”) support, special day class (“SDC”), special education schools, nonpublic schools, residential treatment centers, and home/hospital instruction.

7. A general education placement with RSP support is one of the least restrictive settings because the child with a disability participates in a general education setting with non-disabled peers for the majority of the school day on a comprehensive public school campus.

8. Placement of a child with a disability in general education with RSP support or an SDC on a comprehensive public school campus are both significantly less restrictive than placement in a nonpublic school. A nonpublic school is one of the most restrictive placements for a child with a disability because it is a placement whereby special education students are separated from their nondisabled peers and the regular education environment of the public school.

9. Sutter Middle School is a comprehensive public middle school located in Winnetka, California, within the jurisdictional boundaries of LAUSD.

10. The City School is a comprehensive public charter middle school that is part of LAUSD's SELPA for purposes of special education and located in Los Angeles, California, within the jurisdictional boundaries of LAUSD.

11. LAUSD provides a variety of designated instruction and services for children with disabilities, including, but not necessarily limited to, specialized academic instruction/specially designed instruction; intensive individual instruction; individual and small group instruction; speech and language; adapted physical education; health and nursing: specialized physical health care; health and nursing: other; assistive technology; occupational therapy; physical therapy; individual counseling; counseling and guidance; parent counseling; social worker; psychological; behavior intervention; residential treatment; specialized services for low incidence disabilities; specialized deaf and hard of hearing services; interpreter; audiological; specialized vision; orientation and mobility; Braille transcription; specialized orthopedic; reading; note taking; transcription; recreation service, including therapeutic recreation; college awareness; vocational assessment, counseling, guidance, and career assessment; career awareness; work experience

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education; job coaching; mentoring; agency linkages (referral and placement); travel and mobility training; and other transition services. These designated instruction and services can be provided in a variety of settings, including in the general education and SDC classrooms on comprehensive LAUSD public school campuses.

12. LAUSD is obligated to ensure that, to the maximum extent appropriate, a child with a disability is educated with children who are nondisabled and that a child is removed from the regular educational environment only if the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Given this least restrictive environment mandate, LAUSD's size and resources, and the availability of the full continuum of special education placement and supports and alternative educational options, only 1,630 children with disabilities in LAUSD attend a nonpublic school, which is about 2.0% of the total children in LAUSD eligible for special education and related services.

13. LAUSD maintains a comprehensive system of child find policies and procedures to provide regular and public notice of LAUSD's availability to assess and provide special education services to students who are not otherwise enrolled in LAUSD schools. LAUSD's child find processes include annual notices provided to Regional Centers, hospitals and health agencies, public service agencies, and private schools, among others, to ensure referral sources and the general public are both aware of, and informed of how to initiate, LAUSD's special education assessment and services.

14. LAUSD has no record of a four-year-old child with parents Chaya Loffman and Jonathan Loffman, either having enrolled in LAUSD or having contacted LAUSD for assessment through its child find referral process.

15. LAUSD has record of a fourteen-year-old student attending The City School with parent Fedora Nick. Based on this information, I believe this student is

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1 Plaintiff K.T. The current individualized education program (“IEP”) for K.T.  
2 reflects placement in a general education classroom with RSP support for reading,  
3 writing, and math. K.T. also receives behavior intervention development, behavior  
4 intervention implementation, counseling and guidance, adapted physical education,  
5 language/speech, and occupational therapy. Further, K.T. has the opportunity to  
6 participate in the extended school year (“ESY”) during the summer. Ms. Nick  
7 signed consent to all components of K.T.’s IEP.

8 16. K.T.’s IEP reflects that K.T. participates in the general education  
9 setting for 67% of the school week. This placement reflects a significantly less  
10 restrictive placement than a nonpublic school.

11 17. LAUSD has record of a fourteen-year-old student attending Sutter  
12 Middle School with parents Ariel Perets and Sarah Perets. Based on this  
13 information, I believe this student is Plaintiff N.P. The current IEP for N.P. reflects  
14 placement in a special day class. N.P. receives behavior intervention development,  
15 behavior intervention implementation, adapted physical education,  
16 language/speech, and occupational therapy. N.P. also has the opportunity to  
17 participate in the ESY. Ms. Perets signed consent to all components of N.P.’s IEP.

18 18. N.P. participates in the general education environment for 25% of the  
19 school year. N.P.’s placement is significantly less restrictive than placement at a  
20 nonpublic school.

21 19. To change a student’s placement to a more restrictive placement, such  
22 as a nonpublic school, LAUSD requires the IEP team to follow a specific process.  
23 First, the IEP team typically conducts evaluations to determine the student’s current  
24 levels of functioning and academic performance and unique needs. Next, the IEP  
25 team meets to review the evaluations and use all available information, including  
26 the evaluations, to discuss the student’s least restrictive environment. This  
27 discussion starts with the general education classroom/setting and asks whether the  
28 supports, services, accommodations, and/or modifications in the student’s IEP can



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1 be made available in a general education classroom/setting. Then, the IEP team  
2 repeats this question with a special day program on a general education site and  
3 special day program at a special education center. Only after an IEP team  
4 determines that the child cannot make appropriate progress in these lesser  
5 restrictive settings available within its public schools could a nonpublic school be  
6 considered. Finally, the IEP team must determine that the more restrictive  
7 placement outweighs any potential harmful effects, such as diminished access to the  
8 full range of the curriculum, missed general education instruction taught by highly  
9 qualified staff, rate at which student may earn credits for graduation, lack of  
10 opportunities for social interaction, lack of opportunities for age-appropriate peer  
11 role models, amount of socialization opportunities with nondisabled peers, limited  
12 access to peers in student's home community, and lack of exposure to appropriate  
13 behavioral models from peers.

14 20. After an IEP team determines that a child requires placement at a  
15 nonpublic school, the IEP team must determine which specific nonpublic school  
16 can provide the child with a free appropriate public education ("FAPE"). This  
17 placement decision involves a number of factors, including the student's unique  
18 needs, the nonpublic school's acceptance of the student based on their own  
19 admissions requirements, the availability of the nonpublic school, and the  
20 willingness of the nonpublic school to enter into a master contract with LAUSD.  
21 Taking into consideration all of these factors, the IEP team ultimately makes a  
22 recommendation for the particular nonpublic school a student will attend.

23 21. To place a child at a nonpublic school through the IEP process,  
24 LAUSD must first have a master contract with the nonpublic school. LAUSD may  
25 not enter into a master contract with a private school unless the state certifies the  
26 private school as a nonpublic school.

27 22. LAUSD is not involved in the application process for private schools  
28 to become certified by the state as nonpublic schools.



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23. LAUSD does not have authority to certify private schools as nonpublic schools or authority in any aspect of the state certification process for nonpublic schools.

24. LAUSD's master contract includes a nondiscrimination clause that requires nonpublic schools to comply with all state, federal, and local laws prohibiting discrimination on the basis of actual or perceived sexual orientation, gender or sex, race or ethnicity, ethnic group identification, ancestry, nationality, national origin, religion, color, mental or physical disability, age, immigration status, or a person's association with a person or group with one or more of these actual or perceived characteristics, or any other basis protected by federal, state or local law, ordinance, or regulation.

25. Upon information and belief, during my tenure in my current role, nonpublic schools have declined to enter into a master contract with LAUSD for reasons such as disagreement with terms of the master contract, rates offered for nonpublic school placement and services, lack of program capacity, and other undisclosed reasons.

26. A nonpublic school or LAUSD may also terminate the master contract for cause. Upon information and belief, during my tenure in my current role, nonpublic schools have terminated the master contract with LAUSD for cause.

27. When a nonpublic school declines to enter into a master contract with LAUSD or terminates the master contract for cause, LAUSD is unable to force a nonpublic school to contract with it. In these situations, LAUSD identifies an alternative, comparable nonpublic school placement for the student.

28. LAUSD does not have record of Jerry Friedman Shalhevet High School or Samuel A. Fryer Yavneh Hebrew Academy contacting LAUSD concerning an intent to seek nonpublic school certification, a request to review a nonpublic school certification application, or request to enter into a master contract with LAUSD.

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29. LAUSD operates a Nonpublic Services Department which is responsible for conducting oversight activities at contracted nonpublic schools and under my supervision. The Nonpublic Services Department conducts the following oversight activities at nonpublic schools: onsite visit of the nonpublic school prior to placing a student at the nonpublic school if LAUSD does not have any other students enrolled there; onsite monitoring visits during each school year, which includes observation of the student during instruction, walkthrough of the facility, and review of the student's progress and which can be unannounced; maintenance of school records to ensure high school graduation credit is received by LAUSD students at the nonpublic school, for high school aged students; monitoring of administration of state testing; interviews of nonpublic school staff; review of the records of LAUSD students attending the nonpublic school; and monitoring of nonpublic school documentation of service provision and tracking.

30. Through its master contract with nonpublic schools, LAUSD reserves the right to institute a program audit of a nonpublic school with or without cause, at any time, which may include a review of core compliance areas of health and safety, curriculum/instruction; related services; and contractual, legal and procedural compliance. LAUSD also reserves the right to examine and audit all the books, records, documents, accounting procedures, programs and practices and other evidence that reflect costs and provision of services to LAUSD students at the nonpublic school.

31. Nonpublic schools contracting with LAUSD must provide access to LAUSD to all records related to LAUSD students attending the nonpublic school, including, but not limited to, pupil records; cost data and fiscal records; registers and roll books of teachers and daily service providers; daily service logs and notes used to record the provision of related services; absence verification records; bus rosters; staff lists specifying credentials held and documents evidencing other staff qualifications, social security numbers, dates of hire, and dates of termination;

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1 records of employee training and certification; staff time sheets; non-paid staff and  
2 volunteer sign-in sheets; transportation and other related services subcontracts;  
3 school calendars; bell/class schedules; liability and worker's compensation  
4 insurance policies; by-laws; lists of current board of directors/trustees; other  
5 documents evidencing financial expenditures related to LAUSD students;  
6 federal/state payroll quarterly reports; bank statements and canceled checks; and all  
7 budgetary information, including operating budgets.

8 32. LAUSD provides both Jerry Friedman Shalhevet High School and  
9 Samuel A. Fryer Yavneh Hebrew Academy with funds under Titles I and IV of  
10 Every Student Succeeds Act ("ESSA").

11 33. LAUSD provides eligible students with disabilities attending private  
12 religious schools within LAUSD's boundaries with equitable services through an  
13 Individual Services Plan ("ISP").

14 34. In or around August 2020, Sarah Perets informed LAUSD of her intent  
15 to unilaterally place N.P. at a private religious school and seek reimbursement from  
16 LAUSD. Aside from this August 2020 notice, LAUSD does not have record of a  
17 notice of unilateral placement from Sarah Perets or Ariel Perets concerning N.P.

18 35. In the past three school years, Ms. Perets has filed two due process  
19 complaints against LAUSD concerning N.P. No due process complaint is currently  
20 pending.

21 36. LAUSD does not have record of a current request for nonpublic school  
22 placement from Chaya Loffman, Jonathan Loffman, Fedora Nick, Ariel Perets, or  
23 Sarah Perets concerning their children.

24 37. LAUSD does not have record of any due process complaint filed by  
25 Chaya Loffman, Jonathan Loffman, or Fedora Nick at any time.

26 38. LAUSD does not have a record of any notice of unilateral placement  
27 from Chaya Loffman, Jonathan Loffman, or Fedora Nick at any time.  
28

1 I have read the above declaration and declare under penalty of perjury under  
2 the laws of the United States and the State of California that the foregoing is true  
3 and correct.

4 Executed on this 20th day of June, 2023, in Los Angeles County, California.

5  
6 By:   
ANTHONY AGUILAR

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1 of standing and a defendant’s sovereign immunity. A Rule 12(b)(1) motion mounts a  
2 facial or a factual challenge to jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121  
3 (9th Cir. 2014) (explaining differences). Reserving their right to present a factual attack  
4 later if necessary, the State Defendants bring a facial challenge, because the  
5 jurisdictional failures are apparent from the Complaint. In assessing such challenges,  
6 courts apply the familiar 12(b)(6) plausibility standards. *Terenkian v. Republic of Iraq*,  
7 694 F.3d 1122, 1131 (9th Cir. 2012) (applying *Iqbal*); *Lacano Investments, LLC v.*  
8 *Balash*, 765, F.3d 1068, 1071-1072 (9th Cir. 2014) (conclusory allegations  
9 disregarded); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (plaintiff has burden of  
10 “clearly” alleging “facts demonstrating each element” for Article III standing).

#### 11 **IV. PLAINTIFFS’ CLAIMS**

12 Plaintiffs invoke 42 U.S.C. Section 1983 (“§ 1983”), claiming violations of the  
13 First Amendment’s Free Exercise Clause and the Fourteenth Amendment’s Equal  
14 Protection Clause stemming from California’s provision for contracting with  
15 nonsectarian NPSs (but not sectarian NPSs). Plaintiffs outline six “Counts” – five based  
16 on the Free Exercise Clause (discussed in §VII below), and one on the Equal Protection  
17 Clause (*see* §VIII.) Plaintiffs ask this Court to declare California law unconstitutional  
18 and to issue permanent injunctive relief, as well as an award of “actual damages in an  
19 amount to be determined,” nominal damages, and attorneys’ fees. (Comp. at 37.)

#### 20 **V. SOVEREIGN IMMUNITY AND § 1983 REQUIRE DISMISSAL OF CDE** 21 **AND THE DAMAGE CLAIMS (RULE 12(b)(6))**

22 Through the Eleventh Amendment, a state is immune from suit brought in federal  
23 court by its citizens or citizens of another state. *Papasan v. Allain*, 478 U.S. 265, 275  
24 (1986); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984). That  
25 immunity extends to a state’s agencies, as well as to its officials acting in their official  
26 capacity. *Krainski v. State ex rel. Bd. of Regents*, 616 F.3d 963, 967 (9th Cir. 2010).  
27 That immunity was not abrogated by § 1983, and California has not waived its  
28 immunity to § 1983 suits. *Quern v. Jordan*, 440 U.S. 332, 344-45 (1979); *Brown v.*

1 *Calif. Dept. of Corr.*, 554 F.3d 747, 752 (9th Cir. 2009); *Dittman v. California*, 191  
2 F.3d 1020, 1026 (9th Cir. 1999). Furthermore, for purposes of suits under § 1983, a  
3 state, its agencies, and its officials acting in their official capacity are not considered  
4 “persons” subject to suit. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71  
5 (1989); *Wolfe v. Strankman*, 392 F.3d 358, 364-65 (9th Cir. 2004).

6 The *Ex Parte Young* doctrine provides a limited exception that allows a § 1983  
7 action to proceed against a state *official* sued in their official capacity (but *not* against  
8 the state or its agencies) if the action *only* seeks prospective injunctive relief to address  
9 an ongoing violation of federal law (as opposed to remedying past unlawful conduct)  
10 and the official has a sufficient connection with the law and direct responsibility for  
11 enforcing it. *Papasan*, 478 U.S. at 277-278.

12 Because CDE is a state entity (*see* Comp., ¶35; Cal. Gov’t. Code § 900.6 [“state”  
13 includes any “department” or “agency” of the state]) and California does not waive its  
14 sovereign immunity, all claims against CDE are barred, and CDE must be dismissed. In  
15 addition, claims against the SPI must be limited to the narrow exception noted above,  
16 which requires dismissal of the claims for “actual” and for “nominal” damages. *Platt v.*  
17 *Moore*, 15 F.4th 895, 910 (9th Cir. 2021).

## 18 **VI. PLAINTIFFS LACK STANDING (RULE 12(b)(1))**

19 Article III grants a limited power to federal courts, not “a freewheeling power to  
20 hold defendants accountable for legal infractions.” *TransUnion LLC v. Ramirez*, 141  
21 S.Ct. 2190, 2205 (2021). Thus, the Constitution requires that federal courts dismiss  
22 cases where the plaintiffs lack Article III standing, a doctrine built on the foundational  
23 idea of separation of powers. *Id.* at 2203.

24 To establish Article III standing, “a plaintiff must show (i) that he suffered an  
25 injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury  
26 was likely caused by the defendant; and (iii) that the injury would likely be redressed by  
27 judicial relief.” *Id.* Strict application of these elements “ensures that federal courts  
28 decide only ‘the rights of individuals,’ and that federal courts exercise ‘their proper



1 function in a limited and separated government.” *Id.* (citations omitted). In light of the  
2 standing requirement’s importance, courts “must put aside the natural urge to proceed  
3 directly to the merits of [an] important dispute and to ‘settle’ it for the sake of  
4 convenience and efficiency.” *Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013).

5 Plaintiffs bear the burden of establishing standing at the time they brought suit  
6 and maintaining it thereafter. *Carney v. Adams*, 141 S.Ct. 493, 499 (2020). Where, as  
7 here, a case is at the pleading stage, the plaintiffs must “clearly” “allege facts  
8 demonstrating each element.” *Spokeo*, 578 U.S. at 338. “And standing is not dispensed  
9 in gross; rather, plaintiffs must demonstrate standing for each claim that they press and  
10 for each form of relief that they seek (for example, injunctive relief and damages).”  
11 *TransUnion*, 141 S.Ct. at 2208.

#### 12 **A. The Plaintiff Schools Lack Standing.**

13 The Schools cannot show that the nonsectarian NPS requirement is causing them  
14 to suffer a concrete, particularized, and actual or imminent injury that would be  
15 redressed through this action. The Schools are “Orthodox Jewish schools.” (Comp.,  
16 ¶3.) They say that they exist to provide a religious Jewish education to students  
17 (Comp., ¶¶31, 33) – the “primary goal” of which is “the study of the Torah[,]” which is  
18 to the Schools “itself a form of religious worship” (*id.*, ¶71). The Schools allege that  
19 they “help parents to meet their obligation to provide Jewish education to their  
20 children[,]” and that “*inculcation and transmission of Jewish religious beliefs and*  
21 *practices to children is the very reason that [they] exist.*” (Emphasis added.) (Comp.,  
22 ¶76.) Significantly, the Schools allege that they seek to qualify as an NPS in order to  
23 provide a Jewish religious education to children. (Comp., ¶¶32, 34, 152, 154, 162,  
24 170.) That is not surprising given the above-noted “very reason” that the Schools exist.  
25 Indeed, the Schools say that their “religious beliefs and identity permeate their entire  
26 school and mission.” (*Id.*, ¶177.)

27 The Schools’ premise is that if the nonsectarian requirement were removed, then  
28 they could provide their religious education to the children with disabilities that LEAs

1 might place there. As a matter of law, that premise is false. As discussed above (§II),  
2 NPSs only potentially work with students whose families have enrolled in public school  
3 and accepted the state’s free, state-developed, state-directed and state-supervised  
4 education. When an LEA deems it necessary to place one of its students in an NPS, the  
5 state must ensure that the student “is provided an education that meets the standards that  
6 apply to education provided by the SEA and LEAs” (*i.e.*, the state’s *public* educational  
7 agencies) and has “all of the rights of a child with a disability who is served by a public  
8 agency.” 34 C.F.R. § 300.147; 20 U.S.C. § 1412(a)(10)(B). The state also must ensure  
9 that the child is provided special education that conforms to a properly developed IEP  
10 (*id.*), which is defined, in part, by its focus on ensuring that the child can make  
11 “progress in the general education curriculum (*i.e.*, the same curriculum as for  
12 nondisabled children).” 34 C.F.R. § 300.320(a); *see also* 20 U.S.C. § 1401(9) (defining  
13 FAPE as requiring, *inter alia*, that education and services “meet the standards of the  
14 State educational agency” and are provided “under public supervision and direction.”).  
15 An NPS must agree to use the SBE-adopted, standards-aligned core curriculum and  
16 instructional materials for kindergarten and grades 1 to 8, and to use the state standards-  
17 aligned core curriculum and instructional materials used by an LEA that contracts with  
18 the NPS. Educ. Code § 56366.10(b)(1); 5 C.C.R. § 3001(a). Moreover, an application  
19 must describe the state-adopted and state standards-aligned curriculum and instructional  
20 materials that are “used by general education students.” 5 C.C.R. § 3060(c)(9). And,  
21 significantly, federal regulations flatly prohibit use of IDEA funds for “[r]eligious  
22 worship, instruction, or proselytization.” 34 C.F.R. § 76.532; *M.L.*, 867 F.3d at 496.

23 Because removal of the nonsectarian requirement would not allow the Schools to  
24 ignore the state’s public (and secular) curricular standards and instructional materials  
25 and to, instead, provide their own religious education to publicly-placed students, the  
26 Schools cannot show that the requirement has caused them to suffer an individualized  
27 actual or imminent concrete harm. Under Article III, “an injury in law is not an injury in  
28 fact.” *TransUnion*, 141 S.Ct. at 2205; *see also Carney*, 141 S.Ct. at 498 (“[A] citizen’s



1 interest in the proper application of the law does not count as an ‘injury in fact.’”)

2 The Schools’ above-discussed allegations about their purpose and intent suggest  
3 a lack of attention to the many requirements (other than the nonsectarian requirement)  
4 that apply to would-be NPSs. The Complaint’s only reference to such other  
5 requirements is the general and conclusory allegation – made only on “information and  
6 belief” – that the Schools “either otherwise meet[] or [are] capable of meeting  
7 California’s other certification requirements to become an NPS.” (Comp., ¶¶156, 166.)  
8 Such a general allegation is insufficient. *Spokeo*, 578 U.S. at 338; *Iqbal*, 556 U.S. at  
9 678-79. This is particularly true here, where the Schools’ other allegations clearly  
10 reflect a mission and goal that is counter to some of those other certification  
11 requirements. But more fundamentally, the fact that the Schools could or might apply  
12 to be certified as an NPS if the nonsectarian requirement were removed, is not sufficient  
13 to establish Article III standing. *Carney*, 141 S.Ct. at 499-501. Rather, the Schools  
14 must show that they are “likely” and “able and ready” to be NPSs in the “reasonably  
15 imminent future” were it not for the nonsectarian requirement.” *Id.* at 500-02.

16 *Carney* is instructive. There, a Delaware lawyer registered as a political  
17 independent sought to bring a federal constitutional challenge against a Delaware state  
18 law that disqualified lawyers with his party affiliation from serving on certain state  
19 courts. Even though the plaintiff was a lawyer and otherwise able to apply for a judicial  
20 appointment, and even though the plaintiff provided sworn testimony that he believed  
21 that he was qualified to serve as a judge and that he “would seriously consider and  
22 apply for” judicial positions if the law were changed, the Supreme Court concluded that  
23 the plaintiff lacked standing. *Carney*, 141 S.Ct. 499-500. The Court explained that the  
24 plaintiff’s words – that he “would apply” – stood alone without supporting evidence and  
25 anticipated timeframes. *Id.* at 501. The Court also found that the record suggested that  
26 the plaintiff was primarily concerned with vindicating his view of the law, rather than  
27 by an actual intent to become a judge. *Id.* The Court observed that “some day  
28 intentions” “do not support a finding of the ‘actual or imminent’ injury that [its] cases

1 require[,]” and that if it were to hold that plaintiff’s “few words of general intent” to  
2 apply were sufficient in the case, then it “would significantly weaken the longstanding  
3 legal doctrine preventing this Court from providing advisory opinions at the request of  
4 one who, without other concrete injury, believes that the government is not following  
5 the law.” *Id.* at 501-502. For all those reasons, the plaintiff could not show that “he  
6 was ‘able and ready’ to apply for a vacancy in the reasonably imminent future.” *Id.*

7 The only clear and specific allegations about the School’s actions, purposes and  
8 intentions show that they likely would not, and could not, agree to all of the many NPS  
9 requirements aside from the nonsectarian requirement. As discussed, the Schools’  
10 allegations run directly counter to the requirement to use state-adopted textbooks,  
11 provide state standards-aligned instruction and refrain from religious instruction.

12 In addition, while the Complaint alleges that the Schools offer a “rigorous,”  
13 religion-infused education (Comp., ¶¶31, 33), it does not demonstrate that they are  
14 prepared to meet the needs of children with disabilities so severe that their needs could  
15 not be met in any public school. The “least restrictive environment” rules – (discussed  
16 in §II.C. above, and the rule that precludes NPS placement unless “no appropriate  
17 public education program is available” [Educ. Code § 56365(a)]) – mean that NPSs  
18 only potentially serve children with the most severe disabilities and challenges. Merely  
19 being a private school with a “rigorous” (Comp., ¶¶31, 33) “college preparatory” (*id.*,  
20 31) curriculum does not make an NPS. But, it is absolutely essential that an NPS have a  
21 willingness, the capability, *and* a plan to provide highly specialized services and  
22 instruction to a unique population of children. For example, an NPS applicant must  
23 identify the “types of disabling conditions served” (5 C.C.R. § 3060(c)(5)) and describe  
24 “the special education and designated instruction and services provided to individuals  
25 with exceptional needs” (Educ. Code § 56366.1(a)(1)). In addition, an NPS’s  
26 administrators and staff must hold the same state-issued credential that those at a public  
27 school would be required to hold (Educ. Code § 56366.1(n); 5 C.C.R. § 3064(a)), and  
28 an NPS must identify their teachers holding state-issued credentials authorizing service

1 in special education, and provide copies of the credentials (Educ. Code § 56366.1(a)(3);  
2 5 C.C.R. § 3060(a)(4)). The Complaint does not allege that the Schools are set up to  
3 serve as an NPS and comply with these NPS requirements; it suggests the opposite.

4 Moreover, the Schools do not allege that they will serve the students placed there  
5 with the goal of transitioning the students “back to the public school setting,” as an NPS  
6 must. 5 C.C.R. § 3060(c)(8); Educ. Code § 56366.10(c). Indeed, the Schools’ allegation  
7 that it is their purpose to “help parents to meet their obligation to provide a Jewish  
8 education to their children” (Comp., ¶76), suggests that the Schools would not favor  
9 transition back to a public school setting.

10 Nor do the Schools allege that they will agree to the extensive and continued  
11 oversight and monitoring by the state discussed in §II.H. above.

12 The Complaint also does not allege that the Schools are willing to agree to  
13 “maintain compliance” with Section 504 of the Rehabilitation Act, and with the Civil  
14 Rights Act and the Fair Employment Act, which prohibit practices that discriminate on  
15 the basis of religion. 5 C.C.R. § 3060(d). The Schools do, however, allege that they  
16 seek certification to serve “Jewish” students (but apparently no others), and that their  
17 Orthodox Jewish “beliefs and identity permeate their entire school.” (Comp., ¶¶ 3, 177.)

### 18 **B. The Plaintiff Families Lack Standing.**

19 The Families also lack Article III standing. The Families “send their school-age  
20 non-disabled children to Orthodox Jewish religious schools.” (Comp., ¶75.) The  
21 Families would like to enroll their children with disabilities in Orthodox Jewish  
22 religious schools as well, so that they too can receive a religious education. (*Id.*, ¶¶74,  
23 84, 100, 124.) The Families complain that California’s nonsectarian NPS requirement  
24 harms them by preventing them from having IDEA funds pay for an Orthodox Jewish  
25 education for their children with disabilities at a sectarian NPS. (*Id.*, ¶¶2, 21.)  
26 However, for several reasons, the Families cannot show that the challenged requirement  
27 is causing them to suffer a concrete, particularized, and actual or imminent injury that  
28 would be redressed through this action.

1 First, similarly as with the Schools, the Families’ alleged harm assumes that  
2 removal of the nonsectarian requirement would allow sectarian NPSs to ignore the  
3 state’s public education and to provide, instead, the religious education that they desire.  
4 As discussed above (§§II.D. and II.E.), that is simply not the case.

5 Second, the allegations do not show that any of the Families’ disabled children  
6 could ever be placed in *any* NPS; indeed, the facts demonstrate that they could not. As  
7 discussed (§II.C.), the IDEA requires that provision of the state’s free public education  
8 to children with disabilities take place in the least restrictive environment, beginning  
9 with their local public school’s “regular classes,” and then, “only if the nature or severity  
10 of the disability is such that education in regular classes with the use of supplementary  
11 aids and services cannot be achieved satisfactorily,” allowing for instruction in more  
12 specialized classes or programs within that school, and then, if necessary, in one of the  
13 LEA’s other schools or programs. 34 C.F.R. §§ 300.114–300.116. It is only “if no  
14 appropriate public education program is available” due to the severity of the disability  
15 that NPS placement is even possible. Educ. Code § 56365(a).

16 Here, the Families all “reside within the boundaries of the Los Angeles Unified  
17 School District” (“LASUD”) (Comp., ¶2). The Peretses’ child, N.P., was diagnosed  
18 with autism at age 3 and with a “WAC gene mutation that results in speech delays,  
19 behavioral issues, and learning disabilities” at age 6. (Comp., ¶120.) He is now 14  
20 years old, in grade 7, and has been attending public school in LAUSD. (*Id.*, ¶28.) The  
21 Complaint alleges that N.P. has been “placed in classes with peers that the Peretses  
22 believe operate at a lower level of functioning than N.P.” (*id.*, ¶135), and that “[s]ince  
23 N.P. was removed from a mainstream setting, his academic progress and his speech  
24 development has regressed.” (*Id.*, ¶136.) Those, however, are concerns that N.P.’s  
25 current IEP with LAUSD is *too restrictive* for him, not that his condition is so severe  
26 that no available public program would be appropriate. The IDEA provides due process  
27 procedures for parents to challenge IEPs (20 U.S.C. § 1415(b)(6)(A), (f)(1)(A)), which  
28 allow for reimbursed private school tuition as a remedy if the parents successfully prove

1 that their district failed to offer a “FAPE” and that the parents’ resulting unilateral  
2 private school placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii).) Those  
3 procedures must be exhausted before bringing a civil action under the IDEA (20 U.S.C.  
4 § 1415(i)(2)(A), (l)), and there is a two-year statute of limitations for such actions (20  
5 U.S.C. § 1415(b)(6)(B), (f)(3)(C)). However, the Complaint does not allege that the  
6 Peretses ever invoked available due process procedures to challenge (successfully or  
7 not) any of N.P.’s IEPs over the years.

8 Similarly, the Taxons’ child, K.T., was diagnosed with autism at age 2, which  
9 results in cognitive deficiencies. (Comp., ¶¶94.) He is now 14 years old, in grade 8, and  
10 has attended a public elementary school and a public middle school in LAUSD, and  
11 currently attends a public charter school within LAUSD. (*Id.*, ¶¶93, 104.) The  
12 Complaint does not allege that K.T.’s disability is so severe that no available public  
13 program would be appropriate. Rather, it alleges that “from kindergarten through eighth  
14 grade, K.T. has received a mainstreamed classroom education in public school” and that  
15 LAUSD has provided, through its IEP, “a full-time aide, a supervisor for the aide,  
16 speech and occupational therapists, adaptive physical education, resource specialists for  
17 English and math, and a private reading tutor.” (Comp., ¶¶105-107.) Nor does the  
18 Complaint allege that the Taxons ever invoked (successfully or not) the available due  
19 process procedures to challenge any of K.T.’s IEPs over the years.

20 The Loffmans allege that their 4-year son, M.L., “is diagnosed with high  
21 functioning autism.” (Comp., ¶78.) Because of their “desire to enroll M.L. in an  
22 Orthodox Jewish school,” the Loffmans enrolled him in private religious preschools,  
23 where he has received “behavioral, occupational, and speech therapy.” (*Id.*, ¶¶84-87.)  
24 The Loffmans allege that they “recognize that M.L. might be eligible for more services  
25 in public school as part of an IEP[.]” (*Id.*, ¶90.) However, they are paying for him to  
26 receive behavioral and occupational therapies at a private, religious preschool. (*Id.*,  
27 ¶¶88-89.) The Loffmans do not allege that they have asked LAUSD for an IEP for M.L.,  
28 or that they have otherwise explored LAUSD’s capabilities for children with “high

1 functioning autism” like M.L. But the Complaint admits that LAUSD has the  
2 capabilities to provide things like “a full-time aide, a supervisor for the aide, speech and  
3 occupational therapists, adaptive physical education, resource specialists for English and  
4 math, and a private reading tutor.” (*Id.*, ¶106.) Thus, the Loffmans do not plausibly  
5 allege that M.L.’s disability is so severe that LAUSD could legally place him in *any*  
6 NPS. And public placements in NPSs only occur for children found eligible for special  
7 education and for whom an IEP has been developed under the IDEA (Educ. Code §§  
8 56034, 56365); however, the Complaint does not allege that that M.L. meets that criteria.

9 The Families may feel that their religious beliefs pose unique problems for their  
10 children in public school, and that an IEP should therefore call for placement in a  
11 religious NPS. However, as the Fourth Circuit held in *M.L.* (in which an Orthodox  
12 Jewish family claimed that an IEP was insufficient because it failed to account for the  
13 child’s religious needs and sought reimbursement for private school tuition as a remedy),  
14 the IDEA precludes religious instruction, and a family’s religious needs do *not* require  
15 an LEA to include religious instruction as part of an IEP. *M.L.*, 867 F.3d at 495-98.

