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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Ella T. and Katie T., through their guardian ad litem Tamika T.; Sasha E., through her guardian ad litem Thomas E.; Russell W., through his guardian ad litem Tiana W.; Dylan O., through his guardian ad litem Melody O.; Bella G. and Alex G., through their guardian ad litem Samantha G.; Judith B., through her guardian ad litem Sophie B.; Victoria Q., through her guardian ad litem Alexis Q.; and Bernie M., through his guardian ad litem Wanda M., Fathers & Families of San Joaquin; CADRE; Azalee Green; and David Moch,

Plaintiffs,

v.

STATE OF CALIFORNIA; State Board of Education; State Department of Education; Tom Torlakson, in his official capacity as State Superintendent of Public Instruction, and DOES 1 - 100,

Defendants.

Case No. BC685730

DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO COMPLAINT

Date: July 11, 2018
Time: 8:45 a.m.
Dept: 28
Judge: The Honorable Yvette Palazuelos

Trial Date: Not Assigned
Action Filed: December 5, 2017

RES ID: 180411305336

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INTRODUCTION

Student plaintiffs, who are current or recent students at three schools in the State, have failed to allege the threshold requirements for an equal protection claim against the State of California and its educational entities (defendants). They have not identified any classification created by defendants that caused the alleged failure of students at those schools to attain grade-level literacy. Nor have they properly stated a class of students who allegedly are being denied the lack of "access to literacy," because some of the students in the class have achieved grade-level literacy, as defined by plaintiffs. Plaintiffs also have failed to identify a class consisting of members who all share a suspect classification. They attempt to allege a suspect classification based on minority status, but concede that not all members of the class—current and recent students at the three schools—are African American or Latino. They also attempt to allege a suspect classification based on wealth, but do not allege that student plaintiffs are low-income. And, the fact that the three schools have high percentages of socioeconomically disadvantaged students does not support an inference that *all* members of the purported class are low-income. Nor have plaintiffs alleged facts to show that any action (or inaction) by defendants that *caused* the class to fail to attain grade-level literacy. Thus, plaintiffs have failed to state either a "fundamental interest" or "suspect class" equal protection claim.

In addition, the remaining plaintiffs' taxpayer claim lacks merit because it is based solely on general allegations and legal conclusions. Plaintiffs' claim for declaratory relief is merely derivative of the equal protection claims, and, therefore, fails for the same reasons. Accordingly, defendants' demurrer should be sustained in its entirely, without leave to amend.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR VIOLATION OF EQUAL PROTECTION

Plaintiffs have failed to allege the required elements for an equal protection violation. They allege the "class" at issue in their equal protection claims consists of all students who recently attended or currently attend three schools—La Salle Avenue Elementary, Van Buren Elementary, and Children of Promise Preparatory Academy. (Opposition to Defendants' Demurrer ("Opp.")

at pp. 11, 13; Complaint ("Comp."), ¶ 4.) As set forth below, the "fundamental interest" and "suspect class" claims do not state causes of action for violation of the equal protection clause.

A. Plaintiffs Cannot State a Claim for Violation of Fundamental Interest Because They Have Failed to Allege a Classification Created by Defendants or Even Any Identifiable Class

Plaintiffs argue that they have adequately stated a claim for violation of the "fundamental right to an education," because they alleged they and other students at their schools have been denied access to literacy. (Opp. at p. 11.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [original italics].) Plaintiffs have failed to meet this first criterion of an equal protection claim because they have not alleged any classification adopted by defendants.

1. Defendants have not adopted a classification

Plaintiffs do not allege that defendants have adopted any classification that treats one group of students differently from a similarly situated group. They ignore the "prerequisite" that defendants must have adopted a *classification*, and instead argue that they have "adequately alleged state action." (Opp. at p. 14.) Yet none of the alleged "state action" constitutes a classification created by defendants. For example, plaintiffs argue that defendants are responsible for educating public school students, and administering and enforcing the laws related to education. (*Id.* at p. 15.) But merely asserting alleged duties does not allege a classification by defendants. They also argue that defendants have "direct control" over the Inglewood Unified School District, the charter authorizer of Children of Promise. (*Ibid.*) Again, this does not allege any classification created by defendants. Plaintiffs also point to the fact that the Education Code requires school attendance, the monitoring of student, school and district performance, and addresses the assumption of control of failing school districts, and the operation of charter schools. (*Ibid.*) But none of these requirements constitutes a "classification" by defendants.

