JOHN F. DAUM (S.B. # 52313)
FRAMROZE M. VIRJEE (S.B. # 120401)
DAVID L. HERRON (S.B. # 158881)
PETER L. CHOATE (S.B. # 204443)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for Defendant
State of California

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: Sept. 17, 2003 Hearing Time: 3:30 p.m. Department: 20 Hon. Peter J. Busch

MEMORANDUM OF DEFENDANT STATE OF CALIFORNIA IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION REGARDING TEXTBOOKS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

MEMORANDUM OF DEFENDANT STATE OF CALIFORNIA IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION REGARDING TEXTBOOKS

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Plaintiffs repeatedly have represented that their case is exclusively about the State's supposed lack of a constitutionally adequate "system of oversight and management" for public education. But plaintiffs' motion does not address that subject at all. Instead, they provide a laundry list of alleged conditions at particular schools, and argue that the existence of such conditions creates a duty in defendants to remedy them.

That is not acceptable. The Court said long ago that it would hold plaintiffs to their "oversight and management" theory, and that this case would not be about whether students have experienced bad conditions. Yet plaintiffs' theory of liability, as they admit, now "depends on a showing that nontrivial numbers of students suffer deprivations of instructional materials." Mot. at 17 n.14.

It is, of course, clear why plaintiffs have changed theory. No legal authority whatever says that the State has a constitutional duty to establish and maintain an oversight system to "ensure equal access" to textbooks. Much less does any legal authority hold that the State's existing system for managing the public schools (which plaintiffs' papers all but ignore) is deficient as to textbooks. The State's declarations, which the Court must take as true for purposes of this summary adjudication

motion, show that the State monitors the academic performance of schools throughout the State, intervenes when performance is deficient, and pays attention, both in the intervention process and generally, to whether students have textbooks.

Plaintiffs entirely fail to explain how the State's current system could possibly be held deficient. Their principal criticism is that some school districts provide textbooks for use in class but restrict students' ability to take these textbooks home. Plaintiffs say that the State should impose a standard forbidding this practice. But plaintiffs long ago promised the Court that this case is not about imposing any standards, and the Court so held.

Even if the Court allows plaintiffs to violate all their representations, and pursue a theory where liability depends on proof of conditions at individual schools, this motion must still be denied. Plaintiffs' claim unmistakably rests on Butt v. State of California, 4 Cal. 4th 668 (1992). But that case holds squarely that there is "no constitutional violation" unless "the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards." Id. at 686-87 (emphasis added). Plaintiffs offer no evidence about the educational program, "viewed as a whole" at any school, no evidence about the "prevailing statewide standard" for a district's educational program, and no evidence that the educational program of any district falls "substantially below" the prevailing statewide standard. Nor could plaintiffs offer such evidence without the individual school-by-school analysis they have repeatedly told this Court it will not have to conduct.

Finally, even if plaintiffs had shown that the constitutional rights of any California student had been violated, they could still obtain no relief against the defendants in this case. The Legislature has plenary authority over the public school system, and it has given primary authority for the provision of textbooks to local school districts, not the State. Plaintiffs have made no showing that school districts are incapable of remedying any violation that may exist. Nothing in the Constitution and nothing in Butt says that the State, or any of its agents or officials, have a duty to act when a district is in place and when it has the ability and the duty to remedy any constitutional violation which the Court may find.

II. PLAINTIFFS MAY NOT PURSUE A THEORY OF LIABILITY UNDER WHICH THE MERE EXISTENCE OF BAD CONDITIONS CREATES A DUTY IN THE STATE TO REMEDY THEM.

A. Plaintiffs Are Pursuing Claims That They Repeatedly Represented Formed No Part of This Case.

At the very first hearing in this case, plaintiffs took the position that the California Constitution imposes directly on defendants a duty to provide what plaintiffs call "a system of oversight and management" for the public schools, and that this case is about defendants' supposed breach of that duty. As the Court said:

> Plaintiffs represented to the Court at the hearing on the demurrer [that] this case is exclusively about the State's system of oversight and that system's alleged inadequacies and failures. The lawsuit is aimed at ensuring a system that will either prevent or discover and correct such deficiencies going forward. The specific deficiencies that take up so much of the Complaint are evidence of an alleged breakdown in the State's management of its oversight responsibilities. As such, they are the result, rather than the fact, of the allegedly unconstitutional behavior -- the consequential injury, rather than the violation. Plaintiffs' representation, to which the Court will hold Plaintiffs, has and will have ramifications to all stages of the case, including pleading, class certification, motion practice, trial, and remedies. Order (Nov. 14, 2000) at 2 (emphasis added).

At least three times thereafter, the Court has reaffirmed that plaintiffs' case will depend exclusively on the State's oversight system and its alleged inadequacies, not on the conditions that individual students supposedly experience in individual schools.[1] Plaintiffs' motion, however, does not assert that the Constitution directly imposes on the State a duty to implement an oversight system or that it specifies the system's content. They say essentially nothing about what this Court characterized as the "guts" of this litigation, namely "what the State did or failed to do" to manage the public schools. Reporter's Transcript (Dec. 18, 2001) at 8:15-22.

---

[1] Order (Oct. 1, 2001) at 2 (granting motion for class certification because "[t]he liability issue is whether there is a failure on a state-wide level, not whether any particular individual has suffered"); Reporter's Transcript (Dec. 18, 2001) at 8:15-22 (denying motion for summary judgment as to Cloverdale class members because "the central common issues of what the State did or failed to do . . . that's the guts of what we are here talking about"); Order (July 10, 2003) at 4 (granting motion for judgment on the pleadings as to Article IX claim because "the violation alleged in this case is limited to the failure of the State's system of oversight and management of public education").

Instead, they devote almost all their opening memorandum to the proposition that textbooks are important and that some students supposedly do not have textbooks. Mot. at 3-19. They admit that on their theory liability arises simply from a showing that "nontrivial numbers" of students do not have textbooks. Mot. at 17 n.14, 24 ("[T]he motion depends on a showing that nontrivial numbers of students suffer deprivations of instructional materials . . . . [T]he only issue to be decided for purposes of this motion is whether the students in the respective classrooms have books.").

Plaintiffs thus have abandoned their original contention that the Constitution imposes some sort of oversight and management duty on the State. On this motion, their showing is merely that some students supposedly lack textbooks; and from that showing they say the State's duty arises. To be sure, plaintiffs attempt to cover their tracks by claiming that the State "has a duty to ensure" that the textbook conditions to which they point do not exist. Mot. at 23. But that is no more than a verbal trick. When the proof of plaintiffs' claim that the oversight system is defective is the very fact that unacceptable conditions exist, then this case is not in any meaningful sense about identifying and applying a constitutional standard to which the State's oversight and management system must conform. On the contrary, in those circumstances plaintiffs' real claim is that the State's duty arises merely from the fact that the conditions exist. That is precisely the case that the Court has said plaintiffs will not be allowed to put forward.

B. The Court Should Hold Plaintiffs to Their Original Theory of Liability.

This case has advanced too far, and the parties have invested too many resources, for plaintiffs to change their theory of liability now. Plaintiffs obtained substantial advantages in this litigation on the basis of their representation that they were not pursuing a theory whereby liability depended on proof of conditions at individual schools. See note 1, supra. On that basis, plaintiffs avoided the necessity of invoking administrative remedies that could have remedied the conditions. On that basis, plaintiffs obtained a certified class. And on that basis the Court denied defendants' motions for summary judgment related to the Cloverdale School District. If plaintiffs were now to be allowed to change course, those rulings and others would need to be revisited, and a Pretrial Scheduling Order would need to be adopted that fit plaintiffs' new theory rather than the one they represented they were pursuing. But there is an easier answer: the Court should deny plaintiffs' motion for summary adjudication on the ground that they are not entitled to change theories now. As the Court said nearly three years ago, "Plaintiffs' representation, *to which the Court will hold Plaintiffs*, has and will have ramifications to all stages of the case, including . . . motion practice." Order (Nov. 14, 2000) at 2 (emphasis added).[2] The Court has ample power to deny the motion on that ground.

