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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

ELIEZER WILLIAMS, et al., Plaintiffs, vs. STATE OF CALIFORNIA, DELAINE EASTIN, State Superintendent Of Public Instruction, STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION, Defendants.	Case No. 312 236 Hearing Date: October 30, 2000 Time: 8:30 a.m. Department: 16, Hall of Justice Judge: Hon. Peter J. Busch Action Filed May 17, 2000

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANT STATE OF CALIFORNIA TO PLAINTIFFS' FIRST AMENDED COMPLAINT

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IN SUPPORT OF DEMURRER OF DEFENDANT STATE OF CALIFORNIA

TO PLAINTIFFS' FIRST AMENDED COMPLAINT

At bottom, this demurrer is about taming what gives every indication of becoming an unmanageable piece of litigation. Plaintiffs claim they want quick remedies. But they insist on litigating this case in the manner least likely to produce a speedy, sensible, or effective remedy. They will not define, limit, or specify their claims. They will not invoke administrative remedies that could promptly solve most of the specific problems they complain of. They want a massive class, massive discovery, and years of litigation, but they do not want to reveal to the Court or to defendants the answer to the central question that their Complaint raises: What precisely are the "minimal standards" which plaintiffs contend the State should have established in order to comply with its constitutional duty? FAC ¶¶ 293-94. What standards should the State have established for teachers? What standards for textbooks? What standards for facilities?

That is what this case will ultimately be about. If plaintiffs identify the standards they contend the State should have established, then the parties can address intelligently the question of whether the Constitution in fact requires such standards; discovery can focus on the cost and consequences of having such standards versus the cost and consequences of not

having them; and the Court can ultimately make a decision about whether such standards are constitutionally compelled. But if plaintiffs do not identify the standards they contend the State should have established, then no one will know what conduct plaintiffs contend violates the Constitution, there will be no focus for discovery, for motion practice, or for legal argument, and the case will degenerate into a formless mess. That is the choice before the Court.

The irony is that this is not a case where there is much disagreement about objectives. The State and the plaintiffs agree that the goal is for every child to have a first-rate teacher, for every child to have a textbook, and for school facilities to be clean, safe, and sanitary. The differences, if any, are about the measures the Constitution requires in order to achieve those goals. The State has passed laws, issued regulations, promulgated standards, spent vast sums of money, worked with local school districts, instituted complaint and grievance procedures, and opened its courts to litigants -- all for the purpose of achieving those goals, and the other goals and objectives of education as well. Despite all this activity, plaintiffs contend the State nevertheless violated the Constitution by failing to promulgate other, so far unspecified "minimal standards" in each of the areas of teachers, textbooks, and facilities. This demurrer asks only that plaintiffs spell out, in their Complaint, the content of each of the standards they contend the State should have established.

I. DEFENDANTS' SPECIAL DEMURRER SHOULD BE SUSTAINED SINCE PLAINTIFFS HAVE NOT SPECIFIED THE CONTENT OF THE "MINIMAL STANDARDS" THEY CONTEND THE STATE FAILED TO ESTABLISH.

As pointed out in the State's Memorandum in Support of Demurrer ("Mem."), most of the Complaint is a laundry list of individual problems at individual schools. The State is obligated to accept for purposes of demurrer that these individual problems in fact exist.[1] Plaintiffs' Memorandum in Opposition to Demurrer ("Opp.") spends much space reiterating these same problems. Opp. 6-11. But plaintiffs do not allege that each individual problem constitutes a constitutional violation, let alone a constitutional violation by the State. Rather, the violations that plaintiffs allege are spelled out at paragraph 293 of the Complaint. Plaintiffs allege that "[t]he State and responsible State officials have failed their constitutional obligation to the children in California public schools in four ways." And then plaintiffs "specify" the four ways in which the State has supposedly failed to perform its constitutional duty:

> First, having delegated authority to local school districts, the State and responsible State officials

[1] Noting this point is a sufficient answer to plaintiffs' repeated suggestion that the State has somehow conceded the accuracy of their charges. Opp. 3. That is not so. On the contrary, as the experience with the Ravenswood district shows, it is likely that most if not all of plaintiffs' specific allegations will prove to be mistaken. Mem. 21-24. But the issue is not open on demurrer.

