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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ELIEZER WILLIAMS, a minor, by Sweetie Williams, his guardian ad litem, *et al.*, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

STATE OF CALIFORNIA, DELAINE EASTIN, State Superintendent of Public Instruction, STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION,

Defendants.

No. 312236

PLAINTIFFS' OPPOSITION TO DEFENDANT STATE OF CALIFORNIA'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO SECOND CAUSE OF ACTION IN FIRST AMENDED COMPLAINT

Hearing:	June 19, 2003
Time:	3:30 p.m.
Department:	20, Hall of Justice
Judge:	Hon. Peter J. Busch
Date Action Filed:	May 17, 2000
Trial Date:	August 30, 2004

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INTRODUCTION

It has long been the law in California that constitutional provisions are presumed to be self-executing. Rather than overcoming this presumption, the State's motion simply ignores it. Rather than citing a single California appellate decision that affirms its position, the State cites cases on different issues. The State does not analyze the history of California decisions that have been as protective as any state of the importance of the constitutional right to an education. The State ignores the decisions of other states whose comparable constitutional provisions have been construed to provide judicial enforcement for a substantive right. In short, the State provides nothing to carry its burden. The State argues that under Article IX, sections 1 and 5, the State need only guarantee that a system of schooling exists; and that so long as the schools charge no fees, there is no right to enforce the guarantee, however atrocious are the instructional conditions of the schools in that system. This proposition is impossible to square with California's cases on public education or with decisions in other states.

A claim relying on the "common schools" clause for a substantive right to education is not new to California courts. In *Serrano*, the Supreme Court considered such a claim and disposed of it, not as not-self-executing, but because Article IX section 5, read consistently with section 6, did not cover the system of school finance. *See Serrano v. Priest* ("*Serrano I*"), 5 Cal. 3d 584, 595-96 (1971). Here, we argue that section 5 read consistently with section 1 does support an enforceable right. In *Butt*, the Supreme Court declined to reach the section 5 claim—again without holding such a claim nonactionable—because of the holding that the equal protection theory disposed of the issues on the merits necessary to the ruling. *See Butt v. State*, 4 Cal. 4th 668, 692 n.20 (1992).

The supreme courts of other states with constitutional language indistinguishable from California's have held that there is a substantive, judicially enforceable entitlement to a quality education. This Court should follow the decisions from those states, in light of California's own considerable jurisprudence confirming the preeminent position of education in our state's constitutional scheme, and find that California recognizes a substantive, actionable right to an education.

Plaintiffs have more than satisfied our minimal obligation to plead facts sufficient to ground a cause of action for violation of the substantive entitlement to education. The First Amended Complaint alleges horrifying conditions in California public schools: students lack "trained teachers, necessary educational supplies, classrooms, even seats in classrooms, and facilities that meet basic health and safety standards." (FAC ¶ 1.) They are asked "to learn without books and sometimes without any teachers" and are forced to attend "schools that lack functioning heating or air conditioning systems, that lack sufficient numbers of functioning toilets, and that are infested with vermin, including rats, mice, and cockroaches." (*Id.*)

I. ARTICLE IX, SECTION 5, READ IN CONJUNCTION WITH ARTICLE IX, SECTION 1 IS SELF EXECUTING AND FORMS A PROPER BASIS FOR PLAINTIFFS' SECOND CAUSE OF ACTION.

The State utterly fails to acknowledge the presumption, long established in California case law, that a constitutional provision will be given effect, without legislation "unless it clearly appears that such was not intended." *Winchester v. Howard*, 136 Cal. 432, 440 (1902). Indeed, courts typically take for granted that constitutional provisions establishing fundamental rights are self-executing—such provisions would be meaningless otherwise. For example, the court in *In re Shute*, 58 Cal. App. 3d 543, 550 (1976) held that "[t]he right to a speedy trial is a fundamental right.... The constitutional provision [establishing that right], of course, is self-executing and requires no specific legislation to effectuate it."

