SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

MAYA ROBLES-WONG, *et al.*, Plaintiffs, v. STATE OF CALIFORNIA; EDMUND G. BROWN, Jr., GOVERNOR OF THE STATE OF CALIFORNIA; *et al.*, Defendants.	No. RG10-515768 ORDER SUSTAINING DEMURRERS TO COMPLAINT AND COMPLAINT IN INTERVENTION WITH LEAVE TO AMEND Date: July 1, 2011 Time: 9:00 a.m. Dept.: 17
CALIFORNIA TEACHERS ASSOCIATION, Plaintiff-Intervenor.	

Several matters came on regularly for hearing on July 1, 2011 in Department 17 of this court, the Honorable Steven A. Brick presiding, including the demurrer and motion to strike of defendants the State of California and Edmund G. Brown, Jr., Director of Finance Ana Matosantos, and Controller John Chiang. The Court also heard concurrently the same defendants' demurrers and motion to strike the complaint in the related (but not consolidated) case of *Campaign for Quality Education v. State of California* (Alameda County Superior

Court case no. RG10-524770). The parties were represented by counsel of record. Having considered the extensive briefing on the demurrers and motions to strike, as well as the First Amended Complaint and First Amended Complaint in Intervention filed on March 16, 2011 by, respectively, plaintiffs and intervenor California Teachers Association ("CTA"), and good cause appearing therefor, the Court rules as follows:

Procedural History

The original complaint in this action, filed by guardians *ad litem* for 62 students in the public schools of California, nine school districts, and three non-profit associations, included 173 paragraphs of background and "factual" allegations which were incorporated by reference into each of four causes of action. In its order of January 14, 2011, the Court sustained, without leave to amend, defendants' demurrer to the first and second causes of action which alleged that defendants violate article IX, sections 1 and 5 of the California Constitution by failing to provide and support a system of common schools and "failing to comply with the State's obligation to keep up and support public education in violation of the fundamental right of all California children to a free education…"; and the fourth cause of action, which alleged that defendants, by failing "to ensure that from each year's State revenues there shall 'first be set apart the moneys to be applied by the state for support of the public school system,'" violate section 8(a) of article XVI. The Court sustained with leave to amend defendants' demurrer to the third cause of action, which alleged that defendants violate Article I, sections

7(a) and 7(b) and Article IV, section 16 by "failing to provide and support an education finance system that provides all California school children equal access to the State's prescribed educational program and an equal educational opportunity to become proficient in the State's academic standards." Plaintiffs filed their first amended complaints (the "Amended Complaints") on March 16, 2011.

The Amended Complaints

Consistent with the Court's January 14, 2011 Order, each Amended Complaint[1] includes only the equal protection cause of action. They allege, in essence, that Defendants are operating and "maintaining a system of educational finance that fails to provide an equal opportunity for all students to succeed in learning the content of the educational standards established by the State." (First Am. Compl. ¶ 157; First Am. Compl. in Interv. ¶ 151.)

Although now limited to one cause of action, the Amended Complaints exceed 150 paragraphs, not including the Prayers for Relief. They include numerous factual allegations and statistics regarding the economic, racial, and language status of students (including both students who are plaintiffs and students who are not plaintiffs, but are enrolled in the plaintiff districts). (See, *e.g.*, Am. Compl. ¶¶ 59-61 [education finance system has created, or at least is failing to address, a pattern of disparity limiting opportunities for children who are from low

[1] As CTA's amended complaint is substantially similar to the *Robles Wong* complaint in all material respects, it is not addressed separately in the remainder of this order. All further citations to the "Amended Complaints" or "Am. Compl." refer specifically to paragraphs of the *Robles Wong* First Amended

income families, racial minorities, etc.], 64-65 [lower rates of graduation and UC eligibility for racial minorities than white students], 62 [lower achievement for racial minorities and poor students], 69 [lower achievement for low income students], 149 [report finding disparities for poor and English learners].) They also include numerous allegations comparing California's educational spending and the achievement of California students to spending and achievement in other states. Defendants challenge the complaints on the grounds discussed below.

Proper Defendants

In its prior order, the Court found that the Governor and the State are proper parties defendant and granted leave to amend to add other defendants if, as defendants contended, other state officers may be necessary to effect any of the relief which may appropriately be sought. Plaintiffs additionally named State Controller Chiang and Director of Finance Matosantos as defendants. Defendants now argue that this addition is not necessary to effect any of the relief that may appropriately be sought. They contend that neither defendant is alleged to have caused plaintiffs' alleged harms or to have authority to remediate the school finance system. The Court OVERRULES the demurrer on that ground.

Subvention Claims

Defendants argue that the gravamen of plaintiffs' claims is that the State has imposed certain requirements on districts and students (such as content standards

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Complaint but are meant to apply to both amended complaints.

and the CAHSEE graduation exam) but has failed to provide adequate funds to meet those requirements, and thus that the claims are subject to subvention.

