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

DATE: January 25, 2021 | **DEPARTMENT: 39**
JUDGE: Edward G. Weil | **CLERK: Denese Johnson**
UNREPORTED

KERI K. et al.,
Plaintiff(s),
vs.

Case No.: MSC19-00972

STATE OF CALIFORNIA, et al.,
Defendant(s).

ORDER AFTER HEARING – JANUARY 21, 2021

Before the Court are two demurrers to plaintiffs' Third Amended Complaint ("TAC"): one by the Contra Costa County Office of Education ("County"), and one by the State of California, State Board of Education, California Department of Education, and Tony Thurmond, in his official capacity as Superintendent of Public Instruction ("State Defendants").

The demurrer by the State Defendants is **overruled.**

The demurrer by the County is **overruled as to the first and ninth causes of action, and sustained with leave to amend as to the second cause of action.**

I. Alleged Factual Background

This case stems from the claims of four current and former students of the Floyd I. Marchus School ("Marchus"). Marchus is a school for students with significant emotional and behavioral needs, run by defendant Contra Costa County Office of Education. (TAC, ¶12.) The school provides special education services to approximately 74 K–12 students from 16 California school districts. (TAC, ¶42.) Plaintiffs assert that, despite the specific special needs identified as to each student, the school utilizes a one-size-fits-all behavior management policy, including a "Level System" ill-suited to a school tasked with providing individualized educational programs. (TAC, ¶¶72-80.) To enforce its policy, referred to as the "Marchus Way," the school routinely deploys restraints and seclusions, eliminating and overriding any instruction specially designed according to the unique needs of each child (known as behavior intervention plans, or "BIPs," and individualized education programs, or "IEPs"), undermining any learning at Marchus. (TAC, ¶¶72-80.)

The students contend they are suffering, have suffered, or will suffer, from the alleged improper use of physical restraints and seclusion at Marchus. They allege both individual claims, and claims on behalf of two proposed classes: the "Marchus Way Class," including all enrolled students, and the "Consent Class," including all students and their guardians who are purportedly bound by Marchus's "Behavior Intervention Contract," an agreement that parents/guardians are required to sign as a condition of enrolling their children at Marchus. (TAC, ¶¶63, 65.) The guardians of these four students also bring their own claim based on their standing as taxpayers. (TAC, ¶¶338-342.)

The Court sustained in part, and overruled in part, County and State Defendants' demurrers to the Second Amended Complaint ("SAC") in December of 2019. Parties proceeded to conduct discovery and now, following unsuccessful efforts to meet and confer with plaintiffs, both sets of defendants again demur to the first and ninth causes of action. They argue plaintiffs failed to exhaust remedies, and no such exhaustion was excused. The County also demurs to the second cause of action for declaratory relief on the basis that there is no actual controversy between the parties. Plaintiffs oppose the demurrers.

II. Requests for Judicial Notice

Both County and State Defendants filed requests for judicial notice with their moving papers. They request notice of documents previously noticed by the Court for the purposes of ruling on defendants' demurrers to the SAC. These documents consisted of a copy of Elyse K.'s administrative "CRP" complaint from November 2017, and the initial (January 2018) response to it, as well as the CDE's Reconsideration Investigation Report dated March 12, 2018. These requests are **granted**.

III. Analysis

The limited role of a demurrer is to test the legal sufficiency of a complaint. It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) For purposes of a demurrer, all properly pleaded facts are admitted as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A court does not, however, assume the truth of contentions, deductions or conclusions of law. (*Ibid.*) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) In ruling on a demurrer, the court considers the face of the pleading attacked and matters subject to judicial notice. (Code Civ. Proc. § 430.30(a).) The complaint must be "liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc. § 452.)

A. Exhaustion of Administrative Remedies

The Court previously ruled that exhaustion was required under the allegations in the SAC because the allegations there did not adequately set forth systemwide policies that could be challenged on their face. Plaintiffs proceeded to conduct discovery, and now target Marchus' school-wide Level System, which they contend ignores the extensive individual needs of the students (IEPs and BIPs) to which Marchus is supposed

to cater. While restraints and seclusions are still at issue, they are alleged to be part of this broader one-size-fits-all Level System.

In their respective demurrers to the TAC, both State Defendants and County again assert that plaintiffs have failed to exhaust their administrative remedies. Typically, administrative remedy exhaustion, as prescribed by the IDEA, requires an impartial "due process hearing" conducted by the Office of Administrative Hearings ("OAH") after which either party, if dissatisfied with the outcome, may bring a civil action in state or federal court. (County MPA, 7:4-7, State MPA, 13:27-14:3.)

Plaintiffs again argue their claims are excused from the exhaustion requirement because all three exceptions to exhaustion apply: (1) the administrative process would be futile, (2) the claims arise from a policy or practice of general applicability that is contrary to law, and (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies. (*Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1303-1304.) Plaintiffs must demonstrate in addition that the underlying purposes of exhaustion would not be furthered by enforcing the requirement. (*Id.* at 1304.)

