

Headnotes

to the Order of the First Senate of 19 November 2021

Federal pandemic emergency brake II (school closures)

- 1 BvR 971/21 -

- 1 BvR 1069/21 -

1. Article 2(1) in conjunction with Article 7(1) of the Basic Law affords children and adolescents a right requiring the state to support and promote their development to become self-reliant persons within society through school education (right to school education).
2. The right to school education has several dimensions:
 - a. It affords children and adolescents a right to have the state uphold the minimum educational standards necessary for them to develop into self-reliant persons on the basis of equal opportunities. However, it does not confer an inherent positive right to demand that the state design state schools in a specific way.
 - b. Within the framework of the existing school system, the right to school education also entails a right to equal access to state education programmes.
 - c. Moreover, the right to school education encompasses a defensive right against state measures that restrict a school's currently available education programmes without changing the existing school system, established to give effect to Article 7(1) of the Basic Law, as such.
3. If classroom lessons at school are cancelled for a considerable period of time in the overriding interest of infection control, Article 7(1) of the Basic Law imposes an obligation on the *Länder* to uphold, to the greatest extent possible, the minimum educational standards that are necessary for the personality development of children and adolescents. When classroom lessons are cancelled, the *Länder* must ensure that distance learning takes place wherever possible.

- 4. The longer a situation of danger such as the COVID-19 pandemic persists, and the longer intrusive measures taken to combat that situation remain in place, the more it is incumbent upon the legislator to ensure that its decisions are based on sufficiently reliable assessments. At the same time, the state cannot simply tolerate great dangers to life and limb because the state itself did not contribute enough to identifying alternative means for averting the danger in question that are more accommodating of freedom.**
- 5. [...]**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 971/21 -

- 1 BvR 1069/21 -



IN THE NAME OF THE PEOPLE

In the proceedings on the constitutional complaints

- I. 1. of Mr (...),
 2. of Ms (...),
 3. of minor (...),
legally represented by her parents (...),
 4. of minor (...),
legally represented by her parents (...),
 5. of minor (...),
legally represented by her parents (...),
 6. of minor (...),
legally represented by her parents (...),
- authorised representative: (...) -

against § 28b(3) first sentence (second half-sentence), second sentence, third sentence, tenth sentence and § 33 no. 1 of the Protection Against Infection Act (*Infektionsschutzgesetz*) as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (*Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) of 22 April 2021 (Federal Law Gazette I page 802), last amended by the Act of 28 May 2021 (Federal Law Gazette I page 1174)

- 1 BvR 971/21 -,

II. 1. of Ms (...),

2. of minor (...),
legally represented by his mother (...),

– authorised representatives: (...) -

against § 28b(3) third sentence of the Protection Against Infection Act as amended by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 (Federal Law Gazette I page 802), last amended by the Act of 28 May 2021 (Federal Law Gazette I page 1174)

- 1 BvR 1069/21 -

the Federal Constitutional Court – First Senate –
with the participation of Justices

President Harbarth,
Paulus,
Baer,
Britz,
Ott,
Christ,
Radtko,
Härtel

held on 19 November 2021:

The constitutional complaints are rejected.

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Reasons:

A.

The constitutional complaints challenge the prohibitions and restrictions of classroom lessons at general education schools imposed to contain the spread of COVID-19, in the form of a hybrid learning requirement (with classes divided into different groups alternating between classroom lessons at school and distance learning at home) or in the form of a complete prohibition of classroom lessons. The prohibition, set out in § 28b(3) of the Protection Against Infection Act (*Infektionsschutzgesetz – IfSG*), was part of an overall protection strategy consisting of a range of measures to curb the spread of SARS-CoV-2. It was enacted through the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (*Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) of 22 April 2021 (Federal Law Gazette, *Bundesgesetzblatt – BGBl I* p. 802), a federal law with effect across Germany, and last amended by Art. 1 no. 2, Art. 4(4) of the Second Act Amending the Protection Against Infection Act and Other Acts of 28 May 2021 (BGBl I p. 1174) with effect from 4 May 2021 (“federal pandemic emergency brake” under § 28b IfSG).

I.

1. The challenged provisions imposed complete prohibitions of classroom lessons at general education and vocational schools if the number of new SARS-CoV-2 infections per 100,000 inhabitants in a given district or city within seven days exceeded 165 on three consecutive days (seven-day incidence rate); if the incidence rate exceeded 100, classroom lessons were only allowed in the form of hybrid learning, with limits imposed on the time spent in the classroom ([...]). The *Länder* were authorised to exempt final-year classes and special needs schools from the prohibition of classroom lessons ([...]) and to provide emergency childcare in schools on the basis of criteria to be defined by the *Länder* ([...]). Classroom lessons could only be held if adequate sanitary and protective measures were complied with ([...]). Pupils and teachers were only allowed to take part in classroom lessons if they got tested for SARS-CoV-2 twice a week using a recognised [rapid lateral flow] test ([...]). In addition, in districts or cities that exceeded a seven-day incidence rate of 165, day-care centres were no longer allowed to open ([...]). When the incidence rate fell below the relevant threshold, the restrictions [...] automatically ceased to apply. 2

The legislator limited the applicability of the provisions to the duration of an officially declared 'epidemic situation of national significance' within the meaning of § 5 IfSG; it was set to expire by 30 June 2021 at the latest. [...] 3

[...] 4-5

2. [...] 6-7

3. [...] 8

II.

1. The complainants in proceedings 1 BvR 971/21 live in Munich. Complainants nos. 1 and 2 both work full time. In the 2020/2021 school year, their children attended a state secondary school (complainants nos. 3 and 4) and a primary school (complainant no. 5); complainant no. 6 attended a day-care centre. 9

Complainant no. 1 [...] in proceedings 1 BvR 1069/21 [...] is a working single mother. Her son, complainant no. 2, attended a private primary school in the 2020/2021 school year. 10

2. [...] 11

The pupils who lodged constitutional complaints mainly challenge the violation of their right to education, arguing that such a right follows from the fundamental right to the free development of one's personality under Art. 2(1) of the Basic Law (*Grundgesetz* – GG) and is also recognised in international law. They claim that the interference with this fundamental right, resulting from the prohibition of classroom lessons, is disproportionate. [...] 12

The parents of these pupils, who also lodged constitutional complaints, assert, 13

among other things, that the cancellation of classroom lessons disproportionately impaired their right to freely shape their family life, as protected by Art. 6(1) GG, and their right to freely determine their children's education protected by Art. 6(2) second sentence GG.

III.

1. The Federal Government, the *Bundestag* and the Bavarian *Land* Government submitted statements on the constitutional complaints. 14

[...] 15-21

2. In accordance with § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), many expert third parties from medical science, epidemiology, the student body, teaching and school research were given the opportunity to submit statements regarding the following questions: 22

“I. Effects of the cancellation of classroom lessons

According to the case-law of the Federal Constitutional Court (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 34, 165 <181 f.>), schools have the mandate to afford all pupils, in accordance with their abilities, educational opportunities that are suited to our society and – together with parents – to support and promote their development to become self-reliant persons within society (educational mandate). This raises the following questions:

1. From an expert point of view, what aims do the different types of schools (primary and secondary schools) serve in terms of education and child-rearing? How do the imparting of knowledge at school, education and child-rearing interact?

What significance is accorded to classroom lessons (school attendance) for fulfilling the mandate of education and child-rearing?

2. Based thereon, what effects did the cancellation of classroom lessons (prohibition of classroom lessons and hybrid learning) during the pandemic (since spring 2020) have on the personality development of pupils and their education and training in the different types of schools?

To what extent do the nature and scope of such effects depend on the pupils' personal circumstances (e.g. family life, living and housing conditions, childcare, migrant background)?

To what extent can potential deficits in personality development, education and training caused by the cancellation of classroom lessons impinge on the future participation of affected pupils in so-

cial and professional life?

To what extent and how can deficits caused by the cancellation of classroom lessons be prevented as far as possible and to what extent and how can existing deficits be remedied?

3. Has research been conducted on health impairments (especially permanent conditions) of pupils resulting from the cancellation of classroom lessons?

To what extent and how can potential health impairments of pupils caused by the cancellation of classroom lessons be prevented or existing impairments be remedied?

4. How important are schools as safe spaces for protecting pupils against dangers such as abuse and violence, and what effects does the cancellation of classroom lessons have in this regard?

5. How does the cancellation of classroom lessons impact family life, the organisation of families and the balancing of work and family life?

How great is the burden on parents when they have to take on tasks usually performed by schools?

6. To what extent can the various effects stemming from the cancellation of classroom lessons be mitigated by providing emergency childcare in schools?

7. How great is the burden on pupils and parents resulting from the obligation to get tested twice a week?

II. Cancellation of classroom lessons and spread of the virus (infection risks)

1. What is the expected risk of pupils of different ages to get infected with SARS-CoV-2 and to pass the virus on to others (viral load, emission, immission)? Is the risk of transmission lower in asymptomatic cases? What is the impact of virus mutations on the risk of infection and transmission among pupils? In what respects does the risk of infection and transmission among pupils differ from the risk of other age groups?

What is the risk of developing severe symptoms, long-term effects or inflammatory conditions following a COVID-19 infection for pupils of different ages, and how does this risk differ from that of other age groups?

2. What is the relation between the general infection rates (incidence rates) and infection rates at school?

What is the impact of classroom lessons in schools (both regular classroom lessons and hybrid learning) on general infection rates if the applicable sanitary and protective measures are complied with and pupils and teachers get tested twice a week? Based thereon, what significance is accorded to the cancellation of classroom lessons, as one instrument of the overall “federal pandemic emergency brake” strategy, for curbing the spread of the virus? What is the significance of the seven-day incidence rate exceeding 165 and 100, as the applicable thresholds, in this context?

In what ways does the impact on infection rates attributable to open schools – either in the context of regular classroom lessons or in the context of hybrid learning – differ from the impact attributable to other settings in which people interact indoors (especially in work environments)?

Are there reliable ways of reducing the impact of schools on infection rates other than school closures? If so, how could such measures have been implemented and when?

Does the cancellation of classroom lessons mainly serve to protect pupils themselves or to protect other groups?

3. What effect is the increasing immunisation of the population expected to have on the significance of school closures as a means for curbing the spread of the virus and maintaining the proper functioning of the healthcare system?

4. To what extent is the prohibition of classroom lessons a more suitable means for curbing the spread of the virus than making classroom lessons or hybrid learning subject to compliance with mandatory sanitary and protective measures and twice-weekly testing for pupils and teachers?

How effective is the obligation of pupils and teachers to get tested twice a week in curbing the spread of the virus?

What is the risk of false positive or false negative test results?

5. Insofar as there are no conclusive findings for questions 1 to 4 due to a lack of sufficiently reliable data and information: What are the reasons for the lack of such data and information? Is this situation due to the uncertain transmission dynamics or does the data gap result from causes that can be remedied?”

Statements were submitted by the German Association of Child and Adolescent Psychiatry, Psychosomatics and Psychotherapy (*Berufsverband für Kinder- und Jugendpsychiatrie, Psychosomatik und Psychotherapie in Deutschland e.V. – BKJPP*),

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the German Medical Association (*Bundesärztekammer*), the Federal Parents' Council (*Bundeselternrat*), the Federal Association of Physicians of German Public Health Departments (*Bundesverband der Ärztinnen und Ärzte des Öffentlichen Gesundheitsdienstes – BVÖGD*), the COVID-19 Data Analysis Group at the Department of Statistics at Ludwig Maximilian University Munich (*CODAG*), the German Academy of Paediatrics (*Deutsche Akademie für Kinder- und Jugendmedizin e.V. – DAKJ*), the German Society for Epidemiology (*Deutsche Gesellschaft für Epidemiologie – DGEpi*) in cooperation with the German Society of Medical Informatics, Biometry and Epidemiology (*Deutsche Gesellschaft für Medizinische Informatik, Biometrie und Epidemiologie e.V. – GMDS*), the German Educational Research Association (*Deutsche Gesellschaft für Erziehungswissenschaft e.V. – DGfE*), the German Society of Hospital Hygiene (*Deutsche Gesellschaft für Krankenhaushygiene e.V. – DGKH*), the German Society for Paediatric Infectious Diseases (*Deutsche Gesellschaft für Pädiatrische Infektiologie e.V. – DGPI*), the Federal Branch of the German Child Protection League (*Deutscher Kinderschutzbund Bundesverband e.V. – KSB*), the Society of Aerosol Research (*Gesellschaft für Aerosolforschung e.V. – GAeF*), the Hector Research Institute of Education Sciences and Psychology (*Hector-Institut für Empirische Bildungsforschung – HIB*) at Eberhard Karl University Tübingen, the Helmholtz Centre for Infection Research (*Helmholtz-Zentrum für Infektionsforschung GmbH – HZI*), the ifo Institute – Leibniz Institute for Economic Research at the University of Munich – Centre for the Economics of Education (*ifo Institut – Leibniz-Institut für Wirtschaftsforschung an der Universität München e.V. – Zentrum für Bildungsökonomik*), the Institute of Virology at Charité Berlin (*Institut für Virologie der Universitätsmedizin Charité Berlin – Charité*), the Max Planck-Institute for Dynamics and Self-Organization (*MPIDS*) and the Robert Koch Institute (*RKI*).

