

Claudia Center (SBN 158255)
CCenter@dredf.org
Malhar Shah (SBN 318588)
MShah@dredf.org
Erin Neff (SBN 326579)
ENeff@dredf.org
DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Telephone: (510) 644-2555

Attorneys for Plaintiffs

Additional counsel on signature page

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF DEL NORTE**

OLIVIA R., a minor by and through her
Guardian ad Litem MELONY LENOVER,
MONICA C., a minor by and through her
Guardian ad Litem LISA FINTEL, CALEB
W., a minor by and through his Guardian ad
Litem GLORIA SANCHEZ, JONAH B., by
and through his Guardian ad Litem
JENNIFER GABALL, RAJ K., a minor by
and through his Guardian ad Litem DANIEL
MCQUILLEN, and SHAWN T., a minor by
and through his Guardian ad Litem LINDA
VANG,

Plaintiffs,

v.

STATE OF CALIFORNIA; TONY
THURMOND, in his official capacity as
STATE SUPERINTENDENT OF PUBLIC
INSTRUCTION; STATE BOARD OF
EDUCATION; CALIFORNIA
DEPARTMENT OF EDUCATION; and
DOES 1-100, INCLUSIVE,

Defendants

Case No.

**PLAINTIFFS' EX PARTE APPLICATION
FOR ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD
NOT BE ISSUED**

- (1) MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; and
- (2) DECLARATIONS IN SUPPORT
THEREOF

*[Filed Contemporaneously With: Proposed
Order and Proof of Service]*

DATE: December 22, 2023

TIME: 10:00 AM

Department: 1

1 Cynthia L. Rice (SBN 87630)
2 CRrice@creeclaw.org
3 CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER
4 1245 E. Colfax Ave, Suite 400
5 Denver, CO 80218
6 Telephone: (303) 757-7901

7 Shane Brun (SBN 179079)
8 SBrun@kslaw.com
9 KING & SPALDING LLP
10 50 California Street, Suite 3300
11 San Francisco, CA 94111

12 Alexandra Kennedy-Breit (SBN 316590)

13 KING & SPALDING LLP
14 633 W 5th St., Suite 1600
15 Los Angeles, CA 90071
16 Telephone: (213) 442-4355

17 *Attorneys for Plaintiffs*
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 3

I. Background on Del Norte County Unified School District 3

 A. Shortage of Behavioral Aides 5

 B. Shortage of Board Certified Behavior Analysts..... 7

 C. Shortage of Special Education Teachers 8

 D. Shortage of Speech and Language Pathologists..... 10

 E. Shortage of Physical Therapists 11

 F. Effect of Shortages on Instruction and Learning 11

 G. Compensatory Education 13

II. Argument..... 14

 A. Plaintiffs are Likely to Prevail on the Merits 14

 1. Disabled Students with Exceptional Needs have a Fundamental
 Constitutional Right to an Education that Meets Statewide Standards 14

 2. The Statewide and Prevailing Standard Requires 180 School Days 16

 3. Free Appropriate Public Education Is a Statewide Standard 16

 4. State Defendants Have Allowed Del Norte Unified’s Education System to
 Fall Fundamentally Below Prevailing Statewide Standards 18

 5. The Failure to Provide Equal Educational Opportunities to Disabled
 Students Violates the California Equal Protection Clause. 19

 B. Without a Mandatory Injunction, Plaintiffs will Continue to Suffer Irreparable
 Harm to their Academic and Social Development Far Greater than Imposition
 of a Receivership on Defendants..... 19

 C. Plaintiffs Need a Mandatory Injunction to Stop the Continued Harm Caused by
 Defendants’ Failure to Intervene..... 20

 D. A Mandatory Injunction is in the Public’s Interest because it would Ensure the
 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

<i>American Indian Model Schools v. Oakland Unified School Dist.</i> , (2014) 227 Cal.App.4th 258, 295	21
<i>Butt v. State</i> , (1992) 4 Cal.4th 668	<i>passim</i>
<i>California State University, Hayward v. National Collegiate Athletic Assn.</i> (1975) 47 Cal.App.3d 533.....	13
<i>Cohen v. Bd. of Supervisors</i> (1985) 40 Cal. 3d 277	14
<i>Collins v. Thurmond</i> (2019)41 Cal. App. 5th 879	19
<i>DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.</i> (2009) 176 Cal.App.4th 697	13, 14
<i>Hall v. City of Taft</i> , (1956) 47 Cal.2d 177	2
<i>Hartzell v. Connell</i> (1984) 35 Cal. 3d 899	15
<i>Hayes v. Comm’n on State Mandates</i> , (1992) 11 Cal.App.4th 1564	1, 16
<i>Endrew F. ex rel. Joseph F. v. Douglas Cnty. School Dist. RE-1</i> (2017) 137 S. Ct. 988	17
<i>King v. Meese</i> (1987) 43 Cal. 3d 1217	14
<i>O’Connell v. Superior Court</i> (2006) 141 Cal. App. 4th 1452	3, 14, 17
<i>Piper v. Big Pine School Dist. of Inyo Cnty.</i> , (1924) 193 Cal. 664	2
<i>Sahlolbei v. Providence Healthcare, Inc.</i> , (2003) 112 Cal.App.4th 1137	20
<i>Serrano v. Priest</i> (1971) 5 Cal. 3d 584	15
<i>Shaw v. Los Angeles Unified School Dist.</i> (2023) 95 Cal.App.5th 740 [313 Cal.Rptr.3d 617]	21
<i>Stewart v. Superior Court</i> (1893) 100 Cal. 543	14

1	<i>Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.</i>	
2	(1994) 23 Cal.App.4th 1459, [28 Cal.Rptr.2d 734]	21
3	<i>Timothy O. v. Paso Robles Unified Sch. Dist.</i>	
4	(9th Cir. 2016) 822 F.3d 1105.....	17
5	Statutes	
6	20 U.S.C. § 1400(c)(5).....	17
7	20 U.S.C. § 1412(a)(11).....	17
8	Other Authorities	
9	Cal. Civ. Proc. Code § 526(a)	15
10	Cal. Code Civ. Proc. § 525.....	15
11	Cal. Educ. Code § 46200	17
12	Cal. Educ. Code § 48207	10
13	Cal. Educ. Code § 56000 <i>et seq.</i>	<i>passim</i>
14	Cal. Const., art. IX, § 5	1
15	Other References	
16	CDE https://dq.cde.ca.gov/dataquest/	20
17	California Dashboard	
18	https://www.caschooldashboard.org/reports/08618200000000/2022	20
19	CAL. STATE BD. OF EDUC., English-Language Arts Content Standards for	
20	California Public Schools (Dec. 1997),	
21	https://www.cde.ca.gov/be/st/ss/documents/elacontentstnds.pdf	17
22	CAL. STATE BD. OF EDUC., California Common Core State Standards (Mar.	
23	2013), https://www.cde.ca.gov/be/st/ss/documents/finaelacssstandards.pdf	17
24	California Department of Education Data Quest, 2022-23 <i>Enrollment by</i>	
25	<i>Subgroup for Charter and Non-Charter Schools, Del Norte County Unified</i>	
26	<i>Report</i> ,	
27	https://dq.cde.ca.gov/dataquest/dqcensus/EnrCharterSub.aspx?cds=0861820	
28	&agglevel=district&year=2022-23	4
	California Department of Education Data Quest, 2022-23 <i>Enrollment by</i>	
	<i>Subgroup for Charter and Non-Charter Schools, State Report</i> ,	
	https://dq.cde.ca.gov/dataquest/dqcensus/EnrCharterSub.aspx?cds=00&aggle	
	vel=state&year=2022-23	4