> have failed to establish even minimal standards for many aspects of the type of educational personnel, materials, and facilities encountered by students in the public schools. Second, in those few instances in which the State or responsible State officials have purportedly established minimal standards, the standards oftentimes are insufficient to ensure minimal educational opportunity. Third, whether or not those few existing State standards are adequate, the State and responsible State officials have done nothing effective to determine whether conditions in California public schools violate those standards. Fourth, even when violations of purported minimal standards have become known to the State, the State and responsible State officials have taken no effective steps to remedy violations known by State officials to exist. FAC ¶ 293.

This is the constitutional violation which the Complaint alleges. Failure to establish "minimal standards" and establishing "insufficient standards" are thus not matters of remedy, as plaintiffs' Memorandum argues. Opp. 5, 16. Rather, they are the constitutional violation itself. By not defining what standards the State should have established, by not explaining which of the established State standards are "insufficient" and in what respects, plaintiffs have left a hole at the heart of each of their causes of action. From their Complaint one cannot tell what the constitutional violation is: one learns that the violation is the failure to perform an act of some sort (promulgation of an unspecified standard), but one cannot tell what standard the State failed to promulgate, and therefore one cannot tell what act the State allegedly failed to perform. The uncertainty is thus exactly parallel to the uncertainty that was held fatal in Hills Transportation Co. v. Southwest Forest Industries, Inc., 266 Cal. App. 2d 702 (1968).

It is not an uncertainty about remedy, but an uncertainty about what breach of duty has been alleged.

Plaintiffs say Hills is different because there "the defendants could not answer and the court obviously could not adjudicate whether the contract had been breached." Opp. 5. But that is exactly the case here. Until the Court knows what standards plaintiffs contend the State should have promulgated, the Court cannot adjudicate whether the failure to promulgate those standards constituted a breach of a constitutional duty. Plaintiffs will have to specify those standards in order to obtain any relief from the Court. It is appropriate and efficient that they should do so now, so that the Court and defendants do not waste time on motion practice and discovery without knowing what the case is really about.[2]

[2] In defending their Complaint against the charge of uncertainty, plaintiffs revealingly admit that their actual contentions are different from what appears from the Complaint. For example, although the Complaint alleges that the State has issued no standards for textbooks and ignores Cal. Educ. Code § 60119(a), plaintiffs' real position is that the two-year time given districts to come into compliance is too short and that the State Department of Education gave too many waivers for 1998. Opp. 20. Plaintiffs have their facts wrong: the waivers for 1998 were given to allow districts (which inadvertently had failed to comply with a new statute) access to the large sums in state funding for textbook purchase that were made available by new legislation. No waivers have been given in subsequent years, so the statutory scheme is working. But the point here is that plaintiffs know what their true contentions are, and reveal them partially to the extent convenient to plaintiffs. They should be required to put those contentions into the Complaint, so that defendants and the Court can also know what they are.

Moreover, until defendants know what standards plaintiffs contend the State should have promulgated, the State cannot know whether to admit or deny the allegations of the Complaint. It depends entirely on what standards plaintiffs contend the State should have established whether the State's answer to plaintiffs' allegations is "You are mistaken, we have promulgated such a standard" or "You are correct; we have not promulgated such a standard and we do not believe the Constitution requires it."

The problem is not cured by plaintiffs' follow-on allegations which purport to elaborate on the standards the State has supposedly failed to promulgate. Thus, as to facilities, plaintiffs say:

> The State has established no effective or specific minimal standards for all school facilities with regard to conditions that directly affect the ability of students to obtain an education, including but not limited to: the provision of heat or air conditioning to classrooms, the ventilation of classrooms, the infestation of school buildings and classrooms with rats, mice, cockroaches and other vermin, and the cleanliness or repair of school facilities. FAC ¶ 295.

This answers none of the obvious questions. Do plaintiffs contend that the Constitution compelled the State to require air conditioning at all times in all schools? If so, that is something to litigate about. If not, under what circumstances do plaintiffs contend air conditioning was constitutionally compelled? In San Francisco and Eureka? Or only in Palm Springs and El Centro? What, in other words, was

the content of the "minimal" standard that plaintiffs contend it violated the Constitution for the State not to promulgate?