[2] Similarly, the Court said it would not allow plaintiffs to "turn[] every schoolhouse upside down to shake it for documents

In the first place, it is black letter law that parties cannot evade summary judgment by substituting a new legal theory for the theory disclosed in the plaintiff's pleading. Sutherland v. Barclays Am./Mortgage Corp., 53 Cal. App. 4th 299, 317 (1997); Nash v. Fifth Amendment, 228 Cal. App. 3d 1106, 1116 (1991); IT Corp. v. Superior Ct., 83 Cal. App. 3d 443, 451-52 (1978). The same rule should logically apply to parties who are seeking summary adjudication. Obviously, a party should not be required to refute a theory of liability that is not at issue.

In addition, plaintiffs are judicially estopped from changing their original theory of liability. Under the doctrine of judicial estoppel, a plaintiff may not advocate a position after he or she successfully obtains relief based on an inconsistent position. Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics, 61 Cal. App. 4th 672, 679 (1998); Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997); Schulze v. Schulze, 121 Cal. App. 2d 75, 83 (1953); Alexander v. Hammarberg, 103 Cal. App. 2d 872, 878-879 (1951). Because they represented that the constitutional violation at issue was not the bad conditions alleged in particular schools, the Court allowed plaintiffs to bypass existing administrative remedies, to certify a class, and to defeat defendants' summary judgment motions. Order (Nov. 14, 2000) at 2; note 1, supra. Having obtained that relief, plaintiffs cannot now seek summary adjudication on the entirely inconsistent theory that defendants' liability depends on conditions in particular schools. Aerojet-

---

and problems." Transcript (Dec. 18, 2001) at 9. But plaintiffs' new theory makes that result unavoidable.

General Corp. v. Superior Ct., 211 Cal. App. 3d 216, 240 (1989) ("One may not alter one's [legal] argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment.").

Finally, the Court's order of November 14, 2000, said that plaintiffs would be held to their representation. Under statute and under its inherent powers, the Court has power to compel plaintiffs to obey its order. C.C.P. § 128(a)(4) (court has power to "compel obedience to its judgments, orders, and process"); Sousa v. Capital Co., 220 Cal. App. 2d 744, 755 (1963) ("court has an inherent power of control over its proceedings and may enforce any order it makes").

Accordingly, the Court should hold plaintiffs to their representation as to their theory of this case. Their motion for summary adjudication, which proceeds on a different theory, should be denied.

III. PLAINTIFFS IGNORE THE MOST RELEVANT FACTS AND DISTORT OTHERS

Because this is a motion for summary adjudication, no relief may be granted except on the basis of undisputed material facts. C.C.P. § 437c(c), (f)(2). Accordingly, before addressing the remaining legal issues, it is appropriate to identify what factual matters are in dispute, and what matters the Court may take as true for purposes of this motion.

Broadly speaking, the factual record before the Court addresses two topics.

The first is the way the State oversees and manages the public schools. Plaintiffs submitted essentially no evidence on this topic; defendants have submitted the declarations of numerous high-ranking State officials.[3] Because defendants are the parties opposing summary adjudication, the Court must assume for purposes of the motion that what defendants' declarations say is true.

The second topic is whether individual students in individual schools have textbooks. This topic is sharply disputed. Plaintiffs have submitted declarations which are consistently, and sometimes comically, untrue. Defendants and the intervenors have submitted declarations that show why plaintiffs are wrong. Defendants' Separate Statement filed herewith shows the extent of the disputes. For the Court's convenience, defendants also have filed with this Memorandum a "Chart of Allegations," which identifies each contention plaintiffs make with respect to textbooks, and identifies the declarations that show that the circumstances of which plaintiffs complain never existed, are materially distorted, or were remedied long ago.

We discuss each topic in turn.

---

[3] Separate Statement of Defendants In Response to Plaintiffs' Separate Statement of Undisputed Material Facts at 12-17 (¶ 4), 43 (¶ 9), 63 (¶ 11), 68-69 (¶ 12), 84-91 (¶ 13), 105-106 (¶ 14), 106-121 (¶ 15); Declarations of T. Adams; S. Davis; G. Flores; G. Geeting; B. Gordon; S. Hannon; W. Harris; G. Jackson; A. Matsuura; J. Mayer; J. Mockler; P. Rasanen; R. Worrall; and R. Weikle.

A. Plaintiffs Ignore How the State Manages the Public Schools.

If this case were truly, as plaintiffs have represented, "exclusively about the State's system of oversight," one would have expected plaintiffs' papers to have analyzed and described in detail what the State does. But plaintiffs say essentially nothing about that. Defendants' declarations, however, show a system under which, pursuant to its "plenary" power over education, Hall v. City of Taft, 47 Cal. 2d 177, 180-81 (1956), the Legislature has given local school districts the responsibility for furnishing textbooks,[4] but where State

[4] See, e.g., Ed. Code § 1240(i) ("The superintendent of schools of each county shall . . . [e]nforce the use of state textbooks and of high school textbooks . . . ."); § 41300.1 (requiring school districts to spend state school funds on "[i]nstructional supplies, instructional equipment, instructional materials and support services necessary to improve school conditions."); § 44805 ("Every teacher in the public schools shall enforce the . . . use of legally authorized textbooks . . . ."); § 51050 ("The governing board of every school district shall enforce in its schools . . . the use of textbooks and other instructional materials prescribed and adopted by the proper authority."); § 60000(b)-(c) ("The Legislature hereby recognizes . . . that because of economic, geographic, physical, political, educational, and social diversity, specific choices about instructional materials need to be made at the local level. The Legislature further recognizes that the governing boards of school districts . . . must have the ability to choose instructional materials that are appropriate to their courses of study."); § 60045(a) ("All instructional materials adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels."); § 60411 (The district board of each high school district shall purchase textbooks and may purchase supplementary books for the use of pupils enrolled in the high schools of the district."); § 60422(a) ("A local governing board shall use funding received pursuant to this chapter to ensure that each pupil is provided with a standards-aligned textbook or basic instructional materials . . . .").

agencies and officials monitor the academic performance of schools, intervene when that performance is deficient, give guidance with respect to textbooks and other matters, and supply billions of dollars to local school districts for textbook purchases.

1. The State Operates An Achievement-Based Accountability System.

In 1999, the Legislature enacted the Public Schools Accountability Act ("PSAA"). The intent of the PSAA is to hold schools accountable for their students' academic progress and achievement. Ed. Code §§ 52050, 52050.5 et seq. The PSAA is consistent with recent legislation by Congress, notably the No Child Left Behind Act, 20 U.S.C.A. § 6301 et seq., which also focuses on testing, accountability, and intervention when schools fail to achieve their performance goals. The PSAA and the federal legislation represent a dramatic shift in educational policy: instead of focusing on educational inputs, State and national legislators have determined that regulation and intervention should be driven by whether students are actually learning. G. Flores Decl. ¶¶ 3-4. Obviously both the State and federal programs are new, and the system is rapidly evolving.

