pb 5/2/01

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES HORTON, JAMES BARNHART, JEROME PAYTON, J.B., through his next friend, LORRAINE WEST, and K.M., through his mother DEBBIE MOORE, on behalf of themselves and all others similarly situated, Plaintiffs, vs. BOB WILLIAMS, in his official capacity as Superintendent of Green Hill School; JEAN SOLIZ, in her official capacity as Secretary of the Department of Social and Health Services; and SID SIDOROWICZ, in his official capacity as Assistant Secretary of the Juvenile Rehabilitation Administration; and the Chehalis School District, Defendants.	CLASS ACTION NO. C94-5428 RJB STATE DEFENDANT'S REPLY BRIEF

This reply brief is filed on behalf of defendants Williams, Soliz, and Sidorowicz (the state) in support of its motion to dismiss under Fed. R. Civ. P. 12(b)(6).

1. Conclusory allegations should be dismissed.

The state's motion is based in part on contentions that many of the claims are conclusory. In its answer, the state asserted by way of affirmative defense that plaintiffs had failed to state

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

a claim upon which relief may be granted. Nevertheless, plaintiffs argue that the contentions are not conclusory because the state was able to file an answer, in which many of the claims were admitted or denied. Pl. Brief at 3. Plaintiffs cite no case law in support of their argument. Indeed, enabling defendants to file an answer is just one reason why conclusory allegations are prohibited. Other reasons include providing notice of the facts which underlie the claim, and giving an opportunity for defendants to assess the strength of the case and preserve relevant evidence. Gird Systems Corp. v. Texas Instruments Inc., 771 F.Supp. 1033, 1037 (N.D. Cal. 1991).

In this case, the state in its answer denied many of the conclusory allegations based on its belief there is no truth to them. These allegations, for examples, include such things as failure to provide "treatment services", "social services", "appropriate health care", treatment in the "less restrictive environment", "numbers of properly-trained staff", "alternative education programs", "adequate supervision", "unburdened facilities", "dangerous conditions", "unsafe and unsanitary conditions". Although the state believes it is not deficient in these areas, and therefore denies the allegations, it is totally unclear what plaintiffs believe the problems are. For example, what treatment or social services are lacking? How is the supervision inadequate? Why is the health care inappropriate? How are facilities overburdened? What alternative education programs are being denied? How are cottages unsanitary? Because

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

these questions are unanswered, plaintiffs have failed to sufficiently set out facts which underlie their claims; hence, the claims are conclusory and should be dismissed.

The real danger of allowing a plaintiff to proceed under such conclusory allegations is that litigation becomes a "fishing expedition" in which the discovery process improperly is used to attempt to develop some theory of recovery that is unknown at the time the lawsuit is filed.

In their brief, plaintiffs repeatedly argue that the allegations are sufficient because a constitutional right is at stake. According to plaintiffs, alleging, for example, that Green Hill is "overcrowded as to impermissibly and unsafely burden recreational, educational, and food service," is sufficient because plaintiffs have the right to a "safe facility". Pl. Brief at 6. Plaintiffs miss the point. The state does not contest their right to safety; it contests only their right to claim a constitutional violation based on conclusory allegations.

Conclusory allegations in fact may be dismissed under Fed. R. Civ. P. 12(b)(6). McCarthy v. Mayo, 827 F.2d 1310, 1313 (9th Cir. 1987). When faced with conclusory allegations, a defendant may either move for dismissal for failure to state a claim, or file an answer and move for judgment on the pleadings. Gutierrez v. Municipal Court, 838 F.2d 1031, 1052 (9th Cir. 1988). The court has may treat the state's motion as a motion for judgment on the pleadings, if necessary to decide the issues. Id.

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

In its opening brief, the state cites numerous cases in which courts dismissed a prisoner's conclusory complaint. The vague allegations in these complaints bear striking similarities to plaintiffs' allegations. Plaintiffs do not attempt to factually distinguish these cases; instead, they simply argue generally that courts in these cases imposed a heightened pleading standard for civil rights complaints, adopted in the Fifth Circuit, that later was struck down in Leatherman v. Tarant County, 507 U.S. ___, 122 L.Ed 517, 113 S.C. 1162 (1973). While the state recognizes that a heightened pleading standard is not permissible, there is no suggestion in any of these cases that the court applied such a standard.

Finally, contrary to plaintiffs' argument, the state's stipulation on class certification does not mean that the allegations are non-conclusory. Pl. Brief at 3. Plaintiff cite no support for their argument. The elements for certification do not go to the merits of a claim, and in fact the court expressly so stated in its certification order.

2. Allegations on which no claim is made should be dismissed.

In its opening brief, the state argues that plaintiffs' physical plant allegations should be dismissed because there is no claim based on the allegations. Franklin v. State, 662 F.2d 1337, 1338 (9th Cir. 1981). Plaintiffs in their brief now argue these allegations amount to Fourteenth Amendment violations. Pl. Brief at 4. The fact remains, however, that the complaint itself (pages

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

10-11) does not contain any claim or theory of recovery related to the physical plant allegations.