Plaintiffs respond that the Commission on State Mandates has neither jurisdiction over their claims nor the ability to grant plaintiffs the relief they seek. It may be able to determine whether there is an unfunded state mandate, but cannot determine whether the state's finance system violates the state's constitutional duty to provide equal educational opportunity. They argue that subvention would not remedy the alleged constitutional violation or provide the sought-after relief.

Plaintiffs allege that the State has imposed rigorous academic standards but made "no effort" to determine what resources are necessary to ensure that all students can learn the standards or whether the necessary resources are indeed being provided. (Am. Compl. ¶¶ 53-56, 71, 88.) They allege that the CSTs, which measure proficiency, constitute "the prevailing statewide standards for K-12 education to which all students are entitled." (*Id.* ¶ 57.) At the hearing, plaintiffs explained that these achievement standards are the "prevailing standard" by which the Court must measure plaintiffs' access to educational opportunity and determine their equal protection claims. Plaintiffs do not seek to do away with the standards, but to establish that they exist for purposes of their equal protection claim.

As discussed below, the Court disagrees that the achievement standards are the proper comparison for equal protection purposes. However, plaintiffs' reference to the standards does not implicate subvention. This ground for demurrer is thus OVERRULED.

C.C.P. Section 562a Taxpayer Cause of Action

Defendants argue that because plaintiffs plead that this Court has jurisdiction over this action as a taxpayer action under Code of Civil Procedure section 526a, plaintiffs must allege that they pay taxes or identify an illegal expenditure of funds. However, this contention is undermined by defendants' admissions, elsewhere, that section 526a is not a jurisdictional statute.

Defendants also admit that no cause of action is pleaded by these plaintiffs under section 526a. A demurrer does not lie to a portion of a complaint, but rather to an entire complaint or a cause of action therein. (See C.C.P. § 430.050(a) [a demurrer lies to an entire complaint or a cause of action]; *Kong v. City of Hawaiian Gardens Redevel. Agency* (2002) 108 Cal.App.4th 1028, 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"].) This basis for demurrer is OVERRULED.

Plaintiffs Have Not Stated an Equal Protection Claim

Plaintiffs continue to allege that the educational financing system adopted by the Legislature over the course of many years bears no rational relationship to the educational content and proficiency standards also required by the Legislature in the last ten to fifteen years. Despite the inclusion of allegations suggestive of a "suspect classification" claim, at the hearing all plaintiffs' counsel clearly disavowed any intention to proceed on this theory. Rather, they clarified that the only equal protection claim they seek to pursue is that the education finance

system, as currently structured, "interferes with the exercise of a fundamental right." (See *Serrano v. Priest* (1971) 5 Cal.3d 584, 597 ("*Serrano I*").)

Specifically, plaintiffs allege that the system denies the student plaintiffs, and other students enrolled in plaintiff districts, equal access to "educational opportunity" because the system is irrational and does not distribute sufficient funds to the plaintiff districts to enable the districts to provide the resources (teaching days, course offerings, student-teacher ratios, instructional materials, programs, technology, etc.) needed for all children to have a fair opportunity to achieve state-mandated achievement goals known as content standards ("CSTs") and the California High School Exit Exam ("CAHSEE").

Plaintiffs argued at the hearing that the recognition of a fundamental right to a meaningful education, coupled with a failure to rationally and/or adequately fund that right for some children, violates California's equal protection clause. Under prevailing California authorities, education is undoubtedly a fundamental right for equal protection purposes. (See *Serrano v. Priest* (1976) 18 Cal.3d 728, supplemented (1977) 20 Cal.3d 25 ("*Serrano II*").) Whether education is a fundamental right, however, only goes to the level of scrutiny applied in evaluating the constitutionality of state action. Plaintiffs' argument misapprehends applicable case law, including *Butt v. State of California* (1992) 4 Cal.4th 668.

In *Butt*, plaintiffs challenged a school district's decision, due to lack of funding, to shut down six weeks prior to the end of the 1990-91 school term. The Supreme Court held that the state could be required to make payments in addition

to those otherwise mandated when necessary to prevent closure of the district's schools six weeks early due to inadequate funds. (4 Cal.4th at 703-704.) Noting that the alleged inter-district discrimination was not invidious discrimination against a suspect class, but merely geographic, it nonetheless applied "strict scrutiny" to the State's actions because the denial had a "real and appreciable impact on the affected students'" right to basic educational equality. (*Id*. at 687-88, 672.) The Court held that plaintiffs had made a sufficient evidentiary showing that the quality of plaintiffs' educational program, as a whole, fell "fundamentally below prevailing statewide standards." (*Id*. at 687 & n.14, 16.)[2]

Plaintiffs here argue that they have pleaded that their educational opportunities are, or are at risk of being, fundamentally below prevailing statewide standards because they allege that they are not receiving the resources they need to achieve the CSTs and CAHSEE, which plaintiffs contend constitute "prevailing statewide standards" for equal protection purposes.[3] They argue that it is sufficient to plead a disparity between the resources needed to have a fair chance to pass the CSTs and CAHSEE on one hand, and the resources they receive, on the other. As

[2] The Supreme Court stated that equal protection allows some "ills" or "variances in service" among students (calling them "inevitable") and does not require "strictly equal educational opportunities," because doing so would impose an unworkable standard "requiring impossible measurements and comparisons." (*Butt, supra*, at 686.)

