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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: Sept. 13, 2001
	Time: 8:30 a.m.
	Department: 16
	Judge: Hon. Peter J. Busch
AND RELATED CROSS-ACTION.	

STATE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Defendant State of California submits this memorandum in opposition to Plaintiffs' Motion For Class Certification. There is no need to certify a class in this case, and there is no legal basis for doing so. Plaintiffs' motion ought to be denied. In what follows, we show:

- The class proposed by plaintiffs includes virtually all six million public school students in California. Pages 3-6.

- Plaintiffs' motion says their lawsuit rests on the theory that the class members have been discriminated against compared with "most" of the students in California public schools. No class that includes <u>all</u> public school students can possibly pursue such a claim, or any other claim sounding in equal protection. Pages 6-9.

- If plaintiffs proceed on the theory that the Constitution directly requires the State to have a system of oversight and management for public schools that includes the standards plaintiffs advocate, then a class is entirely unnecessary. On such a theory any public school student could obtain an injunction requiring the State to do its constitutional duty, and that injunction would operate in favor of all class members. When an individual named plaintiff can obtain such an

injunction, the cases hold that a class is unnecessary and certification should be denied. Pages 9-16.

• If plaintiffs proceed on the theory that individual students have been deprived of a constitutionally adequate education, then no class is legally permissible. A class may not be certified where litigation of numerous and substantial individual issues is required to determine whether defendants are liable to the individual class members. Here, to resolve for all class members the issue of defendants' liability, the Court will have to decide whether each class member's school is providing a constitutionally adequate education. There are 8761 schools in California, and the issue will have to be decided separately for each of them. Pages 16-29.

• Whatever plaintiffs' theory, their class is fatally riven by conflicts. The effect of the relief plaintiffs seek, if granted, will be to divert billions of dollars from one group of districts and students to other students and districts. Plaintiffs' proposed class includes both those who will be injured by the relief they seek and those who will benefit. Due process forbids certifying a single class where some members seek relief that will injure others. Pages 29-34.

• The class may not be certified because the class representatives and counsel have breached their fiduciary duty to the absent class members by failing to pursue claims that the absent members could reasonably be expected to pursue. In

particular, plaintiffs and counsel have forsworn any effort to correct specific deficiencies in individual schools, even though absent class members would almost certainly want to seek such relief. Pages 34-36.

- There is no basis to certify plaintiffs' proposed subclass. Pages 36-37.

I. INTRODUCTION: WHAT THIS MOTION IS ABOUT.

Plaintiffs' motion seeks to certify a class that plaintiffs have defined as including all students who suffer from five specified "deprivations." Memorandum in Support of Motion for Class Certification ("Pl. Mem.") 3-4. Any child in public school in California who suffers from any one of the five "deprivations" is a member of the class.

In response to the State's Special Interrogatories (Set I), plaintiffs specified the standards they contend the State is constitutionally required to implement. In response to the State's Special Interrogatories (Set II), plaintiffs confirmed that the "deprivations" that define class membership equate to the absence of those standards. Declaration of Paul B. Salvaty ("Salvaty Dec."), Exs. A, B.

As elucidated by the standards that plaintiffs incorporate into it, plaintiffs' proposed class includes

virtually every public school student in California.[1] In particular:

- Plaintiffs include in their class all children who are attending year-round and multitrack schools. Pl. Mem. 4:6-7. Of the 6 million students in California public schools, 1.3 million, or 22%, attend such schools. Declaration of Thomas Payne ("Payne Dec."), ¶ 8.

- Plaintiffs include in their class all children attending schools where 20% or more of teachers do not have full, clear credentials, regardless of how able or qualified such teachers may be. Pl. Mem. 3:23-24. Excluding multitrack schools, this throws all students at an additional 15% of California's schools into the class. Declaration of William L. Padia ("Padia Dec.") ¶¶ 8, 12.

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[1] Taken separately, many components of plaintiffs' class definition could not be applied without more explanation of what plaintiffs mean and without a detailed investigation of conditions at each school in California. For example, precisely which schools in the State suffer from the "presence of vermin, mildew, or rotting organic material"? Every school that somewhere contains a cockroach or a garbage can? Or what schools have one or more rooms where "ambient or external noise levels regularly impede verbal communication"? If these or similar branches of the definition were critical to membership in the class, there would be serious issues about whether plaintiffs had met their duty of proving the existence of an "ascertainable class." Reyes v. San Diego County Board of Supervisors, 196 Cal. App. 3d 1263, 1270-71 (1987); Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833 (1948). Since other branches of the class definition sweep so broadly as to include virtually every student in California, however, the vagueness of some branches of the definition is not of practical consequence.

- 94% of California's students fall into plaintiffs' proposed class because their classrooms were constructed prior to 1994, and do not meet plaintiffs' classroom size standard. Declaration of Carol Shellenberger ("Shellenberger Dec.") ¶¶ 8, 9; Declaration of Dennis Bellet ("Bellet Dec.") ¶¶ 10-13; Pl. Resp. Interrog. Nos. 170, 292.

- No school in California designed before 1998 meets plaintiffs' criterion that a school must provide as many toilets for girls as toilets and urinals for boys. Bellet Dec. ¶¶ 7-10. This branch of the class definition accordingly sweeps in almost every public school student in the State. Id.

- Plaintiffs include in their class every student at any school that lacks "reasonably current" textbooks for each student in each core subject. Pl. Mem. 3:21. Plaintiffs define "reasonably current" as meaning that the textbooks "fairly portray subject material that is existing at the present time." Pl. Resp. Interrog. Nos. 239-40. But textbooks throughout California are approved and adopted on a seven year cycle. Declaration of Sherry Griffith ("Griffith Dec") ¶¶ 5,6. At any given time, therefore, on average 14% of all textbooks are seven years out of date; and every student at every school in the State falls into the class based on the class definition plaintiffs have proposed. Id. ¶¶ 4, 10.