In addition, plaintiffs allege that defendants " 'drew the school district boundary lines' that define plaintiffs' home schools." (Opp. at p. 15., citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 603 (*Serrano I*).) But this is inaccurate—defendants do not draw boundaries for schools within

school districts. Instead, the local district governing board has the authority to draw the attendance boundaries for schools within the district. (Ed. Code, §§ 35160 to 35160.5; *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 879 ["A local board of education has power . . . to establish school attendance zones with in the district, to determine the area that a particular school shall serve, and to require the students in that area to attend that school."]) This case is therefore squarely controlled by *Vergara*, where the Court of Appeal held that plaintiffs had not stated an equal protection claim against state defendants based on assignment of students to "grossly ineffective" teachers because the state defendants had no role in the creation of that classification. (*Vergara v. State* (2016) 246 Cal.App.4th 619, 649-651.) As in *Vergara*, the classification that plaintiffs rely upon—here school assignment, and in *Vergara* class assignment—was created by school districts, not the state or state agencies. Therefore, as is *Vergara*, the alleged classification here is insufficient to state a classification for an equal protection claim against *state* defendants.

Plaintiffs rely on *Butt v. State of California* (1992) 4 Cal.4th 668, to argue that they are not required to show any classification by defendants to state an equal protection claim. (Opp. at pp. 14-15.) However, *Butt* involved a classification tied to state action: every student in the Richmond Unified School District would have been deprived of the final six weeks of the scheduled school term, in stark contrast to students in every other district. (*Id.* at pp. 681, 685.) Unlike school attendance areas, the State is responsible for the creation of *school district* boundaries. (*Serrano I*, *supra*, 5 Cal.3d at p. 603.) Thus, where the district proved its financial inability to keep its schools open for a period similar to schools in other districts, the Supreme Court held that the trial court properly ordered the State and its officials to intervene to protect the district's students from the harm created by the District's financial distress. (*Id.* at pp. 696, 704.)

Additionally, in *Butt*, there was uncontroverted evidence that the district was unable to remedy the harm. Because it was insolvent, it could not continue operating, and only action by the state defendants could provide a remedy. (*Butt*, *supra*, 4 Cal.4th at pp. 687-688, 692-693.) In contrast, plaintiffs here have not demonstrated extreme and unprecedented circumstances that could *only* be remedied by state-level intervention. Despite their claim to the contrary, they did

not allege they sought assistance from their respective districts. (Opp. at p. 15.) Instead, they only alleged they sought assistance from their teachers and/or schools. (Comp., ¶¶ 89, 117, 119.) Plaintiffs argue that "the ability or willingness of the districts to intervene upon receipt of complaints or demands is not relevant to determining whether the State met its constitutional obligation." (Opp. at p. 16.) But this argument again ignores the essential element necessary for an equal protection claim—the existence of a classification created by the defendants. As noted above, *Butt* held that the California Constitution required the State "to correct basic 'interdistrict' disparities." (*Butt*, *supra*, 4 Cal.4th at p. 681.) Here, plaintiffs are not alleging inter-district disparities. Indeed, they allege that children in their schools are not receiving an education "equal to children in other schools within their own districts" (Comp., ¶ 5), which states an intra-district disparity claim. *Butt* does not support plaintiffs' argument that defendants must intervene to correct alleged intra-district disparities.

2. Even if defendants had created a classification, plaintiffs have not alleged an identifiable class of students that defendants have discriminated against

Even if plaintiffs had adequately alleged state action that created a classification (they have not), their fundamental interest claim fails because they have not alleged an identifiable class that defendants are allegedly discriminating against. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 258 ["In equal protection analysis, the threshold question is whether the legislation under attack somehow discriminates against an identifiable class of persons. Only then do the courts ask the further question of whether this identifiable group is a suspect class or is being denied some fundamental interest, thus requiring the discrimination to be subjected to close scrutiny."]) Plaintiffs contend that the "class" for purposes of their fundamental interest claim does not consist of just plaintiffs or of plaintiffs and other students "similarly situated" by virtue of having allegedly been "denied access to literacy." (Opp. at pp. 11-13.) Indeed, they could not have alleged such a claim, because it would have been defined by the alleged harm of not having achieved grade-level literacy. (*Vergara*, *supra*, 246 Cal.App.4th at p. 646 [to state an equal protection violation, "group members must have some pertinent common characteristic other than the fact that they are assertedly harmed by a statute."])