[3] See Am. Compl. ¶ 57 [by adopting statewide content standards, requiring that schools teach to these standards, and requiring student proficiency in these standards, "the State has determined the prevailing statewide standards for K-12 education to which all students are entitled"].)

explained below, this is entirely inconsistent with the facts, reasoning and holding of *Butt*.

In *Butt*, the Court compared the educational resources *actually provided* to different groups of students. The record included evidence that "virtually every established school district in California operated for at least 175 days," thereby establishing a "prevailing statewide standard." (*Butt*, 4 Cal.4th at 687 n.14.) Plaintiff's district had also intended to operate for at least 175 days but, if the State did not provide additional funds, plaintiffs and other students in their district would lose six weeks of instructional days, nearly 25% of their school year. (*Id.*) There was also evidence that this closure would cause "an extreme and unprecedented disparity" for students in the plaintiff district; it would "prevent [district students] from completing instruction and grading essential for academic promotion, high school graduation, and college entrance." (*Id*. at 688 & n.16.)

The Supreme Court rejected the argument made by plaintiffs in this case that the "prevailing statewide standard" may be established by legislation alone, as opposed to actual practices. The Court observed that although California statutes effectively required a 175-day term, the term was not a constitutional mandate and was not itself protected by the equal protection guarantee. (*Butt,* 4 Cal.4th at 686.) Instead, the Court based its findings on the level of education actually provided to all other students in the State, not what *should* have been provided pursuant to a statute or regulation. (*Id*. at 686-87 & n.14.) In so doing, the Court also rejected

the related argument that, by setting achievement standards, the legislature created a constitutional standard.[4]

At the hearing, plaintiffs also cited the Court to this passage in *Butt*:

> However, both federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest…. As we have seen, education is such a fundamental interest for purposes of equal protection analysis under the California Constitution.

(4 Cal.4th at 685-86, internal citations omitted, emphasis in original.) What plaintiffs overlook in arguing that the "or" clause constitutes an alternative basis for an equal protection claim is that the quoted sentence addresses when strict scrutiny applies. It does not obviate the need for unequal treatment. "Unless the actual quality of the district's programs, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs." (*Butt, supra*, at 686-87.)

Plaintiffs' reliance on legislatively-set achievement goals also ignores established equal protection jurisprudence, which requires class-based discrimination, *i.e.* pleading and proof of state action disparately impacting one class of persons but not another.[5] Neither *Butt,* nor any of the state or federal cases

[4] Neither does *Wilson v. State Board of Educ.* (1999) 75 Cal.App.4th 1125, support such an argument. (See *Wilson* at 1135 [holding that the charter schools act brought charter schools within the constitution's "uniformity requirement" but acknowledging that "the curriculum and courses of study are not constitutionally prescribed. Rather, they are details left to the Legislature's discretion."].)

[5] See, *e.g., Plyler v. Doe* (1982) 457 U.S. 202, 254 n.15, cited in *Butt,* ["In determining whether a *class-based denial* of a particular right is deserving of

it cites in rejecting the state's argument for application of the rational basis test, omits this requirement:

> Whatever the requirements of the free school guaranty, 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.*

(*Butt,* 4 Cal.4th at 684, emphasis added.)[6]

The question, then, is whether plaintiffs have pleaded facts showing that plaintiff districts and students in plaintiff districts are receiving fewer educational resources compared to *most* other students and/or students in *most* other districts. They have not, in several respects.

First, the Amended Complaints do not plead facts to establish any "prevailing statewide standard" in education that is actually provided. Plaintiffs only allege that they have suffered reductions in resources and decreased achievement compared to what they previously enjoyed. (See, *e.g.,* Am. Compl. ¶¶ 89-92 [plaintiff districts have been forced to reduce instructional time; no allegations re non-plaintiff districts], 93-98 [staffing levels and class size], 99-100 [impact on professional development], 101-07 [access to textbooks, libraries, and

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strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."], emphasis added.) See also *Berger v. City of Seattle* (9th Cir. 2008) 512 F.3d 582 on reh'g en banc (9th Cir. 2009) 569 F.3d 1029, 620, citing *Plyler* at 254 (Berzon, J. concurring and dissenting) ["Although the permit requirement does burden a fundamental right, it is not a 'class-based denial of a particular right…and so does not implicate equal protection."].