That is the class that plaintiffs' motion seeks to certify. In this opposition, the State addresses only whether

the Court should certify that specific class. We do not address whether some or all of plaintiffs' claims would be susceptible to class treatment with a different class definition, for the sufficient reason that no motion to that effect is before the Court.[2]

II. PLAINTIFFS' EQUAL PROTECTION THEORY DOES NOT ALLOW CERTIFICATION OF PLAINTIFFS' CLASS.

Class certification in California depends primarily on whether the claims of the class members have a "well-defined community of interest." C.C.P. § 382; Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 435 (2000); Silva v. Block, 49 Cal. App. 4th 345, 350-51 (1996); Brown v. Regents of University of California, 151 Cal. App. 3d 982, 988-91 (1984); Hamwi v. Citinational Buckeye Inv. Co., 72 Cal. App. 3d 462, 471-74 (1977); 4 WITKIN, CALIFORNIA PROCEDURE, PLEADING § 256 (4th Ed. 2000). The leading case in California that has given content to the "community of interest" requirement is City of San Jose v. Superior Court, 12 Cal. 3d 447 (1974), where the Supreme Court held that a "class action cannot be maintained where each member's right to recover depends on facts peculiar to his case." Id. at 459; see Brown,

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[2] If plaintiffs should seek at any point to certify a different class or to modify their class definition, the State reserves the right to file a further response. Similarly, the State addresses plaintiffs' motion solely on the basis of the allegations of the Complaint and of the declarations submitted in support of the motion. Should plaintiffs improperly attempt to submit in reply any further factual information in support of their motion, the State reserves the right to conduct necessary discovery and to file a further opposition to plaintiffs' motion.

151 Cal. App. 3d at 988-91; Hamwi, 72 Cal. App. 3d at 471-74. Only this year, the Supreme Court reaffirmed the community of interest test set out in City of San Jose in Washington Mutual Bank v. Superior Court, 24 Cal. 4th 906, 913-14 (2001). Determining whether a class may be certified thus requires careful definition of the claims being asserted, and careful analysis of the factual and legal issues that need to be resolved if each class member is to prove his or her claims.

In this case, from the very beginning of the litigation, plaintiffs have been cagey about the exact nature of their claims. Their motion is no exception. Apart from a single footnote, it contains no explanation of the legal basis for their claims, much less an analysis of the precise legal and factual issues that would have to be resolved in order for each class member to prevail. Without such an analysis, there is no way to tell whether or not a class member's claim will depend on "facts peculiar to his case"; and thus no way to tell whether, under the controlling standard of City of San Jose, certification of any class is permissible. See Bauman v. Islay Investments, 45 Cal. App. 3d 797, 802 (1975).

Nevertheless, even the single footnote that plaintiffs provide shows clearly that certification of this class is impossible. Pl. Mem. 1 n.1. Plaintiffs say that they "will prove that class members suffer such fundamental educational disadvantages, as compared to most students in California public schools, that they have a constitutional right to a remedy from

the State under the equal protection guarantees of the State Constitution." Id. (emphasis added). And they cite Butt v. State of California, 4 Cal. 4th 668 (1992), an equal protection case. But as we have shown, plaintiffs' proposed class includes virtually every public school student in California; it cannot possibly be the case that such a class suffers from educational disadvantages "as compared to most students in California public schools." Id. In fact, not only "most students in California public schools," but all of them, are members of the class.

More generally, an equal protection claim, whether based on Butt or any other equal protection case, depends on a showing that one group of students has been treated differently as compared with some other group of students -- in the language of the cases, that one group of students was subjected to "invidious discrimination." E.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31 (1994); McLaughlin v. Florida, 379 U.S. 184, 191 (1964). Whatever equal protection claims may or may not exist in favor of some California children based on Butt or Butt's predecessor, Serrano v. Priest, 5 Cal. 3d 584 (1971), it is self-evident that no equal protection claim may exist on behalf of a class of all California schoolchildren. An equal protection claim presupposes that one group is treated badly and one group is treated well. By definition, such a claim cannot be brought on behalf of a class which includes both those who are treated well and those who are treated badly. Plaintiffs' motion for class certification must be denied for this reason alone.

III. PLAINTIFFS' "VIOLATION" THEORY DOES NOT ALLOW CERTIFICATION OF PLAINTIFFS' CLASS.

Even if plaintiffs were to be allowed to seek class certification on the basis not of the only claims their motion says they will assert, but of the various and shifting theories of liability that they have asserted in the past, their motion would still have to be denied. The theories that plaintiffs have asserted fall into two categories, which the State will call the "violation" theory and the "remedy" theory. Neither can justify certification of the class that plaintiffs propose. In this section the State discusses the "violation" theory; in the following section, the "remedy" theory.

A. No Class is Necessary For Plaintiffs' "Violation" Theory.

Plaintiffs' "violation" theory is that the Constitution of California imposes directly on the State a duty to provide what plaintiffs call "a system of oversight and management" for the public schools, and that the State has violated this constitutional duty by failing to implement the required system. See e.g., Plaintiffs' Reply in Support of Motion to Sever and Stay Proceedings at 1-2, 9. Plaintiffs define the required "system of oversight and management" as including the

promulgation and enforcement of the rigid standards which they have proposed in their interrogatory answers.[3]

The trouble with this theory is that there is no support for it in the text of the Constitution or in any case. To the extent the case law speaks to plaintiffs' theory at all, it says that the State's power over public education is "plenary,"[4] which would seem to imply that the State has power to delegate the administration of the public schools to local districts, and that (absent proof of some other constitutional violation) the State is not required to have any "system of oversight and management" at all. But this motion is about class certification, not the merits of the litigation, so for present

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[3] Contrary to plaintiffs' overheated rhetoric about how the State does nothing to assure educational quality, in fact the dispute on the merits of this case is about whether the State is constitutionally required to adopt the rigid standards plaintiffs propose. For example, as to teachers, the State has literally dozens of programs designed to recruit qualified teachers and to help them obtain full clear credentials. Plaintiffs, however, insist that in addition the State should have a rigid standard that no school may have more than 20% of its teachers without a full clear credential. Reasonable people can disagree about whether plaintiffs' proposed standard is a good idea; the State shares the views of many educators that a rigid standard like that would harm educational quality and discourage the recruiting of qualified teachers. Declaration of Kathy Clark ¶¶ 7-11; Declaration of Todd Cherland ¶¶ 13-18; Declaration of Jacqueline Moore ¶¶ 18-20; Declaration of Bob Rodrigo ¶¶ 17-21; Declaration of Betty Steward ¶¶ 19-21. The constitutional dispute is whether the State's plenary power over public education allows it to make its own policy choice in this matter, as opposed to the one that plaintiffs seek to compel.

