SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

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| MAYA ROBLES-WONG, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF CALIFORNIA and ARNOLD SCHWARZENEGGER, GOVERNOR OF THE STATE OF CALIFORNIA,<br><br>Defendants. | No. RG10-515768<br><br>ORDER SUSTAINING DEMURRERS TO COMPLAINT AND COMPLAINT IN INTERVENTION, IN PART WITHOUT LEAVE TO AMEND AND IN PART WITH LEAVE TO AMEND |
| CALIFORNIA TEACHERS ASSOCIATION,<br><br>Plaintiff-Intervenor. | |

Several matters came on regularly for hearing on December 10, 2010, in Department 17 of the above Court, the Honorable Steven A. Brick, presiding: in this case, the demurrers and motion to strike of defendants State of California and Governor Arnold Schwarzenegger.[1] The Court also heard concurrently the motion

[1] Between the hearing of this matter and the issuance of this order, Governor Schwarzenegger's term of office expired and Governor Edmund G.

of the same defendants for judgment on the pleadings 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 motion to strike, as well as the complaints filed by plaintiffs on May 20, 2010, and by intervenor California Teachers Association ("CTA") on July 16, 2010, and good cause appearing therefor, the Court rules as follows:

**Preliminary Observations**

The Complaint in this action was filed by guardians ad litem for 62 students in the public schools of California, nine school districts, and three non-profit associations. It includes 173 paragraphs of background and "factual" allegations which are incorporated by reference into each of four causes of action. The first and second causes of action allege violation of sections 1 and 5 of Article IX 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…." (Complaint, ¶5 of Second Cause of Action.) The Third Cause of Action alleges violations of sections 7(a) and 7(b) of article I and section 16 of article IV of the California Constitution by "failing to provide and support an education finance system that provides all California school children equal access

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Brown, Jr. was inaugurated. The Court refers to the pleadings as they currently stand.

to the State's prescribed educational program and an equal educational opportunity to become proficient in the State's academic standards." (Complaint, ¶7 of Third Cause of Action.) The Fourth Cause of Action alleges a violation of section 8(a) of article XVI of the California Constitution 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.'" (Complaint, ¶9 of Fourth Cause of Action.) Plaintiffs seek declaratory and injunctive relief as well as reasonable attorneys' fees and expenses pursuant to section 1021.5 of the Code of Civil Procedure.

CTA's Complaint in Intervention includes the same four causes of action and seeks essentially the same declaratory and injunctive relief as the Complaint. It is based upon 152 paragraphs of factual allegations which are also incorporated by reference into each of its four cases of action. The essence of both complaints is alleged in paragraphs 173 of the Complaint and 157 of the CTA Complaint: The California Constitution prohibits the maintenance and operation of the common public school system in a way that denies basic educational equality to any students. The insufficient, irrational, and unstable aspects of the State's funding system prevent districts from effectively delivering the required educational program, an impact that falls disproportionately on economically disadvantaged students, racial or ethnic minority students, English language learners, and students with disabilities. Districts are prevented from implementing

programs and services based on student needs, which denies students equal access to the educational program and an equal opportunity to learn the content prescribed in State-established standards. Having set a prevailing statewide standard for education by requiring proficiency in meeting the State-established content standards, the State also bears the responsibility for ensuring that all students have access to an education that provides them with an opportunity to attain proficiency in meeting the required standards. The State has failed in this duty.

Defendants challenge the complaints on many grounds, which will be discussed in the sections which follow:

**Standing**

Defendants claim that none of the plaintiffs (including CTA) has standing. The Court finds that the individual plaintiffs have standing with respect to the first, second, and fourth causes of action, and that the association plaintiffs and the CTA have standing with respect to all four causes of action. Since the Court is sustaining the demurrer with leave to amend in part, individual plaintiffs and school district plaintiffs may further allege their standing as to the remaining cause of action if they wish to do so. (Compare *McKeon v. Hastings College* (1984) 185 Cal.App.3d 877, 892; see pp. 17-18, *infra*.)

**Proper Defendants**

In light of the nature of the claims and the relief sought the Court finds that the Governor and the State are proper parties defendant. Since the Court is

sustaining the demurrer with leave to amend in part, plaintiffs and CTA may wish to add other defendants if, as defendants contend, other state officers may be necessary to effect any of the relief which may appropriately be sought. Plaintiffs and CTQ may also substitute the new governor as a defendant in place of the former governor.