[6] See also *Serrano v. Priest* (1977) 20 Cal.3d 25, 36, n.6 (*Serrano III*) ["It is *only a disparity in treatment between equals* which runs afoul of the California

technology], 108-117 [elimination or reduction of supplemental and intervention programs], 118-120 [after school and summer school programs], 138-39 [funding/budget disruptions preventing continuity or coherency], 140-41 [teacher layoffs], 142 [increased costs for maintenance and repairs, energy, transportation, security, health and retirement benefits].)

Second, plaintiffs have not pleaded facts showing that the resources they receive fall below the prevailing statewide standard actually applicable to other students in other districts. The Amended Complaints, if true, establish neither that plaintiffs' educational opportunity is inferior to the opportunity enjoyed by *most* other California students nor that, as a result, students in the plaintiff districts perform worse on the CST/CAHSEE standards than most other California students. Although the Amended Complaints recite a raft of statistics tending to show that some types of students perform more poorly than others, the statistics do not reveal poor performance along district lines or other identifiable groups of students other than suspect classes, whose claims are not being pursued as such. The Amended Complaints also recite statistics regarding the performance of California students compared to out-of-state students; but the alleged disparity must be *among* California students.

Third, the Complaints allege that public schools throughout California have suffered reduced resources and declining achievement. (See, *e.g.*, Am. Compl. ¶¶ 70 [large numbers of California students, not just disadvantaged subgroups, are not

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constitutional mandate of equal protection of the laws."], emphasis added.

achieving an education that meets the State's own prevailing statewide standards], 87 [most districts have responded to chronic underfunding by seeking funding from outside sources], 136 ["School districts throughout the State, including the nine plaintiff Districts, are unable to provide all of their students with full and equal access to the State's educational program."], 137 ["Proficiency rates for the nine Plaintiff Districts are largely reflective of the state-wide proficiency rates"].) These allegations suggest that plaintiffs may not be able to plead in good faith that the "prevailing statewide standard" for resource provision and achievement provide most students a fair opportunity to pass the CSTs and CAHSEE, and that plaintiff districts' resources are inferior to those of other districts'.

Plaintiffs argued at the hearing that, under *Serrano*, they do not have to identify the specific district(s) that receive superior resources to establish an equal protection claim. *Serrano*, however, involved a "suspect classification" claim alleging a disparity between the poorest and wealthiest districts in the State. The classes of students (plaintiffs versus non-plaintiff students) were defined based upon their school districts and the complaint pleaded quantitative facts showing (1) the way in which the finance system correlated district wealth with educational funding, (2) the relative wealth of each district and (3) the relative educational funding per pupil in specific districts. (See *Serrano I*, 5 Cal.3d 584 at 594.) When plaintiffs proved their factual allegations, they established a wide disparity in both educational resources and impact. However, the facts and statistics pleaded in the

Amended Complaints would prove neither of these things; rather, they would prove that the education finance system allocates resources "irrationally."

Consequently, the demurrer is SUSTAINED. Notwithstanding the foregoing, LEAVE TO AMEND is again GRANTED. If Plaintiffs elect to amend, they are ORDERED to allege only those facts necessary to support a claim for equal protection, recognizing that education is a "fundamental right" and that if sufficiently significant discrimination is adequately pleaded and ultimately proven, the Court will examine any state justification for it under the strict scrutiny test. The claim should be clearly framed and the complaints should be reasonable in length. Irrelevant and unnecessary factual allegations, legal arguments and citations should be omitted.

Motion to Strike

In light of the foregoing, the motion to strike is DROPPED as moot.

Requests for Judicial Notice in Support of Demurrers

Defendants' Request for Judicial Notice is DENIED**.** Exhibits C - H to the Tillman Declaration are not appropriate subjects for judicial notice because their contents are not relevant to defendants' arguments on demurrer and they do not contain "facts and propositions of generalized knowledge that are so generally known they cannot reasonable be the subject of dispute" or facts "capable of immediate and accurate determination." (See Evid. C. §§ 451(f), 452(g), (h); *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301.) Moreover, the Court will not take

judicial notice of the truth of all matters stated in the exhibits, or of facts that might be deduced from governmental acts, or of facts subject to interpretation. (See *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569.)

Conclusion

Plaintiffs and intervenor may file and serve amended complaints, consistent with this order, on or before August 25, 2011. In preparing any amended pleadings, plaintiffs and intervenor are again admonished to consider *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 217-218 [64-page complaint strains the reasonable limit of the length of a complaint].

IT IS SO ORDERED.

July 26, 2011 /s/

Steven A. Brick
Judge of the Superior Court