[4] Butt, 4 Cal. 4th at 688; Hall v. City of Taft, 47 Cal. 2d 177, 181 (1956); Kirchmann v. Lake Elsinore Unified School District, 83 Cal. App. 4th 266, 279 (2000); Tinsley v. Palo Alto Unified School District, 98 Cal. App. 3d 871, 881 (1979); Patterson Joint Unified School District v. State Board of Education, 244 Cal. App. 2d 921, 930 (1966).

purposes the State will assume arguendo that plaintiffs are entitled to contend: (1) that the Constitution directly requires that the State have a "system of oversight and management"; and (2) that the Constitution also requires, as part of such a system, that the State implement the standards plaintiffs have proposed.

If that is plaintiffs' theory, however, it is plain that no class is needed. Plaintiffs say that the Constitution should be interpreted just as if it said (which it does not), in ipsissimis verbis, that "the State shall provide a system of oversight and management for the public schools which shall include the standards plaintiffs propose." If the Constitution said that, then (assuming the other requirements for equitable relief were satisfied) any child with standing could obtain an injunction compelling the State to implement the system that the Constitution required. And "standing" would require no more than a plausible showing that the constitutionally mandated system was designed to benefit schoolchildren like the plaintiff. If an injunction issued, its "benefits" would flow to all children in California, and would give them all the relief that plaintiffs seek. A class would be totally unnecessary.

It is notable that plaintiffs' "violation" theory is the only theory whereby this case could be confined, as plaintiffs repeatedly insist it should be, "to the State's system of oversight and that system's alleged inadequacies and failures." Order, Nov. 14, 2000, at 2. If plaintiffs' case is

limited to the contentions that the Constitution directly requires a particular system of oversight, then the issues to be litigated are: (1) does the Constitution in fact impose on the State the obligation to have such a system? (2) what are the constitutionally required components of such a system? and (3) does the State's current system for overseeing the public schools comply with what the Constitution requires? Evidence about the educational experience of particular children, like evidence about conditions at particular schools, will be entirely irrelevant.

At the first hearing in this case, the Court asked counsel for plaintiffs if they intended to offer proof of circumstances at particular schools. Order, Nov. 14, 2000, at 2:8-16. Plaintiffs represented that they did not intend to do so, since the constitutional violations they alleged were not the conditions existing in individual schools but the State's supposed failure to comply with a constitutional duty resting directly on it. Id. Plaintiffs thus squarely represented that their case was limited to a "violation" theory. The Court stated that it would hold plaintiffs to their representation, and that plaintiffs' choice of theory would have "ramifications to all stages of the case, including . . . class certification." Id.

It is now time for the Court to do as it said it would, and to hold plaintiffs to their representation. If their case is based, as they say, on the "violation" theory, then the "ramification" is that a class is unnecessary for plaintiffs to

obtain the relief they seek. The cases hold universally that where only injunctive and declaratory relief are sought against a governmental entity, and where the relief sought, if granted, would automatically accrue to the benefit of all class members (as it would on plaintiffs' "violation" theory), class certification is unnecessary and should be denied. Berger v. Heckler, 771 F.2d 1556, 1566-67 (2d Cir. 1985); Craft v. Memphis Light, Gas & Water Division, 534 F.2d 684, 686 (6th Cir. 1976); Ihrke v. Northern States Power Co., 459 F.2d 566, 572 (8th Cir. 1972); Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178 (4th Cir. 1978); Cercpac v. Health & Hospitals Corp., 920 F. Supp. 488, 493 (S.D.N.Y. 1996); Gray v. Int'l Broth. Of Elec. Workers, 73 F.R.D. 638, 640-41 (D.D.C. 1977) (collecting cases).

B. A Class Would Produce No Substantial Benefits.

For a class to be certified, California law requires that "the representative plaintiff must show substantial benefit will result both to the litigants and to the court." Blue Chip Stamps v. Superior Court, 18 Cal. 3d 381, 385 (1976); Caro v. Procter & Gamble Co., 18 Cal. App. 4th 644, 657-62 (1993). The Supreme Court has "consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue to both the litigants and the courts." City of San Jose, 12 Cal. 3d at 459; Caro, 18 Cal. App. 4th at 658. If the Court concludes that certification of a class will make no practical difference, certification must be denied.

The previous section has shown that on plaintiffs' "violation" theory a class is unnecessary for the named plaintiffs to obtain all the injunctive relief which they seek. Nor is there any other reason to certify a class. The arguments plaintiffs make about the supposed "benefits" of a class action are illusory or makeweight. Pl. Mem. 12-16.

Plaintiffs' principal argument for a class is that it will prevent a "multiplicity of litigation." Pl. Mem. 12-13. But there is no reasonable prospect that any person can or will pursue litigation outside this lawsuit based on plaintiffs' "violation" theory. The "violation" theory presents a question of law which will ultimately be resolved by the Court of Appeal or the Supreme Court. If plaintiffs' contentions are upheld, no additional lawsuits will be necessary because an injunction will issue that will remedy any violation. If the appellate courts reject plaintiffs' claims, stare decisis means no additional lawsuits will be possible. No class is necessary to obtain a resolution of the merits of plaintiffs' "violation" theory that will be binding, both legally and practically, on the State and on everyone in California.

Plaintiffs also say that a class will ensure the effectiveness of a final judgment and prevent arguments about mootness. Pl. Mem. 13-15. But mootness is not a relevant problem. In a case of public importance like this one, a California court may proceed to adjudicate the merits even of a dispute that is entirely moot as among its original parties.