B.

The constitutional complaints are admissible to the extent that they challenge the prohibition of classroom lessons pursuant to § 28b(3) second and third sentence If-SG.

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I.

The complainants have standing in relation to some but not all of the challenges raised. Standing to lodge a constitutional complaint requires that complainants demonstrate both the possibility of being individually, directly and presently affected and the possibility of a fundamental rights violation in accordance with the substantiation requirements under § 23(1) second sentence and § 92 BVerfGG.

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The constitutional complaint in proceedings 1 BvR 971/21 does not satisfy these substantiation requirements insofar as it is directed against the testing mandate ([...]) and the closure of day-care centres when certain incidence rates have been exceeded ([...]). As regards these challenges, the constitutional complaint is inadmissible. However, insofar as the complainants challenge the provisions governing the restric-

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tions of classroom lessons when incidence rates exceed certain thresholds [...], both constitutional complaints sufficiently demonstrate that the complainants are individually, directly and presently affected and that their fundamental rights may have been violated [...].

1. [...] 27

2. [...] 28-29

3. Insofar as the complainants challenge the provisions governing the restrictions of classroom lessons when incidence rates exceed certain thresholds, they sufficiently demonstrate that the complainants were individually, directly and presently affected and that their own fundamental rights may have been violated. 30

[...] 31-39

II.

The complainants have a recognised legal interest in lodging a constitutional complaint (corresponding order issued today, - 1 BvR 781/21 inter alia -, para. 97 ff.). Moreover, the constitutional complaints satisfy the requirement that all legal remedies be exhausted and subsidiarity requirements in the broader sense (corresponding order issued today - 1 BvR 781/21 inter alia -, para. 100 ff.). 40

C.

The constitutional complaints are unsuccessful on the merits. While the fundamental rights of the Basic Law guarantee a 'right to school education', the prohibition of classroom lessons pursuant to § 28b(3) second and third sentence IfSG did not violate the right to school education of the pupils who lodged constitutional complaints (see I. below). Nor did it violate the right of complainant no. 1 in proceedings 1 BvR 1069/21 to freely determine her son's education (see II. below) or the right to family life under Art. 6(1) GG asserted by complainants no. 1 and 2, as parents of school-age children, in proceedings 1 BvR 971/21 (see III. below). 41

I.

The prohibition of classroom lessons interfered with the right to school education protected by Art. 2(1) in conjunction with Art. 7(1) GG (see 1. below). However, the interference was justified, given that the challenged provisions were formally (see 2. below) and substantively (see 3. below) constitutional (foundationally, BVerfGE 6, 32 <40>; established case-law). 42

1. The pupils who lodged constitutional complaints can invoke their constitutional right to school education to challenge the prohibition of classroom lessons under the Protection Against Infection Act [...]. 43

The state's objective mandate to provide school education under Art. 7(1) GG corresponds to an individual right to school education vis-à-vis the state deriving from 44

the right of children to the free development of their personality under Art. 2(1) GG (this question was expressly left unanswered in BVerfGE 45, 400 <417>; see a) and b) below). The right to school education following from Art. 2(1) in conjunction with Art. 7(1) GG has several dimensions (see c) below). In principle, this right does not entitle rights holders to demand that the state exercise its mandate, imposed by Art. 7(1) GG, to establish and design the state school system in a specific manner (see c) aa) and c) bb) below). It does, however, guarantee all children a right to participate, without discrimination, in school education provided by the state (see c) cc) below). Moreover, it allows pupils to challenge state measures that, while not changing the school system as such, restrict the educational opportunities provided at a given school. Such interferences with the right to school education must be measured against the principle of proportionality. The right to school education also gives rise to a defensive right against state interference insofar as state measures restrict independent school education programmes organised by private schools and offered to pupils on a contractual basis (see d) below). This interpretation of the scope of protection and the different dimensions of the constitutional right to school education is in keeping with the notion of a “right to education” under international law (see e) below). The challenged prohibition of classroom lessons under the Protection Against Infection Act [...] amounted to an interference with the right to school education of children and adolescents (see f) below).

a) aa) Children and adolescents themselves, as rights holders, have a right to the free development of their personality. But they require protection and assistance to develop into self-reliant persons in society (cf. BVerfGE 121, 69 <92 f.>; 133, 59 <73 f. para. 42>; established case-law). Under the Basic Law, it is primarily for parents to provide such protection and assistance. In relation to the state, parents have a right and also a duty to care for and raise their children yet the state watches over how they perform this task (Art. 6(2) GG).

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Nonetheless, children themselves also have an individual right, derived from Art. 2(1) GG, that requires the state to support and promote their development to become self-reliant persons within society; the state must ensure the living conditions they need to grow up healthy. This special responsibility of the state to protect children, deriving from the constitutional right of children to free development, extends to all aspects of children’s life that are essential for their personality development. Therefore, even insofar as the duty to care for and raise children lies with their parents, the state has a duty vis-à-vis children, following from Art. 2(1) in conjunction with Art. 6(2) first sentence GG, to ensure that they can actually develop into self-reliant persons while in their parents’ care (cf. BVerfGE 101, 361 <385 f.>; 121, 69 <93 f.>; 133, 59 <73 f. para. 42>). Where this is important for the personality development of children, the right of children to receive support in developing their personality may give rise to distinct duties of the state vis-à-vis children that go beyond ensuring that parents exercise their responsibility, and oblige the state to take action supporting and complementing parental care (cf. BVerfGE 83, 130 <139> regarding publications that are

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harmful to minors).

bb) The right of children and adolescents to the free development of their personality, following from Art. 2(1) GG, also encompasses a right requiring the state to support and promote their development to become self-reliant persons within society through school education, as set out in the state's educational mandate under Art. 7(1) GG (right to school education).

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The Basic Law does not just guarantee parents' right to care for and raise their children under Art. 6(2) GG, but also guarantees school education provided by the state as another essential precondition for the development of children into self-reliant persons on the basis of equal opportunities. Under Art. 7(1) GG, it is incumbent upon the state to create a school system that affords all children and adolescents, in accordance with their abilities, educational opportunities suited to our society in order to comprehensively support and promote their development to become self-reliant persons within society (cf. BVerfGE 34, 165 <182, 188 f.>; 47, 46 <72>; 93, 1 <20>). This task incumbent upon the state [under Art. 7(1) GG] has the same aim as the right afforded children and adolescents vis-à-vis the state under Art. 2(1) GG to receive support in their personality development. Thus, in guaranteeing school education in accordance with its educational mandate under Art. 7(1) GG, the state also fulfils its duty following from Art. 2(1) GG to support and promote the personality development of children and adolescents. Accordingly, the right of children and adolescents protected by Art. 2(1) GG is the "counterpart", in terms of an individual right ([...]), to the objective duty of the state arising from Art. 7(1) GG, which requires the state to afford educational opportunities at school that serve to further children's personality development (regarding corresponding guarantees in *Land* constitutions cf. Art. 11 of the Constitution of the *Land* Baden-Württemberg, Art. 128(1) of the Constitution of the Free State of Bavaria, Art. 20(1) of the Constitution of the *Land* Berlin, Art. 29 of the Constitution of the *Land* Brandenburg, Art. 27 of the Constitution of the Free Hanseatic City of Bremen, Art. 59 of the Constitution of the *Land* Hesse, Art. 8 and Art. 15 of the Constitution of the *Land* Mecklenburg-Western Pomerania, Art. 4(1) of the Constitution of the *Land* Lower Saxony, Art. 8 of the Constitution of the *Land* North Rhine-Westphalia, Art. 24a(1) of the Constitution of Saarland, Art. 102(1) of the Constitution of the Free State of Saxony, Art. 25(1) of the Constitution of the *Land* Saxony-Anhalt, Art. 20 first sentence of the Constitution of the Free State of Thuringia).

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b) In terms of its scope of protection, the right to school education extends to all education provided at school, with the exception of vocational training, as the latter is protected by Art. 12(1) GG (cf. on this BVerfGE 58, 257 <273>).

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School education aims to foster the development of children and adolescents into self-determined persons. Just like the state can only promote this aim if it goes hand in hand with the exercise of parental care, school education can only contribute to fostering children's development if all the different components interact in a meaning-

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ful way (cf. BVerfGE 34, 165 <182 f., 187>). Based on the statements submitted by the expert third parties, it can be established that the teaching of knowledge and skills as well as general education and child-rearing, – with varying emphasis on different aspects depending on the age of the pupils – together enable the development of children and adolescents into persons that can cultivate their skills and talents and can participate in society in self-determination ([...]). Social skills acquired through social interaction at school, both among pupils and between pupils and teachers, are essential in this regard (cf. Chamber Decisions of the Federal Constitutional Court – *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 1, 141 <143>; 8, 151 <155>). School education thus also serves to complement parental care and nurturing in promoting children's development to become self-reliant persons, and in enabling all children and adolescents to participate in society in self-determination by creating equal opportunities in education (cf. BVerfGE 34, 165 <189>).

c) The right to school education has several dimensions.

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aa) The right to school education, which, for children not attending private schools, can only be exercised by making use of education programmes provided by the state, generally does not afford individual pupils an inherent positive right to demand that the state design state schools in a specific way. This not only means that the rights holders can generally not demand the creation of new school structures (cf. Federal Constitutional Court, Order of the First Chamber of the First Senate of 27 November 2017 - 1 BvR 1555/14 -, para. 25). The right to school education also does not generally confer a right to existing school structures being maintained as they are if the state decides to make changes in the exercise of its educational mandate under Art. 7(1) GG.

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(1) Even though in all the *Länder*, the applicable law provides that school attendance is mandatory, this does by no means imply a right to receive education in a specific format or setting. Not only does the state have broad latitude when exercising its mandate to design the school system under Art. 7(1) GG, it is also not required to provide more than what is realistically attainable (reservation of attainability – *Vorbehalt des Möglichen*). This reservation has already been established by the Federal Constitutional Court with regard to the parental right to determine the type of school their children attend (cf. BVerfGE 34, 165 <182, 184>; 45, 400 <415>; 53, 185 <196>).

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The design of the school system that is incumbent upon the state under Art. 7(1) GG includes the organisation of schools, the structural determination of the education system, the content-related and didactic curricula for learning activities and the formulation of learning goals, the assessment whether and to what extent these goals have been achieved by pupils, as well as the determination of the prerequisites for school admission, the transition from one type of education programme to another and promotion to the next grade within a given education programme (cf. BVerfGE 34, 165 <182>; 45, 400 <415>; 53, 185 <196>). Moreover, parents' right to choose

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the type of school their children should attend is subject to the limits of what is realistically attainable (cf. BVerfGE 34, 165 <184>). It follows from this that the parental right to determine their children's education under Art. 6(2) first sentence GG only affords parents a right to have the state uphold necessary minimum educational standards when designing school structures. The design of the school system chosen by the state must not render meaningless the parental right to determine their children's education (cf. BVerfGE 45, 400 <415 f.>; 53, 185 <202>). It may also not be evidently detrimental to the development of children's personality or their relationship to society (cf. BVerfGE 34, 165 <188 f.>).

