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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

DATE: MARCH 9, 2022
JUDGE: EDWARD G. WEIL

DEPARTMENT 39
COURT CLERK: A. MONTGOMERY
UNREPORTED

MARK S, et al.,
Plaintiff

Case No. MSN21-1755

VS.

ORDER AFTER HEARING

STATE OF CALIFORNIA, et al.,
Defendant

Order after hearing on February 24, 2022

On February 24, 2022, the Court heard oral argument on various matters in this case, and took the pending matters under submission. The Court now rules as set forth below on each matter.

Line 9 – State's joinder

State's joinder is granted. See rulings on the Department of Education's demurrer and motion to stay.

Line 10 – State's Demurrer

The State of California's demurrer is **overruled** on the ground raised. Since the State has also joined in the Department of Education's demurrer, the ruling on line 12 also applies to the State.

The State demurs to all causes of action where it is named, arguing that each claim fails to allege facts sufficient to constitute a cause of action. The State argues that it is not a proper party because Plaintiffs can (and have sued) the state agencies responsible for carrying out the State's duties regarding education.

In *Butt v. State of California* (1992) 4 Cal.4th 668 the court stated that "[t]he State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity" and upheld a ruling that order the "State and its officials to protect the students' rights." (*Id.* at 685, 704.) Since the State has ultimate authority on educational issues it is a proper party in this case.

Line 11 – Pittsburg's Demurrer

Pittsburg Unified School District's demurrer is **sustained without leave to amend as to cause of action five and sustained with leave to amend on all other claims.** Plaintiffs shall file and serve an amended petition by March 30, 2022.

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Pittsburg Unified School District demurs to causes of action one, three, four, five, six, seven and eight, arguing that the Court lacks jurisdiction and that each claim fails to allege facts sufficient to constitute a cause of action.

The Court refers to the original pleading in this case as the "Petition" since the document is called a petition and complaint. The Court refers to the parties as Plaintiffs and Defendants as that is how the parties are discussed throughout the Petition.

California Rules of Court, Rule 2.112

The District argues that the complaint fails to comply with California Rules of Court, rule 2.112 with the exception of the fifth cause of action. The District's demurrer did not include uncertainty grounds and thus, a demurrer for failure to comply with rule 2.112 is not proper. The District is correct, however, that the complaint does not state which of the Plaintiffs are bringing each cause of action. Plaintiffs argue that it is clear that all claims are brought by all Plaintiffs, except for the fifth cause of action and the seventh cause of action. It is unclear why the parties were not able to solve this issue during the meet and confer process. Plaintiffs are required to comply with rule 2.112 and shall amend their Petition to state which Plaintiffs are bringing each cause of action. The Court notes that the District assumed the taxpayers were only bringing the seventh cause of action. When amending the complaint, if Plaintiffs include the taxpayers in causes of action other than seven, the District may demur on issues specific to taxpayers and those other claims.

Unruh Civil Rights Act (C/A 5)

In *Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367 the court ruled that public school districts are not liable under the Unruh Civil Rights Act. The court concluded that that

public school districts are not "business establishments" and that Unruh imposes liability only on business establishments. (*Id.* at 369-370.) The California Supreme Court granted a petition for review of *Brennon B.*, but denied a request to depublish the opinion. (*Brennon B. v. Superior Court* (2021) 275 Cal.Rptr.3d 232.)

California Rules of Court, rule 81115(e)(1) states that "Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court."

The Court chooses to follow *Brennon B.*'s analysis and therefore, this Court finds that public school districts are not liable under the Unruh Civil Rights Act. The demurrer to cause of action five is sustained without leave to amend. If, however, the California Supreme Court reverses the Court of Appeal's decision in *Brennon B.* while this case is still pending before this Court, Plaintiffs may request to add the Unruh claim back to their complaint.

Exhaustion of Remedies

The District's main argument on demurrer is a failure to exhaust their administrative remedies.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. is designed to ensure that children with disabilities have free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. (20 USC 1400(d)(1)(A).) IDEA provides for an impartial hearing conducted by the State educational

agency or by the local educational agency for certain claimed violations of IDEA. (20 U.S.C. § 1415 (f).) A plaintiff must exhaust IDEA's hearing procedures before bringing a claim under IDEA. (20 U.S.C. § 1415 (i).)

In *Fry v. Napoleon Cmty. Sch.* (2017) ___U.S.___ [137 S.Ct. 743, 755], the US Supreme Court clarified that IDEA administrative remedies must be exhausted prior to bringing a civil action under any law for which "the gravamen of [the] complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed precisely that way."

The Supreme Court identified two questions that assist in determining whether the gravamen of the complaint concerns the denial of FAPE. When the answer is no, the complaint likely does concern a FAPE, even if it does not explicitly say so. (*Fry, supra*, 137 S.Ct. at 756.) The first question is: could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility other than a school? The second question is: could an adult at the school (i.e. a non-student employee or visitor) have pursued the same claim? (*Ibid.*) The history of the proceedings can also provide clues as to whether the gravamen of a complaint concerns the denial of a FAPE. (*Id.* at 757.)