DeRonde v. Regents of University of California, 28 Cal. 3d 875, 879-80 (1981); Green v. Superior Court, 10 Cal. 3d 616, 622 n.6 (1974). As for enforcing any judgment, the issue is purely hypothetical; and if there should be a final judgment and if the State should refuse to obey it (which there is no reason to assume) any student who stood to benefit from the order could intervene in this action to enforce the judgment. Plaintiffs' arguments on these points raise no issue of substance.

In contrast to its non-existent benefits, a class would involve real danger of unfairness to defendants in this case and to millions of California school children. Plaintiffs and their counsel want a class so they can create the illusion that they, and they only, speak for six million students in California public schools -- not the local districts that run the schools, not the teachers and administrators who educate the students, and not the elected officials of the State who are ultimately responsible to the People, under the Constitution, for educational policy in California. To be sure, there are doubtless students and parents who agree with the plaintiffs' lawsuit, and with their proposed remedies. But among the six million children in plaintiffs' class there are also many millions who, with their parents, favor local control and not State supervision, who do not agree with the rigid standards plaintiffs seek to impose, who know from their own experience that plaintiffs' claims are vastly exaggerated, and who do not wish to see the current system of public education turned upside

down and replaced with a system run centrally by lawyers under judicial mandate.

If plaintiffs are given the right, through a class, to represent all six million children in California public schools, those who do not agree with plaintiffs' goals or tactics will be effectively disfranchised, and conscripted as collaborators in plaintiffs' lawsuit. They will be required to communicate only with plaintiffs and their counsel, and they will be cut off from communication about this case with their local districts and with the State.[5] That would be unjust and fundamentally unfair, and the Court should not allow it. The solution is not to certify a class.

IV. PLAINTIFFS' "REMEDY" THEORY DOES NOT ALLOW CERTIFICATION OF PLAINTIFFS' CLASS.

The second theory suggested by plaintiffs' Complaint is their "remedy" theory. On this theory the constitutional violation is not the State's failure to implement a system of oversight which the Constitution directly commands, but the fact that individual children allegedly are not receiving a

[5] Plaintiffs themselves have let this cat out of the bag. They say that the class, if certified, will become "the attorneys' client." Pl. Mem. at 15:18. In practice, that means that plaintiffs' counsel hope to cut defendants and the districts off from communication with students about this case. Besides its essential injustice, any such rule would greatly complicate the litigation by preventing the informal communications with students by which defendants (like plaintiffs) now acquire information; and thus potentially requiring formal depositions of hundreds or thousands of students.

constitutionally adequate education.[6] If plaintiffs prove that that is so, then of course those children will be entitled to a remedy (assuming the other requirements for equitable relief are met) sufficient to remedy the constitutional violation that is proved. Since it is not disputed that the State has ultimate responsibility for the public school system, in principle a remedy for a constitutional violation could run against the State.[7]

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[6] This phrase is a shorthand for the various types of constitutional violations that plaintiffs allege in the four causes of action that remain in their Complaint. Sometimes plaintiffs appear to imply that there is an absolute standard for a constitutionally adequate education, as when they rely on the due process clause or the free school clause; at other times they appear to urge that the standard is relative, as when they rely on equal protection. Defendants understand plaintiffs to be relying ultimately on their interpretation of the standard set forth in Butt, which is whether a school's educational program, taken as a whole, falls fundamentally below the standard otherwise prevailing in California. 4 Cal. 4th at 686-87. Plaintiffs sometimes identify the constitutional violation more generally, as when they say it lies in the fact that students in public schools have been subjected to "conditions and facilities that shock the conscience." Pl. Mem. 1:5. For purposes of the argument in this section, it does not much matter what the actual definition of a constitutionally adequate education may be. As long as the application of that definition requires consideration of the nature of the education offered at a particular school, or the education received by a particular student, the circumstances of 8761 schools will have to be considered in order to resolve the claims of all members of the plaintiff class, and the argument in the text is essentially the same.

[7] By acknowledging that in principle a remedy could run against the State, the State does not concede that any such remedy would be an appropriate exercise of the Court's equitable discretion, even assuming it were proven that the education some children are receiving did not measure up to constitutional norms.

A. No Class is Legally Permissible Under Plaintiffs' "Remedy" Theory.

For plaintiffs to obtain relief under their "remedy" theory, they must show that the education particular children are receiving is constitutionally inadequate. Unless a constitutional violation is proved, no remedy can be granted, not against the State and not against anyone else; and since the constitutional violation is a constitutionally inadequate education, no child who is receiving a constitutionally adequate education has a claim.

Plaintiffs' "remedy" theory thus requires them to examine the educational program of particular schools, and to prove that the educational opportunities offered in those schools are constitutionally inadequate. To resolve whether the six million class members have claims, the Court will thus have to make an individualized determination about the quality of education at each of the 8761 public schools in California. Only when that determination has been made can it be known whether students in a particular school are receiving a constitutionally adequate education. Only then can it be known whether they have a claim which will entitle them to a remedy.

This type of determination will be horrendously complicated. Since the motion for class certification was filed, plaintiffs and defendants have conducted considerable discovery. That discovery shows, in the State's view, that the allegations

in the Complaint are largely untrue or exaggerated. The State has filed herewith a Chart of Plaintiffs' Allegations, covering only the 12 schools that the proposed class representatives attend, and contrasting the allegations of plaintiffs' Complaint with what the class representatives or the principals of the school have said in their depositions. The Chart shows that, even for those 12 schools, plaintiffs' allegations are generally contrary to what the school principals know to be the case; and frequently the allegations of the Complaint are contradicted by the proposed class representatives as well. At a minimum, the Chart shows that basic factual issues about conditions in individual schools are subject to sharp dispute. If the Court is to decide whether plaintiffs at those schools are being deprived of a constitutionally adequate education, it will have to resolve the hundreds of factual disputes that the Chart demonstrates. Then the Court will need to make an overall judgment, based on the curriculum offered and the school's overall academic performance, about whether the education offered in each school is constitutionally adequate. That is a very tall order even for 12 schools; for 8761 schools it is simply unthinkable.