Instead of addressing this presumption, the State presents a red herring – a claim that Article IX, section 1, analyzed alone, is not self-executing. Whether or not section 1 provides a basis for a cause of action *on its own* is not a question raised in this action, because Plaintiffs' complaint states the second cause of action *jointly* under Article IX, sections 1 and 5. (FAC ¶¶ 301-302.) Such a pleading is entirely appropriate, as California courts have already held that Article IX, sections 1 and 5 *together* provide the basis for California students' fundamental right to education. *See Slayton v. Pomona Unified Sch. Dist.*, 161 Cal. App. 3d 538, 548 (1984) ("California has extended the right to an education by virtue of two constitutional provisions, one calling for legislative encouragement of education (Cal. Const., art. IX, § 1) and the other requiring the Legislature to create a system of 'free schools' in each district of the state (Cal. Const., art. IX, § 5)."); *see also Hartzell v. Connell*, 35 Cal.

3d 899, 911 (1984) (analyzing sections 1 and 5 together); *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1134 (1999) (Sections 1 and 5 "declare[] the Legislature's preeminent role in encouraging education in this state, as well as its fundamental obligation to establish a system of public schools...."); *Compton Cmty. Coll. Fed'n of Teachers v. Compton Cmty. Coll. Dist.*, 165 Cal. App. 3d 82, 92 (1985) ("The duty begins with the California Constitution which makes education one of the highest priorities of state and local government. (Cal. Const., art. IX, §§ 1, 5...)"); *Myers v. Arcata Union High Sch. Dist.*, 269 Cal. App. 2d 549, 556 (1969) ("The California Legislature has the constitutional duty and power to maintain a system of free public education in this state. (Cal. Const., art. IX, §§ 1, 5.)").

Just as the California Constitution includes two separate equal protection clauses that together form the basis for Californians' constitutional equal protection guarantee, the California Constitution includes two separate education clauses that together form the basis for Californians' fundamental right to education. *See* Cal. Const., art. I , § 7; *id.* art. IV, § 16; *see also Butt v. State*, 4 Cal. 4th 668, 678-79 (1992) (noting that "the equal protection guaranties of the California Constitution (art. I, § 7, subds. (a), (b); art. IV, § 16, subd. (a)) require State intervention to ensure that fiscal problems do not deprive a local district's students of basic educational equality").

The State's motion ignores the dual basis for Californians' right to education and, worse, attempts to read out of section 5 entirely any significance to California courts' decisions that education is a fundamental right. (*See* State MPA at 2. ("This provision [section 5] does nothing more than prohibit the charging of fees for participation in educational activities.")) The State's misinterpretation cannot be squared either with the *Slayton* line of cases or with the text of section 5 itself. Far from simply a prohibition on school fees, section 5 of the California Constitution guarantees "a system of common schools." Cal. Const., art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district...in every year, after the first year in which a school has been established."). The State's own cases make clear the importance of the guarantee of a "system of common schools" independent of the separate guarantee that schooling be provided without charge. *See Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1136 (1999) ("The concept of a 'common' school is linked directly to

that of a 'free school,' which the Constitution mandates must be 'kept up and supported' in each district for a prescribed annual duration."); *id.* at 1137 ("[T]he term 'system' has come to import 'unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the state.'") (quoting *Serrano v. Priest*, 5 Cal. 3d 585, 595 (1971)).

Even if the plain text of section 5 did not refer to a substantive education right in addition to a protection against the charging of fees for schooling, the State's concession that Article IX, section 1 provides a basis for concluding that education is a fundamental right is fatal to its argument. The State acknowledges that "[t]his provision [section 1] no doubt establishes that education is important in California." (State MPA at 6.) Given the *Slayton* holding that sections 1 and 5 together "extend[] the right to an education" and the State's concession that section 1 alone "establishes that education is important," a cause of action concerning substantive education rights plainly can be stated in California. *Slayton v. Pomona Unified Sch. Dist.*, 161 Cal. App. 3d at 548.