The key component of the State system is the Academic Performance Index ("API"), which ranks public schools according to how their students perform on various statewide tests. Each year, every school receives a base API score, a statewide ranking, and a growth target, which is the amount of improvement the school is expected to make in its API score by the next year.

G. Flores Decl. ¶ 7; W. Harris Decl. ¶ 9. The No Child Left Behind Act imposes a similar system, but one based on "Adequate Yearly Progress" and the degree to which children are "proficient" in particular subjects. W. Harris Decl. ¶¶ 2, 10-11, 23.

The oversight system provides both rewards for good performance and requires intervention if targets are not met. Under the PSAA, failure to meet growth targets may lead to intervention under the Immediate Intervention/Underperforming Schools Program, the School Assistance and Intervention Team program, the High Priority Schools Grant Program, or others. In all these programs, a team of external evaluators identify the school's problems and their causes, determine whether lack of educational inputs, such as textbooks, may be contributing to the school's underperformance, and recommend corrective actions and solutions. G. Flores Decl. ¶ 9; W. Harris Decl. ¶¶ 2, 20-23, 27-29, 31-32. The No Child Left Behind Act follows a parallel scheme, although with different labels. A school that fails to make Adequate Yearly Progress is placed in "Program Improvement," which again involves a team of outside evaluators with the power to make and enforce recommendations for corrective action, including action related to educational inputs such as textbooks. W. Harris Decl. ¶¶ 2, 10-18, 23.

Congress and the Legislature have thus designed, and the relevant educational officials are implementing, a complex system of oversight and management designed to assist every child in every district to receive a high-quality education. It focuses appropriately on boosting students' academic achievement,

which is what really matters; and given the limited resources of money and skilled personnel available for intervention, it concentrates those resources on the schools where performance is most deficient.

2. The State Also Plays A Major Role With Respect to the Provision and Selection of Textbooks.

California was among the first states in the Nation to develop academic content standards that specify, on a uniform statewide basis, what students need to know. Beginning in 1997, the State Board of Education has adopted rigorous content standards in each of the four core curriculum areas of English/language arts, mathematics, science, and history/social studies, and developed curriculum frameworks in each area to assist educators in teaching the content standards. These standards and frameworks are intended to be updated every six years. T. Adams Decl. ¶¶ 5-6, 8-15.

As part of the process, and after extensive review by state officials, educators, curriculum specialists, and members of the public, the State Board adopts at least five sets of instructional materials in each area, Ed. Code § 60200, T. Adams Decl. ¶¶ 9, 16, 18-25; districts using state funds to purchase textbooks and other instructional materials for grades K-8 must select materials adopted by the State Board and "aligned" to the content standards. Ed. Code § 60422. For grades 9-12, the State Board requires textbook publishers to provide "standards maps" so that districts can determine the extent to which the textbooks

are standards-aligned. Ed. Code § 60451(d); T. Adams Decl. ¶¶ 16-17.

Providing new standards-aligned textbooks obviously required money. In 1998, the Legislature enacted the Schiff-Bustamante Instructional Materials Program, and embarked on a massive four-year program making available $1 *billion* to districts for the purpose of supplying all public school children with textbooks and instructional materials that are aligned to the rigorous California standards.[5] J. Mockler Decl. ¶ 9; T. Adams Decl. ¶¶ 6, 26. The Legislature also enacted Ed. Code § 60119, which requires, as a condition of the receipt of Schiff-Bustamante money, that every school district determine, at a public hearing attended by parents and teachers, whether the district has sufficient standards-aligned textbooks and instructional materials for all its students. The district must then certify to the State either that it has sufficient textbooks for all its students, or that it has a plan to bring that about. Ed. Code § 60119. In 2002, the Legislature significantly tightened these requirements by enacting the Instructional Materials Funding Realignment Program. This requires the district to certify that every public school child has a standards-aligned textbook or basic instructional materials in each of the core curriculum areas before a school district may use any state textbook money to purchase any other instructional materials for any other student. Ed. Code § 60422.

---

[5] Between 1996 and 2002, the State has expended approximately $2.8 *billion* of categorical funding for textbooks. J. Mockler Decl. ¶ 3.

Each year, armies of independent auditors audit every school district to determine whether state categorical textbook funding[6] has been used consistent with California content standards for the purpose of standards-aligned materials, and whether the district has complied with its obligations under Ed. Code §§ 60119 and 60422. J. Mockler Decl. ¶¶ 19-20, 23; A. Matsuura Decl. ¶¶ 3-10. In addition, each district must provide to parents every year a copy of the School Accountability Report Card for each school. Required by Article XVI, § 8.5(e) of the Constitution and Ed. Code § 35256(c), the SARC must include an assessment of the quality, currency, and accessibility of textbooks and other instructional materials, in order that parents may have data by which to make meaningful comparisons among public schools. B. Gordon Decl. ¶¶ 3-17.

B. Plaintiffs' Evidence is Subject to Sharp Dispute.

Plaintiffs' evidence does not dispute that this is how the State oversees and manages public schools with respect to textbooks. Plaintiffs instead attempt to show that many students lack textbooks, and also complain that some schools and districts do not allow texts that students use in class to go home with them. Plaintiffs' evidence is subject to serious dispute.

Following the filing of this motion, defendants and intervenors went to the schools that are the subject of

[6] That is, funding specifically for textbooks, like Schiff-Bustamante, as opposed to state money that goes into the district's general fund and which the district may use for textbooks but is not required to.

plaintiffs' motion, and gathered the facts from the principals and other responsible officials. The facts are summarized in the Chart of Allegations filed herewith. They are also laid out in defendants' response to plaintiffs' Separate Statement of Undisputed Material Facts.

• A great deal of what plaintiffs say is misleading and out of date. Thus, plaintiffs cite a number of "action plans" generated through the II/USP program. The Court will recall that this is a State-run intervention program triggered when a school fails to meet its performance targets. Sometimes the external evaluators address whether the school has sufficient standards-aligned textbooks. When there is a problem in that area, the action plan takes steps to remedy the problem. G. Flores Decl. ¶ 9; W. Harris Decl. ¶¶ 2, 20, 23, 27, 29, 31-32. Notably, these are not situations (as plaintiffs argue) where a "bad" condition has persisted with no State intervention; they are situations where the State's system of intervention and oversight has detected, cured, and corrected any problem.

• Plaintiffs exaggerate the extent of the problems that the II/USP process addressed and cured. For example, plaintiffs say that Perris High School does not have any math textbooks, citing to a public meeting held four years ago. Mot. at 13. In fact, Perris High had sufficient math textbooks then, as it does now. The point was rather that the district's math texts, although available for every student, had not yet been aligned to meet the State's then brand-new content standards. And that issue, too, has long since been cured. G. Bennett Decl. ¶¶ 4-5. Or again, plaintiffs say that at Richmond Elementary

School in Hanford School District, "resources for instruction are lacking." Mot. 11 (citing DOE 51432, attached at Ex. D to Welch Decl.). In fact, however, according to Richmond's principal, Richmond has "such wealth of texts and supplemental materials that the teachers are saying that they don't have enough book shelves to hold them all." N. Akhavan Decl. ¶ 5.

• Many of plaintiffs' declarations from students and teachers are startlingly wrong. For example, Magaly de Loza, a student at Richmond High School, says that she had no books whatsoever in her English Language Development classes. M. de Loza Decl. ¶ 3. In fact, in one ELD class she had two textbooks to take home and supplemental materials both to use in class and take home. In her other ELD class, which was taught using novels, not textbooks, she had her own individual copy of each novel used. H. Foust Decl. ¶ 3. Plaintiffs' errors are canvassed in detail in Defendants' Separate Statement and in the Chart of Allegations.

