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JAN 26 2012

LOS ANGELES  
SUPERIOR COURT

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES**

JANE DOE, a minor, by John Doe, her guardian  
ad litem; and JASON ROE, a minor, by David  
Roe, his guardian ad litem, on behalf of  
themselves and similarly situated public school  
students in the State of California,

Plaintiffs,

v.

THE STATE OF CALIFORNIA; TOM  
TORLAKSON, in his official capacity as  
STATE SUPERINTENDENT OF PUBLIC  
INSTRUCTION; THE CALIFORNIA  
DEPARTMENT OF EDUCATION; THE  
STATE BOARD OF EDUCATION; and DOES  
1 through 100 inclusive,

Defendants.

LASC Case No: BC445151

COURT'S RULING AND ORDER RE:  
DEMURRERS OF DEFENDANTS STATE  
OF CALIFORNIA; TOM TORLAKSON; THE  
CALIFORNIA DEPARTMENT OF  
EDUCATION; AND THE STATE BOARD  
OF EDUCATION

Hearing Date: January 25, 2012

**I.**

**BACKGROUND**

Plaintiffs filed this putative class action on September 10, 2010, on behalf of a class of  
all current and future students in California public schools who have been or will be required to

1 pay fees or purchase materials for courses for academic credit.<sup>1</sup> According to Plaintiffs, public  
2 schools require their students “to pay fees and purchase assigned materials for courses for  
3 academic credit.”<sup>2</sup> Plaintiffs allege that “[d]espite its clear constitutional duty to provide free  
4 and equal education, the State has stood idly by in the face of this rampant and blatant charging  
5 of illegal fees.”<sup>3</sup> The practice, according to Plaintiffs, violates the right to a free public education  
6 guaranteed by the California constitution.<sup>4</sup>

7 Plaintiffs allege six causes of action against the State Education Defendants<sup>5</sup> and  
8 Defendant State of California (“State”): 1) violation of the Free School Guarantee (Cal. Const.  
9 Art. IX, §5); 2) violation of Equal Education Opportunity (Cal. Const. art. I, §7(a) & art. IV,  
10 §16(a)); 3) wealth discrimination (Cal. Const. art. I, §7(a) & art. IV, §16(a)); 4) declaratory and  
11 injunctive relief pursuant to Cal. Ed. Code §51004; 5) declaratory and injunctive relief pursuant  
12 to Cal. Ed. Code §60070; and 6) declaratory and injunctive relief pursuant to 5 CCR §350.  
13 Plaintiffs seek, among other things, an injunction against all Defendants, directing them to  
14 “develop a monitoring and enforcement system to prevent the imposition of unconstitutional  
15 student fees for courses for academic credit.”<sup>6</sup>

16 The State Education Defendants and the State of California have filed separate demurrers  
17 to each cause of action. For the reasons discussed *infra*, the demurrers of the State Education  
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20 <sup>1</sup> First Amended Complaint (“FAC”), ¶9.

21 <sup>2</sup> FAC, ¶1.

22 <sup>3</sup> *Id.*

23 <sup>4</sup> FAC, ¶2.

24 <sup>5</sup> The State Education Defendants are Tom Torlakson, State Superintendent of Public Instruction (“SSPI”);  
25 California Department of Education (“CDE”) and State Board of Education (“SBE”). Collectively, the Court refers  
to these three Defendants as the “State Education Defendants.”

<sup>6</sup> FAC, ¶99.

1 Defendants and the State of California are overruled as to the 1<sup>st</sup> through 4<sup>th</sup> causes of action, and  
2 sustained, without leave to amend, as to the 5<sup>th</sup> and 6<sup>th</sup> causes of action.

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4 **II.**

5 **REQUEST FOR JUDICIAL NOTICE**

6 The State Education Defendants request judicial notice of the following in support of the  
7 demurrer:

- 8 1. Fiscal Management Advisory 87-03 on “Fees, Deposits and Other Charges”,  
9 issued to county and district superintendents, by the California Department of  
10 Education on September 11, 1987;  
11 2. Fiscal Management Advisory 97-02 on “Fees, Deposits and Other Charge” to  
12 county and district superintendents by the CDE on October 30, 1997; and  
13 3. AB 165, as amended on May 27, 2011.