Finally, the State made no argument, because it cannot, that Article IX, section 5, is not self-executing. Decision after decision from California courts make clear that Article IX, section 5, is self-executing. *See, e.g., Hartzell v. Connell*, 35 Cal. 3d 899 (1984) (holding that the imposition of fees for participation by students in extracurricular music and sports activities violated section 5); *Salazar v. Eastin*, 9 Cal. 4th 836, 860 (1995) (holding that section 5 was not violated in challenge concerning a state statute on school transportation fees); *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 263-65 (1992) (holding that state statute permitting school districts to charge transportation fees did not violate section 5); *California Ass'n for Safety Educ. v. Brown*, 30 Cal. App. 4th 1264, 1280 (1994) (holding that fees charged by a high school district for driver training violated section 5); *Driving Sch. Ass'n v. San Mateo Union High Sch. Dist.*, 11 Cal. App. 4th 1513, 1525 (1992) (holding that charging high school students for driver education courses violated section 5); *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1136-37 (1999) (holding that the establishment of charter schools did not violate section 5); *Helena F. v. West Contra Costa Unified Sch. Dist.*, 49 Cal. App. 4th 1793, 1799-1800 (1996) (holding that student's section 5 rights were not violated by the school district's policy concerning assignment of displaced students); *Piper v. Big*

Pine Sch. Dist., 193 Cal. 664, 672-73 (1924) (holding that student's eligibility to attend a federal school violated section 5 because the state had no control over that school).[1] This Court should therefore hold that Article IX, section 5, read in conjunction with section 1, forms a proper basis for plaintiffs' second cause of action.

II. THIS COURT SHOULD HOLD THAT CALIFORNIA'S CONSTITUTION PROVIDES THIS STATE'S SCHOOLCHILDREN WITH A SUBSTANTIVE, ACTIONABLE RIGHT TO EDUCATION.

As the State acknowledges, the standard for judgment on the pleadings requires a showing that the complaint fails to state facts sufficient to state a cause of action. (State MPA at 3 n.1.) The State's papers fall woefully short of this showing, as they must – the First Amended Complaint more than satisfies the obligation to demonstrate that the substantive right to education provided under the California Constitution—whatever its upper bounds ultimately are determined to mean—have been violated.

The First Amended Complaint paints a stark picture of the bottom rung of California's school system. For example:

- "[T]housands of California public school students lack essential educational tools that other students in the State take for granted. Many students lack textbooks in core academic subjects. . . . Many students must share textbooks in classrooms, sometimes three or four students to a book, with no opportunity to take the books home for study and homework." (FAC ¶ 8.)

- "Many California public school students are taught by persons who, however motivated or well-meaning, have received not so much as one hour of instruction in how to teach children. . . . In at least 100 schools in the State, as few as 50 percent, sometimes as few as 13 percent, of the teachers in a school have full, nonemergency teaching credentials. That means that at least 100 California schools attempt to instruct students with teaching staff who are grossly underprepared and inexperienced and who have virtually no seasoned mentors to turn to for in-practice guidance." (FAC ¶ 9.)

- "Many of California's public school students are consigned to overcrowded, unsafe, poorly ventilated buildings with terrible slum conditions: Some schools have bathrooms in wretched condition, with toilets that back up or leak, with faucets that do not work, and with floors that are wet and sticky and that smell of human waste. Some schools have too

[1] Although dicta from two pre-*Hartzell* cases suggest that section 5 is not self-executing (*People v. Bd. of Educ. of Oakland*, 55 Cal 331 (1880); *Gonzales v. State*, 29 Cal. App. 3d 585 (1972)), *Hartzell* and other more recent California Supreme Court and lower court decisions cited in the text above are controlling and make it clear that section 5 does support a private right of action.

few toilets of any kind. Many schools lack air conditioning and/or heat, leaving children in a constant sweat in temperatures of 90 degrees and above or with a persistent chill so severe that they have to wear coats, hats, and gloves in the classroom. The growth of mold and fungus in many classrooms induces asthma attacks and leads to regular illnesses among children and teachers. Cockroaches, rats, and mice infest many school buildings, threatening disease and ensuring distraction from learning. Leaky roofs, broken windows, peeling paint, defective electrical systems, and other indicia of maintenance long deferred are all too common in many schools." (FAC ¶ 11.)

