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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHAYA LOFFMAN and JONATHAN LOFFMAN, on their own behalf and on behalf of their minor child M.L.; FEDORA NICK and MORRIS TAXON, on their own behalf and on behalf of their minor child K.T.; SARAH PERETS and ARIEL PERETS, on their own behalf and on behalf of their minor child N.P.; JEAN & JERRY FRIEDMAN SHALHEVET HIGH SCHOOL; and SAMUEL A. FRYER YAVNEH HEBREW ACADEMY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF EDUCATION; TONY THURMOND, in his official capacity as Superintendent of Public Instruction; LOS ANGELES UNIFIED SCHOOL DISTRICT; and ANTHONY AGUILAR, in his official capacity as Chief of Special Education, Equity, and Access,

Defendants.

Case No. 2:23-cv-01832-JLS-MRW

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO LOS ANGELES UNIFIED SCHOOL DISTRICT AND ANTHONY AGUILAR'S MOTION TO DISMISS PER F.R.C.P. 12(b)(6)

Judge :	Hon. Josephine L. Staton
Hearing Date:	July 21, 2023
Time:	10:30 a.m.
Courtroom:	8A

Judge: Hon. Josephine L. Staton

Complaint Filed: March 13, 2023

Trial Date: None

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs concede, without argument, this case is precluded by sovereign immunity. They nonetheless argue extensively over the merits of the Motion to Dismiss. However, these arguments fail as Plaintiffs have failed to allege facts to support standing or a violation of the Free Exercise Clause or the Equal Protection Clause. Instead, the facts alleged demonstrate that Plaintiffs have failed to state a claim and the Motion is properly granted.

Despite the procedural failings, Plaintiffs assert they have stated claims under the Free Exercise Clause and the Equal Protection Clause. Not so.

> "[T]there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.); emphasis in original.

The issues presented here are not about private speech. Instead, Plaintiffs seek to compel the State and the District to provide public education through Plaintiff Schools (or other religious schools). There can be no question by their action to compel the District to meet its FAPE obligations by contracting with religious institutions for instruction and related services. Plaintiffs seek to impose government speech endorsing religion which the Establishment Clause forbids. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). Plaintiffs concede this point as alleged in the complaint. ECF, Dkt. No. 1, ¶76 [The goal of the School Plaintiffs is to "provide a distinctively Orthodox Jewish education to children with disabilities" and that "the inculcation and transmission of Jewish religious beliefs and practices to children is

the very reason that Shalhevet and Yavneh exist"]; *see also* ECF, Dkt. No. 1, ¶¶152, 177.

Yet, "[p]ublic schools may not provide religious instruction,… schools may not observe holidays as religious events, nor may schools promote or disparage such observance by students." Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, U.S. Department of Education, May 15, 2023, Section III.B. Plaintiffs nonetheless ask the District to have religious schools stand in its shoes to meet its obligation to provide FAPE. Cal. Educ. Code § 56365(b) [students placed in an NPS by its LEA are "deemed to be enrolled in public schools" for such purposes]; 34 C.F.R. § 300.325(c) [where placement in a private institution "by the state," responsibility for carrying out the IDEA "remains with the public agency" that placed the child]; 34 C.F.R. § 300.147; 20 U.S.C. § 1412(a)(10)(B)]. Just as the District may not provide religious instruction, nor may it place an eligible student in a private school that provides religious instruction in order to meet the District's obligation to provide FAPE.

Notably, while Plaintiffs assert that the "barrier" to a public benefit is the nonsectarian provision of the State regulations, even removal of that provision will not change the outcome. The State regulations implement the IDEA. The federal regulations of the IDEA, which are not challenged here, prohibit states from using IDEA funds to provide religious and cultural instruction. (*M.L. v. Smith*, 867 F.3d 487, 495-98 (4th Cir. 2017), cert. denied, 138 S. Ct. 752 (2018); 34 C.F.R. § 76.532(a)(1) [prohibits states from "us[ing] its grant or subgrant to pay for …[r]eligious worship, instruction, or proselytizing."]; see also, *Peck ex rel. Peck v. Lansing Sch. Dist.*, 148 F.3d 619, 629 (6th Cir. 1998) ["the IDEA has a secular purpose and its primary effect is one that does not advance religion."].) Because federal law precludes the use of IDEA funds as requested by Plaintiffs, there is no changed outcome without the challenged regulation.

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In an effort to shoe horn Plaintiffs' claims into matters governed by favorable caselaw, Plaintiffs seek to morph this case into one involving denial of benefits based upon religious discrimination - but that is not this case. Plaintiffs here are not denied any direct benefit – they acknowledge that those Plaintiff Students eligible for special education services have received same at no cost to parents. ECF, Dkt. No. 1, ¶¶93, 118. While each Plaintiff adds a single sentence conclusion that they are denied FAPE, they tie this to a failure to be placed at a Jewish Orthodox private school rather than any failure to provide FAPE as required by the IDEA. ECF, Dkt. No. 1, ¶¶108-112, 130-149. This is apparently intentional to avoid the inescapable conclusion that some or all of the educational remedy sought in this litigation may be obtained through the administrative due process mandated by the IDEA – a fact that requires exhaustion of the process. 34 C.F.R. § 300.507(a). These facts do not support their claims and their cited case law has no application. This case is properly dismissed.