16 In sum, the Families have not alleged, and cannot allege, that it is even possible  
17 (let alone likely) for their children to be legally placed in an NPS if the nonsectarian  
18 requirement were removed. Thus, they cannot demonstrate that the requirement causes  
19 them to suffer a concrete, particularized and actual or imminent injury in fact.

20 Finally, the Families also cannot make that showing because, even if placement  
21 of their children in any NPS were legally possible, it is the LEA, and not the parents,  
22 that makes the ultimate decision on whether it can and should offer FAPE at an NPS or  
23 not, and if so, which one. (*See* §II.D., *supra*.) While LEAs must allow for parents to  
24 participate in IEP meetings, the LEA ultimately makes the placement offer, and courts  
25 must give due weight to the LEA officials’ educational expertise. (*Id.*) Therefore, even  
26 if NPS placement were a theoretical possibility, the Families and the Court could only  
27 speculate that LAUSD would decide to place their children in a sectarian NPS if the  
28 nonsectarian requirement were removed. However, Article III standing is never based



on speculation; rather, harm must be likely soon. *TransUnion*, 141 S.Ct. at 2212 (speculation that events may occur in the future is insufficient to support standing for injunctive relief; there must be a “serious likelihood” of impending harm); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1100 (9th Cir. 2000) (speculative possibilities that plaintiffs may be injured by allegedly unconstitutional policy insufficient to demonstrate Article III standing for injunctive relief).

## **VII. THE FREE EXERCISE-BASED CLAIMS FAIL (RULE 12(b)(6))**

The five free exercise-based Counts all attack the nonsectarian NPS requirement, although they characterize or approach the provision in a slightly different way. Count I alleges that the requirement violates Plaintiffs’ free exercise rights because it “categorically excludes” religious entities from what it describes as “otherwise available government benefits.” (Comp., ¶¶171-183.) Count II notes that state action “burdening religious practice” is subject to strict scrutiny if it is not generally applicable, and alleges that California’s NPS system is not generally applicable because it does not allow for sectarian NPSs and does not include sectarian NPSs among those who can petition the SPI for a waiver of certain requirements. (*Id.*, ¶¶184-195.) Count III alleges that California’s NPS system is not generally applicable because the state can grant a petition to waive certain requirements in certain circumstances, but “Defendants have refused to waive the ‘nonsectarian’ requirement for the NPS process.” (*Id.*, ¶¶196-204.) Count V repackages Plaintiffs’ initial “exclusion from generally available public benefits” claim as a violation of the “unconstitutional conditions doctrine.” (*Id.*, ¶¶210-215.) In Count VI, Plaintiffs allege that there is a “Free Exercise Clause Right to Religious Education” that is violated by the challenged nonsectarian requirement. (*Id.*, ¶¶ 216-222.)

None of these Counts state a viable claim. As discussed immediately below, they all fail because Plaintiffs cannot show an actual and substantial burden on their exercise of religion, a threshold element of a free exercise claim. Count V’s reliance on the “unconstitutional conditions doctrine” is misplaced (§VII.B.), and Count VI’s assertion of a “free exercise right to religious education” is unavailing (§VII.C.). Finally, even if

strict scrutiny were required, California’s law satisfies it. (§VII.D.)

**A. Plaintiffs Cannot Demonstrate the Threshold Element of a Substantial Burden on Their Religious Exercise.**

The First Amendment provides in pertinent part: “Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*[.]” U.S. Const. amend. I. To state a claim under the Free Exercise Clause, a plaintiff must show that the challenged state action substantially burdens the plaintiff’s exercise of their religion. *Sabra v. Maricopa County Community College Dist.*, 44 F.4th 867, 809 (9th Cir. 2022); *California Parents for the Equalization of Educational Materials v. Torlakson* (“CAPEEM”), 973 F.3d 1010, 1019-20 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2583 (2021). Being offended by government actions that address religion in some way does not suffice; the government’s action must actually operate as a burden on the plaintiff’s practice of their religion. *Id.*

It is easy to see how laws affirmatively proscribing the public’s conduct can burden religious practice. In addition, the Supreme Court has recognized that a state disqualifying otherwise eligible recipients from *generally available public benefits or rights* based on their religious exercise constitutes a burden on such exercise. *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246, 2254-55 (2020); *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 16 (1947) (recognizing infringement when individuals are excluded “from receiving the benefits of public welfare legislation” based solely on their faith); *Hobbie v. Unemployment Appeals Com’n of Fla.*, 480 U.S. 136, 140-141 (1987) (characterizing generally available unemployment benefits as an “important benefit” the loss of which would unmistakably put “substantial pressure” on a religious adherent “to modify his behavior and to violate his beliefs[.]”)

In an attempt to analogize this case to that line of cases, the Complaint repeatedly characterizes the challenged nonsectarian requirement as limiting Plaintiffs’ access to “generally available public funds” from a “government benefit program[.]” (Comp., ¶¶2-3, 12, 175, 178.) However, as shown in §II, California’s provision for contracts



1 with NPSs is *not* a program to bestow generally available “public benefits” upon private  
2 schools or families seeking a private or religious education. Rather, it is California  
3 securing *for itself* the help *it* needs in order for *it* to meet *its* obligations to provide *its*  
4 public education to the children with disabilities enrolled in *its* public schools.

5 The cases that Plaintiffs attempt to analogize to are inapposite. *Espinoza* involved  
6 a Montana state “scholarship program,” intended “to provide parental and student choice  
7 in education,” which “provide[d] tuition assistance to parents who send their children to  
8 private school.” 140 S.Ct. at 2251-52. Under the program, a family whose child was  
9 awarded a scholarship could direct funds to virtually any private school in the state, of  
10 their own private choice. *Id.* A free exercise challenge was brought against a  
11 subsequent administrative rule (based on an application of the state constitution’s “no  
12 aid” provision) that prohibited recipient families from selecting a *religious* private  
13 school. *Id.* at 2252. The Court concluded: “A State need not subsidize private  
14 education. But once a State decides to do so, it cannot disqualify some private schools  
15 solely because they are religious.” *Id.* at 2261.

16 Similarly, *Carson v. Makin* involved “a program of tuition assistance for parents”  
17 whose local school district did not operate a public secondary school or contract with a  
18 private entity for such schooling. 142 S. Ct. 1987, 1993 (2022). The program directed  
19 funds to pay tuition at the private or public school of the parents’ choice; however, the  
20 state later imposed a requirement disqualifying sectarian schools. *Id.* at 1993-94. After  
21 noting that “the curriculum taught at participating private schools need not even  
22 resemble that taught in the Main public schools” and that those private schools “need  
23 not administer state assessments” and “need not hire state-certified teachers[,]” the  
24 Court characterized the state’s program as a public benefit program where “[t]he benefit  
25 is tuition at a public or private school, selected by the parent, with no suggestion that  
26 the ‘private school’ must somehow provide a ‘public’ education.” *Id.* at 1998-99.

27 And *Trinity Lutheran Church of Columbia, Inc. v. Comer* involved a “grant”  
28 program to help public and private schools, nonprofit daycare centers, and other

1 nonprofit entities purchase rubber playground surfaces, but excluded otherwise eligible  
2 religious entities. 137 S. Ct. 2012, 2017 (2017).

3 The “through line” in these cases is a state program that broadly confers a public  
4 benefit or right, such that a religious-based disqualification could actually be viewed as  
5 having a coercive effect against a plaintiff’s exercise of religion. That line simply  
6 cannot be drawn to *this* case. With respect to the Schools, the Complaint characterizes  
7 their loss as one of the ability “to provide a *religious* education” with “generally  
8 available public funds *for children to receive* a free appropriate *public* education[.]”  
9 (Emphasis added.) (Comp., ¶¶ 32, 34.) That allegation reveals a flaw in Plaintiffs’  
10 position. California’s NPS system is *not* a means to generally fund private schools to  
11 provide their own religious education (or any other kind of a “private” education) so  
12 that children with disabilities can receive a private school’s particular brand of private  
13 education. Rather, an NPS *contracts* with the state knowing that it *cannot* use funds for  
14 religious instruction, and that it *must* provide the state’s *public* education while  
15 providing services described in the *LEA-developed* IEP to benefit the eligible child  
16 whose family has accepted the state’s free public education. The ability to *contract* for  
17 *that* is not a “generally available public benefit” the loss of which could be said to  
18 burden a would-be NPS’s exercise of religion. For example, in *Teen Ranch, Inc. v.*  
19 *Udow*, the Sixth Circuit rejected a religious organization’s free exercise claim based on  
20 the notion that the ability to contract with the state of Michigan to provide youth  
21 residential services was a “public benefit.” 479 F.3d 403, 409-410 (6th Cir. 2007), *cert*  
22 *denied*, 128 S.Ct. 653 (2007). The court affirmed the district court’s conclusion that  
23 “[u]nlike unemployment benefits or the ability to hold public office, a state contract for  
24 youth residential services is not a public benefit” and that “[t]he *Sherbert v. Verner* line  
25 of cases does not stand for the proposition that the State can be required under the Free  
26 Exercise Clause to contract with a religious organization.” *Teen Ranch Inc. v. Udow*,  
27 389 F. Supp. 2d 827, 838 (W.D. Mich. 2005), *aff’d* 479 F.3d at 409-10.

28 With respect to the Families, it is even more clear that the nonsectarian NPS

1 requirement does not substantially burden their exercise of religion, because they do not  
2 allege to be schools seeking certification. The Complaint generally alleges that the  
3 challenged nonsectarian requirement violates the Families’ “right to free exercise of  
4 religion by categorically ‘exclud[ing] some members of the community from an  
5 otherwise generally available public benefit because of their religious exercise.’”  
6 (Compl., ¶178.) However, that general and vague legal conclusion is entitled to no  
7 weight. *Spokeo*, 578 U.S. at 338; *Iqbal*, 556 U.S. at 678-79. While the Families allege  
8 that sending their children to Orthodox Jewish schools is critical to their faith, both the  
9 IDEA and California law recognize the right of parents to choose a private religious  
10 education instead of the state’s free public education, and the IDEA and California law  
11 expressly require LEAs to spend a fully proportionate amount of their IDEA funds on  
12 providing special education services to “parentally-placed” children in private schools  
13 in their boundaries, including in private religious schools. (§§II.A. and II.B.)  
14 California’s nonsectarian requirement only comes into play with respect to children  
15 whose families have chosen to accept the state’s free public education. (§II.)  
16 Therefore, it cannot be said that California’s nonsectarian NPS requirement  
17 substantially burdens the Families’ right to choose a private religious education.

18 Moreover, as previously discussed, to the extent the Families’ claim is predicated  
19 on the notion that, but for the nonsectarian requirement, they would be able to choose  
20 the state’s *free public* education and *also* use IDEA funds to have their tuition paid at a  
21 private religious school that provides a religious education, the claim fails because the  
22 notion is legally incorrect. Setting aside the fact that *any* NPS placement is only  
23 possible in very rare circumstances (§§II.C. and II.F.) and that families do not get to  
24 select the NPS of their choice (§II.D.), the fact remains that IDEA funds may not be  
25 used for religious education (§II.E.), and an NPS is only contracted to provide the  
26 state’s public (and secular) education (§§II.F.–II.H.). In other words, once a family  
27 chooses to accept the state’s free public education, a religious education at an NPS  
28 would not be “available” even if the nonsectarian requirement did not exist. *Cf. Gary*

1 S., 374 F.3d at 19-20 (holding that a religious family choosing to enroll its child with  
2 disabilities in a private religious school for religious purposes was not denied a  
3 “generally available public benefit” by the IDEA’s provisions that granted greater rights  
4 to eligible children that enrolled in public school: “Unlike unemployment benefits that  
5 are equally available to all, private school parents can have no legitimate expectancy  
6 that they or their children’s schools will receive the same federal or state financial  
7 benefits provided to public schools . . . Persons opting to attend private schools,  
8 religious or otherwise, must accept the disadvantages as well as any benefits offered by  
9 those schools. They cannot insist, as a matter of constitutional rights, that the  
10 disadvantages be cured by the provision of public funding.”)

11 **B. Reliance on the Unconstitutional Conditions Doctrine is Misplaced.**

12 Plaintiffs’ fifth Count characterizes California’s nonsectarian requirement as an  
13 “unconstitutional condition” that violates Plaintiffs’ rights under the Free Exercise  
14 Clause through application of the “unconstitutional conditions doctrine.” (Comp., ¶¶  
15 211-214.) That Count cites two cases regarding that doctrine, but neither case involved  
16 free exercise rights, religion or education: *Koontz v. St. Johns River Mgmt. Dist.*, 570  
17 U.S. 595 (2013) (Fifth Amendment “takings clause” context) and *U.S. v. Scott*, 450 F.3d  
18 863 (9th Cir. 2006) (Fourth Amendment prohibition on unreasonable searches context).  
19 However, an important lesson from those two cases is that the unconstitutional  
20 conditions doctrine is *not* a simple and separate mechanical rule, but rather a general  
21 principle that derives from, and must account for, the precise constitutional right and  
22 circumstances raised in each case. In *Koontz*, for example, the Court did *not* hold that  
23 conditioning approval of a land use permit on the dedication of property to the public is  
24 always unconstitutional; rather, it held that doing so was unconstitutional only if there  
25 was no “nexus” and “rough proportionality” between the property that the government  
26 demands and the social costs of the applicant’s proposal. 570 U.S. at 605-606. Those  
27 factors accounted for the specific constitutional right at issue, as well as the practical  
28 “realities” that framed the parties’ interests and reasonable expectations in the land use

1 permit context. *Id.* And in *Scott*, the Ninth Court noted that the “government *may*  
2 sometimes condition benefits on waiver of Fourth Amendment rights – for instance,  
3 *when dealing with contractors*[.]” (Emphasis added.) *Scott*, 450 F.3d at 867.

4 The unconstitutional conditions doctrine aims to limit conditions that are  
5 “impermissible” because they seek a waiver of constitutional rights through “coercive  
6 pressure.” *Koontz*, 570 U.S. at 607; *see also Scott*, 450 F.3d at 866 (doctrine intended to  
7 protect against “the risk that the government will abuse its power by attaching strings  
8 strategically, striking lopsided deals and gradually eroding constitutional protections.”)  
9 Thus, a condition on even “a valuable government benefit” does not run afoul of the  
10 doctrine unless it produces a denial “on a basis that infringes [one’s] constitutionally  
11 protected interests.” *Bingham v. Holder*, 637 F.3d 1040, 1046 (9th Cir. 2011). “Also,  
12 the government may condition the grant of a discretionary benefit on a waiver of rights  
13 ‘if the condition is rationally related to the benefit conferred.’” *Id.*

14 Here, as discussed in the preceding section, the NPS system and its nonsectarian  
15 requirement cannot be viewed as an attempt by California to pressure religious entities  
16 into forsaking their identity in order to qualify for generally available public benefits.  
17 The NPS system is not a mechanism to subsidize private schools (religious or  
18 otherwise), or to create and bestow a public right to a free *private* education. Rather, it  
19 is a mechanism to allow the state to meet its obligation to give access to its free public  
20 (and secular) education to certain children with disabilities whose families had the  
21 option of enrolling in private religious school, but who enrolled in LEAs instead. The  
22 system accomplishes that through government contracts, which obligate the contractor to  
23 perform many specific tasks and that grant many specific rights to the state’s public  
24 educational agencies. As argued in more detail elsewhere in this brief (§§II, VII.A. and  
25 VII.D.), given the nature of those tasks and rights, the nonsectarian requirement is a  
26 legitimate provision tailored to the state’s IDEA implementation, not a disqualification  
27 from a valuable or important public benefit that would tend to put substantial pressure on  
28 a religious entity to forsake their religious identity. Plaintiffs’ repackaging of their

earlier “denial of generally available public benefits” argument as a separate “unconstitutional conditions doctrine” argument does not materially change the analysis, because that doctrine does not turn a constitutional condition into an unconstitutional one. *Bingham*, 637 F.3d at 1046 (condition must actually operate to “infringe” plaintiff’s “constitutionally protected interests,” and if placed on a “discretionary benefit,” is proper “if rationally related to the benefit conferred.”)

### C. The Assertion of a “Right to Religious Education” is Unavailing.

The Complaint’s final Count is denominated “Free Exercise Clause Right to Religious Education.” (Comp., p.35.) It speaks in terms of a parents’ right “to direct the religious upbringing of their children” and to “direct the education of their children,” and it claims that any state action that interferes with that right is subject to strict scrutiny. (Comp., p.35.) Plaintiffs misapprehend the law. The Free Exercise Clause “‘is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government’” and it does not “require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family.” *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) (italics in original). The Count cites *Wisconsin v. Yoder*, 406 U.S. 205 (1972), however, that case involved application of a *criminal statute requiring school attendance* after age 16 as applied to the Amish. It also cites *Emp. Div. v. Smith*, 494 U.S. 872 (1990), noting that that case cites *Yoder* and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). However, *Emp. Div.* involved a state criminalizing peyote use, not parents’ rights or education, and it famously *denied* plaintiffs’ free exercise clause claim. 494 U.S. at 890. And *Pierce* (which makes no reference to religion or the free exercise clause) relied on the due process clause to hold that while a state could reasonably regulate all schools and require all children to attend “some school,” it could not *criminalize* a family’s decision to attend a private school instead of the state’s public schools. 268 U.S. at 534-35.

Courts analyzing the scope of the substantive “right” asserted in Plaintiffs’ final Count have clearly limited it to the right to choose a private education (which may cost



money) instead of the state’s free public education, and they have stressed that if the family chooses the state’s public system, they have no right to dictate the school’s policies or to “expect the state to modify its curriculum to accommodate the[ir] personal, moral or religious concerns[.]” *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206-07 (9th Cir. 2005) (considering *Yoder* and *Pierce*); *CAPEEM*, 973 F.3d at 1020; *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1230, n.16 (9th Cir. 2020) (“*Yoder* supports the district courts recognition that parents have the right to remove their children from Dallas High School, but it does not support Plaintiffs’ assertion that their parental rights go beyond that decision[.]”).

Here, the law allows a family to choose a private religious education instead of the state’s free public education, and the law requires LEAs to spend a proportionate amount of their IDEA funds to serve families that have chosen private schools. (§§II.A.–II.B.) California’s decision to contract with nonsectarian NPSs only applies in the context of serving families who have accepted the state’s free public education, and only applies in the rare instance where no existing public program is available. (§§II.C. and II.F.) Plaintiffs have no right to choose the state’s free public education and then insist on a free private religious education from the state’s contractors.

**D. Even if Strict Scrutiny Were Required, the Challenged Requirement Satisfies it.**

Even if Plaintiffs could show an actual, substantial infringement on the free exercise their religion, Plaintiffs’ Free Exercise claims fail because California’s law is narrowly tailored to serve compelling state interests. *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 (9th Cir. 2021) (strict scrutiny standard).

If the nonsectarian requirement were eliminated, then certain religious groups (those with sufficient resources and whose beliefs do not preclude them from performing the “master contracts”) could be certified, and government officials at the state’s more than 1,000 LEAs would be able to steer public school children with the most severe disabilities toward particular (favored) religious institutions for daily instruction. In

1 addition, if the requirement were eliminated, then government officials would have the  
2 power to, and would be required to, audit, monitor and assess whether and how those  
3 religious institutions are, *inter alia*, meeting California’s public education standards,  
4 performing the LEA-developed IEPs, and complying with law prohibiting federal  
5 funding of religious instruction.

6 That scenario presents several serious problems, which California has a  
7 compelling interest in avoiding (and indeed, a Constitutional duty to avoid). The  
8 principle that the government must be neutral toward and among religions, and “may  
9 not aid, foster, or promote” religion, is “rooted in the foundation soil of our Nation” and  
10 “fundamental to freedom.” *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (law  
11 prohibiting teaching of evolution in any state-supported school violated the First  
12 Amendment’s Religion Clauses). “A proper respect for both the Free Exercise and the  
13 Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward  
14 religion, favoring neither one religion over others nor religious adherents collectively  
15 over nonadherents.” *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet* (“*Grumet*”),  
16 512 U.S. 687, 696 (1994) (citations omitted). Thus, a state “may not adopt programs or  
17 practices in its public schools or colleges which ‘aid or oppose’ any religion.”  
18 *Epperson*, 393 U.S. at 106. “This prohibition is absolute.” *Id.*

19 There have been cases where the Supreme Court has upheld government  
20 programs that resulted in government aid flowing to private religious schools; however,  
21 the Court has repeatedly stressed that what saved those programs was the neutrality  
22 ensured by the fact that they were programs “of true private choice, in which  
23 government aid reaches religious schools only as a result of the genuine and  
24 independent choices of private individuals,” as distinct from programs where  
25 government officials could direct aid to religious schools. *Zelman v. Simmons-Harris*,  
26 536 U.S. 639, 648-52 (2002) (discussing cases); *see also Mitchell v. Helms*, 530 U.S.  
27 793, 810 (2000) (recognizing that when aid goes to a religious institution “only as a  
28 result of the genuinely independent and private choices of individuals” it “assur[es]



1 neutrality” by removing government officials’ ability to direct aid and to “grant special  
2 favors,” as well as by “mitigating the preference for pre-existing recipients that is  
3 arguably inherent in any government aid program,” which “could lead to a program  
4 inadvertently favoring one religion[.]”) And, in recently examining Maine’s tuition  
5 assistance program, which allowed families to direct public funds to the public or  
6 private school of their own choosing, the Supreme Court harkened back to *Zelman*’s  
7 holding “that a benefit program under which private citizens ‘direct government aid to  
8 religious schools wholly as a result of their own genuine and independent private  
9 choice’ does not offend the Establishment Clause.” *Carson*, 142 S. Ct. at 1994.

10 In this case, government funds do **not** reach NPSs “*only* as a result of the genuine  
11 and *independent* choices of *private* individuals.” (Emphasis added.) *Zelman*, 536 U.S.  
12 at 649; *see also id.* at 652 (“wholly as a result of” such choices). Indeed, an NPS only  
13 receives government funds if LEA officials decide that one of the LEA’s pupils with  
14 disabilities should be placed in the NPS, and in reaching that decision, the LEA officials  
15 need not agree with the parents’ preferences or account for the family’s religious views.  
16 (§§II.D.–II.G.) While the pupil’s parent/guardian must consent to the LEA’s proposed  
17 placement, that consent is not independent. It comes only after the LEA tells the  
18 parent/guardian what it believes is the appropriate way to provide public education to  
19 the disabled child. And it comes in a context where administrative law judges and  
20 courts give “due weight” to the LEA officials’ placement decision. (§II.D.) This gives  
21 LEA officials significant power to direct pupils (and IDEA funds) to particular favored  
22 religious institutions. This is the opposite of the government neutrality toward religion  
23 that the Constitution requires, and California’s decision to avoid that breach justifies the  
24 nonsectarian requirement. *Cole*, 228 F.3d at 1101 (school district’s policy barring  
25 sectarian graduation speeches was justified as necessary to avoid violating First  
26 Amendment’s Religion Clauses); *see also Freedom From Religion Foundation, Inc. v.*  
27 *Chino Valley Unified School District*, 896 F.3d 1132, 1151 (9th Cir. 2018) (“There is  
28 no doubt that compliance with the Establishment Clause is a state interest sufficiently

1 compelling to justify content-based restrictions on speech,’ including in public fora.”).

2       There is, of course, another important way in which this case is clearly  
3 distinguishable from those neutral independent private choice programs that have been  
4 upheld in the past. Here, unlike in any of those cases, the private school is tasked with  
5 providing the *State’s public* education, not its own private education. *Zelman*, 536 U.S.  
6 at 648-52 (discussing cases); *Carson*, 142 S. Ct. at 1998-99 (concluding that Maine’s  
7 program offered the “benefit” of “tuition at a public or private school, selected by the  
8 parent, with no suggestion that the ‘private school’ must somehow provide a ‘public’  
9 education[,]” noting that the private school’s curriculum “need not even resemble that  
10 taught in the Maine public schools,” and that the private schools did not have to hire  
11 state-certified teachers or administer state assessments). Here, as discussed in §§II.F.–  
12 II.G., an NPS assists California in meeting its IDEA obligation of providing its “free and  
13 appropriate public education” to children that have enrolled in public schools; and NPSs  
14 *are* required to teach state standards-aligned curriculum, use state-adopted textbooks,  
15 hire state-certified teachers, and administer state assessments.

16       Because of that feature of the IDEA/NPS program – (that the NPS is specifically  
17 contracted to provide the state’s public education) – California’s nonsectarian  
18 requirement is necessary to avoid the problematic delegation of authority over public  
19 schooling to an institution “defined by” its religious beliefs, selected in individual cases  
20 by government officials. *See Grumet*, 512 U.S. at 696 (striking down New York’s  
21 creation of a school district because it departed from the “constitutional command” of  
22 neutrality toward religion “by delegating the State’s discretionary authority over public  
23 schools to a group defined by its character as a religious community,” in a context that  
24 gave “no assurance that governmental power has been or will be exercised neutrally.”)

25       In addition to the neutrality problem discussed above, such a delegation is  
26 problematic because it exposes vulnerable and impressionable children, whose parents  
27 enrolled them in public school districts expecting a secular education, to substantial  
28 risks of the inculcation of particular religious beliefs, and pressure or coercion to

1 conform to particular religious beliefs or practices, that may be either unwanted by the  
2 child and their family, or counter to the child's or family's own religious beliefs.  
3 *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (recognizing that heightened  
4 vigilance is required in elementary and secondary schools, because attendance is  
5 mandatory, the students are "impressionable" and "because of the students' emulation  
6 of teachers as role models and the children's susceptibility to peer pressure.")  
7 "Families entrust public schools with the education of their children, but condition their  
8 trust on the understanding that the classroom will not purposely be used to advance  
9 religious views that may conflict with the private beliefs of the student and his or her  
10 family." *Id.* at 584. These well-accepted and long-recognized understandings make K-  
11 12 education a "special context" requiring heightened protection against indoctrination  
12 and coercion that infringe on the rights of the students and their families. *Edwards*, 482  
13 U.S. at 583-84; *see also Van Orden v. Perry*, 545 U.S. 677, 690-91 (2005) (recognizing  
14 that the reason that things like prayer and display of the Ten Commandments have been  
15 prohibited in public schools but allowed in other places is "a consequence of the  
16 'particular concerns that arise in the context of public elementary and secondary  
17 schools.'")

18 California's nonsectarian requirement does not preclude religious *individuals*  
19 from owning and controlling an NPS; rather, the definition excludes organizations that  
20 are owned or operated by *a religious group or sect*. 5 § C.C.R. 3001(p). This is a  
21 material distinction, because when a group operating a school specifically organizes and  
22 defines itself by and for its religious beliefs and commitments, there is a particular  
23 concern that such beliefs and commitments will manifest themselves in the school's  
24 operation in ways that both violate the deeply rooted neutrality principle and infringe  
25 the rights of students and families. Courts recognize that "[e]ducating young people in  
26 their faith, inculcating its teachings, and training them to live their faith are  
27 responsibilities that *lie at the very core* of the mission of a private religious school[.]"  
28 *Carson*, 142 S. Ct. at 2001. That recognition finds proof in the Schools' allegation here

1 that “inculcation and transmission of Jewish religious beliefs and practices to children is  
2 the very reason that [they] exist.” (Comp., ¶76.) California’s nonsectarian requirement  
3 accounts for that recognition, but it does not pass judgment on religious schools’  
4 missions. The “NPS” concept only exists to help California meet its obligation to  
5 provide disabled children whose families have accepted the state’s free public education  
6 with access to that public education, and imposing the nonsectarian requirement allows  
7 California to both meet its governmental needs and obligations, and avoid the above-  
8 discussed serious problems with certifying NPSs controlled by religious sects.

9 Finally, the nonsectarian requirement is necessary to avoid the serious problems  
10 caused when government is put in the position of supervising, evaluating and auditing  
11 religious institutions, particularly in the context of the providing of state standards-  
12 aligned education. As discussed in §§II.C. and II.H. above, both the IDEA and  
13 California’s laws implementing it authorize and require state officials to supervise,  
14 evaluate and audit, and continued certification as an NPS depends upon compliance  
15 with rules and audit findings. Applying anything like that oversight regime with respect  
16 to sectarian NPSs would result in the sort of government entanglement with religion  
17 that has long been recognized as a chief concern of the Establishment Clause, as well as  
18 open the door for non-neutral enforcement. Indeed, in last year’s *Carson* decision, the  
19 Supreme Court reaffirmed the principle that “scrutinizing whether and how a religious  
20 school pursues its educational mission” would “raise serious concerns about state  
21 entanglement with religion and denominational favoritism.” *Carson*, 142 S. Ct. at  
22 2001.

23 In sum, the nonsectarian requirement is narrowly tailored to serve compelling  
24 state interests in ensuring government neutrality toward and among religion, protecting  
25 against coercive non-secular environments in the special context of public K-12  
26 education, and avoiding the serious entanglement and denominational favoritism  
27 concerns that would arise from the monitoring and auditing of sectarian NPSs.

28 **VIII. THE EQUAL PROTECTION CLAIM FAILS (RULE 12(b)(6))**

1 The Equal Protection Clause of the Fourteenth Amendment provides that no State  
2 shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S.  
3 Const. amend. XIV, § 1. Essentially, this is a direction that all persons similarly situated  
4 with respect to a law should be treated alike under that law. *Gallinger v. Becerra*, 898  
5 F.3d 1012, 1016 (9th Cir. 2018). Thus, to determine if a law’s classification  
6 discriminates, it is necessary to identify “a control group” of persons “similarly situated  
7 to those in the classified group in respects that are relevant to the state’s challenged  
8 policy.” *Id.* at 1016. It is only if and when such similarly situated groups are identified  
9 that a court need determine the appropriate level of scrutiny and apply it. *Id.*

10 Where the law does not discriminate on the basis of a suspect classification or the  
11 exercise of a fundamental right, the “rational basis” standard applies and the law “is  
12 presumed to be valid and will be sustained if the classification drawn by the statute is  
13 rationally related to a legitimate state interest.” *Gallinger*, 898 F.3d at 1016.

14 For their equal protection claim, Plaintiffs simply assert that there is  
15 “discrimination based on religion” because “California’s Education Code prohibits  
16 Plaintiffs from utilizing generally available, public funds to send their children to  
17 private religious schools merely because those schools are religious.” (Comp., at  
18 33:18, ¶206.) But that vague and overly generalized conclusion is entitled to no weight  
19 (*Sprewell*, 266 F.3d at 988), and as discussed throughout, it is not a fair  
20 characterization of California’s “nonsectarian” requirement within the context of the  
21 IDEA and California law implementing it. A serious examination of the Complaint  
22 and the law reveals that the equal protection claim fails for several reasons.

23 As an initial matter, the Families cannot maintain an equal protection claim  
24 because the challenged nonsectarian requirement applies to private *schools* that would  
25 enroll and serve children with disabilities pursuant to an IEP. Educ. Code § 56034. In  
26 the absence of special and limited circumstances not present here, in order to state an  
27 equal protection claim, a plaintiff must show that the challenged law has operated to  
28 discriminate against *them* by treating *them* differently from a similarly situated group.

1 *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1085 (9th Cir. 2012).

2 Appropriately, the Families do not allege that they are schools seeking NPS  
3 certification. Therefore, the Families do not show that the challenged nonsectarian  
4 requirement unlawfully discriminates against them, and their equal protection claim  
5 should be dismissed on that basis alone.

6 In addition, none of the Plaintiffs state an equal protection claim, because they  
7 cannot identify a “control group” that is similarly situated to the law’s classified group  
8 in the requisite relevant way. *Gallinger*, 898 F.3d at 1016. The right to equal  
9 protection does not deny the power to treat different classes of persons in different  
10 ways; rather it denies “the power to legislate that different treatment be accorded to  
11 persons placed by a statute into different classes *on the basis of criteria wholly*  
12 *unrelated to the [legitimate] objective of that statute.*” (Emphasis added.) *Johnson v.*  
13 *Robison*, 415 U.S. 361, 375, n.14 (1974). That is why the Ninth Circuit asks whether  
14 the control group and classified group is similarly situated “in respects that are relevant  
15 to the state’s challenged policy.” *Gallinger*, 898 F.3d at 1016. Thus, the relevant  
16 question is not whether nonsectarian private schools and sectarian private schools are  
17 “similarly situated” generally or in *some* ways; the question is whether they are  
18 similarly situated *for purposes of the NPS system*, which as previously discussed,  
19 involves, *inter alia*: (a) officials at the state’s 1,000+ LEAs having the power to steer  
20 children with disabilities enrolled in its public schools to particular NPSs; (b) the NPS  
21 providing the state’s public (and secular) education to the public school students placed  
22 there by the LEA; (c) the NPS refraining from spending IDEA funds on religious  
23 instruction; and (d) extensive and ongoing monitoring, evaluation and auditing of the  
24 NPS by government officials. Due to the previously discussed “neutrality re: religion”  
25 principle, the special context of K-12 education, legitimate recognitions about the  
26 express purposes of sectarian organizations, and the well-recognized and serious  
27 problems that arise when government officials monitor, evaluate and audit religious  
28 groups (*see* §VII.D.), it is clear that sectarian institutions and nonsectarian institutions



1 are not “similarly situated” for purposes of the NPS system. Moreover, parents that  
2 enroll a child in a private religious school are treated no differently than parents that  
3 enroll their child in a private, nonreligious school.