In addition to IDEA administrative process, the District argues that Plaintiffs were required to exhaust their administrative remedies under state law. Education Code section 56500.2(a)(1) requires that a complaint be filed with the Department of Education for any alleged violations of IDEA or violations of Education Code section 56000, et seq. (Education Code section 56500.2(a)(1).) The District then argues that "if an administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy must

be exhausted before judicial review of the administrative action is available." (*Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1463.)

Claims Subject to Exhaustion

The District argues that causes of action one, three, four, six and eight all involve claims related to FAPE. In addition, cause of action three for violations of Education Code section 56000, involves claims under section 56000 and thus, Plaintiffs also must exhaust their administrative remedies based on state law.

The Court finds that all claims in this case involve FAPE issues. (Petition ¶¶108-109, 118, 123, 132, 141, 154.) Thus, Plaintiffs were required to exhaust their administrative remedies as to causes of action three, four, six and eight. In addition, cause of action three involves claims under Education Code section 56000 and that statutory scheme includes an administrative remedy that must be exhausted.

As to cause of action one, Plaintiffs argue that they are not required to exhaust the State Constitutional claims. "[T]he doctrine of exhaustion of administrative remedy applies to actions raising constitutional issues. [Citations.]" (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 74.) While there are some exceptions to this rule, Plaintiffs have not pointed to an exception that applies in this case.

The taxpayer claim also involves claims related to FAPE. (Petition ¶147.) *Collins v. Thurmond* (2019) 41 Cal.App.5th 879 held that a taxpayer bringing a lawsuit based on allegations the state is wasting money by funding discriminatory practices at the local level must first exhaust its administrative remedies under the Uniform Complaint Procedures (UCP). (*Id.* at 912.) Here, the claim is against the District and thus, *Collins* does not directly apply. Still,

Collins explained that " 'where the Legislature has provided an administrative remedy, a taxpayer action cannot be used in lieu of that remedy.' [Citation.]" (*Ibid.*)

The District argues that there are administrative remedies available to taxpayers. A complaint based on FAPE issues can be brought by "an interested third party". (Cal. Code Regs., tit. 5, § 3200 (b).) These complaints are submitted to the California Department of Education. (Cal. Code Regs., tit. 5, § 3200 (e).) Thus, the Taxpayer Plaintiffs must also file a CRP complaint. As explained above, Plaintiffs were required to exhaust their administrative remedies for each cause of action.

Exhaustion Requirements

When an individual student brings claims based on their individual experience, they are usually required to exhaust their administrative remedies by bringing a claim before an Administrative Law Judge ad the Office of Administrative Hearings (OAH). Where, however, Plaintiffs allege "systemic" problems, then filing a complaint using the Complaint Resolution Process (CRP) may be an adequate substitute for exhaustion purposes.

While there are numerous cases on this issue, two in particular provide the best analysis for purposes of this discussion: *Hoeft v. Tucson Unified School District* (9th Cir. 1992) 967 F.2d 1298, 1308 and *Christopher S. v. Stanislaus County Officer* (9th Cir. 2004) 384 F.3d 1205, 1209-10.

In *Hoeft* plaintiffs filed a class action challenging the school district's policies for providing (and denying) extended school year services. One of the plaintiffs pursued a compliance complaint against the Arizona Department of Education, claiming that the district was violating the IDEA. Highlighting the policies behind exhaustion of remedies, the Ninth

Circuit found exhaustion should not be lightly set aside where a court could benefit from the fact-intensive administrative record, the expertise of agencies, and where the state agency is on notice that practices may need correction. (*Hoeft, supra,* 967 F.2d at 1303.)

Plaintiffs in *Hoeft* claimed exhaustion was excused because it would be futile, remedies would be inadequate, and because the agency had adopted a policy or pursued a practice of general applicability that is contrary to the law. (*Hoeft, supra,* 967 F.2d at 1303-04.) The court determined that the latter exception was a narrow one, explaining that it applies only where the claims are "so serious and pervasive that basic statutory goals are threatened." (*Id.*, at 1307-1308.)

There, the Ninth Circuit explained that administrative exhaustion is critically important to the effective determination of claims and scope of any remedy related to individual harm and associated damages. The requirement serves the important purposes of affording the parties and the courts the benefits and expertise of the agency, ensuring the compilation of an adequate record for review, and putting the state on notice. (*Hoeft, supra,* 967 F.2d at 1303-05.) In that case, even where the court found that technical expertise was not required to show that certain policies (parental notification and extent of extended year programming) were unlawful on their face, exhaustion was not excused. (*Id.* at 1306-1307.) Ultimately, it determined that the cases involved significant individualized determinations that would benefit from administrative review.