The problem, according to plaintiffs, is that the concerns here are systemic—the direct consequence of the state's failure to monitor local practices. The state's oversight, according to plaintiffs, is ineffective since there is no consequence of underreporting misconduct. (See TAC, ¶¶5-6.) They emphasize that an OAH administrative judge would not be able to address broad issues that transcend the individual student at issue.

According to the TAC, State Defendants were on notice of the potential ubiquity of the problems plaintiffs allege. Beginning in November 2017, the CDE received "five separate complaints and numerous other communications regarding Marchus's unlawful policies and practices." (TAC, ¶¶6, 74.) At least some of these communications were from a school psychologist at Marchus, someone uniquely positioned to raise systemic issues. There has already been an investigation by the CDE, finding that none of the surveyed students' needs were being met. (TAC, ¶75.) Additional administrative findings would also not substantially further the development of a record because any individual record would not relate to the broader allegations that the Marchus Way ignores individual BIPs and IEPs—only to whether a particular student's IEP was ignored. The Level System, as described in the TAC, is a systemic policy that bypasses all IEPs and BIPs by definition. The purposes underlying exhaustion of remedies would not appear to be served here by further efforts by the individual plaintiffs.

The problems complained of here, because of their scope and integration into the school's policies, are not the type of problems that the due process hearing is designed to remedy. Although potentially having the power to award certain individual remedies, such as compensatory education (requested in individuals' prayer for relief), an OAH administrative law judge would not have the authority to mandate improvements for all students at Marchus.

Exhaustion, under the allegations in the TAC, would be both futile and inadequate. As a result, the Court agrees with plaintiffs that exhaustion is excused. To be clear, however, this finding applies only to claims that the "Marchus Way" and "Level System" policies are facially invalid, e.g., because they are allegedly contrary to the BIP and IEP requirements. The issue of whether, in any given instance, a particular restraint

or seclusion was appropriate for that individual student under the circumstances that existed at that time will not be before the Court.

In coming to the conclusion that exhaustion was excused under the facts alleged, the Court is mindful of the hurdle plaintiffs will face in showing that the Marchus Way and Level System uniformly led to the inappropriate use of restraints and seclusion. (See Education Code section 56521.1(d)(3) [prohibiting emergency interventions involving an amount of force that exceeds that which is reasonable and necessary under the circumstances].) The potential that plaintiffs will be unable to make this showing does not make the administrative process necessary or adequate.

B. 1st Cause of Action

Plaintiffs allege violation of 56000 et seq. of the California Education Code, which encompasses California's legislative scheme adopted in order to comply with the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. § 1400 *et seq.* The IDEA is violated where there is a material failure to implement an individualized education program ("IEP")—i.e., when there is more than a minor discrepancy between the services a school provides and those required by the child's IEP. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 822.)

Both State Defendants and the County generally demur to the first cause of action based on plaintiffs' alleged failed to exhaust their administrative remedies. This issue is addressed above. The Court finds that exhaustion was excused here, within the limitations described above. The demurrers are overruled on this basis.

State Defendants also demur to the first cause of action because they claim there is no private right of action against the State under this statutory scheme and it cannot be vicariously liable. Plaintiffs urge the Court to overrule the demurrer on these grounds since the State Defendants' vicarious liability argument was previously rejected. Previously, the argument regarding vicarious liability was only raised with respect to the Government Code § 11135 cause of action. The demurrer was sustained to that cause of action based on a recent case, *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 904-05.

Code of Civil Procedure § 430.41 states, "[a] party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer." The State Defendants' argument regarding the lack of a private right of action was not raised with respect to the first cause of action in their previous demurrer, but it could have been. For this reason, the State Defendants' demurrer on these grounds is overruled.

C. 2nd Cause of Action – Declaratory Relief

Plaintiffs, based on the County's inclusion of "consent" as an affirmative defense in their answer, have added a new cause of action to their TAC, seeking declaratory relief with respect to the Behavior Intervention Contract. They allege entitlement to relief "to the extent" that the County "construe[s]" the Behavior Intervention Contract to mean consent to "the unlawful use of restraints and seclusion, other inappropriate interventions, and the denial of FAPE" under any circumstances. (See TAC, ¶¶252-254.)

The County demurs, arguing the cause of action fails because it does *not* contend that plaintiffs (or anyone) consented to unlawful restraints and seclusions, or the denial of a FAPE, by signing the Behavior Intervention Contract (or, for that matter, by enrolling at Marchus). The County argues its listing of "consent" as an affirmative defense referred to the legal use of such emergency interventions, not any illegal use.

Code of Civil Procedure section 1060 allows an action for declaratory relief only when an actual controversy relating to the legal rights and duties of the respective parties exists. A justiciable controversy must be definite, concrete, and touching the legal relations of parties having adverse interests. (See *LePage v. Oakland* (1970) 13 Cal.App.3d 689, 692.) It appears no actual controversy exists here, in light of the parties' stated positions. The County's demurrer to the second cause of action is sustained, with leave to amend.

D. 9th Cause of Action - unlawful expenditure of tax funds - CCP §526a

Both sets of defendants generally demur to the ninth cause of action for a failure to exhaust remedies. Exhaustion is discussed above. The demurrers are overruled on this basis.

DATED: January 25, 2021

Hon. Edward G. Weil
Judge of the Superior Court