4 Next, because Plaintiffs’ free exercise claim fails (*see* §VII), analysis of their  
5 equal protection claim is limited to the rational basis review standard, which the  
6 challenged nonsectarian requirement easily passes for reasons previously discussed  
7 (§VII.D.). *Johnson*, 415 U.S. at 375, n.14 (rejecting argument that strict scrutiny should  
8 apply to equal protection claim premised on interference with free exercise of religion  
9 rights after concluding that the challenged law did not violate the free exercise clause:  
10 “since we hold . . . that the Act does not violate appellee’s right of free exercise of  
11 religion, we have no occasion to apply to the challenged classification a standard of  
12 scrutiny stricter than the rational-basis test.”); *Locke v. Davey*, 540 U.S. 712, 720, n.3  
13 (2004) (concluding that because the Court decided that the challenged state action did  
14 not violate the Free Exercise Clause, the rational basis standard of review was  
15 applicable to equal protection claim alleging religion-based discrimination); *St. John’s*  
16 *United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007) (same);  
17 *see also Teen Ranch*, 389 F. Supp. 2d at 841, *aff’d* 479 F.3d 403 (same).

18 In the context of this case, “sectarian private schools” is not a “suspect”  
19 classification requiring heightened scrutiny. The Supreme Court has taken a limited  
20 approach in recognizing suspect classifications, focusing on the context of the case and  
21 the “underlying rationale” for the suspect classification theory, which is that where the  
22 law targets “discrete and insular minorities” for unequal treatment, “the presumption of  
23 constitutionality fades because traditional political processes may have broken down.”  
24 *Johnson*, 415 U.S. at 375, n.14. California’s nonsectarian requirement does not classify  
25 based on traditional indicia of a suspect classification, such as immutable traits  
26 determined by birth, like race, or membership in a “class ‘saddled with such disabilities,  
27 or subjected to such a history of purposeful unequal treatment, or relegated to such a  
28 position of political powerlessness as to command extraordinary protection from the

majoritarian political process.” *Id.* Indeed, the IDEA and California law have long recognized the right of parents to send their children to private religious schools, and they expressly require LEAs to spend a proportionate amount of their IDEA funds to provide special education and related services to students in their jurisdiction that attend private schools. (§§II.A.–II.B.) In this context, it does not make sense to view private schools controlled by any religious group (regardless of the religion) as a historically powerless class warranting extraordinary protection. *Johnson*, 415 U.S. at 375, n.14 (rejecting argument that “conscientious objectors” should be considered a “suspect class”). In fact, when it comes to religion, courts have reserved the concept of “suspect class” for cases of discrimination among religions or against groups because of their particular religious beliefs. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987) (in rejecting application of strict scrutiny to claim challenging disparate treatment between employees of religious employers and employees of nonreligious employers, emphasizing that prior case law indicated that laws “discriminating *among* religions are subject to strict scrutiny,” italics in original); *Droz v. C.I.R.*, 48 F.3d 1120, 1124-1125 (9th Cir. 1995) (“For equal protection purposes, heightened scrutiny is applicable to a statute that applies selectively to religious activity only if the plaintiff can show that the basis for the distinction was religious, not secular.”); *St. John's United Church of Christ*, 502 F.3d at 638 (“Although religion may fit the bill [for suspect treatment in some cases], strict scrutiny has been reserved for laws that ‘discriminate among religions.’”)

Finally, even if heightened scrutiny applied, it is satisfied here. (*See* §VII.D.)

## IX. CONCLUSION

The motion should be granted and the Complaint dismissed.

Dated: May 24, 2023

Respectfully submitted,

By: /s/ Thomas Prouty  
THOMAS PROUTY  
Attorney for the State Defendants



34 C.F.R. § 300.146; Cal. Educ. Code § 56365(a). In addition, this master contract must incorporate provisions concerning instruction, program development, staffing, documentation, IEP implementation, and LEA oversight. Cal. Educ. Code § 56366.

An LEA may only enter into a master contract with a state-certified NPS. Cal. Educ. Code § 56366.1(d). An NPS seeks certification through filing an application with the Superintendent of Public Instruction on CDE forms. Cal. Educ. Code § 56366.1(a).

### **B. Summary of Plaintiffs' Complaint Concerning LAUSD**

Plaintiffs allege LAUSD violated the Free Exercise Clause in refusing to contract with religious schools as NPSs as a means of providing FAPE. ECF, Dkt. No. 1, ¶180. Plaintiffs further suggest that LAUSD has discretion under the Education Code to waive the NPS certification requirements yet refused to waive the “nonsectarian” requirement for School Plaintiffs. ECF, Dkt. No. 1, ¶¶199-200. Plaintiffs further claim LAUSD denied them equal protection under the law on the basis of religion in prohibiting Plaintiffs from using public funds for their children at religious schools. ECF, Dkt. No. 1, ¶206. Plaintiffs’ arguments fail on all counts.

### **III. ARGUMENT**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) is appropriate if the complaint either lacks “a cognizable legal theory” or fails to contain “sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotations omitted). When all allegations, even if

1 true, could not lead to a legal violation, a complaint must be dismissed.

2 At the outset, LAUSD is not a proper party to this action as the Eleventh  
3 Amendment bars Plaintiffs' causes of action against school districts as arms of the  
4 state. Plaintiffs also fail to establish requisite standing to bring the causes of action.  
5 The claims themselves are also deficient, as Plaintiffs cannot demonstrate any  
6 exclusion from an otherwise available public benefit or interference with Plaintiffs'  
7 ability to direct the religious upbringing of their children. Moreover, LAUSD can  
8 demonstrate that the nonsectarian requirement for NPS certification is narrowly  
9 tailored to serve the compelling interest of avoiding governmental oversight of  
10 religious entities. Together, these flaws require this Court to dismiss the Complaint.

11 **A. Plaintiffs' Causes of Action Are Barred by LAUSD's Eleventh**  
12 **Amendment Immunity**

13 **1. The District is Not a Proper Party to this Action**

14 All of Plaintiffs' causes of action are barred by the District's sovereign  
15 immunity. Under the Eleventh Amendment to the United States Constitution, a  
16 state is not subject to suit in federal court. U.S. Const. Amend. XI; *Will v. Michigan*  
17 *Dep't of State Police*, 491 U.S. 58 (1989). In *Belanger v. Madera Unif. Sch. Dist.*,  
18 963 F.2d 248 (9th Cir. 1992), the Ninth Circuit held that California school districts  
19 are arms of the State of California, and thus enjoy Eleventh Amendment immunity.  
20 *Id.*, at 251-52. And in 2017, the Ninth Circuit reaffirmed its holding that California  
21 school districts are arms of the State with Eleventh Amendment immunity, after  
22 changes to the California Education Code. *Sato v. Orange Cty. Dep't of Educ.*, 861  
23 F.3d 923 (9th Cir. 2017). A sovereign immunity defense is the proper subject of a  
24 Rule 12(b)(1) or (b)(6) motion to dismiss. *Id.* at 927, fn. 2 ("A sovereign immunity  
25 defense is 'quasi-jurisdictional' in nature and may be raised in either a Rule  
26 12(b)(1) or 12(b)(6) motion.").

27 While several exceptions to Eleventh Amendment immunity exist, none  
28 apply here. *Wesley-Willis v. Cajon Valley Union Sch. Dist.*, No. 17CV1662-WQH-

1 WVG, 2018 WL 3752833, at \*3 (S.D. Cal. Aug. 8, 2018) (reciting exceptions). For  
 2 example, Plaintiffs’ prayer for declaratory and injunctive relief against the District  
 3 does not overcome the District’s sovereign immunity. *C.N. v. Wolf*, 410 F. Supp. 2d  
 4 894, 898 (C.D. Cal. 2005) (“an action may not be maintained against the State, or in  
 5 this case the [school] District, an agency of the State, for either damages or  
 6 injunctive and declaratory relief.”).

7 Plaintiffs bring this action under 42 U.S.C. section 1983 related to the First  
 8 Amendment’s Free Exercise Clause and the Fourteenth Amendment’s Equal  
 9 Protection Clause. ECF, Dkt. No. 1, ¶1. While Plaintiffs’ subsequent list of causes  
 10 of action references the constitutional provisions without mention of section 1983,  
 11 the First and Fourteenth Amendments are not self-enforcing and require section  
 12 1983 to bring a suit against state actors. 42 U.S.C. § 1983.

13 The Ninth Circuit has held—multiple times—that California school districts  
 14 enjoy Eleventh Amendment immunity against section 1983 claims. *Sato*, 861 F.3d  
 15 at 927 (affirming dismissal of section 1983 claim based on immunity); *Belanger*,  
 16 963 F.2d at 250 (same, but on summary judgment). For their part, California courts  
 17 also treat California school districts, and interpret California law regarding school  
 18 districts, the same. *Kirchmann v. Lake Elsinore Unified Sch. Dist.*, 83 Cal. App. 4th  
 19 1098, 1100 (2000) (“in accordance with authority of the Ninth Circuit Court of  
 20 Appeals holding that a California school district is an arm of the state for Eleventh  
 21 Amendment purposes . . . , we will conclude the District does enjoy the state’s  
 22 immunity from liability under section 1983.”). Plaintiffs’ assertion of any claims  
 23 against the District under section 1983 in the face of overwhelming authority  
 24 barring it is frivolous.

25 For similar reasons, Plaintiffs’ claims also fail on their merits against the  
 26 District because the District, an arm of the State of California, is not a “person”  
 27 within the meaning of section 1983. Section 1983 provides a remedy against a  
 28 “person” acting “under color of” state law who violates a federal law or

1 constitutional provision. 42 U.S.C. § 1983. But “neither a State nor its officials  
 2 acting in their official capacities are ‘persons’ under § 1983.” *Will v. Michigan*  
 3 *Dep’t of State Police*, 491 U.S. 58, 71 (1989). The District, an arm of the State, is  
 4 not a “person” to which section 1983 applies as a matter of statute, in addition to its  
 5 Constitutional immunity. *Armstrong v. Meyers*, 964 F.2d 948, 949-50 (9th Cir.  
 6 1992) (“The Regents, a corporation created by the California constitution, is an arm  
 7 of the state for Eleventh Amendment purposes, and therefore is not a ‘person’  
 8 within the meaning of section 1983.”). Accordingly, the District itself must be  
 9 dismissed from this case.

## 10 **2. Aguilar Cannot Be Sued for Damages or Retrospective Relief**

11 Further, Plaintiffs cannot make claims for damages or other retrospective  
 12 relief against Aguilar, a District employee acting in his official capacity. Courts  
 13 disallow retroactive relief against a state or state official in an official capacity,  
 14 even if the relief is equitable in nature. *Pennhurst State School and Hospital v.*  
 15 *Halderman*, 465 U.S. 89, 102-03, 106 (1984); *Edelman v. Jordan*, 415 U.S. 651,  
 16 667-69 (1974). To the extent any viable claims exist against Aguilar, which  
 17 LAUSD challenges, no damages or other retroactive relief may be awarded.

### 18 **B. Plaintiffs Fail to Establish Article III Standing to Bring Claims**

19 Article III of the U.S. Constitution limits the jurisdiction of federal courts to  
 20 only those cases that present an actual case or controversy. Plaintiffs bear the  
 21 burden of proving they have this “irreducible constitutional minimum of standing”  
 22 to proceed: 1) an injury in fact, 2) a causal connection between the injury and the  
 23 conduct complaint of, and 3) redressability. *Lujan v. Defenders of Wildlife*, 504  
 24 U.S. 555, 560-561 (1992). An injury in fact is an “invasion of a legally protected  
 25 interest” that is both “concrete and particularized” as well as “actual or imminent,  
 26 not ‘conjectural’ or ‘hypothetical.’” *Id.* at 560, quoting *Whitmore v. Arkansas*, 495  
 27 U.S. 149, 155 (1990). The second element, the causal connection, requires that this  
 28 injury be “fairly...trace[able] to the challenged action of the defendant, and

not...the] result [of] the independent action of some third party not before the court.” *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Finally, Plaintiffs must show a likelihood, as opposed to mere speculation, that the injury will be “redressed by a favorable decision.” *Id.* at 38, 43.

If Plaintiffs lack standing to pursue any claims, the Court is without jurisdiction to resolve them and must dismiss the claims. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000), citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (standing is a jurisdictional issue deriving from the case or controversy requirement of Article III); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (a plaintiff is required to “demonstrate standing for each claim he seeks to press and for each form of relief that is sought”).

### 1. Plaintiffs M.L. and Loffmans Lack Standing Because M.L. Is Not a Child With a Disability Under the IDEA

The Education Code sections referencing the nonsectarian requirement for NPS certification only apply to Publicly-Placed private school students. *See* Cal. Educ. Code § 56360 (continuum of program options is available for “individuals with exceptional needs for special education and related services, as required by the [IDEA]”); 34 C.F.R. § 300.146(a) (outlining LEA responsibilities for “child with a disability who is placed in or referred to a private school or facility by a public agency”). A “child with a disability” under the IDEA meets one of the thirteen eligibility criteria, as determined by the LEA, and “who, by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a)(1). The Complaint fails to plead facts to show that Plaintiff M.L. meets this eligibility prerequisite.

The Complaint incorrectly assumes that M.L.’s medical diagnosis of autism necessarily qualifies him as a child with a disability under the IDEA. ECF, Dkt. No. 1, ¶¶79-80. But a medical diagnosis is not enough. *L.J. by and through Hudson v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996, 1003 (9th Cir. 2017) (“Even if a child



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has such a disability, he or she does not qualify for special education services if support provided through the regular school program is sufficient.”) To meet the eligibility criteria under the IDEA, autism must both “significantly affect[] verbal and nonverbal communication and social interaction” and “adversely affect[] a child’s educational performance.” 34 C.F.R. § 300.8(c)(1)(1)(i). The Complaint contains no facts to suggest that LAUSD had ever had the opportunity to evaluate M.L. for special education or determine whether he meets the eligibility criteria. Without eligibility for special education under the IDEA, M.L. would not have the opportunity to be a Publicly-Placed private school student. Therefore, M.L. cannot reasonably claim an injury in fact related to the nonsectarian NPS certification requirement

By the same token, the Loffmans do not have an injury in fact because they are not parents of a child with a disability as defined in the IDEA. Without this qualification, the Loffmans do not have a guarantee of procedural safeguards related to the provision of a FAPE. 20 U.S.C. § 1415(a). Further, the Loffmans would not be members of an IEP team who would make determinations about M.L.’s placement at an NPS, so the nonsectarian NPS certification requirements have no impact on the NPS placement options available to them.

M.L. and the Loffmans also cannot identify any link between any LAUSD action and the nonsectarian NPS certification requirement. The Complaint does not show the Loffmans have even sought an offer of FAPE from LAUSD. Instead, M.L. and the Loffmans present just an “abstract generalized grievance,” which does not establish standing. *Carney v. Adams*, 141 S.Ct. 493, 499 (2020).

Finally, no redressability exists for M.L. and the Loffmans. Because M.L. is not eligible for special education, a change to the nonsectarian certification requirement would result in no change for M.L. or the Loffmans. For these reasons, Plaintiffs M.L. and Loffmans lack standing to pursue this case.

## 2. Plaintiffs K.T., Taxon Family, N.P., and Perets Fail to Establish Standing

Student Plaintiffs K.T. and N.P. fail to demonstrate that they suffered an “actual or imminent” injury extending beyond the “conjectural or hypothetical” that could form the basis for an injury in fact. *Lujan*, 504 U.S. at 560. The Complaint does not plead that K.T. or N.P. require placement in an NPS or claim their respective IEP teams are considering such a change in placement that would be impacted by the definition or certification requirements of an NPS.

Any placement change also could not be “actual or imminent” because LAUSD is required to comply with the IDEA’s least restrictive environment requirement. “To the maximum extent appropriate,” a child with a disability must be “educated with children who are not disabled.” 20 U.S.C. § 1412(a)(IV)(5)(A). A child may be removed from a regular educational environment “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.* An NPS is one of the most restrictive settings and can be offered only “if no appropriate public education program is available.” Cal. Educ. Code §§ 56034, 56361, 56365(a).

By their own admission, K.T. and N.P. currently attend comprehensive public middle schools in LAUSD. ECF, Dkt. No. 1, ¶¶93, 118. K.T. receives services from the resource specialist program, which is one of the least restrictive settings since students spend a majority of their school day in the regular classroom. ECF, Dkt. No. 1, ¶106. Cal. Educ. Code §§ 56361, 56362(a)(1). While the Complaint does not share the type of classroom N.P. attends, his attendance of a public middle school campus provides for daily interactions with nondisabled peers, which is also less restrictive than an NPS. ECF, Dkt. No. 1, ¶135. Neither K.T. nor N.P. claim that they require placement at an NPS or that an NPS is a placement consideration for their IEP teams. Accordingly, the nonsectarian NPS



1 certification requirement has no bearing on K.T. and N.P.’s placements or receipt of  
2 a FAPE and no injury in fact exists.

3 Even if the IEP teams for K.T. or N.P. considered or recommended NPS  
4 placement in the future, this type of “‘some day’ intentions – without any  
5 description of concrete plans, or indeed even any specification of when the some  
6 day will be – do not support a finding of the ‘actual or imminent’ injury” that is  
7 necessary to demonstrate standing. *Lujan*, 504 U.S. at 564. Moreover, the stringent  
8 limitation on NPS placements to only situations where “no appropriate public  
9 education program is available” further extends the “some day” nature of NPS  
10 placement for K.T. and N.P. Cal. Educ. Code § 56365(a).

11 The injury in fact analysis for the Taxon and Perets families fail on the same  
12 basis. Parental participation in the IEP process “does not require districts ‘simply to  
13 accede to parents’ demands without considering any suitable alternatives.”  
14 *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8th Cir. 1999); *see Ms. S.*  
15 *v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003) (District “has no  
16 obligation to grant [parent] a veto over any individual IEP provision.”). In  
17 consideration of the parent’s role on an IEP team, Parent Plaintiffs could not  
18 demand placement in an NPS for K.T. or N.P. unless the IEP team agreed “no  
19 appropriate public education program [was] available.” Cal. Educ. Code §  
20 56365(a). Therefore, Parent Plaintiffs cannot demonstrate an injury in fact because  
21 K.T. and N.P.’s IEP teams have not recommended NPS placement.

22 Both the IEP and due process complaint resolution processes impede these  
23 Plaintiffs from showing causation between LAUSD’s alleged unconstitutional  
24 conduct and their alleged injury. LAUSD’s compliance with the Education Code’s  
25 requirement to enter into a contract with only certified NPSs does not impact  
26 Plaintiffs because NPS placement is not on the table for their IEP teams. A removal  
27 of the “nonsectarian” NPS certification requirement would not change Student  
28 Plaintiffs’ placements. In any event, if Plaintiff Parents disagree with the IEP

team’s recommendations concerning placement for K.T. or N.P., the IDEA requires them to initiate a due process hearing prior to filing any civil action. 34 C.F.R. § 300.507(a). Plaintiff Parents’ concerns about their children’s receipt of a FAPE in LAUSD is properly resolved through a due process complaint and not the present claim. *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1168 (9th Cir. 2007) (“[I]f the injury could be redressed to any degree by the IDEA’s administrative procedures—or if the IDEA’s ability to remedy an injury is unclear—then exhaustion is required.”) Clearly, Student and Parent Plaintiffs lack standing.

### 3. Plaintiffs Shalhevet and Yavneh Not Able and Ready to Apply for NPS Status and Thus Lack Standing

Similarly, School Plaintiffs cannot show they are “able and ready” to apply for NPS status in the “reasonably foreseeable future,” which evidences a lack of standing. *Carney*, 141 S.Ct. at 500. In *Carney v. Adams*, an aspiring judge with independent political affiliation claimed that political party balance requirement for membership on Delaware state courts created an injury in fact since he did not align with one of the major political parties. *Id.* at 497. The Court found this argument suspect because the *Carney* plaintiff was not truly “able and ready” to apply for a judgeship in the “reasonably foreseeable future” and upheld the dismissal of the case for lack of standing. *Id.* at 501. In analyzing the aspiring judge’s potential injury in fact, the Court noted that plaintiff could not show 1) “any actual past injury,” 2) “reference to an anticipated timeframe,” 3) prior applications for a judicial position, 4) “prior relevant conversations,” or 5) “other preparations or investigations.” *Id.* School Plaintiffs have similar deficiencies, asking the Court to “rel[y] on a bare statement of intent alone against the context of a record that shows nothing more than an abstract generalized grievance.” *Id.* at 502.

The statutory requirements for NPS certification are extensive and, on the face of the Complaint, the School Plaintiffs do not demonstrate compliance with key elements and even plead facts to suggest they cannot or do not intend to

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1 comply. A Publicly-Placed private school student must be “provided an education  
2 that meets the standards that apply to education provided by the [state educational  
3 agency] and LEAs” and “ha[ve] all of the rights of a child with a disability who is  
4 served by a public agency.” 34 C.F.R. § 300.146(b), (c). One right that public  
5 school children and any children attending a “program or activity conducted by an  
6 educational institution that receives, or benefits from, state financial assistance”  
7 have in California is the right to non-discrimination on the basis of a variety of  
8 protected characteristics, including religion. Cal. Educ. Code § 220. However, if  
9 certified as NPSs, School Plaintiffs would serve only “Jewish children with  
10 disabilities.” ECF, Dkt. No. 1, ¶154. This intention to serve students of only one  
11 religion explicitly violates the state non-discrimination requirements and makes  
12 School Plaintiffs unable and not ready to comply with the NPS requirements.

13 The Complaint is also bereft of information about School Plaintiffs’ ability to  
14 actually serve students with disabilities or preparations or investigations on that  
15 front. This serving of children with disabilities is the crux of the Education Code  
16 requirements concerning NPSs. Cal. Educ. Code § 56365. An NPS must provide  
17 “special education and designated instruction and services” from “appropriately  
18 qualified staff,” including an administrator with appropriate credentialing. Cal.  
19 Educ. Code §§ 56366.1(a)(1), (a)(3), (a)(5). School Plaintiffs do not claim that they  
20 currently provide or are capable of providing these types of services to students  
21 with disabilities or are working towards those capabilities under any specific time  
22 frame. Incidentally, some credentialing components require at least two years of  
23 experience working with students with disabilities, so cannot be obtained in the  
24 “reasonably foreseeable future. *Id.*; *Carney*, 141 S.Ct. at 500.

25 In addition, an NPS must provide a “standards-based curriculum” with  
26 “standards-focused instructional materials” that implements a student’s IEP. Cal.  
27 Educ. Code §§ 56366(a)(5), 56366.1(j), 56366.10(b). The Complaint does not  
28 indicate that the School Plaintiffs provide this type of standards-based instruction

1 and instead promote the provision of a “distinctively Orthodox Jewish education to  
2 children with disabilities.” ECF, Dkt. No. 1, ¶152. For these reasons, Plaintiff  
3 schools, like the *Carney* plaintiff, are not “able and ready” to apply for NPS status,  
4 a requirement for an injury in fact.

5 School Plaintiffs’ standing also breaks down with respect to causation related  
6 to LAUSD. The NPS certification process occurs separately from LAUSD, who has  
7 no control over the certification requirements, the application process, the  
8 certification itself, or the renewal or revocation of certification. Cal. Educ. Code  
9 § 56366 et seq. The Legislature, not LAUSD, created the NPS certification  
10 requirements outlined in the Education Code. Cal. Educ. Code § 56366. The state  
11 Superintendent of Public Instruction, not LAUSD, processes NPS certification  
12 requests through forms provided by the CDE. Cal. Educ. Code § 56366.1(a). The  
13 Superintendent of Public Instruction, not LAUSD, is responsible for waiver of any  
14 NPS certification requirements. Cal. Educ. Code § 56366.2(a). Contrary to the  
15 allegation in the Complaint, LAUSD has no control over how the Superintendent  
16 processes waiver requests. ECF, Dkt. No. 1, ¶199. School Plaintiffs’ alleged injury  
17 related to the NPS certification requirements is not traceable to any LAUSD action  
18 and instead the result of the independent action of the state Superintendent and  
19 CDE. *See Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. at 41-42.

20 Similarly, the master contracting process interferes with School Plaintiffs’  
21 potential for redressability. NPS certification is not an avenue for automatic funding  
22 from an LEA. The Education Code requires LEAs to enter into master contracts as  
23 a condition of this funding. Cal. Educ. Code § 56365(a). LAUSD cannot compel a  
24 private entity to contract with it, even if parent or student desire placement at the  
25 particular NPS. This intervening step of the master contracting negotiation process  
26 makes automatic redressability of School Plaintiffs’ alleged injury – lack of funding  
27 for students with disabilities – impossible.  
28

1 Taken together, these factors demonstrate the School Plaintiffs lack of  
 2 standing. The Court should dismiss this case, or LAUSD as a party, on that basis.

3 **C. Plaintiffs Fail to State a Claim for Violation of the Free Exercise**  
 4 **Clause of the U.S. Constitution**

5 The First Amendment prohibits both any law “respecting an establishment of  
 6 religion,” (the Establishment Clause) and any law “prohibiting the free exercise  
 7 thereof” (Free Exercise Clause). When a law “excludes religious observers from  
 8 otherwise available public benefits,” the government entity must demonstrate that  
 9 the law is “narrowly tailored” to “advance ‘interests of the highest order’.” *Carson*  
 10 *v. Makin*, 142 S.Ct. 1987, 1996 (2022); *Church of Lukumi Babalu Aye, Inc. v.*  
 11 *Hialeah*, 508 U.S.C. 520, 546 (1993) (citations and quotations omitted). Plaintiffs  
 12 cannot show that LAUSD excluded them from an otherwise available public  
 13 benefit, which causes their Free Exercise Claim to fail.

14 **1. Plaintiffs Mischaracterize Alleged Otherwise Available**  
 15 **Public Benefits At Stake**

16 The Complaint strategically relies on vague references to “exclusion” from  
 17 things characterized as “benefits” in a strained attempt to pigeonhole the  
 18 nonsectarian NPS certification requirement into precedent on public funding for  
 19 religious schools. Plaintiffs consistently and generally assert they have been  
 20 excluded from Education Code sections 56361 and 56365 on account of their  
 21 religion. ECF, Dkt. No. 1, ¶178. The plain language of these Education Code  
 22 sections address the continuum of special education program options and the  
 23 requirements for LEAs and NPSs in contracting for the provision of special  
 24 education services. Yet, Plaintiffs are not excluded from this continuum of special  
 25 education programming or the ability to attend an NPS. Private school placements,  
 26 whether as Parentally-Placed, Unilaterally-Placed, or Publicly-Placed private school  
 27 students, are available to all parents of children with disabilities. 20 U.S.C.  
 28 § 1412(a)(10).



School Plaintiffs, on the other hand, characterize their “exclusion” as public funding for private religious schools. ECF, Dkt. No. 1, ¶¶160, 170. However, this mischaracterization and oversimplification of the NPS/LEA relationship as solely “funding” demonstrates School Plaintiffs’ lack of understanding of the process. The Court should resist Plaintiffs’ attempts to misguide on this front and instead recognize the extensive and problematic entanglement between LEA and private religious entity that Plaintiffs’ scheme for allowing sectarian NPSs would create.

## 2. LAUSD Did Not Exclude Student Plaintiffs From Public Benefit of a FAPE

To the extent Student Plaintiffs assert exclusion from the publicly available benefit of a FAPE, K.T. and N.P.’s receipt of an IEP from LAUSD belies this claim. While M.L. does not have an IEP at this time, the Loffmans, as is their right, decided to “forgo those services” and Parentally-Place M.L. at a private religious school. ECF, Dkt. No. 1, ¶90; 34 C.F.R. § 300.300(a)(3), (b)(3); 20 U.S.C. § 1412(a)(10)(A). If the Loffmans desire to obtain a FAPE for M.L., they have the opportunity to request that LAUSD offer M.L. a FAPE at any time. 20 U.S.C. § 1412(a)(10)(ii)(I).

Courts have also held that the availability of public benefits to children with disabilities attending public schools versus private religious schools does not violate the Free Exercise Clause as “persons opting to attend private schools, religious or otherwise, must accept the disadvantages as well as any benefits offered by those schools.” *Gary S. and Sylvie S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004), *cert. denied*, 543 U.S. 988 (2004). Moreover, given the “traditional pattern that has so far prevailed of financial public education via the public schools” it would “be unreasonable and inconsistent to premise a free exercise violation upon Congress’s mere failure to provide to disabled children attending private religious schools the identical financial and other benefits it confers upon those attending public schools.” *Id.* Therefore, Student and Parent Plaintiffs cannot point

to exclusion from public benefits on this basis either.

### 3. Education Code Sections 56361 and 56365 Contemplate Contractual Relationship, Not Merely Funding

School Plaintiffs allege exclusion from “receipt of crucial funding needed to educate students with disabilities,” yet Education Code sections 56361 and 56365 do not merely contemplate funding<sup>1</sup>. Section 56361 establishes the continuum of program options for students with an IEP. Section 56365 discusses the provision of services from an NPS and the contracting that is the foundation for the relationship between the LEA And NPS. Payment of tuition is just one component of the contract between an LEA and NPS and provided in exchange for the IEP services provided to eligible students. Cal. Educ. Code § 56365(d). For these reasons, School Plaintiffs cannot reasonably claim exclusion from “funding” without a deeper analysis of the contractual relationship between LEAs and NPSs contemplated in the statutes. Nor should the Court be persuaded by any attempt to characterize the benefit here as merely funding.

### 4. Non-Public School Certification is Not an Otherwise Available Public Benefit

In addition, the public benefits of both direct funding of placement in an NPS through the IEP process or reimbursement for placement at a private school as a form of rejection of the school district’s offer of FAPE is available to Parent Plaintiffs whose children have a right to a FAPE. 20 U.S.C. § 1412(a)(10)(B) and (C). The limitation of these public benefits to students with disabilities enrolled in public schools does not in itself violate the Free Exercise Clause, as the Court has “said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise.” *Norwood v.*

<sup>1</sup> Incidentally, LAUSD does not exclude Plaintiff Schools from funding for special education and related services through equitable service provision. 20 U.S.C. § 1412(a)(10)(A)(vi).



1 *Harrison*, 413 U.S. 455, 462 (1973).

2 LAUSD similarly does not exclude School Plaintiffs from otherwise  
3 available public benefits on the basis of their religious affiliation. LAUSD must  
4 timely and meaningfully consult with both religious private school representatives  
5 and parent representatives of Parentally-Placed private school students attending  
6 religious schools during the design and development of special education and  
7 related services for children, including the determination of proportionate funding  
8 and how, where, and by whom special education and related services will be  
9 provided for Parentally-Placed private school students, in compliance with the  
10 IDEA. 20 U.S.C. § 1412(a)(10)(A)(iii). School Plaintiffs can receive these equitable  
11 services in the same way as any other private school within LAUSD's boundaries.

12 State certification as an NPS is clearly distinct from the "generally available  
13 public benefits" discussed in recent precedent. In *Trinity Lutheran Church of*  
14 *Columbia, Inc. v. Comer*, benefit at stake was state-provided grants to help  
15 nonprofit organizations pay for playground resurfacing. *Trinity Lutheran Church of*  
16 *Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). In *Espinoza v. Montana Department*  
17 *of Revenue*, the benefit was a state-provided a tax credit to donors of certain  
18 organizations that awarded scholarships to selected students attending private  
19 schools. *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020). In  
20 *Carson*, the public benefit in question was tuition assistance at a public or private  
21 school selected by the parent. *Carson*, 142 S.Ct. at 1993-94. These cases all involve  
22 funding or a grant, with individuals directing the public funding to a religious  
23 institution at their election or an entity applying for the funding for a non-religious  
24 project. These examples of direct, monetary support did not involve attendant  
25 government oversight, partnership, joint decision-making, or ongoing contracting.

26 NPS certification, on the other hand, does not solely trigger payment of  
27 tuition to the private school, as in the funding or grants in the public benefits cases.  
28 NPS certification is the merely the first step in an intensive contracting process,

which requires the negotiation of a master contract and the provision of special education and related services to a student under the ongoing supervision and direction of the school district. Cal. Educ. Code § 56366; 34 C.F.R. § 300.17 (“FAPE means special education and related services that – (a) are provided at public expense, under public supervision and direction.”) The school district does not merely fund tuition at the private school; it establishes processes to oversee and evaluate placements at the NPS, methods for evaluating a student’s progress, recordkeeping and documentation, and considering whether the student may be transitioned back to a public school setting. Cal. Educ. Code § 56366(a). This contract and involved, ongoing relationship cannot reasonably be compared to one-and-done funding or grants. Accordingly, the court should decline to consider NPS certification an “otherwise available public benefit.”

