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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PLANS, Inc.,

Plaintiff,

v.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, TWIN RIDGES ELEMENTARY SCHOOL DISTRICT, DOES 1-100,

Defendants.

CASE NO. CIV.S-98-0266 FCD PAN

JOINDER OF DEFENDANT SACRAMENTO CITY UNIFIED SCHOOL DISTRICT IN TRIAL BRIEF OF CO-DEFENDANT TWIN RIDGES ELEMENTARY SCHOOL DISTRICT AND SUPPLEMENTAL TRIAL BRIEFING ON SPECIFIED POINTS

Trial Date: September 12, 2005
Time: 1:30 p.m.
Place: Courtroom 2
The Honorable Frank C. Damrell, Jr.

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TABLE OF AUTHORITIES

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To avoid repetitive briefing on the same points, Defendant Sacramento City Unified School District ("SCUSD") hereby joins in the Trial Brief of Defendant Twin Ridges Elementary School District ("TRESD") and incorporates the contents of that brief herein by reference. SCUSD also presents the following additional points and authorities.

I.
INTRODUCTION TO SUPPLEMENTAL ARGUMENTS

The gravamen of PLANS' case is that anthroposophy, as an alleged "religion," has somehow permeated, tainted or infected ***all*** of the Waldorf-inspired educational methods used at the subject schools. In other words, PLANS' target in this case is the entire Waldorf-inspired program at each school. But PLANS will not be able to get a global injunction to shut down the entire program at each school because it will not be able to satisfy its burden of proof.

As a threshold matter, PLANS will not be able to satisfy its burden at Trial Phase I – the burden of showing that anthroposophy is a "religion" within the meaning of the pertinent constitutional provisions. Alternatively, at Trial Phase II -- if the case proceeds that far -- PLANS will not be able to satisfy its burden of proving that John Morse, an elementary school operated by SCUSD, violates any of the pertinent federal or state constitutional provisions through its use of Waldorf-inspired educational techniques. Since PLANS will not establish any constitutional violation, it will not be entitled to the injunctive relief it seeks.

Evidentiary issues will be important in this case. PLANS will be unsuccessful in overcoming the obvious hearsay and authentication problems that arise with many, and perhaps even most, of its exhibits. And even more importantly, PLANS will not be able to establish the foundational facts that would be necessary to overcome Defendants' relevance (FED. R. EVID. 104(b), 402, 1008), opinion (FED. R. EVID. 701 and 702-705), and personal knowledge (FED. R. EVID. 602) objections to PLANS' documentary and testimonial evidence. The unusually high number of evidentiary issues in this case arise from the conclusory rather than fact-specific nature of Plaintiff's claim – the specious claim that the Waldorf-inspired programs *in their entirety* are unconstitutional.

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II.
SUPPLEMENTAL STATEMENT OF FACTS

John Morse is a kindergarten through eighth grade (K-8) school operated and controlled by Sacramento City Unified School District. It is located on 60th Avenue in South Sacramento near Florin Road. John Morse, which opened for the 1997-1998 school year and which continues to operate at the present time, is a different school than Oak Ridge, the school where SCUSD operated its first Waldorf-inspired methods program. John Morse was opened as a magnet school. No teachers were automatically transferred from Oak Ridge. Anyone who wanted to teach at John Morse had to complete an application and be selected to teach in the new school. From its inception, the school has always had racial and ethnic diversity and has drawn students from areas throughout the district to attend its alternative program. The program places strong emphasis on integrating multicultural studies and the fine arts into its instruction.

There was no pre-existing student body that had attended the school the previous year. All of the students who have attended John Morse over the years since its opening in the fall of 1997 have attended by the deliberate, affirmative choice of their parents. As a consequence of student and parental satisfaction with the program, there is a waiting list for admission to the school. Former Assemblyman Darryl Steinberg and many of the John Morse teachers send their own children to John Morse.

Although John Morse utilizes some selected Waldorf methods, it remains a public school through and through. The teachers are required to attend the on-going teacher training that is required of the other certificated employees who teach at other schools in the District. The John Morse teachers remain subject to the terms of the same Collective Bargaining Agreement as the other teachers in the District. And after being in operation for eight years, John Morse has experienced teachers who mentor those with less experience with the selected Waldorf methods that are used at the school and more traditional methods of instruction. The current program at John Morse is an amalgam of both kinds of methods. *All* of the educational methods are appropriate for the public school setting.