1	California Department of Education Data Quest, <i>Selected District Level Data –</i>	
2	<i>Del Norte County Unified for the year 2022-23,</i>	
3	https://dq.cde.ca.gov/dataquest/Cbeds3.asp?FreeLunch=on&cSelect=086182	
4	0--Del+Norte+County+Unified&cChoice=DstProf1&cYear=2022-	
5	23&cLevel=District&cTopic=FRPM&myTimeFrame=S&submit1=Submit	4
6	EdJoin, 23-24 <i>Infant Toddler SPED Teacher Pos #79</i>	
7	https://perma.cc/3VCT-HCG7	8
8	EdJoin, 23-24 <i>SPED Teacher Pos #986</i>	
9	https://perma.cc/75EQ-PQWV	8
10	EdJoin, 23-24 <i>Special Education Teacher Pos. 178</i>	
11	https://perma.cc/3P5A-YXBT	8
12	KidsData, <i>Special Education Enrollment by Race/Ethnicity,</i>	
13	https://tinyurl.com/ryftwe7y	4
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**


2 **PLEASE TAKE NOTE** that on December 22, 2023 at 10:00 AM, or as soon thereafter
3 as this may be heard in Courtroom 1 of the Del Norte Superior Court, 450 H St. #209, Crescent
4 City, CA 95531, Plaintiffs Olivia R., a minor by and through her proposed guardian ad litem
5 Melony Lenover, Monica C., a minor by and through her proposed guardian ad litem Lisa
6 Fintel, Caleb W., a minor by and through his guardian ad litem Gloria Sanchez, Jonah B., a
7 minor by and through his guardian ad litem Jennifer Gaball, Raj K., a minor by and through his
8 guardian ad litem Daniel McQuillen, and Shawn T., a minor by and through his guardian ad
9 litem Linda Vang will, and hereby do, apply *ex parte* for an Order to Show Cause why a
10 preliminary injunction should not issue ordering the State of California, the California
11 Department of Education, the California State Board of Education, and Tony Thurmond his
12 official capacity as Superintendent of Public Instruction, and their agents, employees, officers,
13 representatives, successors, partners, assigns, and any and all person acting in concern or
14 participating with them (collectively “Defendants”), to:

- 15 (1) Immediately take all actions necessary to ensure that students enrolled in the Del
16 Norte County Unified School District receive all education services necessary to
17 provide Plaintiffs and other disabled students with exceptional needs with full and
18 equal access to a program that meets the prevailing educational standards for the
19 state; and
20 (2) Place the Del Norte County Unified School District under a receivership to prevent
21 further irreparable harm to Plaintiffs and other disabled students with exceptional
22 needs.

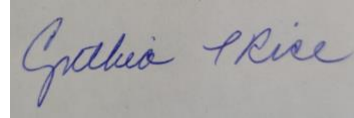
23 This application is based upon this notice of *ex parte* application, the following
24 memorandum of points and authorities and declarations filed herewith, and any additional
25 argument that the court may consider in connection with this matter.

26 Dated: December 14, 2023

Respectfully submitted,

27 
28 _____
Malhar Shah (SBN 318588)
Erin Neff (SBN 326579)

Claudia Center (SBN 158255)
DISABILITY RIGHTS EDUCATION AND
DEFENSE FUND
3075 Adeline St, Ste 210,
Berkeley, CA 94703-2578
Tel: (415) 644-2555
mshah@dredf.org



Cynthia L. Rice (SBN 87630)
Aviance Brown
Kate Thorstad
CIVIL RIGHTS EDUCATION AND
ENFORCEMENT CENTER
1245 E. Colfax Avenue, Suite 400
Denver, CO 80218
Tel: (303) 757-7901
crice@creeclaw.org



Shane Brun (SBN 179079)
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
Tel: (415) 867-1515
sbrun@kslaw.com



Alexandra Kennedy-Breit (SBN 316590)
KING & SPALDING LLP
633 W 5th St., Suite 1600
Los Angeles, CA 90071
Tel: (415) 867-1515
akennedy-breit@kslaw.com

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs are disabled students enrolled in the Del Norte County Unified School District (“the District”) who, under state laws are entitled to minimum days of instruction and specialized services to ensure that they have full and equal access to a public school education. The District, due to lack of resources and mismanagement, has been unable or unwilling to provide even basic classroom instruction to Plaintiffs and other students with disabilities, and has systemically failed to provide them with the aides and other resources identified in their state mandated individualized education programs. As a result, they have been deprived of the education guaranteed them as a fundamental right under the California Constitution. Although on notice of this deprivation, and constitutionally required to address it, the State has likewise failed to provide an education to these students.

Plaintiffs have brought a California Constitutional challenge against the State of California, the California Department of Education (“CDE”), State Superintendent of Public Instruction (“SSPI”) Tony Thurmond, and the State Board of Education (“SBS”) (collectively “State Defendants”) for the violation of Plaintiffs’ fundamental right to education. Plaintiffs seek a mandatory preliminary injunction directing Defendants to put the Del Norte Unified School District into receivership to prevent further irreparable harm to Plaintiffs and others similarly situated.

The California Constitution recognizes education as a “fundamental right,” perhaps the most vital of all fundamental rights, to be obstructed only upon a showing of a compelling interest for doing so. *Butt v. State*, 4 Cal.4th 668, 692-93 (1992); *see* Cal. Const., art. IX, § 5; art. I, § 7. This right extends to students with disabilities who, like all students are constitutionally guaranteed a free and appropriate public education. Indeed, the California legislature has enacted a statutory scheme to provide specialized education for disabled students with exceptional needs. *See* Cal. Educ. Code § 56000 *et seq.*; *Hayes v. Comm’n on State Mandates*, 11 Cal.App.4th 1564, 1592 (1992) (declaring that Section 56000 requires the State “to do [nothing] more than the Constitution already required of them[.]”). These laws, borne of the unfortunate reality that children with disabilities are too often treated as if they were second-

1 class students not entitled to the same degree of respect as students without disabilities, spell out
2 the scope and nature of their entitlements to an education that enables them to reach their
3 potential, no different from their peers without disabilities.

4 Ultimate State control and responsibility is at the core of California's free public
5 education guarantees. *Butt*, 4 Cal. 4th at 680-681. Although the District, like other school
6 districts, have been tasked with the local management of the schools within their defined
7 attendance areas, this local control is subject to the requirements and restrictions imposed by the
8 State, and the State's ultimate responsibility for public education cannot be delegated to any
9 other entity. *Butt*, 4 Cal. 4th at 681 (citing *Hall v. City of Taft*, 47 Cal.2d 177, 181 (1956); *Piper*
10 *v. Big Pine School Dist. of Inyo Cnty.*, 193 Cal. 664, 669 (1924)).

11 The State Defendants, however, continue to sit idly by while disabled students with
12 exceptional needs in the District are told to stay home from school, or are forced to sit in
13 classrooms where no learning occurs—learning to which all California students are entitled. In
14 doing so, they have abdicated their duty under the California Constitution to provide these
15 students with their right to an equal educational opportunity. In *Butt*, the Supreme Court
16 recognized the State's plenary responsibility for ensuring the guarantee of this fundamental right
17 and held that it may be obstructed only upon a showing of a compelling interest for doing so.
18 *Butt*, 4 Cal.4th at 692-93. Accordingly, when “the actual quality of the district's program,
19 viewed as a whole, falls fundamentally below prevailing statewide standards,” the State must
20 intervene to remedy that inter-district disparity. *Id.* at 686-87. Such intervention is what
21 Plaintiffs seek here.

22 As set out below, the State has failed to remedy two critical ways in which the District's
23 program falls fundamentally below prevailing statewide standards. First, the District
24 mismanagement and misallocation of resources, including the shortage of special education
25 staff, deprives disabled students with exceptional needs of their right to 180 school days
26 guaranteed to all California students. Second, the staff shortages further deprive these students
27 of their right to an education appropriate to his or her needs. Cal. Educ. Code § 56001(a). The
28 resulting “real and appreciable impact on the affected students' fundamental California right to

1 basic educational quality” is the same—disabled students with exceptional needs lack access to
2 the fundamentals of education, including instruction in “phonics, reading comprehension,
3 creative writing, [and] handwriting skills,” *Butt*, 4 Cal. 4th at 687-88 & n.16, and other “skills
4 they need to succeed as productive members of modern society,” *O’Connell v. Superior Court*,
5 141 Cal.App.4th 1452, 1482 (2006).