• Plaintiffs' memorandum repeatedly asserts that students lack textbooks. But the undisputed facts, as shown by a careful reading of plaintiffs' declarations and by the declarations filed by defendants and the intervenors, show very few situations where students had no textbooks at all. Rather, most of plaintiffs' complaints are about situations where a school or district in fact has enough textbooks for all its students, but where as a matter of policy it restricts whether students may take their textbooks home. Whether that is a justifiable policy is something about which educators disagree. But instead of facing up to the facts honestly, plaintiffs try to

equate this policy disagreement to a complete absence of textbooks. That is misleading, because the two situations are not equivalent.

• Plaintiffs try to rely on various survey materials to show that textbook "problems" are widespread. L. Welch Decl. ¶¶ 2-4, 7, 21. But not one of their studies is authenticated or sworn to by the author; in no case has anyone sworn that the conclusions of these studies are valid or in accordance with sound scientific principles. A motion for summary adjudication must be supported by competent declarations; and this evidence is simply inadmissible. Moreover, plaintiffs distort what the studies say. For example, they represent that a study they rely on said that "more than half the participating high schools did not have instructional materials necessary to teach the State content standards." Mot. at 11 (citing PLTF 77536). In fact, the study in question says that fully 100% of the participating high schools reported that "their textbooks align well with the content standards," or that "they can cover all the content standards with a mix of textbooks and supplemental material." See California High School Exit Examination (CAHSEE): Year 2 Evaluation Report at PLTF 77536, attached as Exhibit A to the Declaration of Peter L. Choate, filed herewith. Understandably, plaintiffs do not attach a copy of the study to their moving papers.

• Plaintiffs rely on a survey they commissioned from Louis Harris Associates for the proposition that 32% of California students do not have a textbook to take home, and 11.7% supposedly do not have enough textbooks for in-class use.

Mot. at 10. But the Survey is methodological nonsense; as the Declaration of Dr. Richard Berk shows, from the data one cannot logically draw the conclusion plaintiffs present. The survey did no more than ask teachers if they thought they had enough textbooks. If it had been done scientifically (as it was not, Berk Dec. ¶ 3 & Ex. B) such a survey would perhaps be sufficient to show what teachers think. But it is not remotely sufficient to establish whether what they think is true. In most schools, only one teacher responded to the survey. When more than one teacher responded, they frequently disagreed, revealing that the facts are in dispute.[7] And (if the majority view of teachers is taken as the truth, which it should not be) the survey shows that fully 88% of California teachers believe their students have adequate textbooks and instructional materials.

* * *

The net of all this is the following. For purposes of this motion, the Court must accept as true defendants' declarations demonstrating the actual oversight and management system by which the State administers the public schools. Plaintiffs' claim that there is some sort of "systemic" failure to provide textbooks to California students must be rejected; it rests on inadmissible materials, it is disputed, and for purposes of summary adjudication it cannot be taken as true. Most of

---

[7] This shows the fallacy of plaintiffs' attempt to generalize from teachers' opinions to real-world facts. If two teachers in a school are surveyed, and one thinks there are enough books and the other does not, no sensible person would conclude, as plaintiffs do, that 50% of the students in the school have enough books and 50% do not. What the survey shows is that teachers disagree, and that to find the truth one needs to investigate the facts. See Berk Dec. Ex. B at 6-13.

plaintiffs' specific allegations about the absence of textbooks also are disputed. Either plaintiffs have gotten the facts wrong, or the condition was remedied long ago.

But the State concedes, as is necessarily the case in any system involving 9000 schools and 6 million students, that not everything is perfect. Taken as a whole, the undisputed facts in this record show that in a small number of isolated instances, for a wide variety of (usually administrative) reasons peculiar to individual schools, textbooks have not been available to some students in some classes for short periods of time. The record also shows that some schools and some districts have sufficient textbooks for all students, but as a matter of policy they restrict the ability of students to take those textbooks home. The State does not prevent schools or districts from having such policies. The legal question on this motion, accordingly, is whether either (1) the State's failure to prevent occasional administrative problems in schools that delay the distribution of textbooks; or (2) the State's failure to override district policies that restrict students' ability to take their textbooks home amounts to a violation of any constitutional duty resting on the State or its officials. To that issue we now turn.

In Parts IV(A) and IV(B) we address the theory of liability that plaintiffs have always represented (and the Court has held) is the only one in this case, namely that the State's system of oversight and management fails to meet some applicable constitutional standard; we show that there is no merit to such a claim. In Parts V and VI we address the theory of liability that

plaintiffs have put forward in their moving papers for the first time, namely that "deprivations" of instructional materials for a non-trivial number of California students is the constitutional violation entitling plaintiffs to relief against the State; we show that that theory, even assuming plaintiffs are entitled to assert it, is also without legal support.

IV. PLAINTIFFS HAVE SHOWN NO LEGAL BASIS FOR REQUIRING THE STATE TO IMPLEMENT ANY SYSTEM OF OVERSIGHT OF DISTRICTS' DECISIONS TO PURCHASE TEXTBOOKS THAT DIFFERS FROM THE EXISTING ONE.

A. No Legal Authority Holds the State Must Maintain Any System of Oversight As To Textbooks.

Plaintiffs assert (without any analysis) that the State has a duty to establish and maintain a system of oversight and management to "ensure equal access" to textbooks and instructional materials. Mot. at 1-3. They assert that this duty requires the State to ensure that every student in every class has his or her own textbook or instructional materials to use "in class without sharing and to take home." See, e.g., Mot. at 1:12, 19:14, 20:22; Pls.' Sep. State. ¶¶ 8-10.[8] But plaintiffs cite not a single legal authority that says that.

---

[8] See also Plaintiffs' Responses and Supplemental Responses to Special Interrogatory Nos. 34 at 41:21-22, No. 35 at 43:17-18, No. 38 at 50:19-21, No. 39 at 51:17-28 and 52:21-23, and No. 42 at 56:12-17, attached as Ex. B to the Choate Declaration; Plaintiffs' Liability Disclosure Statement ¶ 647 ("[T]here is still no provision of the Education Code that sets standards to ensure the actual *provision* of instructional materials to students for use in class and to take home for homework.").

The Constitution does not say it. No statute says it. And no case says it.[9] If plaintiffs could cite to any legal authority that required such a system of oversight and management, no doubt they would have done so. No such authority exists.

Plaintiffs derive the State's purported obligation to have a system of oversight and management by taking out of context language from Butt v. State of California, 4 Cal. 4th 668 (1992) and Tinsley v. Palo Alto Unified Sch. Dist., 91 Cal. App. 3d 871, 903-04 (1979). Thus, Butt says that "[t]he State bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." 4 Cal. 4th at 685. Tinsley says that the State "has a duty to intervene to prevent unconstitutional discrimination" in the schools. 91 Cal. App. 3d at 904.

Put back in their proper context, these quotations provide no assistance to plaintiffs here. The issue in both Butt and Tinsley was whether, given a proven constitutional violation, a remedy was available against the State in circumstances where the relevant school district was not in a position to provide any relief to plaintiffs. In Butt, the Richmond District had run out of money, shut down, and filed for bankruptcy. The Court held

---

[9] Plaintiffs are bold enough to pretend, by citing this Court's Order of November 14, 2000, that the Court has already ruled that such a duty exists. But of course no such thing occurred. The Court was merely describing plaintiffs' explanation of their own contentions. "Of course, in making this Order, the Court accepts the facts as alleged and makes no determination concerning the justiciability of the issues raised . . . [or] the merits or viability of any of the causes of action . . . ." (emphasis added). Order (Nov. 14, 2000) at 2-3.

that shutting down was a violation of equal protection; plaintiffs seeking to keep the schools open had neither a legal nor a practical remedy against the district; and in that context the Court held that plaintiffs could seek a remedy against the State. Similarly, in Tinsley, the claim was that district boundaries had the effect of placing black students in one district and white students in other districts, thereby producing racial segregation. Segregation was a denial of equal protection, but no district had the power to redraw its own boundary lines, which had been established by the Legislature. Once again, in the absence of a district that could provide relief for the violation, the court held that a remedy against the State was possible.