14 The request is granted as to Exhibits 1 and 2 pursuant to Evidence Code §452(c), as the  
15 advisories constitute “official acts” of the Department of Education (a state agency) and are  
16 subject to judicial notice under this section. The request is granted as to Exhibit 3 pursuant to  
17 Evidence Code §452(c), as AB165 constitutes legislative history and is subject to judicial notice  
18 under this section.

19 In conjunction with their reply, the State Education Defendants request judicial notice of  
20 the following:

- 21 1. Fiscal Management Advisory 11-01 on “Pupil Fees, Deposits and Other  
22 Charges”, issued November 9, 2011 by the CDE.

23 The request is granted as to Exhibit 1 pursuant to Evidence Code §452(c), as the advisory  
24 constitutes an “official act” of the Department of Education.  
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**III.**

**DEMURRERS**

**1. Standards on Demurrer**

CCP § 430.10(e) is grounds for a demurrer when the complaint fails to state facts sufficient to constitute a cause of action. For purposes of ruling on a demurrer, material facts properly pleaded in the complaint must be taken as true. *Serrano v. Priest* (1971) 5 Cal.3d 584, 491. A demurrer may challenge only defects that appear on the face of the pleading or from matters which are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 31; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4<sup>th</sup> 968, 994; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2011) ¶7:8.

The function of a demurrer is to test the legal sufficiency of a complaint, but not the truthfulness of the allegations. *Donabedian v. Mercury Ins. Co.*, *supra*, 116 Cal.App.4<sup>th</sup> at 994; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2011 ¶7:5). Demurrers are to be sustained where a pleading fails to plead adequately any essential element of the cause of action. *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4<sup>th</sup> 857, 879-80.

“A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed (Code Civ. Proc., §§ 430.30, 430.70). The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.” *Hahn v. Mirda* (2007) 147 Cal.App.4<sup>th</sup> 740, 747. *Accord McKenney v. Purepac Pharmaceutical Co.* (2008) 162 Cal.App.4<sup>th</sup> 72, 79. When considering demurrers, courts read the allegations liberally and in context. *McKenney*, *supra*, 167 Cal.App.4<sup>th</sup> at 77; *Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144 Cal.App.4<sup>th</sup> 1216, 1228.

Demurrers on the ground of defect or misjoinder under CCP §430.10(d) lie only where it appears from the face of the complaint (or matters judicially noticed) that:

1 1) there is a defect (nonjoinder) of parties (i.e., some third person is a “necessary”  
2 or “indispensable” party to the action; and hence must be joined before the action  
3 may proceed) [California Practice Guide, Civil Procedure Before Trial, ¶7:80  
(The Rutter Group 2011); or

4 2) plaintiffs lack sufficient unity interest [CCP §378]; or there is no common  
5 question of law or fact as to the defendants [CCP §379]. California Practice  
6 Guide, Civil Procedure Before Trial, ¶7:81 (The Rutter Group 2011). [It is rare  
7 that this ground for objection appears on the face of the complaint. More  
8 frequently, defendant must raise it as a plea in abatement in the answer.]  
9 California Practice Guide, Civil Procedure Before Trial, ¶7:82 (The Rutter Group  
10 2011).

## 11 **2. Discussion of the State Education Defendants’ Demurrer**

### 12 **a. Notion that Plaintiffs cannot compel the State Education Defendants to enforce the Free**

#### 13 **School Guarantee in the California Constitution – 1<sup>st</sup> Cause of Action**

14 The first basis for the State Education Defendants’ demurrer is the notion that Article IX,  
15 §5 of the California Constitution, the “Free School Clause,” is not a “self-executing” provision,  
16 and that it requires the Legislature to take further action. This section provides that “[t]he  
17 Legislature shall provide for a system of common schools by which a free school shall be kept  
18 up and supported in each district at least six months in every year, after the first year in which a  
19 school has been established.” CA. Const. Art. IX, §5. The Free School Clause forms the basis  
20 of the first cause of action in the FAC.