**Justiciability and Separation of Powers**

Defendants' primary challenge to all of plaintiffs' claims is that they are not justiciable and, to the extent that one or more is justiciable, the separation of powers doctrine precludes this Court from entertaining them. It is far too late in the day for defendants to succeed on either of these arguments. As discussed more fully below, in *Serrano v. Priest* (1971) 5 Cal.3d 728 ("*Serrano I*") and *Serrano v. Priest* (1976) 18 Cal.3d 584 ("*Serrano II*") the Supreme Court established that the California Constitution creates a fundamental right to a free public education which may be protected under its Equal Protection clauses. Despite the delegation to the Legislature of plenary authority over what that right will be, and recognizing that "the Constitution does not prohibit all disparities in educational quality or service" (*Butt v. State of California* (1992) 4 Cal.4th 668, 686 ("*Butt*")), when a court determines that a feature of the State's school financing system violates the Equal Protection guaranties of the State Constitution, the court is empowered and indeed, obligated, to intervene in an appropriate fashion to correct failures to comply with the Constitution. As the Supreme Court recognized most recently in *Butt*, *supra*:

> …California courts have adhered to the following principles: Public education is an obligation which the State assumed by the adoption of the Constitution. (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 951-952 [92 Cal.Rptr. 309, 479 P.2d 669]; *Piper v. Big Pine School Dist.* (1924) 193 Cal. 664, 669 [226 P. 926].) The system of public schools, although administered through local districts created by the Legislature, is "one system ... applicable to all the common schools…." (*Kennedy v. Miller* (1893) 97 Cal. 429, 432 [32 P. 558], italics in original.) "... In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis…." (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880 [31 Cal.Rptr. 606, 382 P.2d 878].) "[M]anagement and control of the public schools [is] a matter of state[, not local,] care and supervision…." (*Kennedy v. Miller, supra,* 97 Cal. at p. 431; see also *Hall v. City of Taft* (1956) 47 Cal.2d 177, 181 [302 P.2d 574]; *California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1523-1524 [7 Cal.Rptr.2d 699].) The Legislature's "plenary" power over public education is subject only to constitutional restrictions. (*Hall v. City of Taft, supra,* at pp. 180-181 [302 P.2d 574]; *Tinsley v. Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 903-904 [154 Cal.Rptr. 591].) Local districts are the State's agents for local operation of the common school system (*Hall v. City of Taft, supra,* at p. 181; *San Francisco Unified School Dist. v. Johnson, supra,* 3 Cal.3d at p. 952; *California Teachers Assn., supra*), and the State's ultimate responsibility for public education cannot be delegated to any other entity (*Hall v. City of Taft, supra*; *Piper v. Big Pine School Dist., supra,* 193 Cal. at p. 669).

(*Butt, supra,* 4 Cal.4th at pp. 680-681.) Whether or not plaintiffs can state a claim and perhaps prevail on their causes of action, since their claims are based upon alleged violations of the California Constitution, neither the doctrine of justicability nor separation of powers precludes them from attempting to do so.

**Subvention Claims**

Defendants also argue that "to the extent" plaintiffs complain about inadequate funds being made available by the State to local school districts

(including plaintiff districts) to carry out state-imposed mandates, their claims are barred by article XIIIB, section 6 of the California Constitution. In *Kinslaw v. The State of California* (1991) 54 Cal.3d 326, the Supreme Court held that the administrative procedures established by the Legislature in Government Code sections 17500 et seq. are the exclusive means by which the State's obligations under article XIII, section B are to be determined and enforced. The Court so held despite the fact that plaintiffs, who were medically indigent adults and taxpayers, could not themselves bring a section 17500 proceeding. The Court did so because "the gravamen of the action is … enforcement of section 6." (54 Cal.3d at p. 330.)