In *Christopher S., supra*, 384 F.3d at 1211-14, the court applied the same standards, but to a school district policy that provided that autistic students would have a shorter school day than other students. It found that the policy was uniform, not based on individual

characteristics, and unlawful on its face, and thus did not require use of the administrative procedure.

Thus, on a case by case basis, courts may choose to accept exhaustion of the CRP as a substitute for exhausting IDEA procedures in challenges to facially invalid policies. *(Hoeft, supra,* 967 F.2d 1298 at 1308; *Christopher* S., *supra,* 384 F.3d at 1209-10.)

Exhaustion of Claims - Students

As to Mark S. and Rosa T., the District argues that their claims do not involve systemic issues that excuse bringing a claim before the OAH. It is alleged that both students made claims relating to systemic violations of the law. (Petition ¶¶ 100, 102.) In addition, the Petition alleges that the District's treatment of students with disabilities is a systemic problem. (Petition ¶¶ 6-7, 10-20, 44, 46-49, 54-55, 59, 66-68, 70, 75, 79-81.) The Petition does request compensatory education for Mark S. and Rosa T., but that is just one piece of the requested relief. (Petition ¶163.) Most of the requested relief seeks to mandate changes to district-wide practices and does not seek any relief targeted specifically at the plaintiff students. (Petition ¶¶160-162.) Thus, many of the issues raised in this Petition involve alleged systemic problems within the District that OAH would be not able to adequately address if the issues were brought to OAH. The Court finds that in this case Mark S. and Rosa T. were not required to complete the OAH process and instead they could exhaust their administrative remedies by completing the CRP process.

On July 30, 2021, Sofia L. filed a complaint on behalf of her daughter, Rosa T., with the California Department of Education Complaint Resolution raising that same allegations that were included in Anna S.' complaint. (Petition ¶102.)

Plaintiffs allege that Anna S. filed a complaint on behalf of her son, Mark S., on February 25, 2021 with the California Department of Education Complaint Resolution Unit against the Department and the District. The complaint challenged the systemic violations outlined in the complaint, exception for allegations related to discipline practices. In May 5 and May 21, the Department denied the all the systemic claims. (Petition ¶100.)

The District argues that Mark S. did not allege that he requested reconsideration of the CRP decision to the State Superintendent of Public Instruction as required by 5 C.C.R. section 3204. Section 3204 gives a student 30 days to request reconsideration of a Department of Education Investigation Report to the State Superintendent of Public Instruction. "In evaluating or deciding on a request for reconsideration, the CDE will not consider any information not previously submitted to the CDE by a party during the investigation unless such information was unknown to the party at the time of the investigation and, with due diligence, could not have become known to the party." (Cal. Code Regs., tit. 5, § 3204 (b).)

There are no allegations that Mark S. made this request. Nor do Plaintiffs claim that he made such a request in their opposition (or in their request for judicial notice). Instead, Plaintiffs argue that Mark S. was not required to request reconsideration in order to fully exhaust his administrative remedies under the CRP.

In *Sierra Club*, the California Supreme Court held that "the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510.) The Supreme Court explained that, "[t]his is not to say that reconsideration of agency actions need never be sought

prior to judicial review. Such a request is necessary where appropriate to raise matters not previously brought to the agency's attention." (*Id.* at 493-494.) The Supreme Court explained that reconsideration may be required to address "new evidence, changed circumstances, fresh legal arguments" and "errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing". (*Id.* at 510.)

When bringing a request for reconsideration, the student must show that the (1) "the CDE Investigation Report lacks material findings of fact necessary to reach a conclusion of law;" (2) "The material findings of fact in the CDE Investigation Report are not supported by substantial evidence;" (3) "The legal conclusion in the CDE Investigation Report is inconsistent with the law;" and/or (4) "the required corrective actions fail to provide a proper remedy." (Cal. Code Regs., tit. 5, § 3204 (a).) The reconsideration process in section 3204 does not allow the Department to consider new information unless it was unknown to the parties at the time of the investigation.

The Court finds that Mark S. was not required to seek reconsideration in order to exhaust his administrative remedies. Thus, Mark S. has alleged that he exhausted his administrative remedies by completing the CRP process. If it is shown subsequently that Mark S. is attempting to raise claims that could have been raised in the reconsideration process, the issue may be reviewed at that time.

The District argues that Mark S. prevailed in some of his complaint before the CRP and thus, he cannot bring a civil action on the issues where he prevailed and without those claims, Mark S. is not an aggrieved plaintiff. When bringing a claim under IDEA, the party must be "aggrieved by the findings and decision". (20 U.S.C. § 1415 (i)(2)(A).) Here, the Investigation

Report for Mark S. shows that he prevailed on an individual basis on two of his three allegations, but also that Mark S. was unsuccessful in all three of the allegations based on the systemic claims. (District's RJN 1.) Plaintiff points out, however, that Mark S. requested relief of the systemic issues for all three of his allegations and lost all such requests. Assuming that Mark S. is required to comply with section 1415(i)(2)(A) in order to bring his state claims, he is sufficiently aggrieved to do so.