But the liability plaintiffs have always represented they seek to impose here is not at all like that. They do not allege that there has been a constitutional violation separate from the State's oversight system, that the remedy for that constitutional violation is to modify the oversight system, or even that a remedy must be given against the State because no adequate remedy exists against the relevant districts. Rather, plaintiffs have always claimed that the case is "exclusively about the State's system of oversight and that system's alleged inadequacies and failures." Order (Nov. 14, 2000) at 2. "[T]he violation alleged in this case is limited to the failure of the State's system of oversight and management of public education. Plaintiffs specifically eschewed a challenge based on the specific failings of particular schools and districts to provide educational necessities . . . This is not a case to require any

particular level, kind, or quality of teachers, facilities, or textbooks to be provided to the Plaintiffs." Order (July 10, 2003) at 4.

On such a theory, plaintiffs cannot prevail by showing some constitutional violation for which fixing the State's system of oversight is a plausible remedy; rather they must find, in the Constitution or the statutes, some legal requirement that defines the system of oversight and management the State must have. If the "failures" of the State's system of oversight and management are themselves the constitutional violation, as plaintiffs assert, and if the case is justiciable, then plaintiffs must identify a legal standard by which to judge whether the system now in place is a proper system -- something that "come[s] close to telling a court what that system must look like or how it must act." Order (July 10, 2003) at 5. Neither Butt nor Tinsley provides any such standard. Neither case so much as mentions the word "oversight"; neither case says expressly or by implication that an oversight system must exist; and neither case offers the remotest guidance about what kind of oversight system would be constitutionally required.

There is nothing unusual about the distinction drawn here. If a state or local government commits a constitutional violation, whether of the equal protection clause or anything else, it is subject to a court order requiring that the violation be remedied -- either by an injunction or, in some cases, damages. But it does not follow logically that a constitutional duty exists to set up a "system of oversight and management" which will prevent constitutional violations, or will "ensure"

that they do not occur. If the Legislature passes an unconstitutional law, the law can be struck down. That does not mean the constitution requires the Legislature to create an internal review commission to make sure that unconstitutional laws are never passed. Or if a police officer violates someone's constitutional rights, the injured party has a remedy. That does not mean the constitution requires that the Police Department set up a "system of oversight and management" to "ensure" that no future violations occur.[10]

So here, if plaintiffs maintained that the existence of inadequate textbooks in some schools were the constitutional violation, and if they had sought relief against the State for that violation, then the question of oversight and management might eventually be addressed as a possible remedy if plaintiffs in fact proved any violation. But that is precisely the theory of liability that the Court has found plaintiffs "eschewed"; and they eschewed it precisely because on such a theory of liability the obvious question is why existing legal and administrative remedies against the district are not fully sufficient to remedy any violations.

[10] To be sure, if there were a consistent pattern of violations, affected parties might obtain an order, as a remedy for past violations, requiring preventive measures. But that illustrates precisely the difference between a remedy for past violations, and the violations themselves.

B. Plaintiffs Have Failed to Show Any Constitutional Defect in the State's Existing Oversight System.

The foregoing section shows there is no constitutional or other authority holding that the State has a duty to maintain any system of oversight and management as to textbooks. But even if there were, plaintiffs would still have to show some constitutional standard by reference to which the existing system of oversight and management could be held to be inadequate. They have not done so.

The current system, of course, was designed and created by the Legislature. The Constitution gives the Legislature "plenary" authority over the public schools; and the cases uniformly emphasize the breadth of the Legislature's authority. Hall, 47 Cal. 2d at 180-81; Butt, 4 Cal. 4th at 688; Tinsley, 91 Cal. App. 3d at 903-904. Plaintiffs and their experts criticize various aspects of the system; no doubt if they were in office they would design a different system. But that is no basis for a court "to impose limitations or restrictions upon the Legislature's prerogatives." California Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1534 (1992) (rejecting challenge to charter school program established by the Legislature); Salazar v. Eastin, 9 Cal. 4th 836, 856-57 (1995) (lower court erred in directing Department of Education to promulgate rules to prevent charging of fees where Legislature had confided responsibility to school districts, not Department); People v. Carter, 30 Cal. App. 4th 775, 780 (1994) ("Legislatures are not required to choose the best means available to regulate an industry."); City

of Los Angeles v. Department of Health, 63 Cal. App. 3d 473, 481 (1976) ("The state legislative power over matters of statewide concern necessarily includes the Legislature's right to frame the terms of legislation exercising the power"). It is plaintiffs' burden to show, not that a better system of oversight and management could be devised, but that the changes they would make in the existing system are constitutionally required. Plaintiffs do not even attempt to meet that burden.

The basic aspects of the State's oversight system, of course, are not remotely subject to constitutional challenge. Could it conceivably be outside the Legislature's "plenary" power to decide that the oversight system should be based primarily on student performance? Or that intervention resources should be focused on the schools whose performance is most deficient? Or that textbooks and instructional materials should be aligned to state content standards? Or that the State should provide a billion dollars over four years that districts must use for the purchase of textbooks? Or that districts should be required to certify, in return for this assistance, that they have sufficient textbooks for their students? Certainly not.

Plaintiffs' specific challenges fare no better. They admit that the II/USP program, one of the State's intervention programs for low-achievement schools, is intended to remedy problems regarding educational inputs, such as textbooks. Mot. 22 n. 16. But they say it is deficient because it supposedly does not "systematically address" textbook availability, Mot. 21, apparently because plaintiffs disagree with the Legislature's decision to concentrate intervention on low performance schools.

But plaintiffs cite no legal authority, and there is none, that requires the Legislature to "systematically address" any particular problems; and it is only common sense to spend intervention resources on the schools where the need is greatest. The numerous declarations of school principals and others involved in the II/USP program, moreover, show that in fact the program does systematically address textbook issues, and that any problems that come to light are promptly corrected. See Compendium of Declarations, Exs. 2-6, 8, 10-12, 14-16, 18, 20-25, 28-29, 31-33.

Next, plaintiffs say that the State's oversight program is defective because the State does not override the policies of the handful of schools or districts that provide ample textbooks for use in class but restrict the ability of some students in some classes to take those textbooks home. This is not an "oversight" issue at all. It is a substantive disagreement between plaintiffs and the various school districts about whether, as a matter of educational theory, such policies are justified.[11] This disagreement about theory does not present any legal issue that the Court may decide. Plaintiffs point to no provision of the Constitution, and no statute, that forbids a district from having such a policy; and in any event plaintiffs have represented that they do not seek in this case to impose any

[11] Notably, even plaintiffs do not point to education literature that supports them here. Their expert Jeannie Oakes points to some studies that say homework matters, but to no studies whatever that say students cannot do homework or otherwise learn at home without textbooks, which is the point critical here. Oakes Expert Report at 9-10, attached as Ex. H to the Welch Declaration.

substantive standard,[12] and the Court has said plaintiffs will be held to that representation.[13] Given that representation, they are precluded from asking the Court to create a new educational standard requiring that all students in all classes have textbooks they can take home.

