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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

ELIEZER WILLIAMS, et al., Plaintiffs, v. STATE OF CALIFORNIA; et al., Defendants.	Case No. 312236 Hearing Date: June 19, 2003 Hearing Time: 3:30 p.m. Department: 20 Hon. Peter J. Busch

MEMORANDUM OF DEFENDANT STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AS TO SECOND CAUSE OF ACTION IN FIRST AMENDED COMPLAINT

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I. INTRODUCTION.

The entire premise of this litigation is that defendants are denying "basic educational equality" to some public school children by subjecting them to allegedly "deplorable conditions." First Amended Complaint ("FAC") ¶ 1. Plaintiffs' claim thus sounds in equal protection, and it is governed by Butt v. State of California, 4 Cal. 4th 668 (1992).

The instant motion is not directed to plaintiffs' equal protection claim. Rather, it is directed to plaintiffs' second cause of action, which alleges a violation of article IX, § 1 and § 5 of the California Constitution. That cause of action is not governed by Butt. There are three reasons why the Court should grant this motion.

First, article IX, § 1 provides merely as follows:

> 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.

While this provision establishes the broad principle that education is important, it does not lay down any rule by which that principle may be judicially enforced. Thus, this provision is not self-executing, no judicial remedy may be given, and it cannot support plaintiffs' second cause of action.

Second, as for article IX, § 5, it provides only that:

> 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.

This provision does nothing more than prohibit the charging of fees for participation in educational activities. Plaintiffs, however, recently dismissed their fees claim. There is no other basis on which they can assert a violation of article IX, § 5.

And third, whatever the merits of plaintiffs' equal protection claim, ***no case*** has suggested -- much less held -- that either § 1 or § 5 of article IX creates a right to "basic educational equality" or to any substantive level of education, however defined. Rather, the cases confirm that, consistent with article IX, the educational opportunities provided to some students in some local school districts may differ than those provided to other students in other local school districts.

II. NEITHER SECTION 1 NOR SECTION 5 OF ARTICLE IX GIVES PLAINTIFFS A CAUSE OF ACTION.

Plaintiffs' theory is -- and always has been -- that some children in California attend good public schools while other children attend bad public schools where "deplorable conditions" deprive them of the "bare essentials" of an education. FAC ¶ 1. Through this lawsuit, plaintiffs seek to establish a system of "oversight and management" of public education to ensure that all California public school children "have equal access to the basic educational tools they need to learn." Pls.' Liability Disclosure Statement ¶ 1; Nov. 14, 2000 Order at 2.

Plaintiffs have never been entirely clear about what they contend constitutes the "bare essentials" or the "basic

tools" of an education. What is clear, however, is that the entire thrust of this case is that defendants have violated plaintiffs' right to equal protection of the laws. And all parties agree that that claim is governed by the California Supreme Court's decision in Butt v. State of California.

The Supreme Court decided Butt under the equal protection clause of the California Constitution. It did not decide Butt under article IX, § 1 or § 5 of the California Constitution. 4 Cal. 4th at 685. Accordingly, while Butt controls plaintiffs' equal protection claim, it has no bearing on plaintiffs' second cause of action for violation of article IX.

Nor is there any other basis for plaintiffs' claims under article IX. Section 1 is not self-executing and therefore does not allow for any judicial remedy. The only enforceable right protected by § 5 is the right not to be charged fees for educational activities -- an issue that plaintiffs recently have taken out of this case by dismissing their fees claim. Moreover, ***no case*** has ever suggested -- let alone held -- that article IX, § 1 or § 5 creates any right to "basic educational equality" or to any substantive level of education. Thus, whatever the merits of plaintiffs' equal protection theory, plaintiffs have no cause of action under § 1 and § 5 of article IX, and that cause of action should be dismissed.[1]

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[1] The standard for judgment on the pleadings is the same as that applicable to a general demurrer: whether the pleadings, taken together with any matters that may be judicially noticed, demonstrate that the moving party is entitled to judgment as a matter of law because the complaint fails to state facts sufficient to constitute a cause of action. Cal. Civ. Proc. Code §§ 438(c)(1)(B)(ii), (d); Smiley v. Citibank, 11 Cal. 4th 138, 146 (1995); In re Guardianship of Olivia J., 84 Cal. App. 4th 1146, 1155 (2000). This standard is met here.

