



FILED
ALAMEDA COUNTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
CLERK OF THE SUPERIOR COURT
By Rollie D. Adams
Deputy

COORDINATED PROCEEDINGS
SPECIAL TITLE (RULE 1550(b))

Case No. JCCP 004468

CALIFORNIA HIGH SCHOOL EXIT
EXAM CASES,

LILLIAN VALENZUELA, et al.,

Petitioners,

ORDER GRANTING
PRELIMINARY INJUNCTION AND
CASE MANAGEMENT ORDERS

v.

JACK O'CONNELL, et al.

Respondents.

The Motion of Petitioners/Plaintiffs Lilliana Valenzuela, Ahmed Osama Abd El Rahman, Noemi Cervantes, Mayra Ibanez, Mayela Barragan, and her parents and Laura Echavarria, each individually and on behalf of plaintiffs and all others similarly situated ("Plaintiffs") for Preliminary Injunction came on regularly for hearing on May 9, 2006 in Department 1 of this Court, the Honorable Robert B. Freedman presiding. Appearing and addressing the Court on behalf of Plaintiffs was Arturo J. Gonzales. Appearing and addressing the Court on behalf

of respondents and defendants Superintendent for Public Instruction, State Department of Education, State Board of Education and State of California (“Defendants”) were Douglas Press, Kara Read Spangler and Karin S. Schwartz. Further appearances are reflected in the sign-in sheet filed at the time of the hearing.

Before addressing the matters before the Court for decision, the Court wishes to commend the participants on both sides for their diligent and substantial efforts, and to note that the record clearly reflects that the parties share the ultimate goal of achieving excellence of public education in California, notwithstanding their significant differences of opinion about how to accomplish this, and specifically the role of the California High School Exit Exam (“CAHSEE”) in achieving this goal.

I. Procedural History

The CAHSEE, created in 1999, is a two-part examination in English and mathematics (California Education Code¹ §60850). §60850(e)(3) sets forth the requirement that the CAHSEE have “curricular” and “instructional” validity; that is, it must test the content found within the State’s content standards and also be consistent with what teachers actually teach in the classrooms. §60851(a) sets forth the requirement that “each pupil completing grade 12 shall successfully pass the high school exit examination as a condition of receiving a diploma of graduation from high school.” (Hereafter, “diploma condition.”) This condition

¹ Unless otherwise indicated, all subsequent statutory references shall be to the California Education Code.

was originally set to become operative with the 2003-04 school year, but was delayed by unanimous vote of the Department of Education on July 9, 2003 to the current school year, following a public statement by Superintendent O'Connell that "not all of our students have had all the tools to succeed."

Valenzuela v. O'Connell was originally filed on February 8, 2006 in the Superior Court of the State of California County of San Francisco as Case No. CPF06506050 and was coordinated on March 30, 2005 with *Kidd v. California Department of Education*, Case No. 2002049636 in this court, under Judicial Council Coordination Proceeding No. 4468 (hereafter, "JCCP004468").

Subsequently, a third action initiated in this court, *Californians for Justice Education Fund v. State Board of Education*, Case No. RG06265395, was made part of these coordinated proceedings on April 19, 2006. These coordinated proceedings address issues regarding the CAHSEE. Since initiation, requests for dismissal of three named plaintiffs, Hoang Vy Tran, Bennie Horton, and Richard Williams, have been filed and approved by the Court. A fourth named plaintiff, Alex Sellman, is reported to have passed the CAHSEE, but has not been dismissed as a representative plaintiff.

The *Valenzuela* complaint is framed as a class action, seeking relief on behalf of a class comprised of "those high school students in California public schools who are scheduled to graduate with the Class of 2006 and who have satisfied all of their requirements for graduation except for passing the exit exam." The complaint alleges five causes of action: (1) Deprivation of Fundamental Right

to Public Education, (2) Violation of the Equal Protection Clause of the California Constitution, Art. 1, §7, (3) Education Code §60856 - Request for Mandamus Relief, (4) Deprivation of Due Process of Law Under the California Constitution, and (5) Request for Declaratory Relief. Included in the prayer, setting the stage for the instant motion, is a request for injunctive relief.

At the time of the hearing on the instant motion, the remaining named representative plaintiffs, Valenzuela, Barragan, Cervantes, Echevarria, Ibanez and Abd El Rahman, were all classified as "English language learners." Five attend Richmond High School and one attends Newark Memorial High School.

