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(*Defendant is a Public Entity and Exempt from Filing Fees Pursuant to Gov. Code § 6103*)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

MARK S, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	Case No. MSN21-1755 [PROPOSED] ORDER REGARDING THE DEMURRER OF CALIFORNIA DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION, TONY THURMOND, AND THE STATE OF CALIFORNIA TO FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF Hearing Date: June 30, 2022 Time: 9:00 a.m. Dept.: 39 Judge: Hon. Edward Weil

On June 30, 2022, in Department 39 of the above-entitled Court, the Honorable Edward G. Weil held a hearing on Defendants California Department of Education (CDE), State Board of Education (SBE), Tony Thurmond, in his official capacity as State Superintendent of Public Instruction's Demurrer to First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, which was joined by Defendant State of California.

Ana G. Nájera Mendoza of ACLU Foundation of Southern California and Linnea Nelson of ACLU Foundation of Northern California appeared on behalf of Plaintiffs. Virginia Cale of the California Department of Education (CDE) appeared on behalf of the State Defendants. Jimmie Johnson of Leone Albert & Duus appeared on behalf of Defendant Pittsburg Unified School District.

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After consideration of the Demurrer and Opposition papers, and having heard argument of counsel, the Court adopted its Tentative Ruling, attached hereto as **Exhibit 1**, and finds and orders as follows:

State Defendants' Demurrer to the First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief is overruled as to the fourth cause of action and sustained without leave to amend as to the fifth cause of action, as set forth in the attached Tentative Ruling.

IT IS SO ORDERED.

Dated: ______________________, 2022

____
HONORABLE EDWARD G. WEIL
Judge of the Superior Court of Contra Costa County

APPROVED AS TO FORM

Dated: July 6, 2022

Ana Nájera Mendoza
ANA G. NAJERA MENDOZA
Attorney for
PLAINTIFFS MARK S., by and through his guardian as litem, ANNA S. ROSA T., by and through her guardian ad litem SOFIA L., and JESSICA BLACK, MICHELL REDFOOT, and DR. NEFERTARI ROYSTON, as Taxpayers

Dated: ______________________, 2022

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JIMMIE JOHNSON
Attorney for
DEFENDANT PITTSBURG UNIFIED SCHOOL DISTRICT

Dated: ______________________, 2022

____
JACQUELYN YOUNG
Attorney for
DEFENDANT STATE OF CALIFORNIA

EXHIBIT 1

10. 9:00 AM CASE NUMBER: MSN21-1755
CASE NAME: MARK S. VS STATE OF CALIFORNIA
HEARING ON DEMURRER TO: FIRST AMENDED COMPLAINT
TENTATIVE RULING:

The California Department of Education, State Board of Education and Tony Thurmond's demurrer to the first amended petition is **overruled as to cause of action four and sustained without leave to amend as to cause of action five**. The State Defendants shall file and serve their answers by August 5, 2022. The Court has extended the time to file answers until after the Court decides the motion for judgment on the pleadings set for hearing on July 21.

The State of California's joinder in the demurrer is granted. The Court's ruling on the demurrer applies to the State of California. The State of California, California Department of Education, State Board of Education and Tony Thurmond are collectively referred to as the State Defendants.

In this demurrer, the State Defendants challenge the Taxpayer Claim (cause of action 4) and the writ claim (cause of action 5). The States Defendants previously demurred to these claims and their demurrer was sustained with leave to amend.

Taxpayer Claim (cause of action four)

The State Defendants argue that Plaintiffs have not alleged a taxpayer claim because their claim is based on the State Defendants' monitoring of the Pittsburg Unified School District. A claim for waste, however, must be based on the expenditure of funds.

"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 v. Thurmond* (2019) 41 Cal.App.5th 879, 910.)

Collins explained 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 (citing to *Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356].)

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." (*Collins, supra,* 41 Cal.App.5th at 911.)

Here, Plaintiffs allege that the "State Defendants continue to permit or authorize the allocation or reimbursement of public funds to Pittsburg Unified despite knowing that the funds are being illegally used. Because State Defendants have permitted the use of these funds or authorized these funds without fulfilling their statutory and constitutional obligation to ensure these funds are not used to deprive students of equal educational access in a discrimination-free environment, they have also committed waste." (FAP ¶132.) These allegations are similar to the ones found sufficient in *Collins*.