Plaintiffs' answer to this issue in the present case is that they are seeking to enforce constitutional mandates which are not subject to section 17500. However, that is not entirely clear. The Complaint and Complaint in Intervention include allegations that state requirements imposed by the Legislature have not been sufficiently funded so that local school districts can comply with those mandates. Indeed, the Complaint includes a considerable amount of material under the heading of "FACTUAL ALLEGATIONS" (beginning with paragraph 54 and continuing through paragraph 173) which can be read as complaining about inadequate funding of legislative mandates, as well as considerable other material which goes well beyond a pleading of ultimate facts in support of the Constitutional claims which are alleged. (See Code Civ. Proc. § 425.10, subd. (a)(1).) The CTA Complaint contains a similar level of detail. Although the Court need not sustain a demurrer if any cause of action is properly pleaded (see, e.g.,

Weil & Brown, *Civil Procedure Before Trial* (Rutter 2010), section 7:41 at p. 7(l)-20 and cases cited therein), the Court believes the parties will benefit from the filing of a more focused and preferably consolidated amended complaint which eliminates allegations subject to a subvention defense as well as other unnecessary evidentiary factual allegations. Hence, except as otherwise indicated in this order, the Court SUSTAINS the demurrer WITH LEAVE TO AMEND so that plaintiffs and CTA may restate the essence of the facts they believe support their remaining Equal Protection Constitutional claim, and make clear that they are not seeking to enforce section 6 of article XIIIB.

**Can Plaintiffs Enforce the Provisions of Sections 1 and 5 of Article IX?**

Assuming plaintiffs can amend to eliminate any subvention issue in this case, the question remains whether sections 1 and 5 of article IX create a mandatory duty which can be judicially enforced. The Court thinks not.

Section 1 reads as follows:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.

Section 5 reads as follows:

> The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

Section 1 was originally adopted as part of section 2 of Article IX of the Constitution of 1849.[2] At that time, the financial wherewithal for the Legislature to "encourage by all suitable means" was provided by the dedicated sources identified in the Constitution, "together with … such other means as the Legislature may provide…."

The history of funding California's system of public education, as alleged in the complaints and argued in the briefs, shows that as times and sources of funding changed, so did the funds which would be designated for public education. However, plaintiffs fail to show that in 1849 or in 1879, or at any time since, section one could be fairly read to require the Legislature to provide a level of funds which would further what the courts recognize as the fundamental right to a public education.

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[2] Section 2 (as displayed on the Secretary of State's web site) then provided:

> The Legislature shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement. The proceeds of all land that may be granted by the United States to this State for the support of schools, which may be sold or disposed of, and the five hundred thousand acres of land granted to the new States, under an act of Congress distributing the proceeds of the public lands among the several States of the Union, approved A.D. 1841; and all estates of deceased persons who may have died without leaving a will, or heir, and also such per cent. as may be granted by Congress on the sale of lands in this State, shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, and such other means as the Legislature may provide, shall be inviolably appropriated to the support of common schools throughout the State.

Plaintiffs argue that sections one and five should be read together. The Court agrees. Section five was adapted in the Constitution of 1879 from the former section 3 of the 1849 Constitution.[3] If the Court were writing on a clean slate, plaintiffs' reliance on the provisions that "a free school shall be kept up and supported in each district…" might carry the day. However, the seminal decision of the Supreme Court in *Serrano I* considered and rejected the argument that section 5 of article IX included any particular financing requirement. It is true that plaintiffs here rely on the "kept up and supported" portion of section five, whereas plaintiffs in *Serrano I* may have focused only on "a system of common schools…." Be that as it may, the Court made clear that:

> [We] have never interpreted the constitutional provision [section 5] to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade….
>
> We think it would be erroneous to hold otherwise.

(5 Cal.3d at p. 596 [citation omitted].)

Plaintiffs correctly point out that the Supreme Court has enforced students' rights to a free public school education under article IX in *Hartzell v. Connell*

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[3] The original section 3 (as displayed on the Secretary of State's web site) provided:

> Sec. 3. The Legislature shall provide for a system of common schools, by which a school be kept up and supported in each district at least three months in every year, and any school neglecting to keep and support such a school, may be deprived of its proportion of the interest of the public fund during such neglect.

(1984) 35 Cal.3d 899. However, *Hartzell* involved a school district's attempt to impose fees for extra-curricular music and sports activities, not any particular level of funding for the public school system. Given the Court's determination in *Serrano I*, this Court may not find a constitutional right to a particular level of funding in section 5, even when read in combination with section 1, and even though decisions in other states may support plaintiffs' theory. Hence, the demurrer to the first and second causes of action in both complaints is SUSTAINED WITHOUT LEAVE TO AMEND.