6 As a result, disabled students with exceptional needs have lost access to more than just
7 instruction in reading and mathematics. They have lost the benefit of specialized programs that
8 include designated instruction and services designed to help them reach their educational goals.
9 Cal. Educ. Code § 56363. Without these programs, they have lost the tools necessary for
10 employment, and independent living, including instruction in speech, motor skills, cooking,
11 potty training, money skills, and emotional and behavioral regulation, among others. For these
12 students, the loss of extended learning sows consequences that cannot be remedied and that will
13 have ripple effects throughout their lives.

14 Plaintiffs seek a preliminary injunction directing the State to take all necessary actions to
15 ensure all disabled students with exceptional needs that all students within the District,
16 including students with disabilities, are provided equal educational opportunities as required by
17 the state Constitution. Because the District has demonstrated that it is incapable of fulfilling this
18 Constitutional guarantee, the State must step in by way of receivership or other directive action
19 to ensure these students receive the education to which they are entitled. The deprivation of an
20 education has lifelong consequences and, as such, the law properly demands that educators
21 consistently and without fail meet their obligations with respect to a student’s educational
22 progress. Time and precision matter. The responsibilities of our statewide system of education
23 are not just to disabled students with exceptional needs and their families, but it is also in the
24 public interest to put an end to societal discrimination against individuals with disabilities.

25 **STATEMENT OF FACTS**

26 **I. Background on Del Norte County Unified School District**

27 The District’s location in a rural and isolated region of California has historically
28 restricted the District’s ability to recruit and retain special education service providers. The

COVID-19 pandemic worsened this shortage, which hit a historical low and sparked a state of emergency this school year. Declaration of Brittany Wycoff in Support of Plaintiffs’ Motion for Preliminary Injunction (“Wycoff Decl.”) ¶ 3. Throughout the District, schools lack enough behavioral aides, special education teachers, board certified behavior analysts (“behavior analysts”), speech and language pathologists (“speech therapists”), occupational therapists (“OTs”), physical therapists (“PTs”), and school psychologists to provide the floor of education to disabled students with exceptional needs. When these resource specialists and aides are not available, instruction is either ineffective, or does not take place at all because students are instructed to just stay home. For almost every special education student in the District, the limited staff have closed the school doors in actuality or in effect.

The impact of this emergency falls along existing demographic lines. The District serves a greater rate of special education, Native American, and indigent students than other California school districts. Students with IEPs¹ make up 15.4% of students compared to the 13% state average.² And because Del Norte County is also home to several Native American tribes, including the Tolowa Dee-ni’ Nation and Yurok Tribe, Native American students make up 15.2% of students with IEPs in the District, far higher than the State average of 0.7%.³ And over 65% of students in the District are eligible for reduced priced meals compared to the State average of 60%.⁴

¹ School districts are required to conduct an assessment of each disabled student with exceptional needs and develop an individualized education program (“IEP”) that addresses those needs. Educ Code § 56345.

² California Department of Education Data Quest, *2022-23 Enrollment by Subgroup for Charter and Non-Charter Schools, Del Norte County Unified Report*, <https://dq.cde.ca.gov/dataquest/dqcensus/EnrCharterSub.aspx?cds=0861820&agglevel=district&year=2022-23> (last visited December 7, 2023); California Department of Education Data Quest, *2022-23 Enrollment by Subgroup for Charter and Non-Charter Schools, State Report*, <https://dq.cde.ca.gov/dataquest/dqcensus/EnrCharterSub.aspx?cds=00&agglevel=state&year=2022-23> (last visited December 7, 2023).

³ KidsData, *Special Education Enrollment by Race/Ethnicity*, <https://tinyurl.com/ryftwe7y> (last visited December 7, 2023); Populations Reference Bureau (PRB) determined this rate for the 2020 school year based on data retrieved from the California Dept. of Education, Special Education Division custom tabulation (Jun. 2021).

⁴ California Department of Education Data Quest, *Selected District Level Data – Del Norte County Unified for the year 2022-23*, <https://dq.cde.ca.gov/dataquest/Cbeds3.asp?FreeLunch=on&cSelect=0861820--Del+Norte+County+Unified&cChoice=DstProf1&cYear=2022->

1 **A. Shortage of Behavioral Aides**

2 The District faces the greatest shortage of behavioral aides. Behavioral aides, or “aides”,
3 serve a critical role for both disabled students with exceptional needs and by consequence other
4 students in their classrooms. Disabled students with exceptional needs in the District require one
5 of three degrees of aide support: a floating aide, one-to-one aide, or two-to-one aide. Declaration
6 of Alisha Beers (“Beers Decl.”) ¶ 7; Declaration of Emily Caldwell (“Caldwell Decl.”) ¶¶ 9-10;
7 Declaration of Jennifer Eames (“Eames Decl.”) ¶¶ 4-5; Declaration of Sarah Elston (“Elston
8 Decl.”) ¶ 5; Declaration of CoRina Hendrickson (“Hendrickson Decl.”) ¶¶ 5-6; Declaration of
9 Lindsie Jones (“Jones Decl.”) ¶¶ 14; Declaration of Amber McAdams (“McAdams Decl.”) ¶¶ 3-
10 4; Declaration of Mike Tyce (“Tyce Decl.”) ¶¶ 3-4; Wycoff Decl. ¶¶ 4-5. Most students with
11 non-significant support needs, like learning disabilities or attention deficit hyperactivity
12 disorder, require at least one classroom—or “floating”—aide who supports all students. *Id.*
13 These aides redirect students’ attention or provide individualized classroom support. Students
14 with more significant support needs, like autistic or developmentally disabled students, may
15 engage in more disruptive behaviors, like physical aggression or eloping from their classroom.
16 *Ibid.* In addition to classroom aides, these students often require a one-to-one aide who provides
17 individualized and frequent behavior support. *Ibid.* A two-to-one aide may be required for
18 students with even more significant behaviors, including self-injurious ones. *Id.* These aides
19 must receive additional training about the disabilities and behaviors of the specific students to
20 whom they are assigned. *Ibid.* Because some disability-related behavior may present a harm to
21 the student or others, students with the most significant behavior cannot attend school without
22 their assigned one-to-one or two-to-one aide. *Ibid.* Without these aides, students with behavioral
23 disabilities cannot engage in academic, social, and emotional learning and their teachers cannot
24 provide instruction to students. *Ibid.*

25 The District’s shortage of behavioral aides has closed the school doors for many disabled
26 students with exceptional needs while preventing learning for countless others. At Del Norte
27 High School, for example, seven students who cannot attend school without one-to-one or two-

28

[23&cLevel=District&cTopic=FRPM&myTimeFrame=S&submit1=Submit](#) (last visited
December 7, 2023).