II. ARGUMENT

A. Plaintiffs' Recognition of the Application of Sovereign Immunity Must Lead to The Dismissal of the Complaint

In a footnote, Plaintiffs acknowledge that binding precedent in the Ninth Circuit requires a finding that sovereign immunity prevent Plaintiffs' claims. ECF, Dkt. 37, p. 12. Plaintiffs offer no argument to refute the application of sovereign immunity as a bar to their claims.

Under the Eleventh Amendment to the United States Constitution, a state is not subject to suit in federal court. U.S. Const. Amend. XI; *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). In *Belanger v. Madera Unif. Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), the Ninth Circuit held that California school districts are arms of the State of California, and thus enjoy Eleventh Amendment immunity. *Id.*, at 251-52. And in 2017, the Ninth Circuit reaffirmed its holding that California school districts are arms of the State with Eleventh Amendment immunity, after

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changes to the California Education Code. *Sato v. Orange Cty. Dep't of Educ*., 861 F.3d 923 (9th Cir. 2017); see also *Glenn v. Cal. Dep't of Educ.*, 709 F. App'x 499 (9th Cir. 2018). Plaintiffs specifically concede that these cases would prohibit Plaintiffs' claims against the District.

Plaintiffs' claims fit squarely within the District's sovereign immunity. While Plaintiffs' subsequent list of causes of action references the constitutional provisions without mention of section 1983, the First and Fourteenth Amendments are not self-enforcing and require section 1983 to bring a suit against state actors. 42 U.S.C. § 1983. The Ninth Circuit has held—multiple times—that California school districts enjoy Eleventh Amendment immunity against section 1983 claims. *Sato*, 861 F.3d at 927 (affirming dismissal of section 1983 claim based on immunity); *Belanger*, 963 F.2d at 250 (same, but on summary judgment).

Despite acknowledging the binding precedent before them, Plaintiffs nonetheless continue to litigate their claims. Plaintiffs filed a 38 page opposition brief despite their full awareness that their claims cannot proceed. The Complaint must be dismissed for this reason.

B. Plaintiffs have Not Plead Facts Sufficient To Demonstrate Article III Standing

To overcome the District's arguments regarding Plaintiffs' lack of standing, Plaintiffs rewrite these arguments in order to shoe horn them into existing, favorable case law. In reality, the District has raised a number of concerns regarding Plaintiffs' standing, none of which are dealt through Plaintiffs' mischaracterization.

The "irreducible constitutional minimum of standing" requires three elements: 1) an injury in fact, 2) a causal connection between the injury and the conduct complaint of, and 3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The second element, the causal connection, requires that this injury be "fairly…trace[able] to the challenged action of the defendant, and

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not…the] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Finally, Plaintiffs must show a likelihood, as opposed to mere speculation, that the injury will be "redressed by a favorable decision." *Id*. at 38, 43.

The Opposition fails to demonstrate that the Plaintiffs satisfy these elements.

1. Plaintiffs Have Failed to Prove Injury In Fact Even If A Lower Standard Applies

An injury in fact is an "invasion of a legally protected interest" that is both "concrete and particularized" as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, *supra*, at 560, quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Plaintiffs do not attempt to refute the District's lengthy demonstration that each of the Plaintiffs do not meet this standard. Rather, Plaintiffs seek to utilize a lower standard in cases involving discriminatory burdens on a public benefit. However, even if this standard applies, which Defendants dispute, Plaintiffs are still unable to meet this lowered standing standard.

In some instances, injury in fact may be demonstrated by a showing that an obstacle or exclusion has prevented equal access to a public benefit. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666, (1993) ("*AGC*"). The Supreme Court in *AGC* made it clear that in certain cases, the proof required to demonstrate standing is altered. According to Plaintiffs, *AGC* stands for the proposition that the "denial of equal treatment resulting from the imposition of the barrier" is more than enough for standing." Dkt. 31, p.15, citing to *Bras v. California Pub. Utilities Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995) ("*Bras*"). However, Plaintiffs overreach.

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For one, Plaintiffs are not "prevented equal access to a public benefit." (See discussion, pp. 16-19, *infra*.) Even to accept this premise, these cases may lower the applicable standard, but they do not remove it entirely.

To begin, this lowered standard applies only to equal protections cases. *AGC* and *Bras* are clear that this standard applies due to the specific nature of equal protection cases. "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *AGC,* 508 U.S. at 666. And *Bras* notes that the Supreme Court adopted the Ninth Circuits' "analysis of the injury in fact requirement as it applies *in equal protection cases*." *Bras,* 59 F.3d, at 873; emphasis added. Neither case expands this standard to Free Exercise claims, and Plaintiffs cite to no such case. As Plaintiffs bring only one equal protection count in their Complaint, this standard has only limited applicability. ECF Dkt. 1, ¶¶216-222.