A. Article IX, Section 1 Cannot Support Plaintiffs' Second Cause of Action Because It Is Not Self-Executing.

California constitutional provisions are of two sorts: those directed to the Legislature, which do not create a private right of action unless the Legislature has enacted appropriate implementing legislation; and those directed to the courts, which do permit a judicial remedy. No California case has held that a cause of action lies directly under the Constitution for a violation of article IX, § 1. The reason is that this provision is not self-executing.

Under California law, a constitutional provision is self-executing only if it "supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Leger v. Stockton Unified Sch. Dist., 202 Cal. App. 3d 1448, 1455 (1988). By contrast, a provision is not self-executing "when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law," see id., or when it contemplates or requires legislation to be effective. People v. Vega-Hernandez, 179 Cal. App. 3d 1084, 1092 (1986).

In Leger, the court held that the plaintiff could not sue for damages directly under article I, § 28(c) of the California Constitution, which provides that "[a]ll students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure, and peaceful." 202 Cal. App. 3d at 1455-56. The court so held because article I, § 28 "declares a general right

without specifying *any* rules for its enforcement" and because the provision "is wholly devoid of guidelines, mechanisms, or procedures" from which a remedy could be inferred. Id. at 1455.

Similarly, in Vega-Hernandez, the court held that the trial court's order requiring a criminal defendant to make restitution to his crime victims could not be upheld directly under article I, § 28(b) of the California Constitution because that provision is not self-executing. Although it establishes for crime victims an "unqualified right" to direct restitution from convicted persons, article 1, § 28 specifically gives the Legislature the discretion to define how that right is implemented. 179 Cal. App. 3d at 1092, 1096-97. As the court explained:

> As a general rule, a directive to the Legislature to implement a constitutional provision is an expression of intent that the provision not be self-executing, as the language of the provision is addressed to the Legislature rather than to the courts. (16 Am.Jur.2d, Constitutional Law, § 44 p. 517.) The provision 'must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the Legislature for action [citation]; and ***such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation.*** (*Taylor v. Madigan, supra*, 53 Cal. App. 3d 943, 951, 126 Cal.Rptr. 376.)
>
> . . .
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> A constitutional provision which for present purposes is analogous to the one before us, and which has been judicially analyzed to determine whether it is self-executing, is that providing for various mechanics liens. Article 14, section 3, of our Constitution states that: 'Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and

> the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.' Interpreting an earlier but virtually identical version of this provision, [footnote omitted] our Supreme Court concluded that '[t]his declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action. . . . So far as substantial benefits are concerned, ***the naked right without the interposition of the legislature is like the earth before the creation, 'without form and void,' or to put it in the usual form, the constitution in this respect is not self-executing.*** *Spinney v. Griffith* (1893) 98 Cal. 149, 151-152, 32 P.2d 486, 505; accord *Borchers Bros. V. Buckey Incubator Co.* (1963) 59 Cal.2d 234, 238, 28 Cal.Rptr. 697, 379 P.2d 1, *Reese v. Bald Mountain etc. Min. Co.* (1901) 133 Cal. 285, 290, 65 P. 578.)

Id. at 1092, 1095-96 (emphasis added).

These principles control the issue here. Article IX, § 1 provides in full as follows:

> 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.

This provision no doubt establishes that education is important in California. But it does nothing more. It does not create an entitlement to "equal educational equality" or to a "basic education" or to "basic educational opportunities" or to any substantive level of education. It does not impose any duty on the Legislature to take any specific action. And it does not contain any "guidelines, mechanisms, or procedures" from which some duty could be imposed. Leger, 202 Cal. App. 3d at 1455. Rather, it specifically contemplates that the Legislature will enact legislation and will take whatever other means it deems suitable to encourage education generally. Vega-Hernandez, 179 Cal. App. 3d at 1092, 1096-97.