1 to-one aides have lost an average of 32 out of 53 school days this academic year. Elston Decl. ¶
2 9; Wycoff Decl. ¶ 7. In addition to missing valuable classroom instruction, these students also
3 miss special education services required by their IEPs, such as occupational therapy, speech
4 therapy, and physical therapy. Elston Decl. ¶¶ 12, 14; Wycoff Decl. ¶¶ 12, 14. To prevent
5 students from missing more time, the District has directed special education teachers in the high
6 school to cut their students' school days in half so that students can share classroom and
7 individual aides. Wycoff Decl. ¶ 7. But the District lacks enough aides to even implement this
8 insufficient solution. *Id.*

9 Even when they attend school, disabled students with exceptional needs attend class
10 where learning happens in name only. Classrooms throughout the District lack enough
11 classroom, one-to-one, and two-to-one aides necessary to provide accommodations and
12 proactive behavioral interventions to these students. Beers Decl. ¶ 12; Caldwell Decl. ¶¶ 11-12;
13 Eames Decl. ¶¶ 9-10; Declaration of Dr. Judy Elliot ("Elliot Expert Decl.") ¶¶ 13; Elston Decl.
14 ¶¶ 8-9, 15-16, 17; Hendrickson Decl. ¶¶ 7, 11-12, 14-15; Jones Decl. ¶¶ 14-16; McAdams Decl.
15 ¶¶ 6-8; Tyce Decl. ¶¶ 8-11; Wycoff Decl. ¶¶ 6-7. Moreover, the District frequently rotates these
16 aides to fill vacant positions in other classrooms and schools, which forces these aides to learn
17 how to accommodate new students while harming the students the aides leave behind. Beers
18 Decl. ¶ 12; Eames Decl. ¶ 9; Jones Decl. ¶¶ 16; McAdams Decl. ¶ 8; Tyce Decl. ¶¶ 8-11. The
19 burden of filling vacant aide positions has also fallen on the Tolowa Dee-ni' Nation, which has
20 paid the salary for some of its own members' aides. Declaration of Monique Brundin ("Brundin
21 Decl.") ¶ 5;

22 Without enough aides to accommodate disabled students with exceptional needs,
23 teachers throughout the District find themselves overwhelmed by the needs and behaviors of
24 their students. Beers Decl. ¶ 12; Caldwell Decl. ¶¶ 11-12; Eames Decl. ¶¶ 9-10; Elliot Expert
25 Decl. ¶ 13; Elston Decl. ¶¶ 10-11, 15-17; Hendrickson Decl. ¶¶ 11-12, 14-16; Jones Decl. ¶ 15;
26 McAdams Decl. ¶¶ 6, 11; Tyce Decl. ¶ 11; Wycoff Decl. ¶¶ 8-11. Teachers, and what little aide
27 support they have, lack the time and capacity to provide *proactive* behavioral interventions
28 necessary to reduce or eliminate disruptive student behavior. *Id.* As a result, the frequency of

1 disruptive disability-related behavior, including crying, physical aggression, and eloping has
2 exponentially risen. *Id.* Teachers are forced to spend most classroom time on managing and
3 reacting to students' behaviors to prevent further escalation and physical harm to other students.
4 *Id.* They must also spend instruction time to prompt, redirect, and check for students'
5 understanding of instruction—tasks that are typically the responsibility of aides, and required by
6 students' IEPs. *Id.*

7 **B. Shortage of Board Certified Behavior Analysts**

8 The District's shortage of Behavior Analysts has further deprived disabled students with
9 exceptional needs of learning time. Behavior Analysts are licensed mental health clinicians who
10 study behavioral patterns and create plans to help clients improve or change disruptive behavior.
11 Beers Decl. ¶ 8; Eames Decl. ¶ 6; Jones Decl. ¶¶ 2-3. At the District level, Behavior Analysts
12 are responsible for training the District's Registered Behavior Technicians and Behavior
13 Intervention Technicians (collectively "Behavior Technicians") on students' disability-related
14 behaviors and effective interventions to prevent or eliminate those behaviors. *Id.* These
15 technicians are in turn responsible for providing that training to the aides who work directly
16 with the students, including classroom aides, one-to-one aides, and two-to-one aides. *Id.*

17 The District has only two Behavior Analysts serving the entire district this school year,
18 and one will resign on December 22, 2023 because she is overworked and overwhelmed. Beers
19 Decl. ¶ 8; Eames Decl. ¶ 6; Jones Decl. ¶¶ 4, 17. The two current Behavior Analysts have
20 caseloads as high as 56 students compared to 32 the previous school year. Jones Decl. ¶ 4. This
21 number has the potential to rise to 75 students by the end of the current school year. *Id.* Because
22 their caseload is so high, the Behavior Analysts have not had nearly enough time to adequately
23 train the District's RBT and BITs. Beers Decl. ¶ 9; Eames Decl. ¶ 7; Jones Decl. ¶ 8. As a result,
24 these technicians cannot train classroom aides, one-to-one aides, or two-to-one aides. Beers
25 Decl. ¶ 9; Eames Decl. ¶ 7; Elliot Expert Decl. ¶ 17; Jones Decl. ¶ 8. Without the training
26 necessary to work with disabled students with exceptional needs, these classroom and individual
27 aides do not know how to read an IEP, and consequently cannot identify what supports and
28 services they must provide their students. Beers Decl. ¶¶ 9-11; Eames Decl. ¶ 8; Elliot Expert

Decl. ¶ 17; Jones Decl. ¶¶ 9-10. They cannot and do not identify precursors to disability-related behavior or provide proactive behavioral interventions to prevent that behavior from escalating. Beers Decl. ¶¶ 9-11; Eames Decl. ¶ 8; Jones Decl. ¶¶ 9-10; McAdams Decl. ¶ 10-11. As a result, the frequency of disruptive disability-related behavior, including crying, physical aggression, and eloping has exponentially risen. Beers Decl. ¶¶ 9-11; Eames Decl. ¶ 8; Elliot Expert Decl. ¶ 17; Jones Decl. ¶¶ 9-10. Without the skills necessary to de-escalate these students, classroom aides have instead resorted to using harmful and traumatic restraints. Jones Decl. ¶ 9.

In practice, reliance on these untrained aides has the same consequence as the shortages—teachers throughout the District are forced to spend most classroom time on managing and reacting to students behaviors to prevent further escalation and physical harm to other students instead of providing academic, socio-emotional, and functional life skills instruction. Beers Decl. ¶¶ 9-11; Eames Decl. ¶ 8; Elliot Expert Decl. ¶ 17; Jones Decl. ¶¶ 9-11. In some circumstances relying on untrained aides has resulted in the use of inappropriate intervention techniques that have triggered more aggressive behavior responses, resulting in unwarranted discipline. McQuillen Decl. ¶¶ 4-5.

The District’s Behavior Analysts also lack the time to complete all the behavioral assessments on disabled students with exceptional needs, which has delayed the provision of effective behavioral interventions and accommodations. Jones Decl. ¶¶ 12-13. The District has requested the Behavior Analysts to shorten the assessments, but doing so would decrease the quality of the assessments and further undermine aides’ ability to provide behavioral interventions. Jones Decl. ¶¶ 12-13.

C. Shortage of Special Education Teachers

The District is also facing a shortage of special education teachers. Three schools—Crescent Elk Middle School, Mountain Elementary School, and Mary Peacock Elementary School—have listed vacancies for special education teachers.⁵ Additionally, the District lacks

⁵ EdJoin, 23-24 *Infant Toddler SPED Teacher Pos #79* <https://perma.cc/3VCT-HCG7> (perma link generated Nov. 24, 2023); EdJoin, 23-24 *SPED Teacher Pos #986* <https://perma.cc/75EQ-PQWV> (perma link generated Nov. 24, 2023); EdJoin, 23-24 *Special*

1 enough special education teachers at Redwood Elementary School, Bess Maxwell Elementary
2 School, and the District’s “home and hospital” placement.

3 Redwood Elementary School serves over 500 students from kindergarten through eighth
4 grade, but has only one teacher with a special education credential. This sole special education
5 teacher has a caseload of over 50 students with IEPs—double the maximum number allowed by
6 the collective bargaining agreement between the District and the Del Norte Teacher’s Union and
7 California law. Elston Decl. ¶ 19; Cal. Educ. Code § 56362. As a result, she lacks enough time
8 to provide students in her special education classroom with their required instruction. Elston
9 Decl. ¶ 19. Instead, a substantial majority of that instruction is provided by a substitute teacher
10 and a classroom aide, neither of whom have a special education teaching credential and
11 therefore legally cannot provide that instruction in a special education classroom. Elston Decl. ¶
12 19.