The State Defendants argue that *Collins* can be distinguished because there it was alleged the State was "*authorizing* funds that they know are being illegally used by their recipients". (Reply p. 2.) Yet the allegations here are nearly identical to those in *Collins*. Plaintiffs have alleged that the State Defendants "continue to permit or authorize" funds "knowing that the funds are being illegally used." (FAP ¶132.)

The State Defendants also argue that the claim fails because the taxpayer allegations do not arise from the ministerial duty to approve budgets, but from the discretionary ability to withhold apportionments. This argument does not defeat the taxpayer claim. In *Collins*, the state argued that their duties and obligations are limited to verifying that the budget requests submitted by the local-level defendants meet statutory requirements. (*Id*. at 910-911.) Appellants did not contest this position, but argued that they could state a claim because the state was aware of the discrimination actions and approved the school district's budget and thus failed in an alleged duty to correct those actions. (*Id*. at 911.)

The Court finds that Plaintiffs have alleged a taxpayer claim and the demurrer to cause of action four is overruled.

<u>Writ of Mandate (cause of action five)</u>

The State Defendants argue that Plaintiffs have not alleged any ministerial duties and instead focus on discretionary obligations. The State Defendants' argument focuses on alleged ministerial duties (or lack thereof) and they do not focus on the allegations that State Defendants abused their discretion until the reply.

"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.)

"The two requirements for mandamus thus are (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right in the petitioner to performance of that duty. [Citation.] And, while mandamus is not available to control the discretion exercised by a public official or board, it is available to correct an abuse of discretion by such party. [Citation.]" (*Barnes v. Wong* (1995) 33 Cal.App.4th 390, 394-395.)

"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.)

Ministerial Duty

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, the court explained that "any claim arising from the way in which the state implements such a duty must demonstrate an abuse of discretion." (*Id*. at 918.)

In the First Amended Petition, Plaintiffs allege that the "State Defendants each have a clear and present ministerial duty to provide for equal access to educational opportunity for all children enrolled in the school districts they administer and/or oversee; to take appropriate action to identify and eliminate policies that interfere with the equal participation by their students in their instructional programs; and to monitor and ensure that the schools and/or school districts are in compliance with state and federal statutory and regulatory requirements and the underlying purposes and specific provisions of the California Constitution and state laws applicable to the provision of equal education to students of color and disabled students of color." (FAP ¶140.)

Plaintiffs alleged that the State Defendants violated section 5 C.C.R. section 4900(c) and section 4902. Later, Plaintiffs alleged that the State Defendants violated Education Code section 56000, et seq. (FAP ¶144.) In their opposition brief, Plaintiffs cited to section 56836.04. Section 4900 and 4902 were not included in the original petition. Section 56000 was included, but in the writ section it was included as part of the claims against the District. These regulations and the statutory scheme are new issues. Yet neither side actually discusses the language to argue their position regarding whether the State has a mandatory duty here.

Section 4900(c) states that "It is the intent of the State Board of Education that the

Superintendent of Public Instruction assist school districts and county offices of education to recognize and eliminate unlawful discrimination that may exist within their programs or activities and to meet the requirements of this Chapter. The Superintendent shall meet this responsibility through technical assistance and ensuring compliance pursuant to Chapter 5.1 (commencing with section 4600) of this Title relating to standard complaint procedures."

Section 4902 states that "the Superintendent of Public Instruction is responsible for providing leadership to local agencies to ensure that the requirements of the following nondiscrimination laws and their related regulations are met in educational programs that receive or benefit from state or federal financial assistance and are under the jurisdiction of the State Board of Education…" Section 4902 cites to various statutory schemes, including the Individuals with Disabilities Education Act. (5 CCR 4902(h).)

Section 56836.04(a) states that "The Superintendent continuously shall monitor and review all special education programs approved under this part to ensure that all funds appropriated to special education local plan areas under this part are expended for the purposes intended."

These sections create some potential mandatory duties. The State Defendants waited until reply to address whether these sections created mandatory duties, which did not provide sufficient notice to Plaintiffs. Therefore, the Court's analysis here gives Plaintiffs the benefit of the doubt and assumes that these regulations and statutes create some, albeit limited, mandatory duties.