No class can be certified under such circumstances. The leading case of City of San Jose holds clearly that a class cannot be certified if the issues common to the class members (and which could be resolved by a "class judgment") do not suffice to determine whether a defendant is liable to individual class members. As the Supreme Court said:

> [A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case . . . . The rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment" determining issues common to the purported class.
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> . . .
>
> It is true that some questions common to the members of the class [are present]. But the class judgment rendered on those facts would not determine issues of sufficient number or substantiality to warrant class treatment. Most notably, the class judgment would fail to establish the basic issue of defendant's liability to the purported class. While we have held in several cases the failure of the class judgment to establish damages would not be fatal, in each the class judgment to be rendered would have established the basic issue of liability to the class. Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the class members would be required to individually prove not only damages but also liability. 12 Cal. 3d at 459, 463 (citations omitted).

On plaintiffs' "remedy" theory, their proposed class has the same fatal deficiency as the class in City of San Jose. No evidence common to the class can establish whether any individual class member is or is not receiving a constitutionally adequate education. No evidence common to the class can "establish the basic issue of defendants' liability" to the purported class members. Even if all common issues are resolved against defendants, every member of the alleged class will be required to litigate numerous and substantial questions in order to establish his or her individual right to relief.[8]

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[8] This was shown clearly by the papers filed on the recent motion for summary adjudication concerning plaintiffs attending

B. The "Deprivations" That Define Class Membership Do Not Equate To Constitutional Violations.

Plaintiffs cannot avoid the need to make an individualized showing about the education offered at each school by pretending that the "deprivations" that define membership in the class also constitute proof that a school is offering a constitutionally inadequate education. On the contrary, the various "deprivations" to which plaintiffs point -- which for the most part amount to nothing but a school's failure to conform to an arbitrary rigid standard which plaintiffs' counsel have proposed[9] -- do not necessarily mean that the school offers a

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Cloverdale High School. Whether or not the Court's ruling based on C.C.P. § 437c(f)(1) is ultimately upheld by the Court of Appeal, the papers filed show clearly that whether the three Cloverdale plaintiffs are receiving a constitutionally inadequate education depends entirely on facts unique to them and to Cloverdale. Even if plaintiffs eventually show that the 12 schools attended by the proposed class representatives provide a constitutionally inadequate education, such a showing will have no tendency to prove that the Cloverdale plaintiffs are also receiving an inadequate education, or that a constitutional violation has occurred as to them.

[9] It bears emphasis, as previously discussed at note 3 supra, that the merits of the constitutional dispute go not to whether defendants are taking steps to address educational problems in California, but whether the particular standards plaintiffs insist on are constitutionally required. For example, the State has chosen to address the matter of textbooks through requiring districts to certify that they have adequate supplies, Educ. Code § 60119, and through massive appropriations of money under the Schiff-Bustamante Act and otherwise. The Chart of Allegations confirms the view of most objective observers that plaintiffs' factual allegations on this subject are misguided. See Myth of the Book Crisis, Los Angeles Times, April 11, 2001, Salvaty Dec. Ex. C. In any event, the constitutional question is not whether something should be done about textbooks; it is whether the State is constitutionally required to take the particular actions plaintiffs propose as distinct from the actions it is carrying out now.

poor quality of education. The Padia Declaration and the declarations of school principals Elizabeth Flynn, Judy Washington, Norma Baker, Lorraine Fong, Debra Tate, Jacqueline Moore, Betty Steward, Nancy Copley, Todd Cherland, Rick Grove, Bob Rodrigo, Tom Donfrio, Nancy Mettler, Steve Muzinich, Mark Pospisil, Robert Williams and Kathy Clark show that many schools whose students fall into plaintiffs' class for one reason or another nevertheless offer excellent and prizewinning educational programs.

Statewide statistics paint the same picture. Consider multitracking, which plaintiffs treat as involving almost a per se deprivation of a constitutionally adequate education. In fact, of the 1003 schools in that category that received an API rating -- the State's basic method of measuring academic performance -- 208 rank in the sixth decile or higher, meaning that they scored better than 50% of California's schools. Padia Dec. ¶¶ 12, 13. And 414 such schools rank in the fourth decile or higher, that is, roughly the top two-thirds. Id. Multitrack schools are frequently located in inner city neighborhoods where many students are poor, lack English language skills, and/or suffer from multiple social problems. It would hardly be surprising if the academic performance of such schools as a group were far below the average for the State as a whole. Yet the statistics do not show that. And certainly there is nothing in the statistics to show that multitracking is the cause of any educational deficiencies, or that it translates automatically into a constitutionally inadequate education. Padia Dec. ¶ 15;

Payne Dec. ¶ 9. Whether that is the case for a school using multitracking can be determined, if at all, only by examining and analyzing all aspects of the school's educational program.

Or take plaintiffs' contention that there is an unconstitutional "deprivation" if 20% or more of the teachers at a particular school do not have full clear credentials. The State maintains statistics that show the distribution of teacher credentials at every school in California. But there is no reason to assume that a school with large numbers of teachers with less than full credentials is a poor school, or that plaintiffs' alleged "deprivation" translates into a constitutionally inadequate education.

For example, Jackie Robinson Academy is a prize-winning magnet school in Long Beach that draws students from all over the district, and offers bilingual teaching in French, Spanish and Japanese. About half its teachers do not have full clear credentials, so plaintiffs target it in their Complaint.[10] But here is what the principal of Jackie Robinson Academy has to say about plaintiffs' theory that this deprives her students of qualified teachers:

> Robinson is a language and science magnet and, thus, teachers at Robinson must be fully bilingual in Japanese, French, or Spanish. These unique language proficiencies are not easily found in existing files of permanent teacher applicants with full credentials. Therefore, Robinson recruits and attracts many highly

[10] Complaint ¶¶ 267-270; the Flynn Declaration shows that plaintiffs' allegations are entirely without substance.