(2) In principle, these constitutional standards apply accordingly to the right to school education of children and adolescents following from Art. 2(1) in conjunction with Art. 7(1) GG (cf. already BVerfGE 53, 185 <203> regarding pupils' right to the free development of their personality under Art. 2(1) GG). This right does therefore not confer an individual entitlement that school be designed according to one's personal preferences; given that individual pupils have very diverse education expectations, this would be simply unfeasible (cf. BVerfGE 45, 400 <415 f.>). Rather, school is intended to lay the foundations for the development of all children and adolescents into self-reliant persons within society. Therefore, it is for the state to coordinate different educational aspects when determining school structures, such as the discovery and cultivation of individual talents, the teaching of general knowledge and social skills. The state can only fulfil this task by "taking into account individual interests on the basis of the principle of proportionality" (cf. BVerfGE 34, 165 <188 f.>). Therefore, neither the right to school education nor the parental right to determine their children's education call into question the leeway to design afforded to the *Länder* in the exercise of their mandate to shape schooling under Art. 7(1) GG.

In relation to the right to school education, too, the state's duty is subject to the reservation of attainability. This reservation cannot only be invoked in cases where state education programmes cannot be provided in accordance with the wishes of fundamental rights holders because of currently insurmountable constraints in terms of staff, factual or organisational capacity, but also with regard to the decision whether and to what extent limited public resources should be allocated. This is because it is primarily the legislator's responsibility to decide to what extent the available resources are to be used for school education as other equally important state functions must be taken into consideration as well (cf. BVerfGE 96, 288 <305 f.> with further references). Yet the legislator's decision must give adequate weight both to the paramount significance accorded to the right to school education on the basis of equal opportunities as an essential precondition – besides parental care and nurturing – for the development of children and adolescents into self-reliant persons within society, and to the particularly significant interest of the common good that is the contribution of school education to the successful integration of young people into the state order and society.

bb) In light of the foregoing, fundamental rights generally do not entitle their holders to demand that schooling be designed in a specific way. However, the right to school education affords children and adolescents a constitutionally protected right to have the state uphold, at state schools, the minimum educational standards necessary for their development into self-reliant persons on the basis of equal opportunities ([...] see para. 173 f. below regarding the claim of individual pupils to distance learning that must be provided, where possible, as a substitute for classroom lessons if the latter are cancelled for an extended period of time for infection control purposes). It is true that the exercise of this right can, in exceptional cases, be precluded by the protection of overriding constitutional interests (regarding the appropriateness of prohibiting classroom lessons for the purposes of protecting life and limb, see para. 133 ff. below). However, the state cannot deny this right on grounds of its mandate to freely shape schooling under Art. 7(1) GG – as failing to uphold minimum educational standards would in any case be incompatible with this mandate – nor on grounds of having discretion in how to allocate scarce public resources.

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cc) The right to school education also entails a right to equal participation. In this respect, it already follows from mandatory schooling laid down by the *Länder* that the right to school education does not so much concern the question whether children have access to state schools at all, but whether they are admitted to specific education programmes.

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Together with parental care and nurturing, school education is essential for the development of children and adolescents into self-reliant persons within society (see para. 48 ff. above). The right to establish private schools under Art. 7(4) first sentence GG notwithstanding, the state plays a pivotal role in school education, which is predominantly provided at state schools (cf. BVerfGE 96, 288 <304>). Children and adolescents are thus only able to receive a school education, in accordance with their personal preferences and in the interest of developing their own personality, if they have access to the different education programmes offered at state schools. Therefore, the right to school education in conjunction with the general guarantee of the right to equality confers a right to equal participation in state education programmes (cf. BVerfGE 33, 303 <332 ff.>; 134, 1 <13 para. 36> and 147, 253 <305 f. para. 103 f.> regarding equal access to higher education programmes provided by the state).

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The right to equal access to school education is a derivative right. This is because it presupposes, and is dependent on, the existence of education programmes and school structures provided by the state in the exercise of its leeway to shape education policy, and subject to the prerequisites defined by the state for school admission, the transition from one type of education programme to another and promotion to the next grade within a given programme (cf. BVerfGE 34, 165 <182>). It amounts to a violation of the right to school education, in its dimension of a right to equal participation, if these prerequisites for admission are determined or applied in an arbitrary or discriminatory manner ([...]). Moreover, if pupils are denied admission to an education programme or if they have to repeat a grade based on academic performance,

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this may, in the context of mandatory schooling, interfere with “ (Art. 2(1) GG) or, where the schooling is relevant for pursuing professional training, with the right to freely choose one’s place of training (Art. 12(1) GG) (cf. BVerfGE 58, 257 <272 ff.>).

dd) In addition, pupils can challenge state measures that do not change the school system – which was established to fulfil the educational mandate under Art. 7(1) GG – as such, but that restrict opportunities for exercising their right to school education that would normally be provided to them at their school.

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(1) Recognising such a defensive right against state interference is not precluded by the fact that pupils can in any case not exercise the right to school education without relying on state resources – unless they attend private school. From the outset, exercising this right depends on the extent to which the state provides education programmes. The right to school education serves to ensure that the state supports and promotes the development of children and adolescents into self-reliant persons within society through school education, under the state’s educational mandate in accordance with Art. 7(1) GG (see para. 47 f. above). Accordingly, the education programmes provided by the state serve to enable pupils to develop into self-reliant persons through the exercise of their right to school education. In the classroom, pupils do not just fulfil their obligation to attend school, but also exercise their right, protected by Art. 2(1) GG in conjunction with Art. 7(1) GG, to freely develop their personality with the help of school education. If this specific possibility of developing one’s personality at school is restricted by state measures, this amounts to an interference – just like impairments of other fundamental rights qualify as interferences – which pupils can challenge by invoking their defensive right.

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(2) This defensive right against state interference only applies to the extent that the overall school system designed by the state provides school education programmes that are specified in terms of type, contents and scope at each individual school. By invoking their defensive right, pupils can therefore only challenge measures that restrict their right to school education, but do not affect the school system established by the state – on which the exercise of the right to school education depends – as such; relevant measures include restrictive disciplinary measures like expulsion of pupils for disruptive conduct (regarding the disciplinary expulsion from a vocational training programme, which must be measured against Art. 12 GG, cf. BVerfGE 41, 251 <261 f., 264>). Regardless of whether affected persons are subject to mandatory schooling, it is sufficient for establishing an interference with the right to school education that an ‘external’ state measure adversely affects school education programmes currently provided by the school and attended by pupils.

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By contrast, a measure changing school structures as such, based on the state’s mandate to design schooling under Art. 7(1) GG or on its authority to decide on the allocation of scarce public resources, does not amount to an interference with the right to school education, even if it results in the loss of educational opportunities that have been provided up to that point. In this respect, pupils can only demand that the

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minimum educational standards generally considered necessary for their personality development be upheld (see para. 57 above).

d) Pupils at private schools can also invoke the right to school education protected by Art. 2(1) in conjunction with Art. 7(1) GG. For pupils at private schools, school education – which in this case is largely designed independently by the non-state operators of private schools (cf. BVerfGE 27, 195 <200 f.>; 88, 40 <46 f.>) – is essential to the development of their personality, just like it is for pupils attending state schools. Yet in a private school context, the right to school education from the outset mainly becomes relevant in its dimension as a defensive right against state interference. Pupils at private schools can thus challenge state measures restricting the education programmes organised independently by private schools and contractually guaranteed to pupils.

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e) The right to school education following from children's right to the free development of their personality under Art. 2(1) GG, which corresponds with the educational mandate under Art. 7(1) GG and is constitutionally protected in its different fundamental rights dimensions, is in line with EU law and with the "right to education" guaranteed under international law.

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aa) A "right to education" was already laid down in Art. 26 of the Universal Declaration of Human Rights. The key provision recognising the right to education in international law is Art. 13 of the International Covenant on Economic, Social and Cultural Rights, which has been ratified by Germany (ICECSR, BGBl II 1973 p. 1569). According to Art. 13(2)(a) and (b) ICECSR, schools must be accessible to everyone (regarding the dimensions of this guarantee, cf. Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education, 8 December 1999, E/C.12/1999/10, § 6). According to Art. 28 of the Convention on the Rights of the Child (BGBl II 1992 p. 121), States Parties recognise the right of the child to education on the basis of equal opportunity. Under European law, Art. 2 first sentence of Protocol No. 1 to the European Convention on Human Rights provides that no one may be denied the right to education (foundationally ECtHR, Judgment of 23 July 1968, no. 1474/62 – case relating to the use of languages in education in Belgium – Belgian Linguistic Case). Finally, a right to equal access to education is also guaranteed by Art. 22(1) of the Convention Relating to the Status of Refugees (BGBl II 1953 p. 559).

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In its case-law, the European Court of Human Rights has recognised that Art. 2 of Protocol No. 1 to the European Convention on Human Rights in principle does not give rise to positive obligations of the state to establish new education institutions (cf. ECtHR, Judgment of 23 July 1968, no. 1474/62 – Belgian Linguistic Case I B § 3). It is assumed that Member States have a considerable margin of appreciation in shaping the right to education under Art. 2 of Protocol No. 1 to the Convention ([...]); positive obligations of the state are only recognised in exceptional cases where the educational institutions provided by the state are evidently insufficient (regarding Art. 13

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ICECSR, cf. Committee on Economic, Social and Cultural Rights, General Comment No. 13, 8 December 1999, E/C.12/1999/10, §§ 6, 57). According to Art. 28(1)(a) and (b) of the Convention of the Rights of the Child, the States Parties are required to make primary education available free for all and to encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.

In terms of equal participation, international law guarantees non-discriminatory access to existing educational institutions. This already follows from Art. 2(2) ICECSR (cf., e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 13, 8 December 1999, E/C.12/1999/10, §§ 6b, 57). Art. 24(2)(a) and (b) of the Convention on the Rights of Persons with Disabilities (CRPD, BGBl II 2008 p. 1419) prohibits discrimination of persons with disabilities with regard to access to school, and requires that reasonable accommodation be provided if necessary. Moreover, Art. 5(e) subsection V of the International Convention on the Elimination of All Forms of Racial Discrimination (BGBl II 1969 p. 961) and Art. 10(a) of the Convention on the Elimination of All Forms of Discrimination against Women (BGBl II 1985 p. 647) prohibit discrimination with regard to access to school. According to the case-law of the European Court of Human Rights, however, the right to education does not guarantee access to a particular school (cf. ECtHR, Judgment of 23 July 1968, no. 1474/62 – Belgian Linguistic Case I B §§ 3 f.).

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Finally, it is also recognised in international law that interferences with the right to education may be permissible but require special justification. Art. 4 ICECSR provides for the possibility of limiting the right to education. According to the foregoing article, such limitations must be determined by law and are only permissible insofar as they are compatible with the nature of these rights and solely serve the purpose of promoting the general welfare in a democratic society. Interferences with Art. 2 of Protocol No. 1 to the Convention may be justified insofar as the measures constituting interferences do not violate the essence of the right to education or any other Convention right, pursue a public interest, and observe the principle of proportionality (cf. Bitter, in: Karpenstein/Mayer, EMRK, 2nd ed. 2015, Art. 2 ZP I para. 20 with further references).