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III.
ADMISSIONS

Defendant SCUSD plans to introduce into evidence PLANS' response to Defendants' Request for Admission No. 5 (Set One). In response to the statement, "John Morse Waldorf Methods Magnet School is not affiliated with a traditional religious sect or denomination," PLANS stated, "ADMIT." *See* Defendants' Joint Exhibit "E."

IV.
ADMISSIBILITY OF EVIDENCE DISPUTES

(Eastern District Local Rule 16-285(a)(3))

A. Status of Previously-Filed Motion In Limine No. 6.

On Defendants' Motion In Limine No. 6, the court reserved its ruling for trial on whether to exclude testimony by witnesses lacking personal knowledge. The Court's final pretrial order of April 20, 2005 stated, "At this stage, defendants' motion pertains solely to plaintiff's witnesses Francesca Schomberg and Tina Means." Pretrial Conference Order dated April 20, 2005, p. 5, lines 14 – 16. At trial, PLANS will not be able to show that either of these individuals (a teacher and a parent, respectively) have any personal knowledge of anything relevant to the operations of John Morse or its use of Waldorf-inspired methods over the last eight years. Their involvement with SCUSD's use of Waldorf-inspired methods was entirely at Oak Ridge Elementary School before the program moved to John Morse in the fall of 1997.

B. A major portion of the Plaintiff's exhibits and other evidence will not be admissible.

Judging by its exhibits, the Plaintiff apparently plans to offer reams of written hearsay, and hearsay upon hearsay (FED. R. EVID. 802 and 805). In the absence of any foundational showing (as required by FED. R. EVID.104(b), 402 and 1008), most of PLANS' exhibits are also objectionable because they are not relevant to the elements of the alleged constitutional violations. PLANS apparently hopes that its evidence will cause the Court to leap to unsupported and prejudicial inferences while losing sight of the correct legal standards. The Defendants' joint objections to PLANS exhibits, which document will be filed in compliance

with the Court's schedule, contains additional briefing on these and other evidentiary issues.

V.
POINTS OF LAW

A. SCUSD's supplemental briefing on some points of law.

General

1. Whether anthroposophy is a religion for Establishment Clause purposes.

PLANS' will be unable to produce the required foundations for relevance (under Federal Rules of Evidence, Rules 104(b), 402 and 1008) at Phase I of the trial. At that phase, PLANS will bear the burden of producing evidence showing what anthroposophy is in the first place, and whether anthroposophy is a religion. A mere showing that Rudolf Steiner personally held spiritual beliefs will not suffice.

In an amicus brief dated July 15, 2004, the Anthroposophical Society in America, Inc. described anthroposophy to this Court as a "cognitive methodology, a path to Knowledge" -- without any system of beliefs.[1] In other words, the official anthroposophist view is that anthroposophy is an approach to *epistemology* (a philosophical *methodology* for obtaining knowledge) without any *metaphysics* (philosophical *conclusions* or ultimate beliefs).

Separate and apart from anthroposophy, Rudolf Steiner was an extremely prolific writer and lecturer in many other subject matter areas ranging from education of the young, care of the disabled, agriculture, medicine, architecture, science, religion and the arts. He founded separate organizations and movements in connection with some of these other interests. Thus, PLANS will be faced with the foundational task of establishing that Steiner was wearing his anthroposophy "hat," as distinguished from one of his many other "hats" when a specific Steiner statement in an exhibit was written or spoken.

PLANS will also have to show, as a foundational matter, that any statement of spiritual beliefs or conclusions offered into evidence in Phase I somehow constitute beliefs that

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[1] *See* Amicus Curiae Brief of the Anthroposophical Society in America In Support of Defendants, dated July 15, 2004, p. 9, line 15 through p. 10, line 6.

are ***components*** of an anthroposophical "***creed***" or ***canon of ethics***[2] -- rather than the personal beliefs of Rudolf Steiner, or perhaps the viewpoints of one of the other organizations that Steiner founded. Such a task for PLANS is daunting indeed, especially in view of the fact that the Anthroposophical Society itself says it has no such creed or canon. But without that kind of showing, the opinions or statements of Rudolf Steiner (or of others who write about his beliefs) are irrelevant to important issues presented at Trial Phase I: (1) what is *anthroposophy*, and (2) does *anthroposophy* promulgate a set of beliefs that are religious in nature and so fundamental and so well entrenched among anthroposophists that they collectively constitute a religious *creed* or a canon of ethics?; and (3) if so, what are the fundamental, defining beliefs, ultimate conclusions or ethical commands of anthroposophy?

