ORIGINAL

CIVIL TRACK I
THE HONORABLE JUDGE DIXON

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

T.I., et al.,

Plaintiffs,

v.

HAROLD DELIA, et al.,

Defendants.

NO. 90-2-16125-1

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Noted for Hearing:
June 29, 1993; 8:15 a.m.

I. INTRODUCTION/RELIEF REQUESTED

For three years, improper representatives have pursued this case against the wrong parties in the wrong forum. To prevent further wasteful litigation, defendants Love Denton, Donald Felder, and the Seattle School District No. 1 ("Defendants" or "School District") move this Court to dismiss plaintiffs' remaining claims against them in their entirety.

Plaintiffs are juveniles at one time confined at the King County Youth Detention Facility ("KCDF"). Their sole remaining claim in this lawsuit is a "controversy over the statutory and constitutional adequacy of the special education program in detention, especially about the adequacy of the

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funding for it by the Office of the Superintendent for Public Instruction." Plaintiffs' Reply To Defendant Seattle School District's Response to Plaintiffs' Motion For Protective Order Permitting Expert Access to Education Files at 2.

Plaintiffs' claims should be dismissed for three reasons. First, to the extent plaintiffs allege that defendants inadequately operate special education programs, this Court lacks subject matter jurisdiction because plaintiffs failed to exhaust their administrative remedies. Second, to the extent plaintiffs allege defendants inadequately fund KCDF's special education program, they have pursued the wrong party. The School District is not responsible for funding special education. Third, plaintiffs' chosen class representatives, B.I and S.K, have failed to allege any inadequacy with KCDF's special education program and, therefore, have no standing.

II. STATEMENT OF FACTS

The School District operates the KCDF school under a contract with King County imposed by the State. See RCW 28A.58.772-78. The plaintiffs are a class of juveniles confined in the facility. Without ever seeking an administrative remedy, the plaintiffs filed this lawsuit against the School District and the County in King County Superior Court on August 10, 1990.

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Plaintiffs' Complaint alleged that the conditions at the temporary Alder facility, which were primarily the result of overcrowding, violated state laws and infringed on their state and federal constitutional rights. Prior to any real judicial involvement, the parties resolved a dispute concerning the education program in the overcrowded Alder facility and agreed that no youth would be kept from a regular classroom because of a lack of space. Stipulation and Order of Partial Settlement. Thereafter, the plaintiffs went forward with their Motion for Class Certification and their overcrowding and prison condition case against the County. In keeping with this focus on King County, the declarations of class representatives, B.I. and S.K, in support of the Motion for Class Certification, concentrated on the overcrowding and prison condition issue. Thus, at this point, the plaintiffs' concerns with the School District seemed to be resolved. All that remained to tie the School District to the case was one generic paragraph in the Complaint alleging that the School District "failed to provide plaintiffs with adequate educational assessments, opportunities and programs appropriate for their respective levels of development." Complaint ¶ 4.28.

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Only this Spring -- after the new facility was completed and overcrowding was no longer a problem -- did the plaintiffs elect to turn paragraph 4.28 of their Complaint into a special education lawsuit by seeking access to education files of youth detained at KCDF. As this Court is aware, the School District contested plaintiffs' effort to peruse these records both because of the privacy concerns under 20 U.S.C. § 1232g(b)(2), the Family Educational Rights and Privacy Act, and because the discovery request seemed to be a fishing expedition in search of a claim. In response, the plaintiffs did not articulate any specific special education claim. Emphasizing the breadth of discovery in a class action, however, the Court granted plaintiffs' request in part and allowed them access to a limited number of education records. Now that plaintiffs and their experts have reviewed those records and taken three depositions of school employees, they are expected to decide soon whether to pursue paragraph 4.28. It has become manifestly evident, however, that this case should be dismissed for the reasons explained below.

III. STATEMENT OF ISSUES

A. Should the Court dismiss a class action for lack of subject matter jurisdiction where neither class representative has exhausted available administrative remedies?

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B. Should the Court dismiss funding claims against the School District where the District is not legally responsible for funding special education programs?

C. Should the Court dismiss plaintiffs' claim that the special education program is inadequate where the named class representatives have alleged no personal injury from special education inadequacies and, therefore, have no standing to sue?

IV. LEGAL ARGUMENT

A. PLAINTIFFS CLAIMS MUST BE DISMISSED BECAUSE THEY FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES

Washington's special education system accords parents and guardians ("parents") significant rights concerning their children's education. For example, parents have the right to receive notice of any change in their child's special education program, WAC 392-171-521, to examine their child's educational records, WAC 392-171-596, and to obtain an independent educational assessment paid for by the State if the parent disagrees with the School District's assessment. WAC 392-171-371

A primary right granted parents under this regulatory scheme is the right to a due process hearing to seek review of any decision concerning their child's special education status or program. If a parent requests the School District to take

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some action regarding his or her child and the District refuses, the parent has the right to a hearing to challenge the appropriateness of the School District's refusal either to initiate or to change: (i) the identification of the student; (ii) the assessment of the student; (iii) the educational placement of the student; or (iv) the provision of special education and related services to the student.[1] WAC 392-171-531(b). The hearing officer's decision may be appealed to superior court. WAC 392-171-561.