13 Bess Maxwell Elementary School has only one special education “resource classroom”
14 teacher. Hendrickson Decl. at ¶ 8. A “resource classroom” is a separate classroom where a
15 special education program can be delivered to a special education student. *Id.* at ¶ 3. Students
16 are pulled out of their regular classroom into the resource class to receive individualized or
17 small-group instruction. *Ibid.* But the one special education resource teacher in this school must
18 shoulder a caseload of 34 students with significantly different academic, social, and behavioral
19 needs by herself. *Id.* at ¶¶ 8-9. The resource teacher currently lacks enough classroom aides to
20 effectively address students’ disability related behaviors. *Id.* at ¶ 11. As a result, she teaches and
21 splits her attention between three to four large groups at one time for students who are
22 constantly physically aggressive, hiding under their desks, and eloping. *Id.* at ¶¶ 10-11. This
23 shortage prevents her from providing over 50% of the instruction her students require. *Id.* at ¶
24 12. Moreover, she lacks enough time to provide additional support for students who need it.
25 *Ibid.* At least seven other resource classroom teachers in the District also have caseloads greater
26 than 28 students. *Id.* ¶ 8.

27 The District also lacks enough special education teachers to staff its home and hospital
28

Education Teacher Pos. 178, <https://perma.cc/3P5A-YXBT> (perma link generated Nov. 24,
2023).

1 program. “Home and hospital” is a state-mandated program through which the District provides
2 instruction, including special education services and supports, to its students with a temporary
3 disability in their home, hospital, or other residential health facility. *See* Cal. Educ. Code §
4 48207. At least two District students with IEPs—one at Crescent Elk Middle School and one at
5 Del Norte High School—have missed most or all days of instruction this year because the
6 District lacks enough special education teachers. Declaration of Lisa Fintel (“Fintel Decl.”) ¶¶ 4,
7 8.

8 **D. Shortage of Speech and Language Pathologists**

9 Many District disabled students with exceptional needs require speech therapy services
10 to attain grade and age-appropriate speech, language, and communication skills. Beers Decl. ¶ 3;
11 Caldwell Decl. ¶ 3. Speech and Language Pathologists (“Speech Pathologists”) assess, diagnose,
12 and treat speech, language, social communication, cognitive-communication, and swallowing
13 disorders. This school year, the District has only four permanent Speech Pathologists who carry
14 heavy caseloads of up to 80 students. Caldwell Decl. ¶ 5. Because of their high caseloads, they
15 lack the time to provide individualized, one-to-one speech therapy required by students’ IEPs.
16 *Id.* at ¶¶ 5-6. Instead, Speech Pathologists must simultaneously provide speech therapy to three
17 to four students at a time. *Ibid.* Because students work on vastly different speech skills, SLPs are
18 forced to split their attention—while a Speech Pathologist works with one student, the other
19 students sit and wait. *Ibid.* The result is that each student received only one-third or one-fourth
20 of the speech therapy services to which they are entitled. *Id.*; Elliot Expert Decl. ¶ 17.

21 The quality of the speech therapy services has similarly decreased because the Speech
22 Pathologists lack enough time to plan lessons and conduct detailed speech assessments.
23 Caldwell Decl. ¶ 7; Elliot Expert Decl. ¶ 17. Moreover, the increase in disruptive student
24 behavior caused by the lack of classroom and individualized aides has made it almost
25 impossible for them to provide speech services. Beers Decl. ¶ 13. As a result, Speech
26 Pathologists spend most of their time filling in for classroom aides and providing behavioral
27 intervention services instead of speech therapy services. *Id.* The lack of speech services
28 negatively impacts students in the classroom and at home. It has resulted in diminished in-

1 classroom participation, eroded communication skills and disrupted the development of
2 relationships at school and in the classroom. Beers Decl. ¶¶ 11, 13-14; Caldwell Decl. ¶ 8;
3 Declaration of Amy Dorsey (“Dorsey Decl.”) ¶ 5; Elliot Expert Decl. ¶ 17; Elston Decl. ¶ 12;
4 Fintel Decl. ¶ 9; Declaration of Melony Lenover (“Lenover Decl.”) ¶ 4; Declaration of Gloria
5 Sanchez (“Sanchez Decl.”) ¶ 5; Tyce Decl. ¶ 16; Declaration of Linda Vang (“Vang Decl.”) ¶ 6;
6 Wycoff Decl. ¶ 12.

7 **E. Shortage of Physical Therapists**

8 Disabled students with exceptional needs whose disabilities affect their ability to use
9 their muscles to perform daily activities like walk, run, and crawl require physical therapy. This
10 school year, the District has no physical therapists. Elston Decl. ¶ 14; Wycoff Decl. ¶ 14. As a
11 result, any student whose IEP requires physical therapy has not received any services at all. *Id.*

12 **F. Effect of Shortages on Instruction and Learning**

13 Because of the shortages of aides and Behavior Analysts, disabled students with
14 exceptional needs are either not attending school at all or are receiving almost no instruction in
15 the classroom, preventing any possible academic and intellectual development. Elliot Expert
16 Decl. ¶ 12-15. The shortage has forced teachers throughout the District to spend most of the
17 classroom time on managing and reacting to students’ behaviors instead of providing
18 instruction. On their best days, most teachers throughout the District can provide only 10 to 30%
19 of their lesson plans. For example, at Bess Maxwell Elementary School, special education
20 teachers cannot provide 80% of the academic, socio-emotional, and functional skills instruction.
21 Caldwell Decl. ¶ 11; Jones Decl. ¶ 10; *see* Eames Decl. ¶ 8; The resource classroom teacher and
22 general education classroom teachers similarly cannot provide 50% of their planned instruction.
23 Hendrickson Decl. ¶¶ 11-12, 14-16. At Joe Hamilton Elementary School, special education
24 teachers cannot provide over half of their planned instruction. Jones Decl. ¶ 15. At Mary
25 Peacock Elementary School, special education teachers cannot provide over half of their
26 planned instruction. Jones Decl. ¶ 15. And at Del Norte High School, special education teachers
27 for students with significant support needs cannot provide 70 to 80% of their planned
28 instruction, while special education teachers with less significant support needs cannot provide

1 60% of their planned instruction. Elston Decl. ¶¶ 10, 16; Jones Decl. ¶ 15; Wycoff Decl. ¶ 8.

2 Accordingly, disabled students with exceptional needs throughout the District either do
3 not attend school or attend classrooms where little to no learning occurs. Elliot Expert Decl. ¶
4 12-15. To account for this, special education teachers are forced to write fewer and simpler IEP
5 goals because they know the staffing shortages will prevent students from meeting higher
6 standards. Elston Decl. ¶ 10; Wycoff Decl. ¶ 8. Even then, these teachers do not finish more
7 than 20% of their lesson plans and students still cannot meet their IEP goals. *Id.*

8 But the academic, socio-emotional, and functional abilities disabled students with
9 exceptional needs do not just remain at the same level—the lack of instruction has caused them
10 to regress, both academically and socially, and cut them off from their communities. Students
11 who once displayed age and grade-appropriate reading, writing, and mathematics have almost
12 completely lost these abilities. Beers Decl. ¶ 14; Brundin Decl. ¶¶ 6-7; Elston Decl. ¶¶ 10, 12;
13 Fintel Decl. ¶¶ 5, 9; Declaration of Jennifer Gaball (“Gaball Decl.”) ¶¶ 5-6; Hendrickson Decl. ¶
14 12; Jones Decl. ¶ 11; Lenover Decl. ¶ 5; Declaration of Daniel McQuillen (“McQuillen Decl.”)
15 ¶ 6; Tyce Decl. ¶ 14; Wycoff Decl. ¶ 12. Many disabled students with exceptional needs at the
16 District are non-verbal and use an Augmentative and Alternative Communication (“AAC”)
17 device—a tool that helps people who have difficulty communicating using speech. Beers Decl. ¶
18 11; Elston Decl. ¶¶ 10, 12; Wycoff Decl. ¶ 12. But without sufficient support from aides and
19 SLPs to model and help them use their device, students have almost completely lost their ability
20 to use it and by consequence their ability to communicate with their family, friends, and school
21 community. Beers Decl. ¶ 14; Brundin Decl. ¶ 6; Dorsey Decl. ¶¶ 4-5; Elston Decl. ¶¶ 10, 12;
22 Gaball Decl. ¶¶ 5-6; Lenover Decl. ¶ 4; Declaration of Gloria Sanchez (“Sanchez Decl.”) ¶ 5
23 Tyce Decl. ¶ 14; Vang Decl. ¶ 6; Wycoff Decl. ¶ 12.