Further, while these cases lower the proof required to demonstrate standing, they do not remove it entirely. Rather, courts have been clear that a plaintiff must still demonstrate that they are ready, willing, and able to receive the benefit in question. In *Bras*, the court stated that despite the standard set out in *AGC*, the plaintiff must still "demonstrate that he is 'able and ready to bid on contracts and that a discriminatory policy prevents [him] from doing so on an equal basis.'" *Bras*, 59 F.3d at 873. However, despite applying this standard, the court analyzed the evidence provided by plaintiff to determine plaintiff "is willing, ready, and able to do work for Pacific Bell in the future should he be given the opportunity. Nothing in the record indicates that this is not so…Pacific Bell was satisfied with Bras's past performance and that it promised to keep his information on file and to consider him when Pacific Bell reevaluates its needs." *Id*., at 874. Further, the court looked to any reasons plaintiff would be prevented from taking the opportunity in the future. "There is no evidence in the record indicating that the settlement with

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Pacific Bell prevents Bras from competing for future contracts... Given all of this evidence, we cannot assume that Bras would suffer no future injury by the ongoing implementation of the program." *Id*. Similarly, in *Gurrola v. Duncan*, 519 F. Supp. 3d 732, 739 (E.D. Cal. 2021), the court applied the lower standard set out in *AGC* to a plaintiff's claim that a rule stating that an EMT certification applicant could not have a past felony improperly prevented him from seeking certification as an EMT. The court then moved on to determine whether plaintiff "was "able and ready" to apply if he were not barred based on his felonies." *Id*.

As such, Plaintiffs cannot simply rely on the standard in *AGC* in its entirety as to its equal protection claim – they must still make a factual showing as to whether they are "able and ready" to accept the benefit at issue. Each of the Plaintiffs have failed to meet this standard.

Each of the Student Plaintiffs must demonstrate that, barring the nonsectarian requirement for NPS certification, each of the Student Plaintiffs is "able and ready" to accept placement at an NPS. They have not done so. To begin, the Complaint incorrectly assumes that M.L.'s medical diagnosis of autism necessarily qualifies him as a child with a disability under the IDEA, but a medical diagnosis is insufficient. ECF, Dkt. No. 29, p. 21. As such, M.L. has not demonstrated that they are even eligible for placement under the IDEA. The Loffmans' claim to standing fails for the same reason. *Id*. K.T. and N.P. currently attend comprehensive public middle schools in the Los Angeles Unified School District ("LAUSD"), and the Complaint pleads no facts demonstrating that their IEP teams have sought placement at an NPS or are otherwise entitled to seek such placement. ECF, Dkt. No. 29, pp. 22-23. As a child may only be removed from a regular educational environment "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," K.T. and N.P. are not "able and ready". 20 U.S.C. § 1412(a)(5)(A).

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Similarly, School Plaintiffs cannot establish they are "able and ready" to be certified as an NPS. For one, School Plaintiffs have alleged nothing more than a conclusory statement and offer no facts to demonstrate the ability to meet any of the criteria even aside from the nonsectarian requirement. For example, School Plaintiffs have made it clear that they would serve only "Jewish children with disabilities," which would directly conflict with the state non-discrimination requirements. Cal. Educ. Code § 220; ECF, Dkt. No. 29, p. 25. Additionally, an NPS must provide a "standards-based curriculum" with "standards-focused instructional materials" that implements a student's IEP, and the Complaint states only that the Plaintiff Schools provide a "distinctively Orthodox Jewish education to children with disabilities." Cal. Educ. Code §§ 56366(a)(5), 56366.1(j), 56366.10(b); ECF, Dkt. No. 29, pp. 25-26. Nor do School Plaintiffs allege they have staff competent to meet the State's requirements for serving students with disabilities as required by law. Cal. Educ. Code § 56366.10; Cal. Code Regs. title 5, § 3001(a); see also, discussion pp. 18-19, *infra*, Plaintiffs are not "otherwise eligible" to receive a public benefit.

Plaintiffs have failed to demonstrate an injury in fact, even as to equal protection where the lower standard applies.

2. Plaintiffs Have Not Shown That Their Injury is Traceable to the District Nor Redressable

In addition to demonstrating injury in fact, Plaintiffs must show that the injury is traceable to the District and that the injury is redressable. Plaintiffs must show that the injury is "fairly…trace[able] to the challenged action of the defendant, and not…the] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

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Plaintiffs cannot escape the lack of District involvement in the certification process. The District did not create the NPS certification requirements (Cal. Educ. Code § 56366), it does not process NPS certification requests through forms provided by the CDE (Cal. Educ. Code § 56366.1(a)), nor is responsible for waiver of any NPS certification requirements. Cal. Educ. Code § 56366.2(a). The District's role is to contract with a certified NPS for the provision of FAPE, which is simply not traceable to the injury at play in the Complaint.

Plaintiffs assert without support that providing input is insufficient – yet this is not alleged. And, while the District may have an opportunity to seek a waiver in general, that is not the case here as no action has been taken by Plaintiffs – or alleged - to even prompt consideration of a potential waiver.