**Can Plaintiffs Enforce the Provisions of Section 8(a) of Article XVI?**

Plaintiffs argue that Article XVI section 8(a) was originally added to the Constitution by Proposition 1 in 1910. The historical information provided by CTA in its Request for Judicial Notice, Exh. B ("CTA RJN Exh. B") suggests that language like that which now appears in section 8(a) was first proposed and adopted in 1910. However, it appears that Proposition No. 1, as presented to the electorate as a Senate Constitutional Amendment, was primarily an issue of tax reform which permitted the State to have exclusive authority to tax "public service" corporations including railroads, and local authorities to have exclusive authority to tax all other property. Proposition No. 1, which according to the materials provided was adopted October 3, 1910 (CTA RJN Exh. B at 5), added a new section 14 to Article XIII of the Constitution. Subsection (e) of that provision is reported as providing as follows:

> Out of the revenues from the taxes provided for in this section, together with all other state revenues, there shall be first set apart the moneys to be applied by the state to support the public school system and the state university. In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the state, including the above named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax, for state purposes, on all the property in the state, including the classes of property enumerated in this section, sufficient to meet the deficiency….

(*Id.* at 7-8.) The "Reasons Why Senate Constitutional Amendment No. 1 Should Be Adopted" apparently were written J.B. Curtin, State Senator, as the official spokesperson for the Senate. Senator Curtin explained that "in a few years, it is confidently expected that California, like the State of Pennsylvania, will get all the revenue it needs for the support of its government from the gross earnings of railroads alone, and all other forms of property would then be taxed for county purposes only." (*Id.* at 3.) He then went on to write:

> This amendment provides that out of the total moneys collected, revenues for the support of the public schools system and university must be first deducted, thus insuring support of the schools.
>
> Further, if the total revenues are insufficient, then all the property in the state, including the public service corporations, must be taxed alike in order to make up the deficiency, thus insuring the state always ample revenue for its support. . . .

(*Id.* at 4.)

The historical notes for article XIII, section 14 reported in 2A West's Annotated California Codes (1996) at p. 411 indicate that the version of section 14 added on November 8, 1910, was amended several times between 1926 and 1949. The language which is now article XVI section 8(a) was apparently moved to

article XVI section 8 during one of these revisions. According to the historical notes reported for article XVI section 8 reported in 3 West's Annotated California Codes (1996) at p. 93, when Proposition 98 was approved at the general election of November 8, 1988, former section 8 was designated as section 8(a) when subsections (b) and (c) were added.

The parties have not cited any decision determining whether or not section 8(a) requires the Legislature to fund public school education in California at any particular level. Plaintiffs argue that, based upon the language of sections one and five of article IX, together with the language of section 8(a), such a mandatory duty was intended by the voters and is enforceable by this Court. However, no case so holds. To the extent that plaintiffs rely upon section one and five of article IX, the Court has already made clear that based upon the Supreme Court's decisions in *Serrano I* and *Serrano II* this Court is not free to ascribe to those sections the meaning plaintiffs urge.

If we look then to the text of section 14(e) as adopted by the voters in 1910, it establishes a priority for the public schools (and the state university) from certain designated tax sources, that is, the taxes on "public service" corporations which are authorized in subsections (a) through (d). In this respect, the designation of those dedicated funds is similar to the designation of dedicated funds from the sale of federal lands and other sources in the 1849 Constitution. (See footnote 2, *supra.*) However, in 1910, as in 1849, the possibility of the dedicated funds being

insufficient was contemplated, and the Legislature was given the discretion, not a duty, to raise additional funds.

It is true that Senator Curtin's ballot argument included the possibility of insufficient revenues, in which case, he said, "then all the property in the state, including the public service corporations, must be taxed alike in order to make up the deficiency, thus insuring the state always ample revenue for its support." (CTA RJN Exh. B at p. 4.) However, that is not what the text of the constitutional amendment said.