Overall, as the NPS certification requirements are not an otherwise available public benefit, Plaintiffs cannot show that they suffered exclusion that amounted to a free exercise violation.

#### **D. Plaintiffs Fail to State an Equal Protection Claim Under the U.S. Constitution**

Plaintiffs suggest that the NPS certification requirements restrict their ability to send their children to private religious schools of their choice. ECF, Dkt. No. 1, ¶¶206, 219. This argument fails for a number of reasons. First, Congress’s decision to direct public funding to children with disabilities who attend public versus private religious schools does not impinge on a parent’s right to direct their child’s education. *Gary S.*, 374 F.3d at 20; *Strout v. Albanese*, 178 F.3d 57, 66 (1st Cir. 1999), cert denied 120 S.Ct. 329 (1999) (the “fundamental right [to direct child’s upbringing and education] does not require the state to directly pay for a sectarian education”). “A further anomaly of such a holding would be that only persons...with a declared religious belief in the necessity of sending their children to private schools would be entitled under the First Amendment to the funding

sought.” *Gary S.*, 374 F.3d at 20, fn.3.

Additionally, Parent Plaintiffs, like any other parents of a child with a disability, have a right to participate in the IEP process and accept or decline LAUSD’s offer of a FAPE for their child. 34 C.F.R. § 300.321(a)(1); 34 C.F.R. § 300.9. When a parent accepts the LEA’s offer of FAPE, the child has access to the full continuum of special education placements outlined in Education Code section 56361, subject to the least restrictive environment requirements. 34 C.F.R. § 300.115(a); Cal. Educ. Code § 56365(a). If Parent Plaintiffs decline LAUSD’s offer of FAPE, they can place their child in a private school, including any private religious school, just like any other parent of a child with a disability. 20 U.S.C. § 1412(a)(10)(A). Alternatively, Parent Plaintiffs, like any other parent of a child with a disability, may reject the offer of FAPE, place their child in a private school, including a religious private school, and seek reimbursement from LAUSD. 20 U.S.C. § 1412(a)(10)(C)(iii). The Education Code requirements related to NPS certification and contracting do not abrogate or burden those rights. To the extent Parent Plaintiffs allege their children are not receiving a FAPE in their current settings, they can utilize the administrative due process complaint procedures. 34 C.F.R. § 300.507. In no way has LAUSD denied Plaintiffs equal protection on the basis of their religion.

**E. If Strict Scrutiny is Applied, a Legitimate Government Interest Exists in Avoiding Ongoing Governmental Oversight of Religious Entities**

As the Education Code provides for a contractual, ongoing relationship between LEAs and NPSs, the removal of the nonsectarian requirement would violate the Establishment Clause through requiring direct governmental oversight of a religious entity. The separation of Church from State “ha[s] been regarded from the beginning as among the most cherished features of our constitutional system.” *Committee for Public Education v. Nyquist*, 413 U.S. 756, 796 (1973).

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The “means by which state assistance flows to private schools is of some importance” and a “material consideration in Establishment Clause analysis.” *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Nyquist*, 413 U.S. 756, 781 (1973). “It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves.” *Mueller*, 463 U.S. 399 at 399. Indeed, the policies maintaining separation of Church and State attempt to prevent “that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently straining a political system to the breaking point.” *Walz v. Tax Comm’n*, 397 U.S. 664, 694 (1970).

The Court has found schemes providing far less state involvement in religious schools than Plaintiffs propose here to result in “excessive entanglement between government and religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In *Lemon*, the Court struck down a state’s direct payment of a salary supplement to private school teachers and reimbursement for the cost of teachers’ salaries, textbooks, and instructional materials in certain secular subjects. *Id.* at 607. In *Levitt v. Committee for Public Ed.*, the Court found a state’s reimbursement to private schools for the costs of administering teacher-prepared examinations unconstitutional. *Levitt v. Committee for Public Ed.*, 413 U.S. 472 (1973). In *Meek v. Pittenger* and *Wolman v. Walter*, the Court found unconstitutional a state’s loan of instructional materials to private schools. *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977). Notably, the Court found the state’s actions in these cases unconstitutional, yet they still primarily involved funding or aid and nothing more.

The provision of tuition to NPSs under a contract with an LEA is not a benefit program under which private citizens “direct government aid to religious schools wholly as a result of their own genuine and independent private choice.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). There are no intervening

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private citizens here. It is a contract between the LEA and a private school that governs the conduct of these entities. Cal. Educ. Code § 56365(a). Removal of the nonsectarian NPS certification requirement would result in far more entanglement. An LEA would be required to enter into a legal contract with the private religious school (Cal. Educ. Code, § 56365(a)), monitor the NPS's compliance with implementation of the IEP, state standards, and the IDEA (34 C.F.R. § 300.147(a)), evaluate whether each student placed at the NPS is making appropriate educational progress (Cal. Educ. Code § 56366(a)(2)(B)), consider whether the needs of the student continues to be met at the NPS and whether the student needs to be transitioned to a public school setting (Cal. Educ. Code § 56366(a)(2)(B)(ii)), verify the NPS's compliance with staff training and NPS certification requirements (Cal. Educ. Code § 56366.1(a)(4)(D), and conduct onsite visits prior to placement of a student at the NPS and at least once each school year (Cal. Educ. Code § 56366.1(e)(3).) These oversight requirements are in addition to regular interactions the LEA and NPS must have to develop, update, and implement a student's IEP. 20 U.S.C. § 1414(d)(3)-(4).

This breadth and depth of partnership between the LEA and NPS would create immense, unresolvable challenges for the separation of church and state. "The potential for conflict 'inheres in the situation'" because the LEA would be "constitutionally compelled to assure that the state supported activity is not being used for religious indoctrination." *Levitt*, 413 U.S. at 480, quoting *Lemon*, 403 U.S. at 617, 619. The representations Plaintiffs make in the Complaint about their instructional program and mission reveal that any separation of secular and non-secular instruction would be impossible. School Plaintiffs do not attempt to hide their goal of seeking to "provide a distinctively Orthodox Jewish education to children with disabilities" and that "the inculcation and transmission of Jewish religious beliefs and practices to children is the very reason that Shalhevet and Yavneh exist." ECF, Dkt. No. 1, ¶¶76, 152. As "Shalhevet's and Yavneh's religious

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beliefs and identity permeate their entire school and mission,” separation of public and private religious interests and monitoring of the provision of special education to students at these religious schools would be impossible. ECF, Dkt. No. 1, ¶177.

This overt goal for religious education of students with disabilities would undermine the NPS/LEA relationship and disrupt the ability of the LEA to provide students with a FAPE. Children, and particularly children with disabilities, could be particularly susceptible to the influence of religious education at school. *See Lee v. Weisman*, 505 U.S. 577, 592, 605 n.6 (1991) (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”) School Plaintiffs’ desire for religious instruction and inculcation vis-à-vis NPS status is not subtle. The religious identify of NPSs could also lead to IEP team discrimination on the basis of religion as parents or IEP team members attempt to steer children into NPSs that support particular religions.

Further, LAUSD, as a governmental entity, has a compelling interest in maintaining the separation of church and state and compliance with state and federal law in this area. *See, e.g.*, U.S. Department of Education, *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (May 15, 2023). The potential for overt religious education with the removal of the “nonsectarian” requirement from NPS certification would also violate Section 8 of Article IV of the California Constitution, which states, “Nor shall any sectarian or denominational doctrine be taught or instruction thereon permitted, directly or indirectly, in any of the common schools of this State.”

Maintaining the nonsectarian requirement for NPSs ensures the separation of Church and State and avoids the entanglement and monitoring concerns that would otherwise arise. The nonsectarian requirement is also narrowly tailored to these significant interests. As a result, the Court should uphold the nonsectarian NPS certification requirement under a strict scrutiny analysis.



1 **IV. CONCLUSION**

2 While Plaintiffs make much of alleged exclusion from public benefits and  
 3 infringement on their free exercise of religion, Plaintiffs cannot ignore the rights  
 4 they maintain to direct the religious upbringing and education of their children,  
 5 accept or reject an offer of FAPE from LAUSD, and place their children with  
 6 disabilities who are eligible for special education and related services under the  
 7 IDEA in a private school if they so choose. LAUSD's compliance with Education  
 8 Code requirements concerning NPS certification requirements does not impede  
 9 those rights. Plaintiffs' Complaint should be dismissed on all counts or at least with  
 10 respect to LAUSD as a party.

11  
 12 DATED: May 23, 2023

DANNIS WOLIVER KELLEY  
 SUE ANN SALMON EVANS  
 MEAGAN M. KINSEY

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 14  
 15 By: /s/ Sue Ann Salmon Evans  
 16 SUE ANN SALMON EVANS  
 Attorneys for Defendants  
 Los Angeles Unified School District  
 and Anthony Aguilar  
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# Exhibit 1

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 Daniel L. Chen (CA SBN 312576)  
 Laura Wolk Slavis (DC Bar No. 1643193)  
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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
 LOFFMAN, on their own behalf and on behalf of  
 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:

2:23-cv-01832-JLS-MRW

**DECLARATION OF CHAYA  
 LOFFMAN IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 A PRELIMINARY  
 INJUNCTION**

Date: July 21, 2023

Time: 10:30am

Courtroom: 8A

Judge: Hon. Josephine L. Staton

\* Not a member of the D.C. Bar; admitted in  
 California. Practice limited to cases in federal court.

1 I, Chaya Loffman, declare and state as follows:

2 1. My name is Chaya Loffman. I am over the age of 18 and am capable of making  
3 this declaration pursuant to 28 U.S.C. § 1746. I have personal knowledge of all of  
4 the contents of this declaration.

5 2. I live with my husband Jonathan and our two children in Los Angeles,  
6 California. My son, M.L., is 4 years old, and my daughter is an infant.

7 3. My family are Orthodox Jews. Among other things, this means that we strive  
8 to abide by the laws of *kashrut* (which govern dietary restrictions), observe Jewish  
9 holidays, engage in Orthodox Jewish prayers and services, and otherwise carry out  
10 the tenets of our faith.

11 4. As Orthodox Jews, we also believe firmly in the importance of sending our  
12 children to an Orthodox Jewish school, where they will not only receive an education  
13 in secular subjects, but also in the faith.

14 5. This belief flows directly from the Torah, the Talmud, and the Jewish Code  
15 of Law, all of which impose on Jewish parents a duty to transmit the faith to their  
16 children.

17 6. For example, the Torah instructs, “Take to heart these instructions with which  
18 I charge you this day. Impress them upon your children. Recite them when you stay  
19 at home and when you are away, when you lie down and when you get up.”  
20 *Deuteronomy* 6:7-8; *see also Deuteronomy* 11:19 (“And you shall teach them to your  
21 children—reciting them when you stay at home and when you are away, when you  
22 lie down and when you get up.”).

1       7. Similarly, the Talmud instructs that parents must teach both Torah and  
2 rabbinic writings to their children. *See, e.g.*, Talmud Bavli, *Kiddushin* 29a (“The  
3 sages taught a father is obligated . . . to teach his son Torah.”); *id.* at 29b (“From  
4 where do we know that a father is obligated to teach his son Torah? As it is written,  
5 ‘and you shall teach them to your children’.” (quoting (*Deuteronomy* 11:19))); *id.* at  
6 30a (describing the Torah subjects encompassed within this obligation).

7       8. Likewise, the Jewish Code of Law, the Shulchan Aruch, explains that “there  
8 is an obligation upon each person to teach his son Jewish law; if the father does not  
9 teach him, the son is obligated to teach himself.” Rabbi Joseph Caro, Shulchan  
10 Aruch, *Yoreh De’ah* 245:1.

11       9. In keeping with these religious beliefs, my husband and I decided that we  
12 would send our children to Orthodox Jewish schools.

13       10. However, this decision has come at considerable personal cost to us with  
14 respect to our son M.L., who was diagnosed with autism at age 3.

15       11. Because of his disability, M.L. requires a number of services, including  
16 speech, occupational, and behavioral therapies.

17       12. When we first learned of M.L.’s autism, we sought to enroll him in pre-school  
18 at Yeshiva Toras Emes, a Jewish school serving children from preschool to eighth  
19 grade. Our hope was that M.L. would receive an education there that nourished his  
20 Jewish faith while also providing the support necessary for him to progress  
21 developmentally.

22       13. However, soon after M.L. enrolled, we learned that we would be responsible  
23 for paying the costs of his therapies unless we enrolled M.L. in public school.

15. Likewise, if we wished to send M.L. to a secular private school, we could petition for him to receive a FAPE in that setting at no cost to us.

16. But a provision of the California Education Code excludes any funds from being used to reimburse any religious school for the cost of providing a student with a FAPE. Because of that law, we would be responsible for all of M.L.'s services if we chose to send him to an Orthodox Jewish school.

17. This information put me and my husband to a stark choice. Though we recognized that M.L. might qualify for services in public school at no cost to us, it is extremely important to us that he be treated the same as his nondisabled sibling and receive a Jewish education.

18. We therefore made the difficult decision to keep M.L. enrolled in a Jewish school even though this meant we would need to pay for special-education services out of pocket. M.L. currently receives services at Maor Academy, an Orthodox Jewish learning center dedicated to supporting students with special needs and their families in the Los Angeles Jewish community.

19. M.L. has thrived at Maor. He has learned songs that help to explain our Jewish faith and regularly engages in other activities that help to nurture our religious identity.

1       20. However, because of California's restriction, we have no ability to advocate  
2 that M.L. should be receiving a FAPE including an individualized education plan  
3 and special-education and related services, at no cost to us.

4       21. This means that my husband and I are fully responsible for the costs of M.L.'s  
5 weekly therapy, including 25 hours of behavior therapy and 1 hour of occupational  
6 therapy. It also means that, solely due to financial strain, we had to discontinue his  
7 speech therapy.

8       22. Though keeping M.L. enrolled in an Orthodox Jewish educational setting  
9 imposes a significant financial burden upon us because of the services required by  
10 his disability, we feel that we cannot compromise our religious beliefs concerning  
11 the importance of educating M.L. in an Orthodox Jewish setting.

12       23. We firmly intend to send our daughter to Orthodox Jewish schools once she  
13 reaches the appropriate age, and we see no reason why M.L. should be treated any  
14 differently than his nondisabled sister.

15       24. We want M.L. to have the same opportunities as his sister and to be treated  
16 as an equal to her in every respect. This includes giving him the same opportunity  
17 as she will have to receive a dual curriculum education. We feel that it is  
18 discriminatory for California to deprive us of that opportunity simply because we  
19 are religious.  
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23

1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed on this 9<sup>th</sup> day of May, 2023.

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4   
Chaya Loffman

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DECLARATION OF CHAYA LOFFMAN



## Exhibit 2

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 Daniel L. Chen (CA SBN 312576)  
 Laura Wolk Slavis (DC Bar No. 1643193)  
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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
 LOFFMAN, on their own behalf and on behalf of  
 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:

2:23-cv-01832-JLS-MRW

**DECLARATION OF SARAH  
 PERETS IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 A PRELIMINARY  
 INJUNCTION**

Date: July 21, 2023

Time: 10:30am

Courtroom: 8A

Judge: Hon. Josephine L. Staton

\* Not a member of the D.C. Bar; admitted in  
 California. Practice limited to cases in federal court.

1 I, Sarah Perets, declare and state as follows:

2 1. My name is Sarah Perets. I am over the age of 18 and am capable of making  
3 this declaration pursuant to 28 U.S.C. § 1746. I have personal knowledge of all of  
4 the contents of this declaration.

5 2. I live with my husband Ariel and our six children in Los Angeles, California.  
6 My son, N.P., is 14 years old. My other five children range in age from two to twenty.

7 3. My family are Orthodox Jews. Among other things, this means that we strive  
8 to abide by the laws of *kashrut* (which govern dietary restrictions), observe Jewish  
9 holidays, engage in Orthodox Jewish prayers and services, and otherwise carry out  
10 the tenets of our faith.

11 4. As Orthodox Jews, we also believe firmly in the importance of sending our  
12 children to an Orthodox Jewish school, where they will not only receive an education  
13 in secular subjects, but also in the faith.

14 5. This belief flows directly from the Torah, the Talmud, and the Jewish Code  
15 of Law, all of which impose on Jewish parents a duty to transmit the faith to their  
16 children.

17 6. For example, the Torah instructs “Take to heart these instructions with which  
18 I charge you this day. Impress them upon your children. Recite them when you stay  
19 at home and when you are away, when you lie down and when you get up.”  
20 *Deuteronomy* 6:7-8; *see also Deuteronomy* 11:19 (“And you shall teach them to your  
21 children—reciting them when you stay at home and when you are away, when you  
22 lie down and when you get up.”).

23 7. Similarly, the Talmud instructs that parents must teach both Torah and  
rabbinic writings to their children. *See, e.g.,* Talmud Bavli, *Kiddushin* 29a (“The  
sages taught a father is obligated . . . to teach his son Torah.”); *id.* at 29b (“From  
where do we know that a father is obligated to teach his son Torah? As it is written,

1 ‘and you shall teach them to your children’.” (quoting (*Deuteronomy* 11:19)); *id.* at  
2 30a (describing the Torah subjects encompassed within this obligation).

3 8. Likewise, the Jewish Code of Law, the Shulchan Aruch, explains that “there  
4 is an obligation upon each person to teach his son Jewish law; if the father does not  
5 teach him, the son is obligated to teach himself.” Rabbi Joseph Caro, Shulchan  
6 Aruch, *Yoreh De’ah* 245:1.

7 9. In keeping with these religious beliefs, my husband and I decided that we  
8 would send all of our children to Orthodox Jewish schools.

9 10. This is the course we took with five of our children, all of whom received an  
10 education at an Orthodox Jewish school from pre-school through twelfth grade.

11 11. However, due to California’s discriminatory restriction, which prevents  
12 special-education funding from being used to provide a free and appropriate public  
13 education (FAPE) in a private religious school, we were unable to follow these  
14 beliefs when it came to our son, N.P.

15 12. At age 3, N.P. was diagnosed with autism, and at age 6, he was diagnosed  
16 with a WAC gene mutation that results in speech delays, behavioral issues, and  
17 learning disabilities.

18 13. We wanted N.P. to have the same educational and religious opportunities as  
19 his five brothers and sisters, and therefore endeavored to figure out a way for him to  
20 receive an education at an Orthodox Jewish school that would also provide the  
21 supports and services necessary to accommodate his disability.

22 14. We attempted to enroll N.P. in Orthodox Jewish schools such as Emek  
23 Hebrew Academy and Adat Ari El, but had to withdraw him because we were forced  
to pay for N.P.’s services ourselves.

1       15. There was no way for us to access a critical California funding program,  
2 which could reimburse a private school the cost of N.P.'s special-education and  
3 related services at no cost to us.

4       16. That's because California law categorically excludes private religious  
5 schools from the reimbursement program. As a result, we lacked—and continue to  
6 lack—any ability to petition for N.P. to be placed at a private Orthodox Jewish  
7 school.

8       17. Thus, for N.P. to receive an education that nourished both his development  
9 and his faith, we would be responsible for funding all of his special-education  
10 services ourselves.

11       18. We simply could not, and cannot, make this work financially, and so we have  
12 been forced to enroll N.P. in public school in order to provide an education for our  
13 son.

14       19. Unlike our other five children, who have been educated exclusively at  
15 Orthodox Jewish schools, N.P. has been educated mainly at public schools after our  
16 brief but failed attempts to enroll him at Orthodox schools. He attended the Wilbur  
17 Charter School for Advanced Academics, an affiliated charter school that is part of  
18 the Los Angeles Unified School District (LAUSD), and Emelita Street Elementary  
19 School, a LAUSD public school. He is now in seventh grade at Sutter Middle School,  
20 a public school within LAUSD. He stopped receiving a mainstreamed education in  
21 second grade and does not perform at grade level.

22       20. N.P. has an individualized education plan that includes speech therapy,  
23 occupational therapy, and adaptive physical education.

24       21. These services are currently provided through LAUSD as a means of  
25 enabling N.P. to receive a FAPE. But we do not believe he is actually receiving a

1 FAPE in public school, and we would like to petition for placement in an Orthodox  
2 Jewish school.

3 22. For one thing, N.P.'s therapeutic and academic progress is severely impacted  
4 by the fact that he does not receive services both when his public school is not in  
5 session *and* when he does not attend school during Orthodox Jewish holidays. N.P.  
6 would not experience this augmented service disruption in an Orthodox Jewish  
7 school.

8 23. For another, we have experienced repeated difficulties getting N.P.'s public  
9 school to adhere to our religious beliefs concerning Kosher food. Due to his  
10 disability, N.P. has difficulty understanding the rules surrounding *kashrut* and  
11 communicating his needs, and school officials have repeatedly given him non-  
12 Kosher food to eat, despite our frequent requests not to do so.

13 24. On one occasion, I learned that N.P. had been given pizza, which is rarely  
14 Kosher, to eat at school. When I spoke to the teacher to remind her again of our  
15 religious beliefs surrounding food, she told me I had nothing to worry about because  
16 the pizza was vegetarian.

17 25. The fact that the pizza was vegetarian did not render the food compliant with  
18 our religious beliefs. It is frustrating to me that I need to argue with N.P.'s teachers  
19 about how our sincerely held religious beliefs affect N.P.'s needs, and I would not  
20 need to do this at an Orthodox Jewish school.

21 26. On another occasion, I was reprimanded by N.P.'s principal over our  
22 observance of the Jewish holiday Sukkot, which spans seven days. In accordance  
23 with our observance of the holiday, N.P. did not attend school for the duration of  
24 Sukkot.

25 27. After he returned, his principal chastised me for allowing N.P. to miss so  
26 much school. I explained to her that our religious beliefs, which hold that driving

1 and other forms of work are inappropriate during Sukkot, required us to keep N.P.  
2 home. She explained to me that she had googled Sukkot and spoken to other Jewish  
3 people, who said my interpretation of Sukkot was wrong and N.P. could have  
4 attended school for at least part of the holiday.

5 28. I resented the fact that N.P.'s principal was instructing me on how to be a  
6 good Jew, and for using interpretations of Jewish law that we do not agree with to  
7 support her point. If N.P. attended an Orthodox Jewish school that aligned with our  
8 religious beliefs, interactions like this would no longer occur.

9 29. These are not the only problems N.P. has experienced. On two occasions, he  
10 was sent home from school early due to staffing issues. When I complained, school  
11 officials told me that I could solve the problem by serving as N.P.'s aide throughout  
12 each school day myself.

13 30. Because of these issues, my husband and I would like to petition to have N.P.  
14 placed in an Orthodox Jewish school to receive the free and appropriate public  
15 education guaranteed him by the Individuals with Disabilities Education Act and  
16 California law. However, because of California's discriminatory exclusion of all  
17 religious schools from eligibility for such placement, we are unable to do so.

18 31. Because we cannot provide for N.P.'s education and services without  
19 California's special-education funding, we cannot follow our religious beliefs each  
20 day he remains in public school. Every day N.P. spends in a public school is another  
21 day of faith formation that we can never recover.

22 32. This law prevents us from doing for N.P. what we have done for our other  
23 five children—providing them with an education that allows both their faith and



1 intellect to flourish. Without this law, we would be able to advocate that N.P. be  
2 placed in the best educational environment for his unique circumstances.

3 I declare under penalty of perjury that the foregoing is true and correct.

4 Executed on this 5<sup>th</sup> day of May, 2023.

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6 Sarah Perets

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DECLARATION OF SARAH PERETS

# Exhibit 3

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 Daniel L. Chen (CA SBN 312576)  
 Laura Wolk Slavis (DC Bar No. 1643193)  
 Brandon L. Winchel\* (CA SBN 344719)  
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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
 LOFFMAN, on their own behalf and on behalf of  
 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:

2:23-cv-01832-JLS-MRW

**DECLARATION OF FEDORA  
 NICK IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 A PRELIMINARY  
 INJUNCTION**

Date: July 21, 2023

Time: 10:30am

Courtroom: 8A

Judge: Hon. Josephine L. Staton

\* Not a member of the D.C. Bar; admitted in  
 California. Practice limited to cases in federal court.

1 I, Fedora Nick, declare and state as follows:

2 1. My name is Fedora Nick. I am over the age of 18 and am capable of making  
3 this declaration pursuant to 28 U.S.C. § 1746. I have personal knowledge of all of  
4 the contents of this declaration.

5 2. I live with my husband Morris and our three children in Los Angeles,  
6 California. My son, K.T., is 14 years old. My other two sons are 20 years old and 18  
7 years old.

8 3. My family are Orthodox Jews. Among other things, this means that we strive  
9 to abide by the laws of *kashrut* (which govern dietary restrictions), observe Jewish  
10 holidays, engage in Orthodox Jewish prayers and services, and otherwise carry out  
11 the tenets of our faith.

12 4. As Orthodox Jews, we also believe firmly in the importance of sending our  
13 children to an Orthodox Jewish school, where they will not only receive an education  
14 in secular subjects, but also in the faith.

15 5. This belief flows directly from the Torah, the Talmud, and the Jewish Code  
16 of Law, all of which impose on Jewish parents a duty to transmit the faith to their  
17 children.

18 6. For example, the Torah instructs “Take to heart these instructions with which  
19 I charge you this day. Impress them upon your children. Recite them when you stay  
20 at home and when you are away, when you lie down and when you get up.”  
21 *Deuteronomy* 6:7-8; *see also Deuteronomy* 11:19 (“And you shall teach them to your  
22 children—reciting them when you stay at home and when you are away, when you  
23 lie down and when you get up.”).

1       7. Similarly, the Talmud instructs that parents must teach both Torah and  
2 rabbinic writings to their children. *See, e.g.*, Talmud Bavli, *Kiddushin* 29a (“The  
3 sages taught a father is obligated . . . to teach his son Torah.”); *id.* at 29b (“From  
4 where do we know that a father is obligated to teach his son Torah? As it is written,  
5 ‘and you shall teach them to your children.’” (quoting (*Deuteronomy* 11:19))); *id.* at  
6 30a (describing the Torah subjects encompassed within this obligation).

7       8. Likewise, the Jewish Code of Law, the Shulchan Aruch, explains that “there  
8 is an obligation upon each person to teach his son Jewish law; if the father does not  
9 teach him, the son is obligated to teach himself.” Rabbi Joseph Caro, Shulchan  
10 Aruch, *Yoreh De’ah* 245:1.

11       9. In keeping with these religious beliefs, my husband and I decided that we  
12 would send all of our children to Orthodox Jewish schools.

13       10. This is the course we took with our older two sons, both of whom received  
14 an education at an Orthodox Jewish school from pre-school through twelfth grade.

15       11. However, due to California’s discriminatory restriction, which prevents  
16 special-education funding from being used to provide a free and appropriate public  
17 education (FAPE) in a private religious school, we could not follow these beliefs  
18 when it came to our youngest son, K.T.

19       12. At approximately age 2, K.T. was diagnosed with pervasive developmental  
20 disorder, not otherwise specified, which is now considered to be part of the autism  
21 spectrum of disorders.

22       13. K.T.’s autism results in cognitive, behavioral, and motor difficulties.  
23

1       14. We wanted K.T. to have the same educational and religious opportunities as  
2 his brothers, and therefore endeavored to figure out a way for him to receive an  
3 education at an Orthodox Jewish school that would also provide the support and  
4 services necessary to accommodate his disability.

5       15. However, there was no way for us to access a critical California funding  
6 program, which could reimburse a private school the cost of K.T.'s special-education  
7 and related services at no cost to us.

8       16. That's because California law categorically excludes private religious  
9 schools from the reimbursement program. As a result, we lacked—and continue to  
10 lack—any ability to petition for K.T. to be placed at a private Orthodox Jewish  
11 school.

12       17. If we enrolled K.T. in an educational setting that nourished both his  
13 development and his faith, we would be responsible for funding all of his services  
14 ourselves.

15       18. We simply could not, and cannot, make this work financially, and so we have  
16 been forced to enroll K.T. in public school in order to provide an education for our  
17 son.

18       19. Unlike our other two children, who have been educated exclusively at  
19 Orthodox Jewish schools, K.T. has been educated exclusively at public schools. He  
20 attended Vine Elementary School and Melrose Magnet School, both public schools  
21 within Los Angeles Unified School District (LAUSD). He is now in eighth grade at  
22 The City School, a charter school within LAUSD, and is scheduled to transition to a  
23

1 public high school next year. He has been mainstreamed throughout, but he does not  
2 perform at grade level.

3 20. K.T. has an individualized education plan that includes eight service  
4 providers, including a full-time aide, a supervisor for the aide, speech and  
5 occupational therapists, adaptive physical education, resource specialists for English  
6 and math, and a private reading tutor.

7 21. These services are currently provided through LAUSD as a means of  
8 enabling K.T. to receive a FAPE. But we do not believe he is actually receiving a  
9 FAPE in public school.

10 22. For example, K.T.'s therapeutic and academic progress is severely impacted  
11 by the fact that he does not receive services both on days when his public school is  
12 not in session *and* on days when he cannot attend school due to an Orthodox Jewish  
13 holiday. K.T. would not experience this level of service disruption were he to attend  
14 an Orthodox Jewish school.

15 23. In addition, we have experienced repeated difficulties getting K.T.'s public  
16 school to adhere to our religious beliefs concerning Kosher food. Due to his  
17 disability, K.T. has difficulty understanding the rules surrounding *kashrut* and  
18 communicating his needs, and he has repeatedly been given non-Kosher food to eat.

19 24. In addition, we fear that K.T. will face increased bullying due to his disability  
20 at a large, chaotic public high school. We think it is paramount that we begin the  
21 process of seeking placement elsewhere as soon as possible, before he is forced to  
22 endure the even more challenging environment of high school.



1       25. Because of these issues, my husband and I would like to petition to have K.T.  
2 placed in an Orthodox Jewish school to receive the free and appropriate public  
3 education guaranteed him by the Individuals with Disabilities Education Act and  
4 California law. However, because of California's discriminatory exclusion of all  
5 religious schools from eligibility for such placement, we are unable to do so.

6       26. Because we cannot provide for K.T.'s education and services without  
7 California's special-education funding, we are unable to follow our religious beliefs  
8 each day he remains in public school. Every day K.T. spends in a public school is  
9 another day of faith formation that we can never recover.

10       27. Unsurprisingly, K.T.'s inability to attend Orthodox Jewish schools alongside  
11 his nondisabled siblings has had a profound impact on my family, particularly on  
12 my son A.T.

13       28. Inspired by our family's experience and K.T.'s difficulties at public school,  
14 A.T. has become a champion for inclusion of children with disabilities, including at  
15 his own Orthodox Jewish high school. In his advocacy, A.T. has stressed that K.T.  
16 has not received the same Jewish education in public school as A.T. has received,  
17 which has negatively impacted K.T.'s ability to fully participate in many of the  
18 religious observances that are important to A.T. and our family.

19       29. We are very proud of A.T.'s efforts, but we wish they weren't necessary.  
20 Instead, we wish we lived in a world that did not contain laws like California's,  
21 which discriminate against religious families and their children with disabilities.

22       30. This law prevents us from doing for K.T. what we have done for our other  
23 two children—providing them with an education that allows both their faith and



1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed on this 12th day of May, 2023.

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5 Fedora Nick  
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# Exhibit 4

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 Daniel L. Chen (CA SBN 312576)  
 Laura Wolk Slavis (DC Bar No. 1643193)  
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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
 LOFFMAN, on their own behalf and on behalf of  
 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:

2:23-cv-01832-JLS-MRW

**DECLARATION OF RABBI  
 DAVID BLOCK IN SUPPORT  
 OF PLAINTIFFS' MOTION  
 FOR A PRELIMINARY  
 INJUNCTION**

Date: July 21, 2023

Time: 10:30 AM

Courtroom: 8A

Judge: Hon. Josephine L. Staton

\* Not a member of the D.C. Bar; admitted in  
 California. Practice limited to cases in federal court.

1 I, David Block, declare and state as follows:

2 1. My name is David Block. I am over the age of 18 and am capable of making  
3 this declaration pursuant to 28 U.S.C. § 1746. I have personal knowledge of all of  
4 the contents of this declaration.

5 2. Since 2020, I have served as Head of School at the Jean & Jerry Friedman  
6 Shalhevet High School, a private co-educational Orthodox Jewish high school in Los  
7 Angeles, California. Prior to holding this position, I served as the Associate Head of  
8 School at Shalhevet for two years. Before that, I served as Assistant Principal for  
9 Judaic Studies. I am a rabbi and received my *semicha*, or rabbinic ordination, at  
10 Yeshiva University in 2016.