> qualified teaching candidates from private language academies and out-of-state language schools or professionals from other industries, all of whom may not possess a California permanent credential but have many years of teaching or professional experience.
>
> . . .[H]aving a California credential does not guarantee that the candidate will be an excellent teacher. . . . I have been able to hire excellent teachers at Robinson regardless of whether they have full credentials. For example, last year, Robinson employed a math and science teacher with emergency credentials who was chosen as a Disney Teacher of the Year, a national recognition award.

Flynn Dec. ¶¶ 13-15.

Or here is the deposition testimony of the principal of Cahuenga Elementary School in Los Angeles, another outstandingly good school mystifyingly trashed by plaintiffs' Complaint,[11] where over 40% of the teachers do not have full clear credentials:

> Q. What are you looking for when you are interviewing applicants for a teaching position at Cahuenga?
>
> A. . . . I look for who they are as a human being, that I want people who are bright and who are reflective about themselves, who can admit they made a mistake, who are willing to learn, who have a passion for teaching, who love children. And I suppose the most important part is that being able to reflect on oneself. If you can own up you have made a mistake and you are willing to change, then there is hope for creating a really fabulous teacher.
>
> Q. Is it important to you when you are

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[11] Complaint ¶¶ 169-173. It is a sufficient answer to plaintiffs' allegations that Rosa Tellechea, the mother of two of plaintiffs' proposed class representatives, testified that Cahuenga is a good school that provides her son a good education. Salvaty Dec. Ex. BB at 228:4-29:5, 472:10-73:1, 485:19-87:3. Her grievance is rather that Cahuenga is full, so that her other son must go to a neighboring school and cannot attend it. The Chart of Allegations shows just how little there is to plaintiffs' allegations about Cahuenga. Chart at 1-5.

interviewing that the candidate have a full nonemergency teaching credential?

A. No.

Q. Why is that?

A. I believe that training is the polishing of the stone. And I believe that innate part that you have to have, if it is not there, you can't give it. And I tell everybody I am working with the finest staff I have ever had in my whole professional career.

Salvaty Dec. Ex. M at 82:11-83:17. See also the principals' declarations cited supra note 3.

There is no shortcut available to plaintiffs here. Plaintiffs' alleged "deprivations" have no necessary relationship to educational quality. Determining whether class members have been offered a constitutionally adequate education will require an examination in detail of the actual educational program at each school. It cannot be done on a class-wide basis.

C. No Authority Supports Plaintiffs' Arguments That A Class Like This One Can Be Certified.

Plaintiffs argue that the requisite "community of interest" is present here, Pl. Mem. 20-22, but they cite no case that is remotely comparable to this one -- no California case and no federal case. So far as the State is aware, no Court has ever certified a statewide class of six million students, let alone a class where determining whether defendants have liability to the

class members will require individualized examination of conditions at 8761 schools.

The only California case plaintiffs cite is Mendoza v. County of Tulare, 128 Cal. App. 3d 403 (1982), which involved a class of 250 prisoners complaining of conditions in the Tulare County Jail. In upholding certification, the Court of Appeal pointed out that most of the jail's alleged violations affected every class member in the same way, so that proof of a violation affecting one class member would prove the violation as to all.[12] Mendoza thus fits squarely within the City of San Jose standard that a class may be certified only when proof of liability to one class member will be proof of liability to all. 12 Cal. 3d at 459-61. Mendoza might justify a class of students at a single California school. It cannot justify a class of students attending 8761 different schools, with different educational programs and conditions at each school.

Equally distinguishable is the federal case plaintiffs rely on, Baby Neal v. Casey, 43 F.3d 48 (3d Cir. 1994). That case involved children who were in the custody of the Philadelphia Department of Health Services. They complained that the Department was violating various statutory requirements about provision of services, and they sought an injunction requiring the Department to comply. In approving certification of a class, the Third Circuit noted explicitly that the services the

[12] 128 Cal. App. 3d at 417. For example, proof that the jail did not have a doctor was proof that each class member lacked access to one.

Department should have provided were prescribed by statute, so that no consideration of the circumstances of individual class members was needed to determine whether the Department had violated the law. 43 F.2d at 62 ("the violations exist independently of individual children's circumstances"). Like Mendoza, Baby Neal is perfectly consistent with City of San Jose, since in Baby Neal (unlike this case) it was possible to prove liability on a class-wide basis.

Plaintiffs' argument that Baby Neal justifies the class they seek here is also foreclosed by other federal case law. The Baby Neal court acknowledged and distinguished Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982), where the Fifth Circuit refused to certify a statewide class of prisoners claiming Eighth Amendment violations, since the requisite totality of the circumstances test would have required separate consideration of conditions at 82 county jails. The Third Circuit held that Baby Neal was different from Stewart because plaintiffs in Baby Neal challenged a "unitary system" and a "localized service," the provision of child welfare services in Philadelphia, 43 F.2d at 62, and because (unlike Stewart) Baby Neal did "not require an individualized inquiry into a vast network of institutions." Id.

The next case was K.L. v. Valdez, 167 F.R.D. 688 (D.N.M. 1996), where plaintiffs sought to invoke Baby Neal to certify a class challenging the child welfare system of the entire State of New Mexico. The district court refused certification on the ground that a statewide class, unlike Baby

Neal, would require "individualized inquiry into a network of institutions" servicing a large geographic area. 167 F.R.D. at 692.

The Tenth Circuit affirmed on the ground that "other than being disabled in some way and having had some sort of contact with New Mexico's child welfare system, no common factual link joins these plaintiffs." J.B. v. Valdez, 186 F.3d 1280, 1289 (10th Cir. 1999). And the court specifically rejected the contention, made by plaintiffs here, that an allegation of "systemic failures in the defendants' child welfare delivery system" was sufficient to create a common issue that would justify class certification. Compare Pl. Mem. 21:6-13 with 186 F.3d at 1289.