Based on the foregoing, it is plain that article IX, § 1 is not self-executing.[2] It follows that plaintiffs may seek no judicial remedy thereunder, and their second cause fails to the extent that it relies on this provision of the California Constitution.

B. Plaintiffs' Second Cause of Action Fails to the Extent It Relies On Article IX, Section 5 of the California Constitution.

Plaintiffs' second cause of action derives no more support from article IX, § 5 of the California Constitution. Also known as the free school guarantee, article IX, § 5 provides in full as follows:

> 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.

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[2] Nor is it remotely arguable, even if any judicial remedy were available, that the Legislature has failed somehow to encourage "a diffusion of knowledge." As multiple courts have recognized, the Legislature has complied with the directive of article IX, § 1 by enacting the various provisions of the Education Code. See, e.g., University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 528 (1934) (quoting article IX, § 1 and stating: "The Legislature, mindful of this duty, has enacted from time to time laws appropriately designed to make effectual this ideal [i.e., a diffusion of knowledge], including the Code section under which this action is brought. In doing so, it has properly assumed the power vested in it as a body composed of duly elected representatives of the citizens of this state, and has exercised a discretion which is a reasonable concomitant to the responsibility imposed upon it by the Constitution."); In re Shinn, 195 Cal. App. 2d 683, 686 (1961) ("In obedience to the constitutional mandate to bring about a general diffusion of knowledge and intelligence, the Legislature, over the years, enacted a series of laws.").

In Hartzell v. Connell, 35 Cal. 3d 899 (1984), a plurality of the Supreme Court held that article IX, § 5 prevents school districts from charging fees for activities which form "an integral fundamental part of . . . elementary and secondary education" or are "necessary elements of any school's activity" and which are "educational in character." Id. at 905. In the FAC, plaintiffs alleged that a number of school districts charged fees for educational activities and thus arguably alleged a violation of article IX, § 5, as construed in Hartzell.

Plaintiffs have now dismissed all their claims about fees.[3] With the elimination of those claims, plaintiffs no longer have any basis upon which to assert a violation of article IX, § 5, since there is no basis on which to argue that the Legislature has failed to establish or support "a system of common schools."

As used in article IX, § 5, the phrase "common schools" historically referred only to primary and grammar schools as opposed to other types of schools such as kindergarten, high schools, evening schools, technical schools, and so forth. Los Angeles County v. Kirk, 148 Cal. 385, 389 (1905); Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1136 (1999). And the term "system" as used in article IX, § 5 requires no more than the establishment of a single, state-wide system that is "uniform in terms of the prescribed course of study and educational

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[3] See Court's Order (Mar. 6, 2003) ("Plaintiffs' claims challenging Defendants' acts or omissions as to fees charged in California schools in violation of Article IX, section 5 of the California Constitution are dismissed without prejudice.").

progression from grade to grade." Serrano v. Priest, 5 Cal. 3d 584, 596 (1971).

Plaintiffs do not contend that the Legislature has failed to establish a single system of public schools in which students must follow a uniform course of study and advance from one grade to the next pursuant to a uniform set of rules. Nor could they. The California Supreme Court recognized 80 years ago that that is precisely the system that the Legislature has established. Piper v. Big Pine Sch. Dist., 193 Cal. 664, 669 (1924) ("Both the constitution and statutes of the state provide for a uniform system and course of study as adopted and provided by the authority of the state. Under this uniform system pupils advance progressively from one grade to another and, upon the record made, are admitted from one school into another pursuant to a uniform system of educational progression.") (emphasis added). And of course the system persists today.[4]

Plaintiffs also cannot contend that the Legislature has violated a duty to support the "common schools" that it created by failing to provide equal resources to all schools in the

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[4] See, e.g., Cal. Educ. Code § 41600 (specifying that elementary schools comprise grades 1-8 and high schools comprise grades 9-12); §§ 51210, 51220, 51224, 51225.3, 51228 (specifying required courses of study for grades 1-12); § 49066 (providing for the grading of students' academic performance); § 60640 (establishing Standardized Testing and Reporting Program applicable to all public school students in grades 2-11); § 60850 (requiring establishment of High School Exit Examination); § 51226 (requiring Superintendent of Public Instruction to "coordinate the development, on a cyclical basis, of model curriculum standards for the courses of study required by Section 51225.3"); see also Reed v. Hollywood Professional Sch., 169 Cal. App. 2d Supp. 887, 889 (1959) ("The legislature has provided for a system of common schools (Education Code).") (emphasis added).