21 Generally, “[a] constitutional provision may be said to be self-executing if it supplies a  
22 sufficient rule by means of which the right given may be enjoyed and protected, or the duty  
23 imposed may be enforced; and it is not self-executing when it merely indicates *principles*,  
24 without laying down rules by means of which those principles may be given the force of law.’  
25 [Citations.]” *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455. Where  
the constitutional provision “is wholly devoid of guidelines, mechanisms, or procedures from  
which a damages remedy could be inferred,” it is not self-executing. *Id.* At first glance, it would

1 seem that Art. IX, §5 is not self-executing, and would require further action by the Legislature to  
2 ensure that section's enforcement.

3 Nevertheless, there is case law which suggests a direct action can be brought under the  
4 Free School Clause. *See, e.g., Hartzell v. Connell* (1984) 35 Cal.3d 899; *Levi v. O'Connell*  
5 (2006) 144 Cal.App.4<sup>th</sup> 700. In *Levi*, the plaintiff was the guardian ad litem for her son, a gifted  
6 student, who sought, inter alia, a declaration under Art. IX, §5 that he was entitled to a free  
7 public university education, While the California Supreme Court ultimately held that the free  
8 education guarantee under Art. IX, §5 did not include colleges and universities, the Court did not  
9 disallow the plaintiff from bringing the claim in the first instance (i.e., the Court did not state that  
10 the Free School Clause did not provide the right to bring a declaratory relief claim).

11 Accordingly, the notion that a plaintiff cannot bring a claim against the State Education  
12 Defendants under Art. IX, §5 is not persuasive, and the demurrer to the first cause of action is  
13 overruled pursuant to CCP §430.10(e).

14 **b. 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> causes of action for alleged violations of equal protection and wealth**  
15 **discrimination**

16 The basis for the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> causes of action is premised on the allegation that the  
17 State Education Defendants violated Plaintiffs' right to equal educational opportunity and  
18 discriminated against them based on wealth by failing to monitor and ensure compliance with the  
19 free school guarantee.<sup>7</sup> According to the State Education Defendants, Plaintiffs "fail to allege  
20 that the State Education Defendants have acted in a manner that denies students in one district an  
21 education basically equivalent to that in other districts in the state based on funding  
22 inadequacies, or that the State Education Defendants have taken actions that have resulted in  
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24 <sup>7</sup> See, e.g., FAC, ¶¶73, 77, 83.  
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1 interdistrict disparities relating to the allocation of education resources.”<sup>8</sup> The State Education  
2 Defendants also claim that “local school districts have the power and authority to cure the  
3 alleged problems.”<sup>9</sup>

4 *Butt v. California* (1992) 4 Cal.4<sup>th</sup> 668 and *Serrano v. Priest* (1971) 5 Cal.3d 584  
5 contemplate that the State Education Defendants are proper defendants. Indeed, *Butt* observed  
6 that “[t]he State itself bears the ultimate authority and responsibility to ensure that its district-  
7 based system of common school provides basic equality of educational opportunity.” *Butt*, 4  
8 Cal.4<sup>th</sup> at 685. At the pleading stage, the Court determines that Plaintiffs can state the equal  
9 protection claims against the State Education Defendants.

10 **c. Alleged illegal charging of fees – 5<sup>th</sup> and 6<sup>th</sup> causes of action**

11 The 5<sup>th</sup> and 6<sup>th</sup> causes of action in the FAC are premised on the allegations that the  
12 Defendants violated Education Code §§60070 and 5 CCR §350.

13 Education Code §60070 provides that “[n]o school official shall require any pupil, except  
14 pupils in classes for adults to purchase any instructional material for the pupils' use in the  
15 school.” 5 CCR §350 similarly states that “A pupil enrolled in a school shall not be required to  
16 pay any fee, deposit, or other charge not specifically authorized by law.”