"The doctrine of exhaustion of administrative remedies is well established in Washington. The rule provides that '[i]n general[,] an agency action cannot be challenged on review until all rights of administrative appeal have been exhausted.'"[2] Hollywood Hills Citizens v. King County, 101

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[1]The hearing is conducted at the State's expense by an administrative law judge who is not an employee of the School District involved in the dispute. WAC 392-171-536.

[2]The exceptions to this rule are limited and are not satisfied in this case. A party may bypass his or her administrative remedies only if (1) resort to agency review would be futile; (2) administrative remedies would be inadequate; or (3) the agency has adopted a general policy or pursued a practice that is contrary to the law, the challenged conduct involves a pure question of law, and the interest in affording the agency an opportunity to correct any deficiencies is insubstantial.

Plaintiffs can satisfy none of these limited exceptions. First, the futility exception to the exhaustion doctrine applies only "in rare factual situations." Dils v. Department of Labor & Indus., 51 Wn. App. 216, 752 P.2d 1357 (1988) (citing Orion Corp. v. State, 103 Wn.2d 441, 458, 693 P.2d

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Wn.2d 68, 73, 677 P.2d 114 (1984) (citing Spokane County Fire Protection Dist. 9 v. Spokane County Boundary Review Bd., 97 Wn.2d 922, 928, 652 P.2d 1356 1982)). Because an administrative remedy exists for parents to challenge special education decisions, parents must pursue this administrative process before bringing a court action. See Magruder v. Bellingham Sch. Bd., 19 Wn. App. 628, 576 P.2d 1340 (1978). Failure to exhaust administrative remedies divests the Court of subject matter jurisdiction and results in dismissal of the lawsuit. Id.

The exhaustion principle is based on the notion that the courts should defer, at least preliminarily, to agencies possessing special expertise in a given area. Id. Courts have recognized that this principle is especially important in

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1369 (1985)). Plaintiffs can put forth no facts establishing futility, nor did they plead futility in invoking this Court's jurisdiction. See G.C. v. Coler, 673 F. Supp. 1093, 1096 (S.D. Fla. 1987) (futility must be alleged in complaint). Second, administrative remedies are not inadequate simply because "the complaint is structured as a class action seeking injunctive relief . . . ." Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1308 (9th Cir. 1992). Finally, plaintiffs cannot overcome the severe restrictions of the third exception. This dispute does not involve a pure question of law, the agency's interest in making the factual determinations required in this case is not insubstantial, see infra note 3, and plaintiffs never have specifically alleged any School District policy or practice that they believe is contrary to the law. Simply "[s]tructuring a complaint as a challenge to policies . . . does not suffice to establish entitlement to a waiver of the . . . exhaustion requirement." Id. at 1304.

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the education context. In Magruder, the Court of Appeals noted:

> The school board regulations are authorized by statute . . . . Their purpose is to resolve disputes of this type simply and quickly without turning every grievance into a lawsuit. It is a reasonable and desirable provision. Courts are and should be last resorts in resolving simple disputes about policies of day-to-day school operations. [S]chool administrators and not courts should first administer school programs.

Id. at 630.

Similarly, in Hoeft v. Tucson Unified School District, 967 F.2d 1298 (9th Cir. 1992), the Ninth Circuit stated as to the parallel federal scheme:

> Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.

Id. at 1303.[3]

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[3] See also Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988) (education is "primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("Judicial imposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities.").

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This exhaustion requirement is no less important simply because plaintiffs chose to fashion their case as a class action. See Dils v. Department of Labor & Indus., 51 Wn. App. 216, 752 P.2d 1357 (1988); see also Hoeft, 967 F.2d at 1308, 1309 ("the mere fact the complaint is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion," "[a]dministrative remedies are not inadequate simply because a large class of plaintiffs is involved"). Although "each class member need not exhaust before a suit is brought[, u]ntil representative plaintiffs have sought and been denied administrative relief . . ., they have not met an important prerequisite for class-wide judicial intervention." Hoeft, 967 F.2d at 1309.

Plaintiffs here claim that the School District's special education program at KCDF is inadequate. However, it is undisputed that neither B.I. nor S.K., the class representatives, ever attempted to pursue their administrative remedies prior to instituting this lawsuit. They never complained to the School District or sought a hearing challenging the alleged inadequate special education program at KCDF. Rather, they chose to forfeit what could have been a simple administrative resolution to their complaints in favor of wasteful and improper litigation in a court without any

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special expertise to render a decision. Because neither B.I. nor S.K. exhausted his or her administrative remedies, the Court must dismiss the remaining class claims against these defendants.

B. PLAINTIFFS FUNDING CLAIMS MUST BE DISMISSED BECAUSE THEY FAIL TO STATE A CLAIM AGAINST THE SCHOOL DISTRICT

As plaintiffs state, the core of their claim against the School District concerns funding for the KCDF special education program. In a recent pleading, plaintiffs characterize their claim as a controversy "especially about the adequacy of the funding for [special education] by the Office of the Superintendent for Public Instruction. " See Plaintiff's Reply to Defendant Seattle School District's Response to Plaintiffs' Motion for Protective Order Permitting Expert Access to Education Files at 2. As the plaintiffs themselves recognize, any claim they have regarding inadequate funding of KCDF's special education program must be pursued against the State Superintendent of Public Instruction, not the School District.