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bb) The right to education is also recognised in EU law, specifically in Art. 14(1) of the Charter of Fundamental Rights of the European Union. This right expressly encompasses the possibility to receive free compulsory education (Art. 14(2) of the Charter), but leaves it to the Member States to design their school systems in consideration of the freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions (Art. 14(3) of the Charter; see also Art. 165 of the Treaty on the Functioning of the European Union). According to Art. 52(4) of the Charter, fundamental rights guar-

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anteed in the Charter which, like the right to education, correspond to rights recognised in the Convention and in the constitutional traditions common to the Member States (cf. Explanation on Art. 14 of the Charter, OJ EU C 303 of 14 December 2007, p. 34) must be interpreted in harmony with those traditions. In this respect, many European jurisdictions expressly enshrine a fundamental right to education in their national Constitutions (cf. Art 24(3) of the Belgian Constitution, Art. 53 of the Constitution of the Republic of Bulgaria, Art. 76 of the Constitutional Act of Denmark, Art. 37 of the Constitution of the Republic of Estonia, Art. 16 of the Constitution of Finland, Art. 16(4) of the Constitution of Greece, Art. 66 of the Constitution of the Republic of Croatia, Art. 112 of the Constitution of the Republic of Latvia, Art. 23 of the Constitution of the Grand Duchy of Luxembourg, Art. 43 of the Constitution of the Portuguese Republic, Art. 32 of the Constitution of Romania, Art. 27 of the Spanish Constitution, Art. 57 of the Constitution of the Republic of Slovenia, Art. 42 of the Constitution of the Slovak Republic, Art. 3 in conjunction with Art. 33(1) of the Charter of Fundamental Rights and Freedoms of the Czech Republic).

f) The prohibition of classroom lessons [...] interfered with the right to school education of pupils protected by Art. 2(1) in conjunction with Art. 7(1) GG. 72

aa) This finding is not precluded by the fact that the statutory prohibition of classroom lessons in cases where incidence rates exceeded the relevant thresholds in a given district or city did not directly address the pupils themselves, but were directed at the public or private schools attended by pupils. Both the aim of the prohibition – reducing contacts among pupils and between pupils and teachers – and its actual effects are comparable to that of a prohibition directly addressed to pupils who attend classroom lessons. 73

bb) The provisions of federal law prohibiting classroom lessons in districts or cities where the incidence rates exceeded the relevant thresholds resulted in interferences with the right to school education. 74

The pupils who lodged constitutional complaints challenge the fact that in the schools and grades they attend, classroom lessons were cancelled or restricted for infection control purposes. Thus, their complaints do not concern the fundamental right to school education in its dimensions as a right to equal participation or a right imposing positive obligations on the state, but in its dimension as a defensive right against state interference. 75

The prohibition of classroom lessons does not affect access to school or to certain education programmes or grades as such. It also does not aim to change how school lessons at state schools are designed in principle. The prohibition of classroom lessons was neither based on considerations relating to the design of schooling, such as the expansion of distance learning for pedagogical or didactic reasons, nor was it imposed because of scarce public resources. Rather, the measure had the sole aim of averting dangers resulting from the pandemic by restricting contacts at school. The school system as such – with classroom lessons as the standard type of lessons –, 76

which allows pupils to exercise their right to school education, remained unchanged ([...]). The existing education programmes were restricted for purposes that are unrelated to schooling as such, thereby obstructing the possibilities for development specifically offered at schools for the pupils who lodged constitutional complaints.

2. Formally, the interference with the pupils' right to school education resulting from the restriction of classroom lessons [...] was constitutional. The Federation had legislative competence in this regard [...]. The Fourth Act to Protect the Population During an Epidemic Situation of National Significance of 22 April 2021 could be adopted without the consent of the *Bundesrat* (Art. 78 GG), as such consent was not required in the legislative process [...]. 77

[...] 78-106

3. Substantively, too, the interference with the pupils' right to school education under Art. 2(1) in conjunction with Art. 7(1) GG brought about by the prohibition of classroom lessons [...] was compatible with the Constitution. 107

The self-executing nature of the legislative measure is not objectionable with regard to the constitutional guarantee of effective legal protection, the principle of the separation of powers or the requirement of general applicability (cf. corresponding order issued today - 1 BvR 781/21 inter alia -, paras. 135 ff., 138 ff., 151). 108

The prohibition of classroom lessons in the form of a hybrid learning requirement taking effect as soon as the seven-day incidence rate exceeded 100, and in the form of a complete prohibition of classroom lessons as soon as the seven-day incidence rate exceeded 165, [...] was constitutional. The prohibition served constitutionally legitimate purposes (see a) below), and it was suitable (see b) below) and necessary (see c) below) for pursuing these purposes. Based on the information available when the Act was adopted, it was also appropriate for achieving these purposes (see d) below). 109

a) With the prohibition of classroom lessons, the legislator pursued legitimate purposes, namely to fulfil its duties of protection arising from Art. 2(2) first sentence GG. 110

With the Fourth Act to Protect the Population During an Epidemic Situation of National Significance, the legislator was – according to the explanatory memorandum to the draft act – pursuing the objectives of protecting life and health and of ensuring the proper functioning of the healthcare system, including the best possible medical care, as exceptionally significant interests of the common good (cf. *Bundestagsdrucksache*, *Bundestag* document – BTDrucks 19/28444, pp. 1 and 8). These aims were to be achieved through effective measures for reducing social contacts (cf. BTDrucks 19/28444, p. 1). The paramount objective was to slow down the further spread of the virus and to interrupt its exponential growth in order to prevent the virus from overwhelming the entire healthcare system, thereby ensuring the provision of medical care nationwide (for a detailed analysis cf. corresponding order issued today - 1 BvR 781/21 inter alia -, para. 174 ff.). 111

The prohibition of classroom lessons also served to prevent infections. The legislator assumed that, given the many contacts at school and the room conditions and other parameters in school settings, a higher risk of infection existed at school for a rather large group of schoolchildren and indirectly for their family members as well. This assumption was based on the consideration that particularly with regard to smaller schoolchildren, a consistent implementation of sanitary measures is only possible to a limited extent (cf. BTDrucks 19/28444, p. 14)

b) The [...] cancellation of classroom lessons when incidence rates exceeded high thresholds in a given city or district was suitable, within the meaning of constitutional law, to prevent infections and thus to help protect the public from dangers to life and limb and maintain the proper functioning of the healthcare system.

aa) Under constitutional law, a measure is already considered suitable if it could further the desired outcome (cf. BVerfGE 63, 88 <115>; 67, 157 <175>; 96, 10 <23>; 103, 293 <307>). When appraising the suitability of a provision, the legislator has a prerogative of assessment. It is in principle sufficient that it appears possible that the provision will achieve the purpose pursued. In this respect, the legislator is afforded latitude with regard to the appraisal and assessment of the underlying circumstances, any prognoses that may be necessary and the means chosen to achieve the legislator's objectives (cf. BVerfGE 151, 101 <140 para. 100>; 152, 68 <130 f. para. 166>). A provision can only be found to be unsuitable if it cannot further the legislative purpose pursued in any way or if it counteracts this purpose (Federal Constitutional Court, Order of the First Senate of 8 July 2021 - 1 BvR 2237/14 inter alia -, para. 131 with further references).

However, if the provision at issue gives rise to serious interferences with fundamental rights – like in the present case (see para. 136 ff. below) –, it is not in principle permissible for uncertainties in the assessment of the factual situation to simply be interpreted to the detriment of fundamental rights holders. Yet if – as in the present case – the interferences serve to protect significant constitutional interests, and if the legislator's possibilities of drawing sufficiently reliable conclusions are limited because definitive scientific findings are not available, the Federal Constitutional also limits its review to whether the legislator's prognosis on suitability is tenable (cf. BVerfGE 153, 182 <272 f. para. 238> with further references; in greater detail cf. corresponding order issued today - 1 BvR 781/21 inter alia -, paras. 171, 185).

bb) Measured against these standards, the prohibition of classroom lessons was suitable for furthering the legislative objective of protecting the public from infection-related dangers to life and limb and of maintaining the proper functioning of the healthcare system.

(1) The expert third parties indicated in their statements that all virus variants that have occurred so far can also infect children and adolescents, who can then transmit the virus to others, even though children and adolescents only rarely become severely ill with COVID themselves (see in particular the statements of the German Medical

Association, Charité, DGEpi/GMDS, DGPI, HZI and RKI). It is widely assumed in these statements that the younger the children are, the less susceptible they are to the virus and the less infectious they are. By contrast, the Charité assumes in its statement that children, even though they are less infectious, contribute just as much, or even more than adults, to the spread of the virus as they have more contacts.

(2) Based thereon, schools may not have been drivers of infection (see the statements of RKI and DGPI). However, it was tenable to assume that open schools at least contributed to the danger to life and limb posed by infection given the contacts among children as well as between children and teachers in school settings. This is not altered by the fact that children themselves, according to the unanimous view of the experts, only become severely ill with COVID-19 in rare cases, and usually only if they have underlying medical conditions. According to the experts' assessment, what is decisive is that pupils can get infected with the virus when schools are open – not only through various contacts with other pupils and teachers in the classroom, in the school building or on school grounds, but also on their way to school – and that they can then transmit the virus to family members or to teachers (see the statements of the German Medical Association, DGEpi/GMDS, HZI and RKI).

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The legislator concluded that restrictions of classroom lessons in situations of high incidence rates, together with other measures imposed by the “federal pandemic emergency brake” to restrict social contacts, are at least conducive to protecting the public from the danger to life and limb posed by infection and by an overwhelming of the healthcare system. In light of the foregoing, this assessment is not objectionable under constitutional law.

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(3) The suitability of the challenged provisions is not called into question by the fact that the prohibition of classroom lessons was tied to certain thresholds [...] regarding the seven-day incidence rate. The legislator was free to use incidence rates as the earliest indicator for rising infections. The legislator opted for an incidence rate of 165 as the threshold for the complete prohibition of classroom lessons, which is clearly above the threshold [of 100] that triggered contact restrictions and curfews (in greater detail cf. corresponding order issued today - 1 BvR 781/21 inter alia -, para. 198 ff.; regarding the threshold of 165 see para. 161 below). This was within the legislator's latitude.

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c) The prohibition of classroom lessons was necessary to protect the public from infection-related dangers to life and limb and to maintain the proper functioning of the healthcare system.

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aa) Interferences with fundamental rights may not go beyond what is necessary to protect the common good (cf. BVerfGE 100, 226 <241>; 110, 1 <28>). A measure falls short of this standard if an equally effective means is available that would be less intrusive for the fundamental rights holders and would not entail greater burdens for third parties or the general public (cf. BVerfGE 148, 40 <57 para. 47> with further references; established case-law). In this regard, it must be clearly established that the

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alternative measure is equally effective for achieving the purpose pursued (cf. BVerfGE 81, 70 <91> with further references).

In principle, the legislator is also afforded a margin of appreciation in assessing the necessity of a measure (cf. BVerfGE 152, 68 <136 para. 179>; 155, 238 <280 para. 105>; established case-law; cf. also corresponding order issued today - 1 BvR 781/21 inter alia -, para. 204; regarding the recognition of similar margins cf. Conseil constitutionnel, Decision no. 2020-808 DC of 13 November 2020, para. 28 f.; Constitutional Court of Austria, Decision of 10 March 2021 - V 583/2020 inter alia -, para. 28 f. with further references; Constitutional Court of the Czech Republic, Decision of 9 February 2021 - Pl. ÚS 106/20 -, para. 76). This margin of appreciation concerns, among other things, projecting the effects of the chosen measures, also in comparison with other, less intrusive measures. The margin may become narrower depending on the affected fundamental right or the severity of interference (cf. BVerfGE 152, 68 <119 para. 134>). Conversely, the margin is broader the more complex the matter addressed by the legislator is (cf. BVerfGE 122, 1 <34>; 150, 1 <89 para. 173> with further references). If a measure gives rise to serious interferences with fundamental rights, it is not in principle permissible for uncertainties in the assessment of facts to simply be interpreted to the detriment of fundamental rights holders. But if the interference is carried out in order to protect significant constitutional interests, and if the legislator's possibilities to draw sufficiently reliable conclusions are limited in view of factual uncertainties, the Federal Constitutional Court's review is in turn limited to assessing whether the legislator's prognosis is tenable (cf. BVerfGE 153, 182 <272 f. para. 238>).

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bb) Based on these standards, the prohibition of classroom lessons was necessary. The necessity of the measures taken is not called into question on the grounds that an alternative option existed in the form of completely maintaining classroom lessons with twice-weekly testing and adequate sanitary and protective measures ([...]).

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(1) Nevertheless, keeping schools open combined with imposing an obligation to get tested twice weekly for COVID-19 would have placed a lesser burden on pupils than the cancellation of classroom lessons as soon as the relevant threshold had been exceeded. Overall, the adverse effects on pupils' personality development stemming from the cancellation of classroom lessons (see para. 136 ff. below) clearly outweigh any potential burdens that may arise from testing, depending on how testing procedures are organised by the *Länder*.

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(2) However, it cannot be established with the required degree of certainty that this testing strategy would definitively have been at least as effective as school closures.

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It is true that the COVID-19 Data Analysis Group at the Department of Statistics at Ludwig Maximilian University Munich assumes that open schools combined with testing and sanitary measures are a more effective means for curbing the spread of the virus than school closures ([...]). [...]

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Yet none of the other expert third parties heard in the present proceedings concurs with the assessment that open schools, combined with regular testing and sanitary measures, were clearly better suited for curbing infections than the prohibition of classroom lessons. [...]