Finally, the parties differ in their views as to whether Proposition 98, adopted in 1988, and significantly modified by Proposition 111, adopted in 1990, should affect the analysis of Article XVI section 8(a). Because the Court holds that section 8(a) does not create a mandatory duty on the part of the Legislature to allocate any particular level of funds for the public schools, the Court need not address this question.[4]

Whether it would have been a wise decision for the voters to dedicate adequate funds to assure the meaningful public education described in Article IX, sections one and five, and given a funding priority in Article XVI section 8(a), is not for this Court to say. The Court's role in this, as in any other case of constitutional interpretation, is limited to determining what the people, through the

[4] At the hearing on December 10, 2010, plaintiffs confirmed that, although the complaints include such allegations, they do not intend to pursue a claim for failure to fund consistently with the minimum requirements adopted in Proposition 98.

constitutional conventions and through their votes in the election of 1910, intended by the provisions they adopted. For the reasons set forth above, the demurrer to the fourth cause of action in both complaints is SUSTAINED WITHOUT LEAVE TO AMEND.

**Have Plaintiffs Stated an Equal Protection Claim Which May Proceed to Trial?**

Plaintiffs have alleged 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. Plaintiffs also allege that the funds allocated for public education are insufficient to provide all public school students with an equal educational opportunity. Plaintiffs rely on the cases discussed in this section to assert that they have stated a viable equal protection claim under the California Constitution.

In *Serrano I*, the Supreme Court reversed the trial court's dismissal of plaintiffs' challenge to the school financing system and ordered the trial court, on remand, to overrule the demurrer it had previously sustained. (5 Cal.3d at 619.) The Court relied upon the allegations of the complaint, summarized at footnote 1 of its decision, and matters pertaining to the educational financing system of which judicial notice was appropriate. After a lengthy analysis, the Court held as follows:

> We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiffs' complaint

> supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the equal protection of the laws. [Fn. omitted.] If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional.

(*Id.* at pp. 614-615.)

Because *Serrano I* was based upon a challenge to plaintiffs' complaint, it is particularly appropriate to note the following: The Plaintiffs were public school children and their parents, who brought suit as a class action. (*Id.* at p. 584.)[5] The allegations about the school financing scheme quoted by the Supreme Court are set forth in the margin.[6] Several, but not all, of the key allegations are phrased in

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[5] The Court's decision in *Serrano II* explains that, after remand in *Serrano I*, the CTA and seven school districts were allowed to intervene on the condition that their complaints adopt the essential allegations of the original complaint. (18 Cal.3d at pp. 735-736 & note 3.)

[6] Footnote one in *Serrano I* reads as follows:

> The complaint alleges that the financing scheme:
> "A. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the wealth of the children's parents and neighbors, as measured by the tax base of the school district in which said children reside, and
> "B. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the

terms of "school age children in California, including Plaintiff Children…." The present case has not been brought as a class action, and none of the individual plaintiffs are expressly described as having been injured by the school finance system which is challenged. The Court also notes that in *Serrano I*, subparagraph I of the complaint alleged that "a disproportionate number of school children" belonging to various minority groups "reside in school districts in which a relatively inferior educational opportunity is provided." However, the equal

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> geographical accident of the school district in which said children reside, and
> "C. Fails to take account of any of the variety of educational needs of the several school districts (and of the children therein) of the State of California, and
> "D. Provides students living in some school districts of the State with material advantages over students in other school districts in selecting and pursuing their educational goals, and
> "E. Fails to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources, and
> "F. Perpetuates marked differences in the quality of educational services, equipment and other facilities which exist among the public school districts of the State as a result of the inequitable apportionment of State resources in past years.
> "G. The use of the 'school district' as a unit for the differential allocation of educational funds bears no reasonable relation to the California legislative purpose of providing equal educational opportunity for all school children within the State.
> "H. The part of the State financing scheme which permits each school district to retain and expend within that district all of the property tax collected within that district bears no reasonable relation to any educational objective or need.
> "I. A disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided."

protection challenge to the system as a whole was not analyzed in terms of the quoted allegations.

Rather, the Supreme Court relied primarily on the Equal Protection Clause of the 14th Amendment, but also mentioned the comparable clauses of the California Constitution in holding the legislatively created school districts resulted in a disparity of educational opportunity between children residing in wealthy districts and children residing in poor districts. (5 Cal.3d at pp. 614-615.)