11 3. Founded in 1992, Shalhevet offers a rigorous, dual curriculum of Judaic and  
12 college preparatory studies. Shalhevet's goals are to promote the values of our  
13 Jewish heritage, the ideals of American democracy, and a passionate support for the  
14 welfare of the State of Israel, within an environment that encourages critical and  
15 creative thought.

16 4. Shalhevet emphasizes study of Torah and following Jewish law, *halacha*,  
17 which is the primary goal of Jewish education and of paramount importance in  
18 Orthodox Judaism. "All the faith and all the love in the world remain insignificant  
19 until they are actualized in a regular routine, in the Halakhah, which transforms faith  
20 and love into reality." Norman Lamm, *The Illogic of Logical Conclusions*, in  
21 *Derashot Shedarashti: Sermons of Rabbi Norman Lamm*, Feb. 10, 1973,  
22 <https://perma.cc/J962-C96B>.

23 5. Study of Torah is not simply about the accumulation of knowledge or  
development of skill: "even if one has retained nothing, the experience itself—live

1 contact with the epiphanous divine will manifested through Torah, and encounter  
2 with the divine Presence, which hovers over its student—is immeasurably  
3 important.” Aharon Lichtenstein, *Study, in 20th Century Jewish Religious Thought*  
4 931, 934 (A. Cohen & P. Mendes-Flohr eds., 2009).

5 6. Shalhevet’s educational model is built on the following core values: deep  
6 commitment to Torah and Israel; critical thinking and academic inquiry;  
7 transformative personal growth; empathetic dialogue and discourse; active  
8 engagement in community and beyond; and wellness, joy, and self-actualization.

9 7. In this way, we help Orthodox Jewish parents to fulfill their duty to provide  
10 an Orthodox Jewish education to their children.

11 8. Shalhevet also strives to create an inclusive learning environment, where  
12 students are prepared to lead meaningful, confident, and thoughtful Modern  
13 Orthodox lives.

14 9. One area in which Shalhevet wishes to explore becoming more inclusive is  
15 the education of students with disabilities.

16 10. Shalhevet believes that the Torah commands members of the Jewish  
17 community to care for the most vulnerable, including those with disabilities. The  
18 Torah further commands us to go and seek out the most vulnerable among us and to  
19 welcome them into our community, rather than waiting for them to approach us.

20 11. For Shalhevet, these religious commands call us to explore developing a  
21 program for children with disabilities that enables each child to obtain the required  
22 individualized support necessary for his or her educational progress.

23 12. A primary way we could provide this individualized support is to become  
a certified nonpublic school (NPS) under California law. If certified, Shalhevet could



1 receive students with disabilities as part of the free and appropriate public education  
2 guaranteed to them by the Individuals with Disabilities Education Act and California  
3 law.

4 13. Unfortunately, however, California will only certify schools if they are  
5 “nonsectarian,” meaning, in part, that the applicant must state that the school is not  
6 “formally affiliated with a religious group or sect.” Cal. Code Regs. tit. 5, § 3001(p).  
7 Shalhevet obviously runs afoul of this requirement because of its affiliation with the  
8 Orthodox Jewish faith.

9 14. Thus, though Shalhevet seeks the opportunity to qualify to provide a  
10 distinctively Orthodox Jewish education to children with disabilities, California’s  
11 nonsectarian requirement puts us to an impossible choice: we can either be a  
12 religious school or seek certification as an NPS—we cannot do both.


13 15. Even beginning the certification process would require me to violate  
14 Shalhevet’s sincerely held religious beliefs, since to do so would require me to  
15 disavow its religious character as a Jewish educational institution.

16 16. I could not possibly violate those beliefs, and so we are unable to even  
17 explore NPS certification.

18 17. California’s law asks Shalhevet to choose between its religious beliefs and  
19 the ability to receive needed funding to serve students with disabilities. This choice  
20 is particularly perplexing, since it is our religious beliefs that motivate us to explore  
21 how we can better serve those with disabilities.

1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed on this 16 day of May, 2023.

3  
4   
Rabbi David Block

# Exhibit 5

Eric C. Rassbach (CA SBN 288041)  
 erassbach@becketlaw.org  
 Daniel L. Chen (CA SBN 312576)  
 Laura Wolk Slavis (DC Bar No. 1643193)  
 Brandon L. Winchel\* (CA SBN 344719)  
 The Becket Fund for Religious Liberty  
 1919 Pennsylvania Ave., Suite 400  
 Washington, DC 20006  
 202-955-0095 tel. / 202-955-0090 fax

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
 LOFFMAN, on their own behalf and on behalf of  
 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:

2:23-cv-01832-JLS-MRW

**DECLARATION OF RABBI  
 SHLOMO EINHORN IN  
 SUPPORT OF PLAINTIFFS'  
 MOTION FOR A  
 PRELIMINARY  
 INJUNCTION**

Date: July 21, 2023

Time: 10:30 AM

Courtroom: 8A

Judge: Hon. Josephine L. Staton

\* Not a member of the D.C. Bar; admitted in  
 California. Practice limited to cases in federal court.

1 I, Shlomo Einhorn, declare and state as follows:

2 1. My name is Shlomo Einhorn. I am over the age of 18 and am capable of  
3 making this declaration pursuant to 28 U.S.C. § 1746. I have personal knowledge of  
4 all of the contents of this declaration.

5 2. Since 2012, I have served as Rabbi and Dean of the Samuel A. Fryer  
6 Yavneh Hebrew Academy, a private co-educational Orthodox Jewish high school  
7 in Los Angeles, California serving students from early childhood through eighth  
8 grade. I received my rabbinic ordination (*Yoreh Yoreh*) from Yeshiva University in  
9 2004 and my advanced rabbinic ordination (*Yadin Yadin*) from Yeshiva University  
10 in 2018.

11 3. Founded in 1958, Yavneh offers a rigorous, dual curriculum of Judaic and  
12 college preparatory studies.

13 4. Yavneh emphasizes study of Torah and following Jewish law, *halacha*, which  
14 is the primary goal of Jewish education and of paramount importance in Orthodox  
15 Judaism. “All the faith and all the love in the world remain insignificant until they  
16 are actualized in a regular routine, in the Halakhah, which transforms faith and love  
17 into reality.” Norman Lamm, *The Illogic of Logical Conclusions*, in *Derashot*  
18 *Shedarashti: Sermons of Rabbi Norman Lamm*, Feb. 10, 1973,  
19 <https://perma.cc/J962-C96B>.

20 5. Study of Torah is not simply about the accumulation of knowledge or  
21 development of skill: “even if one has retained nothing, the experience itself—live  
22 contact with the epiphanous divine will manifested through Torah, and encounter  
23 with the divine Presence, which hovers over its student—is immeasurably

important.” Aharon Lichtenstein, *Study, in 20th Century Jewish Religious Thought* 931, 934 (A. Cohen & P. Mendes-Flohr eds., 2009).

6. Yavneh’s mission is to inspire and provide the tools for lifelong Jewish living. These include *Ahavat* and *Limud Torah*, *Mitzvot*, and steadfast support of *Medinat Yisrael*.

7. Yavneh fulfills its mission by guiding its students in the pursuit of knowledge in a manner that maintains intellectual honesty, excites students’ curiosity, and meets the demands of scholarship. We seek to instill in our students a fineness of character, respect for others, integrity, and the centrality of worthy deeds in Jewish life.

8. In this way, we help Orthodox Jewish parents to fulfill their duty to provide an Orthodox Jewish education to their children.

9. Yavneh also strives to create an inclusive learning environment, including for students with disabilities. Through our CAL Department, we work to accommodate the unique needs of each student, so that all Yavneh students have the tools necessary to successfully demonstrate their knowledge. We provide accommodations such as small-group testing, assistive technologies, and other interventions to meet this goal.

10. Yavneh would like to explore additional avenues of serving students with disabilities, especially those with more complex needs.

11. A primary way we could provide this individualized support is to become a certified nonpublic school (NPS) under California law. If certified, Yavneh could receive students with disabilities as part of the free and appropriate public education guaranteed to them by the Individuals with Disabilities Education Act and California law.



12. Unfortunately, however, California will only certify schools if they are “nonsectarian,” meaning, in part, that the applicant must state that the school is not “formally affiliated with a religious group or sect.” Cal. Code Regs. tit. 5, § 3001(p). Yavneh obviously runs afoul of this requirement because of its affiliation with the Orthodox Jewish faith.

13. Thus, though Yavneh seeks the opportunity to qualify to provide a distinctively Orthodox Jewish education to children with disabilities, California’s nonsectarian requirement puts us to an impossible choice: we can either be a religious school or seek certification as an NPS—we cannot do both.

14. Even beginning the certification process would require me to violate Yavneh’s sincerely held religious beliefs, since to do so would require me to disavow its religious character as a Jewish educational institution.

15. I could not possibly violate those beliefs, and so we are unable to even explore NPS certification.

16. California’s law asks Yavneh to choose between its religious beliefs and the ability to receive needed funding to serve students with disabilities. This choice is particularly perplexing, since it is our religious beliefs that motivate us to seek how we can better serve those with disabilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11 day of May, 2023.

  
\_\_\_\_\_  
Rabbi Shlomo Einhorn



# Exhibit 6

Eric C. Rassbach (CA SBN 288041)  
 erassbach@becketlaw.org  
 Daniel L. Chen (CA SBN 312576)  
 Laura Wolk Slavis (DC Bar No. 1643193)  
 Brandon L. Winchel\* (CA SBN 344719)  
 The Becket Fund for Religious Liberty  
 1919 Pennsylvania Ave., Suite 400  
 Washington, DC 20006  
 202-955-0095 tel. / 202-955-0090 fax

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
 LOFFMAN, on their own behalf and on behalf of  
 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:  
 2:23-cv-01832-JLS-MRW

**DECLARATION OF MIRA  
 SHUCHATOWITZ IN  
 SUPPORT OF PLAINTIFFS'  
 MOTION FOR A  
 PRELIMINARY  
 INJUNCTION**

Date: July 21, 2023  
 Time: 10:30am  
 Courtroom: 8A  
 Judge: Hon. Josephine L. Staton

\* Not a member of the DC Bar; admitted in  
 California. Practice limited to cases in federal court.

1 1. My name is Mira Shuchatowitz. I am over the age of 18 and am capable of  
2 making this declaration pursuant to 28 U.S.C. § 1746. I have personal knowledge  
3 of all of the contents of this declaration.

4 2. On May 2, 2023, I emailed the California Department of Education and  
5 requested a copy of the current certification application for a nonpublic,  
6 nonsectarian school.

7 3. On May 3, 2023, I received by email the California Certification  
8 Applications for a New Nonpublic, Nonsectarian School and a New Residential  
9 Nonpublic, Nonsectarian School.

10 4. A true and correct copy of the California Certification Application for a New  
11 Nonpublic, Nonsectarian School is attached as Exhibit A to this declaration.

12 5. A true and correct copy of the California Certification Application for a New  
13 Residential Nonpublic, Nonsectarian School is attached as Exhibit B to this  
14 declaration.

15 I declare under penalty of perjury that the foregoing is true and correct.

16 Executed on this 15 day of May, 2023.

17   
18 \_\_\_\_\_  
19 Mira Shuchatowitz  
20  
21  
22  
23

# Exhibit A

# CALIFORNIA CERTIFICATION APPLICATION

## NPS01 – NEW NONPUBLIC, NONSECTARIAN SCHOOL

Date of Submission:		If Revised, Application Revision Date:	
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### NONPUBLIC SCHOOL INFORMATION

Name of School:		CDS Code:	
School Address:			
City:	State:	Zip:	Fax:
School Administrator Name:			Phone:
School Administrator E-mail Address:			
On-Site Contact Name:			Phone:
On-Site Contact E-mail Address:			

### NONPUBLIC SCHOOL DEMOGRAPHIC INFORMATION

Gender(s) Served:			
Grade Levels Served:		Student Age Ranges Served:	
Total Student Capacity:		Number of Certified Classrooms:	

### NONPUBLIC SCHOOL PROGRAM – PRIMARY DISABLING CONDITIONS SERVED

Check the appropriate box to indicate each Primary Disabling Condition the NPS serves.

<input type="checkbox"/> Autism (AUT)	<input type="checkbox"/> Hard of Hearing (HH)	<input type="checkbox"/> Orthopedic Impairment (OI)
<input type="checkbox"/> Deaf-Blindness (DB)	<input type="checkbox"/> Hearing Impairment (HI)	<input type="checkbox"/> Specific Learning Disability (SLD)
<input type="checkbox"/> Deafness (DEAF)	<input type="checkbox"/> Intellectual Disability (ID)	<input type="checkbox"/> Speech/Language Impairment (SLI)
<input type="checkbox"/> Emotional Disturbance (ED)	<input type="checkbox"/> Multiple Disabilities (MD)	<input type="checkbox"/> Traumatic Brain Injury (TBI)
<input type="checkbox"/> Established Medical Disability (EMD)	<input type="checkbox"/> Other Health Impairment (OHI)	<input type="checkbox"/> Visual Impairment (VI)

Check if a residential program is affiliated with the NPS:	<input type="checkbox"/>	Program Name(s):
--	--------------------------	------------------

### APPLICATION FEES

Check the appropriate box to indicate the total student capacity of the NPS:

Total Student Capacity	Application Fee
<input type="checkbox"/> 1–5 Students	<input type="checkbox"/> \$485.00
<input type="checkbox"/> 6–10 Students	<input type="checkbox"/> \$815.00
<input type="checkbox"/> 11–24 Students	<input type="checkbox"/> \$1,630.00
<input type="checkbox"/> 25–75 Students	<input type="checkbox"/> \$2,445.00
<input type="checkbox"/> 76 or More Students	<input type="checkbox"/> \$3,260.00

Application fees are nonrefundable pursuant to California *Education Code* Section 56366.1(m).

### FILING INSTRUCTIONS

**Mail the completed NPS01 form and a check payable to the California Department of Education to the following address:**

California Department of Education  
Special Education Division  
Focused Monitoring and Technical Assistance Unit VI  
1430 N Street, Room 2401  
Sacramento, CA 95814-5901

### CALIFORNIA DEPARTMENT OF EDUCATION USE ONLY

Check#:	Amount Paid:	Date Received	Assigned Staff:
---------	--------------	---------------	-----------------

## NPS02 – SPECIAL EDUCATION LOCAL PLAN AREA NOTIFICATION AND VERIFICATION

### Intent to Apply for Nonpublic School Certification

NPS Name:

#### Pursuant to California *Education Code (EC)* § 56366.1:

(b)(1) The applicant shall provide the special education local plan area (SELPA) in which the applicant is located with the written notification of its intent to seek certification or renewal of its certification. The local educational agency (LEA) representatives shall acknowledge that they have been notified of the intent to certify or renew certification. The acknowledgment shall include a statement that representatives of the local educational agency for the area in which the applicant is located have had the opportunity to review the application at least 60 calendar days before submission of an initial application to the Superintendent, or at least 30 calendar days before submission of a renewal application to the Superintendent. The acknowledgment shall provide assurances that local educational agency representatives have had the opportunity to provide input on all required components of the application.

(2) If the local educational agency has not acknowledged an applicant's intent to be certified 60 calendar days from the date of submission for initial applications or 30 calendar days from the date of the return receipt for renewal applications, the applicant may file the application with the Superintendent.

#### SELPA Use Only

As the representative of the SELPA in which the NPS is located, I attest I have been notified of the intent of the NPS named above to be certified by the California Department of Education (CDE) as a NPS providing services for individuals with exceptional needs. The NPS has provided the opportunity to review and provide input on all components of the application.

Name of SELPA:

Date NPS application was sent to SELPA:

Printed name of SELPA Representative:

Signature of SELPA Representative:

Date signed by SELPA Representative:

## NPS03 – FIRE INSPECTION CLEARANCE AND ASSURANCE STATEMENT

NPS Name:

**Instructions:** Pursuant to Title 5 of the *California Code of Regulations (CCR)* § 3060 (c)(20), submit a copy of the fire inspection clearance completed within the last 12 months.

### Assurance Statement

Pursuant to *EC* § 56366.1(o), as the authorized agent of the NPS, I assure the NPS meets all applicable standards relating to fire, health, sanitation, and building safety.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:



## NPS04 – PROGRAM AND SERVICE DESCRIPTION

NPS Name:

Course of Study Leads to:

☐

Diploma

☐

Certificate of Completion

Provide a brief description of the program including entrance criteria and exit criteria for transition back to the public school setting, and specific services designed to address student needs as listed on the students' Individualized Education Programs (IEPs).

## NPS05 – SERVICES AND FEES

Please provide information on all services for which you are seeking certification.

NPS Name:

Designated Instruction	Service Abbreviation	Fees	Time Allotment (per hour, day, or month)
Specially Designed Instruction (34 CFR § 300.39)	SDI/SAI	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Specially Designed Instruction – Extended School Year	SDI/SAI	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
<b>Related Services</b>			
Adapted Physical Education (5 CCR § 3051.5)	APE	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Audiological Services (5 CCR § 3051.2)	AS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Assistive Technology Service (5 CCR § 3051.19)	ATS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Behavior Intervention–Design (5 CCR § 3051.23)	BID	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Behavior Intervention–Implementation (5 CCR § 3051.23)	BII	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Counseling and Guidance Services (5 CCR § 3051.9)	CG	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Related Services for the Deaf and Hard of Hearing (5 CCR § 3051.18)	DHH	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Early Education Programs (5 CCR § 3051.20)	EE	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Health and Nursing Services (5 CCR § 3051.12)	HNS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Specialized Services for Low Incidence Disabilities (5 CCR § 3051.16)	LI	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Language, Speech and Hearing Development and Remediation (5 CCR § 3051.1)	LSDR	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Music Therapy (5 CCR § 3051.21)	MT	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Orientation and Mobility Instruction (5 CCR § 3051.3)	OM	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Occupational Therapy (5 CCR § 3051.6)	OT	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Parent Counseling and Training (5 CCR § 3051.11)	PCT	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Psychological Services Other Than Assessment and Development of the IEP (5 CCR § 3051.10)	PS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Physical Therapy (5 CCR § 3051.6)	PT	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Recreation Services (5 CCR § 3051.15)	RS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Social Worker Services (5 CCR § 3051.13)	SW	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Transcription Services (5 CCR § 3051.22)	TS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Specially Designed Vocational Education and Career Development (5 CCR § 3051.14)	VECD	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Vision Services (5 CCR § 3051.7)	VS	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Vision Therapy (5 CCR § 3051.75)	VT	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
Other Related Service (5 CCR § 3051.24)	OTH	<input style="width: 40px; height: 20px;" type="text"/>	<input style="width: 80px; height: 20px;" type="text"/>
<b>Enter Other Related Service name(s):</b> <input style="width: 490px; height: 20px;" type="text"/>			

## NPS06 - CONTRACT INFORMATION

NPS Name:

[illegible]

California Department of Education, Special Education Division

## NPS07a – CLASSROOM TEACHERS AND CLEARANCE INFORMATION

NPS Name: \_\_\_\_\_

Date of Submission: 

**This staff list should contain only classroom or substitute teachers. Include a copy of each credential.**

[illegible]

California Department of Education, Special Education Division

**NPS07b – RELATED SERVICES LICENSED/CREDENTIALLED STAFF  
AND CLEARANCE INFORMATION**

NPS Name: \_\_\_\_\_

Date of Submission: 

**This staff list should contain only staff whose position at the school requires a license or credential. This staff list should NOT contain paraprofessionals as those should be listed on NPS07c. Include licenses/credentials immediately after this form.**

## NPS Administrator Information

For NPS administrator qualifications requiring a credential and specific experience, include evidence of the relevant experience along with the qualifying credential as instructed above.

NPS Administrator Name	Related Service (BID, LSDR, etc.)	Type of License, Credential, or Degree	Expiration Date	Behavior Training Date	Hire Date	DOJ Date	TB Date

### Related Services Provider Information

[illegible]

California Department of Education, Special Education Division

[illegible]

California Department of Education, Special Education Division

## NPS07c – NONLICENSED STAFF AND CLEARANCE INFORMATION

NPS Name:

Date of Submission: 

This staff list should contain those staff who do not possess a license or credential. All staff who may potentially have contact with students during the school day should be included on this list (janitorial, secretarial, etc.). An individual who provides BII must be a high school (HS) graduate or equivalent. *Please do not submit copies of transcripts or high school diplomas.*

[illegible]

California Department of Education, Special Education Division



**NPS07c – NONLICENSED STAFF AND CLEARANCE INFORMATION**  
**(continued)**

NPS Name:

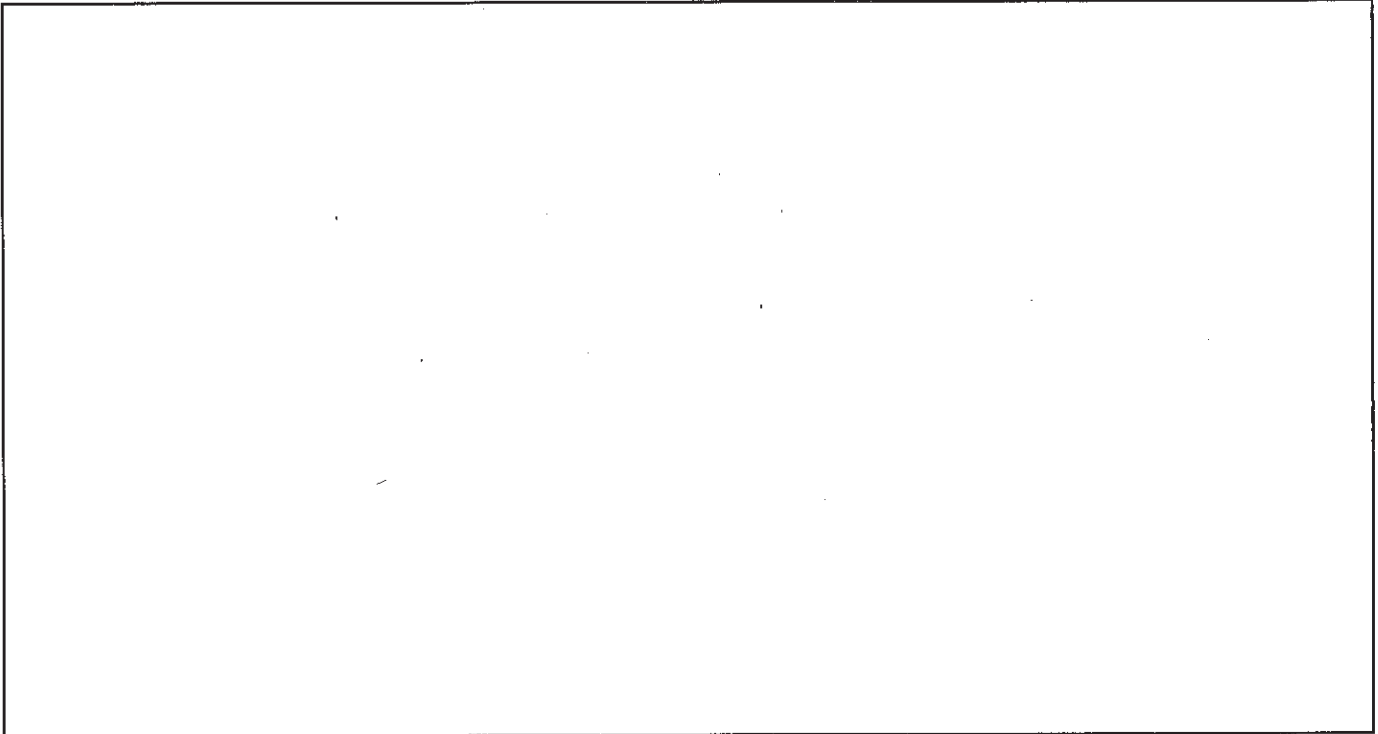
Date of Submission: [illegible]

California Department of Education, Special Education Division

## NPS08 – GEOGRAPHIC LOCATION

NPS Name:

Please provide written directions describing the location of the nonpublic school in reference to the nearest major airport. Include any major highways and landmarks. Also, please provide special instructions needed to find the school's main office, visitor check-in, and available parking. Include as an attachment a street map of the school's location.



## NPS09 - NONPUBLIC SCHOOL ASSURANCE STATEMENT

NPS Name:

Pursuant to 5 CCR § 3060(d), the applicant shall submit a signed assurance statement that the nonpublic school will maintain compliance with the following:

- (1) Fair Employment Act;
- (2) Drug Free Workplace Act;
- (3) Section 504 of the Rehabilitation Act;
- (4) Individuals with Disabilities Education Act;
- (5) Civil Rights Act;
- (6) Nonsectarian status (as defined by 5 CCR § 3001(p), "Nonsectarian" means a private, nonpublic school or agency that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility and whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group);
- (7) Prohibition of Corporal Punishment of Pupils under *Education Code* section 49001; use of Positive Behavioral Interventions pursuant to *Education Code* sections 56520 through 56525;
- (8) OSHA Bloodborne Pathogens Standards;
- (9) all local, county, or state ordinances and/or statutes relating to fire, health, sanitation, and building safety;
- (10) use permit, conditional permit or zoning; and
- (11) other assurances as required by state or federal law set forth in an assurance statement in the nonpublic school or nonpublic agency application for certification.

As the NPS's authorized agent, I assure all information included in this application is true and accurate. I acknowledge the understanding that any violation of *Education Code* § 56366.4, may result in the suspension or revocation of the certification for the NPS.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

## NPS10 - NONPUBLIC SCHOOL PROVIDER STATEMENT

### California *Education Code* 56366.10

NPS Name:

In addition to the certification requirements set forth in Sections 56366 and 56366.1, a nonpublic, nonsectarian school that provides special education and related services to an individual with exceptional needs shall certify in writing to the Superintendent that it meets all of the following requirements:

(a) It will not accept a pupil with exceptional needs if it cannot provide or ensure the provision of the services outlined in the pupil's individualized education program.

(b) Pupils have access to the following educational materials, services, and programs that are consistent with each pupil's individualized education program:

(1) (A) For kindergarten and grades 1 to 8, inclusive, state-adopted, standards-based, core curriculum and instructional materials, including technology-based materials as defined in Section 60010.

(B) For grades 9 to 12, inclusive, standards-based, core curriculum and instructional materials, including technology-based materials as defined in Section 60010, used by any local educational agency that contracts with the nonpublic, nonsectarian school.

(2) College preparatory courses.

(3) Extracurricular activities, such as art, sports, music, and academic clubs.

(4) Career preparation and vocational training, consistent with transition plans pursuant to state and federal law.

(5) Supplemental assistance, including individual academic tutoring, psychological counseling, and career and college counseling.

(c) The teachers and staff provide academic instruction and support services to pupils with the goal of integrating pupils into the least restrictive environment pursuant to federal law.

(d) The school has and abides by a written policy for pupil discipline that is consistent with state and federal law and regulations.

(e) For a school serving pupils with significant behavioral needs or who are on behavioral intervention plans, the school has an individual onsite during school hours who is qualified, and responsible for the design, planning, and implementation of behavioral interventions, as authorized under Section 3051.23 of Title 5 of the California *Code of Regulations*.

(f) Commencing with the 2020–21 school year, the nonpublic, nonsectarian school provides annual training to all staff who have any contact or interaction with pupils during the schoolday. The training is also provided within 30 days of employment to new staff who have any contact or interaction with pupils during the schoolday. The nonpublic, nonsectarian school maintains written records of the training, and will provide written verification of the training upon request. The training shall comply with the requirements of subparagraphs (B) and (C) of paragraph (4) of subdivision (a) of Section 56366.1.

As the authorized administrator or designee of the NPS, I assure all the information included in this application is true and accurate. I acknowledge the understanding that any violations of EC § 56366.4, may result in the suspension or revocation of the certification for the NPS.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

## NPS11 – SCHOOL YEAR CALENDAR AND SCHEDULES

NPS Name:

Pursuant to 5 CCR 3060(c)(19), the NPS shall provide a copy of the current school year calendar, weekly class schedule, and daily schedule with number of instructional minutes by each grade level served.

☐ 2022-23 School Year Calendar

☐ Weekly Class Schedule

☐ Daily Class Schedule

## NPS12 – ANNUAL OPERATING BUDGET AND ATTESTATION

NPS Name:

Pursuant to 5 CCR § 3060(c)(12), a nonpublic, nonsectarian school that seeks certification shall include an annual operating budget, including projected costs and revenues for each school program, providing documentation that demonstrates that the rates to be charged are reasonable to support the operation of the school program.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

## NPS13 – BUSINESS LICENSE

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(A), submit a copy of the current business license for the property address along with this cover sheet. The business license must include the name and address of the proposed school site.



## NPS14 – WRITTEN DISASTER PLAN

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(B), submit a copy of the NPS's written emergency disaster plan of action along with this coversheet. Specifically, include fire and earthquake emergency procedures and any other emergency procedures that may affect the regular operation of the school.

## NPS15 – MASS CASUALTY PLAN OF ACTION

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(B), submit a copy of the NPS's written mass casualty plan of action along with this coversheet. The written plan of action identifies NPS staff that will respond to a mass casualty incident and assist in the coordination of any mutual aid response.

## NPS16 – BUILDING SAFETY INSPECTION CLEARANCE

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(C), all new or relocating NPS applications must include a copy of the building safety inspection clearance. The CDE does not provide a form template for this requirement. Contact the building department of the local jurisdiction to complete an inspection of the proposed site.

## NPS17 – HEALTH INSPECTION CLEARANCE

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(D), all new or relocating NPS applications must include a copy of the health inspection clearance consistent with local jurisdiction requirements. CDE does not provide a form template. Contact the local or state environmental health department to complete a health and safety inspection.

## NPS18 – CERTIFICATION ASSURANCE STATEMENT

NPS Name:

I acknowledge that in accordance with *EC* § 56366.4, the Superintendent may revoke or suspend the certification of a nonpublic, nonsectarian school for any violation of *EC* § 56366.4 including, falsification or intentional misrepresentation of an element of the application, pupil records, or program presented for certification purposes.

I assure all information included in this application is true and accurate. I further assure the applicant will abide by contractual agreements with LEAs, and comply with all requirements of special education laws and regulations governing NPS certification and the provision of instruction, related services, and services to students with special needs.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

# Exhibit B

# CALIFORNIA CERTIFICATION APPLICATION

## NPS01R – NEW RESIDENTIAL NONPUBLIC, NONSECTARIAN SCHOOL

Date of Submission:		If Revised, Application Revision Date:	
---------------------	--	--	--

NONPUBLIC SCHOOL INFORMATION			
Name of School:		CDS Code:	
School Address:			
City:		State:	Zip: Fax:
School Administrator Name:		Phone:	
School Administrator E-mail Address:			
On-Site Contact Name:		Phone:	
On-Site Contact E-mail Address:			

NONPUBLIC SCHOOL DEMOGRAPHIC INFORMATION			
Gender(s) Served:			
Grade Levels Served:		Student Age Ranges Served:	
Total Student Capacity:		Number of Certified Classrooms:	

NONPUBLIC SCHOOL PROGRAM – PRIMARY DISABLING CONDITIONS SERVED			
Check the appropriate box to indicate each Primary Disabling Condition the NPS serves.			
<input type="checkbox"/> Autism (AUT)	<input type="checkbox"/> Hard of Hearing (HH)	<input type="checkbox"/> Orthopedic Impairment (OI)	
<input type="checkbox"/> Deaf-Blindness (DB)	<input type="checkbox"/> Hearing Impairment (HI)	<input type="checkbox"/> Specific Learning Disability (SLD)	
<input type="checkbox"/> Deafness (DEAF)	<input type="checkbox"/> Intellectual Disability (ID)	<input type="checkbox"/> Speech/Language Impairment (SLI)	
<input type="checkbox"/> Emotional Disturbance (ED)	<input type="checkbox"/> Multiple Disabilities (MD)	<input type="checkbox"/> Traumatic Brain Injury (TBI)	
<input type="checkbox"/> Established Medical Disability (EMD)	<input type="checkbox"/> Other Health Impairment (OHI)	<input type="checkbox"/> Visual Impairment (VI)	

Check if a residential program is affiliated with the NPS:		Program Name(s):
--	--	------------------

APPLICATION FEES	
Check the appropriate box to indicate the total student capacity of the NPS:	
Total Student Capacity	Application Fee
<input type="checkbox"/> 1–5 Students	<input type="checkbox"/> \$485.00
<input type="checkbox"/> 6–10 Students	<input type="checkbox"/> \$815.00
<input type="checkbox"/> 11–24 Students	<input type="checkbox"/> \$1,630.00
<input type="checkbox"/> 25–75 Students	<input type="checkbox"/> \$2,445.00
<input type="checkbox"/> 76 or More Students	<input type="checkbox"/> \$3,260.00
Application fees are nonrefundable pursuant to California Education Code Section 56366.1(m).	