3. Injury must be shown.

Plaintiffs mischaracterize the state's position as being that they must show actual harm, as opposed to potential harm. Pl. Brief at 6. The state recognizes that plaintiff are entitled to safe conditions of confinement. Plaintiffs must demonstrate, however, that an alleged condition at least threatens their safety. Helling v. McKinney, 509 U.S. ___, 125 L.Ed 22, 113 S.Ct. 2481 (1993). In fact, the state acknowledges that most of the allegations do allege an injury. Several do not, however. These include allegations on "burdened facilities", "overcrowding", and buildings in "disrepair". There is no allegation on how these alleged conditions are causing or threatening injury to plaintiffs. This argument, of course, is related closely to the argument on conclusory allegations.

4. The allegations must amount to a constitutional violation.

In their brief, plaintiffs do not contest the fact that an allegation to be actionable must rise to the level of a constitutional violation. For example, while a prisoner has the right to freedom of religion, this right is not violated by refusing to provide a prisoner with a minister of his faith. Swoboda v. Dubach, 992 F.2d 286, 290 (10th Cir. 1993).

In its opening brief, the state pointed out numerous instances in which an allegation in the complaint fails to rise to

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

the level of a constitutional violation. This failure is closely tied to the issue of conclusory allegations which simply do not provide sufficient facts.

The issue of right to treatment deserves further reply. The state's position in this case is that under state law plaintiffs have a right to treatment and are receiving it. The contested issue is to what extent treatment is a constitutional right.

As pointed out in the state's opening brief, Youngberg v. Romero, 457 U.S. 307 (1982), held that involuntarily-committed mental patients had a right to "minimally adequate training" to be free from physical restraints. This holding was applied to incarcerated juvenile offenders in Gary H. v. Hegstrom, 831 F.2d 1430, 1431 (9th Cir. 1987). What this means is that officials at juvenile institutions must take certain minimum steps to reduce the need to use physical restraints on residents. The Ninth Circuit has not adopted a Fourteenth Amendment "right to rehabilitation", and in fact this right was expressly rejected in Santana v. Collazo, 714 F.2d 1172, 1176-77 (1st Cir. 1983), a case cited with approval in Gary H., 831 F.2d at 1431.

Plaintiffs argue that the "implication of the court's holding (in Gary H.) is that juveniles have a constitutionally based right to treatment, even if the scope of that right may be somewhat limited." Pl. Brief at 14. What plaintiffs seem to concede is that at most they have the right to only "minimally adequate" treatment under the Youngberg standard.

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

Recognizing the limits of this right, plaintiffs also argue that the alleged lack of treatment violates their right to be treated in the "least restrictive setting". Pl. Br. at 14-15. In support of this argument, plaintiffs cite two cases involving the holding of civil committees. Johnson v. Soloman, 484 F.Supp. 278, 305 (D.C.Md. 1979), Gary W. v. Louisiana, 437 F.Supp. 1209, 1217 (E.D.La. 1976). A third case, Morales v. Truman, 383 F.Supp. 53 (E.D.Tex. 1974), did involve juvenile offenders, but simply did not hold they had the right to be treated in the least restrictive environment. Plaintiffs claim this right stems from Shelton v. Tucker, 464 U.S. 479, 488 (1960), a case holding that a statute allowing inquiry into the organizational relationships of teachers must be drawn as narrowly as possible. There simply is no support for the proposition that juvenile offenders have the right to be treated in the least restrictive environment, or that alleged lack of certain treatment programs is a denial of this right.

Based on the foregoing, the state requests that the allegations on "education, treatment, and rehabilitative services" (page 9-10) be dismissed either because (1) there is no constitutional right to treatment, or (2) plaintiffs fail to allege sufficient facts to show they are not receiving "minimally adequate" training.

5. Educational claims not related to special education should be dismissed.

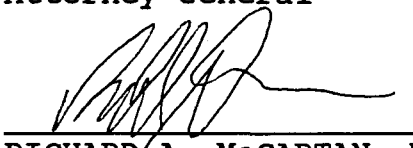
The state recognizes that 20 U.S.C. §1400(c) provide certain rights to special education students, and is not moving to dismiss

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558

those claims. Pl. Brief 19-20. Several of the education allegations however, appear to relate to non-special education students, and these allegations should be dismissed either as conclusory or not rising to the level of a constitutional violation. These include that educational services are not equivalent to those outside the institution; that educational services are denied for violating rules; that alternative education programs are not provided; that educational needs are not evaluated; and that appropriate educational services are not developed and implemented.

Respectfully submitted this 24 day of October, 1994.

CHRISTINE O. GREGOIRE
Attorney General



RICHARD A. McCARTAN, WSBA #8323
Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO BOX 40124
Olympia, WA 98504-0124
(206) 459-6558