A. The Preeminent Role Played by Education in California's Constitutional Jurisprudence Makes Clear that This Court Should Recognize an Actionable Substantive Right to Education.

California courts have consistently reiterated the fundamental importance of education in California. The California Supreme Court has declared that "[w]e are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"[2] *Serrano I*, 5 Cal. 3d at 608-09; *see also id.* at 607 ("education may have far greater social significance than a free transcript or a court-appointed lawyer" (finding similarities between Article IX, section 1 and the rights of defendants in criminal cases)); *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 673 (1924) ("[T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities.... These are rights and privileges that cannot be denied.").

Perhaps the most sweeping review of "the role played by education in [California's] overall constitutional scheme" occurs in *Hartzell v. Connell*, 35 Cal. 3d 899, 906 (1984). *Hartzell* is regularly referred to as the "seminal decision on the meaning of the free school clause." *California Ass'n for Safety Educ. v. Brown*, 30 Cal. App. 4th 1264, 1277 (1994); *see also Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 261 (1992) (describing *Hartzell* as the "leading case interpreting California's free school provision"). Quoting Thomas Jefferson, Ralph Waldo Emerson, Horace Mann, and a litany of previous California and United States Supreme Court decisions, a plurality of the *Hartzell* court noted, *inter alia*, that public schooling: "forms the basis of self-

[2] The California Supreme Court preserved this holding even in light of the United States Supreme Court's contrary interpretation of the United States Constitution. *See Serrano v. Priest* ("*Serrano II*"), 18 Cal. 3d 728, 766 (1976).

government and constitutes the very corner stone of republican institutions"; "breaks down aristocratic caste"; "plays an increasingly critical role in fostering 'those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion'"; "supplies the practical training and experience — from communicative skills to experience in group activities — necessary for full participation in the 'uninhibited, robust, and wide-open' debate that is central to our democracy"; "holds out a 'bright hope' for the 'poor and oppressed' to participate fully in the economic life of American society"; and "serves as a 'unifying social force' among our varied population, promoting cohesion based upon democratic values." *Hartzell v. Connell*, 35 Cal. 3d at 906-08 (surveying a variety of commentary and caselaw) (citations omitted).[3] The court went on to hold that analysis of the scope of Article IX, section 5 must occur "[v]iewed in light of these constitutionally recognized purposes." *Id.* at 908. Education's preeminent position within California's constitutional firmament underscores the importance of the substantive right to education protected by the Constitution. Of necessity, this right is self-executing, as otherwise the fundamental right would be meaningless because it would be remediless.

B. Courts in the Four Other States with Constitutional Language Indistinguishable from California's Have Recognized Actionable Substantive Education Rights.

Every court to consider the question whether a state constitutional provision with language like California's offers a substantive basis for suit has recognized actionable substantive education rights. The California Supreme Court has explicitly held that reference to other states is appropriate in this context. *See Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 261 (1992) ("[W]e have supplemented our own history of interpreting the free school guarantee by looking to other states' interpretations of similar provisions in their states' constitutions. It is especially appropriate for us to continue to do so in this case, because California's provisions for schooling appear to have been at least partially modeled on similar provisions in other states' constitutions.")

[3] Indeed, a concurring opinion joined by four justices noted that the plurality's commentary on the value of education was, if anything, too limited. *Id.* at 918 (J. Mosk, Grodin, Kaus, and Bird concurring) (education has "inherent value" over and above any "economic, social, or political" value it brings).