2. Whether John Morse advances anthroposophy in violation of the Establishment Clause through its use of Waldorf-inspired methodology.

PLANS will not be able to prove that SCUSD violates the Establishment Clause through its use of Waldorf-inspired methodology at John Morse. *See* points and authorities as stated in the TRESD brief, points nos. 3, and 10 through 13, in which SCUSD joins for the same reasons stated therein. *See also*, SCUSD's supplemental briefing on points numbered 6 through 9 below.

SCUSD and Endorsement

4. Whether John Morse advances anthroposophy in violation of art. XVI, sec. 5 of the California Constitution through its use of Waldorf inspired methodology.

PLANS will be unable to show that SCUSD gives anything to anthroposophy or any anthroposophical institution, including Rudolf Steiner College, that would constitute unconstitutional "aid" or "benefit" under California Constitution, Article XVI, § 5. PLANS will

[2] The Ninth Circuit's opinion in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) demonstrates that the absence of certain religious indicia, such as a creed and/or a set of moral obligations, is properly considered in determining whether something is a religion: "The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. In other words, anyone's in and 'anything goes.'" *Id.* at 1229-30.

also be unable to show that SCUSD engages in any other activity that would violate this provision. See TRESD brief concerning this issue under point number 23.

But even if any of SCUSD's actions should be interpreted to constitute "aid" or a "benefit," the action would not violate the constitution because its effect would be too remote, indirect and unsubstantial. *See Paulson v. City of San Diego*, 294 F.3d 1124, 1131 (9th Cir. 2002), *cert. denied* 534 U.S. 978, 123 S.Ct. 1786 (2003) ("Government conduct that aids religious or sectarian purposes, but does *not* have a direct, immediate, and substantial effect, does not contravene the provision.").)

6. Whether an objective observer in the position of an elementary school student would perceive a message of endorsement of anthroposophy in the use of Waldorf education methods at John Morse.

The United States Supreme Court has explained the endorsement test by focusing on the *message that the government communicates* by its conduct:

> Of course, the word 'endorsement' is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred.*"

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593, 109 S.Ct. 3086, 3101 (1989), quoting *Wallace v. Jaffree*, 472 U.S. 38, 70, 105 S.Ct. 2479, 2497 (1985) (O'CONNOR, J., concurring in judgment) (emphasis added in *Allegheny*). The pertinent perspective is that of a "reasonable observer" who is not an expert on esoteric religions. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996). In *Alvarado*, the Plaintiff unsuccessfully argued that the "reasonable observer would

> . . . be aware that the Plumed Serpent [portrayed in a statue] represents an ancient Aztec deity, as publicized by the City, and that the City-sponsored dedication ceremony included a performance by a Native American Aztec dance group. None of these elements would lead the reasonable observer to infer an endorsement of religion on the part of the City. Plaintiffs argue in their reply brief that the informed observer would also be aware of the New Age and Mormon connections they have cited. We disagree. *The reasonable observer is not an expert on esoteric religions, nor can he or she be turned into one by any publicity generated by plaintiffs' lawsuit.* Furthermore, a reasonable

> observer cannot be expected to infer an endorsement of the religion practiced by a revolutionary group in southern Mexico.

Id. (emphasis added).

Anthroposophy is the alleged "religion" in this case. Like the Plaintiff in *Alvarado* who expected the public to be aware of esoteric matters, PLANS seems to want the Court to infer that young, elementary school children in Northern California would detect (alleged) esoteric messages of anthroposophy in otherwise benign school activities. Such an inference would ignore the reality that anthroposophy is anything but a well-known philosophy (or alleged "religion") for average adults, let alone elementary school aged children. And it is the perspective of these young children -- not esoteric symbol-seeking outsiders -- that counts. *See Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994) (in education cases, the court properly focuses on the perspective of an objective, not subjective, schoolchild). Moreover, the objectivity or "reasonableness" component of the observer test is employed to avoid exactly what PLANS is trying to do—i.e., to assume the role of a hypersensitive and highly subjective "curriculum review committee":

> If an Establishment Clause violation arose each time a student [or a non-profit organization] believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student [or organization] to become a 'curriculum review committee' unto himself or herself.

Id. In this case, PLANS will not be able to prove that an objective, school-aged child would perceive any endorsement of anthroposophy at John Morse, even if the trial should proceed past Phase I.