The District not only has no role in the certification process, it also has no certified NPS before it to contract with. Plaintiffs' assert that the injury is traceable to the District because, in theory, the District has the ability to "provide input on all required components of the application." ECF, Dkt. 37, p. 19, citing to Cal. Educ. Code § 56366.1(b)(1). But no such application is before the District – indeed, the Plaintiffs concede they have not submitted an application. ECF, Dkt. 1, ¶¶156, 166; ECF, Dkt. 37, p. 11 Nor have Plaintiffs explained how the District is able to prevent the injury alleged simply by providing input. Plaintiffs also allege that the District's ability to petition for a waiver of the nonsecular requirement is sufficient to demonstrate traceability, going so far as alleging without supporting facts that the District is "unwilling." But the District is not the party to decide upon a waiver – the state Superintendent of Public Instruction is. Cal. Educ. Code § 56366.2(a) Further, the District cannot be said to be unwilling when it has been given no opportunity to decide whether petition for waiver of this requirement, because School Plaintiffs have not sought certification.

Plaintiffs' hyperbolic example is instructive, although not for their claimed purpose. "Were CDE to implement a policy requiring race-based discrimination in

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violation of the Constitution, LAUSD would not, and could not, escape liability by pleading unquestioning obedience to the law." ECF, Dkt. 37, p. 20. In both the example given and the Complaint, Plaintiffs assume the District would act in a certain manner, resulting in an injury to Plaintiffs. But the District has taken no action because no opportunity to do so has been offered. As such, the injury – to the degree it can exist without action - cannot be traced to the District.

Plaintiffs must also show a likelihood, as opposed to mere speculation, that the injury will be "redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 at 38, 43. Plaintiffs argue that they "are not asking for the Court to "compel" the parties to enter into a contract; they simply ask this Court to remove the unconstitutional barrier that prevents them from negotiating a contract with *any* LEA, including LAUSD, merely because they are religious." ECF, Dkt. 37, p. 20. While this may address Plaintiffs' interest in a favorable interest against CDE, it does not explain how a favorable decision against LAUSD will benefit Plaintiffs. As laid out in detail, the District did not create the nonsectarian requirement and it does not enforce it. As such, Plaintiffs have not demonstrated any redressability.

Where Plaintiffs' claims are not traceable to the District, nor would a favorable decision provide redress, Plaintiffs have failed to plead facts sufficient to establish Article III standing.

C. Plaintiffs Do Not State a Free Exercise Clause Violation

"Public schools may not provide religious instruction… schools may not observe holidays as religious events, nor may schools promote or disparage such observance by students." *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, U.S. Department of Education, May 15, 2023, Section III.B. Nor may states "use its grant or subgrant to pay for …[r]eligious worship, instruction, or proselytizing." 34

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C.F.R. § 76.532(a)(1).[1]

The issues presented here are not about private speech. Instead, Plaintiffs seek to compel the State and the District to provide public education through Plaintiff Schools (or other religious schools) to meet their desire for a religious education. There can be no question that to remove the nonsectarian "barrier" with the premise to compel the District to contract with religious institutions for instruction and related services for eligible students with disabilities, Plaintiffs seek to impose government speech endorsing religion. This, the Establishment Clause forbids. It is well recognized that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." (*Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).) Plaintiffs concede this point as alleged in the Complaint. ECF, Dkt. No. 1, ¶¶76, 152, 177.

Plaintiffs disregard the fact that a NPS stands in the shoes of the District and must provide a public education consistent with that of the District. Cal. Educ. Code § 56365(b) [students placed in an NPS by its LEA are "deemed to be enrolled in public schools" for such purposes]; 34 C.F.R. § 300.325(c) [where placement in a private institution "by the state," responsibility for carrying out the IDEA "remains with the public agency" that placed the child]; 34 C.F.R. § 300.147; 20 U.S.C. § 1412(a)(10)(B)]; Cal. Educ. Code § 56366.10 [NPS must provide pupils in kindergarten through eighth grade with state-adopted, standards-based core curriculum, and instructional materials and provide pupils from ninth through twelfth grade with standards-based, core curriculum, and instructional materials used by any LEA that contracts with the NPS]; Cal. Educ. Code § 56366.1(n),

[1] Notably, federal IDEA regulations prohibit states from use of funds for religious instruction. Plaintiffs do not challenge this regulation (or the California Constitution) and the State and District will be bound by it regardless of the status of the State regulation challenged in the Complaint.

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Cal. Code Regs. title 5, § 3064(a) [the NPS's administrators and staff must "hold a certificate, permit, or other document equivalent to that which staff in a public school are required to hold."]; Cal. Code Regs. title 5, § 3070 ["the public education agency which developed the IEP shall award the diploma."]

Moreover, Plaintiffs do no refute that the IDEA has already been interpreted to: 1) preclude use of IDEA funding for religious instruction, and 2) affords no duty for LEAs to provide religious and cultural instruction when making a private placement. *M.L. v. Smith*, 867 F.3d 487, 495-98 (4th Cir. 2017), cert. denied, 138 S. Ct. 752 (2018). Plaintiffs' cited case law does not refute these holdings. In fact, *M.L.* involved a disabled student whose family sought placement in an Orthodox Jewish private school as part of the IEP process. The court found that the IDEA creates no duty to consider religious or cultural instruction in developing an IEP citing the fact that it is not required in the statute, it is contrary to the IDEA's prohibition on funding religious instruction, and the intent of the IDEA is "'to open the door of *public education* to handicapped children ...'" (*Id.* at 495; emphasis added.) Just as the District may not provide religious instruction under either state or federal law, neither may an NPS.