Instead, plaintiffs contend the class allegedly being discriminated against consists of all "students attending or recently attending Plaintiffs' schools." (Opp. at p. 13.) They attempt to support their argument that this group was denied their fundamental interest in education by citing the percentage of students at each school who scored "Standard Met" or above on the 2016-17 administration of the California Assessment of Student Performance and Progress (CAASPP) for English language arts (ELA). (*Ibid.*) Plaintiffs assume, without explanation, that scoring "Standard Met" or above is necessary to demonstrate grade-level literacy. But even if plaintiffs' assumption were correct, for purposes of this demurrer only, they still fail to allege a cognizable class for equal protection purposes, because not all of the members have been discriminated against. On the 2016-17 CAASPP ELA assessment, the following percentages of students scored "Standard Met" or above at the three schools: 4% at La Salle; 6% at Van Buren; and 11% at Children of Promise. (Opp. at p. 13; Comp. ¶¶ 67, 80, 94.) Thus not all students at those schools share the common characteristic of failing to demonstrate grade-level literacy. The fact that between four and 11 percent of students in the alleged class have not been deprived of the "fundamental right to education," by plaintiffs' own definition, defeats their allegation that the *class* has been discriminated against. (Comp. ¶¶ 67, 80, 94.)

The fatal defect with plaintiffs' alleged class is illustrated by the very cases on which they rely. (Opp. at p. 13.) Plaintiffs claim that "this case resembles *Butt*, where the class discriminated against was all children in the district." (*Ibid.*) There is no such resemblance. In *Butt*, the identifiable class discriminated against was *all* Richmond Unified School District students versus students in all other districts in California. (*Butt*, *supra*, 4 Cal.4th at p. 685.) Every class member faced the same exact harm –missing six weeks of school—as a result of the district's decision to abruptly end the school year early.

Likewise, in *Serrano I,* the alleged class consisted of "all public school pupils in California, 'except children in that school district . . . which . . . affords the greatest educational opportunity of all school districts within California.' " (5 Cal.3d at p. 589.) Thus, *all* members of the class allegedly were being denied equal protection by the State's former school financing system because it produced inter-district disparities. (*Id.* at pp. 617-618.) Similarly, in *O'Connell v.*

Superior Court (2006) 141 Cal.App.4th 1452, 1460-1461, the class consisted of all "high school students in California public schools who are scheduled to graduate with the class of 2006 and who have satisfied all of their requirements for graduation except for passing the [CAHSEE.]"

In each of those cases, every class member was alleged to have been deprived of their right to a basically equivalent education. In contrast, here, not all "students attending or recently attending Plaintiffs' schools" have been deprived of the "right to education," based on the theory advanced by plaintiffs to show such deprivation. There is no principled way to distinguish those members of the alleged class who have met or exceeded proficiency levels from students at other schools in the same school district or in other districts who have met or exceeded proficiency levels on the CAASPP in ELA in 2016-17. Nor is there a principled way to distinguish members of the alleged class who failed to meet proficiency levels from the 51% of students statewide who also did not meet proficiency levels. (Opp. at p. 11; Comp. ¶¶ 67, 80, 94.)

Plaintiffs' argument that the fact that some students in the alleged class scored "proficient" on the CAASPP ELA assessment is "not legally significant to the analysis," because equal protection rights are "individual rights," is misplaced. (Opp. at p. 14, citing *Connerly v. State Pers. Bd.* (2001) 92 Cal.App.4th 16, 35.) *Connerly* was a *facial* challenge to five statutory programs that provided for affirmative action, "on that ground that they impermissibly establishe[d] classifications" based on race, ethnicity, and gender. (*Id.* at p. 27.) In the context of applying strict scrutiny, the court explained that "where an individual is denied an opportunity to benefit or otherwise suffers a detriment as a result of a race-based governmental scheme, it is no answer that others of his or her race secured the opportunity or benefit or avoided the detriment." (*Id.* at pp. 35-36.) Thus, it noted that equal protection rights are "personal rights which are guaranteed to the individual." That concept is not relevant where, as here, plaintiffs are attempting to allege that a *class* has been discriminated against, but some members *of the class*, by plaintiffs' own measure, have not been discriminated against. *Connerly* is also distinguishable because it challenged a governmental scheme that used a racial classification, while plaintiffs here have not alleged any governmental scheme adopted by defendants that used a "classification" based on any suspect class. (*Ibid.*)

In sum, plaintiffs have failed to state a cognizable class, which is a threshold requirement for a "fundamental interest" equal protection claim.