Similarly, do plaintiffs contend the Constitution required a separate standard about rats, mice and vermin, in addition to the existing standard (which the Court is bound to notice judicially) that schools must be kept in "sanitary, neat, and clean condition"? Cal. Code Regs. Tit. 5, § 631. Defendants cannot determine whether to admit or deny plaintiffs' allegation without knowing plaintiffs' contention. If plaintiffs contend it was a violation not to have a separate standard for rats, mice, and vermin, then the State's answer is that no separate standard is constitutionally required in light of the existing requirement that schools be in sanitary condition. If plaintiffs do not contend that a separate standard was required, then the State's answer is that it already has a standard prohibiting the presence of vermin, because schools must be maintained in "sanitary" condition. Id.

Again, when plaintiffs address the issue of teacher qualifications, they say that the State has not "established any mechanisms to ensure that all schools are staffed with minimally sufficient numbers of qualified teachers . . ." FAC ¶ 296. The State clearly has established some such mechanisms, by statutes which the Court is required to notice judicially. Mem. 6-11. So plaintiffs' Complaint must be read as alleging that the State was constitutionally required to establish additional mechanisms.

But plaintiffs utterly fail to specify any "mechanism" the State did not establish which plaintiffs contend it was constitutionally required to establish. Once again, this is not a matter of remedy; the failure to establish "mechanisms" is part of the substantive constitutional violation of which plaintiffs complain.

Similar examples of uncertainty could be multiplied indefinitely. The relevant point is that nowhere in plaintiffs' Complaint do they describe simply or directly the content of the standards they say the State should have promulgated. Yet failure to promulgate those (unspecified) standards is the core constitutional violation they allege. Thus, plaintiffs have purported to plead a constitutional violation without specifying the act (really the omission) that in their view offended the Constitution. Without such specification, the Court cannot adjudicate plaintiffs' claim, since the Court cannot determine whether failure to promulgate the (unspecified) standard was or was not a constitutional violation. Without such specification, defendants cannot frame an answer to plaintiffs' complaint, because defendants cannot determine whether they have, or have not, promulgated the (unspecified) standard to which plaintiffs are referring. That renders the Complaint uncertain, and defendants' demurrer on that ground should be sustained. Hills, supra.[3]

[3] Plaintiffs suggest that the State's demurrer attacks only the First Cause of Action. Opp. 2 n.3. The Demurrer itself

II. DEFENDANTS' DEMURRER SHOULD BE SUSTAINED BECAUSE PLAINTIFFS HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

Plaintiffs' basic argument about exhaustion is that they need not exhaust administrative remedies because they are seeking relief against the State, not against local districts. Opp. 23-24. The major thrust of plaintiffs' Complaint, however, is that the State has not acted to remedy the various educational deprivations they allege. And the Uniform Complaint Procedures, Cal. Code Reg. Tit. 5 § 4600 et seq. ("UCP"), are the remedy the State has provided to correct the conditions of which plaintiffs complain. Plaintiffs should not be entitled to initiate a massive lawsuit against the State on the theory that the State has not acted to cure their problems, when they are simultaneously refusing to invoke the very remedy which the State has voluntarily provided for that purpose.

The UCP can solve plaintiffs' problems, and simplify this litigation, in at least three ways.

First, the UCP provide an easy way to ascertain the facts about the myriad of problems plaintiffs allege. If plaintiffs are mistaken in what they have alleged, the UCP will

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specifies that it is addressed to all causes of action. Moreover, the paragraphs of the Complaint in which plaintiffs allege the constitutional violations of which they complain (¶¶ 293-97) are incorporated into each cause of action. The uncertainty of these allegations infects each cause of action.

demonstrate that they are mistaken; and the result will be the elimination from this action of matters that will otherwise require discovery and litigation. That happened with the Ravenswood district. Mem. 21-23. Going through the process with the other districts should produce similar simplification, for the benefit of defendants and the Court.

Second, the UCP can put plaintiffs' allegations in proper context. Whether the State is constitutionally required to intervene to solve the problems of a particular student in a particular school surely depends on context. Even when the facts plaintiffs allege are accurate, the context may make plain that there is no conceivable constitutional violation. That too, happened with the Ravenswood district. For example, plaintiffs were correct that there was not a school nurse. But in fact the incumbent had resigned and the district was trying to hire a new one. Mem. 22:18-19. Identifying such situations will conduce to simplifying the case, and reduce the workload of the parties and the Court.