7. <u>This observer is not an expert on esoteric religions.</u>

See discussion in point 6 immediately above.

8. <u>Whether mere consistency with, or resemblance to, a religious practice has the primary effect of endorsing religion.</u>

See points under item 6 above about the legal standard for endorsement.

9. Whether the Waldorf method program at John Morse primarily advances the previously adjudicated secular purpose of educational innovation and desegregation through a magnet school.

See points under item 6 above and the points and authorities cited for points 3 and 10 through 13 in the TRESD Trial Brief, in which SCUSD joins.

The general rule in civil actions is that the plaintiff bears the burden of proof. *Cleary v. Knapp Shoes, Inc.*, 924 F.Supp. 309, 315 (D. Mass. 1996). A diligent search failed to locate any case law reflecting that the normal burden of proof is somehow shifted to the defendant in an Establishment Clause case merely because the Court held in *Lemon v. Kurtzman* (403 U.S. 601, 615, 91 S.Ct. 2105, 2112 (1971)) that the constitutionality of a governmental action under the Establishment Clause depends upon compliance with all three of the (original[3]) prongs of what is commonly referred to as the "Lemon Test"[4]:

PLANS will not be able to establish a case-in-chief at Trial Phase II showing that John Morse violates the Establishment Clause under any of the tests used in the applicable case law. But even if the time came for presentation of a defense case at Phase II, SCUSD would show through its exhibits and witnesses that the educational program at John Morse, which employs some Waldorf-inspired methods, advances secular purposes only.

Entanglement Test

14. Whether there is payment of SCUSD public funds to a private religious institution.

a. Character and purposes of the institutions that are benefited.

See discussion under point number 4 above about the absence of any aid or benefit to a sectarian organization or purpose. But even if something were to be found to be an "aid" or "benefit" to Rudolf Steiner College, it would be significant that the college is an educational

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[3] *See* discussion in the TRESD brief about the apparent demise of the third prong ("excessive entanglement") of the *Lemon* Test as a separate and independent factor.

[4] "Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592, 109 S.Ct. 3086, 3100 (1989).

institution for the training of teachers rather than a church. It is a "vendor" of teacher training classes and books rather than a provider of worship services.

b. The nature of the aid that the State provides.

See points numbered 4 and 14(a) above.

c. Resulting relationship between the government and religious authority.

There is no necessary resulting relationship continuing between the government and any religious authority as the result of SCUSD's operation of John Morse with some Waldorf-inspired methods.

15. Whether there is excessive entanglement between SCUSD and religion in general.

There is no excessive entanglement between SCUSD and religion in general as the result of John Morse's use of some Waldorf-inspired teaching methods.

16. Whether supervision of public employees by public officials creates excessive entanglement between church and state.

If the trial proceeds as far as the presentation of the Defendants' case at Phase II, the evidence will show that public employees at John Morse and at SCUSD are under the direct and exclusive supervision and control of *public* officials and that there is no excessive entanglement between church and state.

California Constitution

22. Legal standards for California Constitution, Article I, sec. 4.

Article I, section 4, of the California Constitution states in pertinent part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion." (Emphasis added.)

a. Legal standard for Establishment Clause portion of California Constitution, Article I, sec. 4.

It appears that the California Establishment Clause portion of this provision is interpreted in the same manner as the federal Establishment Clause. The California Supreme

Court has stated:

> Because the California Constitution is a document of independent force, the rights it guarantees are not necessarily coextensive with those protected by the federal Constitution. [Citations omitted.] We do not believe, however, that the protection against the establishment of religion embedded in the California Constitution creates broader protections than the First Amendment. We are satisfied that the California concept of a "law respecting an establishment of religion" (art. I, § 4) coincides with the intent and purpose of the First Amendment establishment clause.

East Bay Asian Local Dev.Corp. v. State of California, 24 Cal.4th 693, 718 (2000), *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1735 (2001).

b. Legal standard for "no preference" portion of California Constitution, Article I, sec. 4.

As quoted above, this constitutional provision also contains an express prohibition against religious preference. *See* Cal. Const., art. I, § 4. Controversy has arisen about whether this "no preference" term gives rise to a separate and higher standard. Although the California Supreme Court has not definitively resolved this controversy, it has provided at least some guidance:

> This court has never had occasion to definitively construe the no-preference clause of article I, section 4 and we need not do so here. In guaranteeing free exercise of religion 'without discrimination or preference,' the plain language of the clause suggests, however, that the intent is to ensure that free exercise of religion is guaranteed regardless of the nature of the religious belief professed, and that the state neither favors nor discriminates against religion.