In *Serrano II*, the Supreme Court recognized that the U.S. Supreme Court's decision in *San Antonio School District v. Rodriquez* (1973) 411 U.S. 1, held that no federal constitutional equal protection claim was stated on facts such as those alleged in *Serrano II*. Nonetheless, the Supreme Court held that the California Constitution's equal protection guaranty required strict scrutiny of the legislatively created school finance system in which "disparities in assessed valuation per ADA among the various school districts result in disparities in the educational opportunity available to the students within such districts." (18 Cal.3d at pp. 773; see also pp. 765-766, 775-776.)[7] The Court also rejected the defendants' jurisdictional argument that the Governor and the Legislature should have been

[7] The main point of contention between the majority and the dissenting opinions in *Serrano II* was the dissent's contention that other provisions of the Constitution, including former article IX, section 6 (which was moved to article XIII, section 21 and not eliminated) specifically authorized the local district financing plan which the majority held to be in violation of the equal protection clause. The majority rejected that view, as well as defendants' argument that article IX section 1 authorized the challenged financing system.

joined as indispensable parties. The Court held that ample evidence supported the trial court's findings and judgment, and left it to the Legislature, with the guidance of its opinion and recent scholarship, "to devise a public school financing system which achieves constitutional conformity from the standpoint of educational opportunity through an equitable structure of taxation." (*Id.* at p. 775, n. 54.)

The California Supreme Court has not had occasion to examine whether the public school financing system as it has evolved since *Serrano II* comports with the equal protection guaranty since 1976.[8] However, in *Butt v. State of California* (1992) 4 Cal.4th 668, 703-704, the Court held that the state could be required to make payments in addition to those otherwise mandated when necessary to prevent closure of one district's schools six weeks early because of inadequate funds. The

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[8] The Court is mindful that in *Serrano v. Priest* (1977) 20 Cal.3d 25, 36, fn. 36 ("*Serrano III*"), the Supreme Court quoted the following passage from the trial court's memorandum opinion:

> The equal-protection-of-the-laws provisions of the California Constitution mandate nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied. This court does not read the *Serrano* [*I*] opinion as requiring that there is any constitutional mandate for the State to provide funds for each child in the State at some magic level to produce either an adequate-quality educational program or a high-quality educational program. It is only a disparity in treatment between equals which runs afoul of the California constitutional mandate of equal protection of the laws.

The Supreme Court then said: "As our opinion in *Serrano II* makes clear, this is a correct characterization."

District's financial inability to complete the final six weeks of its 1990-1991 school term threatened to deprive District students of their California constitutional right to basic educational equality with other public school students in this State. As the Court further concluded, discrimination of this nature against education, a fundamental interest, could only be justified as necessary to serve a compelling interest. The State itself, as the entity with plenary constitutional responsibility for operation of the common school system, had a duty to protect District students against loss of their right to basic educational equality. Local control of public schools was not a compelling interest which would justify the State's failure to intervene.

The trial court thus properly ordered the State and its officials to protect the students' rights. The court also acted within its remedial powers by authorizing the Superintendent of Public Instruction to assume control of the District's affairs, relieve the Board of its duties, and supervise the District's financial recovery. However, the court invaded the exclusive legislative power of appropriation by approving the diversion of appropriations for Greater Avenues for Independence and the Oakland Unified School District to an emergency loan for the District.

*Butt* includes an important summary of the principles to be applied in school financing cases such as this one:

- California constitutional principles require State assistance to correct basic "interdistrict" disparities in the system of common schools,

even when the discriminatory effect was not produced by the purposeful conduct of the State or its Agents. (*Id.* at pp. 668, 681.)

- 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. (*Id.* at p. 685.)
- A finding of constitutional disparity depends on the individual facts. Unless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs. (*Id.* at pp. 686-687.)
- In sum, the California Constitution guarantees "basic" equality in public education, regardless of district residence. Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny. (*Id.* at p. 692.)

*Butt* does not use the term "equal educational opportunity" as the Court did in the *Serrano* cases. However, it is important to understand that the facts in *Butt* showed that the Richmond Unified School District had received its proportionate share of revenues for the school year. Nonetheless, because of the District's mismanagement of those funds, the Court held that the state had an obligation to provide "basic education equality" to the students of that district, even if it meant

finding other state money to keep the schools open for the remainder of the school year. Hence, *Butt* is properly understood as requiring basic educational opportunity.