Thus, the District's arguments as to Mark S. fail. As noted above, however, Plaintiffs are required to amend their complaint to comply with California Rules of Court, rule 2.112.

The District argues that Rosa T. did not receive an answer from her CRP complaint before filing this action. In addition, Rosa T. does not allege that she requested reconsideration of her claims. After the filing of this case, Rosa T. filed a request for reconsideration with the State Superintendent of Public Instruction. Thus, when the petition was filed Rosa T. had not exhausted her administrative remedies and the demurrer as to Rosa T.'s claims is sustained. It appears, however, that Rosa T. has now exhausted her administrative remedies under the CRP process and thus, the demurrer is sustained with leave to amend for Rosa T. to allege exhaustion.

The District argues that Rosa T. prevailed in some of her complaint before the CRP and thus, she cannot bring a civil action on the issues where he prevailed. (District's RJN 2.) The Investigation Report for Rosa T. shows that she prevailed on one of her two allegations on her individual claims. The report for Rosa T. does not address systemic claims, however, that does not mean Rosa T. did not raise systemic issues. The petition alleges that Rosa T. challenged systemic issues and the Court must accept that allegation as true. (Petition ¶102.) Thus, based

on the allegations in the Petition, Rosa T. raised systemic issues in her CRP complaint and she did not prevail on these issues. Rosa T. is thus an aggrieved party.

Exhaustion of Claims - Taxpayers

Plaintiffs allege that on July 7, 2021, Jessica Black filed a complaint on behalf of her daughter, L.G., challenging challenged the systemic violations included in Anna S.' complaint, and adding allegations related to discipline practices. On July 20, the California Department of Education informed Plaintiffs that it would not investigate systemic violations that had been made in previous administrative complaints. (Petition ¶101.)

On June 1, 2021, the Taxpayer Plaintiffs (Michell Redfoot, Dr. Nefertari Royston and Jessica Black) filed a Uniform Complaint Procedure Complaint with the District challenging the systemic violations. The District found the complaint lacked merit on July 30, 2021 and again on August 24, 2021. The Taxpayer Plaintiffs appealed these decisions to the California Department of Education on August 4, 24 and 30. (Petition ¶104.)

Although not alleged in the Petition, Plaintiffs include requests for judicial notice with their opposition that show Plaintiff Black's CRP complaint was denied. (Plaintiffs' RJN F.) Plaintiffs' documents also show that the Taxpayer Plaintiffs' appeals have been closed. (Plaintiffs' RJN A, B and C.)

The Taxpayer Plaintiffs claims are based on alleged systemic problems at the school, rather than on individual claims. In addition, the Taxpayer Plaintiffs are not seeking compensatory education and thus, their requested relief all involves fixing the alleged systemic problems. (Petition ¶¶160-162.) Looking at the claims in this case, the Court finds that the

Taxpayer Plaintiffs' claims involve systemic issues and that they were not required to complete the OAH process.

As to Plaintiff Black, the Petition sufficiently alleges that she completed the CRP process. Since Black has completed the CRP process based on systemic violations, she is not required to complete the OAH process.

Plaintiffs argue that the other Taxpayer Plaintiffs were not required to also exhaust their administrative remedies on claims raised by Black because such exhaustion would be futile. The futility "exception applies only if the party invoking it can positively state that the administrative agency has declared what its ruling will be in a particular case. [Citation.]" (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) The Petition alleges that the Department of Education informed Plaintiff Black that it would not investigate systemic violations that had been made in previous administrative complaints. Thus, the Petition alleges that Plaintiffs Redfoot and Royston will receive the same result as Plaintiff Black if those they file a CRP complaint with the Department. These facts also show that Plaintiffs Redfoot and Royston were not required to complete the OAH process. Plaintiffs Redfoot and Royston have alleged futility from exhausting their administrative remedies. The demurrer on this ground is fails.

Racial Discrimination Claims

In a footnote in the demurrer memorandum, the District argues that Mark S. and Rosa T., as Latino/a students, do not have standing to bring claims based on discrimination of Black, multiracial or Native American students. (Memorandum p. 19.) The District also argues that they do not know if Mark S. and Rosa T. are attempting to bring these claims because of the

failure to allege which plaintiffs are bring each cause of action. In opposition, Plaintiffs argue that Mark S. and Rosa T. do have standing.

This issue was not sufficiently briefed in the moving papers, but was raised by the District as a potential issue in the future once Plaintiffs specifically allege which Plaintiffs are bringing which claims. Therefore, the Court will not rule on this issue now and will permit the District to raise this issue in a future demurrer.