Id. at 719. It is possible that when the interpretation of this provision is finally clarified by the California Supreme Court, the standard may be no higher than the Establishment Clause tests for both the federal and state Establishment Clauses in general. After all, "no preference" has long been included within the interpretation of the Establishment Clause of the First Amendment to the United States Constitution:

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, [citation omitted] it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially

preferred over another."

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 604, 109 S.Ct. 3086, 3106-07 (1989), quoting *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683 (1982).

23. Legal standards for the two other provisions of the California Constitution.

a. Legal standard for California Constitution, Article XVI, § 5

See discussion under point number 4 above.

b. Legal standard for California Constitution, Article IX, sec. 8.

Article IX, section 8, of the California Constitution states:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

Cal. Const., art. IX, § 8. "This section endeavors to (1) prohibit the use of public funds to support private schools, whether sectarian or not; and (2) preserve strict separation between religion and public education." *Wilson v. State Board of Education,* 75 Cal.App.4th 1125, 1138-39 (1999).

This constitutional provision simply does not apply. John Morse, like the charter schools in the *Wilson* case, is a public school, not a private one. John Morse is under the exclusive direction and control of public officials. Moreover, SCUSD does not "support" or give subsidies to any private schools in construction with its operation of John Morse. And John Morse faculty members do not endorse any religious doctrine at the school.

Relief

24. Whether the relief requested by Plaintiff is necessary and proper in the circumstances as presented at trial.

Note: Injunctive relief is the only relief PLANS requested in this case.

a. Retrospective injunctive relief against California School Districts is barred by the Eleventh Amendment.

In addition to all the reasons cited in the TRESD Trial Brief about why retrospective injunctive relief is improper (which reasoning is incorporated here), retrospective

injunctive relief is barred for yet another reason—sovereign immunity under the Eleventh Amendment. The United States Supreme Court has held that ". . . in the absence of consent[,] a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984). School districts in California are "state agencies" for purposes of the Eleventh Amendment. *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251 (9th Cir. 1992); *see also, Freeman v. Oakland Unified School Dist.*, 179 F.3d 846, 846 (9th Cir. 1999).

To fall under the *Ex Parte Young* (209 U.S. 123, 28 S.Ct. 441 (1908)) exception to Eleventh Amendment immunity, injunctive relief for federal constitutional violations must be characterized as *prospective*. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003); see also *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S.Ct. (2002), quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296, 117 S.Ct. 2028 (1997) (O'CONNOR, J., joined by SCALIA and THOMAS, JJ., concurring in part and concurring in judgment ("In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"). What this means for this case is that the current and future operations of the schools in question are the proper focus for the trial and for any relief -- rather than anything that allegedly may have occurred in the distant past.

b. <u>PLANS must prove that each District's entire program of using Waldorf-inspired methods is unconstitutional before any injunctive relief can be considered.</u>

Indisputably, relief in an action is inexorably linked to and dependent upon the outcome of the claim upon which it is asserted. *See, e.g.*, FED. R. CIV. PROC. 12(b)(6) (uses the wording, "failure to state *a claim upon which relief can be granted*...." (Italics added)); *see also Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.*, 747 F.2d 844, 850 (3rd Cir. 1984) (consideration of an appropriate remedy comes *after* the court determines whether the plaintiff has actually succeeded on the merits, i.e. met its burden of proof). SCUSD expects that PLANS

will fail to satisfy its burden of proof at Phase I, or alternatively, at Phase II on its global claim that all of the Waldorf-inspired methods used at John Morse (i.e. the program as a whole) are unconstitutional. If that burden failure occurs, no relief can be granted.

c. <u>But even if PLANS could prove such a broad and non-specific claim, injunctive relief cannot and should not be granted, as indicated below.</u>

Absent specific relief provisions in the substantive law governing the particular claim, injunctive relief is discretionary under Federal Rules of Civil Procedure, Rule 65, even if the claim is established. *See*, Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2942 ("Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion."). "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 93 S.Ct. 1463, 1469, 411 U.S. 192, 200 (1973) (per Burger, C.J.).