Unlike the *Serrano* decisions, *Butt* did not address the public school system as a whole or the free school guaranties of Article IX. (*Id.* at p. 685.) Its application of the equal protection guaranty of the constitution was based upon two distinct groups of students: those in the Richmond Unified School District, and those in all other school districts in the state. Hence, *Butt* does not clearly authorize a case in which the essence of plaintiffs' complaint is that the irrational and inadequate method of funding public schools has deprived California students, in general, of an equal educational opportunity. On the other hand, *Butt* in no way purports to overrule or narrow the Court's *Serrano* holdings.

The most recent equal protection case involving the schools was not a finance case, but one arising out of the Legislature's decision to require all high school graduates to pass an exit examination before receiving a high school diploma. In *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, this Court issued a preliminary injunction based upon the equal protection guaranty of the California Constitution restraining defendants from denying diplomas to members of the 2006 graduating class who were otherwise eligible, but who had not passed both portions of the California high school exit exam ("CAHSEE"). The Court of Appeal issued a writ commanding that the preliminary injunction be dissolved

because the injunction was beyond the Court's jurisdictional power and unrelated to the fundamental right to education.

Plaintiffs argue that *O'Connell* supports their position that they have stated an equal protection claim in the current complaints. The Court must disagree. The Court of Appeal agreed with the trial court that "California case law holds that there is a fundamental right of equal access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right." (141 Cal.App.4th at p. 157.) The opinion goes on to say:

> The trial court also concluded, at least implicitly, that the right of equal access to education includes the right to receive equal and adequate instruction regarding all specific high school graduation requirements imposed by the state, including passing both portions of the CAHSEE. For purposes of this opinion we assume this conclusion was correct.

(*Id.*) Such an assumption cannot be viewed as authority in light of the Court's decision granting the writ vacating the preliminary injunction. The Court also says:

> As to the funding shortfall, we note further only that plaintiffs did not ask the trial court to order defendants to provide additional funds to pay for the necessary instruction. Thus, the question whether such relief would have been constitutionally appropriate, legally justified, or practically feasible is not before us.

(*Id.* at 1467.) Again, this comment provides no authority in aid of plaintiffs' position.

The Court recognizes that education is a fundamental right under the California Constitution and that any legislative or executive impingement on that

right which causes discrimination among students must be viewed with strict scrutiny.[9] The question is whether plaintiffs have adequately stated an equal protection claim based upon their allegations of chronic statewide underfunding coupled with their allegations that the funding "system" bears no rational relationship to the education standards the Legislature itself has required over the past fifteen years. The Court finds no authority to support plaintiffs' argument that a California Constitutional equal protection claim can be stated based upon inadequate funding, however devastating the effects of such underfunding have been on the quality of public school education. However, plaintiffs' claim is not just that funding is inadequate, but that the funding system is not rationally related to legislatively required content and assessment standards. Having legislatively established educational content and assessment standards, a system that does not provide an equal opportunity for all students to succeed in learning the required content may, under *Serrano I and II*, be viewed as violating the equal protection guaranty.

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[9] As the Court of Appeal in *O'Connell* made clear:

> There is no controversy about the fundamental issues of public policy implicated in the case now before us. The parties and amici curiae unanimously agreeas do we-that all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society. Nor is there any genuine disagreement that California's public education system has fallen short of achieving that goal in recent decades, as the Legislature and the Governor have both recognized.

The Court believes that it and the reviewing courts will be better able to focus on this critical question if it is more clearly framed in a revised complaint. For these reasons, the demurrer to the third cause of action in both complaints is SUSTAINED WITH LEAVE TO AMEND.

**Motion to Strike**

In light of the above rulings, defendants' motion to strike is DROPPED as moot.

**Requests for Judicial Notice**

All parties' requests for judicial notice are GRANTED. The Court notes, however, that "although courts may notice official acts and public records, we do not take judicial notice of the truth of all matters stated therein. The taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom." (*People v. Castillo* (2010) 49 Cal.4th 145, 157 [internal citations and quotation marks omitted].)

**Conclusion**

Plaintiffs and intervenor may file and serve amended complaints, consistent with this order, on or before February 14, 2011. In preparing any amended

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(*O'Connell, supra*, 141 Cal.App. 4th at p. 1482 [footnotes omitted].)

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pleadings, plaintiffs and intervenor are advised 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.

Date: January 14, 2011

Steven A. Brick
Judge of the Superior Court