Requests for Judicial Notice

The District's requests for judicial notice of the Department of Education's findings in response to Mark S. and Rosa T.'s CRP complaints are granted as unopposed and appropriate for judicial notice.

The Plaintiffs' request for judicial notice are granted to exhibits A to F and denied as to exhibit G. Exhibits A to C are documents showing that the Department of Education has closed the appeals of the Taxpayer Plaintiffs. Exhibits D and E show that Rosa T's request for reconsideration on her CRP complaint was denied. Exhibit F relates to Plaintiff Black's CRP complaint. These documents are appropriate for judicial notice.

Exhibit G, however, is the complaint in another case. While Court documents are often appropriate for judicial notice, this document is not relevant and thus, judicial notice is denied.

Line 12 – Dept of Education's Demurrer

The California Department of Education, State Board of Education and Tony Thurmond's demurrer is sustained without leave to amend as to causes of action two and four as to all Plaintiffs. It is sustained with leave to amend as to Rosa T., Michell Redfoot, Dr. Nefertari

Royston and Jessica Black. As to Mark S., the demurrer is overruled as to cause of action one and six, and sustained with leave to amend as to cause of action eight.

Plaintiffs shall file and serve an amended petition by March 30, 2022.

The California Department of Education, State Board of Education and Tony Thurmond demur to causes of action one, two, four, six, seven and eight, arguing that each claim fails to allege facts sufficient to constitute a cause of action. The State of California has joined in this demurrer and the ruling here also applies to the State. The State of California, California Department of Education, State Board of Education and Tony Thurmond are collectively referred to as the State Defendants.

Exhaustion of Remedies

Whether Plaintiffs exhausted their administrative remedies is an argument raised in response to several causes of action.

The State Defendants argue that under *Paul G. v. Monterey Peninsula Unified Sch. Dist.* (9th Cir. 2019) 933 F.3d 1096, the student plaintiffs must get a finding from OAH that the student was denied FAPE in order to sue the State Defendants. In *Paul G.*, a student filed a complaint with OAH against the State and the district. The State was dismissed because OAH could not order the State to provide the relief requested by the student. The student then settled his claims with the district and never received a decision from OAH on whether he was denied FAPE. The court in *Paul G.* found that the student could not sue the State because the student had not completed the administrative process. *Paul G.* did not consider whether CRP could act as a substitute for OAH, but did mention the exceptions to exhaustion. (*Id.* at 1101-02.)

Paul G. is distinguishable on its facts because no CRP complaint was filed and the student settled with the district. In addition, this Court is not required to follow federal circuit or district court decisions on issues of federal law. (See, *Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 327-328.) Finding a failure to exhaust as to claims that the hearing officer specifically dismissed from the procedure seems inconsistent with the body of judicial authority governing exhaustion of administrative remedies.

As explained in the Court's ruling on the District's demurrer, Mark S. has exhausted his administrative remedies and the demurrer on that ground is overruled. Rosa T. has not alleged exhaustion of her administrative remedies, but will be given leave to do so. Therefore, the demurrer as to Rosa T.'s claims in cause of action one is sustained with leave to amend.

As to the taxpayer claims, *Collins v. Thurmond* (2019) 41 Cal.App.5th 879 held that a taxpayer bringing a lawsuit based on allegations the state is wasting money by funding discriminatory practices at the local level must first exhaust its administrative remedies under the Uniform Complaint Procedures (UCP). (*Id.* at 912.) Thus, the Taxpayer Plaintiffs must have followed the UCP in order to bring claims against the State Defendants.

On June 1, 2021, the Taxpayer Plaintiffs (Michell Redfoot, Dr. Nefertari Royston and Jessica Black) filed a Uniform Complaint Procedure Complaint with the District. The District found the complaint lacked merit on July 30, 2021 and again on August 24, 2021. The Taxpayer Plaintiffs appealed these decisions to the California Department of Education on August 4, 24 and 30. (Petition ¶104.) Although not alleged in the Petition, Plaintiffs include requests for judicial notice with their opposition that shows that the Taxpayer Plaintiffs' appeals have been

closed. (Plaintiffs' RJN A, B and C.) The State Defendants argue that Redfoot's appeal is not completed.

Thus, while the Petition does not allege completion of the UCP, it appears that they will be able to amend their petition to do so. Whether or not those allegations are sufficient can be raised in a future demurrer. Thus, the demurrer to the Taxpayer claims is sustained with leave to amend.

Equal Protection (C/A 1)

The State Defendants argue that this claim fails because (1) FAPE is not the statewide standard for equal protection purposes, (2) Plaintiffs have not shown that a state policy causes a disparate impact or that the State Defendants took no action, and (3) Plaintiffs did not exhaust their administrative remedies.

As discussed above, Mark S. has exhausted his administrative remedies. The remaining Plaintiffs have not yet alleged exhaustion, but are given leave to amend to do so.