Moreover, the expert third parties highlight that additional infections at school can only be prevented with certainty through school closures; if classroom lessons were to continue in such a scenario, this would at least require PCR testing ([...]). However, according to the assessment of Charité, implementing comprehensive PCR testing at schools would be impossible due to capacity constraints. [...]

The legislator concluded that, in situations of high incidence rates resulting in limited or no possibility of contact tracing as well as the emergence of new variants with higher transmissibility, infections could be curbed more effectively by restricting classroom lessons than by maintaining classroom lessons in combination with regular testing and sanitary measures. In light of the above, there are no sufficiently reliable findings that would make this assessment appear untenable.

cc) The finding that prohibiting classroom lessons had been necessary can also not be challenged on the grounds that tougher restrictions for workplaces, the targeted shielding of vulnerable groups and improved contact tracing would have been equally effective measures that would not have placed burdens on pupils.

The complainants cannot demand that stricter rules for workplaces and targeted protection of vulnerable groups be imposed because this would shift the burden to third parties (cf. BVerfGE 109, 64 <86>; 113, 167 <259>; 123, 186 <243>; 148, 40 <57>). Furthermore, there are no reliable scientific indications that the above-mentioned measures would clearly have been at least equally effective in curbing the spread of the virus as the prohibition of classroom lessons. [...]

d) Measured against the information available when the Act was adopted, which is the decisive point in time for the review of constitutionality, the prohibition of classroom lessons [...] was proportionate in the strict sense (appropriateness). This notwithstanding, in combination with the school closures that had already occurred since the start of the pandemic, the prohibition of classroom lessons at issue here amounted to a serious impairment of the right to school education, which serves to further children's personality development. However, the measure was designed to protect exceptionally significant interests of the common good. Overall, an appropriate balance was struck between the interests of the common good pursued through the measures and pupils' fundamental rights.

aa) For a measure to be appropriate and thus proportionate in the strict sense, the purpose pursued by a measure, and its likelihood of achieving that purpose, may not be disproportionate to the severity of the interference (cf. BVerfGE 155, 119 <178 para. 128>; established case-law). It is for the legislator to strike a balance between the extent and severity of the interference with fundamental rights, on the one hand,

and the provision's importance for achieving legitimate aims on the other (cf. BVerfGE 156, 11 <48 para. 95>). The prohibition of excessive measures (*Übermaßverbot*) requires that the more severely individual freedom is restricted, the more significant the pursued interests of the common good must be (cf. BVerfGE 36, 47 <59>; 40, 196 <227>; established case-law). Conversely, the need to take legislative action becomes more urgent the greater the dangers and adverse effects are that could potentially arise if fundamental rights were to be freely enjoyed with no restriction whatsoever (cf. BVerfGE 7, 377 <404 f.>).

When assessing whether a measure is appropriate, too, the legislator in principle has a margin of appreciation (cf. BVerfGE 68, 193 <219 f.>; 121, 317 <356 f.>; 152, 68 <137 para. 183>; for a stricter view cf., e.g., BVerfGE 153, 182 <283 f. para. 266>; cf. also corresponding order issued today - 1 BvR 781/21 inter alia -, para. 217). In this respect, the Federal Constitutional Court reviews whether the legislator has taken tenable decisions within its margin of appreciation (regarding such margins cf. Conseil constitutionnel, Decision no. 2020-808 DC of 13 November 2020, para. 28 f.; Constitutional Court of Austria, Decision of 10 March 2021 - V 583/2020 inter alia -, para. 28 f. with further references; Constitutional Court of the Czech Republic, Decision of 9 February 2021 - Pl. ÚS 106/20 -, para. 76). With regard to prognostic decisions, this requires that the legislator's prognosis be based on sufficiently reliable foundations (cf. BVerfGE 68, 193 <220>; cf. also BVerfGE 153, 182 <272 para. 237>).

bb) The prohibition of classroom lessons constituted a serious interference with the right to school education of pupils under Art. 2(1) in conjunction with Art. 7(1) GG, already when viewed in isolation but even more so when taking into account the cumulative effects of all school closures that occurred since the start of the pandemic.

(1) In balancing the conflicting interests of the individual and the general public, the overall burden placed on pupils resulting from the school closures that occurred since the start of the pandemic in Germany in spring 2020 had to be taken into account. The effects of the cancellation of classroom lessons on children's personality development cannot be considered in isolation for each instance where school closures were imposed since the start of the pandemic, first by the *Länder* and later by the Federation, given that the cancellation of classroom lessons places a cumulative burden on schoolchildren (regarding this aspect and the aspects mentioned below cf. the statements of BVÖGD and DGfE as well as Wößmann, ifo Schnelldienst, 6/2020, p. 38 <39> und Leopoldina, Kinder und Jugendliche in der Coronavirus-Pandemie, 21 June 2021, p. 8 f.). Each time classroom lessons are cancelled, learning gaps and loss of skills become greater and more serious. Each additional school closure further worsens the opportunities for personality development of affected pupils; the weight of the impairment thus increases with each interference. This also applies to the acquisition of social skills. The longer schools are closed, the greater the loss of group skills, which are important for the development of children's personality. Children and adolescents no longer have a [physical] space in which they can practise

maintaining social contacts in interaction with others. This applies all the more as other meeting spaces were not available either, or only available to a limited extent, due to other measures taken to combat the pandemic. Digital spaces cannot adequately replace such physical spaces.

(2) Based on these considerations, the prohibition of classroom lessons seriously impairs pupils' right to school education following from Art. 2(1) in conjunction with Art. 7(1) GG. This is clearly shown by the educational deficits and their effects on the development of children's personality which, according to the expert third parties, stem from the repeated school closures that occurred since the start of the pandemic. 138

(a) [...] 139

From December 2020 to February 2021, schools were in effect completely closed for a total of 61 school days. Following this period, classroom lessons were partially resumed, particularly for primary school children, with considerable differences between the *Länder* regarding classroom lessons for secondary school pupils. [...] Millions of children and adolescents did not physically attend school in these four to five months. According to a statement given by the President of the German Teachers' Association (*Deutscher Lehrerverband*) in May 2021, 350 to 800 hours of classroom lessons were cancelled for each pupil since March 2020. This amounts to half a school year on average, although it must be noted that there are significant differences between the *Länder* (Federal Institute for Population Research, *Bundesinstitut für Bevölkerungsforschung*, Belastungen von Kindern, Jugendlichen und Eltern in der Corona-Pandemie, 2021, p. 8). 140

(b) The expert third parties also pointed out that in most cases classroom lessons were not replaced by digital lessons, but by assignments provided by teachers ([...]). [...] 141

(c) The pandemic-related cancellation of lessons led to significant reductions in learning time. Younger pupils saw greater reductions in learning time than older pupils. [...] 142

According to the experts' assessment, it must be assumed that cancelled classroom lessons have led to learning gaps, negative effects on subject-specific skill development and shortcomings in personality development ([...]). While the precise extent of these disadvantages is overall difficult to assess, the majority of teachers considered these educational deficits to be serious as early as December 2020. [...] Even school closures of eight weeks already result in measurable educational deficits (see the statement of DAKJ). Cancelled classroom lessons led to a reduction of teaching curricula to the core subjects, pupils forgetting their work ethics and the ability to organise as well as pupils losing the skill of coping with school stress. Yet one quarter of pupils considered that their learning outcomes had not been adversely affected; 36% to 52% of pupils stated that they also learned a lot in their subjects through distance learning (for an overall view, see the statement of DGfE). 143

(d) The expert third parties unanimously point out that schools are an important space for the socialisation of children and adolescents, which was no longer available when schools were closed. They emphasise that children and adolescents need social contacts, in particular for their psychosocial development. They develop social skills in interaction with others (see the statements of the Federal Parents' Council, BKJPP, BVÖGD, DGfE and ifo Institute). In particular, the experts stress that the cancellation of classroom lessons adversely affected children's group skills (see the statement of BVÖGD). Furthermore, the contact restrictions generally resulted in feelings of isolation and loneliness, including in children and adolescents, most of whom did not report such feelings before the pandemic (see the statement of BKJPP and Leopoldina, Kinder und Jugendliche in der Coronavirus-Pandemie, 21 June 2021, p. 11). Nevertheless, the experts also point out the positive effects of distance learning on digital literacy, independence and self-organisation skills of pupils. At the same time, the experts state that these positive effects are very limited given that the development of such skills also requires systematic and regular support, which cannot be provided to the necessary extent through distance learning (see the statements of BKJPP, DGfE and HIB). 144

(e) The expert third parties agree that learning gaps caused by the cancellation of classroom lessons were especially pronounced in children from socially disadvantaged backgrounds and in primary school children (see in particular the statements of the Federal Parents' Council, BKJPP, DAKJ, DGfE, HIB and KSB). 145

Schools in prosperous areas held more classroom lessons. After the second lockdown, final-year pupils intending to obtain the *Abitur* (higher education entrance qualifications) were taught almost entirely through classroom lessons, while only two-thirds of the curriculum was taught through classroom lessons for pupils seeking to obtain the intermediate school-leaving certificate (*mittlere Reife*) and just one-third for pupils seeking to obtain the lower school-leaving certificate (*Hauptschulabschluss*). Moreover, children from non-graduate households and pupils with low academic performance received far less online teaching and had less one-on-one contact with their teachers. The effectiveness of distance learning is also considered to be significantly lower for these groups. According to school principals, pupils are harder to reach the more socially disadvantaged pupils there are in a class (see the statement of DGfE). 146

The expert third parties agreed that the approximately three million primary school children were hit much harder by the prohibition of classroom lessons than pupils at secondary school (regarding this and the following aspects see the statements of DAKJ and DGfE). Especially primary school children need classroom lessons. It cannot be assumed that primary school children have already acquired the ability to learn independently, which is why the successful teaching of basic skills such as reading and writing very much hinges on their direct interaction with teachers. Distance learning, let alone learning solely based on worksheet assignments, therefore does not compensate for the cancellation of classroom lessons to the same extent for primary school children. 147

According to the experts, primary school children are also hit especially hard by school closures because the foundations for a long-term willingness to learn are laid in the early stages of education (regarding this and the following aspects see the statements of DAKJ and DGfE). Therefore, solid education at primary schools is a crucial element for successful educational outcomes. Any further acquisition of skills in later stages of education builds on the skills learned at primary school. The more education and development is fostered at this early stage, the better children's potential can be fulfilled. Consequently, learning gaps regarding the foundations to be taught in the first years of school can adversely affect children's entire school careers. Moreover, in the early stages of development, primary school children are more dependent on the space for interaction with their peers provided by classroom lessons, which enables them to acquire social skills by engaging with their peers. 148

(f) According to the experts, the extent of deficits in personality development and educational outcomes resulting from the cancellation of classroom lessons mainly depends, on the one hand, on the degree to which pupils are individually affected, their personal resilience, and the personal resources available to them, and, on the other hand, on the quality and quantity of supporting and accompanying measures (see the statements of DAKJ and DGfE as well as Leopoldina, Kinder und Jugendliche in der Coronavirus-Pandemie, 21 June 2021, p. 5). Deficits can be remedied through changes in curricula and in the assistance provided, systematic support measures, to be implemented as soon as possible, for example in the afternoons or during holidays, and psychosocial and special-needs care in particular for the hardest hit pupils (see the statements of BKJPP, DGfE and HIB). 149

(g) Finally, it is clear from the expert statements that in many cases educational outcomes were adversely affected by a deterioration in the well-being and family circumstances of pupils resulting from pandemic-related contact restrictions such as the cancellation of classroom lessons. 150

According to the experts, the general pandemic-related restrictions imposed [in addition to school-related measures] affect the quality of life and mental well-being of children and adolescents. There was also an increased risk of mental health issues and psychosomatic problems (see the statements of the German Medical Association, BKJPP, BVÖGD, DAKJ and HIB as well as Federal Institute for Population Research, Belastungen von Kindern, Jugendlichen und Eltern in der Corona-Pandemie, 2021, p. 30 f.). [...] 151

In part, the pandemic-related contact restrictions also placed a much greater overall burden on families, which increased the risks to children's welfare. Risks to children's welfare can in particular be identified in schools as spaces for state monitoring. Schools are the second most frequent source of reports regarding risks to children's welfare. It must therefore be assumed that the cancellation of classroom lessons led to significantly lower chances of early detection of such risks (see the statements of the German Medical Association, Federal Parents' Council, BKJPP, BVÖGD, DAKJ 152

and HIB as well as Federal Institute for Population Research, Belastungen von Kindern, Jugendlichen und Eltern in der Corona-Pandemie, 2021, p. 39). [...].