B. Plaintiffs Failed to State a Claim for Violation of Suspect Class

Plaintiffs have failed to rebut defendants' argument that the allegations in the Complaint do not state a claim for violation of equal protection based on a suspect class. To state such a claim, plaintiffs must allege that *defendants* have made a classification that discriminates on the basis of a suspect personal characteristic. (*Serrano I*, *supra*, 5 Cal.3d at pp. 597-598.)

Plaintiffs have not alleged any discriminatory classification on the part of defendants – the threshold requirement to stating an equal protection claim. (See Section I.A.1, *supra*.) Even if they had, they also failed to allege any classification based on a suspect class. Plaintiffs appear to contend that the "class" for purposes of their suspect class claim, like their fundamental interest claim, consists of all current and recent students at their three schools. (Opp. at pp. 7.) But, again, they have not alleged that *all* current and recent students at those schools are African American or Latino. To the contrary, they allege that the three schools consist of the following percentages of African American and Latino students: 98% at La Salle, 85% at Van Buren, and 99% at Children of Promise. (Comp., ¶¶ 65, 78, 92.) Because not all members of the class are African American or Latino, plaintiffs have failed to state a suspect class based on race.

And, there is no allegation in the Complaint regarding any student plaintiff's wealth. Plaintiffs argue that their schools have high percentages of socioeconomically disadvantaged students: 95% at La Salle, 90% at Van Buren, and 93% at Children of Promise. (Comp., ¶¶ 65, 78, 92.) But that again shows not *all* members of the class are socioeconomically disadvantaged, thus, plaintiffs have not alleged a suspect class based on wealth.

Plaintiffs also have failed to allege facts to show that any alleged action (or inaction) caused the students at just these three schools to be unable to attain grade-level literacy. (*Vergara*, *supra*, 246 Cal.App.4th at p. 648 [required analysis for suspect class allegation was whether the challenged statutes caused the harm to the low-income and minority students.]) Their argument that "proving causation is an issue for trial, not for the demurrer," misses the point. (Opp. at p. 17.) Plaintiffs must *allege* sufficient facts, which, if true, would show that action (or inaction) by

defendants, as opposed to the schools or districts, *caused* the alleged failure of students at just three schools to obtain grade-level literacy. They failed to do so.

Because plaintiffs have not alleged a class that defendants have discriminated against on the basis of either race or wealth, they have failed to state a "suspect class" equal protection claim.

II. CLAIMS FOR VIOLATION OF TAXPAYER FUNDS AND FOR DECLARATORY RELIEF FAIL, AS DO ALL CLAIMS AGAINST THE "STATE OF CALIFORNIA"

A. Plaintiffs Have Not Stated a Taxpayer Claim

The remaining plaintiffs have failed to state a "taxpayer claim" under Code of Civil Procedure section 526a. Plaintiffs argue that they have alleged "wrongful government spending." (Opp., p. 17-18.) But their general allegations, innuendo, and legal conclusion that defendants' unidentified "actions and inactions" in expending funds to "administer and implement a system of public education that engages in unconstitutional discrimination . . . is unlawful," are insufficiently specific to state a claim under section 526a. (Comp. ¶¶ 151, 154; see *Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 355.)

B. Plaintiffs Have Not Met the Requirements for Declaratory Relief

The court should deny plaintiffs' request for declaratory relief, as it "is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.) Plaintiffs concede that their request for declaratory relief is "derivative" of the equal protection claims. (Opp. at p. 18.) Because it is based on the same allegations underlying the causes of action brought by the student plaintiffs and taxpayer plaintiffs, and those claims fail as a matter of law, declaratory relief also should be denied. (See, e.g., *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80.)

C. Claims Against Defendant "State of California" Should Be Dismissed

Plaintiffs argue that the State of California is a proper defendant here. (Opp. at p. 18.) However, where an action for declaratory and injunctive relief challenges the constitutionality of state statutes, the state officers and agencies with statewide administrative functions under the challenged statute are the proper parties. (*State v. Superior Court* (1974) 12 Cal.3d 237, 255; *Serrano v. Priest* (1976) 18 Cal.3d 728, 752.) As alleged in the Complaint, that would be the

California Department of Education (CDE), State Board of Education (SBE) and Superintendent of Public Instruction. (Comp., ¶¶ 9-11.)