Washington's law regarding special education funding for detention facilities was settled in 1983 when the State

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legislature amended RCW 28A.58.765 et seq.,[4] the Residential Education Programs Act. Prior to this amendment, the counties were responsible for funding education in detention facilities. Tommy P. v. Board of County Comm'rs, 97 Wn.2d 385, 645 P.2d 697 (1982). Following the amendment, the State became wholly responsible for such funding.[5] The amended law imposes no responsibility for funding on the individual school districts. Indeed, school districts are responsible only for expending funds appropriated by the Legislature. RCW 28A.190.030(6).

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[4]RCW 28A.58.765 et seq. was recodified in 1990. The current provision is RCW 28A.190.030(6).

[5]The Legislature amended this provision to clarify the respective duties of the school districts, counties, and the Department of Social and Health Services. See Senate Bill Report, SHB 241, April 5, 1983. The legislative history indicates that a main purpose of the law was to shift the responsibility for funding the detention school programs from the counties to the State. The Fiscal Note included with the legislative history provides that the fiscal impact of the bill on the general State fund was estimated to be almost 1.5 million for the first year. The Fiscal Note further states,

> The Superintendent of Public Instruction budget request for the 1983-85 biennium includes $3.7 million to fund this program. This will replace most of the counties' financial involvement in juvenile detention education programs (they will still provide space, utilities and security). It will also redistribute the tax burden for supporting these programs statewide.

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Because the law imposes no responsibility on the School District to fund special education programs, plaintiffs' claims regarding inadequate funding must be dismissed.

C. THE CLASS ACTION MUST BE DISMISSED BECAUSE B.I. AND S.K. LACK STANDING TO SUE

The well-settled rule that an individual must have a personal claim against a defendant to bring a suit applies with equal force to class actions. General Tel. Co. v. Falcon, 457 U.S. 147 (1982); Washington Educ. Ass'n v. Shelton Sch. Dist., 93 Wn.2d 783, 613 P.2d 769 (1980). A court must determine whether the named plaintiff in a class action has standing independently from whether the class can be certified under Fed. R. Civ. P. 23. Washington Educ. Ass'n, 93 Wn.2d at 790. "[A]n individual named as a party in a class action cannot assert the action merely because the class has a claim if he himself does not." Id. (citing Johnston v. Beneficial Management Corp., 85 Wn.2d 637, 538 P.2d 510 (1975), overruled on other grounds by, Salois v. Mutual of Omaha Ins., 90 Wn.2d 355, 581 P.2d 134 (1978)).

To satisfy the standing requirement, a class representative must show, at a minimum, that (1) he or she personally has suffered some actual or threatened injury as a result of the allegedly improper conduct; (2) the injury can be traced to the challenged action; and (3) the injury is

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likely to be redressed by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-72 (1982). "The type of injury necessary to confer standing, however, must be something 'other than the psychological consequence presumably produced by observation of conduct with which one disagrees.' . . . [F]ervent advocacy is not a substitute for a direct personal injury." Foster v. Center Township, 798 F.2d 237, 243-44 (7th Cir. 1986).

Neither of plaintiffs' class representatives have alleged any inadequacy with KCDF's special education program. Although S.K. notes several problems with the living conditions at the facility, he never once mentions special education. See Declaration of S.K.[6] B.I. mentions that he receives special education, but he fails to identify any inadequacies with the program:

> "I am allowed out of my room only for meals, gym and forty-five minutes for my special education class."
>
> "I am not allowed to go to school except for my special education class."

Declaration of B.I. 1:24-27.

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[6]Copies of the Declarations of B.I. and S.K., which plaintiffs submitted in support of their Motion for Class Certification, are attached as Tab A for the Court's convenience.

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Because B.I. and S.K. have not asserted that they have suffered any injury because of any possible inadequacies with KCDF's special education program, they have no standing to pursue this claim against the School District. Accordingly, the class claim must be dismissed.[7] See Foster, 798 F.2d at 244; Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981); Boyle v. Madigan, 492 F.2d 1180, 1182 (9th Cir. 1974).

V. CONCLUSION

For the foregoing reasons, defendants Love Denton, Donald Felder, and Seattle School District No. 1 respectfully request

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[7]Where the named plaintiffs lack standing, dismissal, not decertification, is the proper remedy. Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981) ("[T]he proper procedure when the class plaintiff lacks individual standing is to dismiss the complaint, not to deny the class for inadequate representation or to allow other class representatives to step forward."); Boyle v. Madigan, 492 F.2d 1180, 1182 (9th Cir. 1974) ("Until they can show themselves aggrieved in the sense that they are entitled to the relief sought, there is no occasion for the court to wrestle with the problems presented in considering whether the action may be maintained on behalf of the class.").

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the Court to grant their Motion to Dismiss plaintiffs' claims against them in their entirety.

DATED: June 17, 1993.

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