cc) At the time the Act was adopted, the serious interferences with pupils' right to school education had to be weighed against the interests in protecting the public from infection-related dangers to life and limb, which are exceptionally significant interests of the common good. These interests could be invoked as a basis for justifying not only the overall protection strategy to combat the pandemic, but also the individual measures that formed part of that strategy, such as the prohibition of classroom lessons. 153

(1) The complainants object that the contribution of school closures to the fight against the pandemic was minor. According to the complainants, this means that the serious interferences with the right to school education were from the outset disproportionate to the low significance for the common good of this measure. However, this objection is without merit. Given that the individual measures are part of an overall strategy to protect the population from danger to life and limb, and therefore complement one another, the significance for the common good of each individual measure can only be assessed when considering how the measure in question interacts with the other measures imposed by the "federal pandemic emergency brake". 154

(a) The Act was adopted in April 2021 amid highly volatile transmission dynamics. The virus spread exponentially. The number of COVID-19 patients requiring intensive care had increased considerably; there was reason to fear that many hospitals would have to switch to emergency mode, further postponing planned surgeries. At the same time, new virus variants spread rapidly, including variants that were more contagious and deadlier. Given the higher transmissibility of these variants, it had to be assumed that the increase in patients requiring intensive care would accelerate and that contact tracing would no longer be feasible in many areas once the incidence rates exceeded 100. [...] 155

(b) In this situation, it was crucial to curb infections as widely and swiftly as possible to protect the public from dangers to life and limb that would be caused if the virus spiralled out of control and the healthcare system therefore could no longer maintain its proper functioning. According to the experts, no scientific findings were available at the time that would have allowed to specifically assess the effects of individual measures (see the statements of DGEpi/GMDS, DGPI and HZI). By contrast, reliable findings did exist regarding the ways the virus was transmitted: through inhaling virus-containing droplets generated when persons in close proximity exhale, cough, talk, sing or sneeze, and through inhaling virus-containing aerosols in indoor settings. Thus, the measures taken were primarily aimed at considerably and effectively reducing social interactions at relevant places of contact – including in institutions such as schools – to disrupt the exponential spread of the virus as swiftly and reliably as possible. In this respect, the individual measures were elements of an overall protection strategy, and as such complemented one another, to protect the population from 156

dangers to life and limb, which constitutes an objective of the common good.

(2) With the prohibition of classroom lessons, the legislator therefore pursued exceptionally significant interests of the common good. 157

Health and life, which are protected under Art. 2(2) first sentence GG, are exceptionally significant legal interests (cf. BVerfGE 126, 112 <140>; established case-law). In view of the circumstances prevailing when the Act was adopted, there was an acute danger (*dringende Gefahr*) of serious impairment to these legal interests. The situation in April 2021 was marked by the exponential spread of the virus, the spread of new variants that were more contagious and deadlier, potentially rendering contact tracing unfeasible, and quickly rising numbers of COVID-19 patients in intensive care. In this situation, it had to be assumed that failure to act would lead to many people becoming severely ill and dying from COVID, and to intensive care units in many hospitals becoming overwhelmed, which would cause additional dangers to life and limb. The transmission dynamics, and the risk of losing control of the situation entirely, created an apparent need for urgent action to interrupt the exponential spread of the virus, not least so as to ensure that the success of the vaccination programme that had just been launched would not be jeopardised by new immune escape variants (see para. 155 f. above). 158

dd) Uncertainties regarding the threat posed by the COVID-19 pandemic, and the measures required to combat it, persisted both at the time the Act was adopted and during its entire period of application. Based thereon, the challenged prohibition of classroom lessons cannot be found to violate the constitutional requirement of appropriateness. The serious interference with the right to school education had to be weighed against exceptionally significant interests of the common good: the protection of the public from dangers to life and limb resulting from infection and the related protection of the healthcare system from being overwhelmed. These interests were capable of justifying the interference. The legislator has a duty to strike a balance between these conflicting interests, and it ultimately did so in a manner that was constitutional at the time. The protection strategy designed by the legislator did not one-sidedly give precedence to the common good, in this case the protection of life and limb. Rather, the adopted statutory framework contained several provisions that have this interest of the common good stand back behind the interests of the pupils affected by school closures (see (1) below). Moreover, the federal legislator could assume that the *Länder* would partially compensate for the cancellation of classroom lessons by implementing distance learning (see (2) below). The prohibition of classroom lessons also was not inappropriate on the grounds that there would have been less intrusive means for fighting the pandemic if the state had previously contributed to improving the data and information available (see (3) below) or had taken other precautions (see (4) below). Finally, the legislator limited the applicability of the challenged measures to a short period. The legislator thereby recognised that its balancing of conflicting interests was necessarily of a preliminary nature, reflecting the particularities of the underlying dangerous situation, namely one that persists for a long time while 159

being volatile in nature and laced with uncertainty (see (5) below).

(1) First of all, it must be taken into consideration that the legislator enacted provisions designed to strike a balance between individual interests and interests of the general public. 160

(a) Like other measures taken under the “federal pandemic emergency brake” framework, the scope of the school-related measures in question was limited from the outset. Classroom lessons were only prohibited in districts or cities where the seven-day-incidence rate exceeded the relevant threshold. Moreover, unlike other places of contact, which had to close when the incidence rate exceeded 100, schools were allowed to remain open – on condition that pupils and teachers got tested twice weekly and adequate sanitary and protective measures were complied with ([...]) – and only had to close completely when the incidence rate exceeded 165. The legislator thus took into account the special significance of classroom lessons for school education as an essential precondition for the development of pupils into self-reliant persons. Classroom lessons at school, with direct interaction between pupils and teachers, were only cancelled completely in situations where imposing further contact restrictions was regarded as indispensable to curb the spread of the virus ([...]). 161

(b) Moreover, the provisions adopted by the federal legislator authorised the *Länder* [...] to provide emergency childcare in schools “on the basis of criteria to be defined by them” [...]. This also contributed to the adequate balancing of the conflicting interests. In this respect, too, the federal legislator accorded more weight to the interest in school education than to the interest in controlling infections. [...] 162

(c) Furthermore, the severity of interference resulting from the prohibition of classroom lessons was mitigated by the fact that the *Länder* were allowed to fully exempt final-year classes and special needs schools from the prohibition ([...]). 163

(2) Another significant factor for assessing the reasonableness (*Zumutbarkeit*) of the prohibition of classroom lessons under constitutional law was that the implementation of distance learning, wherever possible, was sufficiently guaranteed despite the lack of competence of the Federation for schooling. 164

(a) In terms of infection control, distance learning is a safe means of mitigating the severity of the interference with the right to school education resulting from the cancellation of classroom lessons. It is true, however, that distance learning can only replace classroom lessons to a limited extent. The expert third parties agree that, because of the direct interaction between pupils and teachers, classroom lessons are especially conducive to the successful imparting of education and social skills on the basis of equal opportunities ([...]). Moreover, primary school children in particular need classroom lessons because basic skills such as reading and writing can only successfully be taught through direct interaction with teachers ([...]). Yet it is also clear from the statements submitted by the expert third parties that deficits in educational outcomes and learning gaps resulting from school closures can be reduced to 165

a considerable extent if distance learning takes place. According to the experts' assessments, at least certain abilities and knowledge can be successfully taught through digital learning, provided that good digital equipment is available to students and teachers and that teaching concepts are adapted to digital learning ([...]).

(b) However, as the Federation does not have legislative competence for schooling, the federal legislator could not by itself ensure that when classroom lessons are cancelled on the basis of federal legislation, distance learning ought to take place wherever possible; it is also not ascertainable that any agreements were concluded with the *Länder* in this respect ([...]). Still, the fact that the federal legislator could not itself ensure that the severity of interference resulting from the measures provided for under federal law was mitigated in a material respect does not render these measures unreasonable. It was not necessary that the federal legislator itself set out distinct guarantees [concerning distance learning as a mitigating instrument] in the law. Rather, the federal legislator could assume that the *Länder* would continue to provide distance learning – as they had already done in the past – if schools were closed on the basis of the “federal pandemic emergency brake”, in order to uphold their educational mandate following from Art. 7(1) GG (see (aa) below). In the individual case, the right to school education also entitles pupils to demand that distance learning be provided at their particular school if the school in question fails to offer any significant amount of distance learning arrangements in the absence of any major obstacles related to staff, factual resources or organisation (see (bb) below).

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(aa) In the event that classroom lessons are cancelled, Art. 7(1) GG requires the *Länder* to ensure that distance learning takes place wherever possible. It was therefore sufficiently guaranteed that serious impairments of the right to school education resulting from extended school closures were mitigated through distance learning, even where the lessons were cancelled on the basis of federal law.

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(α) Under Art. 7(1) GG, it is incumbent upon the state to guarantee that the school system affords all children and adolescents, in accordance with their abilities, educational opportunities suited to our society and to facilitate the development of their personality, and thus of their talents and aptitudes, with as few impediments as possible (cf. BVerfGE 34, 165 <182, 188 f.>; 45, 400 <72>; 98, 218 <257 f.>).

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In general, this state educational mandate does not give rise to positive obligations of the *Länder*, which have exclusive legislative competence for schooling, to design the school system in a specific way. The state has broad leeway when designing schooling (see para. 54 f. above). Yet the state falls short of the educational mandate set out in the Constitution if it fails to meet the minimum educational standards necessary for pupils' personality development. In that situation, the *Länder* have an objective duty under Art. 7(1) GG to take active steps to uphold these minimum standards (see para. 57 above on the individual right to have the state uphold the minimum educational standards at school following from Art. 2(1) in conjunction with Art. 7(1) GG).

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(β) In the present case, such a duty was incumbent upon the *Länder* given that classroom lessons were cancelled over a longer period of time due to the pandemic. Art. 7(1) GG required the *Länder* to replace cancelled classroom lessons with distance learning wherever possible, including during the applicability [of the challenged provisions]. 170

School lessons, where teaching and learning takes place in interaction between teachers and pupils, are a core element of the state mandate to guarantee school education under Art. 7(1) GG. It would clearly fall short of the minimum educational standards necessary for pupils' personality development if no lessons took place at all over a longer period of time. This does not rule out the prohibition of classroom lessons as a permissible infection control measure where it serves the overriding interest of protecting the public from dangers to life and limb, as in the present case. However, in this scenario, Art. 7(1) GG imposes an obligation on the *Länder* to make use of the remaining options for upholding minimum educational standards. These options primarily include distance learning. Distance learning is safe in terms of infection control as it does not result in additional social contacts. It is true that distance learning can only compensate for the cancellation of classroom lessons to a limited extent, especially in respect of primary school children, since the successful teaching of basic skills such as reading and writing requires direct and personal interaction with teachers (see the statements of DAKJ and DGfE). However, the experts also submitted that in respect of secondary school children, distance learning is an essential tool to prevent, at least in part, deficits in educational outcomes and learning gaps resulting from school closures (see the statements of BKJPP and DAKJ as well as Leopoldina, Kinder und Jugendliche in der Coronavirus-Pandemie, 21 June 2021, p. 8 f.). Despite the leeway to design afforded to the *Länder* in exercising their educational mandate under Art. 7(1) GG, it was not up to the *Länder* to freely decide whether cancelled classroom lessons should be replaced by distance learning or not. As a minimum requirement of school education, it had to be ensured that some form of lessons took place within the limits set by the need for infection control. Fulfilling this constitutional duty was incumbent upon the *Länder*, regardless of whether the prohibition of classroom lessons was imposed by the *Länder* or the Federation. 171

(γ) When interpreting provisions of international law that recognise a right to education (see para. 67 ff. above), several human rights committees also emphasise the importance of distance learning if classroom lessons cannot be provided. The Committee on Economic, Social and Cultural Rights calls for access to such educational programmes to be as equal as possible ("accessibility": cf. General Comment No. 13, 8 December 1999, E/C.12/1999/10, § 6; see also Report of the Special Rapporteur on the Right to Education, 30 June 2020, Human Rights Council, 45th session, A/HRC/44/39, §§ 22 ff.). In a statement on the COVID-19 pandemic, the Committee highlighted that online learning programmes are important to mitigate the impact of school closures on the right to education (cf. Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease <COVID-19> pandemic and 172

economic, social and cultural rights, 17 April 2020, E/C.12/2020/1, §§ 7, 18). Likewise, the Committee on the Rights of the Child emphasises with regard to the COVID-19 pandemic that digital technologies can enable distance learning to reach children who cannot be physically present in school (cf. General Comment No. 25, 2 March 2021, CRC/C/GC/25, § 102; regarding distance learning see also Committee on the Rights of the Child, COVID-19 Statement, 8 April 2020, § 3; on the importance of the General Comments cf. BVerfGE 142, 313 <346 para. 90>; 151, 1 <29 para. 65> with further references).