First, Section 4900(c) states that "The Superintendent shall meet this responsibility [to ensure no unlawful discrimination] through technical assistance and ensuring compliance pursuant to Chapter 5.1 (commencing with section 4600) of this Title relating to standard complaint procedures." This section can be read as required the Superintendent to provide technical assistance, but how the assistance is provided appears to be a matter of discretion. Similarly, how the Superintendent is to ensure compliance section 4600, et seq is a matter of discretion.

Arguably section 4900(c) creates a mandatory duty that the Superintendent must provide technical assistance. The First Amended Petition alleges that the State is providing "technical assistances". (FAP ¶140.) Thus, Plaintiffs have not alleged a violation of a mandatory duty in section 4900(c). Plaintiffs contend that the technical assistances is insufficient, but that argument can only relate to the abuse of discretion claim as it is alleged that the State is doing something and thus, the State has not violated a mandatory duty.

Section 4902 makes the Superintendent "responsible for providing leadership to local agencies to ensure that the requirements of the following nondiscrimination laws and their related regulations are met in educational programs…" This section does not state exactly how the Superintendent is to behavior in providing this leadership and thus, this section does not create a mandatory duty.

Finally, section 56836.04(a) states that "The Superintendent continuously shall monitor and review all special education programs…to ensure that all funds appropriated to special education

local plan areas under this part are expended for the purposes intended." Here there is a mandatory duty that requires the Superintendent to monitor and review the special education programs. But how the Superintendent performs that obligation is not specified in this statute. Thus, as long as the Superintendent is engaging in some more of monitoring and review of the special education programs, the State will have met its mandatory duty.

The First Amended Petition alleges that the State has a "defective system for monitoring" school districts and that this system "fails to identify the scope of systemic issues at school districts, like Pittsburg Unified, that disproportionately segregate disabled students of color into classrooms". (FAP ¶140.) These allegations show that the State is fulfilling its mandatory duty to monitor the school districts and that Plaintiffs objection is with how the monitoring is being conduct. Again, whether the State's actions are so deficient as to abuse its discretion is a different issue than whether the State is preforming any mandatory duty under this section.

The Court finds that Plaintiffs have not alleged the failure to fulfill a mandatory duty by the State Defendants and thus, Plaintiffs have not stated a writ claim based on a mandatory duty.

Abuse of Discretion

Plaintiffs also allege that the State Defendants "have failed and are failing to comply with those duties and obligations and their actions, or inactions, constitute an abuse of discretion." (FAP ¶141.) Thus, the Court must consider whether Plaintiffs have alleged that the State Defendants abused their discretion.

In order to state a claim for abuse of discretion based on the State's duty to monitor local districts, "a plaintiff must allege that the monitoring program in whole is sufficiently flawed such that its continued use constitutes an abuse of discretion." (*Collins, supra,* 41 Cal.App.5th at 918 [citing to *Alejo, supra,* 212 Cal.App.4th at 781].)

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 here allege that the State Defendant's monitoring systems are not good enough. Such allegations are insufficient to state a claim based on abuse of discretion. Plaintiffs needed to allege (with facts supporting the allegations) that the State Defendant's monitoring system is so bad that it amounts no essentially no monitoring system. That was not done here. Therefore, the demurrer is sustained.

This is the second demurrer on the same issue and Plaintiffs have not provided additional

facts that they can allege to state a writ claim. Therefore, leave to amend is denied. If Plaintiffs have additional facts that they can add to the petition they may timely contest the tentative ruling and explain those facts and their legal effect at the hearing.

If Plaintiff decides to seek leave to amend they will need to consider how their claim does not run afoul of *AIDS Healthcare Foundation*, which is discussed in the State Defendants' reply papers. In *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693 the plaintiff sought to compel the health department to protect individuals working on the pornography industry from sexually transmitted diseases by ordering that the department to require performers to be vaccinated and require condom use. (*Id*. at 699.) The court found that plaintiff had not state a writ claim because the claim based on the department's "failure to act" was really a claim that the department's actions were ineffective or failed and the plaintiff sought to compel the department to act in a different manner. The court explained that it "cannot compel another branch of the government to exercise its discretion in a particular manner". (*Id*. at 704-705.)

11. 9:00 AM CASE NUMBER: N22-0690
CASE NAME: CLAIM OF: VANESSA LAKTHANASUK
***HEARING ON MINOR'S COMPROMISE RE: MINOR'S COMPROMISEE**
****TENTATIVE RULING:****

The Guardian ad Litem is ordered to appear in person. Appearance of the minor is waived for good cause.