1. Supreme Court Precedent Does Not Support Plaintiffs Count I

Plaintiffs rely entirely on *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) ("*Espinoza*"); *Carson v. Makin*, 142 S. Ct. 1987 (2022) ("*Carson*"); and *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 582 U.S. 449 (2017) ("*Trinity Lutheran*") to assert that Parent Plaintiffs have been excluded from advocating for Student Plaintiffs to receive FAPE at an Orthodox Jewish NPS and School Plaintiffs have been excluded from participating as an NPS. However significant the departure from precedent, these cases do not support the alleged violations.

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Espinoza and *Carson* each involved the state's choice to provide direct public benefits to families in order to subsidize private school education by scholarship or tuition. *Trinity Lutheran* involved a grant for playground equipment. Each involve a direct public benefit and none involve the state (via local school district) providing religious instruction for students. These cases do not support Plaintiffs' position that the State regulation which the District is bound by violates the Free Exercise Clause.

a. The State Regulation Does Not Provide a Public Benefit

Espinoza holds, "[a] State need not subsidize private education, but once the State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct at 2261. As established, California has not undertaken to subsidize private schools, religious or otherwise. The issue here is subsumed in the IDEA. Contrary to promoting private education, the intent of the IDEA was "to open the door of public education to handicapped children on appropriate terms…" *M.L. v. Smith*, 867 F.3d at 495. The IDEA does not provide a direct benefit within the meaning of Plaintiffs' cited authority but instead affords eligible students with disabilities access to public education through the local district/LEA's provision of FAPE as defined by federal and state law.

The *Espinoza* Court invalidated a law that provided families with government aid otherwise available to any secular school but expressly prohibited families from using the scholarships at religious schools. *Espinoza,* 140 S. Ct at 2251. This was part of a legislative enactment "to provide parental and student choice in education." *Ibid*. The program had requirements for which "[v]irtually every private school in Montana qualifies." *Ibid*. The *Espinoza* plaintiffs sought to use the scholarship for a Christian school but was blocked by Montana's "no-aid" provision which prevented plaintiffs from using the scholarship for tuition at the Christian school. *Id.*, at 2252. As noted by the Court, the *Espinoza* law was a direct

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benefit to the families such that the "government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." *Id*. at 2253. But California has no such law or regulation.

Like *Espinoza*, *Carson* involved a benefit to families to support the provision of secondary education where the state did not provide such schools. There was no requirement the private schools accept all students, and the "curriculum taught at participating private schools need not even resemble that taught in the Maine public schools." *Carson*, 142 S. Ct. at 1999. The Court in *Carson* called out the fact that "[t]he benefit provided by statute is *tuition* at a public *or* private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education." *Id.*, at 1998-99 (emphasis in original). "Maine has chosen to offer tuition assistance that parents may direct to the public or private schools of *their* choice." *Ibid.* Thus, the statute's nonsectarian requirement violated the Free Exercise and Establishment Clause of the First Amendment because the religious schools were "otherwise eligible" to receive the tuition assistance received through parents.

California has no such program. There is no public benefit entitling a student to placement in an NPS. California's system for provision of special education and services for eligible disabled students mandated by federal law includes, placement at a certified NPS in very limited circumstances where: 1) the LEA cannot otherwise serve the student in conformity with the IEP; 2) the NPS is the least restrictive environment; 3) the NPS is certified to provide instruction based upon state approved curricula and to appropriately provide services on behalf of the school district/LEA in order to meet its obligation to provide a free and appropriate *public* education; and, 4) a contract is entered between the school district/LEA and NPS addressing all requirements of the provision of FAPE on behalf of the school district/LEA.

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Notably, placement in an NPS does *not* enroll the student in the private school – *student remains enrolled in the district*. Cal. Educ. Code § 56365(b) [students placed in an NPS by its LEA are "deemed to be enrolled in public schools" for such purposes]; 34 C.F.R. § 300.325(c) [where placement in a private institution "by the state," responsibility for carrying out the IDEA "remains with the public agency" that placed the child]; 34 C.F.R. § 300.147; 20 U.S.C. § 1412(a)(10)(B)].) Indeed, the NPS must offer the district's curriculum (34 C.F.R. § 300.320(a)(1)(i)) and when a child completes the IEP's prescribed course of study, "the public education agency which developed the IEP shall award the diploma." Cal. Code Regs. title 5, § 3070.