(bb) Another factor contributing to the reasonableness of the challenged measure was that the objective duty of the *Länder* to guarantee distance learning to replace cancelled classroom lessons under Art. 7(1) GG was matched by a corresponding right of individual pupils. Based on their constitutional right to school education, individual pupils were entitled to demand that the state provide distance learning if their school failed to arrange a significant amount of this type of learning programme. 173

The right to school education following from Art. 2(1) in conjunction with Art. 7(1) GG entitles pupils to demand that the minimum educational standards necessary for their personality development be upheld at state schools; the *Länder* can neither deny this right on the grounds that they have leeway in exercising their educational mandate under Art. 7(1) GG nor on the grounds that they want to use scarce public resources for other state tasks (see para. 57 above). As set out above, under the special circumstances of the pandemic, the minimum educational standards required that arrangements for distance learning be put in place as otherwise no schooling would have been provided at all over a longer period of time. Insofar as individual state schools did not arrange any significant amount of distance learning to replace classroom lessons, the affected pupils had a right to demand that suitable steps be taken in this regard, insofar as there were no major obstacles to implementing distance learning in terms of staff, factual resources or organisation at that particular school (regarding inclusive schooling of pupils with disabilities cf. BVerfGE 96, 288 <305 ff.>). 174

(3) At least at the time when the federal pandemic emergency brake was adopted, the legislator was not precluded from prohibiting classroom lessons on the grounds that the resulting burdens on pupils might have been less severe if more information had been available at an earlier stage on how classroom lessons affect the development of the pandemic. 175

(a) A pandemic results in a prolonged situation of danger to life and limb that is volatile and involves a lot of uncertainty. Curbing the spread of infections requires continued and recurring measures. In this scenario, the reasonableness of measures taken to avert such dangers in the further course of the pandemic may depend on whether and to what extent the resulting burdens could have been avoided if the state had taken more timely action. Where the state fails to take timely, reasonable and evidently imperative action by which foreseeable future burdens arising in the course 176

of a situation of prolonged danger could have been avoided, the interest of affected persons in being spared intrusive measures may be accorded increasingly more weight in the balancing against conflicting interests of the common good.

This may be the case if the state continues to take [intrusive] action to combat the pandemic on the grounds that uncertainties regarding the effectiveness of less intrusive measures persist yet the data needed to resolve such uncertainties could not be collected because the state itself failed to enact legal provisions authorising such data collection. In general, the longer intrusive measures are in place, the less permissible it is for the legislator to base its actions on unverified causality assumptions when it would have been possible for the legislator to obtain more reliable assessments. The longer intrusive measures are in place, the more conclusive the underlying findings must be to justify the measures (cf. BVerfGE 152, 68 <119 f. para. 134>). This requires that the legislator continue to examine the assumed causalities even after the law has been adopted and ensure that they are further investigated (cf. also BVerfGE 110, 141 <166>). If it is still not possible to resolve remaining uncertainties because researchers are not able to improve the available data, this does not call into question the constitutionality of further legislative action. Yet a different conclusion may be merited if new scientific findings, which would allow a better assessment of the effectiveness of less intrusive measures as alternatives means for averting the danger in question, could not be obtained because the state failed to create a statutory basis authorising data collection in a domain controlled by it.

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However, even in that scenario, the weight of other conflicting interests must be taken into consideration. The state may not simply tolerate great dangers to life and limb because it did not make enough efforts to identify alternative measures through which the danger in question could have been averted in a manner that is more accommodating of freedom. By contrast, the mere argument that such alternative albeit more freedom-friendly measures would entail a greater financial burden for the public may be accorded less weight in the balancing the longer the state fails to obtain more reliable assessments regarding the effectiveness of these alternative strategies despite having opportunities to do so.

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(b) In the present case, there is no evidence that the state failed to make sufficient efforts with regard to obtaining knowledge, at least not in a manner that would alter the assessment under constitutional law of whether the prohibition of classroom lessons was reasonable. In any case, the effects of the challenged provisions were limited to a very short time period of just over two months. From the outset, any further investigation of the underlying causalities cannot realistically have any bearing on the challenged provisions, but could only inform potential future restrictions of classroom lessons, which have not been imposed so far and which are not under review in the present proceedings.

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Nevertheless, when the Act was adopted, the situation of danger had already persisted for over a year, and before the Act was adopted [by the federal legislator], re-

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strictions of classroom lessons spanning several months had already been imposed by *Land* legislation (see paras. 6 f. and 139 above). To a certain extent, it would therefore already have been possible to investigate the significance of classroom lessons for the spread of the virus. According to the statements submitted by the expert third parties, it appears that data providing insights on how infection prevention and control measures in school settings could be designed in a manner more accommodating of fundamental rights had not been collected, especially not in schools (see the statements of the German Medical Association, Charité, CODAG, DGKH, DGPI and RKI; see para. 128 above). [...] Providing for better means of data analysis in this context also depends on the cooperation of state authorities.

However, this is not sufficient to establish a failure on the part of the state that could have a bearing on the constitutional assessment of reasonableness in relation to the prohibition of classroom lessons applicable from 23 April to 30 June 2021. Firstly, the legislator took responsibility for ensuring that efforts were made to improve the data available, to which the state must contribute. Pursuant to § 5(9) first sentence IfSG, the Federal Ministry of Health is to commission an external evaluation regarding the effects of the protective measures taken in the context of an epidemic situation of national significance. This also includes the measures [taken under the federal pandemic emergency brake]. This evaluation is to analyse the effectiveness of the protective measures in order to draw conclusions as to what changes to the Protection Against Infection Act are necessary and how to proceed in potential future pandemics (cf. BTDrucks 19/26545, p. 17 f.). In the present proceedings, the Federal Government stated that the Robert Koch Institute commissioned a study on the effectiveness of protective measures taken to combat the pandemic in 2020, which is subsidised by the Federal Ministry of Health and also concerns the effectiveness of school-related measures (the “Stop COVID” study).

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Secondly, even in view of the volatile development of the pandemic, the state must be given appropriate time to discern possible options for resolving uncertainties and to take the necessary action. [...] In any case, the Federation did not remain passive (see para. 181 above).

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(4) Ultimately, the reasonableness of the prohibition of classroom lessons cannot be challenged on the grounds that infection control measures at school, a domain controlled by the state, could have been designed in ways that would have been more accommodating of fundamental rights if the state had taken more timely precautions.

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(a) [The challenged prohibition forms part of] recurring measures that restrict fundamental rights for the purposes of averting dangers that stem from causes that persist for a long time, in this case the COVID-19 pandemic. When assessing the reasonableness of such measures under constitutional law, it must be examined whether the state, in a domain controlled by it, took timely, reasonable and evidently imperative action in order to be able to, over time, design such measures in ways that are more accommodating of fundamental rights than they were in an early stage of the

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danger. Failure to take such action does not change the fact that other less intrusive means for countering the danger are then not actually available in the further course of the danger situation. However, failure to take action may have a bearing on the balancing of interests – just like in cases where the state takes insufficient steps to improve the data available (see para. 176 ff. above) – given that the interest of affected persons in being spared such intrusive measures may then be accorded more weight in the balancing against conflicting interests of the common good.

(b) Yet such failure on the part of the state, which would alter the assessment under constitutional law of whether the prohibition of classroom lessons was reasonable, cannot be established here. 185

(aa) Sensible infection control measures at school that are more accommodating of fundamental rights and should be considered in the further course of the pandemic are, for instance, improved ventilation in the classroom or the option of using bigger venues to ensure physical distancing. Depending on infection rates, such measures could prevent further school closures or raise the threshold that triggers school closures. Other evidently imperative measures are to strengthen the digitisation of teaching and learning and to develop corresponding pedagogical concepts in order to offer better and more comprehensive distance learning, thereby avoiding, as far as possible, educational deficits and mitigating the severity of interference in the event of future school closures. 186

Yet it is not evident that measures such as those described above would already have been feasible at all schools when the Act was adopted in April 2021. All of these measures require coordination, planning and implementation efforts with varying degrees of complexity. 187

(bb) Prior to the “federal pandemic emergency brake”, the Federation was in principle already authorised under Art. 104c first sentence GG to [provide financial assistance] ensuring that the public resources necessary for planning and implementing measures were available [at the level of the *Länder*]. Yet the Federation did not fail to take action in this regard. 188

Even before the “federal pandemic emergency brake” was adopted, the Federation provided a total of EUR 1.5 billion in financial assistance to the *Länder* in the framework of the “Digital Compact for Schools” for the purpose of improving the IT environment for distance learning. In July 2020, the programme “COVID Assistance I” was adopted to provide digital devices to pupils. The purpose of the programme was to support schools in ensuring that while restrictions of classroom lessons were in place – until regular lessons could be resumed – the highest possible proportion of pupils are equipped with mobile devices (laptops, notebooks and tablets, excluding smartphones) for digital learning at home. Moreover, the “Digital Compact for Schools” served to provide schools with the necessary equipment to create professional online learning programmes ([...]). In November 2020, the programme “COVID Assistance II”, and most recently, in January 2021, the programme “COVID Assistance III” was 189

adopted to support the administration of information technology at schools and to ensure the swift expansion of digital teaching and learning infrastructures. The additional assistance was designed to further improve the development of digital teaching, learning and communication at school.

The Federation also provided financial support for the installation of air purifiers in schools. [...]

(c) If, in the further course of the pandemic, the state considers new restrictions of schooling, the assessment of whether they are reasonable under constitutional law will inter alia depend on whether sensible precautions, such as improved digitisation of teaching and learning, have been taken so that future restrictions of classroom lessons can be designed in ways that are more accommodating of fundamental rights. Insofar as they have legislative competence, both the Federation and the *Länder* are required to take such precautions.

(5) Finally, the legislator limited the challenged measures to a short time period. In line with constitutional law, this sufficiently reflected the fact that the balancing of interests undertaken by the legislator, and thus the assessment of constitutionality, was necessarily of a preliminary nature due to the transmission dynamics and the vaccination programme that was being launched at the time. Specifically, the preliminary nature of the balancing extended to the assessment regarding the significance for the common good accorded to the prohibition of classroom lessons and the severity of interference resulting therefrom.

(a) The constitutionality of a provision can initially only be assessed from an *ex ante* perspective in consideration of the information and evidence available (cf. Federal Constitutional Court, Order of the First Senate of 8 July 2021 - 1 BvR 2237/14 inter alia -, para. 154). When adopting the challenged provisions, the legislator could therefore assume that measures restricting social contacts such as the prohibition of classroom lessons were especially urgent and significant in view of the transmission dynamics, the spread of more dangerous virus variants and the imminent risk of overwhelming the healthcare system (see para. 155 f. above). Yet the significance for the common good accorded to the measures was, from the outset, subject to a changing assessment pending further developments.

(aa) Firstly, this applies to the question whether and when the measures adopted under the “federal pandemic emergency brake” framework would succeed in interrupting the surge in case numbers and what role the spread of new virus variants would play in this regard.

(bb) The preliminary nature of the legislator’s constitutional assessment stems in particular from the fact that the vaccination programme was being launched at the time. The legislator had to assume that a new balancing of the conflicting interests would have to be conducted in the further course of the pandemic because the significance of the challenged measures for protecting life and limb would diminish once

a larger proportion of the population had been vaccinated, and even more so once everyone who is medically eligible had been offered the vaccine, than it was when the Act was adopted. This holds true especially for the prohibition of classroom lessons. According to the current assessment of the experts, unvaccinated children of school age – unlike unvaccinated adults – rarely display symptoms when they are infected and usually only become severely ill if they have underlying medical conditions (see in particular the statements of the German Medical Association, BVÖGD, Charité, DGEpi/GMDS, DGKH, HZI and RKI). Therefore, the legislator had to expect that the prohibition of classroom lessons would gradually lose its justification once all eligible persons had been offered the vaccine, unless there were unforeseeable developments such as an increased risk for children arising from novel variants. This applies all the more insofar as the prohibition of classroom lessons affects primary schools. This is because pupils at primary schools are hit especially hard as their educational outcomes hinge on direct interaction with teachers, with learning gaps in this early stage of education potentially affecting their entire school career (see paras. 147 f., 165, 171 above).