Here, no injunctive relief would be necessary, fair or workable in connection with PLANS' global claim that all Waldorf-inspired methods are unconstitutional when used in the public schools. The text of Federal Rule of Civil Procedure, Rule 65(d) shows where serious difficulties would lie. "Rule 65(d), which is derived principally from the Clayton Act, requires that every order granting a permanent injunction … 'shall set forth the reasons for its issuance; *shall be specific in terms*; [and] *shall describe in reasonable detail*, and not by reference to the complaint or other document, ***the act or acts sought to be restrained*** . . . .'" Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2955, p. 308, quoting FED. R. CIV. PROC. 65(d) (emphasis added).

As would be shown if this case proceeds to the defense portion of Trial Phase II, the Waldorf-inspired methods used at John Morse are secular in nature and consistent with good pedagogy in general. In crafting any specific injunction under Rule 65(d), this Court would face insurmountable difficulty if it tried to single out ***all of the specific Waldorf-inspired acts*** used at John Morse (i.e. specific Waldorf-inspired pedagogical techniques) for prohibition. For example, those specific acts would include the technique of using games (perhaps involving bean-bag

tossing) and other specific, physical activities to teach arithmetic and letters of the alphabet in the lower grades; teaching children to play particular musical instruments, such as recorders or violins; teaching children the fundamentals of the visual arts such as the use of perspective and color; and teaching children the memory and oral language skills involved in reciting poetry, and telling stories, etc. Rather than being inseparable from anthroposophy, the Waldorf-inspired methods used at John Morse are and too integral to secular educational methods to be prohibited by an injunction.

B. Additional point of law: Fed. R. Civ. Proc. 16(e) imposes limits on the claims and issues that can be advanced at trial.

In addition to the law-of-the-case limitation on PLANS' claims, as described in Section V-F of the TRESD trial brief (OTHER POINTS OF LAW), Federal Rule of Civil Procedure 16(e) also limits the nature and scope of PLANS' claims at this late stage of the litigation. Rule 16(e) states that the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order" and "shall be modified only to prevent manifest injustice." Fed. R. Civ. Proc. 16(e). The final pretrial order is an important document since it "generally supersedes the parties' pleadings...." *DP Aviation v. Smiths Industries Aerospace and Defense Systems Ltd.*, 268 F.3d 829, 842, n. 8 (9th Cir. 2001), quoting *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 950 (9th Cir. 1993).

In this case, the pretrial conference order filed on April 20, 2005, shows in numerous respects that anthroposophy in particular is the (alleged) "religion" involved with PLANS' constitutional allegations. The pretrial order also shows that it is the Waldorf-inspired methods program in its entirety that is the targeted (allegedly unconstitutional activity) -- rather than any one or more specific educational methods *per se*. Given that PLANS' theory of the case is so clearly delineated in the final pretrial order, SCUSD will object under Federal Rule of Civil Procedure 16(e) to any attempt by PLANS to advance different claims or different issues at trial.

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VI.
SUGGESTION FOR FINAL TRIAL BRIEFING IN LIEU OF FINAL ARGUMENTS

The emphasis in this case is necessarily on important points of constitutional law and the application of such points to the facts of the case -- rather than on purely factual disputes at the evidentiary level. Because of the predominance of the legal issues and the high number of evidence issue, Defendant SCUSD suggests that the Court set a schedule for post-trial briefing in this case in lieu of oral closing arguments if the trial proceeds that far. In that manner, the parties will be able to apply the pertinent law to whatever evidence is ultimately determined to be admissible.

VII.
CONCLUSION

In this lawsuit, PLANS has elected to rely upon its own conclusory speculations that all Waldorf –inspired teaching methods are unconstitutionally contaminated with an alleged "New Age" religion – a "religion" with unidentified and unidentifiable characteristics. And PLANS has effectively "rested its case" on the difficult and sometimes impenetrable writings of the founder of Waldorf education from the early twentieth century rather than using discovery to learn about the actual nature and actual effects of the use of selected Waldorf methods at the schools in question at the present time. If PLANS had gone looking for concrete evidence related to the actual elements of the constitutional claims it raises, it would know by now that the "impossibility" of separating particular Waldorf methods from anthroposophy exists only in the minds of PLANS members. John Morse applies completely appropriate, secular methods, some of which happen to be Waldorf-inspired. At the close of the case, judgment must be entered against PLANS, Inc. and in favor of Sacramento City Unified School District.

Dated: August 29, 2005

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By /s/ Susan R. Denious
Susan R. Denious
Attorneys for Defendant SACRAMENTO CITY UNIFIED SCHOOL DISTRICT