(citations omitted). And as the Alabama Supreme Court recognized, "other courts' interpretations of their respective state constitutions can provide useful guidance to the courts of this state. As the Kentucky Supreme Court has noted, opinions of this kind 'show that courts may, should, and have involved themselves in defining the standards of a constitutionally mandated educational system.'" *Opinion of the Justices (No. 338)*, 624 So. 2d 107, 154 (Ala. 1993) (*quoting Rose v. Council for Better Educ.*, 790 S.W.2d 186, 210 (Ky. 1989)).

Article IX, sections 1 and 5 of the California Constitution provide in pertinent part that "[t]he Legislature shall provide for a system of common schools by which a free school shall be kept up and supported" and that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Four states have constitutional provisions indistinguishable to this language:[4]

- New York: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1.
- North Carolina: provides for a "general and uniform system of free public schools," and declares that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. IX, § 2 & art. I, § 15.
- South Carolina: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." S.C. Const. art. XI, § 3

[4] A fifth state, Arizona, also has language indistinguishable from section 5. *See* Ariz. Const. art. XI, § 1.A ("The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system"). In *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 815 n.7 (Ariz. 1994), the state supreme court declined to reach the question as to whether the state constitution set "minimum standards" for education. The case was instead decided, in plaintiffs' favor, on the ground that the inequalities present in Arizona's education violated the state constitution. *Id.* at 815-16.

- Tennessee: "The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, §12.

All have recognized an actionable substantive right to an education. *See Bd. of Educ., Levittown Union Free Sch. Dist v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Campaign for Fiscal Equity v. New York* ("*CFE I*"), 655 N.E.2d 661 (1995)[5]; Leandro v. State, 488 S.E.2d 249, 257 (N.C. 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993). In recognizing such a right, each of these courts was bound by the same principles governing when constitutional provisions are self-executing as are present in California's jurisprudence. *See, e.g., Brown v. State*, 674 N.E.2d 1129 (N.Y. 1996); *People v. Carroll*, 148 N.E.2d 875 (N.Y. 1958); *Kitchin v. Wood*, 70 S.E. 995, 996 (N.C. 1911); *Becker v. Atlantic Coast Line R. Co.*, 121 S.E. 476, 478 (S.C. 1924); *McColl v. Marlboro Graded Sch. Dist. No. 10*, 141 S.E. 265, 266 (S.C. 1928); *Washington County Election Comm'n v. City of Johnson City*, 350 S.W.2d 601, 603-04 (Tenn. 1961). Two states—New Hampshire[6] and Massachusetts[7]—have constitutional provisions similar in tone to Article IX, section 1, and both have

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[5] The *Campaign for Fiscal Equity* suit was later dismissed on factual grounds, in *Campaign for Fiscal Equity v. New York* ("*CFE II*"), 744 N.Y.S.2d 130 (2002), and is presently on appeal to New York's supreme court. *CFE II* left standing, however, *CFE I*'s holding that New York's constitution provides for a substantive, actionable right to an education.

[6] N.H. Const. Pt. 2, art. 83 provides:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people....

[7] Mass. Const. Pt. 2, ch. 5, sec. 2 provides:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.

recognized an actionable substantive right to an education. *See McDuffy v. Sec'y. of Educ.*, 615 N.E.2d 516 (Ma. 1993); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993). Finally, at least an additional nine states recognize such a right on the basis of their constitutions' educational provisions.[8]