Finally, plaintiffs say that some districts do not comply with Ed. Code § 60119, but report to the State that they have "sufficient" textbooks when, in plaintiffs' view, they do not. Mot. at 20. Mostly, this is a recasting of plaintiffs' argument about taking textbooks home: plaintiffs score a district as not having "sufficient" textbooks if it restricts whether the books go home. But plaintiffs' disagreement with a district's policy judgment does not render false the district's certification under Ed. Code § 60119 that it has "sufficient" textbooks: the district is merely applying its own view of proper policy rather than plaintiffs', as the district is entitled to do. Even more fundamentally, if a local district were failing to comply with its Ed. Code § 60119 obligations, plaintiffs' obvious remedy would be to compel the district to obey the law. It cannot reasonably be said that the State violates the Constitution when it administers an oversight system on the premise that local districts will not commit fraud by making false certifications, or when it follows the established

---

[12] "Your Honor, we are not arguing in this case, and we will not argue to this Court or any other court that standards are constitutionally required. . . . We're not seeking any constitutionally required standards." Reporter's Transcript (Sept. 20, 2001) at 40:5-7, 14-15.

[13] "This is not a case to require any particular level, kind or quality of teachers, facilities, or textbooks to be provided to the Plaintiffs." Order (July 10, 2003) at 4.

legal presumption that the law has been obeyed and that that has been done which ought to have been done. Civil Code §§ 3548, 3529.

* * *

Assuming that this case is "exclusively about the State's system of oversight," then there is nothing to plaintiffs' case. If, as plaintiffs have always represented, the constitutional violation giving rise to their claim is that the existing system of oversight is constitutionally deficient, then plaintiffs have no legal ground on the basis of which they can support that claim. They can point to no legal authority that holds that the State has a duty to maintain any system of oversight. And a fortiori, they can point to no legal authority that holds that the State has a duty to maintain a system of oversight different from the current one.

V. IF THE COURT ALLOWS PLAINTIFFS TO PURSUE THEIR NEW THEORY OF LIABILITY, IT STILL SHOULD DENY THIS MOTION.

What has been said above disposes of the theory of liability plaintiffs have always maintained, namely that the State's existing oversight system is constitutionally defective. It shows why plaintiffs have now abandoned that theory. But the undisputed evidence also fails to make out a claim under plaintiffs' new theory, namely that defendants are liable if "nontrivial numbers of students suffer deprivations of instructional materials" which have a "real and appreciable

impact" on the students' right to "basic educational equality." Mot. at 4, 17 n.14, 24.

Whatever constitutes a "nontrivial" number of students, it is plain that, under Butt, no constitutional violation can be found in the absence of proof that the "actual quality of the district's program, viewed as a whole" is substantially below the standard prevailing statewide. The relevant language from Butt is clear and unambiguous; it deserves to be quoted in full:

> . . . Of course, the Constitution does not prohibit all disparities in educational quality or service. Despite extensive State regulation and standardization . . . the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. . . .
>
> In an uncertain future, local districts, faced with mounting fiscal pressures, may be forced to seek creative ways to gain maximum educational benefit from limited resources. In such circumstances, a planned reduction of overall term length might be compensated by other means, such as extended daily hours, more intensive lesson plans, summer sessions, volunteer programs, and the like. An individual district's efforts in this regard are entitled to considerable deference.
>
> Even unplanned truncation of the intended school term will not necessarily constitute a denial of 'basic' educational disparity. ***A finding of constitutional disparity depends on the individual facts. Unless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs.*** (Butt, 4 Cal. 4th at 686-88) (emphasis added).

Plaintiffs do not even attempt to make out a claim that would fall within this language. They focus solely on "deprivations" of textbooks and instructional materials; they do not discuss any other aspect of the educational program of any school or any district; they do not analyze the educational

program of any school or district "viewed as a whole." But the quoted language from Butt shows clearly that inequality as to textbooks standing alone (the only matter that plaintiffs assert on this motion) creates no constitutional violation. And this constitutional rule makes excellent sense. The proof of the pudding is in the eating. If students are getting an overall good education, there is no reason for courts to adjudicate whether all of the particular input resources are distributed equally. Just as the Legislature has created an oversight system that focuses on overall student achievement, so the Supreme Court's analysis focuses on the only thing that, in the end, really matters -- the educational program of the district, taken as a whole.[14]

A. Plaintiffs Fail to Identify Any "Prevailing Statewide Standard" for A District's Educational Program.

Under the Butt standard that there is a constitutional violation only if a district's program "falls substantially below" the "prevailing statewide standard," it is self-evident that there cannot be proof of a violation without proof of the

[14] Plaintiffs say disingenuously that the Butt standard is whether an educational deprivation has a "real and appreciable impact" on a student's right to basic educational equality. Mot. at 4. Plaintiffs fail to tell the Court that the language from Butt previously quoted in the text, including the language that "no constitutional violation occurs," is the Supreme Court's explanation of the circumstances when there is not a "real and appreciable" impact on basic educational equality. 4 Cal. 4th at 687-88.

prevailing statewide standard. Plaintiffs' motion fails to offer any competent evidence of what that standard might be. Even overlooking the critical fact that plaintiffs focus solely on textbooks rather than on the "actual program of the district, viewed as a whole," plaintiffs have failed to prove the existence or nature of any "prevailing statewide standard" for textbooks.

Their sole effort to identify such a standard is at page 19 of their Motion, where they say that the "prevailing standard" is "the provision of sufficient numbers of instructional materials" to students. Plaintiffs have made this up out of whole cloth. The only authority they cite for the existence of such a standard is one of the State Agency Defendants' interrogatory answers; and the answer says only that textbooks "are part of the educational materials used by the districts to educate school children."[15]

Even if a having a "sufficient number" of instructional materials were a prevailing statewide standard, that would not help plaintiffs here. The issue is what "sufficient" means. The undisputed evidence in the record shows at most that some schools and districts restrict students from taking textbooks home, and that sometimes for one reason or another there are short delays in the provision of textbooks to students. To win this motion, plaintiffs must show that there is a prevailing standard inconsistent with any restrictions on students' taking books home, and inconsistent with even short delays in the provision of textbooks to students. Plaintiffs have offered no evidence that

[15] State Agency Defendants' Responses to Plaintiffs' First Set of Special Interrogatories, at 3.

such a standard prevails in California; without such evidence their motion must be denied.

B. Plaintiffs Offer No Evidence that the Educational Program of Any District, Viewed As A Whole, Falls Fundamentally Below Prevailing Statewide Standards.

More fundamentally, it is plain that plaintiffs have made no effort whatever to come to grips with the Butt requirement that they must show that "the actual program of the district, viewed as a whole" falls below the prevailing statewide standard. They offer no evidence from which one might derive a "prevailing statewide standard" for the educational program of a district or school. They offer no analysis of the educational program, "viewed as a whole," of any school or district whatever. And they offer no evidence from which one could infer that the total educational program of any school or district falls beneath the prevailing statewide standard.

Deficiencies or inequalities in textbooks alone are simply not enough to make out a constitutional violation under Butt. The decision itself is clear on that point. What matters is not individual educational inputs, but the educational program as a whole. Plaintiffs have not even tried to show a disparity in any district's educational program, "viewed as a whole." They have therefore failed to make out any constitutional violation under Butt that could justify imposing liability on anyone.

VI. PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF AGAINST ANY STATE AGENCIES OR OFFICIALS OR AGAINST THE STATE ITSELF.