(cc) The legislator's assessment of the severity of interference with the right to school education could also only be preliminary in nature. The severity of interference intensifies with each further cancellation of classroom lessons; this applies all the more to primary schools since that is where the foundations for a successful school career are laid (see para. 148 above). It therefore had to be expected that further school closures could result in interferences of such severity that the initial balancing of conflicting interests conducted by the legislator would no longer be tenable.

(b) Yet where the future constitutionality of an intrusive measure is subject to particular reservations given the volatility of further developments, as is the case here, it is more likely that such a measure may be accepted as permissible under constitutional law the more certain it is that the measure will actually cease to apply if it is rendered unconstitutional by subsequent developments. In the present case, the federal legislator limited the application of the "federal pandemic emergency brake" to a short time period, thus providing for a particularly effective procedural safeguard to ensure that the measures do not apply for longer than would be constitutional.

When the legislator adopts a measure on an uncertain factual and prognostic basis, it is in any case required to monitor further developments; it is also required to amend the law if there is reason to fear that the measure could gradually become unconstitutional due to changed factual circumstances or changes in the information available (cf. BVerfGE 56, 54 <78 ff.>; 110, 141 <158>). Yet limiting the applicability of the law to a specific time period from the outset, as opposed to mere monitoring, is usually a far better way to ensure that the intrusive measure is lifted as soon as it is no longer justified (cf. already Federal Constitutional Court, Order of the Second Chamber of the First Senate of 10 April 2020 - 1 BvQ 28/20 -, para. 14 and Order of the First Chamber of the First Senate of 13 May 2020 - 1 BvR 1021/20 -, para. 10). In this scenario, the measure can only be extended in a new legislative process, which gives

effect to openness and transparency and ensures that the new factual circumstances are comprehensively examined and another weighing of all relevant aspects is conducted (cf. BVerfGE 139, 148 <176 f. para. 55>; 143, 246 <343 para. 274 f.>); if the legislator does not pass new legislation, the provisions automatically cease to apply.

In light of the above, the limited duration of the federal pandemic emergency brake was an essential element in ensuring that the serious interferences with the right to school education brought about by the cancellation of classroom lessons in case of high incidence rates were still reasonable under constitutional law. For the reasons set out above, it was evident that the prohibition of classroom lessons would no longer be imposed once everyone eligible to get vaccinated had been offered the vaccine.

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II.

The prohibition of classroom lessons [...] was compatible with the right of complainant no. 1 in proceedings 1 BvR 1069/21 under Art. 6(2) first sentence GG to freely determine her son's education.

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The complainant states that she chose a private school for her son because she found its educational concept convincing. Her son's school puts special emphasis on fostering intense dialogue between pupils and teachers and interaction among pupils. She claims that the prohibition of classroom lessons disproportionately impairs her parental right to freely determine her son's education protected by Art. 6(2) first sentence GG.

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This is, however, not the case. It is true that Art. 6(2) first sentence GG affords parents a right to choose the type of school their children attend (cf. BVerfGE 34, 165 <184>; 45, 400 <415 f.>; see para. 53 f. above). This right – which in this case was exercised on the basis of contractual relations with the school under private law– was indeed impaired by the cancellation of classroom lessons imposed by the state. However, the requirements for justifying this interference cannot be stricter than those applicable to the interference with pupils' right to school education following from Art. 2(1) in conjunction with Art. 7(1) GG, which serves to foster pupils' personality development. Therefore, the school closures in question were also compatible with Art. 6(2) first sentence GG.

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III.

The prohibition of classroom lessons pursuant to § 28b(3) second and third sentence IfSG also did not violate the right to family life of the parents who lodged constitutional complaints.

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1. Art. 6(1) GG guarantees parents the right to plan and fulfil their family life according to their own wishes and to decide, in the context of their responsibility for raising their children, whether and at what development stage the children are primarily cared for by one parent alone, by both parents together or by third parties (cf. BVer-

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fGE 99, 216 <231>; 130, 240 <251>). The state is required to respect the shape given to family life by the family members themselves on the basis of autonomy and independence (cf. BVerfGE 61, 319 <346 f.>; 99, 216 <231>; 107, 27 <53>).

In addition, the guarantee of Art. 6(1) GG gives rise to a duty of the state to support and promote families, which goes beyond the general duty of protection arising from fundamental rights. It is incumbent upon the state to support and promote parents through suitable economic measures when they care for and raise children (cf. BVerfGE 130, 240 <252>). The state is also required to set the framework for reconciling work and family life, ensuring that performing the task of raising children within the family does not lead to disadvantages at work (cf. BVerfGE 88, 203 <260>; 97, 332 <348>; 121, 241 <264>). The state thereby also satisfies the requirement to promote equal rights for women in the workplace following from Art. 3(2) second sentence GG (cf. BVerfGE 97, 332 <347 f.>). It is true that no specific claims to any particular state measures can be derived from the requirement to protect and promote families under Art. 6(1) GG (regarding financial benefits cf. BVerfGE 130, 240 <252> with further references). The legislator must also take into account other interests of the common good besides family support; it is afforded leeway to design when satisfying the mandate to protect and promote families. However, this constitutional mandate is violated if family support provided by the state is evidently inappropriate (cf. BVerfGE 82, 60 <81 f.>; 87, 1 <35 f.>).

2. In light of the above, parents of school-age children could not invoke Art. 6(1) GG in its dimension as a defensive right against state interference to challenge the prohibition of classroom lessons. From the outset, the challenged measures did not interfere with the scope of protection of the right to family life.

a) Firstly, this holds true insofar as the prohibition of classroom lessons directly led to the cancellation of childcare and support that is usually provided during classes for pupils in need thereof. This form of childcare and support is not covered by the scope of protection of Art. 6(1) GG given that it is not based on a free decision by parents to let others take care of their children. Rather, given that school attendance is mandatory in Germany, children are required to attend classroom lessons. Parents therefore can decide neither whether they want to make use of the care and support provided at school, nor can they determine the time and extent of such care.

[...]

b) Secondly, parents could also not invoke Art. 6(1) GG in its dimension as right against state interference on the grounds that the cancellation of classroom lessons burdened them with having to provide additional childcare and support or on the grounds that it put additional strains on family life and their work. It is true that these burdens were heavy (see para. 212 ff. below), and that they concerned matters falling within the scope of protection of Art. 6(1) GG. The burdens resulting from the cancellation of classroom lessons affected parents' ability to shape their family life and their work according to their own wishes. However, the burdens arising from the [...] pro-

hibition of classroom lessons do not result from interferences, not even indirect and factual ones, with the right to family life.

A legal provision constitutes an indirect and factual fundamental rights interference if the objectives pursued and its resulting indirect and factual effects are functionally equivalent to an interference, that is if the indirect effects are not mere unintended side effects of a provision (cf. BVerfGE 148, 40 <51 para. 28> with further references). This is not the case here. The prohibition of classroom lessons served the sole purpose of curbing the spread of the virus; it was not aimed at effecting changes to the family life of parents with school-age children or their working life. The adverse effects of the measure are simply unintended side effects. [...]

3. The parents who lodged constitutional complaints also could not assert a violation of the state's mandate to protect and promote families and women following from Art. 6(1) GG and Art. 3(2) second sentence GG. It is true that the prohibition of classroom lessons placed heavy burdens on parents of school-age children (see a) below). In view of this measure, it is incumbent upon the state to provide support to families so as to compensate for these adverse effects (see b) below). However, the state sufficiently satisfied this mandate by providing for various support measures (see c) below).

a) With regard to the general consequences arising from the cancellation of classroom lessons for parents of school-age children, the expert third parties point out that parents had to take on many additional tasks relating to the education of their children which are usually performed by schools. Over one third of parents reported in various studies that they had more arguments with their children, reflecting the burdens borne by parents as they had to provide support to their children at home. [...] According to the Federal Institute for Population Research, the additional time mothers with children under 16 had to spend on domestic and family work during the first lockdown in spring 2020 amounted to 1.3 hours per day on average compared to what they spent on these tasks before the pandemic. For fathers, time spent on these tasks even increased by 2.3 hours per day ([...]). In addition, the pandemic led to changes in employment conditions. These ranged from working from home to furlough schemes and job losses. While working from home meant that parents no longer had to commute and that they benefitted from more flexible working hours to some extent, thus alleviating their burden, the lack of childcare and the organisation of home schooling, which often had to happen at the same time as work, also led to major conflicts between work and family life according to several expert third parties (see the statements of the German Medical Association, the Federal Parents' Council and DAKJ).

Parents of pupils in need of childcare were hit especially hard. In view of mandatory school attendance, these parents had not developed any other childcare strategy before the pandemic. They were also not able to establish a stable childcare system outside of school because of the frequent switches between the cancellation of classroom lessons, hybrid learning and regular classroom lessons. In many cases, grand-

parents could not be asked to take care of children given the risk of infection in the context of the pandemic. Moreover, primary school children needed higher levels of care, which made working from home considerably more difficult (see the statements of the Federal Parents' Council, DAKJ and DGfE).

According to the experts, while fathers saw a bigger increase in time spent on family work, mothers provided the greatest share of parental learning support overall given that they shoulder a considerably larger proportion of domestic and family work. Thus, a significantly greater share of mothers than fathers stated in surveys that they had to reduce their working hours in order to take care of their children (Federal Institute for Population Research, *Belastungen von Kindern, Jugendlichen und Eltern in der Corona-Pandemie*, 2021, p. 51 ff.). 214

The experts also highlight that school closures placed a heavy burden on single parents because they faced especially large childcare gaps. [...] According to the expert third parties, another group hit especially hard by school closures were parents who, due to their limited knowledge of German or because of their own gaps in education, had difficulties supporting their children with home schooling (statements of DGfE and KSB). Another factor aggravating the burden were cramped living conditions [...]. 215

b) The mandate to support and promote families and women laid down in Art. 6(1) GG and Art. 3(2) second sentence GG imposes a duty on the state to offset the adverse effects of pandemic-related school closures on families and on parental participation in the workplace by taking support measures. This does not entitle individual parents of school-age children to demand that the state take any particular measure; yet it would be evidently inappropriate if the state provided for no support measures at all to mitigate the burdens on family life and on parents' work resulting from the school closures imposed since the start of the pandemic. What is decisive in this respect is, firstly, the weight of these burdens and the fact that they arose because of state action rather than social circumstances. Above all, it is the protection of legitimate expectations following from the rule of law that requires the state to help parents of school-age children cope with the consequences of the cancellation of classroom lessons. Parents were unable to make timely provision for the possibility that schools would no longer be able to fulfil the tasks they had previously performed. [...] 216

c) Yet overall, the adverse effects on family life and work for parents with school-age children caused by the prohibition of classroom lessons were mitigated to such an extent that the response by the state, in terms of family support, cannot be considered clearly inappropriate (cf. BVerfGE 82, 60 <81 f.>; 87, 1 <35 f.>). 217

aa) Firstly, the *Länder* [...] were authorised to establish emergency childcare in schools. [...] 218

bb) In order to protect parents who could not work because they had to take care of their children from loss of income, the Protection Against Infection Act was amended 219

[...] with effect from 4 May 2021. In its amended version, parents were entitled to claim compensation from the state if they were affected by school closures brought about by the “federal pandemic emergency brake”. [...]

cc) Moreover, sick pay (lost income due to providing care for sick children) for parents with statutory health insurance was extended to cases where parents had to care for children because schools were closed or mandatory school attendance was lifted ([...]); [...]. At the same time, the number of days for which sick pay can be claimed to care for sick children was raised for the 2021 period [...]. 220

Overall, these measures constitute an appropriate state response to the adverse effects on family life and the working life of parents of school-age children resulting from the cancellation of classroom lessons. 221

D.

The decision was unanimous. 222

Harbarth

Paulus

Baer

Britz

Ott

Christ

Radtko

Härtel

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