FILING INSTRUCTIONS	
Mail the completed NPS01R form and check payable to the California Department of Education to the following address:	
California Department of Education Special Education Division Focused Monitoring and Technical Assistance Unit VI 1430 N Street, Room 2401 Sacramento, CA 95814-5901	

CALIFORNIA DEPARTMENT OF EDUCATION USE ONLY			
Check#:	Amount Paid:	Date Received	Assigned Staff:



## NPS02R – SPECIAL EDUCATION LOCAL PLAN AREA NOTIFICATION AND VERIFICATION

### Intent to Apply for Nonpublic School Certification

NPS Name:

*This form is not required for out-of-state schools*

### Pursuant to California Education Code (EC) § 56366.1:

(b)(1) The applicant shall provide the special education local plan area (SELPA) in which the applicant is located with the written notification of its intent to seek certification or renewal of its certification. The local educational agency (LEA) representatives shall acknowledge that they have been notified of the intent to certify or renew certification. The acknowledgment shall include a statement that representatives of the local educational agency for the area in which the applicant is located have had the opportunity to review the application at least 60 calendar days before submission of an initial application to the Superintendent, or at least 30 calendar days before submission of a renewal application to the Superintendent. The acknowledgment shall provide assurances that local educational agency representatives have had the opportunity to provide input on all required components of the application.

(2) If the local educational agency has not acknowledged an applicant's intent to be certified 60 calendar days from the date of submission for initial applications or 30 calendar days from the date of the return receipt for renewal applications, the applicant may file the application with the Superintendent.

### SELPA Use Only

As the representative of the SELPA in which the NPS is located, I attest I have been notified of the intent of the NPS named above to be certified by the California Department of Education (CDE) as a NPS providing services for individuals with exceptional needs. The NPS has provided the opportunity to review and provide input on all components of the application.

Name of SELPA:

Date NPS application was sent to SELPA:

Printed name of SELPA Representative:

Signature of SELPA Representative:

Date signed by SELPA Representative:

### SELPA Comments:

## NPS03R – FIRE INSPECTION CLEARANCE AND ASSURANCE STATEMENT

NPS Name:

**Instructions:** Pursuant to Title 5 of the *California Code of Regulations (CCR)* § 3060 (c)(20), submit a copy of the fire inspection clearance completed within the last 12 months.

### Assurance Statement

Pursuant to *EC* § 56366.1(o), as the authorized agent of the NPS, I assure the NPS meets all applicable standards relating to fire, health, sanitation, and building safety.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

## NPS04R – PROGRAM AND SERVICE DESCRIPTION

NPS Name:

Course of Study Leads to: ☐ Diploma ☐ Certificate of Completion

Provide a brief description of the program including entrance criteria and exit criteria for transition back to the public school setting, and specific services designed to address student needs as listed on the students' Individualized Education Programs (IEPs):

## NPS04R – PROGRAM AND SERVICE DESCRIPTION

Describe the relationship between the various entities operated by the same entity and define the responsibilities of each entity. The description shall clearly identify the services to be provided as part of each program, for example, the residential program, medical program, mental health program, and educational program.

## NPS05R – SERVICES AND FEES

Please provide information on all services for which you are seeking certification.

NPS Name:

Designated Instruction	Service Abbreviation	Fees	Time Allotment (per hour, day, or month)
Specially Designed Instruction (34 CFR § 300.39)	SDI/SAI		
Specially Designed Instruction – Extended School Year	SDI/SAI		
<b>Related Services</b>			
Adapted Physical Education (5 CCR § 3051.5)	APE		
Audiological Services (5 CCR § 3051.2)	AS		
Assistive Technology Service (5 CCR § 3051.19)	ATS		
Behavior Intervention–Design (5 CCR § 3051.23)	BID		
Behavior Intervention–Implementation (5 CCR § 3051.23)	BII		
Counseling and Guidance Services (5 CCR § 3051.9)	CG		
Related Services for the Deaf and Hard of Hearing (5 CCR § 3051.18)	DHH		
Early Education Programs (5 CCR § 3051.20)	EE		
Health and Nursing Services (5 CCR § 3051.12)	HNS		
Specialized Services for Low Incidence Disabilities (5 CCR § 3051.16)	LI		
Language, Speech and Hearing Development and Remediation (5 CCR § 3051.1)	LSDR		
Music Therapy (5 CCR § 3051.21)	MT		
Orientation and Mobility Instruction (5 CCR § 3051.3)	OM		
Occupational Therapy (5 CCR § 3051.6)	OT		
Parent Counseling and Training (5 CCR § 3051.11)	PCT		
Psychological Services Other Than Assessment and Development of the IEP (5 CCR § 3051.10)	PS		
Physical Therapy (5 CCR § 3051.6)	PT		
Recreation Services (5 CCR § 3051.15)	RS		
Social Worker Services (5 CCR § 3051.13)	SW		
Transcription Services (5 CCR § 3051.22)	TS		
Specially Designed Vocational Education and Career Development (5 CCR § 3051.14)	VECD		
Vision Services (5 CCR § 3051.7)	VS		
Vision Therapy (5 CCR § 3051.75)	VT		
Other Related Service (5 CCR § 3051.24)	OTH		
Enter Other Related Service name(s): <input style="width: 400px;" type="text"/>			

## NPS06R - CONTRACT INFORMATION

NPS Name:

[illegible]

California Department of Education, Special Education Division

## NPS07R(a) – CLASSROOM TEACHERS AND CLEARANCE INFORMATION

NPS Name: \_\_\_\_\_

Date of Submission: 

**This staff list should contain only classroom or substitute teachers. Include a copy of each credential.**

[illegible]

California Department of Education, Special Education Division

**NPS07R(b) – RELATED SERVICES LICENSED/CREDENTIALLED STAFF AND CLEARANCE INFORMATION**

**NPS Name:** \_\_\_\_\_

Date of Submission: 

**This staff list should contain only staff whose position at the school requires a license or credential. This staff list should NOT contain paraprofessionals as those should be listed on NPS07R(c). Include licenses/credentials immediately after this form.**

NPS Administrator Information							
For NPS administrator qualifications requiring a credential and specific experience, include evidence of the relevant experience along with the qualifying credential as instructed above.							
NPS Administrator Name	Related Service (BID, LSDR, etc.)	Type of License, Credential, or Degree	Expiration Date	Behavior Training Date	Hire Date	DOJ Date	TB Date

[illegible]

California Department of Education, Special Education Division



[illegible]

California Department of Education, Special Education Division

## NPS07R(c) – NONLICENSED STAFF AND CLEARANCE INFORMATION

NPS Name: \_\_\_\_\_

Date of Submission: 

This staff list should contain those staff who do not possess a license or credential. All staff who may potentially have contact with students during the school day should be included on this list (janitorial, secretarial, etc.). An individual who provides BII must be a high school (HS) graduate or equivalent. *Please do not submit copies of transcripts or high school diplomas.*

[illegible]

California Department of Education, Special Education Division

**NPS07R(c) – NONLICENSED STAFF AND CLEARANCE INFORMATION (continued)**

**NPS Name:** \_\_\_\_\_

Date of Submission: [illegible]

## NPS08R – GEOGRAPHIC LOCATION

NPS Name:

Please provide written directions describing the location of the nonpublic school in reference to the nearest major airport. Include any major highways and landmarks. Also, please provide special instructions needed to find the school's main office, visitor check-in, and available parking. Include as an attachment a street map of the school's location.

## NPS09R - NONPUBLIC SCHOOL ASSURANCE STATEMENT

NPS Name:

Pursuant to 5 CCR § 3060(d), the applicant shall submit a signed assurance statement that the nonpublic school will maintain compliance with the following:

- (1) Fair Employment Act;
- (2) Drug Free Workplace Act;
- (3) Section 504 of the Rehabilitation Act;
- (4) Individuals with Disabilities Education Act;
- (5) Civil Rights Act;
- (6) Nonsectarian status (as defined by 5 CCR § 3001(p), "Nonsectarian" means a private, nonpublic school or agency that is not owned, operated, controlled by, or formally affiliated with a religious group or sect, whatever might be the actual character of the education program or the primary purpose of the facility and whose articles of incorporation and/or by-laws stipulate that the assets of such agency or corporation will not inure to the benefit of a religious group);
- (7) Prohibition of Corporal Punishment of Pupils under *Education Code* section 49001; use of Positive Behavioral Interventions pursuant to *Education Code* sections 56520 through 56525;
- (8) OSHA Bloodborne Pathogens Standards;
- (9) all local, county, or state ordinances and/or statutes relating to fire, health, sanitation, and building safety;
- (10) use permit, conditional permit or zoning; and
- (11) other assurances as required by state or federal law set forth in an assurance statement in the nonpublic school or nonpublic agency application for certification.

As the NPS's authorized agent, I assure all information included in this application is true and accurate. I acknowledge the understanding that any violation of *Education Code* § 56366.4, may result in the suspension or revocation of the certification for the NPS.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

## NPS10R - NONPUBLIC SCHOOL PROVIDER STATEMENT

### California Education Code 56366.10

NPS Name:

In addition to the certification requirements set forth in Sections 56366 and 56366.1, a nonpublic, nonsectarian school that provides special education and related services to an individual with exceptional needs shall certify in writing to the Superintendent that it meets all of the following requirements:

(a) It will not accept a pupil with exceptional needs if it cannot provide or ensure the provision of the services outlined in the pupil's individualized education program.

(b) Pupils have access to the following educational materials, services, and programs that are consistent with each pupil's individualized education program:

(1) (A) For kindergarten and grades 1 to 8, inclusive, state-adopted, standards-based, core curriculum and instructional materials, including technology-based materials as defined in Section 60010.

(B) For grades 9 to 12, inclusive, standards-based, core curriculum and instructional materials, including technology-based materials as defined in Section 60010, used by any local educational agency that contracts with the nonpublic, nonsectarian school.

(2) College preparatory courses.

(3) Extracurricular activities, such as art, sports, music, and academic clubs.

(4) Career preparation and vocational training, consistent with transition plans pursuant to state and federal law.

(5) Supplemental assistance, including individual academic tutoring, psychological counseling, and career and college counseling.

(c) The teachers and staff provide academic instruction and support services to pupils with the goal of integrating pupils into the least restrictive environment pursuant to federal law.

(d) The school has and abides by a written policy for pupil discipline that is consistent with state and federal law and regulations.

(e) For a school serving pupils with significant behavioral needs or who are on behavioral intervention plans, the school has an individual onsite during school hours who is qualified, and responsible for the design, planning, and implementation of behavioral interventions, as authorized under Section 3051.23 of Title 5 of the California *Code of Regulations*.

(f) Commencing with the 2020–21 school year, the nonpublic, nonsectarian school provides annual training to all staff who have any contact or interaction with pupils during the schoolday. The training is also provided within 30 days of employment to new staff who have any contact or interaction with pupils during the schoolday. The nonpublic, nonsectarian school maintains written records of the training, and will provide written verification of the training upon request. The training shall comply with the requirements of subparagraphs (B) and (C) of paragraph (4) of subdivision (a) of Section 56366.1.

As the authorized administrator or designee of the NPS, I assure all the information included in this application is true and accurate. I acknowledge the understanding that any violations of EC § 56366.4, may result in the suspension or revocation of the certification for the NPS.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

## NPS11R – SCHOOL YEAR CALENDAR AND SCHEDULES

NPS Name:

Pursuant to 5 CCR 3060(c)(19), the NPS shall provide a copy of the current school year calendar, weekly class schedule, and daily schedule with number of instructional minutes by each grade level served.

☐ 2022-23 School Year Calendar

☐ Weekly Class Schedule

☐ Daily Class Schedule

## NPS12R – ANNUAL OPERATING BUDGET AND ATTESTATION

NPS Name:

Pursuant to 5 CCR § 3060(c)(12), a nonpublic, nonsectarian school that seeks certification shall include an annual operating budget, including projected costs and revenues for each school program, providing documentation that demonstrates that the rates to be charged are reasonable to support the operation of the school program.

Pursuant to EC § 56366.1(l) (1)(A) The entity operating the nonpublic, nonsectarian school maintains separate financial records for each entity that it operates, with each nonpublic, nonsectarian school identified separately from any licensed children's institution that it operates.

Pursuant to EC § 56366.1(l) (1)(B) The entity submits an annual budget that identifies the projected costs and revenues for each entity and demonstrates that the rates to be charged are reasonable to support the operation of the entity.

**Instructions:** Submit with this cover sheet the NPS's current annual operating budget(s), and sign the proceeding attestation.

### Attestation

As the NPS Administrator or the designated NPS Financial Representative, by my signature I attest the NPS shall not seek funding from a public agency for a service, either separately or as part of a package of services, if the service is funded by another public agency, either separately or as part of a package of services.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:



## NPS13R – ENTITY-WIDE ANNUAL AUDIT AND ATTESTATION

### Required for all NPSs that are affiliated with residential or Licensed Children's Institution programs

NPS Name:

Pursuant to EC 56366.1(f)(1), and 5 CCR 3060(c)(13), a nonpublic, nonsectarian school or agency that seeks certification shall include an entity-wide audit in accordance with generally accepted accounting and auditing principles including each entity's costs and revenues by individual cost center.

**Instructions:** Submit with this cover sheet the NPS's current annual entity-wide audit(s), and sign the proceeding attestation.

#### EC § 56366.1

(f)(1) Notwithstanding any other law, the Superintendent shall not certify or renew the certification of a nonpublic, nonsectarian school that also operates a licensed children's institution, unless all of the following conditions are met:

(A) The entity operating the nonpublic, nonsectarian school maintains separate financial records for each entity that it operates, with each nonpublic, nonsectarian school identified separately from any licensed children's institution that it operates.

(B) The entity submits an annual budget that identifies the projected costs and revenues for each entity and demonstrates that the rates to be charged are reasonable to support the operation of the entity.

(C) The entity submits an entity-wide annual audit that identifies its costs and revenues, by entity, in accordance with generally accepted accounting and auditing principles. The audit shall clearly document the amount of moneys received and expended on the educational program provided by the nonpublic, nonsectarian school.

(D) The relationship between various entities operated by the same entity are documented, defining the responsibilities of the entities. The documentation shall clearly identify the services to be provided as part of each program, for example, the residential or medical program, the mental health program, or the educational program. The entity shall not seek funding from a public agency for a service, either separately or as part of a package of services, if the service is funded by another public agency, either separately or as part of a package of services.

#### Maintenance of Financial Records Attestation:

As the NPS Administrator or the designated NPS Financial Representative, by my signature I attest the entity operating the nonpublic, nonsectarian school maintains separate financial records for each entity that it operates, with each nonpublic, nonsectarian school identified separately from any Licensed Children's Institution (LCI) that it operates.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:  Date Signed:

## NPS14R - RESIDENTIAL AND LCI PROGRAM INFORMATION

### Proprietary Status

NPS Name:

**Instructions:** In the spaces provided below, list each residential or LCI program affiliated with the NPS. For each program listed, include with this form a copy of the current license(s) and certification(s).

Name of Residential or LCI Program Affiliated with the NPS	Certifying Body	Proprietary Status Issued by Certifying Body (type of program)	Total Student Capacity

California Department of Education, Special Education Division

## NPS15R – LOCAL STATE CERTIFICATION

NPS Name:

***This form is required only for an out-of-state NPS***

**Instructions:** Pursuant to 5 CCR § 3060(c)(18), submit a copy of the current certification or license, issued by the state education agency in which the NPS is located, to provide education services to individuals with exceptional needs under the Individuals with Disabilities Education Act.

## NPS16R – BUSINESS LICENSE

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(A), submit a copy of the current business license for the property address along with this cover sheet. The business license must include the name and address of the proposed school site.

## NPS17R – WRITTEN DISASTER PLAN

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(B), submit a copy of the NPS's written emergency disaster plan of action along with this coversheet. Specifically, include fire and earthquake emergency procedures and any other emergency procedures that may affect the regular operation of the school.

## NPS18R – MASS CASUALTY PLAN OF ACTION

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(B), submit a copy of the NPS's written mass casualty plan of action along with this coversheet. The written plan of action identifies NPS staff that will respond to a mass casualty incident and assist in the coordination of any mutual aid response.

## NPS19R – BUILDING SAFETY INSPECTION CLEARANCE

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(C), all new or relocating NPS applications must include a copy of the building safety inspection clearance. The CDE does not provide a form template for this requirement. Contact the building department of the local jurisdiction to complete an inspection of the proposed site.

## NPS20R – HEALTH INSPECTION CLEARANCE

NPS Name:

**Instructions:** Pursuant to 5 CCR § 3060(c)(21)(D), all new or relocating NPS applications must include a copy of the health inspection clearance consistent with local jurisdiction requirements. CDE does not provide a form template. Contact the local or state environmental health department to complete a health and safety inspection.



## NPS21R – CERTIFICATION ASSURANCE STATEMENT

NPS Name:

I acknowledge that pursuant to *EC* § 56366.4, the Superintendent may revoke or suspend the certification of a nonpublic, nonsectarian school for any violation of *EC* § 56366.4 including, falsification or intentional misrepresentation of an element of the application, pupil records, or program presented for certification purposes.

I assure all information included in this application is true and accurate. I further assure the applicant will abide by contractual agreements with LEAs, and comply with all requirements of special education laws and regulations governing NPS certification and the provision of instruction, related services, and services to students with special needs.

Print Name of Authorized NPS Agent:

Signature of Authorized NPS Agent:

Title of Authorized NPS Agent:

Date Signed:

Eric C. Rassbach (CA SBN 288041)  
Daniel L. Chen (CA SBN 312576)  
Laura Wolk Slavis (DC Bar No. 1643193)  
(pending *pro hac vice* admission)  
Brandon L. Winchel\* (CA SBN 344719)  
The Becket Fund for Religious Liberty  
1919 Pennsylvania Ave., Suite 400  
Washington, DC 20006  
202-955-0095 tel. / 202-955-0090 fax  
erassbach@becketlaw.org

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN  
LOFFMAN, on their own behalf and on  
behalf of their minor child M.L.; FEDORA  
NICK and MORRIS TAXON, on their own  
behalf and on behalf of their minor child  
K.T.; SARAH PERETS and ARIEL  
PERETS, on their own behalf and on  
behalf of their minor child N.P.; JEAN &  
JERRY FRIEDMAN SHALHEVET HIGH  
SCHOOL; and SAMUEL A. FRYER  
YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
EDUCATION; TONY THURMOND, in his  
official capacity as Superintendent of  
Public Instruction; LOS ANGELES  
UNIFIED SCHOOL DISTRICT; and  
ANTHONY AGUILAR, in his official  
capacity as Chief of Special Education,  
Equity, and Access,

Defendants.

**No. 23-1832**

**COMPLAINT**

**JURY DEMAND**

\* Not a member of the D.C. Bar; admitted in  
California. Practice limited to cases in federal court.

## NATURE OF THE ACTION

1  
2 1. The State of California discriminates against Jewish children with  
3 disabilities and Jewish schools that seek to provide an education for  
4 children with disabilities. Plaintiffs bring this federal civil rights action  
5 under 42 U.S.C. § 1983 to vindicate their rights guaranteed by the First  
6 Amendment's Free Exercise Clause and the Fourteenth Amendment's  
7 Equal Protection Clause.

8 2. Plaintiff parents Chaya Loffman and Jonathan Loffman, Fedora  
9 Nick and Morris Taxon, and Sarah Perets and Ariel Perets reside within  
10 the boundaries of the Los Angeles Unified School District. They are  
11 Jewish parents who seek to send their children with disabilities to  
12 Orthodox Jewish schools with the help of generally available public  
13 funds.

14 3. Plaintiff schools Jean & Jerry Friedman Shalhevet High School and  
15 Samuel A. Fryer Yavneh Hebrew Academy are private Orthodox Jewish  
16 schools located in Los Angeles that seek the ability to obtain state  
17 certification to access generally available public funds and better serve  
18 Jewish students with disabilities.

19 4. The Individuals with Disabilities Education Act, a federal statute,  
20 provides funding to States to provide a special education and related  
21 services to students with disabilities.

22 5. IDEA provides that if certain conditions are met, a State may place  
23 children with disabilities in private schools, and generally available

1 public funds may be used to pay tuition and the special education and  
2 related services at those schools.

3 6. But California discriminates against religious children with  
4 disabilities and against religious schools.

5 7. The State will not allow a private school to access otherwise  
6 generally available funds for special education if the private school is  
7 religious. Under California law, only “nonsectarian” schools are welcome.

8 8. It is thus impossible for a child with a disability to be placed at a  
9 religious school and receive the same funding that he would otherwise be  
10 entitled to had his parents sent him to a nonreligious school.

11 9. It is similarly impossible for a private religious school to receive the  
12 public funding necessary to provide critical services to children with  
13 disabilities.

14 10. Since parents often cannot afford to pay for disability services  
15 themselves, California forces them to choose between accessing those  
16 services and giving their children a Jewish education.

17 11. Defendants California Department of Education and  
18 Superintendent of Public Instruction Tony Thurmond are responsible for  
19 administering and implementing California law governing nonpublic  
20 schools and special education funding, including IDEA funding.  
21 Defendants Los Angeles Unified School District and Anthony Aguilar,  
22 LAUSD’s Chief of Special Education, Equity, and Access, administer  
23

1 funding for children with disabilities within LAUSD, including those who  
2 are placed at nonpublic schools.

3 12. Defendants' administration and implementation of California law  
4 excludes Plaintiffs from the generally available public funding necessary  
5 to provide an education to students with disabilities.

6 13. Plaintiffs merely seek to educate and care for children with  
7 disabilities and practice their Jewish faith on an equal basis with other  
8 California citizens.

9 14. As the Supreme Court recently held, they are entitled to equal  
10 treatment because "religious schools and the families whose children  
11 attend them . . . 'are members of the community too.'" *Espinoza v. Mont.*  
12 *Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020). Excluding Plaintiffs from  
13 government programs—for no other reason than the fact that they are  
14 religious—is "odious to our Constitution and cannot stand." *Id.* at 2263  
15 (cleaned up).

### 16 **JURISDICTION AND VENUE**

17 15. This action arises under the Constitution and laws of the United  
18 States. The Court has subject-matter jurisdiction under 28 U.S.C.  
19 §§ 1331 and 1343.

20 16. The Court has authority to issue the declaratory and injunctive  
21 relief sought under 28 U.S.C. §§ 2201 and 2202.

1 17. Venue lies in this district under 28 U.S.C. § 1391(b)(1) because all  
2 Defendants reside in California and Defendants LAUSD and Aguilar  
3 reside in the Central District of California.

4 18. Venue also lies in this district under 28 U.S.C. § 1391(b)(2)  
5 because a substantial part of the events or omissions giving rise to the  
6 claims in this lawsuit occurred in the Central District of California.

7 **THE PARTIES**

8 19. Plaintiffs Chaya Loffman and Jonathan Loffman are devout  
9 Orthodox Jews and reside in Los Angeles, California.

10 20. The Loffmans have an infant daughter and a 4-year-old son, M.L.  
11 M.L. is diagnosed with high functioning autism. He currently receives  
12 services at Maor Academy, an Orthodox Jewish learning center dedicated  
13 to supporting students with special needs and their families in the Los  
14 Angeles Jewish community.

15 21. California's unconstitutional laws discriminate against religious  
16 parents like the Loffmans by forbidding them from using otherwise  
17 generally available public funding for special education services at an  
18 Orthodox Jewish school.

19 22. The Loffmans are suing in their own right and on behalf of their  
20 minor son M.L.

21 23. Plaintiffs Fedora Nick and Morris Taxon are devout Orthodox  
22 Jews and reside in Los Angeles, California.

23

1       24. The Taxons have three sons and send all their children to  
2 Orthodox Jewish schools, except for their youngest, K.T. K.T., their 14-  
3 year-old son, is currently in eighth grade and attends a public charter  
4 school in LAUSD. K.T. is diagnosed with autism, which results in  
5 pronounced academic deficiencies.

6       25. California's unconstitutional laws discriminate against religious  
7 parents like the Taxons by forbidding them from using otherwise  
8 generally available public funding for special education services at an  
9 Orthodox Jewish school.

10       26. The Taxons are suing in their own right and on behalf of their  
11 minor son K.T.

12       27. Plaintiffs Sarah Perets and Ariel Perets are devout Orthodox Jews  
13 and reside in Los Angeles, California.

14       28. The Peretses have 6 children and have sent all their children to  
15 Orthodox Jewish schools, except for N.P. N.P., their 14-year-old son, is  
16 currently in seventh grade and attends a public school in LAUSD. N.P.  
17 is diagnosed with autism and a WAC gene mutation that results in  
18 speech delays, behavioral issues, and learning disabilities.

19       29. California's unconstitutional laws discriminate against religious  
20 parents like the Peretses by forbidding them from using otherwise  
21 generally available public funding to receive special education services at  
22 an Orthodox Jewish school.

1       30. The Peretses are suing in their own right and on behalf of their  
2 minor son N.P.

3       31. The Jean & Jerry Friedman Shalhevet High School is a private  
4 Orthodox Jewish high school in Los Angeles, California. Shalhevet offers  
5 a co-educational, Modern Orthodox education with a rigorous dual  
6 curriculum of Judaic and college preparatory studies.

7       32. Shalhevet seeks to qualify to provide a religious education to  
8 children with disabilities. But because California prohibits the use of  
9 generally available public funds for children to receive a free appropriate  
10 public education (FAPE) at private religious schools, Shalhevet currently  
11 cannot qualify to apply for special education funding, including IDEA  
12 funding.

13       33. The Samuel A. Fryer Yavneh Hebrew Academy is a private  
14 Orthodox Jewish school in Los Angeles, California. Yavneh offers a co-ed  
15 education to students from pre-kindergarten through eighth grade.  
16 Yavneh provides a rigorous modern Orthodox education alongside  
17 secular studies, enabling its students to flourish as community leaders  
18 and model American citizens.

19       34. Yavneh seeks to qualify to provide a religious education to children  
20 with disabilities. But because California prohibits the use of generally  
21 available public funds for children to receive a FAPE at private religious  
22 schools, Yavneh currently cannot qualify to apply for special education  
23 funding, including IDEA funding.



1       35. Defendant California Department of Education (CDE) is charged  
2 with overseeing the implementation and interpretation of California  
3 state law that makes up California's IDEA state plan, including the  
4 certification of nonpublic schools and the distribution of federal IDEA  
5 funds and state special education funds to LEAs.

6       36. Defendant Tony Thurmond is the State Superintendent of Public  
7 Instruction. Thurmond is responsible for overseeing the certification and  
8 renewal of nonpublic schools. *See* Cal. Educ. Code § 56366.1. Thurmond  
9 is sued in his official capacity only.

10       37. Defendant Los Angeles Unified School District (LAUSD) is a local  
11 educational agency that, under California law, contracts with certified  
12 nonpublic schools as possible placements for students with disabilities.  
13 *See* Cal. Educ. Code § 56366. Once a student with a disability is placed,  
14 LAUSD is responsible for reimbursing the nonpublic school the cost of  
15 tuition and special education and related services. *See* Cal. Educ. Code  
16 §§ 56365(a), (d), 56366.5(a). LAUSD receives its federal and state special  
17 education funding from CDE. *See* 20 U.S.C. § 1413(a).

18       38. Anthony Aguilar is Chief of Special Education, Equity and Access  
19 for LAUSD. The LAUSD's Division of Special Education has the  
20 authority to contract for nonpublic services under Cal. Educ. Code  
21 § 56366 and Cal. Code Regs. tit. 5, § 3065. Aguilar is responsible for the  
22 administration of special education funds within LAUSD. Aguilar is sued  
23 in his official capacity only.

## BACKGROUND

### *The Individuals with Disabilities Education Act*

39. The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, was enacted in 1990 and offers federal funding to States to assist in educating children with disabilities.

40. The stated purpose of IDEA is “to ensure that *all* children with disabilities have available to them a free appropriate public education” and “to assist States, localities, educational service agencies, and Federal agencies to provide for the education of *all* children with disabilities.” 20 U.S.C. §§ 1400(d)(1)(A), (C) (emphasis added).

41. In exchange for federal funding, a State must comply with a number of statutory conditions, including the requirement to provide a FAPE to all eligible “children with disabilities residing in the State between the ages of 3 and 21, inclusive.” 20 U.S.C. § 1412(a)(1)(A).

42. The FAPE must be “provided in conformity with the [student’s] individualized education program.” 20 U.S.C. § 1401(9)(D). Individualized education programs are typically called IEPs.

43. A student’s IEP is “a written statement for each child with a disability” that covers, *inter alia*, a “child’s present levels of academic achievement and functional performance,” “a statement of measurable annual goals, including academic and functional goals,” and “a statement of the special education and related services and supplementary aids and

1 services, based on peer-reviewed research to the extent practicable, to be  
2 provided to the child, or on behalf of the child.” 20 U.S.C. § 1414(d).

3 44. A student’s IEP is prepared with input by teachers, school officials,  
4 and a student’s parents.

5 45. IDEA also permits children to receive funding in private schools  
6 under certain circumstances.

7 46. Specifically, the statute provides that:

8 Children with disabilities in private schools and facilities are  
9 provided special education and related services, in accordance  
10 with an individualized education program, at no cost to their  
11 parents, if such children are placed in, or referred to, such  
12 schools or facilities by the State or appropriate local educational  
agency as the means of carrying out the [statute’s]  
requirements[.]

13 20 U.S.C. § 1412(a)(10)(B)(i).

14 47. The “special education” provided under IDEA “means specially  
15 designed instruction, at no cost to parents, to meet the unique needs of a  
16 child with a disability, including- (A) instruction conducted in the  
17 classroom, in the home, in hospitals and institutions, and in other  
18 settings; and (B) instruction in physical education.” 20 U.S.C. § 1401(29);  
19 *see also* 34 C.F.R. 300.39(a) (defining “special education”).

20 48. The “related services” provided under IDEA:

21 [M]eans transportation, and such developmental, corrective, and  
22 other supportive services (including speech-language pathology  
23 and audiology services, interpreting services, psychological  
services, physical and occupational therapy, recreation,  
including therapeutic recreation, social work services, school

1 nurse services designed to enable a child with a disability to  
2 receive a free appropriate public education as described in the  
3 individualized education program of the child, counseling  
4 services, including rehabilitation counseling, orientation and  
5 mobility services, and medical services, except that such medical  
6 services shall be for diagnostic and evaluation purposes only) as  
may be required to assist a child with a disability to benefit from  
special education, and includes the early identification and  
assessment of disabling conditions in children.

7 20 U.S.C. § 1401(26)(A); *see also* 34 C.F.R. 300.34(a) (defining “related  
8 services”).

9 ***The California Education Code***

10 49. California, like every State, has chosen to participate in IDEA.

11 50. Every year, California receives millions of dollars in IDEA funding  
12 from the federal government. California supplements these federal funds  
13 with state funding for services to children with disabilities.

14 51. In order to comply with IDEA’s requirements and enable  
15 California to receive federal funding, California adopted a state plan and  
16 enacted a series of statutes and regulations. Cal. Educ. Code §§ 56000 *et*  
17 *seq.*; Cal. Code Regs. tit. 5, §§ 3000 *et seq.*

18 52. As relevant here, this includes IDEA’s requirements to provide a  
19 FAPE, and its provision that placement in private school is appropriate  
20 “if no appropriate public education program is available.” Cal. Educ. Code  
21 § 56365(a).

22 53. When a student is placed in a nonpublic school, public funding  
23 reimburses “the full amount of the tuition,” as well as the special

1 education and related services covered by the student's IEP. *See* Cal.  
2 Educ. Code § 56365(d); Cal. Educ. Code § 56365(a); Cal. Educ. Code  
3 § 56031(a) (defining "[s]pecial education" "in accordance with Section  
4 1401(29) of Title 20 of the United States Code"); Cal. Educ. Code  
5 § 56363(a) (defining "related services" as that term is defined in Section  
6 1401(26) of Title 20 of the United States Code"); *see also* Cal. Educ. Code  
7 § 56363(b) (listing included services).

8 54. However, California's program for placing children in private  
9 schools categorically excludes religious schools.

10 55. To be eligible as a placement for a student with a disability, the  
11 CDE must "certify" an applicant school as a nonpublic school. *See* Cal.  
12 Educ. Code §§ 56366.1, 56366.8.

13 56. To meet those certification requirements, California law requires  
14 the school to be "nonsectarian." Cal. Educ. Code § 56365.

15 57. An NPS applicant must therefore "certify" that it is nonsectarian.  
16 Cal. Code Regs. tit. 5, § 3060(d)(6).

17 58. CDE regulations define "[n]onsectarian" as "a private, nonpublic  
18 school . . . that is not owned, operated, controlled by, or formally affiliated  
19 with a religious group or sect, whatever might be the actual character of  
20 the education program or the primary purpose of the facility and whose  
21 articles of incorporation and/or by-laws stipulate that the assets of such  
22 agency or corporation will not inure to the benefit of a religious group."  
23 Cal. Code Regs. tit. 5, § 3001(p).

1       59. As a result of these requirements, private religious schools are  
2 wholly excluded from becoming certified NPS's, meaning that children  
3 cannot be placed there as a means of receiving a FAPE, and private  
4 religious schools are incapable of receiving the public funding otherwise  
5 available to private secular schools.