Instead, the State implements the IDEA and in doing so has a variety of requirements to ensure compliance with the IDEA and proper provision of FAPE for eligible students. Notably, and unlike the programs at issue in *Espinoza* and *Carson*, students with exceptional needs receiving services from an NPS in California must have access to the educational materials, services, and programs that are consistent with each student's IEP. In this regard, and consistent with each student's IEP, the NPS must:

- Provide pupils in kindergarten through eighth grade with state-adopted, standards-based core curriculum, and instructional materials. Provide pupils from ninth through twelfth grade with standards-based, core curriculum, and instructional materials used by any LEA that contracts with the NPS.
- All pupils should have their own individual copy of textbooks and other instructional materials used to support the standards-based core curriculum in each subject taught for each grade level as required by the California Education Code.
- Provide access to college preparation courses.
- Provide extracurricular activities, such as art, sports, music, and academic clubs.
- As appropriate, provide career preparation and vocational training, consistent with transition plans pursuant to state and federal laws.

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- As appropriate, provide supplemental assistance, including individual academic tutoring, psychological counseling, and career and college counseling.

Cal. Educ. Code section 56366.10; Cal. Code Regs. title 5, § 3001(a). Additionally, the NPS's administrators and staff must "hold a certificate, permit, or other document equivalent to that which staff in a public school are required to hold." Cal. Educ. Code § 56366.1(n); Cal Code Regs. title 5, § 3064(a). The NPS must also enroll all eligible students without discrimination. Cal. Educ. Code §§ 220, 234.1; 42 U.S.C. §§ 2000d-2000e-17, 2000h-2000h-6. This is all to ensure that the NPS is serving the District's students properly and providing the *public education* consistent with what students would receive in the public school. There is no direct benefit being denied as in *Espinoza, Carson or Trinity Lutheran*.

b. Plaintiffs Do Not and Cannot Allege They Are "Otherwise Eligible"

In addition to not meeting the public benefit prong, Plaintiffs have not and cannot establish they are otherwise eligible recipients. The *Espinoza* Court states, "…*Trinity Lutheran* distilled these and other decisions to the same effect into the 'unremarkable' conclusion that disqualifying *otherwise eligible recipients* from a public benefit 'solely because of their religious character' imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza*, 140 S. Ct. at 2255 citing *Trinity Lutheran*, 582 U.S. at 2021; emphasis added.

But that is not the case here – while the State precludes nonsectarian schools from certification, neither Plaintiffs nor Plaintiff Schools are "otherwise eligible" for a State benefit. Plaintiff Students have alleged no facts supporting an entitlement to placement at an NPS and to the degree they are entitled to "benefits" under the IDEA they have admittedly received same.

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The Peretses' child, N.P., is now 14 years old, in grade 7, and has been attending public school in LAUSD. ECF, Dkt. 1, at ¶93. N.P. has been "placed in classes with peers that the Peretses believe operate at a lower level of functioning than N.P." (*Id*., at ¶135), and that "[s]ince N.P. was removed from a mainstream setting, his academic progress and his speech development has regressed." *Id*., at ¶136. However, even if accepted as true, it does not entitle N.P. to placement in a NPS. The least restrictive environment requirement would preclude placement in a NPS and there is no allegation that the Peretses have sought such placement and been denied.

The same is true for the Taxons' child, K.T., who is now 14 years old, in grade 8, and has attended a public elementary school and a public middle school in LAUSD, and currently attends a public charter school within LAUSD. *Id*., ¶104. The Complaint does not allege that K.T.'s disability is so severe that no available public program would be appropriate. To the contrary, it alleges that "from kindergarten through eighth grade, K.T. has received a mainstreamed classroom education in public school" and that LAUSD has provided, through its IEP, "a full-time aide, a supervisor for the aide, speech and occupational therapists, adaptive physical education, resource specialists for English and math, and a private reading tutor." *Id*., ¶¶105-107. Moreover, there is no allegation that the Taxons have sought placement at an NPS and been denied.

Lastly, the Loffmans do not allege that they have even asked LAUSD for an IEP for M.L., or that they have otherwise explored eligibility for M.L. *Id*., ¶¶85-90. Thus, the Loffmans do not allege facts to demonstrate eligibility or entitlement to placement in any NPS. None of the Plaintiff Students are otherwise eligible to be placed in an NPS and none have alleged they have pursued the administrative process to challenge their placement and/or services as required under the IDEA.

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c. Plaintiff Schools Do Not and Cannot Allege They Are "Otherwise Eligible"

Nor have Plaintiff Schools alleged facts to demonstrate they meet any of the criteria for NPS certification so as to be an "otherwise eligible recipient." The Complaint's only reference to such requirements is the vague and conclusory allegation that the Schools "either otherwise meet[] or [are] capable of meeting California's other certification requirements to become an NPS." ECF, Dkt. 1, ¶¶156, 166. But this is insufficient to demonstrate Plaintiff Schools meet the criteria for certification as an NPS. Nor can the Schools make adequate allegations considering their admission that they have no intention of serving non-Orthodox Jewish students, will not teach the State curriculum and District text, and intend to offer instruction that will indoctrinate or inculcate students with religious beliefs. The Schools are "Orthodox Jewish schools." *Id.*, ¶3. They say that they exist to provide a religious Jewish education to students (*Id.*, ¶¶31, 33) – the "primary goal" of which is "the study of the Torah[,]" which is to the Schools "itself a form of religious worship" *Id.*, ¶71. The Schools allege that they "help parents to meet their obligation to provide Jewish education to their children[,]" and that "inculcation and transmission of Jewish religious beliefs and practices to children is the very reason that [they] exist." *Id.*, ¶76.