This case is governed by California law, not federal law; so even if federal cases had departed from the requirements of City of San Jose, this Court could not do so. But in fact the federal law on which plaintiffs rely shows that this class should not be certified. This case is like Stewart and K.L., not like Baby Neal. Those cases, like a host of federal decisions that plaintiffs do not cite, show that no class should be certified.[13]

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[13] See e. g., Simpson v. Heckler, 630 F. Supp. 736 (E.D. Pa. 1986) (no class of all Medicaid recipients in Pennsylvania where claimed violation did not affect all of them); Metcalf v. Edelman, 64 F.R.D. 407 (N.D. Ill. 1974) (no class of welfare recipients where claim that defendants had failed to provide plaintiffs with a "livelihood compatible with their health and well being" would require individual adjudication for each plaintiff); Yen v. Kissinger, 70 F.R.D. 656 (N.D. Cal. 1976) (no class of Vietnamese children claiming to have been brought to the United States improperly where decision as to one child would not

V. WHATEVER PLAINTIFFS' THEORY OF LIABILITY, THE CLASS THEY PROPOSE MAY NOT BE CERTIFIED BECAUSE OF CONFLICTS AMONG THE CLASS MEMBERS.

It is axiomatic that a class may not be certified where the members of the class have actual conflicting interests with respect to the subject matter of the lawsuit. Hansberry v. Lee, 311 U.S. 32, 44-45 (1940); Richmond v. Dart Industries, Inc., 29 Cal. 3d 462, 470-71 (1981); Horton v. Citizens National Trust & Savings Bank, 86 Cal. App. 2d 680, 683-86 (1948). That is the case here; and it is so regardless of whether plaintiffs proceed on their "violation" theory or their "remedy" theory.

The State's Special Interrogatories forced plaintiffs to come out from behind the generalities of the Complaint, and to lay out at least in part what they actually want the State to do. Plaintiffs' answers make apparent that what plaintiffs want will necessarily injure the interests of many of the six million members of plaintiffs' proposed class.

Thus, plaintiffs propose:

- That the State design and implement a plan to eliminate all multitracking and year-round schools. Pl. Resp. Interrog. Nos. 181, 283. Leaving aside the dubious educational

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decide the case as to another child); Massengill v. Board of Education, 88 F.R.D. 181 (N.D. Ill. 1980) (in challenge to student suspension policy, class of all students was improper since not all students were subject to suspension).

merits of this idea,[14] it would require about $4 billion in new school construction and related costs to implement, over and above the $9.69 billion that it has been estimated will be needed to fund new schools just to cope with population growth. (Los Angeles, for example, has a plan to build 85 new schools over the next few years.) Payne Dec. ¶ 11, Ex. A; Salvaty Dec. Ex. DD.

- That the State design and implement a program to retrofit all schools throughout the State to meet the requirements of the State's 1994 new school construction standards. Pl. Resp. Interrog. Nos. 170, 292. There is no way to estimate such costs, but they certainly would exceed by far the projected $9.37 billion that it is estimated will be needed merely for modernization and deferred maintenance over the next five years. Salvaty Dec. Ex. DD.

- That the State design and implement a standard to ensure that no school in the State has more students than the number for which it was originally designed. Pl. Resp. Interrog. Nos. 170, 292. Taken literally, this would require the elimination of all so-called "portable" classrooms throughout the State. An estimated 144,716 students are currently housed in portables funded by the State; others are housed in portables

[14] Many educators prefer year round schools to the traditional calendar, which was created 150 years ago for the needs of a largely rural society. The long summer vacation, while convenient for parents and teachers, has only negative educational value. Declaration of Norma Baker ¶ 15; Declaration of Lorraine Fong ¶ 14; Declaration of Nancy Mettler ¶¶ 8, 9; Declaration of Jacqueline Moore ¶ 17; Declaration of Betty Steward ¶ 17; Declaration of Debra Tate ¶ 15.

which districts have funded on their own. Shellenberger Dec. ¶ 10. Building new permanent classrooms only for the 144,716 students housed in State-funded portables would cost $2.4 billion, given that new school construction costs per student are $16,728. Salvaty Dec. Ex. DD.

- That the State design and implement a standard to ensure that every school has as many bathrooms as required by the State's 1994 new school construction standard, and as many toilets for girls as there are toilets and urinals for boys. Pl. Resp. Interrog. Nos. 78, 82, 93, 260. No school in the State currently complies with this standard, and there is no way to tell exactly what the standard would cost. But it would be expensive: the cost of renovating toilets at a single school is $30,000. Bellet Dec. ¶ 16.

- That the State design and implement a standard to ensure that every classroom in the State has air conditioning. Pl. Resp. Interrog. Nos. 104, 115, 251. The Bellet declaration estimates the cost of replacing HVAC rooftop units at a single school as $372,530. Bellet Dec. ¶ 17.

If plaintiffs obtain the relief they want, where will these billions come from? The Court has no power to require the Legislature or the voters to provide more money for education. Butt v. State of California holds clearly that the doctrine of separation of powers precludes the Court from requiring that the State spend money for any purpose for which the Legislature has

not appropriated it. 4 Cal. 4th at 697-702. Since the Court cannot conjure up out of nothing the vast sums that would be necessary to implement the relief that plaintiffs are seeking, the Court could at most order the State to redirect money already appropriated by the Legislature (or voted by the people) from one use to another.[15] That is a game which will inevitably have losers as well as winners among California's school children.

To put it bluntly, plaintiffs seek relief which, if granted, will divert school construction and perhaps other funds, in massive quantities, from the districts that currently receive them to urban and inner city schools that are older and overcrowded. Instead of going to districts like Hemet or Palmdale or Palo Alto or Walnut Creek, it will go to Los Angeles and Oakland. That may or may not be a good thing: reasonable people can (and in the political process do) dispute where the funding priorities for education should be. But no one should pretend that resources are infinitely expansible, or that improving funding for children in some districts will not also reduce funding for other children in other districts.