6       60. Moreover, in order for students with disabilities to receive a FAPE  
7 outside of public school, a private school must meet a number of  
8 requirements. *See, e.g.*, Cal. Educ. Code §§ 56365, 56366, 56366.1.

9       61. Defendants, however, possess discretion to waive or request  
10 waiver of requirements necessary for a private school to receive public  
11 funds to educate students with disabilities. *See, e.g.*, Cal. Educ. Code  
12 § 56366.2(a), (b); Cal. Educ. Code § 56101.

13       62. But upon information and belief, Defendants have not waived and  
14 will not waive the “nonsectarian” requirement necessary for private  
15 religious schools to access otherwise generally available public funding.

16       63. Similarly, the California Education Code allows a nonpublic,  
17 nonsectarian school to petition for waiver of requirements to receive  
18 funding, but private religious schools cannot. *See, e.g.*, Cal. Educ. Code  
19 § 56366.2.

20       64. California law thus treats comparable secular conduct more  
21 favorably than religious conduct, and it allows individualized exemptions  
22 for secular private schools but not religious ones.

23

## ***Religious Beliefs***

65. Jewish parents have a duty to transmit Jewish religious beliefs and practices to their children.

66. The Torah and the Talmud repeatedly exhort parents to train their children in Jewish religious belief and practice.

67. For example, the Torah instructs “Take to heart these instructions with which I charge you this day. Impress them upon your children. Recite them when you stay at home and when you are away, when you lie down and when you get up.” *Deuteronomy* 6:7-8; *see also Deuteronomy* 11:19 (“And you shall teach them to your children—reciting them when you stay at home and when you are away, when you lie down and when you get up”).

68. Similarly, the Talmud instructs that parents must teach both Torah and rabbinic writings to their children. *See, e.g.,* Talmud Bavli, *Kiddushin* 29a (“The sages taught a father is obligated . . . to teach his son Torah”); *id.* at 29b (“From where do we know that a father is obligated to teach his son Torah? As it is written, ‘and you shall teach them to your children’ (*Deuteronomy* 11:19)”; *id.* at 30a (describing the Torah subjects encompassed within this obligation).

69. Likewise, the Jewish Code of Law, the Shulchan Aruch, explains that “there is an obligation upon each person to teach his son Jewish law; if the father does not teach him, the son is obligated to teach himself.” Rabbi Joseph Caro, Shulchan Aruch, *Yoreh De’ah* 245:1.



1       70. As a result, civil courts have long recognized that “[r]eligious  
2 education is a matter of central importance in Judaism. . . . [T]he Torah  
3 is understood to require Jewish parents to ensure that their children are  
4 instructed in the faith.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*,  
5 140 S. Ct. 2049, 2065 (2020).

6       71. The primary goal of Jewish education is the study of Torah. The  
7 study of Torah is itself a form of religious worship. *See* Chaim Saiman,  
8 *Halakhah: The Rabbinic Idea of Law* 6 (2018) (“For as the Talmud sees  
9 it, the study of Torah, a study often centered on picayune particulars of  
10 halakhah, is one of the most pristine forms of divine worship”).

11       72. Study of Torah is not simply about the accumulation of knowledge  
12 or development of skill: “even if one has retained nothing, the experience  
13 itself—live contact with the epiphanous divine will manifested through  
14 Torah, and encounter with the divine Presence, which hovers over its  
15 student—is immeasurably important.” Aharon Lichtenstein, *Study, in*  
16 *20th Century Jewish Religious Thought* 931, 934 (A. Cohen & P. Mendes-  
17 Flohr eds., 2009).

18       73. Thus, “for modern Orthodox Jews, enrolling their children in a  
19 dual curriculum Jewish day school is ‘virtually mandatory.’” *Westchester*  
20 *Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y.  
21 2006), *aff’d*, 504 F.3d 338 (2d Cir. 2007); *id.* at 545 (“the religious  
22 education of children is in fact central to modern Orthodox Judaism: the  
23 religious education of children is a key religious obligation mandated by



1 the Torah, and for most modern Orthodox Jews, the enrollment of their  
2 children in a dual curriculum Jewish school . . . is virtually mandatory”).

3 74. Parent Plaintiffs believe that enrolling their children in Orthodox  
4 Jewish schools is a religious obligation and are therefore committed to  
5 transmitting their Jewish religious beliefs and practices to their children,  
6 including their children with disabilities.

7 75. For this reason, the Loffmans, Taxons, and Peretses send their  
8 school-age non-disabled children to Orthodox Jewish religious schools.

9 76. The school Plaintiffs are dedicated to the same mission. Shalhevet  
10 and Yavneh help parents to meet their obligation to provide Jewish  
11 education to their children. Indeed, the inculcation and transmission of  
12 Jewish religious beliefs and practices to children is the very reason that  
13 Shalhevet and Yavneh exist.

#### 14 ***The Loffman Family***

15 77. Plaintiffs Chaya and Jonathan Loffman are devout Orthodox Jews  
16 who reside in Los Angeles, California. They have an infant daughter and  
17 a four-year-old son, M.L.

18 78. M.L. currently receives services through Maor Academy, an  
19 Orthodox Jewish learning center dedicated to supporting students with  
20 disabilities and their families in the Los Angeles Jewish community.

21 79. At age 3, M.L. was diagnosed with autism after his parents began  
22 to notice speech delays.

1       80. M.L.'s condition means that he qualifies as a child with a disability  
2 as defined under 20 U.S.C. § 1401(3)(A)(i) and a child with exceptional  
3 needs as defined in Cal. Educ. Code § 56026. He is therefore entitled to  
4 receive special education and related services.

5       81. The Loffmans are Orthodox Jews. In accordance with their  
6 sincerely held religious beliefs, the Loffman family strive to observe the  
7 laws of *kashrut*, observe Jewish holidays, engage in Orthodox Jewish  
8 prayers, and generally carry out the tenets of their faith.

9       82. The Loffmans also believe that they are obligated to send their  
10 children to Orthodox Jewish schools to maintain and strengthen their  
11 family's Jewish religious beliefs, culture, and heritage.

12       83. Consistent with these beliefs, the Loffmans intend to enroll their  
13 infant daughter in Orthodox Jewish schools.

14       84. Due to their sincerely held religious beliefs, the Loffmans also  
15 desire to enroll M.L. in an Orthodox Jewish school. They wish for M.L. to  
16 receive both a religious and secular education, as well as receive the  
17 services necessary to support his disability.

18       85. The Loffmans therefore enrolled M.L. in pre-school at Yeshiva  
19 Toras Emes' pre-school, a Jewish school serving children from preschool  
20 to eighth grade.

21       86. At preschool, M.L. received behavioral, occupational, and speech  
22 therapy. Shortly after enrolling, however, the Loffmans were informed  
23

1 that M.L.'s therapy would not be paid for unless M.L. attended public  
2 school and received an IEP.

3 87. Because the Loffmans wanted him to have an Orthodox Jewish  
4 education, they opted to pay out of pocket for M.L.'s costly therapies.

5 88. The Loffmans were eventually forced to discontinue M.L.'s speech  
6 therapy due to the exorbitant costs associated with paying for therapies  
7 out of pocket.

8 89. The Loffmans subsequently enrolled M.L. at Maor Academy,  
9 where they continue to pay weekly for his 25 hours of behavior therapy  
10 and 1 hour of occupational therapy out of pocket, as well as his tuition.

11 90. The Loffmans recognize that M.L. might be eligible for more  
12 services in public school as part of an IEP, but they have been forced to  
13 forgo those services due to California law and Defendants' practices.

#### 14 *The Taxon Family*

15 91. Plaintiffs Fedora Nick and Morris Taxon are devout Orthodox  
16 Jews who live in Los Angeles, California. The Taxons have three sons  
17 ranging in age from fourteen to twenty: S.T., A.T., and K.T.

18 92. S.T. and A.T. have attended Orthodox schools for the entirety of  
19 their primary education.

20 93. K.T. is fourteen years old and is currently in eighth grade. K.T.  
21 currently attends the City School, a charter school in the LAUSD.  
22  
23

1       94. At age 2, K.T. was diagnosed with autism, then known as  
2 pervasive developmental disorder, which results in pronounced cognitive  
3 deficiencies.

4       95. K.T. first showed signs of autism at 6 months old, when his  
5 parents began to notice developmental delays, such as an inability to sit  
6 up, walk, and roll over.

7       96. K.T.'s condition means that he qualifies as a child with a disability  
8 as defined under 20 U.S.C. § 1401(3)(A)(i) and a child with exceptional  
9 needs as defined in Cal. Educ. Code § 56026. He is therefore entitled to  
10 receive special education and related services.

11       97. The Taxons are Orthodox Jews. In accordance with their sincerely  
12 held religious beliefs, the Taxon family strive to observe the laws of  
13 *kashrut*, observe Jewish holidays, engage in Orthodox Jewish prayers,  
14 and generally carry out the tenets of their faith.

15       98. The Taxons also believe that they are obligated to send their  
16 children to Orthodox Jewish day schools to maintain and strengthen  
17 their family's Jewish religious beliefs, culture, and heritage.

18       99. Consistent with these beliefs, the Taxons sent S.T. and A.T.  
19 exclusively to Orthodox Jewish schools.

20       100. Due to their sincerely held religious beliefs, the Taxons also  
21 desire to enroll K.T. in an Orthodox Jewish school, as they have done  
22 with K.T.'s siblings. They wish for him to be educated at a school where  
23

1 he can receive both a religious and secular education, as well as the  
2 services necessary to support his disability.

3 101. As soon as K.T. was in preschool, his parents began to seek out  
4 educational opportunities tailored to K.T.'s needs. But the Taxons have  
5 been unable to place K.T. in an Orthodox Jewish school due to  
6 California's prohibition on using generally available special-education  
7 funding at private religious schools.

8 102. As noted above, California prohibits the certification of religious  
9 nonpublic schools, meaning that private religious schools cannot receive  
10 public funding and work with the State to provide special-education  
11 services.

12 103. The Taxons are thus unable to utilize funds for K.T. that would  
13 otherwise be available to them—unless they decide to forgo a religious  
14 education for K.T.

15 104. The Taxons were therefore forced to enroll K.T. at Vine  
16 Elementary School and Melrose Magnet School, both public schools in  
17 LAUSD.

18 105. From kindergarten through eighth grade, K.T. has received a  
19 mainstreamed classroom education in public school. While K.T. is  
20 currently in the eighth grade, he performs below grade level  
21 academically.

22 106. K.T. has an IEP that includes 9 service providers, including a  
23 full-time aide, a supervisor for the aide, speech and occupational

1 therapists, adaptive physical education, resource specialists for English  
2 and math, and a private reading tutor.

3 107. These services are currently provided through LAUSD.

4 108. The Taxons do not believe K.T. is receiving a FAPE in public  
5 school.

6 109. K.T.'s faith imposes unique difficulties at his current public  
7 school.

8 110. Because K.T. observes Orthodox Jewish holidays, he fails to  
9 receive services not only when the public school is not in session, but also  
10 when he misses school for religious observance.

11 111. His academic development and therapeutic progress have been  
12 impacted by these extra absences, which would not occur if he were  
13 placed in an Orthodox school.

14 112. The Taxons must also repeatedly remind the school that K.T.  
15 cannot eat non-kosher food.

16 113. K.T.'s inability to obtain a Jewish education has also affected his  
17 other family members, including his older brother A.T.

18 114. A.T. has noticed that public schools do not fully include K.T.  
19 within the school environment, and that without a Jewish education,  
20 K.T. is unable to fully participate in many of the religious observances  
21 that are important to A.T. and their family.

22 115. A.T. has championed inclusive education programs for students  
23 with disabilities at his own Jewish school. A.T. has often explained that

1 K.T.'s experiences—as well as his own family's experiences—have  
2 inspired his efforts for inclusion.

3 ***The Perets Family***

4 116. Plaintiffs Sarah Perets and Ariel Perets are devout Orthodox  
5 Jews and reside in Los Angeles, California. The Peretses have six  
6 children ranging in age from two to twenty, including their son N.P.

7 117. All of the Perets children have attended Orthodox schools for the  
8 entirety of their primary education, except for N.P.

9 118. N.P. is fourteen years old and is currently in seventh grade. N.P.  
10 attends Sutter Middle School, a public school in the Los Angeles Unified  
11 School District.

12 119. At age 3, N.P. was diagnosed with autism, and at age 6, he was  
13 diagnosed with a WAC gene mutation that results in speech delays,  
14 behavioral issues, and learning disabilities.

15 120. N.P.'s condition means that he qualifies as a child with a  
16 disability as defined under 20 U.S.C. § 1401(3)(A)(i) and a child with  
17 exceptional needs as defined in Cal. Educ. Code § 56026. He is therefore  
18 entitled to receive special education and related services.

19 121. The Peretses are Orthodox Jews. In accordance with their  
20 sincerely held religious beliefs, the Perets family strive to observe the  
21 laws of *kashrut*, observe Jewish holidays, engage in Orthodox Jewish  
22 prayers, and generally carry out the tenets of their faith.

23

1       122. The Peretses also believe that they are obligated to send their  
2 children to Orthodox Jewish schools to maintain and strengthen their  
3 family's Jewish religious beliefs, culture, and heritage.

4       123. Consistent with these beliefs, the Peretses have sent their other  
5 five children exclusively to Orthodox Jewish schools.

6       124. Due to their sincerely held religious beliefs, the Peretses also  
7 desire to enroll N.P. in an Orthodox Jewish school, as they have done  
8 with N.P.'s five non-disabled siblings. They wish for N.P. to receive both  
9 a religious and secular education, as well as receive the services  
10 necessary to support his disability.

11       125. But the Peretses have been unable to seek placement for N.P. in  
12 an Orthodox Jewish school due to California's prohibition on using  
13 generally available special-education funding at private religious schools.

14       126. As noted above, California prohibits the certification of religious  
15 nonpublic schools, meaning that private religious schools cannot receive  
16 public funding and work with the State to provide special-education  
17 services. The Peretses are thus unable to utilize funds for N.P. that would  
18 otherwise be available to them—unless they decide to forgo a religious  
19 education for N.P.

20       127. After his diagnosis, Sarah and Ariel enrolled N.P. in a number of  
21 schools in an attempt to find an educational placement that best met  
22 N.P.'s needs.

23



1 128. They attempted to enroll him in Orthodox Jewish schools such as  
2 Emek Hebrew Academy and Adat Ari El, but because the public school  
3 district would not pay for his services, the costs of paying for his services  
4 out of pocket were prohibitive.

5 129. The Peretses were therefore forced to enroll N.P. in public school.  
6 He currently attends Sutter Middle School, a public middle school, where  
7 he has an IEP in place.

8 130. The Peretses do not believe N.P. is receiving a FAPE in public  
9 school.

10 131. To assist with his delayed speech, N.P. receives limited speech  
11 therapy, which is provided by Sutter Middle School.

12 132. But LAUSD's speech therapists are prohibited from  
13 administering therapy involving physical touch, which has slowed N.P.'s  
14 speech progression.

15 133. On information and belief, N.P. could receive prompted speech  
16 therapy in private schools.

17 134. N.P. also has learning disabilities and behavioral issues and is  
18 falling behind in his class.

19 135. Because of N.P.'s disabilities, he was taken off core curriculum  
20 after middle school and placed in classes with peers that the Peretses  
21 believe operate at a lower level of functioning than N.P.

22 136. Since N.P. was removed from a mainstream setting, his academic  
23 progress and his speech development has regressed.

1       137. The Peretses believe that the smaller class sizes available in  
2 private schools would better meet N.P.'s needs and would enable him to  
3 be placed in a classroom with peers who function at a similar level to N.P.

4       138. Additionally, on two occasions, N.P. was sent home early from  
5 school because the school did not have adequate staffing.

6       139. When Sarah Perets raised her concerns that N.P. was not being  
7 appropriately supervised and instructed, she was told by school officials  
8 that she should serve as N.P.'s aid.

9       140. The Peretses do not believe these problems would occur in private  
10 school.

11       141. N.P.'s faith also imposes unique difficulties in public school.

12       142. Because N.P. observes Orthodox Jewish holidays, he fails to  
13 receive services not only when the public school is not in session, but also  
14 when he misses school for religious observance.

15       143. His academic development has been impacted by these absences.

16       144. The Peretses' observance of Jewish holy days has even led to  
17 school officials instructing the Peretses on the right way to observe their  
18 religion.

19       145. On one occasion, a principal confronted Sarah Perets after N.P.  
20 missed school to observe Sukkot, a religious holiday spanning seven days.  
21 The teacher claimed that, according to an article she read, N.P. could  
22 have attended school on certain days during the holiday, and that the  
23 Peretses were wrong to have N.P. miss so much instructional time.

1       146. This interpretation of Sukkot observance is not in accordance  
2 with the Peretses' sincerely held religious beliefs, and issues of this  
3 nature would not arise if N.P. were placed at an Orthodox school.

4       147. Additionally, the Peretses must repeatedly remind the school  
5 that N.P. cannot eat non-kosher food. Still, teachers have provided non-  
6 kosher meals to N.P. despite his parents' pleas.

7       148. In one instance, a teacher (incorrectly) told Sarah Perets that the  
8 pizza was kosher because it was vegetarian.

9       149. The Peretses would like to send N.P. to an Orthodox Jewish  
10 private school that specializes in serving autistic children and aligns with  
11 their sincerely held religious beliefs, but they cannot afford to pay for  
12 N.P.'s private education out of pocket.

13       ***The Jean & Jerry Friedman Shalhevet High School***

14       150. The Jean & Jerry Friedman Shalhevet High School is a private  
15 Orthodox Jewish high school in Los Angeles, California. Shalhevet offers  
16 a co-educational Modern Orthodox Jewish education with a rigorous dual  
17 curriculum of Judaic and college preparatory studies.

18       151. Shalhevet's mission is to promote the values of Jewish heritage,  
19 to live Torah values, to stimulate Torah learning, and to develop a love  
20 of, and commitment to, the State of Israel.

21       152. Shalhevet seeks the opportunity to qualify to provide a  
22 distinctively Orthodox Jewish education to children with disabilities.

23

1       153. Shalhevet believes that the Torah commands members of the  
2 Jewish community to care for the most vulnerable, including those with  
3 disabilities. For Shalhevet, this means working to ensure that children  
4 who are in need obtain the individualized support that each child  
5 requires.

6       154. In this way, Shalhevet hopes to foster a religious educational  
7 environment where Jewish children with disabilities can feel welcomed  
8 and included in the Jewish community, as well as receive the best  
9 education and services possible.

10       155. Due to its limited resources, however, Shalhevet cannot welcome  
11 all students with disabilities, particularly those with more complex  
12 needs.

13       156. On information and belief, Shalhevet either otherwise meets or  
14 is capable of meeting California's other certification requirements to  
15 become an NPS.

16       157. Because it is "formally affiliated with a religious group or sect,"  
17 Cal. Code Regs. tit. 5, § 3001(p), Shalhevet does not meet California's  
18 definition of "nonsectarian."

19       158. Thus, California law categorically prohibits Shalhevet from  
20 becoming certified as a NPS solely because it is religious.

21       159. As a result, Shalhevet cannot be considered for placement as part  
22 of a student's FAPE for the sole reason that it is religious, nor can it  
23 receive the reimbursement that would result from such a placement.

1 160. Because California law prohibits the use of generally available  
2 public funds at private religious schools, Shalhevet is currently unable to  
3 provide its services and religious education to all children with  
4 disabilities.

5 ***The Samuel A. Fryer Yavneh Hebrew Academy***

6 161. The Samuel A. Fryer Yavneh Hebrew Academy is a private  
7 Orthodox Jewish day school located in Los Angeles, California. Yavneh  
8 offers a co-educational Orthodox Jewish education for students from  
9 early childhood through eighth grade.

10 162. Yavneh is committed to the pursuit of knowledge, intellectual  
11 honesty, and scholarship. It seeks to foster in its students a passion for  
12 Torah, learning, hard work, joy, a respect for tradition, and a desire to be  
13 positive members of the community.

14 163. Yavneh also seeks to create an inclusive learning community  
15 where all students thrive. To that end, Yavneh strives to provide testing  
16 accommodations, small-group learning settings, behavioral specialists,  
17 assistive technology, and other resources and tools that will facilitate a  
18 child's educational progress.

19 164. Due to its limited resources, however, Yavneh cannot welcome all  
20 students with disabilities, particularly those with more complex needs.

21 165. In order to foster opportunities for the greatest number of  
22 students possible, Yavneh seeks the ability to qualify as a certified NPS.

23

1 166. On information and belief, Yavneh either otherwise meets or is  
2 capable of meeting California's other certification requirements to  
3 become an NPS.

4 167. Because it is "formally affiliated with a religious group or sect,"  
5 Cal. Code Regs. tit. 5, § 3001(p), Yavneh does not meet California's  
6 definition of "nonsectarian."

7 168. Thus, California law categorically prohibits Yavneh from  
8 becoming certified as a NPS solely because it is religious.

9 169. As a result, Yavneh cannot be considered for placement as part  
10 of a student's FAPE for the sole reason that it is religious, nor can it  
11 receive the reimbursement that would result from such a placement.

12 170. Because California law prohibits the use of generally available  
13 public funds at private religious schools, Yavneh is currently unable to  
14 provide its services and religious education to all children with  
15 disabilities.

## 16 **CLAIMS FOR RELIEF**

### 17 **Count I**

#### 18 **Violation of U.S. Const. Amend. I:** 19 **Free Exercise Clause Categorical Exclusion from Otherwise** 20 **Available Government Benefits**

21 171. All preceding paragraphs are realleged and incorporated herein  
22 by reference.  
23

1       172. The Free Exercise Clause of the First Amendment provides,  
2 “Congress shall make no law respecting an establishment of religion, or  
3 prohibiting the free exercise thereof.” U.S. Const. amend. I.

4       173. The Free Exercise Clause applies to states and their subdivisions  
5 and municipalities through the Fourteenth Amendment to the U.S.  
6 Constitution.

7       174. Under the Free Exercise Clause, imposing “special disabilities on  
8 the basis of religious views or religious status” triggers strict scrutiny.  
9 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012,  
10 2019-21 (2017).

11       175. Thus, a “categorical ban” excluding religious entities from  
12 generally available state benefits solely because of an organization’s  
13 religious character is unconstitutional unless the government can satisfy  
14 strict scrutiny. *Espinoza*, 140 S. Ct. at 2261. This is because “religious  
15 schools and the families whose children attend them” “are members of  
16 the community too, and their exclusion from [government benefit]  
17 program[s] is odious to our Constitution and cannot stand.” *Id.* at 2261-  
18 63 (cleaned up).

19       176. Here, Parent Plaintiffs sincerely believe that sending their  
20 children to Orthodox Jewish schools is crucial to express and maintain  
21 their religious beliefs, heritage, and identity.

22       177. Similarly, Shalhevet’s and Yavneh’s religious beliefs and identity  
23 permeate their entire school and mission.

1 178. California Education Code §§ 56361 and 56365 violate Parent  
2 Plaintiffs’ right to free exercise of religion by categorically “exclud[ing]  
3 some members of the community from an otherwise generally available  
4 public benefit because of their religious exercise.” *Carson v. Makin*, 142  
5 S. Ct. 1987, 1998 (2022).

6 179. California Education Code §§ 56361 and 56365 similarly require  
7 Shalhevet and Yavneh to choose between exercising their religious  
8 beliefs and the receipt of crucial funding needed to educate students with  
9 disabilities.

10 180. California Education Code §§ 56361 and 56365’s prohibition  
11 against granting funding to any religious school as a means of providing  
12 a FAPE, and an LEA’s refusal to contract with such school to provide  
13 these services, is “discrimination against religion” because “[t]he State  
14 [provides funding] for certain students at private schools—so long as the  
15 schools are not religious.” *Carson*, 142 S. Ct. at 1998.

16 181. Categorically excluding schools because of their religious exercise  
17 furthers no governmental interest.

18 182. The discrimination against religious schools is not the least  
19 restrictive means of furthering a compelling governmental interest.

20 183. Plaintiffs have suffered and will suffer harm absent relief.  
21  
22  
23



**Count II**  
**Violation of U.S. Const. Amend. I:**  
**Free Exercise Clause Categorical Exemptions**

184. All preceding paragraphs are realleged and incorporated herein by reference.

185. State action “burdening religious practice must be of general applicability.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

186. A law is not generally applicable if it treats “any comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *Lukumi*, 508 U.S. at 542-46.

187. Under this rule, California’s Education Code’s exclusion of private religious schools from public funds is not generally applicable.

188. The California Education Code provides that nonsectarian private schools may receive public funding to provide a special education and related services to students with disabilities while their religious counterparts may not.

189. Additionally, while nonsectarian private schools may petition for the waiver of certain statutory requirements, private religious schools may not. By its very terms, a religious school cannot even apply for a waiver, as only “nonsectarian school[s]” may petition for a waiver. *See, e.g.,* Cal. Educ. Code § 56366.2(a).

1 190. Thus, California law treats “comparable secular activity more  
2 favorably than religious exercise.” *Tandon*, 141 S. Ct. at 1296.

3 191. The California Education Code is therefore subject to strict  
4 scrutiny, requiring the State to have a compelling interest in  
5 discriminating against religious schools in the NPS process, and this  
6 policy must be the least-restrictive means of achieving that end. *Lukumi*,  
7 508 U.S. at 531-32.

8 192. Conditioning access to government funding on a school’s  
9 “nonsectarian” status furthers no governmental interest.

10 193. Conditioning petitions for waivers of statutory requirements on  
11 a school’s “nonsectarian” status furthers no governmental interest.

12 194. The discrimination against religious schools is not the least  
13 restrictive means of furthering a compelling governmental interest.

14 195. Plaintiffs have suffered and will suffer harm absent relief.

15 **Count III**  
16 **Violation of U.S. Const. Amend. I:**  
17 **Free Exercise Clause Individualized Exemptions**

18 196. All preceding paragraphs are realleged and incorporated herein  
19 by reference.

20 197. State action “burdening religious practice must be of general  
21 applicability.” *Lukumi*, 508 U.S. at 542.

22 198. A law is not generally applicable if it allows for “individualized  
23 exemptions.” *Id.* at 537; *see also Fulton*, 141 S. Ct. at 1876-77.

1       199. Under the California Education Code, Defendants possess  
2 discretion under the law to make individualized exemptions because they  
3 can waive one or more of the requirements necessary for a private school  
4 to receive public funds to educate students with disabilities. Cal. Educ.  
5 Code § 56366.2(a), (b).

6       200. Yet, upon information and belief, Defendants have refused to  
7 waive the “nonsectarian” requirement for the NPS process.

8       201. Defendants’ actions thus trigger strict scrutiny, requiring  
9 Defendants to have a compelling interest in discriminating against  
10 religious schools, and this policy must be the least-restrictive means of  
11 achieving that end. *Lukumi*, 508 U.S. at 531-32.

12       202. Conditioning access to government funding on a school’s  
13 “nonsectarian” status furthers no governmental interest.

14       203. The discrimination against religious schools is not the least  
15 restrictive means of furthering a compelling governmental interest.

16       204. Plaintiffs have suffered and will suffer harm absent relief.

17                                   **Count IV**  
18                           **Violation of U.S. Const. Amend. XIV:**  
19                   **Equal Protection Discrimination Based on Religion**

20       205. All preceding paragraphs are realleged and incorporated herein  
21 by reference.

22       206. California’s Education Code prohibits Plaintiffs from utilizing  
23 generally available, public funds to send their children to private

1 religious schools merely because those schools are religious. That  
2 prohibition denies Plaintiffs equal protection.

3 207. Defendants do not have a compelling interest in discriminating  
4 on the basis of religion and denying Plaintiffs equal protection.

5 208. Defendant's religious discrimination is not the least restrictive  
6 means to further any governmental interest.

7 209. Plaintiffs have suffered and will suffer harm absent relief.

8 **Count V**  
9 **Violation of U.S. Const. Amend. I:**  
10 **Free Exercise Clause Unconstitutional Conditions**

11 210. All preceding paragraphs are realleged and incorporated herein  
12 by reference.

13 211. The "unconstitutional conditions doctrine . . . vindicates the  
14 Constitution's enumerated rights by preventing the government from  
15 coercing people into giving them up." *Koontz v. St. Johns River Water*  
*Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

16 212. "The 'unconstitutional conditions' doctrine limits the  
17 government's ability to exact waivers of rights as a condition of benefits,  
18 even when those benefits are fully discretionary." *United States v. Scott*,  
19 450 F.3d 863, 866 (9th Cir. 2006) (citations omitted); *see also Koontz*, 570  
20 U.S. at 608 ("[W]e have repeatedly rejected the argument that if the  
21 government need not confer a benefit at all, it can withhold the benefit  
22 because someone refuses to give up constitutional rights." (citations  
23 omitted)).

213. In order to participate in California’s special education regime (including contracting with an LEA), private religious schools must give up their religious identity and certify themselves as “nonsectarian” in order to participate.

214. Such a requirement violates the unconstitutional conditions doctrine.

215. Plaintiffs have suffered and will suffer harm absent relief.

**Count VI**  
**Violation of U.S. Const. Amend. I:**  
**Free Exercise Clause Right to Religious Education**

216. All preceding paragraphs are realleged and incorporated herein by reference.

217. “[T]he traditional interest of parents with respect to the religious upbringing of their children” is a “fundamental right[] and interest[]” and is “specifically protected by the Free Exercise Clause of the First Amendment.” *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); see also *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990) (“the right of parents . . . to direct the education of their children” receives heightened scrutiny) (citing *Yoder* and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

218. Government actions that interfere with parents’ ability to direct the religious upbringing of their children are subject to strict scrutiny. *Yoder*, 406 U.S. at 214 (when government action “interferes with the practice of a legitimate religious belief, . . . the State [must] not deny the free exercise of religious belief by its requirement” or the State must

1 demonstrate an “interest of sufficient magnitude to override the interest  
2 claiming protection under the Free Exercise Clause”).

3 219. By prohibiting the use of otherwise generally available public  
4 funding for special-education services at religious schools and refusing to  
5 contract with such schools, Defendants have interfered with Plaintiffs’  
6 right to direct the religious upbringing of their children and the vital role  
7 that religious schools such as Shalhevet and Yavneh “play in the  
8 continued survival of [Orthodox Jewish] communities.” *Yoder*, 406 U.S.  
9 at 235.

10 220. Without that otherwise available funding, Plaintiffs are unable  
11 to send their children to religious schools or offer their religious  
12 curriculum to children with disabilities.

13 221. Defendants do not have a compelling reason for its actions, and  
14 Defendants have not selected the means least restrictive of religious  
15 exercise in order to further a compelling governmental interest.

16 222. Plaintiffs have suffered and will suffer harm absent relief.

17 **PRAYER FOR RELIEF**

18 Wherefore, Plaintiffs request that the Court:

19 a. Declare that the California Education Code’s prohibition on  
20 providing funding to “nonsectarian” schools violates the Free Exercise  
21 Clause of the First Amendment to the United States Constitution;

b. Declare that the California Education Code's prohibition on providing funding to "nonsectarian" schools violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

c. Declare that the California Education Code's prohibition on providing funding to "nonsectarian" schools is unconstitutional both on its face and as applied to Plaintiffs.

d. Issue preliminary and permanent injunctive relief prohibiting Defendants from excluding religious schools from eligibility as nonpublic schools and denying religious options to students for purposes of receiving generally available public funds;

e. Issue preliminary and permanent injunctive relief prohibiting Defendants from requiring schools seeking NPS status to indicate whether they have a religious affiliation or not;

f. Award actual damages in an amount to be determined;

g. Award nominal damages;

h. Award Plaintiffs reasonable attorney's fees and costs; and

i. Award all such other relief as the Court may deem proper.

### **JURY DEMAND**

Plaintiffs request a trial by jury on all issues so triable.

1 Dated: March 13, 2023

Respectfully submitted,

2 /s/ Eric C. Rassbach

3 Eric C. Rassbach (CA SBN 288041)

4 Daniel L. Chen (CA SBN 312576)

5 Laura Wolk Slavis (DC Bar No. 1643193)

(pending *pro hac vice* admission)

6 Brandon L. Winchel\* (CA SBN 344719)

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

CHAYA LOFFMAN and JONATHAN LOFFMAN, on their own behalf and on behalf of their minor child M.L.; FEDORA NICK and MORRIS TAXON, on their own behalf and on behalf of their minor child K.T.; SARAH PERETS and ARIEL PERETS, on their own behalf and on behalf of their minor child N.P.; JEAN & JERRY FRIEDMAN SHALHEVET HIGH SCHOOL; and SAMUEL A. FRYER YAVNEH HEBREW ACADEMY

PLAINTIFF(S),

V.

CALIFORNIA DEPARTMENT OF EDUCATION; TONY THURMOND, in his official capacity as Superintendent of Public Instruction; LOS ANGELES UNIFIED SCHOOL DISTRICT; and ANTHONY AGUILAR, in his official capacity as Chief of Special Education, Equity, and Access

DEFENDANT(S).