"[U]nder California's equal protection clause, a claim is stated when a policy adopted in California has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools and an appreciable impact to a district's educational quality, and no action is taken to correct that policy when its impacts are identified." (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896-897.)

" 'The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." (*Butt* [*v. State of California* (1992)] 4 Cal.4th [668,] 685.) In this vein, 'the equal protection clause precludes the State from maintaining its common school system in a manner that denies

the students of one district an education basically equivalent to that provided elsewhere throughout the State.' (*Ibid.*)" (*Collins, supra,* 41 Cal.App.5th at 898.) In *Butt*, the Supreme Court limited California equal protection claims to cases where "the actual quality of the district's program... falls fundamentally below prevailing statewide standards." (*Butt, supra,* 4 Cal.4th 668, 686-687.) "California constitutional principles require State assistance to correct basic 'interdistrict' disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents." (*Id.* a 681.)

In *Collins,* the court found that the following allegations were sufficient to state a claim for violation of the California equal protection clause:

> Appellants have alleged that students within [the school district] are being subjected to racially discriminatory disciplinary proceedings and that the state became aware of the resulting discriminatory impact. Appellants have pleaded facts suggesting that minority students subjected to these policies are provided with a lower quality education than White students. They further allege that [the school district's] disciplinary policies have created a segregated school system whereby minority students are placed in allegedly lower quality school settings in substantially higher proportions than their population or disciplinary requirements warrant.

(*Collins, supra,* 41 Cal.App.5th at 898.) The Court explained that "[f]or purposes of stating [an equal protection] claim, it is reasonable to conclude that students of a district subject to de facto racial segregation due to racially discriminatory disciplinary practices are receiving an education that is fundamentally below the standards provided elsewhere

throughout the state where the legal proscriptions on such discriminatory practices are being enforced." (*Id.* at. 899.)

Here, it is alleged that the "State Defendants have also violated the rights of Plaintiffs by failing to respond to reports that disabled students do not receive basic educational opportunities equal to those that other students in California receive and failing to exercise meaningful oversight over school districts, including Pittsburg Unified, where disabled, Black, Native American, multiracial, and English learner students are de facto segregated from school and/or provided inferior academic instruction; and where Black, Native American, multiracial, and disabled students, and students at the intersection of those identities, are targeted for harassment and discriminatory discipline." (Petition ¶109.)

These allegations are sufficient to state an equal protection claim based on segregation and discipline under the California Constitution against the State Defendants.

Plaintiffs have alleged that FAPE is the prevailing statewide standard. (Petition ¶40.) Federal law requires public schools in California to provide FAPE, thus is appears that FAPE is a prevailing statewide standard for providing education to students with disabilities. There may be additional standards provided by California law, but since all public schools are required to provide FAPE, FAPE is a statewide standard.

The parties disagree over whether Plaintiffs can use FAPE as the statewide standard for an equal protection under the California Constitution. The State Defendants argue that FAPE cannot be used for an equal protection claims under the Federal Constitution. However, this is does not address the claim under the California Constitution. Under the California Constitution there is a fundamental right to an equal education that is not mirrored in the Federal

Constitution. (See, e.g. *Collins, supra,* 41 Cal.App.5th at 896.) The Court finds that FAPE can be used as a statewide standard for a California Constitutional claim. There are other statewide standards that may support a claim for violation of equal protection under the California Constitutional, but for this demurrer the parties focused on FAPE as the statewide standard and therefore the Court has not addressed other potential statewide standards.

Thus, Plaintiffs have also stated a claim for an equal protection under the California Constitution against the State Defendants based on the failure to make sure that the District provides FAPE.

The State Defendants reliance on *Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896 is misplaced. There the question was whether all students had a Constitutional right to a certain level of education such that they could compel the Legislature to better fund education. That is not the issue before this Court.

The demurrer to cause of action one is overruled as to Mark S. and sustained with leave to amend on the exhaustion of administrative remedies as to the remaining Plaintiffs.

Education Code section 33300 (C/A 2)

The State Defendants argue there is no private right of action under section 33300 and that Plaintiffs did not exhaust their administrative remedies. In opposition, Plaintiffs stated that while they believe they have a claim here, they do not oppose the demurrer to this cause of action. Therefore, the demurrer to cause of action two is sustained without leave to amend.

Government Code section 11135 (C/A 4)

The State Defendants argue that there is no claim for education equity against the state. In *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 904-05 the Court of Appeal held that the

education-based claims were removed from the ambit of the statute by amendments made in 2017 when the Legislature removed "educational equity claim[s]" from the scope of Government Code section 11135. Plaintiffs have explained why they believe this case was wrongly decided. Since the decision is the only published Court of Appeal opinion on the subject, however, this Court must follow it. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The demurrer to cause of action four is sustained without leave to amend.