The foregoing discussion has shown that plaintiffs are not entitled to any relief against anyone, either under their original theory of liability or under their new theory. But even if undisputed evidence before the Court showed that one or more California public school students were deprived of equal access to textbooks, and even if (contrary to the square holding of Butt), such facts could constitute a constitutional violation, still there would be no showing that plaintiffs would then be entitled to impose duties on any defendant.

A. Plaintiffs Are Not Entitled To Relief Against State Agencies or Officials, Since The Legislature Has Given School Districts, Not State Officials, Responsibility for Purchasing Textbooks.

It is axiomatic that administrative action "that is not authorized by, or is inconsistent with, acts of the Legislature is void." Association for Retarded Citizens v. Department of Developmental Services, 38 Cal. 3d 384, 391 (1985); San Jose Teachers Ass'n v. Barozzi, 230 Cal. App. 3d 1376, 1382-83 (1991) (regulation promulgated by State Board of Education, which required school districts to conduct an annual search among its certificated employees before employing a noncertificated coach,

was void in light of statute giving school districts "general control" of interscholastic athletic programs).

As explained above, by specific statutory provisions the Legislature has entrusted school districts -- and not other agencies or officers of the State -- with the duty and responsibility to acquire textbooks. See note 4 supra. By contrast, no statute says that any state agency, department, or official has any general duty to police or monitor whether school districts have purchased sufficient textbooks, or to intervene when they do not.[16] No provision of the California Constitution says that. No regulation adopted by any authorized body does so. The law, however, is that State "[e]ducational boards and administrative officers have no inherent powers -- only those powers granted them by the Constitution and the Legislature." State Bd. of Educ. v. Honig, 13 Cal. App. 4th 720, 750 (1993). Unless plaintiffs can find a statute or constitutional provision that imposes on state agencies a duty to police local districts, the legal issue here is concluded: No such duty exists.

The Legislature knows full well how to confer on state education agencies a duty to enforce rules against local districts or to monitor their activities -- when the Legislature intends that such a duty exist. See, e.g., Ed. Code § 48401

[16] Of course, as previously discussed, the Legislature provides money for textbook purchases, and state officials are authorized to see that the conditions of that legislation are complied with. And when the Legislature has specifically authorized intervention, as under the II/USP Program, the statute allows the intervention teams to address textbook issues. That does not change the point here, which is that the powers of state officials and agencies are limited to the terms of the relevant legislative grants; they have no general right or duty to intervene to insure that a district has purchased sufficient textbooks.

(Superintendent of Public Instruction shall "enforce" compliance with statute re continuation classes); Ed. Code § 48436 (State Board of Education shall "enforce" specified standards); Ed. Code § 1240 (County Superintendents shall "enforce" courses of study and use of textbooks); Ed. Code §§ 8260, 8460, 33127, 44730 (all requiring Department of Education to "monitor" specified activities). Under elementary principles of statutory construction, the absence of any such provision relating to purchases of textbooks is evidence that the Legislature's omission was deliberate, and that the Legislature did not intend that state agencies police or monitor local districts with respect to whether they have purchased sufficient textbooks. See Pasadena Police Officers Ass'n v. City of Pasadena, 51 Cal. 3d 564, 576 (1990) ("When the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded") (internal quotation marks and citations omitted); Safer v. Superior Court, 15 Cal. 3d 230, 237-38 (1975) ("[T]he Legislature[] . . . knows how to grant . . . power when it wishes to do so"); Campbell v. Zolin, 33 Cal. App. 4th 489, 497 (1995) ("Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning").

Comite de Padres de Familia v. Honig, 192 Cal. App. 3d 528 (1987), is dispositive on this point. In Comite, the Legislature had required local educational agencies (that is, school districts) to develop affirmative action employment

programs with goals and timetables for implementation, and to submit affirmations of compliance to the Department of Education. Ed. Code § 44100, 44102. The statute required the Department to develop guidelines and otherwise to provide "assistance" to local educational agencies in adopting, implementing, and maintaining affirmative action programs. It also required the State Board of Education to "adopt all necessary rules and regulations to carry out the intent" of the statute. The Department duly issued guidelines and provided assistance to local districts; the Board duly adopted regulations stating its policy to promote affirmative action, and requiring each public educational agency to develop and administer an affirmative action program. But neither the Board nor the Department did anything more; neither one undertook to monitor compliance by local districts.

Plaintiffs in Comite sued the two State agencies on a theory very similar to the one plaintiffs adopt here -- the theory that the agencies were required to "monitor and enforce" compliance with affirmative action programs by local school districts. The Court of Appeal squarely rejected this contention. It held that neither the Department of Education nor the State Board had any duty to monitor districts' compliance with affirmative action programs since the Legislature had not imposed such a duty. The Court said:

> The statutory language here is plain and unambiguous. In respect to the Department's responsibilities, the operative word is "assist." "Assist" does not share the coercive connotations of "monitor" and "enforce." . . . The words deliberately chosen by the Legislature are not susceptible to the meaning ascribed to them by plaintiffs. To interpolate notions of regulation, compulsion and control into article 4 would entail a rewriting of the law under the

> guise of construction, a role we may not undertake. . . .
>
> Plaintiffs encounter the same difficulty with respect to the Board's duties. Section 44105 states the Board is to "adopt all necessary rules and regulations to carry out the intent" of article 4. As we have pointed out, the plain language of the statute does not contemplate monitoring and enforcement responsibilities for the department. Nor is the Board enjoined by the statute to do anything other than adopt all necessary rules and regulations. . . . Furthermore, to hold that rules and regulations adopted by the Board must include provisions for monitoring and enforcement amounts to directing the Board how to perform its duties. That is beyond our province. The powers and authority of the Board are prescribed by the Legislature; absent a specific directive, the manner in which they are exercised is a matter of administrative discretion. 192 Cal. App. at 532-33.

Comite is binding here. It holds that no general duty rests on state education agencies or officials to police school districts or to intervene when they go wrong, that such a duty can arise only from a specific directive by the Legislature. No such directive exists. Plaintiffs' contention that state agencies and officials have a duty to supervise local districts' activities with respect to the purchase of textbooks is therefore without legal support.

B. Butt and Similar Cases Provide No Support For Plaintiffs' Theory.

Plaintiffs have argued throughout this case that state agencies and officials have duties to intervene at the school district level because of the language in Butt v. State of California, 4 Cal. 4th 668 (1992), to the effect that the State has "ultimate responsibility" for public education in California. Id. at 681. But Butt lends no support to an argument that State

agencies have a general duty to police whether school districts have purchased sufficient textbooks, nor to intervene when they do not.

Butt was a situation where the local district had no power to act. The Richmond school district had shut down six weeks early because it ran out of money; the district itself was in bankruptcy. Because of the provisions of the federal Bankruptcy Code, no legal relief was available against the district; in any event, one can't get blood out of a turnip, and the district did not have any money. So neither legally or practically was there any possibility of obtaining relief against the district or of the district's curing the problem.

The entire premise of Butt was that the district was disabled from acting. The holding of the case, as the Supreme Court itself described it, was that "the State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality. . . ." 4 Cal. 4th at 692 (emphasis added). In that context, the meaning of "ultimate responsibility" as used in Butt is clearly no more than that the State must intervene when students are deprived of constitutional rights and when the district lacks the ability to fix the problem. The Butt court was not presented with a situation where a district had the power to remedy a constitutional violation but had failed to do so; and not a word in Butt suggests that the State has any duty to intervene when a local school district can correct the problem, that is, when a remedy against the local district is both available and

effective. Butt did not consider that situation, and the Supreme Court cannot reasonably be thought to have decided it.