"system." That argument was explicitly rejected by the California Supreme Court over 30 years ago:

> [W]e reject [plaintiffs'] contention that the school financing system violates article IX, section 5 of the California Constitution . . . . Plaintiffs' argument is that the present financing method produces separate and distinct systems, each offering an educational program which varies with the relative wealth of the district's residents. . . . [W]e have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade. (*Piper v. Big Pine School Dist.* (1924) 193, Cal. 664, 669, 673 [226 P. 926].)
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> We think it would be ***erroneous*** to hold otherwise.

Serrano v. Priest, 5 Cal. 3d 584, 595-96 (1971) (emphasis added); see also Serrano v. Priest, 89 Cal. Rptr. 345, 348 (Ct. App. 1970) (dismissing claim under article IX, § 5 and holding that "the constitution does not require that the school system be uniform as to quality of education") (emphasis added). And in any event, it is article XIII, § 21 and article IX, § 6 -- not § 5 -- that govern school financing. Serrano, 5 Cal. 3d at 596; Cal. Const. art. XIII, § 21. Plaintiffs have asserted no claim under article IX, § 6 or article XIII, § 21.

Finally, plaintiffs cannot contend that article IX, § 5 creates a judicially enforceable right to "basic educational necessities" or to "basic educational opportunities" or to "basic tools" of an education -- however plaintiffs ultimately may choose to define those terms. The court in Wilson v. State Board of Education explicitly rejected any such argument:

> Appellants first maintain that the 1998 [amendments to the Charter School Act] violate article IX, section 5 because they amount to an abdication of *any* state control over essential educational functions, e.g., control over

> curriculum, textbooks, educational focus, teaching methods and operation of charter schools.
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> . . .
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> Appellants confuse the delegation of certain educational functions with the delegation of the public education system itself. . . . [T]he public school system is the system of schools, which the Constitution requires the Legislature to provide . . . . However, the curriculum and courses of study ***are not constitutionally prescribed.*** Rather, they are *details* left to the Legislature's discretion. Indeed, they ***do not constitute part of the system*** but are merely a function of it. The same could be said for such functions as educational focus, teaching methods, school operations, furnishing of textbooks and the like.

75 Cal. App. 4th at 1135 (bolded italics added); California Teachers Ass'n v. Board of Trustees, 82 Cal. App. 3d 249, 255 (holding that curriculum and courses of study "are not prescribed by the Constitution . . . [and] do not constitute a part of the system"); Helena F. v. West Contra Costa Unified Sch. Dist., 49 Cal. App. 4th 1793 (1996) (no obligation under article IX, § 5 "to provide schools that are geographically convenient"); cf. Ryan v. California Interscholastic Federation-San Diego Section, 94 Cal. App. 4th 1048, 1064 (2001) ("right to *free* public education does not necessarily create a property interest in each of its constituent parts"); Steffes v. California Interscholastic Fed., 176 Cal. App. 3d 739, 748 (1986) (no constitutional right to participate in interscholastic athletics).

Accordingly, nothing in article IX, § 5 helps plaintiffs, and their second cause of action fails to the extent it relies on this provision of the California Constitution.

III. NEITHER SECTION 1 NOR SECTION 5 OF ARTICLE IX CREATES ANY RIGHT TO EQUAL EDUCATIONAL OPPORTUNITIES OR TO ANY SUBSTANTIVE LEVEL OF EDUCATION.

What has been said above is sufficient to dispose of plaintiffs' second cause of action under article IX, § 1 and § 5. Their cause of action fails, however, for another reason. ***No case*** decided by a California court has suggested -- much less held -- that § 1 or § 5 of article IX creates a right to "equal educational opportunity" or to any substantive level of education. On the contrary, courts that have interpreted article IX, § 1 and § 5 agree that these provisions actually permit variation in the educational opportunities available to students in different local school districts.