Declaratory Relief (C/A 6)

The State Defendants argue that the declaratory relief claim is entirely derivative of Plaintiffs' other claims and fails for the same reasons as the other claims. Since the Court finds that Plaintiffs have alleged at least one valid claim, the demurrer on this ground fails.

Taxpayer Claim (C/A 7)

The State Defendants argue that this claim fails because the Taxpayer Plaintiffs do not have standing under Code of Civil Procedure section 526a and because of a failure to exhaust their administrative remedies.

The State Defendants argue that the Taxpayer Plaintiffs do not have standing because "the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur. [Citations.]" (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.)

"A ' "taxpayer action must involve an actual or threatened expenditure of public funds. [Citation.] [¶] General allegations, innuendo, and legal conclusions are not sufficient [citation]; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal

expenditure or injury to the public fisc is occurring or will occur." ' [Citation.] Similarly, the 'term "waste" as used in [Code of Civil Procedure] section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or discretion.' [Citation.] Rather, it is more readily understood as 'a "useless expenditure of funds." ' [Citation.]" (*Collins, supra,* 41 Cal.App.5th at 910.)

Collins found that the taxpayer plaintiffs had stated a claim for waste explaining that "although appellants' contentions are vague as to the nature of the state-level defendants' actions, appellants do minimally allege that the state-level defendants are authorizing funds that they know are being illegally used by their recipients, that illegality arising, at a minimum, from a violation of the equal protection clause." (*Id.* at 911.)

Collins also stated that a "claim the state-level defendants are wasting state funds by failing to fully implement a monitoring system for discriminatory practices" is not a viable waste claim. *Collins* explained that "[t]he extent to which those funds are appropriately spent is, absent additional allegations that the assignment of funds to that program is illegal, a political issue involving legislative discretion on how to comply with their legal obligations." (*Id.* at 911, fn. 12.)

Plaintiffs include allegations of improper monitoring, which are not a viable waste claim under *Collins.* (Petition ¶147.) Plaintiffs also allege, however, that the Defendants receive state and federal funds for the purpose of administering education programs and that Defendants use these funds to implement a system of public education that includes unconstitutional discrimination. (Petition ¶¶145-146.)

The allegations here are even more vague than the ones in *Collins*. Plaintiffs have not yet alleged a taxpayer claim for waste. The demurrer is sustained with leave to amend on this ground. As explained above, the demurrer is also sustained with leave to amend on the exhaustion issue.

Writ of Mandate (C/A 8)

The State Defendants argue that the writ claim fails because Plaintiffs cannot obtain a writ based on how the State Defendants monitor a school. The State Defendants' supervisory responsibility over special education involves an exercise of discretion and relief is only available where Plaintiffs can show an abuse of discretion.

"To state a cause of action for a writ of mandate, one must plead facts showing (1) a clear duty to act by the defendant; (2) a beneficial interest in the defendant's performance of that duty; (3) the defendant's ability to perform the duty; (4) the defendant's failure to perform that duty or abuse of discretion if acting; and (5) no other plain, speedy, or adequate remedy exists. [Citation.] (*Collins, supra,* 41 Cal.App.5th at 915.)

"Mandatory duties are often invoked in the context of ministerial acts. 'A ministerial act is one that a public functionary " ' "is required to perform in a prescribed manner in obedience to the mandate of legal authority," ' " without regard to his or her own judgment or opinion concerning the propriety of such act.' [Citation.] ... However, '[w]hile a party may not invoke mandamus to force a public entity to exercise discretionary powers in any particular manner, if the entity refuses to act, mandate is available to compel the exercise of those discretionary powers in some way.' [Citation.]" (*Collins, supra,* 41 Cal.App.5th 879, 914.) " 'Where the duty in

question is not ministerial, mandate relief is unavailable unless the petitioner can demonstrate an abuse of discretion.' " (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780.)

In *Collins* the court found there was no ministerial duty as to how the State defendants monitored a local school. *Collins* explained that the State defendants had a duty to monitor compliance with federal law, but it was a discretionary in nature. The court also noted that it found "no clear mandate in the law for the state to act at any particular moment upon learning of potential violations of the equal protection clause." (*Id.* at 916, fn.13.) Instead, "any claim arising from the way in which the state implements such a duty must demonstrate an abuse of discretion." (*Id.* at 918.)

In *Collins,* it was alleged that the local-level defendants failed to submit data required of them for the 2011–2012 school year, yet the state-level defendants took no action to procure the date and failed to implement any process for ensuring the data is accurately submitted. (*Id.* at 918.) The court found that a writ claim had been alleged because the plaintiff was "alleging that the state-level defendants, having a mandatory duty to monitor for compliance with federal law, have abused their discretion to do so by failing to implement any review of the program they implemented to ensure they are receiving the data necessary to meet their duty. (*Ibid.*)

Plaintiffs do not address this discussion in *Collins* in their opposition. Instead, Plaintiffs argue more generally that they have stated a writ of mandate claim.