Finally, the UCP provide a mechanism to fix any problems that do exist. Plaintiffs say that their goal is to fix the problems of students in California schools. But the easiest way to fix problems is to bring them to the attention of the local district. If plaintiffs are correct that a particular classroom has broken windows or is dirty, or that students in a given school do not have textbooks, a local district required to

respond to an administrative complaint will have every incentive to fix the problem. And if the local district does not act, plaintiffs can appeal to the Department of Education, and the Department can enforce a solution on the local district. UCP § 4663-64, 4670. There is thus every reason to believe that the administrative process will eliminate many of the problems of which plaintiffs complain. It will clear out the underbrush of plaintiffs' Complaint, and leave the Court free to concentrate on those major issues, if any, where plaintiffs and the State disagree about what should be done.

All this is in everyone's interest, and especially in the interest of the students for whose benefit this action was ostensibly filed. Take, as one example, the allegations of paragraph 199 of the Complaint that at Virgil Middle School in the Los Angeles Unified School District new textbooks are on campus but are not available for use because the textbook room is too crowded.

If this issue is litigated, discovery will be required to find out the facts. Discovery will also be required at hundreds of other schools, to ascertain whether lack of textbooks for this or other reasons is as widespread as plaintiffs contend. Once the facts are ascertained, the Court will have to determine whether there should be a class, following full briefing and argument. If a class is certified, the Court will have to decide whether the various measures the State has adopted in the field

of textbook availability are adequate to deal with whatever problems may be found to exist. Since this will involve issues of fact, which will almost certainly be disputed, there will need to be a trial. Then the Court will need to decide, again after briefing and argument, whether plaintiffs are correct that the State violated the Constitution by failing to enact some (so far unspecified) measure that is not now in place. If plaintiffs prevail, the parties will need to argue and brief the question of the appropriate remedy. If the Court eventually decides to order the State to adopt some additional measure, there will be appeals. When the appeals are concluded, the State will promulgate whatever standard it has been ordered to promulgate; and it will then enforce the standard against the district. All this will take years. And the end result of this lengthy process, even assuming that plaintiffs' legal position prevails at every point, will be an order from the State to the local district to fix the problem.

But an order from the State to the local district is precisely what plaintiffs can obtain through the UCP within a few months, without need for any litigation. They will send their administrative complaint to the LA Unified District, and the District will be obliged to respond to it within the short time frame fixed by the UCP. Probably the LA District will fix the problem. (Why would it not do so if plaintiffs are correct that the books are in a closet waiting to be distributed?) But if it does not, plaintiffs have a right to appeal to the Department,

and the Department has the power to impose a solution. That process can be, and presumably will be, completed this school year, not in, say, 2006. And therefore the problem of which plaintiffs complain will be solved this school year, not years after every plaintiff attending Virgil Middle School has graduated. Is not that the most persuasive reason for requiring administrative remedies to be exhausted?

These are the obvious practical advantages of requiring exhaustion of administrative remedies. Defendants' Memorandum in Support of Demurrer demonstrated that exhaustion is also legally required where, as here, a plaintiff is seeking relief against a government agency and the agency has provided an administrative remedy. Mem. 18-20 & n.6. As the Supreme Court said only last year:

> The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief. Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the Court may review.

Sierra Club v. San Joaquin Local Agency Formation Comm., 21 Cal. 4th 489, 501 (1999) (internal quotations and citations omitted).

All these considerations are reasons for insisting on exhaustion here. Plaintiffs' arguments to the contrary are makeweights.

Thus plaintiffs say, quoting the State, that the UCP would not cover a claim of "inter-district disparity in educational experience." Opp. 24. Which is perfectly true, if by a claim of inter-district disparity plaintiffs mean what the State meant, which is a claim that the educational program of District A, viewed as a whole, is unconstitutionally inferior to the educational program of District B. Mem. 23 n.9. And plaintiffs also correctly point out that in Butt v. State of California, 4 Cal. 4th 668 (1992), which was a case of inter-district disparity, the UCP was not invoked. Opp. 23-24.