24 Students with the most significant support needs, like students with developmental
25 disabilities, are losing the functional living skills necessary to live and work independently after
26 school. These include counting money, cooking, doing laundry, communicating with new
27 people, crossing streets, using the bathroom, walking, crawling, regulating emotions, and
28 preventing their own aggressive behaviors. Beers Decl. ¶ 10; Brundin Decl. ¶ 6; Caldwell Decl.

¶¶ 11-12; Declaration of Chris Jones (“Chris Decl.”) ¶¶ 8-9; Dorsey Decl. ¶¶ 4-5; Elston Decl. ¶¶ 10, 12-13; Fintel Decl. ¶ 9; Jones Decl. ¶¶ 11, 13; Lenover Decl. ¶ 6; Declaration of Tabitha Maddox (“Maddox Decl.”) ¶ 6; McAdams Decl. ¶¶ 6-8; Mcquillen Decl. ¶ 5; Sanchez Decl. ¶ 4; Vang Decl. ¶ 6; Wycoff Decl. ¶¶ 12-13. Most of these students have completely lost these skills—they cannot count, cook, or talk to strangers. *Id.* Some have even lost their potty-training skills and urinate in class, something they had not done for a decade. Elston Decl. ¶ 11. Almost all these students have demonstrated more aggression and self-injurious behaviors. Beers Decl. ¶ 10; Caldwell Decl. ¶¶ 11-12; Eames Decl. ¶ 8; Elston Decl. ¶ 11; Hendrickson Decl. ¶¶ 11, 16; Jones Decl. ¶¶ 11, 13; McAdams Decl. ¶¶ 6-7; Wycoff Decl. ¶¶ 9-11. For example, one eighteen-year-old student who has missed 48 school days used to hit himself only 5-10 times a day when he regularly attended school with a one-to-one aide. Dorsey Decl. ¶ 4. But he now hits himself 50 to 80 times, cannot do laundry or cook anymore, uses one-word communication instead of partial sentences on his AAC device. *Id.* at ¶¶ 4-5. Without immediate compensatory education to make up for lost instruction and services, disabled students with exceptional needs will experience irreversible academic, socio-emotional, and behavioral harm. Elliot Expert Decl. at ¶¶ 12-15, 17.

G. Compensatory Education

The emergency staff shortage has further eliminated the District’s ability to provide compensatory education—the provision of special education services to replenish the deprivation of those services. Without enough aides, including adequately trained aides, BCBAs, SLPs, and physical therapists, the District cannot provide these compensatory services. Indeed, the District has failed to even offer these services to students who have missed multiple months of school due to staff shortages. Fintel Decl. ¶ 10. Even when the District has offered these services, it has been unable to follow through because of the staff shortages. Elston Decl. ¶ 21; Lenover Decl. ¶ 7; Vang Decl. ¶¶ 7-8. The District has also required students to miss their regular classroom instruction to receive compensatory services because it does not have the staffing to cover both. Gaball Decl. ¶ 7.

///

II. Argument

A party may request a preliminary injunction to direct a party to do or refrain from doing something, the purpose of which is to prevent harm until the final determination of a case. Cal. Code Civ. Proc. § 525; *California State University, Hayward v. National Collegiate Athletic Assn.*, 47 Cal.App.3d 533, 543-544 (1975) (citing *Stewart v. Superior Court* (1893) 100 Cal. 543, 545). A trial court should grant preliminary injunction if the requesting party would suffer irreparable harm without it. *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.*, 176 Cal.App.4th 697 (2009); *see also*, Cal. Civ. Proc. Code § 526(a).

A. Plaintiffs are Likely to Prevail on the Merits

Courts look at two factors when determining whether to grant a preliminary injunction: the likelihood plaintiffs will prevail on the merits at trial and the interim harm that either granting or denying the injunction will impose on the parties. *Cohen v. Bd. of Supervisors*, 40 Cal. 3d 277, 285 (1985). Neither factor is dispositive and trial courts will balance them so that a strong likelihood of success reduces the need to show severe interim harm. *King v. Meese*, 43 Cal. 3d 1217, 1227 (1987). Nevertheless, some possibility of success on the merits must be present. *Butt*, 4 Cal. 4th at 670.

1. Disabled Students with Exceptional Needs have a Fundamental Constitutional Right to an Education that Meets Statewide Standards

Disabled students with exceptional needs, like all California students, have a fundamental constitutional right to education that will “teach them the skills they need to succeed as productive members of modern society.” *O’Connell*, 141 Cal. App. 4th at 1482. To prevail on the constitutional claim based on violation of this fundamental right, Plaintiffs must show “the actual quality of the district’s program, viewed as a whole, falls fundamentally below prevailing statewide standards.” *Butt*, 4 Cal. 4th at 686-87. The record establishes how disabled students with exceptional needs at Del Norte County Unified receive an education that falls fundamentally below two prevailing statewide standards: (1) the right to 180 school days guaranteed to all California students; and (2) students’ right to a free appropriate public education and the special educational instruction and services needed in order to ensure the right

1 to an appropriate educational opportunity that meets their unique needs. The resulting “real and
2 appreciable impact on the affected students’ fundamental California right to basic educational
3 quality” is the same—these students lack access to the fundamentals of education, including
4 instruction in “phonics, reading comprehension, creative writing, [and] handwriting skills,” *Butt*,
5 4 Cal. 4th at 687-88 & n.16, and other “skills they need to succeed as productive members of
6 modern society,” *O’Connell*, 141 Cal. App. 4th at 1482.

7 The California Constitution recognizes basic education equality as a “fundamental
8 interest,” perhaps the most vital of all fundamental rights, to be obstructed only upon a showing
9 that there is a compelling interest for doing so. *Butt*, Cal. 4th at 692; *Serrano v. Priest*, 5 Cal. 3d
10 584, 608-09 (1971) (observing that public education serves a “distinctive and priceless
11 function”). The Court reaffirmed the fundamental nature of this right and elaborated on the
12 elements required to establish its violation in *Butt v. State*. In *Butt*, schoolchildren sought a
13 preliminary injunction directing the State to ensure that Richmond Unified School District
14 remain open the final six weeks of the school year, despite a severe financial crisis caused by
15 district fiscal mismanagement. 4 Cal.4th at 673. The court followed a long line of cases
16 emphasizing that this right to an education that meets the statewide standard “means more than
17 access to a classroom.” *Serrano*, 5 Cal.3d at 607. It extends to “all activities which constitute an
18 ‘integral fundamental part of the elementary and secondary education.’” *Hartzell v. Connell*, 35
19 Cal.3d 899, 905, 909-11 (1984) (citations omitted). Accordingly, the court found the
20 constitutional violation resulting from school closure derived, not from the loss of school days
21 per se but from the “real and appreciable impact on the affected students’ fundamental
22 California right to basic educational equality,” including the loss of ‘instruction in phonics,
23 reading comprehension, creative writing, [and] handwriting skills’ *Butt*, 4 Cal.4th at 687-
24 88 & n. 16. Similarly, in *O’Connell v. Superior Court*, the Court of Appeal held that the
25 constitutional right to education requires “equal access to a public education system that will
26 teach them the skills they need to succeed as productive members of modern society.” 141
27 Cal.App.4th at 1482.