A. Article IX, Section 1 Permits Variation in Educational Opportunities.

There is very little case law interpreting the reach of article IX, § 1. The few courts that have considered this provision, however, agree that it allows local government to provide educational opportunities to some students that are not provided to other students.

For example, in Whitmore v. Brown, 207 Cal. 473 (1929), the California Supreme Court held that, consistent with article IX, § 1, local governments may provide educational opportunities to students within their boarders that children elsewhere in the State may not receive:

> In this connection also we must pause to note distinct evidences of the trend of onr [sic] judicial decisions toward sustaining the power of cities, which desire to supplement the efforts of the state, counties and districts, to support, maintain and strengthen the public schools functioning within their borders. This is in line with the policy announced in [article IX, § 1 of] our constitution . . .
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> . . .
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> In short, the holding is that, notwithstanding the fact that the school system is of general concern and not strictly speaking a municipal affair, nevertheless it may be made such an affair by the city when acting in promotion and not in derogation of the legislative school plans and purposes of the state.

Id. at 479-80.

The Courts of Appeal have come to a similar conclusion. For example, in Berkeley Unified School District v. City of Berkeley, 141 Cal. App. 2d 841 (1956), the Court of Appeal specifically confirmed that, consistent with article IX, § 1, local government can provide "more generous support" to some but not all public school students. Id. at 846 ("Although education in general is a state affair, it may be made a municipal affair in part when the city acts in promotion of and not in derogation of the purposes of the state. . . . [A] chartered city is free to act in furtherance of the policy of the state in favor of a diffusion of knowledge and intelligence . . . [by] providing a more generous support to education.").

And in Gordon v. Board of Education of City of Los Angeles, 78 Cal. App. 2d 464 (1947), Justice White concluded that, consistent with article IX, § 1, the Los Angeles Unified School District may excuse students from attending school so that they may participate in and receive religious instruction elsewhere. Id. at 481 (concurring opinion). It certainly cannot

be said that students who are excused from attending public school will receive the same educational opportunities as students who attend public schools that receive more "generous support."

The bottom line is that while article IX, § 1 establishes the unremarkable principle that education is important in California, it does not create any right to "basic educational equality" or to "basic educational opportunities" or to a "basic education." It does nothing more than vest the Legislature with broad discretion to encourage education in whatever manner that it sees fit. Wilson, 75 Cal. App. 4th at 1134-35 (quoting article IX, § 1 and confirming that "[t]here can be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools including broad discretion to determine the types of programs and services which further the purposes of education"); California Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) (same).

B. Article IX, Section 5 Permits Variation in Educational Opportunities.

Article IX, § 5 also does not mandate equality in the financial resources or opportunities provided by local school districts. Serrano, 5 Cal. 3d at 595-96. Plainly, schools that have more financial support will be able to provide more educational opportunities than schools that do not have such support. In fact, the California Supreme Court and the Courts of

Appeal have all acknowledged that, as a direct result of the obligation under article IX, § 5 not to charge fees for educational activities, some local school districts inevitably will decide not to offer educational opportunities that other districts may choose to provide. See, e.g., Hartzell, 35 Cal. 3d at 912-13 ("[D]efendants warn that, if fees are invalidated, many school districts may be forced to drop some extracurricular activities . . . [thereby] reducing the number of educational opportunities available to students. This court recognizes that, due to legal limitations on taxation and spending, school districts do indeed operate under difficult financial constraints. . . . A solution to these financial difficulties must be found elsewhere -- for example, through the political process."); Driving Sch. Ass'n of Cal. v. San Mateo Union High Sch. Dist., 11 Cal. App. 4th 1513 (1992) (driver training fee violates article IX, § 5 and noting that "the probable consequence of the finality of our holding would be to cause the School District either to drop driver training from the adult school curriculum or to offer classes less directly adapted to the convenience and needs of high school students").

Accordingly, there is no support for plaintiffs' theory that, pursuant to article IX, § 5, all students must have equal access to educational opportunities.

CONCLUSION.

For the reasons stated, plaintiffs' second cause of action should be dismissed.

DATED: May 29, 2003.

Respectfully submitted,

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