CASE NUMBER:

2:23-cv-01832-JLS-MRW

**NOTICE OF APPEAL  
PRELIMINARY INJUNCTION APPEAL**

NOTICE IS HEREBY GIVEN that \_\_\_\_\_ all Plaintiffs  
*Name of Appellant*  
 the United States Court of Appeals for the Ninth Circuit from:

**Criminal Matter**

- ☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]  
☐ Conviction and Sentence  
☐ Sentence Only (18 U.S.C. 3742)  
☐ Pursuant to F.R.Cr.P. 32(j)(2)  
☐ Interlocutory Appeals  
☐ Sentence imposed:

☐ Bail status:

**Civil Matter**

- ☒ Order (specify):  
 Dkt. 50  
☐ Judgment (specify):  
☐ Other (specify):

Imposed or Filed on 8/9/2023. Entered on the docket in this action on \_\_\_\_\_.

A copy of said judgment or order is attached hereto.

8/14/2023

/s/ Eric Rassbach

Date

Signature

☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

**Note:** The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

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**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

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 their minor child M.L.; FEDORA NICK and  
 MORRIS TAXON, on their own behalf and on  
 behalf of their minor child K.T.; SARAH  
 PERETS and ARIEL PERETS, on their own  
 behalf and on behalf of their minor child N.P.;  
 JEAN & JERRY FRIEDMAN SHALHEVET  
 HIGH SCHOOL; and SAMUEL A. FRYER  
 YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
 EDUCATION; TONY THURMOND, in his  
 official capacity as Superintendent of Public  
 Instruction; LOS ANGELES UNIFIED  
 SCHOOL DISTRICT; and ANTHONY  
 AGUILAR, in his official capacity as Chief of  
 Special Education, Equity, and Access,

Defendants.

Case No.:

2:23-cv-01832-JLS-MRW

**PLAINTIFFS'  
 REPRESENTATION  
 STATEMENT**

\* Not a member of the DC Bar; admitted in  
 California. Practice limited to cases in federal court.

1 Plaintiffs file this Representation Statement under Federal Rule of Appellate  
2 Procedure 12(b) and Circuit Rules 3-2(b) and 12-2.

3  
4 **Plaintiffs:**

5 Chaya Loffman and Jonathan Loffman, on their own behalf and on behalf of  
6 their minor child M.L.

7 Fedora Nick and Morris Taxon, on their own behalf and on behalf of their  
8 minor child K.T.

9 Sarah Perets and Ariel Perets, on their own behalf and on behalf of their minor  
10 child N.P.

11 Jean & Jerry Friedman Shalhevet High School

12 Samuel A. Fryer Yavneh Hebrew Academy

13 **Counsel for Plaintiffs:**

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26 **Defendants:**

27 California Department of Education

28 Tony Thurmond, in his official capacity as Superintendent of Public Instruction

Los Angeles Unified School District

Anthony Aguilar, in his official capacity as Chief of Special Education, Equity,  
and Access

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*Counsel for Los Angeles Unified School District and Anthony Aguilar*

1  
2 Dated: August 14, 2023

Respectfully submitted,

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ACCO,(MRWx),**APPEAL**,**CLOSED**,DISCOVERY,MANADR

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)  
CIVIL DOCKET FOR CASE #: 2:23-cv-01832-JLS-MRW**

Chaya Loffman et al v. California Department of Education et al  
Assigned to: Judge Josephine L. Staton  
Referred to: Magistrate Judge Michael R. Wilner  
Case in other court: 9th CCA, 23-55714  
Cause: 42:1983 Civil Rights Act

Date Filed: 03/13/2023  
Date Terminated: 09/19/2023  
Jury Demand: Plaintiff  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**Chaya Loffman**

*on their own behalf and on behalf of their minor child  
M.L.*

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**Plaintiff**

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represented by **Brandon L. Winchel**  
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*TERMINATED: 08/24/2023*

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**Plaintiff**

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**Plaintiff**

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*TERMINATED: 08/24/2023*

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**Plaintiff**

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*TERMINATED: 08/24/2023*

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**Plaintiff**

**Samuel A. Fryer Yavneh Hebrew Academy**

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*TERMINATED: 08/24/2023*

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**Eric C Rassbach**  
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*ATTORNEY TO BE NOTICED*

**Plaintiff**

**M. L.**  
*a minor by and through parents Chaya & Jonathan Loffman*

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*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

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(See above for address)  
*TERMINATED: 08/24/2023*

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**Nicholas Robert Reaves**  
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**Plaintiff**

**K. T.**  
*a minor by and through parents Fedora Nick & Morris Taxon*

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**Nicholas Robert Reaves**  
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**Plaintiff**

**N. P.**  
*a minor by and through parents Sarah Perets & Ariel Perets*

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**Brandon L. Winchel**  
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*TERMINATED: 08/24/2023*

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*ATTORNEY TO BE NOTICED*

**Nicholas Robert Reaves**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Jonathan Loffman**  
*on their own behalf and on behalf of their minor child M.L.*

represented by **Brandon L. Winchel**  
(See above for address)  
*TERMINATED: 08/24/2023*

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*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Eric C Rassbach**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Ariel Perets**  
*on their own behalf and on behalf of their minor child N.P.*

represented by **Brandon L. Winchel**  
(See above for address)  
*TERMINATED: 08/24/2023*

**Daniel L. Chen**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Laura W. Slavis**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Nicholas Robert Reaves**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Eric C Rassbach**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**California Department of Education**

represented by **Thomas Howard Prouty**  
California Department of Education  
1430 N. Street  
Suite 5319  
Sacramento, CA 95814-5901  
916-319-0860  
Fax: 916-319-0155  
Email: tprouty@cde.ca.gov  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Tony Thurmond**  
*in his official capacity as Superintendent of Public Instruction*

represented by **Thomas Howard Prouty**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Los Angeles Unified School District**

represented by **Sue Ann Salmon Evans**  
Dannis Woliver Kelley  
444 West Ocean Boulevard Suite 1750  
Long Beach, CA 90802  
562-366-8500  
Fax: 562-366-8505  
Email: sevans@dwkesq.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Meagan M Kinsey**  
Dannis Woliver Kelley  
444 West Ocean Boulevard Suite 1070  
Long Beach, CA 90802  
562-366-8500  
Fax: 562-366-8505  
Email: mkinsey@lbschools.net  
*TERMINATED: 07/05/2023*

**William Guy Ash**  
Dannis Wolliver Kelley  
444 West Ocean Boulevard Suite 1750  
Long Beach, CA 90802  
562-366-8500  
Fax: 562-366-8505  
Email: wash@dwkesq.com  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Anthony Aguilar**  
*in his official capacity as Chief of Special Education, Equity, and Access*

represented by **Sue Ann Salmon Evans**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Meagan M Kinsey**  
(See above for address)  
*TERMINATED: 07/05/2023*

**William Guy Ash**

(See above for address)

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/13/2023	<a href="#">1</a>	COMPLAINT Receipt No: ACACDC-34941280 - Fee: \$402, filed by Plaintiffs Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon, Fedora Nick, Chaya & Jonathan Loffman, Sarah & Ariel Perets, Jean & Jerry Friedman Shalhevet High School. (Attorney Eric C Rassbach added to party Jean & Jerry Friedman Shalhevet High School(pty:pla), Attorney Eric C Rassbach added to party Chaya & Jonathan Loffman(pty:pla), Attorney Eric C Rassbach added to party Fedora Nick(pty:pla), Attorney Eric C Rassbach added to party Sarah & Ariel Perets(pty:pla), Attorney Eric C Rassbach added to party Samuel A. Fryer Yavneh Hebrew Academy(pty:pla), Attorney Eric C Rassbach added to party Morris Taxon(pty:pla))(Rassbach, Eric) (Entered: 03/13/2023)
03/13/2023	<a href="#">2</a>	CIVIL COVER SHEET filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, Chaya & Jonathan Loffman, Fedora Nick, Sarah & Ariel Perets, Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon. (Rassbach, Eric) (Entered: 03/13/2023)
03/13/2023	<a href="#">3</a>	CERTIFICATE of Interested Parties filed by Plaintiffs All Plaintiffs, identifying CHAYA LOFFMAN and JONATHAN LOFFMAN, on their own behalf and on behalf of their minor child M.L.; FEDORA NICK and MORRIS TAXON, on their own behalf and on behalf of their minor child K.T.; SARAH PERETS and ARIEL PERETS, on their own behalf and on behalf of their minor child N.P.; JEAN & JERRY FRIEDMAN SHALHEVET HIGH SCHOOL; and SAMUEL A. FRYER YAVNEH HEBREW ACADEMY; CALIFORNIA DEPARTMENT OF EDUCATION; TONY THURMOND, in his official capacity as Superintendent of Public Instruction; LOS ANGELES UNIFIED SCHOOL DISTRICT; and ANTHONY AGUILAR, in his official capacity as Chief of Special Education, Equity, and Access. (Rassbach, Eric) (Entered: 03/13/2023)
03/13/2023	<a href="#">4</a>	(Attorney Eric C Rassbach added to party M. L.(pty:pla), Attorney Eric C Rassbach added to party N. P.(pty:pla), Attorney Eric C Rassbach added to party K. T.(pty:pla))(Rassbach, Eric) (Entered: 03/13/2023)
03/13/2023	<a href="#">5</a>	Notice of Appearance or Withdrawal of Counsel: for attorney Daniel L. Chen counsel for Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya & Jonathan Loffman, Fedora Nick, N. P., Sarah & Ariel Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. Filed by Attorney Daniel L. Chen. (Attorney Daniel L. Chen added to party Jean & Jerry Friedman Shalhevet High School(pty:pla), Attorney Daniel L. Chen added to party M. L.(pty:pla), Attorney Daniel L. Chen added to party Chaya & Jonathan Loffman(pty:pla), Attorney Daniel L. Chen added to party Fedora Nick(pty:pla), Attorney Daniel L. Chen added to party N. P.(pty:pla), Attorney Daniel L. Chen added to party Sarah & Ariel Perets(pty:pla), Attorney Daniel L. Chen added to party Samuel A. Fryer Yavneh Hebrew Academy(pty:pla), Attorney Daniel L. Chen added to party K. T.(pty:pla), Attorney Daniel L. Chen added to party Morris Taxon(pty:pla))(Chen, Daniel) (Entered: 03/13/2023)
03/13/2023	<a href="#">6</a>	Notice of Appearance or Withdrawal of Counsel: for attorney Brandon L. Winchel counsel for Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya & Jonathan Loffman, Fedora Nick, N. P., Sarah & Ariel Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. Filed by Attorney Brandon L. Winchel. (Attorney Brandon L. Winchel added to party Jean & Jerry Friedman Shalhevet High School(pty:pla), Attorney Brandon L. Winchel added to party M. L.(pty:pla), Attorney Brandon L. Winchel added to party Chaya & Jonathan Loffman(pty:pla), Attorney Brandon L. Winchel added to party Fedora Nick(pty:pla), Attorney Brandon L. Winchel added to party N. P.(pty:pla), Attorney Brandon L. Winchel added to party Sarah & Ariel Perets(pty:pla), Attorney Brandon L. Winchel added to party Samuel A. Fryer Yavneh Hebrew Academy(pty:pla), Attorney Brandon L. Winchel added to party K. T.(pty:pla), Attorney Brandon L. Winchel added to party Morris Taxon(pty:pla))(Winchel, Brandon) (Entered: 03/13/2023)
03/15/2023	<a href="#">7</a>	NOTICE OF ASSIGNMENT to District Judge Josephine L. Staton and Magistrate Judge Michael R. Wilner. (jtil) (Entered: 03/15/2023)
03/15/2023	<a href="#">8</a>	NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (jtil) (Entered: 03/15/2023)
03/15/2023	<a href="#">9</a>	Notice to Counsel Re Consent to Proceed Before a United States Magistrate Judge. (jtil) (Entered: 03/15/2023)
03/15/2023	<a href="#">10</a>	NOTICE OF PRO HAC VICE APPLICATION DUE for Non-Resident Attorney Laura Wolk Slavis. A document recently filed in this case lists you as an out-of-state attorney of record. However, the Court has not been able to locate any record that you are admitted to the Bar of this Court, and you have not filed an application to appear Pro Hac Vice in this case. Accordingly, within 5 business days of the date of this notice, you must either (1) have your local counsel file an application to appear Pro Hac Vice (Form G-64) and pay the applicable fee, or (2) complete the next section of this form and return it to the court at <a href="mailto:cacd_attyadm@cacd.uscourts.gov">cacd_attyadm@cacd.uscourts.gov</a> . You have been removed as counsel of record from the docket in this case, and you will not be added back to the docket until your Pro Hac Vice status has been resolved. (jtil) (Entered: 03/15/2023)
03/16/2023	<a href="#">11</a>	APPLICATION of Non-Resident Attorney Laura Wolk Slavis to Appear Pro Hac Vice on behalf of Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon (Pro Hac Vice Fee - \$500 Fee Paid, Receipt No. ACACDC-34965195) Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Attachments: # <a href="#">1</a> Proposed Order) (Rassbach, Eric) (Entered: 03/16/2023)
03/19/2023	<a href="#">12</a>	INITIAL STANDING ORDER FOR CIVIL CASES ASSIGNED TO JUDGE JOSEPHINE L. STATON. (vv) (Entered: 03/19/2023)
04/04/2023	<a href="#">13</a>	Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening),, <a href="#">1</a> filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets,

		Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Attachments: # <a href="#">1</a> Exhibit, # <a href="#">2</a> Exhibit, # <a href="#">3</a> Exhibit) (Rassbach, Eric) (Entered: 04/04/2023)
04/05/2023	<a href="#">14</a>	WAIVER OF SERVICE Returned Executed filed by Plaintiffs K. T., Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon, N. P., Ariel Perets, Fedora Nick, Chaya Loffman, Sarah Perets, Jonathan Loffman, M. L., Jean & Jerry Friedman Shalhevet High School. upon California Department of Education waiver sent by Plaintiff on 4/3/2023, answer due 6/2/2023. Waiver of Service signed by Thomas Prouty. (Rassbach, Eric) (Entered: 04/05/2023)
04/05/2023	<a href="#">15</a>	WAIVER OF SERVICE Returned Executed filed by Plaintiffs K. T., Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon, N. P., Ariel Perets, Fedora Nick, Chaya Loffman, Sarah Perets, Jonathan Loffman, M. L., Jean & Jerry Friedman Shalhevet High School. upon Tony Thurmond waiver sent by Plaintiff on 4/3/2023, answer due 6/2/2023. Waiver of Service signed by Thomas Prouty. (Rassbach, Eric) (Entered: 04/05/2023)
04/05/2023	<a href="#">16</a>	21 DAY Summons Issued re Complaint (Attorney Civil Case Opening) <a href="#">1</a> as to Defendants Anthony Aguilar, California Department of Education, Los Angeles Unified School District, Tony Thurmond. (Attachments: # <a href="#">1</a> Summon Issued as to Tony Thurmond, # <a href="#">2</a> Summon Issued as to Los Angeles Unified School District, # <a href="#">3</a> Summon Issued as to Anthony Aguilar) (jp) (Entered: 04/05/2023)
04/18/2023	<a href="#">17</a>	PROOF OF SERVICE Executed by Plaintiff K. T., Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon, N. P., Ariel Perets, Fedora Nick, Chaya Loffman, Sarah Perets, Jonathan Loffman, M. L., Jean & Jerry Friedman Shalhevet High School, upon Defendant Los Angeles Unified School District served on 4/12/2023, answer due 5/3/2023. Service of the Summons and Complaint were executed upon Lisa Lopez, Authorized Representative in compliance with Federal Rules of Civil Procedure by personal service. Original Summons NOT returned. (Rassbach, Eric) (Entered: 04/18/2023)
04/19/2023	<a href="#">18</a>	ORDER by Judge Josephine L. Staton GRANTING <a href="#">11</a> Non-Resident Attorney Laura W Slavis APPLICATION to Appear Pro Hac Vice on behalf of Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon, designating Eric C Rassbach as local counsel. (jp) (Entered: 04/19/2023)
05/01/2023	<a href="#">19</a>	PROOF OF SERVICE Executed by Plaintiff K. T., Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon, N. P., Ariel Perets, Fedora Nick, Chaya Loffman, Sarah Perets, Jonathan Loffman, M. L., Jean & Jerry Friedman Shalhevet High School, upon Defendant Anthony Aguilar served on 4/29/2023, answer due 5/22/2023. Service of the Summons and Complaint were executed upon Anthony Aguilar, Chief of Special Education, Equity, and Access in compliance with Federal Rules of Civil Procedure by personal service (Rassbach, Eric) (Entered: 05/01/2023)
05/03/2023	<a href="#">20</a>	EX PARTE APPLICATION to Extend Time to File Answer to 5/23/2023 re Complaint (Attorney Civil Case Opening),, <a href="#">1</a> filed by Defendant Anthony Aguilar, Los Angeles Unified School District. (Attachments: # <a href="#">1</a> Declaration of Meagan Kinsey, # <a href="#">2</a> Declaration of Mary Kellogg, # <a href="#">3</a> Declaration of Anthony Aguilar, # <a href="#">4</a> Proposed Order) (Attorney Sue Ann Salmon Evans added to party Anthony Aguilar(pty:dft), Attorney Sue Ann Salmon Evans added to party Los Angeles Unified School District(pty:dft)) (Evans, Sue) (Entered: 05/03/2023)
05/03/2023	<a href="#">21</a>	NOTICE of Interested Parties filed by Defendant Anthony Aguilar, Los Angeles Unified School District, identifying All captioned Parties to this litigation, Los Angeles Unified School District and Anthony Aguilar. (Evans, Sue) (Entered: 05/03/2023)
05/04/2023	<a href="#">22</a>	Notice of Appearance or Withdrawal of Counsel: for attorney Meagan M Kinsey counsel for Defendants Anthony Aguilar, Los Angeles Unified School District. Adding Meagan M. Kinsey as counsel of record for Los Angeles Unified School District; Anthony Aguilar for the reason indicated in the G-123 Notice. Filed by Defendant Los Angeles Unified School District; Anthony Aguilar. (Attorney Meagan M Kinsey added to party Anthony Aguilar(pty:dft), Attorney Meagan M Kinsey added to party Los Angeles Unified School District(pty:dft))(Kinsey, Meagan) (Entered: 05/04/2023)
05/04/2023	<a href="#">23</a>	OPPOSITION to EX PARTE APPLICATION to Extend Time to File Answer to 5/23/2023 re Complaint (Attorney Civil Case Opening),, <a href="#">1</a> <a href="#">20</a> filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Attachments: # <a href="#">1</a> Declaration of Daniel L. Chen)(Rassbach, Eric) (Entered: 05/04/2023)
05/05/2023	<a href="#">24</a>	REPLY Opposition EX PARTE APPLICATION to Extend Time to File Answer to 5/23/2023 re Complaint (Attorney Civil Case Opening),, <a href="#">1</a> <a href="#">20</a> filed by Defendants Anthony Aguilar, Los Angeles Unified School District. (Attachments: # <a href="#">1</a> Declaration of Mary Kellogg)(Evans, Sue) (Entered: 05/05/2023)
05/08/2023	<a href="#">25</a>	ORDER GRANTING Ex Parte Application for an Extension of Time to Respond to Initial Complaint By 20 Days (Doc. <a href="#">20</a> ) by Judge Josephine L. Staton. Defendants LAUSD's and Anthony Aguilar's initial response to complaint is due on or before 5/23/2023. (jp) (Entered: 05/08/2023)
05/12/2023	<a href="#">26</a>	STIPULATION to Exceed Page Limitation as to State Def's. Motion to Dismiss and Opposition thereto filed by Defendant Tony Thurmond. (Attachments: # <a href="#">1</a> Proposed Order On Stipulation to Extend Page Limit for Motion to Dismiss and for Opposition)(Attorney Thomas Howard Prouty added to party Tony Thurmond(pty:dft))(Prouty, Thomas) (Entered: 05/12/2023)
05/16/2023	<a href="#">27</a>	ORDER by Judge Josephine L. Staton APPROVING Stipulation to Extend Page Limit for Motion to Dismiss and for Opposition (Doc. <a href="#">26</a> ). See document for further information. (jp) (Entered: 05/16/2023)
05/22/2023	<a href="#">28</a>	NOTICE OF MOTION AND MOTION for Preliminary Injunction filed by Plaintiff Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. Motion set for hearing on 7/21/2023 at 10:30 AM before Judge Josephine L. Staton.

		(Attachments: # <a href="#">1</a> Memorandum, # <a href="#">2</a> Exhibit 1, # <a href="#">3</a> Exhibit 2, # <a href="#">4</a> Exhibit 3, # <a href="#">5</a> Exhibit 4, # <a href="#">6</a> Exhibit 5, # <a href="#">7</a> Exhibit 6, # <a href="#">8</a> Exhibit 7, # <a href="#">9</a> Proposed Order) (Rassbach, Eric) (Entered: 05/22/2023)
05/23/2023	<a href="#">29</a>	NOTICE OF MOTION AND MOTION to Dismiss Case filed by Defendant Anthony Aguilar, Los Angeles Unified School District. Motion set for hearing on 7/21/2023 at 10:30 AM before Judge Josephine L. Staton. (Attachments: # <a href="#">1</a> Proposed Order) (Evans, Sue) (Entered: 05/23/2023)
05/23/2023	<a href="#">30</a>	ORDER SETTING SCHEDULING CONFERENCE by Judge Josephine L. Staton. Scheduling Conference set for 7/21/2023 at 10:30 AM before Judge Josephine L. Staton. (vv) (Entered: 05/23/2023)
05/24/2023	<a href="#">31</a>	NOTICE OF MOTION AND MOTION to Dismiss Case filed by Defendants California Department of Education, Tony Thurmond. Motion set for hearing on 7/21/2023 at 10:30 AM before Judge Josephine L. Staton. (Attachments: # <a href="#">1</a> Memorandum of Points and Authorities, # <a href="#">2</a> Proposed Order) (Attorney Thomas Howard Prouty added to party California Department of Education(pty:dft)) (Prouty, Thomas) (Entered: 05/24/2023)
06/15/2023	<a href="#">32</a>	APPLICATION of Non-Resident Attorney Nicholas R. Reaves to Appear Pro Hac Vice on behalf of Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon (Pro Hac Vice Fee - \$500 Fee Paid, Receipt No. ACACDC-35497618) filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Attachments: # <a href="#">1</a> Proposed Order) (Rassbach, Eric) (Entered: 06/15/2023)
06/15/2023	<a href="#">33</a>	NOTICE of Deficiency in Electronically Filed Pro Hac Vice Application RE: APPLICATION of Non-Resident Attorney Nicholas R. Reaves to Appear Pro Hac Vice on behalf of Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer <a href="#">32</a> . The following error(s) was/were found: Case information is incomplete. DJ and MJ initials missing on application and proposed order. Please note DJ and MJ Notice of Assignment, dated 3/15/23, Dkt. 7. (lt) (Entered: 06/15/2023)
06/16/2023	<a href="#">34</a>	Corrected APPLICATION of Non-Resident Attorney Nicholas R. Reaves to Appear Pro Hac Vice on behalf of Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon (Pro Hac Vice Fee - \$500 Previously Paid on 6/15/2023, Receipt No. ACACDC-35497618) filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Attachments: # <a href="#">1</a> Amended Proposed Order) (Rassbach, Eric) (Entered: 06/16/2023)
06/20/2023	<a href="#">35</a>	ORDER by Judge Josephine L. Staton GRANTING <a href="#">32</a> , <a href="#">34</a> Non-Resident Attorney Nicholas R Reaves APPLICATION to Appear Pro Hac Vice on behalf of Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon, designating Eric C Rassbach as local counsel. (jp) (Entered: 06/20/2023)
06/30/2023	<a href="#">36</a>	Los Angeles Unified School District and Anthony Aguilar's Opposition to Plaintiffs' Motion for Preliminary Injunction Opposition re: NOTICE OF MOTION AND MOTION for Preliminary Injunction <a href="#">28</a> filed by Defendants Anthony Aguilar, Los Angeles Unified School District. (Attachments: # <a href="#">1</a> Declaration)(Evans, Sue) (Entered: 06/30/2023)
06/30/2023	<a href="#">37</a>	MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION to Dismiss Case <a href="#">31</a> , NOTICE OF MOTION AND MOTION to Dismiss Case <a href="#">29</a> filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Rassbach, Eric) (Entered: 06/30/2023)
06/30/2023	<a href="#">38</a>	The State Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction in Opposition re: NOTICE OF MOTION AND MOTION for Preliminary Injunction <a href="#">28</a> filed by Defendants California Department of Education, Tony Thurmond. (Prouty, Thomas) (Entered: 06/30/2023)
07/05/2023	<a href="#">39</a>	Notice of Appearance or Withdrawal of Counsel: for attorney William Guy Ash counsel for Defendants Anthony Aguilar, Los Angeles Unified School District. Adding William G. Ash as counsel of record for Los Angeles Unified School District; Anthony Aguilar for the reason indicated in the G-123 Notice. Filed by Defendant Los Angeles Unified School District; Anthony Aguilar. (Attorney William Guy Ash added to party Anthony Aguilar(pty:dft), Attorney William Guy Ash added to party Los Angeles Unified School District(pty:dft))(Ash, William) (Entered: 07/05/2023)
07/05/2023	<a href="#">40</a>	Notice of Appearance or Withdrawal of Counsel: for attorney Sue Ann Salmon Evans counsel for Defendants Anthony Aguilar, Los Angeles Unified School District. Meagan M. Kinsey is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant Los Angeles Unified School District; Anthony Aguilar. (Evans, Sue) (Entered: 07/05/2023)
07/07/2023	<a href="#">41</a>	JOINT REPORT Rule 26(f) Discovery Plan ; estimated length of trial 3 days, filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon.. (Attachments: # <a href="#">1</a> Exhibit A)(Rassbach, Eric) (Entered: 07/07/2023)
07/07/2023	<a href="#">42</a>	REPLY in support of NOTICE OF MOTION AND MOTION to Dismiss Case <a href="#">29</a> filed by Defendants Anthony Aguilar, Los Angeles Unified School District. (Evans, Sue) (Entered: 07/07/2023)
07/07/2023	<a href="#">43</a>	REPLY Reply in Support of NOTICE OF MOTION AND MOTION to Dismiss Case <a href="#">31</a> filed by Defendants California Department of Education, Tony Thurmond. (Prouty, Thomas) (Entered: 07/07/2023)
07/07/2023	<a href="#">44</a>	REPLY in support of NOTICE OF MOTION AND MOTION for Preliminary Injunction <a href="#">28</a> filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets,



		Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Rassbach, Eric) (Entered: 07/07/2023)
07/18/2023	<a href="#">45</a>	Objections to Evidence In Support of Motion for Preliminary Injunction Opposition re: NOTICE OF MOTION AND MOTION for Preliminary Injunction <a href="#">28</a> filed by Defendants Anthony Aguilar, Los Angeles Unified School District. (Evans, Sue) (Entered: 07/18/2023)
07/19/2023	<a href="#">46</a>	Response to District Defendants' Objections to Evidence in Support of Motion for Preliminary Injunction re: NOTICE OF MOTION AND MOTION for Preliminary Injunction <a href="#">28</a> filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (Rassbach, Eric) (Entered: 07/19/2023)
07/19/2023	<a href="#">47</a>	MINUTE (IN CHAMBERS) ORDER Continuing Scheduling Conference and ORDERING Counsel to Submit Revised Exhibit A by Judge Josephine L. Staton: No later than 8/25/2023, counsel shall file an Amended Joint Rule 26(f) Report with a fully completed Exhibit A containing a specific date for each deadline. The Court CONTINUES the Scheduling Conference to 9/1/2023, at 10:30 AM. (jp) (Entered: 07/20/2023)
07/21/2023	<a href="#">49</a>	MINUTES OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION <a href="#">28</a> ; DEFENDANTS LOS ANGELES SCHOOL DISTRICT AND ANTHONY AGUILAR'S MOTION TO DISMISS <a href="#">29</a> ; AND THE STATE DEFENDANTS' MOTION TO DISMISS <a href="#">31</a> before Judge Josephine L. Staton: The motions hearing are held. The Court takes the motions under submission and a written order will issue. Court Reporter: April Lassiter-Benson. (jp) (Entered: 07/27/2023)
07/25/2023	<a href="#">48</a>	TRANSCRIPT ORDER as to Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon for Court Reporter. Court will contact Nicholas R. Reaves at nreaves@becketlaw.org with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the court reporter. (Reaves, Nicholas) (Entered: 07/25/2023)
08/09/2023	<a href="#">50</a>	ORDER by Judge Josephine L. Staton (1) GRANTING Defendants' Motions to Dismiss Case (Docs. <a href="#">29</a> , <a href="#">31</a> ); and (2) DENYING Plaintiffs' Motion for Preliminary Injunction. (See document for further information). Any amended complaint must be filed within twenty-one (21) days of the date of this Order. Failure to timely file an amended complaint will result in the dismissal of this action and closing of the case without further notice. (jp) (Entered: 08/09/2023)
08/14/2023	<a href="#">51</a>	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. Appeal of Order on Motion for Preliminary Injunction,, Order on Motion to Dismiss Case,,, <a href="#">50</a> . (Appeal Fee - \$505.00 Previously Paid on 08/14/2023, Receipt No. 35849590.) (Attachments: # <a href="#">1</a> Exhibit Representation Statement)(Rassbach, Eric) (Entered: 08/14/2023)
08/15/2023	<a href="#">52</a>	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 23-55714 assigned to Notice of Appeal to 9th Circuit Court of Appeals,, <a href="#">51</a> as to Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. (car) (Entered: 08/21/2023)
08/16/2023	<a href="#">53</a>	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals,, <a href="#">51</a> filed by K. T., Samuel A. Fryer Yavneh Hebrew Academy, Morris Taxon, Sarah Perets, Chaya Loffman, M. L., Jonathan Loffman, Ariel Perets, N. P., Jean & Jerry Friedman Shalhevet High School, Fedora Nick. CCA # 23-55714. The appeal filed August 14, 2023 is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply. Briefing schedule has been set. [See Order for further information.] (car) (Entered: 08/21/2023)
08/23/2023	<a href="#">54</a>	TRANSCRIPT ORDER re: Court of Appeals case number 23-55714, as to Defendant Anthony Aguilar, Los Angeles Unified School District for Court Reporter. Court will contact Shanti Friend at sfriend@dwkesq.com with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the court reporter. (Ash, William) (Entered: 08/23/2023)
08/24/2023	<a href="#">55</a>	Notice of Appearance or Withdrawal of Counsel: for attorney Brandon L. Winchel counsel for Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon. Filed by plaintiff Brandon L. Winchel. (Winchel, Brandon) (Entered: 08/24/2023)
08/25/2023	<a href="#">56</a>	JOINT REPORT Rule 26(f) Discovery Plan ( <i>AMENDED</i> ) ; estimated length of trial 3, filed by Plaintiffs Jean & Jerry Friedman Shalhevet High School, M. L., Chaya Loffman, Jonathan Loffman, Fedora Nick, N. P., Ariel Perets, Sarah Perets, Samuel A. Fryer Yavneh Hebrew Academy, K. T., Morris Taxon.. (Attachments: # <a href="#">1</a> Exhibit A)(Rassbach, Eric) (Entered: 08/25/2023)
08/25/2023	<a href="#">57</a>	NOTICE of Change of Attorney Business or Contact Information: for attorney Sue Ann Salmon Evans counsel for Defendants Anthony Aguilar, Los Angeles Unified School District. Changing address to 444 W. Ocean Blvd., Suite 1750, Long Beach, CA 90802. Filed by Defendants Anthony Aguilar, Los Angeles Unified School District. (Evans, Sue) (Entered: 08/25/2023)
08/25/2023	<a href="#">58</a>	NOTICE of Change of Attorney Business or Contact Information: for attorney William Guy Ash counsel for Defendants Anthony Aguilar, Los Angeles Unified School District. Changing address to 444 W. Ocean Blvd., Suite 1750, Long Beach, CA 90802. Filed by Defendants Anthony Aguilar, Los Angeles Unified School District. (Ash, William) (Entered: 08/25/2023)
09/19/2023	<a href="#">59</a>	JUDGMENT OF DISMISSAL by Judge Josephine L. Staton, a JUDGMENT OFDISMISSAL is hereby entered. (MD JS-6, Case Terminated). See document for further information. (jp) (Entered: 09/19/2023)

10/17/2023	<a href="#">60</a>	TRANSCRIPT for Motion proceedings held on JULY 21, 2023. Court Reporter: APRIL BENSON, phone number 213-894-3539. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 11/7/2023. Redacted Transcript Deadline set for 11/17/2023. Release of Transcript Restriction set for 1/16/2024. (alb) (Entered: 10/17/2023)
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