Significantly, the Plaintiff Schools allege that they seek to qualify as an NPS not because they are qualified to serve students with significant disabilities but in order to provide a Jewish religious education to children. *Id.*, ¶¶32, 34, 152, 154, 162, 170. But even removal of the nonsectarian requirement would not allow the Schools to ignore the State's public (and secular) curricular standards and instructional materials and to, instead, provide their own religious education to publicly-placed students. Cal. Educ. Code § 56366.10; Cal. Code Regs. title 5, § 3001(a); Cal. Educ. Code § 56366.1(n); Cal. Code Regs. Title 5, § 3064(a); Cal. Educ. Code §§ 220, 234.1; 42 U.S.C. §§ 2000d-2000e-17, 2000h-2000h-6. The

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Schools have not and cannot allege that Plaintiffs can or would meet any of the criteria for certification and are therefore not "otherwise eligible" recipients.[2]

The public benefit programs available in *Espinoza*, *Carson*, and *Trinity Lutheran* were devoid of any criteria, were either funded through parents or did not involve secular instruction, and the schools did not stand in the shoes of the state/local district for provision of public education. These factors were central to the Court's determination that the secular requirement for use of the "generally available benefits" (scholarship/tuition) required strict scrutiny and ran afoul of the Free Exercise Clause. These cases have no application where, as here, Plaintiffs are not otherwise eligible recipients for State benefits.

2. Supreme Court Precedent Does Not Support Plaintiffs' Count II and III

Plaintiffs fail to establish a "system of exemptions" as set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) ("*Lukumi*"), *Fulton*, or *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) ("*Tandon*"). In each of these cases the government sought to regulate religious activity. There is no such regulation at issue here.

In *Lukumi*, the ordinances at issue were enacted to specifically target a particular religion and its practice of sacrificing animals. However, the ordinances allowed for a variety of other animal killings and therefore were found to be not of general applicability and the city's interest in did not justify the targeting of religious activity. *Lukumi*, 508 U.S. at 546-547.

In *Fulton*, the government contract's nondiscrimination provision precluded

[2] Plaintiffs argue at p. 25 that the District can be compelled to contract with religious entities citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2022) ("*Fulton*"). While the Court found fault with the provision at issue finding it included "a formal system of entirely discretionary exceptions," which rendered the contractual nondiscrimination requirement "not generally applicable," The Court did not mandate the parties' contract. (*Ibid*.)

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the city from contracting with religious organizations unless they agreed to certify same sex couples as foster parents. The Court held that the provision included "a formal system of entirely discretionary exceptions," which rendered the contractual nondiscrimination requirement "not generally applicable." *Fulton*, 141 S. Ct. at 1878.

In *Tandon*, the state's pandemic restrictions on private gatherings treated comparable secular activities more favorably than religious exercise and afforded a myriad of exceptions and accommodations for secular activities that were not provided to comparable religious activities, triggering strict scrutiny for a violation of the Free Exercise Clause." *Tandon*, 141 S. Ct. at 1298.

Here, the State does not purport to regulate religious activity nor are religious schools comparable to public schools. Plaintiffs rely upon the waiver process as some sort of unfettered discretion to argue the regulation is not neutral. Not so. And while the State Board may have discretion, Plaintiffs cite no authority for the proposition that the District has any authority with regard to the approval of waivers. Nor have they alleged any *facts* to establish a target on religious practices or that secular activities are treated more favorably than religious exercise or are afforded a myriad of exceptions and accommodations that were not provided to comparable religious activities. As such, these authorities do not support the argument that the District violates the Free Exercise Clause by permitting individualized and categorical exemptions.

3. The District Does Not Violate the Free Exercise Clause by Infringing on Plaintiffs' Right to Direct the Education of Children (Count VI)

Plaintiffs rely upon *Wisconsin v. Yoder*, 406 U.S. 205 (1972) ("*Yoder*") and *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) ("*Smith*") to assert that Plaintiffs are denied their right to direct their child's education. This, again, overstates the caselaw. Certainly, parents have a long

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recognized right to direct the child's education as recognized in the *Meyer-Peirce* line of cases referenced by Plaintiffs. However, it is equally recognized that the right has limitations and does not afford parents a right to a state funded religious education. Parental right is limited to their choice of educational forum itself - public or private – not the administration of the public school, the decisions made by publicly elected school boards, or the content of the educational program. As the Ninth Circuit held in *Fields v. Palmdale Unified School District*, 427 F.3d 1197, 1206 (2005):

> While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.' "(citations omitted) (emphasis in original). *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005).

This holds true here. Plaintiffs may choose to enroll in a private school but enrollment in the public school is required, among other things, for consideration of NPS placement for eligible students with disabilities. As explained, a student placed at a NPS is deemed enrollment in the public school district with *placement* at the NPS – the NPS stands in the shoes of the school district. And, as explained in *Fields*, issues of public education are generally "committed to the control of state and local authorities." This includes where to place a student to provide FAPE.