17 The FAC alleges that the Defendants “have violated and continue to violate section  
18 60070 by failing to ensure that public school districts do not require Plaintiff Jane Doe, Plaintiff  
19 Jason Roe, and class members to purchase instructional materials for use in school.”<sup>10</sup> Paragraph  
20 93 alleges that “Defendants have violated and continue to violate Title 5, section 350 by failing  
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23 <sup>8</sup> Demurrer at 5:6-9.

24 <sup>9</sup> Demurrer at 5:5.

25 <sup>10</sup> FAC, ¶88.

1 to ensure that public school districts do not require Plaintiff Jane Doe, Plaintiff Jason Roe, and  
2 class members to pay fees not specifically authorized by law.”<sup>11</sup>

3 However, there is no allegation that the State Education Defendants *themselves* required  
4 any pupil to purchase instructional materials or fees. Such an allegation is required to state a  
5 claim under both of these provisions. As such, the demurrer to the 5<sup>th</sup> and 6<sup>th</sup> causes of action is  
6 sustained. The Court makes this order without leave to amend, as Plaintiffs cannot allege facts  
7 supporting this contention.

#### 8 **d. Legislative versus Judicial Remedy**

9 The State Education Defendants claim that the Plaintiffs ultimately seek a legislative, not  
10 a judicial remedy. They assert that the controversy is nonjusticiable in nature, and that Plaintiffs  
11 must go to the Legislature for relief. However, the FAC, as framed, seeks to have the State  
12 Education Defendants comply with existing duties under the law. Accordingly, the Court is not  
13 persuaded by the State Education Defendants’ argument that this case is nonjusticiable.

#### 14 **e. Misjoinder/Defect in Joinder**

15 The other broad basis for the demurrer is that Plaintiffs have failed to add the individual  
16 school districts, who they claim are necessary parties to the action pursuant to CCP §389.<sup>12</sup>

17 In this case, Plaintiffs seek an order directing Defendants “to develop a monitoring and  
18 enforcement system to prevent the imposition of unconstitutional student fees for courses for  
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20 <sup>11</sup> FAC, ¶93.

21 <sup>12</sup> CCP §389(a) provides as follows:

22 (a) A person who is subject to service of process and whose joinder will not deprive the court of  
23 jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his  
24 absence *complete relief cannot be accorded among those already parties* or (2) he claims an  
25 interest relating to the subject of the action and is so situated that the disposition of the action in his  
absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii)  
leave any of the persons already parties subject to a substantial risk of incurring double, multiple,  
or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined,  
the court shall order that he be made a party. (Emphasis added.)



1 academic credit[.]”<sup>13</sup> Significantly, the FAC does not seek any monetary relief from any of the  
2 named Defendants (outside of the award of attorneys’ fees and costs of suit in the prayer).  
3 Instead, it seeks a judgment that the Defendants’ conduct violates various provisions of the  
4 California Constitution, the Education Code, and the Code of Regulations. There is no direct  
5 relief sought against the individual districts, either. Thus, “complete relief” – compliance with  
6 the Defendants’ alleged duties under the law – can be accorded without the local school districts  
7 (the LEAs) as parties to the case.

8 Accordingly, the misjoinder demurrer is overruled, pursuant to CCP §430.10(d).

### 9 **Conclusion on State Education Defendants’ Demurrer**

10 For these reasons, the demurrer of the State Education Defendants is overruled as to the  
11 1<sup>st</sup> through 4<sup>th</sup> causes of action; sustained, without leave to amend, as to the 5<sup>th</sup> and 6<sup>th</sup> causes of  
12 action, and overruled on “misjoinder” grounds pursuant to CCP §430.10(d).

### 13 **3. Discussion of the State’s Demurrer**

14 Separately, the State of California demurs to the FAC. The overarching basis for the  
15 State’s demurrer is that it is not a proper Defendant in this case, and that the State Education  
16 Defendants are the proper Defendants (as they “collectively and separately, have broad  
17 administrative and rule making authority to provide any necessary remedy”).<sup>14</sup> The State further  
18 claims that it cannot provide any of the four forms of relief identified at 12:10-26 of the  
19 Opposition – namely, legislation, regulatory action by the State Education Defendants, executive  
20 action by the State Education Defendants, or executive action by other state entities or officials.