28 ///

1 **2. The Statewide and Prevailing Standard Requires 180 School Days**

2 As in *Butt*, California law’s guarantee of 180 school days establishes a statewide
3 standard. In *Butt*, the Supreme Court held that statutes prohibiting school districts from
4 receiving funds if they failed to remain in session at least 175 days established the “standard
5 school term originally intended by the District and provided everywhere else in California.” 4
6 Cal. 4th at 687. The court held that a departure from that standard that would cause “an extreme
7 and unprecedented disparity in educational service and progress” constituted a violation of the
8 right to education. There, students faced the loss of one-fifth of the standard school term
9 originally intended by the District and provided everywhere else in California. *Id.* Critically,
10 several district teachers declared that the proposed early school closure “would prevent them
11 from completing instruction and grading essential for academic promotion, high school
12 graduation, and collect entrance.” *Id.* Similarly, California law now requires school districts
13 provide 180 school days to receive state funds, Cal. Educ. Code § 46200, which Del Norte
14 Unified teachers declare are necessary to provide disabled students with exceptional needs with
15 the academic, socio-emotional, and functional life skills instruction necessary for their academic
16 promotion and participation in the workforce. Elston Decl. ¶ 10; Wycoff Decl. ¶ 7. Plaintiffs,
17 and other disabled students with exceptional needs in Del Norte, have been told not to come to
18 school and been deprived of up to 60 instructional days, or 27% of the school year in 2022-23.
19 Chris Decl. ¶ 8; Elston Decl. ¶ 9; Gaball Decl. ¶ 5; Lenover Decl. ¶ 4; Vang Decl. ¶ 5; Wycoff
20 Decl. ¶ 7. Many have missed as many as 20 days, approximately 25% of the first four months of
21 the 2023-24 school year. Vang Decl. ¶ 6. These are extreme and unprecedented deprivations that
22 have and will prevent these students from meeting their academic goals.

23 **3. Free Appropriate Public Education Is a Statewide Standard**

24 The prevailing statewide standard for disabled students with exceptional needs also
25 includes the right to a free and appropriate public education that addresses their unique needs.
26 The California Legislature passed California Education Code section 56000 (“Section 56000”)
27 to fulfill disabled students’ fundamental right to education and established access to a public
28 education and recognized that “special educational instruction and services for these persons are

1 needed in order to ensure the right to an appropriate educational opportunity.” *See* Cal. Educ.
2 Code § 56000; *Hayes v. Comm’n on State Mandates*, 11 Cal.App.4th 1564, 1592 (1992)
3 (declaring the adoption of Section 56000 to be consistent with *Serrano*’s declaration of basic
4 education as a fundamental right). This declaration and concomitant expectation that districts
5 comply with it, has created a substantive and prevailing standard that is not being met in the Del
6 Norte County Unified School District.

7 This statewide standard is also analogous to the standard articulated in *Butt*—it is an
8 essential, irreplaceable educational component that enables disabled students to access the
9 fundamentals of education by requiring specialized instruction and services calculated provide
10 an education appropriate to his or her needs in publicly supported programs through completion
11 of his or her prescribed course of study or until the time that he or she has met proficiency
12 standards prescribed. Cal. Educ. Code § 56001(a).⁶ A free appropriate public education requires
13 instruction in “phonics, reading comprehension, creative writing, [and] handwriting skills,” all
14 of which are basic educational skills identified by the *Butt* Court in determining whether a
15 constitutional disparity in “educational service and progress” exists to establish a violation. *Butt*,
16 4 Cal. 4th at 687-88 & n. 16. For disabled students with exceptional needs who cannot meet
17 these standards, a FAPE requires instruction in the socio-emotional and behavioral tools
18 necessary for “employment, and independent living” including like cooking, potty training, and
19 counting money, 20 U.S.C. § 1400(d)(1)(A)—“skills they need to succeed as productive
20 members of modern society,” *O’Connel*, 141 Cal. App. 4th at 1482.

21 California’s prevailing standard for education of disabled students with exceptional
22 needs incorporates the minimum standards established under federal law in the Individuals with
23 Disabilities in Education Law (“IDEA”). (20 U.S.C. §§ 1400, et seq.) *See* Cal. Educ Code §
24 56000(d). To comply with the IDEA an appropriate education must be “reasonably calculated to
25

26 ⁶ *See also*, CAL. STATE BD. OF EDUC., English-Language Arts Content Standards for
27 California Public Schools (Dec. 1997),
<https://www.cde.ca.gov/be/st/ss/documents/elacontentstnds.pdf> (“California 1997 Content
28 Standards”) (last visited Dec. 7, 2023); CAL. STATE BD. OF EDUC., California Common Core
State Standards (Mar. 2013),
<https://www.cde.ca.gov/be/st/ss/documents/finalelaccsstandards.pdf> (“California Common
Core Standards”) (last visited Dec. 7, 2023).

1 enable a child to make progress appropriate in light of the child’s circumstances,” “specially
2 designed” to meet a child’s “unique needs,” and “appropriately ambitious” to enable the child to
3 meet “challenging objectives.” *Endrew F.*, 137 S. Ct. at 999-1000. “[F]or most children, a FAPE
4 will involve . . . individualized special education calculated to achieve advancement from grade
5 to grade.” *Id.* at 1000 (emphasis added). “Progress through this system is what our society
6 generally means by an ‘education.’” (*Id.* at 999). Denial would “entirely exclude [] [disabled
7 students] from public schools,” *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105,
8 1109 (9th Cir. 2016), and this would enact “a real and appreciable impact on the affected
9 [disabled] students’ fundamental right to basic educational equality,” *Butt*, Cal. 4th at 688; *See*
10 Plaintiffs’ Request for Judicial Notice Exhibit A (holding of Contra Costa County Superior
11 Court that FAPE is the prevailing statewide standard under the California Constitution).

12 To be clear, Plaintiffs do not challenge the specifics of any IEP. Plaintiffs assert that
13 those IEPs are an element of the learning assessment that all California schools must do. Once
14 done, they become as integral to the delivery of education services, as are teacher credentials
15 and curriculum. Operating a school district in a manner that makes it systemically and generally
16 impossible to provide an appropriate education program for disabled students with exceptional
17 needs is an extreme departure from the prevailing practice, and is constitutionally actionable.

18 **4. State Defendants Have Allowed Del Norte Unified’s Education System to**
19 **Fall Fundamentally Below Prevailing Statewide Standards**

20 The evidentiary record establishes that the quality of education provided by Del Norte
21 County Unified falls fundamentally below the prevailing statewide standards. The staff
22 shortages at the District have forced disabled students with exceptional needs to miss numerous
23 school days or, equivalently, to sit in classrooms where they receive little to no specialized
24 instruction, supports, or services required by their individual education programs. This
25 “extensive educational disruption” has had a “real and appreciable impact on [disabled]
26 students’ fundamental right to basic educational equality,” including the loss of “instruction in
27 phonics, reading comprehension, creative writing, handwriting skills,” mathematics, counting
28 money, emotional and behavioral regulation, cooking, speech, communication, motor skills,

1 physical therapy, potty training, and doing laundry, among others. *Butt*, 4 Cal. 4th 668, 688 & n.
2 16

3 Disabled students with exceptional needs have been denied both their right to 180 school
4 days and their right to a free appropriate public education that meets their needs. Combined,
5 these rise to the level of a significant, and in many respects irreparable, denial of their
6 fundamental right to education. Because the District has not or cannot provide the education
7 services constitutionally guaranteed to these students, the State must act. Because the State has
8 failed to do so on its own, Plaintiffs seek a preliminary injunction from this court directing
9 Defendants to comply with their constitutionally imposed duties and responsibilities.

10 **5. The Failure to Provide Equal Educational Opportunities to Disabled**
11 **Students Violates the California Equal Protection Clause.**

12 The District's failure to hire and train adequate staff has resulted in the exclusion of
13 disabled students from school and placed them in an education program that is inferior to that
14 provided to students without disabilities. This denial of equal protection is a constitutional
15 violation that the State bears responsibility for addressing. California constitutional principles
16 require State assistance to correct basic disparities in the system of common schools, "even
17 when the discriminatory effect was not produced by the purposeful conduct of the State or its
18 agents." *Collins v. Thurmond*, 41 Cal.App.5th 879, 897 (2019) (citing *Butt*, 4 Cal.4th at 681).