Contrary to Plaintiffs' assertion that "private individuals make independent choices concerning a child's placement that determine where IDEA funds flow," private individuals *do not* make such determinations. While LEAs must include parents and consider their views, the LEA is responsible for providing FAPE and must abide by the IDEA's "least restrictive environment" rules; and can ultimately disagree with the parents about IEP specifics, including placement in an alternative

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setting. *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1134 (9th Cir. 2021) (reaffirming that the law "does not require school authorities automatically to defer to [parents'] concerns" and that school authorities can listen, consider and "just disagree[]."); *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131-33 (9th Cir. 2003) (recognizing that school districts and a pupil's parents may have "a difference of educational philosophy," but that "districts have expertise in educational methods that may be given appropriate weight in addressing an IEP's compliance with the IDEA" and that a district "has no obligation to grant [the pupil's parents] a veto over any individual IEP provision."); *K.M. v. Tustin Unified Sch. Dist.*, 775 F.3d 1088, 1101 (9th Cir. 2013), cert. denied, 571 U.S. 1237 (2014) (IEP development under the IDEA "does not require that parental or child requests be assigned 'primary' weight.")

And LEAs are entitled to great deference: courts "are not free to substitute [their] own notions of sound educational policy for those of the school authorities which [they] review.'" *Capistrano Unified Sch. Dist.*, 21 F.4th at 1132. Rather, courts "must defer" to the school authorities' "'specialized knowledge and experience' by giving 'due weight' to the decisions of the states' administrative bodies." *Ibid.*

Though *Yoder* was overruled in *Smith*, *Yoder* does not hit the mark.[3] In *Yoder*, the Supreme Court held that a state criminal statute that required parents to send their children to public or private school infringed on the religious liberties of Amish parents whose beliefs did not permit their children to attend the last two years of secondary school. Here, Plaintiffs point to no regulation of Plaintiffs' religious beliefs or practices nor any action preventing Plaintiffs from enrolling in a public school or a private school of their choice. Plaintiffs take issue with the costs

[3] The Supreme Court in *Smith*, 494 U.S. 872, (1990), overruled *Yoder*. *Ruiz-Diaz v. U.S.*, 703 F.3d 483, 486 (2012). *Smith*, by its own terms, is limited to unemployment matters. *Smith* at 885.

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of the religious education which may be undesirable for Plaintiffs but it does not reflect government conduct infringing their right to enroll in a private school of their choosing.

And, of course, the District and State have a compelling interest in ensuring compliance with federal law and the provision of FAPE to eligible students. As explained, a NPS stands in the shoes of the District with the District holding responsibility and liability for the provision of FAPE – this is not an arm's length relationship. Just as Plaintiffs assert the right to choose a private or public school option, a family that has enrolled their student in the District is entitled to be placed in a *public school*. To follow Plaintiffs' lead, a family would be placed in a school espousing religion endorsed by the government which is directly contrary to the Establishment Clause. All District schools are precluded from violating the Establishment Clause regardless of whether it is a contracted NPA delivering instruction and services.

As the court said in *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968), there "can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." Thus, under *Epperson*, the state is required to plan its curriculum on the basis of educational considerations and without reference to religious considerations.

D. Plaintiffs Do Not State An Equal Protection Violation

Plaintiffs' claims simply do not comply with the basic requirements for a claim for equal protections. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. art. XIV, § 1. Plaintiffs argue that their Equal Protections claim is not premised on the right to participate in the IEP process and accept or decline LAUSD's offer of a FAPE for their child. To do so would be fatal to their case, as they are on equal footing with any member of the

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public as to such a right. 34 C.F.R. § 300.321(a)(1); 34 C.F.R. § 300.9.

Rather, Plaintiffs argue that "the facial discrimination against religious schools prevents Parent Plaintiffs, because they are religious, from advocating for their children to be placed in the NPS that they believe will meet the FAPE requirement—a right available to every other parent." ECF, Dkt. 37, p. 34. However, as described above, the IDEA creates no duty to consider religious or cultural instruction in developing an IEP, as it is contrary to the IDEA's prohibition on funding religious instruction'" *M.L. v. Smith.* at 495. Further, if the Parent Plaintiffs believe FAPE is not being provided, they, like any LAUSD parent of a child with a disability, may reject LAUSD's offer of FAPE, and place their child in a private school, including any private religious school. 20 U.S.C. § 1412(a)(10)(A). Alternatively, Parent Plaintiffs, like any other parent of a child with a disability, may reject the offer of FAPE, place their child in a private school, including a religious private school, and seek reimbursement from LAUSD. 20 U.S.C. § 1412(a)(10)(C)(iii). Finally, if Parent Plaintiffs wish to seek recourse for not receiving a FAPE in their current settings, they can utilize the administrative due process complaint procedures, again in the same footing as any similarly situation parent. 34 C.F.R. § 300.507.

III. CONCLUSION

As Plaintiffs have not pled facts sufficient to support their claims, the District's Motion to Dismiss must be granted.

DATED: July 7, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants Los Angeles Unified School District and Anthony Aguilar, certifies that this brief contains 24 pages, which complies with Judge Staton's 25-page limit for memoranda of points and authorities.

DATED: July 7, 2023

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