But plaintiffs' own discussion of Butt shows that their claims involve much more than inter-district disparity, since they propose a student-by-student, school-by-school analysis. Indeed they specifically and unequivocally reject the proposition that Butt forbids only inter-district disparities, Opp. 14-16 -- despite the fact that the Supreme Court unmistakably said precisely that. Mem. 2:19-22.[4] If plaintiffs will limit their

[4] Plaintiffs purport to take the State to task for a "crabbed construction" of Butt, and say that it would "radically reshape" California law. Opp. 15. The State did no more than quote what the Supreme Court plainly said, which is that there is "no constitutional violation" unless the quality of a "district's program, viewed as a whole," falls fundamentally below statewide standards. 4 Cal. 4th at 687 (emphasis added). On the facts, both Butt and Serrano v. Priest, 5 Cal. 3d 584 (1971), on which Butt rests, involve claims of discrimination between districts, not discrimination among students within a single district, or discrimination between students in one district and students in another district. Of course, plaintiffs are entitled to derive a

claims to inter-district disparity (such as the claim that remains, post-exhaustion, with respect to the Ravenswood district, see Opp. 28-29), the State will gladly agree that no administrative remedies need to be exhausted, and will withdraw this portion of its Demurrer. But if plaintiffs are making claims in addition to inter-district disparity (as they certainly are), then the UCP are available. And as the Supreme Court has said, exhaustion is not excused merely because "the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff." Sierra Club, 21 Cal. 4th at 501. It is enough to require exhaustion that an administrative remedy may simplify the litigation, reduce the Court's workload, draw on administrative expertise, promote judicial efficiency, and allow preliminary administrative sifting of the evidence. Id. The UCP would achieve all that here.

For similar reasons, there is nothing to plaintiffs' argument that they need not exhaust administrative remedies because the UCP supposedly "does not apply to all the species of discrimination identified in plaintiffs' complaint." Opp. 25:22-23. Plaintiffs' own formulation of their argument concedes that the UCP applies to some of the species of discrimination

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principle from Butt, and to argue that it should be extended beyond what the Supreme Court did and said in Butt. But they should not criticize the State for pointing out that no case decided by the Supreme Court or any California court has held in accordance with plaintiffs' contentions; and that the plain meaning of the language the Supreme Court used in Butt is contrary to plaintiffs' arguments.

identified in the Complaint, and that is enough to require exhaustion. Id.

Nor can plaintiffs rely on the principle that exhaustion is not required where no administrative remedy is provided or where an administrative agency is "powerless to grant relief." Opp. 26-27. The local districts are entirely capable of providing a remedy for most of the specific problems plaintiffs allege in their Complaint. If plaintiffs are dissatisfied with the result of the process at the local level, they have the right to appeal to the Department, the Department is entitled to make a recommendation for corrective action by the district, and the Department may "use any means authorized by law to effect compliance." UCP § 4652, 4663, 4664, 4670. Plaintiffs can thus obtain, through the administrative process, precisely the relief they say they want through litigation -- an enforceable order from the State directing the local district to solve the problems plaintiffs allege.[5]

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[5] Plaintiffs cite Kling v. County of Los Angeles, 633 F.2d 876, 879 (9th Cir. 1980), for the proposition that exhaustion is not required for their cause of action under the Civil Rights Act of 1964. Opp. 26. The case held only that a plaintiff was not required to exhaust "administrative remedies" with the United States Department of Education by asking the Department to cut off federal funding. As shown by Kling's reliance on footnote 41 of Cannon v. University of Chicago, 441 U.S. 677 (1979), the reason was that the federal agency had no administrative process that plaintiffs could "activate and participate in." 441 U.S. at 706-08 n.41. The cases cited do not deal with the UCP or any state administrative remedy, and they neither say nor suggest that exhaustion is excused if, as here, an administrative process is available which plaintiffs can activate and participate in, and which can provide them an effective remedy.

Finally, plaintiffs' reliance on Rojo v. Kliger, 52 Cal. 3d 65, 87-88 (1990), is entirely misplaced. Opp. 27-28. As pointed out in the State's Memorandum in Support of Demurrer, Rojo and similar cases deal with whether litigation between private parties must be held in abeyance while the parties present their claims to an administrative tribunal instead of a court. Mem. 20 n.6. This is not an action between private parties. It is an action against the State. And the issue is whether plaintiffs may bring a claim against the State without first exhausting the administrative remedy which the State has provided. No California case has ever allowed a plaintiff to avoid exhaustion in that circumstance.

And if an exception were ever to be made, it would not be in a case where plaintiffs' basic claim is that the State has not acted to cure their problems. No sensible rule of law or policy could possibly allow plaintiffs to sue the State for failing to cure their problems, when the State has provided an administrative remedy precisely so that plaintiffs' problems can be cured, and when plaintiffs have refused to invoke that remedy.

CONCLUSION

For the reasons stated, and those in the State's Opening Memorandum, the State's Demurrer should be sustained, with leave to plaintiffs to amend.

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