19 The disparities here are apparent. Only disabled students are directed to stay home due to
20 staffing shortages. If the District cannot, or will not, address that disparity, then the State must
21 step in.

22 **B. Without a Mandatory Injunction, Plaintiffs will Continue to Suffer**
23 **Irreparable Harm to their Academic and Social Development Far Greater**
24 **than Imposition of a Receivership on Defendants.**

25 The severe academic disruption that disabled students in the District have experienced
26 will reap irreparable harm not only on their academic careers, but on the rest of their lives. Elliot
27 Expert Decl. at ¶¶ 12-15, 17. In *Butt*, the Court found the District's inability to complete its
28 school year caused irreparable harm because teachers would not be able to complete their lesson

1 plans, disabled students with exceptional needs “would lose carefully nurtured progress,” and
2 expensive childcare costs would be imposed on parents. 4 Cal. 4th at 693. Here, the evidence
3 establishes not only that these students have regressed because teachers cannot complete their
4 lesson plans, but also that many will never be able to fully recover their academic, socio-
5 emotional, and functional living skills. Elliot Expert Decl. at ¶¶ 12-15, 17. This includes their
6 age-appropriate reading, writing, and math skills, ability to communicate with their parents and
7 peers, to use the bathroom, cook, do their laundry, navigate their neighborhoods, and manage
8 their emotions and behaviors. Beers Decl. ¶ 10; Brundin Decl. ¶ 6; Caldwell Decl. ¶¶ 11-12;
9 Chris Decl. ¶¶ 8-9; Dorsey Decl. ¶ 4-5; Elliot Expert Decl. at ¶¶ 12-15; Elston Decl. ¶¶ 10-13;
10 Fintel Decl. ¶ 9; Jones Decl. ¶¶ 11, 13; Lenover Decl. ¶ 6; Maddox Decl. ¶ 6; McAdams Decl.
11 ¶¶ 6-8; Mcquillen Decl. ¶ 5; Sanchez Decl. ¶ 4; Vang Decl. ¶ 6; Wycoff Decl. ¶¶ 12-13. High
12 school students with significant support needs will soon transition to a life outside of school, but
13 will not be able to live independently or participate in the workforce without these skills. This
14 loss will have ripple effects throughout their lives, including loss of income and development of
15 meaningful and long-lasting community relationships. Elliot Expert Decl. at ¶¶ 12-15, 17.
16 Conversely, Defendants will experience little to no harm, as the preliminary injunction seeks to
17 enforce standards and practices already within the purview of Defendants’ responsibilities of
18 supervision over school districts.

19 **C. Plaintiffs Need a Mandatory Injunction to Stop the Continued Harm**
20 **Caused by Defendants’ Failure to Intervene**

21 While a prohibitory injunction prevents a party from acting, a mandatory injunction
22 requires a party to take on a course of action to remedy harm. *Shaw v. Los Angeles Unified*
23 *School Dist.*, 95 Cal.App.5th 740, 767 (2023). “Mandatory ‘injunctive relief has been upheld
24 where the defendant’s completed act causes ongoing harm or is part of a continuing course of
25 conduct.’ *Id.* at 767 (quoting *Sahlolbei v. Providence Healthcare, Inc.*, 112 Cal.App.4th 1137,
26 1156 (2003)).

27 As the foregoing legal argument delineates, Defendants actions have caused ongoing
28 damage and are part of a continuing course of conduct that harms the well-being and education

1 of Plaintiffs. In this case, a prohibitory injunction would not suffice as the Defendants are on
2 notice of these deprivations due to the data reporting submitted by the District⁷, and complaints
3 filed with the State. Vang Decl. ¶ 7. The State has failed to act when necessary to stop the
4 violation of Plaintiffs' right to education. Imposing a receivership is necessary to rectify the
5 failure to act in the past. Without a mandatory injunction, Plaintiffs will continue to lose the
6 opportunity to learn and regress in life skills.

7 **D. A Mandatory Injunction is in the Public's Interest because it would Ensure**
8 **the State Fulfills its Obligation to Provide an Equal Educational**
9 **Opportunity**

10 The trial court must also consider the preliminary injunction's effect on the public
11 interest. *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.*, 23
12 Cal.App.4th 1459, 1472, (1994). In particular, the court must consider whether an injunction
13 will impact the performance of official duties by public officers, leading to a risk of harm to the
14 public interest. *Id.* In education cases, Courts have found preliminary injunctions to favor the
15 public interest where they grant the public entity significant discretion to monitor and regulate
16 the school district. Thus, in *American Indian Model Schools v. Oakland Unified School Dist.*,
17 the California Court of Appeal held the public interest favored a preliminary injunction stopping
18 the implementation of a school district's revocation of three charter schools because the
19 injunction permitted the school district "to more carefully monitor and regulate the schools'
20 financial management. 227 Cal.App.4th 258, 295 (2014).

21 Similarly, the injunction Plaintiffs seek—a temporary State takeover of the District's
22 affairs—would maintain the State's considerable discretion to carefully monitor and regulate the
23 District's management. The Supreme Court in *Butt* affirmed the same order given the same
24 emergency circumstances and the school district's systemic management problems. 4 Cal. 4th at
25 697-98. Del Norte Unified has similarly demonstrated mismanagement and misallocation of its
26 service providers, including haphazardly rotating aides in and out of classrooms and schools,

27 ⁷ The District is required to provide teacher credentialing assignment out of
28 classification, enrollment and attendance reports to the State. Some, but not all, of that reported
data is available publicly on the Data Quest cite, maintained by the CDE at
<https://dq.cde.ca.gov/dataquest/>. It is also produced in the California Dashboard, maintained at
<https://www.caschooldashboard.org/reports/08618200000000/2022>.

1 directing staff to skirt California law, and ignoring pleas for assistance from its staff. The
2 District has also soured its relationship with third-party agencies once willing to provide
3 assistance. Moreover, the District's inability to recruit and retain special education service
4 providers stems also from its rural location and isolation from labor sources. These unique
5 problems require the State to displace the District's existing management structure that has
6 caused and exacerbated the crisis. Further, the injunction does not seek to impose any duties on
7 Defendants that are not already within their responsibilities to oversee school districts.

8 CONCLUSION

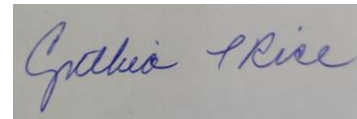
9 For the reasons set forth above, Plaintiffs requests that the Court grant the Ex Parte
10 Application for an Order to Show Cause, and after hearing on that grant the Motion for
11 Preliminary Injunction as prayed in the [Proposed] Order Granting Motion for Preliminary
12 Injunction and Preliminary Injunction, lodged concurrently herewith.

13 Dated: December 14, 2023

Respectfully submitted,

14
15 

16 Malhar Shah (SBN 318588)
17 Erin Neff (SBN 326579)
18 Claudia Center (SBN 158255)
19 DISABILITY RIGHTS EDUCATION AND
20 DEFENSE FUND
3075 Adeline St, Ste 210,
Berkeley, CA 94703-2578
Tel: (415) 644-2555
mshah@dredf.org

21 

22 Cynthia L. Rice (SBN 87630)
23 Aviance Brown
24 Kate Thorstad
25 CIVIL RIGHTS EDUCATION AND
26 ENFORCEMENT CENTER
1245 E. Colfax Avenue, Suite 400
Denver, CO 80218
Tel: (303) 757-7901
crice@creeclaw.org

27
28 

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Shane Brun (SBN 179079)
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
Tel: (415) 867-1515
sbrun@kslaw.com


Alexandra Kennedy-Breit (SBN 316590)
KING & SPALDING LLP
633 W 5th St., Suite 1600
Los Angeles, CA 90071
Tel: (415) 867-1515
akennedy-breit@kslaw.com