Indeed, no court in a state with constitutional language and jurisprudence similar to California's has held that students may not sue. In the three states in which courts have held that state constitutional education provisions do not provide a basis for suit, the jurisprudence differs markedly from California's.[9] For example, in Rhode Island, "both at the time [the education clause of the state constitution] was adopted and for decades afterward, there was no requirement that public education be provided *at all* in [the] state." *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55 (1995) (emphasis added). In California, on the other hand, education has always been deemed a fundamental right. *See Serrano I*, 5 Cal. 3d at 608-09. In Pennsylvania, the state supreme court held that its constitutional provisions were intended only to "shift *some* of the control of the operation of the public school system in this Commonwealth from the various localities to the General Assembly." *Marrero v. Commonwealth*, 709 A.2d 956, 965 (1998) (emphasis added). To the contrary, "the California Constitution makes public education uniquely a fundamental concern of the State." *Butt*, 4 Cal. 4th at 685. Finally, in Illinois, the state supreme court questioned whether the courts could even "intervene, where, for instance, a school district provides a school that consists of nothing more than a vacant building with the word 'School.'" *Lewis v. Spagnolo*, 710 N.E.2d 798, 804 (1999). *Butt*, and the more than 100 years of case law that precedes it make clear that the California Supreme

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[8] Alabama: *Opinion of the Justices (No. 338)*, 624 So. 2d 107, 154 (Ala. 1993); Arkansas: *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Lake View Sch. Dist. No. 25. v. Huckabee*, No. 1992-5318 (Ark. Pulaski Chancery Court, May 25, 2001); Idaho: *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); Kentucky: *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989); New Jersey: *Robinson v. Cahill*, 351 A.2d 713, 729 (N.J. 1974); Ohio: *DeRolph v. Ohio*, 677 N.E. 2d 733 (Ohio 1997); Texas: *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); Washington: *Seattle Sch. Dist. No. 1 of King County v. Washington*, 585 P.2d 71 (1978); West Virginia: *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

[9] In three additional states, plaintiffs' claims were dismissed, but in those cases, no substantive education claim was put squarely before the court. *See Skeen v. State*, 505 N.W.2d 299, 302 (Minn. 1993) ("[U]nlike many cases in other states, this case never involved a challenge to the adequacy of education in Minnesota."); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) ("[T]he [s]tudents do not contend that the manner of funding prevents their schools from meeting the standards of quality"); *School Admin. Dist. No. 1 v. Commissioner*, 659 A.2d 854, 857 (Me. 1995) (Plaintiffs "presented no evidence at trial that any disparities in funding resulted in their students receiving an inadequate education.").

Court does not view the judiciary's duty and responsibility to oversee compliance with this state's constitution in so limited a fashion. *See Butt*, 4 Cal. 4th at 685.[10]

C. Neither *Serrano* nor *Wilson* Rejects a Substantive, Actionable Right to an Education.

The State claims that *Serrano v. Priest*, 5 Cal. 3d 584, 595-96 (1971) and *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1135 (1999), reject the argument that an actionable right to education can be grounded in Article IX, sections 1 and 5. (State MPA at 9-11.) As the State itself acknowledges, however, the *Serrano* court addressed only the question of whether Article IX, section 5 "requires uniform educational expenditures." *Serrano I*, 5 Cal. 3d at 596. The uniformity, or lack thereof, of educational expenditures in California is not at issue in this litigation.[11]

Moreover, far from rejecting the idea that the California Constitution provides substantive rights to education, the *Wilson* case recognized that "[s]ince 1879 our Constitution has declared the Legislature's preeminent role in encouraging education in this state, as well as its fundamental obligation to establish a system of public schools"; that "the Legislature retains ultimate responsibility for all aspects of education, including charter schools"; and, critically, that "[w]here the Legislature delegates the local functioning of the school system to local boards, districts or municipalities, *it does so, always, with its constitutional* power and *responsibility for ultimate control*