Plaintiffs also cite three unpublished trial court decisions, but only attach one decision to their Request for Judicial Notice. In that decision, the court did not conclude that the State was a proper party, but rather that is was "premature" to make that determination. (Plaintiffs' Request or Judicial Notice, Exh. A, p. 11.) Plaintiffs also contend that because the State was a defendant in *Butt*, it necessarily is a proper defendant here. (Opp. at p. 18.) However, Butt did not address whether the State, apart from any state-level agency or officer, was a proper party, nor is there any indication the issue was ever raised. A decision does not stand for a proposition not considered by a court. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343.) In contrast, the issue of whether the State was a proper party was directly presented in *Coachella Valley Unified School District v. State* (2008) 176 Cal.App.4th 93, 112.) Plaintiffs there argued that the trial court's determination that the State was not a proper party should be reversed. (*Id.* at p. 126.) The Court of Appeal concluded that its decision affirming the denial of the writ of mandate mooted appellants' claim on this issue; thus, when given the opportunity to reverse a specific trial court determination that the State was not a proper party, it declined to do so. (*Ibid.*)

III. PLAINTIFFS' LAWSUIT MUST BE DISMISSED BECAUSE THE COMPLAINT SEEKS RELIEF THAT VIOLATES THE SEPARATION OF POWERS DOCTRINE

As discussed in defendants' opening brief, plaintiffs seek relief that violates the separation of powers doctrine. (See MPA at pp. 18-19; Cal. Const., art. III, § 3; *Butt*, *supra*, 4 Cal.4th at p. 695.) Plaintiffs' contentions that defendants' separation of powers argument is "premature," and that their requested relief does not violate the separation of powers, are incorrect. (Opp. at p. 18.) They concede that a court may only require defendants to ensure by "whatever means they deem appropriate" that plaintiffs receive their constitutional rights. (*Id.* at p. 19.) But it is clear they are seeking highly prescriptive relief. Indeed, they ask the Court to order defendants to implement specific factors, discussed at length in the Complaint, that they believe are necessary in order "to provide access to literacy." (Comp., ¶¶ 132-145.) In any event, those factors have already been implemented and are being utilized as State Priorities in the State's accountability

system, as required by the Legislature. (Ed. Code, §§ 52060, 52061, 51210, 47606.5; see also MPA, pp. 8-9.) Likewise, the State's ELA/ELD Frameworks set forth extensive, research-based literacy frameworks based on the stage of education, for schools to follow. (RJN, Exh. I.) Also, the Legislature recently enacted Assembly Bill 1808, which allocates $300 million in funding for the Low-Performing Students Block Grant—set forth in Education Code section 41570—to provide districts with additional funding for low-performing students who have not met academic achievement standards, and are not otherwise eligible for supplemental grant funding under the LCFF. (Chapter 32, Statutes of 2018 [Assem. Bill No. 1808 (June 27, 2018)], Sec. 31.5 <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1808>.) AB 1808 also amended the original provisions of the LCFF to more precisely describe the multiple measures accountability system developed by SBE. (See *id.*, Secs. 60-61, 66-67, 69-77.) In addition, the recently-enacted 2018-19 budget provides $3.7 billion in new LCFF funding, which fully implements the LCFF two years earlier than originally scheduled. (California State Budget 2018-19, p. 23 <http://www.ebudget.ca.gov/FullBudgetSummary.pdf>.)

Thus, despite plaintiffs' conclusory statements to the contrary, the Legislature and defendants have developed and are implementing an accountability and continuous improvement system that provides the funding, framework, evaluation, support and interventions necessary to enable districts and schools to provide their students access to literacy. (Ed. Code, §§ 52060-52077; MPA, pp. 7-10.)[1] There is no constitutional violation, and this lawsuit, which seeks to force defendants to instead provide plaintiffs' preferred plan for improving literacy, violates the separation of powers doctrine.

CONCLUSION

Defendants' demurrer should be sustained in its entirety, without leave to amend.

[1] Plaintiffs contend that "to the extent Defendants argue that the factors are already implemented and being utilized . . . this is an issue of fact not appropriate for demurrer." (Opp. at p. 20.) All of the facts cited in defendants' briefs concerning the LCFF and accountability system are either set forth in the Education Code, or are properly subject to judicial notice and may be considered on demurrer. (See MPA, pp. 7-10; Defendant's Request for Judicial Notice; see also *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

Dated: June 29, 2018

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Ella T., et al. v. State of California, et al.**
No.: **BC685730**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On June 29, 2018, I served the attached: **DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO COMPLAINT** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Public Counsel 610 S. Ardmore Avenue Los Angeles, CA 90005 calliteracy@publiccounsel.org	Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105 Literacy_MoFo@mofo.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 29, 2018, at San Francisco, California.

M Dubonnet
Declarant

Signature

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