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23 <sup>13</sup> FAC, ¶99.

24 <sup>14</sup> State’s Reply at 2:7-8.  
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1 CCP §379 sets forth the standards in assessing whether a party to litigation is proper.<sup>15</sup>

2 From a practical standpoint, the relief Plaintiffs are actually seeking may ultimately, in fact, only  
3 be provided by the State Education Defendants or specific state agencies or officers. However,  
4 pursuant to CCP §379, the Court finds the State qualifies as a “proper” party at the pleading  
5 stage. To be sure, *Butt* recognized that the “State” was required to intervene to ensure equal  
6 protection in public education (and to ensure that right was not deprived). The State was a  
7 named defendant in the *Butt* case. As such, the Court finds the State is a “proper” party (though  
8 again, the extent to which it can formulate the relief prayed for is an open question to be litigated  
9 in this proceeding).

11 Further, the Attorney General “has charge, as attorney, of all legal matters in which the  
12 State is interested” (Gov’t. Code §12511) and “shall...prosecute or defend all causes to which  
13 the State, or any State officer is a party in his or her official capacity.” (Gov’t. Code §12512.).

14 In the reply, the State cites *Coachella Valley Unified School Dist. v. State of California*  
15 (2008) 176 Cal.App.4<sup>th</sup> 93 for the notion that the State, on a motion for judgment on the  
16 pleadings, was dismissed as a “proper party” in litigation seeking a writ of mandate to have the  
17 State, state officials, and state agencies to abide by the No Child Left Behind Act’s requisites for

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20 <sup>15</sup> CCP §379 provides in applicable part:

21 (a) All persons may be joined in one action as defendants if there is asserted against them:

22 (1) Any right to relief *jointly, severally, or in the alternative*, in respect of or arising out of the  
23 same transaction, occurrence, or series of transactions or occurrences and if any question of law or  
24 fact common to all these persons will arise in the action; or

(2) A claim, right, or interest adverse to them in the property or controversy which is the subject  
of the action.

25 (b) It is not necessary that each defendant be interested as to every cause of action or as to all relief  
prayed for. Judgment may be given against one or more defendants according to their respective  
liabilities. (Emphasis added.)

1 assessing Limited English Proficiency students. However, it appears that the litigation had  
2 proceeded on a bifurcated basis prior to the State's dismissal.

3 In the Court's view, it is premature to make the determination that the State, in fact, is  
4 not a "proper party" to this litigation. It is also too early to make the determination that  
5 maintaining the State as a separate Defendant is "wasteful."

6 For these reasons, the State's demurrer on grounds that it is an "improper party" is  
7 overruled.

8 The State's demurrer on grounds that it is not liable under the 5<sup>th</sup> and 6<sup>th</sup> causes of action  
9 is sustained, without leave to amend, for the reasons discussed *supra* in conjunction with the  
10 State Education Defendants' demurrer.

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V.

**RULING AND ORDER**

For the foregoing reasons, the demurrer of the State Education Defendants is overruled as to the 1<sup>st</sup> through 4<sup>th</sup> causes of action; sustained, without leave to amend, as to the 5<sup>th</sup> and 6<sup>th</sup> causes of action, and overruled on “misjoinder” grounds per CCP §430.10(d). The State’s Demurrer is overruled on “misjoinder” grounds per CCP §430.10(d). The demurrer under CCP §430.10(e) is overruled as to the 1<sup>st</sup> through 4<sup>th</sup> causes of action, and sustained, without leave to amend, as to the 5<sup>th</sup> and 6<sup>th</sup> causes of action. Defendants shall answer within twenty (20) days from the date of this Ruling and Order.

The Court sets a further status conference in this matter for March 8, 2012, at 1:30 p.m.. The parties are to submit a joint statement in anticipation of the further status conference no later than March 2, 2012 , with proposals for proceeding with the next phase of the litigation.

Dated: January 26, 2012

**CARL J. WEST**

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Carl J. West  
Judge of the Superior Court