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[10] *See also Salazar v. Eastin*, 9 Cal. 4th 836, 858 (1995) ("the state has ultimate responsibility for the constitutional operation of its schools"); *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal. 3d 937, 951 (1971) ("Education, including the assignment of pupils to schools, is plainly a state function."); *Hall v. City of Taft*, 47 Cal. 2d 177, 181 (1956) ("[t]he public school system is of statewide supervision and concern"); *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 669 (1924) (Public schooling "is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution."); *Kennedy v. Miller*, 97 Cal. 429, 431 (1893) ("Article IX of the constitution makes education and the management and control of the public schools a matter of state care and supervision."); *City of El Monte v. Comm'n on State Mandates*, 83 Cal. App. 4th 266, 278-279 (2000) ("[E]ducation is the ultimate responsibility of the state. The principle is undeniable . . . ."); *California Teachers Ass'n. v. Hayes*, 5 Cal. App. 4th 1513, 1534 (1992) ("In this state, education is a matter of statewide rather than local or municipal concern."); *Johnson v. San Diego Unified Sch. Dist.*, 217 Cal. App. 3d 692, 698 (1990) (same); *Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d 871, 903 (1979) ("[I]t is clear that in California, . . . the responsibility for furnishing constitutionally equal educational opportunities to the youth of the state is with the state, not solely in the local entities it has created.").

[11] It bears noting, however, that, as discussed above, the *Serrano* court went on to hold that the State's system of education financing violated the schoolchildren's right to equal protection under the laws. *See Serrano I*, 5 Cal. 3d at 614-615.

for the common welfare in reserve." *Wilson v. State Bd. of Educ.*, 75 Cal. Ap.. 4th at 1134-1135 (internal quotes omitted; emphasis added).

III. THE STATE'S CLAIM THAT THE "VARIATION" PERMITTED BY THE CALIFORNIA CONSTITUTION ALLOWS THE KINDS OF CONDITIONS THAT GIVE RISE TO THIS SUIT IS A FACTUAL ARGUMENT NOT APPROPRIATE FOR ADJUDICATION BY WAY OF JUDGMENT ON THE PLEADINGS.

The State argues that even if Article IX, sections 1 and 5 guarantee California's schoolchildren substantive rights to education, both sections "permit variation in the educational opportunities available to students in different local school districts." (State MPA at 12.) Plaintiffs have not contended that Article IX, sections 1 and 5 themselves mandate any lockstep uniformity among California schools. Rather, Plaintiffs contend these provisions mean that the fundamental right to education in California is not satisfied merely because an institution is called a school, though it provides none of the means of an education. The cases the State cites are not to the contrary. *Whitmore v. Brown*, 207 Cal. 473 (1929), and *Berkeley Unified School Dist. v. City of Berkeley*, 141 Cal. App. 2d 841 (1956), hold only that a city can levy taxes to support its schools. Plaintiffs do not claim that a school, a city, or the State runs afoul of the California Constitution when it provides *more* education than is minimally required by the Constitution, and these cases are therefore entirely irrelevant. *Gordon v. Board of Education*, 78 Cal. App. 2d 464 (1947), holds only that schoolchildren can be excused from public school to receive religious instruction.

The State's "variance" argument boils down to one of two things: a claim that California's Constitution permits *total* "variation" in the provision of a child's education; or a claim that it permits some level of variation, and that California's educational system is not so bad as to fall outside the permissible range of variation. The first position is simply a restatement of the arguments already addressed (*i.e.*, that there is no substantive right to education in California), and should be rejected for the reasons outlined above. The second position calls for this Court to undertake an evaluation of the state of California's educational system, which is plainly not permitted by way of a motion for judgment on the pleadings.

CONCLUSION

It would be error to grant judgment as a matter of law that no claim can arise based on the face of the pleadings. Moreover, it would be gratuitous in light of the fact that evidence the Plaintiffs will present under the second cause of action will be the same as that presented in support of its equal protection-based claims. Whether this Court ultimately holds that the record supports relief independently on the second cause of action or, as the court in *Butt* did, finds that the equal protection, standing alone, justifies complete relief, the second cause of action cannot be properly dismissed as legally untenable. For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant State of California's Motion for Summary Judgment on the Pleadings as to Second Cause of Action in First Amended Complaint.

Dated: June 9, 2003

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