Money, moreover, is not the only issue. Plaintiffs' proposal to cap at 20% the number of teachers in any given school who lack full clear credentials will also require massive redistribution of a scarce resource -- in this case, teachers -- within districts and across district boundaries. Since at any

[15] Any such transfer of appropriated funds would of course have to comply with the rules laid out in Butt.

given time about 20% of all teachers in California lack full clear credentials, plaintiffs' proposal could not possibly be implemented without inducing some teachers possessing full clear credentials to transfer to schools where they are not now teaching. If, as plaintiffs insist, possession of a full clear credential is a prerequisite to educational quality, then the schools and students which lose such teachers will be hurt.

It is worth emphasizing that the only issue here is whether the class proposed by plaintiffs should be certified. No one disputes that students whose rights have been violated may seek relief, even if it comes at the expense of other students and other districts. But they may not do so on behalf of a class that includes students whose interests will be injured by the relief which the plaintiffs seek. The class plaintiffs propose is fatally deficient because it includes both students in the suburban or successful districts that plaintiffs' proposals would injure and students in the urban and inner city districts that plaintiffs contend their proposals would help. "[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." Hansberry, 311 U.S. at 45; Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26 (1997).

VI. PLAINTIFFS' PROPOSED CLASS MAY NOT BE CERTIFIED BECAUSE CLASS REPRESENTATIVES AND COUNSEL WILL NOT ADEQUATELY REPRESENT AND PROTECT THE INTERESTS OF THE CLASS.

In addition to the basic requirement of "community of interest," California law also requires the proponent of a class action to show that the proposed class representatives will "adequately represent and protect the interests of the class." City of San Jose, 12 Cal. 3d at 463; La Sala v. American Savings & Loan Ass'n, 5 Cal. 3d 864, 871-72 (1971). Here no class can be certified since it is clear that the "adequacy of representation" requirement is not met.

In City of San Jose, the Supreme Court made plain that a class representative fails in his or her duty to adequately represent the class if the representative fails to raise claims that one would reasonably expect the class members to raise. 12 Cal. 3d at 464. In City of San Jose, plaintiffs sought to certify a class of all landowners near the San Jose airport who were affected by noise, vapors and vibration from aircraft taking off and landing. The purported class sought damages for diminution in the market value of the land, but elected (in an effort to provide the "community of interest" necessary for a class action) not to pursue claims for the class members' annoyance and discomfort caused by the overflights. The Supreme Court held that failure to pursue remedies available to the class members was a breach of fiduciary duty which precluded certification of the class. It said:

> This court has long been concerned with requiring the representative party to protect the interests of the absent class members, even imposing a fiduciary duty to do so on the representative class member. To fulfill this fiduciary duty the representative plaintiff must raise those claims "reasonably expected to be raised by the members of the class." Clearly, under the facts alleged here the members of the class would reasonably be expected to seek recovery of damages beyond mere diminution in market values. Thus, by certifying this class, the trial court sanctioned a clear violation of plaintiffs' fiduciary duty. Id. (citations omitted)

Plaintiffs in this case are guilty of a breach of duty identical to the one the Supreme Court found fatal to the class in City of San Jose. The factual basis of each class member's claim, as set forth in the Complaint, is that conditions in the class member's school are such that the individual plaintiff is deprived of adequate educational opportunities. Surely a plaintiff making such a claim in an ordinary lawsuit "would reasonably be expected" to seek correction of the conditions complained of. In this case, however, plaintiffs have clearly and repeatedly forsworn any effort to obtain such a remedy. They have said specifically that "this case is not about correcting the specific deficiencies suffered by these students at their specific schools in their specific school districts." Order, Nov. 14, 2000, at 2:5-6. Plaintiffs thus intend to forego remedies that an ordinary class member would reasonably be expected to seek.

It is no excuse that plaintiffs (or, more precisely, their counsel[16]) may believe in good faith that relief against the State is more important, in the long run, than obtaining correction of specific defects. Class representatives and their counsel are not free to pursue, on behalf of absent class members, only those claims that they believe are important or socially worthwhile. They are fiduciaries, who owe a duty to the class members to further their interests, and who must bring forth for judicial resolution the claims the class members possess. City of San Jose holds that class representatives and their counsel have a fiduciary duty to assert and present not just some of the class members' claims, but all claims the absent class members might "reasonably be expected" to pursue. Here class representatives and class counsel have not done that; instead they have breached their fiduciary duty to the absent class members, and no class may be certified.

VII. THERE IS NO BASIS FOR CERTIFYING PLAINTIFFS' PROPOSED SUBCLASS.

Plaintiffs have also proposed to certify an unascertainable "subclass" comprising all California public

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[16] The depositions of the class representatives reveal that many of them, contrary to the representations their counsel has made to the Court, actually joined this lawsuit for the purpose of obtaining correction of the "specific deficiencies suffered . . . at their specific schools." Salvaty Dec. Exs. I at 185:9-17, P at 58:1-16, Q at 163:1-65:5, W at 33:4-17, Z at 50:3-21. That class representatives entered into this lawsuit in order to obtain such relief shows plainly that absent class members might "reasonably be expected" to seek such relief as well.

school students who attend schools on a multitrack calendar or who are bussed "excessive" distances -- a term that plaintiffs do not bother to define. Since the State has shown that plaintiffs' proposed class cannot be certified, there is no basis for certifying a "subclass" of that class. Plaintiffs' motion nowhere seeks certification of the subclass if the class is not certified.

In any event, if plaintiffs had sought class certification for the proposed subclass, it would not meet the requirements for class certification for reasons already discussed. If plaintiffs' theory is that multitracking or "excessive" bussing are forbidden for some reason independent of the circumstances of individual students at individual schools, then they do not need a class, and no class should be certified for the reasons discussed in Section III. On the other hand, if plaintiffs' theory is that multitracking or "excessive" bussing cause constitutional violations by depriving students of a constitutionally adequate education, then plaintiffs' claims require examination of the individual circumstances at each of the hundreds of schools that utilize multitracking, and no class may be certified for the reasons discussed in Section IV.

CONCLUSION

For the reasons stated herein, plaintiffs' motion for class certification should be denied.