Quite the contrary. Three years after Butt, the Supreme Court considered whether the Court of Appeal had correctly ordered the Department of Education to promulgate rules for fee-waivers under Education Code § 39807.5, and to police districts' compliance with the fee-waiver provisions which it promulgated. Salazar v. Eastin, 9 Cal. 4th 836 (1995). Plaintiffs argued that such regulations were appropriate under Butt "if necessary to correct unconstitutional practices in local districts." Id. at 857. The Court held, however, that the Legislature had specifically directed that rules governing fee waivers were to be promulgated not by the State Board of Education, but by local districts. Id. Accordingly, it reversed the Court of Appeal, held that no remedy lay against state agencies for matters committed by the Legislature to local districts, and ordered the injunction vacated.

Salazar is thus direct authority that Butt does not override the Legislature's "plenary" and "sweeping and comprehensive" powers to divide responsibility for educational policy between state agencies and local school districts. Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134-35 (2000); Dawson v. East Side Union High Sch. Dist., 28 Cal. App. 4th 998, 1017-19 (1994; California Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1533-34 (1992). Butt does not change the rule of Comite that when the Legislature has clearly given local districts, and not state agencies, responsibility for acting with respect to a particular matter, those complaining of what a local

district is doing must seek their remedy against the local district, not the State. As long as the local district has the ability to do what the Legislature has delegated to it, so that the Legislature's allocation of responsibilities can be carried out, judicial relief must be sought against the local district, not the State. The State's "ultimate responsibility" comes into play only when (as in Butt) the local district cannot do what the Legislature has directed it to do. Any other rule would conflict with the "plenary" power of the Legislature to determine what governmental entities shall have responsibility for implementing public education in California, and would let plaintiffs impose on state agencies responsibilities that the Legislature has chosen to assign elsewhere.

Plaintiffs cannot honestly contend that any local district's situation with respect to the purchase of textbooks is remotely comparable to Butt. Textbooks cost money, but their cost is a fraction of any school district's budget, and ample resources are available from the State and from the federal government to assist. A local district that fails to purchase sufficient textbooks, however one defines sufficient, is nevertheless physically and financially capable of purchasing them. If failure to purchase sufficient textbooks is a violation of law, an efficient and practical judicial remedy exists, and the district may be ordered to comply with its legal obligations. The situation presented in Butt, where the State had to act

because the district was incapable of doing so, is not presented here.[17]

C. No Remedy Against the State As An Entity Can Be Given With Respect to Districts' Duty to Purchase Textbooks.

There are, of course, circumstances where a Court may declare that the State has a constitutional duty, even though no agency or official of the State is legally empowered to fulfill that duty. Such will ordinarily be the case where new legislation is required to cure a constitutional problem. Because of the doctrine of separation of powers, a court has no power to order the Legislature to do anything. But courts should not, and do not, assume that the Legislature will "fail or refuse to respond as necessary" to judicial determinations of its constitutional obligations. Butt, 4 Cal. 4th at 703 n.28.

---

[17] Plaintiffs' other favorite cases provide them even less support. None suggests, much less holds, that a state agency has any duty to police any local district. Tinsley v. Palo Alto Unified School District, 91 Cal. App. 3d 871 (1979), was also discussed in Salazar. 9 Cal. 4th at 858. It holds no more than that a remedy against the State may lie for a claim that school district boundaries have been improperly drawn, since (1) it is the State that draws the boundaries; and (2) a local district is incapable of changing its own boundary. Hall v. City of Taft, 47 Cal. 2d 177 (1956), holds only that since schools are a matter of state concern, school construction is not subject to city building codes, despite the plenary grant to cities of local police power in Article XI, § 7 of the Constitution. Piper v. Big Pine School District, 193 Cal. 664 (1924), holds that all children in California have a right to be educated within the Public School System, as that is defined by Article IX, § 6 of the Constitution, and that the State may not delegate educational responsibility to an entity outside that System; since all local school districts are within the Public School System, Big Pine does not address in any way the division of responsibilities between state agencies and local districts, and has no relevance to any issue presented here.

In this case, however, there is no need for any such declaration, no need for any legislation, and no need for any relief against the State as an abstract entity. The previous sections have shown that no state agency or official is authorized to take action if a district fails to purchase sufficient textbooks, or otherwise violates its constitutional duty with respect to textbooks. But this case is not one where the Legislature has failed to create an entity with the power and ability to fulfill the constitutional obligations, whatever they may be, of the State as an abstract entity. That entity is the local district.

"Local districts are the State's agents for local operation of the common school system." Id. at 681; Hall v. City of Taft, 47 Cal. 2d at 181; San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 952 (1971); California Teachers Ass'n, 5 Cal. App. 4th at 1523-24. The districts are capable of giving plaintiffs a remedy, if any district has failed any constitutional obligation with respect to textbooks.[18] They are the entities on whom the Legislature has conferred the power and

[18] If a district were financially or otherwise unable to provide students with textbooks, a question not presented on plaintiffs' motion might arise as to whether the Legislature had some obligation to fund the district's operations. But an obligation on the Legislature to fund districts would not change the fact that under existing law the duty to provide textbooks lies with districts, not agencies and officials of the State. If the rule were otherwise, the Legislature's power to divide responsibility for educational affairs would be in no sense "plenary." Butt, 4 Cal. 4th at 688 ("The Constitution has always vested 'plenary' power over education . . . in the State, through its Legislature, which may create . . . and regulate local districts at pleasure."). In any event, the Court has ruled that this case is not about addressing "the level of funding for education provided generally in the state or particularly for the plaintiffs." Order (July 10, 2003) at 4.

the responsibility to purchase textbooks, and they are the State's agents for purposes of running the public schools. By electing to assert a claim solely against the State and its officials and agencies, plaintiffs have sued the wrong governmental entity; the appropriate result will be to dismiss their lawsuit. Elberg v. San Luis Obispo County, 112 Cal. 316, 318 (1896) (action against county to recover taxes dismissed because county had no control over taxes, which were to be used by local school district; "appellant is in the unfortunate position of claiming a cause of action against B which he seeks to prosecute against A. . . . His only course would be to institute a new suit against the true defendant."); Freis v. Soboroff, 81 Cal. App. 4th 1102, 1104-1106 (2000) (action against city and city officials dismissed where plaintiff's claim should have been directed to federal government); Harris v. Civil Serv. Comm'n, 65 Cal. App. 4th 1356, 1362-1363 (1998) (summary judgment given to defendant city where plaintiff's claim should have named defendant Civil Service Commission); Pacific States Enters., Inc. v. City of Coachella, 13 Cal. App. 4th 1414, 1424-1425 (1993) (claim against city dismissed where plaintiff should have sued city redevelopment agency); Williams v. United States, 711 F.2d 893, 897-898 (9th Cir. 1983) (action against Federal Aviation Administration dismissed where proper defendant was United States).

CONCLUSION

Plaintiffs have moved for summary adjudication on a legal theory which is contrary to what they have always represented, and the Court has held, this case is about. The Court should hold them to their representations, and deny the motion for that reason alone. In addition, the motion should be denied since the facts that are undisputed on this record are insufficient to show either: (1) on the theory that plaintiffs have always pursued, that the State's system of oversight and management of the public schools, insofar as it relates to textbooks, violates any constitutional duty resting on the State or its officials; or (2) on plaintiffs' new theory, that any constitutional violation exists which would warrant any remedy or relief against the State or its officials.

DATED: August 21, 2003.

Respectfully submitted,

O'MELVENY & MYERS LLP
JOHN F. DAUM
FRAMROZE M. VIRJEE
DAVID L. HERRON
PETER L. CHOATE

By: _____
Peter L. Choate
Attorneys for Defendant
State of California