Plaintiffs argue that the State Defendants have been aware of discrimination at the District and failed to take action to correct the policies and practices at the District. Plaintiffs do

not point to any specific duty and argue that the State defendants have a clear, non-discretionary duty to ensure equal educational opportunities. (*Butt, supra,* 4 Cal.4th at 692.) Plaintiffs also argue that the State Defendants have "been on notice about the deficiencies in the District's special education program through the State's own evaluation processes, the District's data collection, and the District's reports to the State on educational outcomes for students with disabilities. Yet, they have failed to ameliorate the issues that harm students with disabilities..." (Petition ¶58.) Plaintiffs also allege that the State Defendants have not "effectively supervised the statewide system of public education to ensure that students in Pittsburg Unified... receive equal educational opportunity." (Petition ¶96.) These allegations do not allege an abuse of discretion by the State Defendants, but rather continue to allege that the State Defendants have a ministerial duty.

As currently alleged, Plaintiffs have not stated a writ of mandate claim against the State Defendants. The demurrer is sustained with leave to amend for Plaintiffs to allege some facts, even ultimate facts, that the State Defendants have abused their discretion.

Requests for Judicial Notice

The State Defendants' request judicial notice of a number of documents, which appear to be offered to show that the State Defendants have been complying with their legal obligations. The State Defendants have offered these exhibits to show that they have done something regarding the Pittsburg District and thus, cannot be liable for an equal protection claim. The Court denies the request for judicial notice of these documents for this demurrer. If requested, the Court may decide to take judicial notice of these documents for an evidentiary motion or hearing.

The Plaintiffs' request for judicial notice are granted to exhibits A to F and denied as to exhibit G. See the Court's ruling on the District's demurrer.

The State Defendants' supplemental requests for judicial notice are denied.

The Court notes that the State Defendants' request for judicial notice in support of its demurrer did not include tabs in violation of California Rules of Court, rule 3.1110 and Local Rule 3.42. All parties should ensure exhibits are properly tabbed in the future.

Line 15 - motion to stay

The California Department of Education, State Board of Education and Tony Thurmond's motion to stay is **denied**.

The California Department of Education, State Board of Education and Tony Thurmond (collectively, "The State Defendants") argue that the claims against the State Defendants should be stayed because of a lawsuit pending in federal court, *Emma C. v. Thurmond*, Case No. 3:96-cv-4179-VC.

"[W]hen a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action. [Citations.]" (*Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 804.) " 'In exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the

proceedings in the other court have already advanced.' (*Farmland Irrigation. Co. v. Dopplmaier* [(1957)] 48 Cal.2d [208,] 215.)" (*Ibid.*)

It is also important to consider whether "the federal action is pending in California not some other state". (*Caiafa, supra,* 15 Cal.App.4th at 804.) *Emma C.* is being heard in the Northern District of California and thus, there is no concern about the federal litigation being located out of state.

When considering the other factors in *Caiafa*, the Court finds that a stay is not warranted in this case. This case is not brought solely to harass the Defendants. It does not appear that this case and Emma C. involve the same issues. The State Defendants did not provide the complaint in *Emma C.* and thus, the Court cannot determine exactly what issues are involved in that case. Still, the Court's review of the documents shows that the focus in *Emma C.* is the State Defendants' compliance with IDEA. *Emma C.* does not appear to be addressing California Constitutional Equal Protection claims. Finally, it is not clear if the issues related to the State Defendants' monitoring and enforcement activities in *Emma C.* will address the problems alleged here.

The State Defendants' requests judicial notice are granted as to exhibits 1, 2 and 4 are granted. The request for judicial notice of exhibit 3 is denied.

The State Defendants' supplemental requests for judicial notice are granted as to exhibits 5, 6 and 8 and denied as to exhibit 7.

IT IS SO ORDERED:

DATED: 3/9/22

Hon. Edward G. Weil
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT - MARTINEZ
COUNTY OF CONTRA COSTA
MARTINEZ, CA 94553
(925) 608-1000

CLERK'S CERTIFICATE OF MAILING

CASE TITLE: MARK S. VS STATE OF CALIFORNIA

CASE NUMBER: MSN21-1755 - CIVIL

THIS NOTICE/DOCUMENT HAS BEEN SENT TO THE FOLLOWING ATTORNEYS/PARTIES:

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I am a Clerk of the Court indicated below and am not a party to this cause. On the date below indicated, I served a copy of the attached document(s) by depositing a true copy in the mail in a sealed envelope with postage prepaid, at MARTINEZ, California addressed as above indicated.

TITLE OF DOCUMENT SERVED: ORDER AFTER 2-24-22 HEARING

DATE MAILED: ~~03/09/22~~ 3/10/22

CLERK OF THE COURT

BY: _____
ANTIGONE MONTGOMERY
Deputy Clerk of the Court