The moving papers for the instant motion were voluminous. Plaintiffs' opening brief was supported by 42 declarations, Defendants' opposition brief was supported by 23 declarations, and Plaintiffs' reply brief was supported by 23 declarations. Many of the declarations had lengthy exhibits. Defendants also submitted a Request for Judicial Notice and 72 pages of objections to Plaintiffs' evidence. The Court has reviewed all of the information submitted.

Two "general objections" among Defendants' objections to evidence were submitted by Defendants to declarations and exhibits submitted by Plaintiffs relating to schools or school districts other than those attended by the named representative plaintiffs. At the hearing, Defendants took the position, which had not been included in their opposition brief, that any injunction issued by this Court could only apply to the named plaintiffs because no class had yet been certified. The Court asked the State to provide a supplemental brief addressing this limited

issue by 4:00 p.m. on Wednesday, May 10, 2006. The Court found Defendants' supplement briefing unpersuasive on the requested issue, and also notes that the Defendant chose to raise several new substantive issues in their supplemental brief, without having requested leave to do so. Plaintiffs were given 24 hours to file a response to Defendants' supplemental brief, and that response included a motion to strike the portions of the brief addressing other questions. Plaintiff did, however, also address all of the supplemental arguments on their merits. Accordingly, the Court, with some reluctance, hereby denies Plaintiffs' motion to strike, and will permit the supplemental briefing from both sides to remain in the record.

II. ANALYSIS OF SUBSTANTIVE ARGUMENTS

A. Availability of Injunctive Relief -

With respect to the threshold issue raised by Defendants at the hearing, upon which the Court permitted additional briefing, the Court concludes that the class wide relief requested by Plaintiffs may be granted before the class is certified. Code of Civil Procedure §527(b), which was not mentioned by Defendants in their supplemental brief, is dispositive of this issue.

Defendants' related assertion in their supplement brief, that the claims of the named representative plaintiffs cannot be typical of those class members who are not also English learners, is not well taken. Class certification is appropriate under Code of Civil Procedure §382 when an ascertainable class exists, and when there is a well-defined community of interest in the questions of law and fact involved.

(*Vasquez v. Sup.Ct.* (1971) 4 Cal.3d 800, 809.) Community of interest includes whether there are predominant questions of law and fact, whether the class representatives have claims which are typical of the claims of the class, and whether the representative can adequately represent the class. (*Richmond v. Dart Indus.* (1981) 29 Cal.3d 462, 470.) As correctly pointed out by Plaintiffs, claims need not be identical to qualify as "typical" for purposes of determining the appropriateness of class representatives. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) Here, a common question of law is whether the Equal Protection clause permits denial of equal educational opportunity, resulting in failure to pass the CAHSEE, and the denial of the benefits of graduation to students who have satisfied all other requirements. The specific circumstances of the named plaintiffs in this case present that claim. The fact that factual circumstances other than those of the named plaintiffs may also present the same claim does not preclude class-wide injunctive relief upon motion by these representative plaintiffs.

Defendants also argue that a class-wide injunction is unavailable because Plaintiffs' claims are an "as applied" challenge to the CHASSEE graduation requirement as opposed to a "facial challenge." This argument is not supported by the applicable law. Both *Butt v. State of California* (1992) 4 Cal.4th 668 and *Serrano v. Priest* (1971) 5 Cal.3d 584 involved class-wide injunctive relief in "as applied" challenges rather than facial challenges to the validity of any statute. In fact, in *Serrano* the plaintiffs defined the putative class as "all public school pupils in California 'except children in that school district, the identity of which is

presently unknown, which school affords the greatest educational opportunity of all school districts within California.” (*Serrano*, 5 Cal.3d at 589.)

The additional arguments made by Defendants in their supplemental brief are not of adequate consequence to warrant discussion, except to say that their assertion that these proceedings are somehow barred by the settlement agreement in *Williams v. California* (Sup.Ct. San Francisco, No. CGC-00-312236) is directly and completely discredited by the express terms of the Settlement Agreement in that action. Paragraph 4 of the Covenant Not to Sue explicitly states “[t]he covenant not to sue shall not apply to an action contesting the denial of graduation from High School based on the results of the High School Exit Examination.”

B. Balancing of Harm

The substantive issues on the preliminary injunction itself fall into two categories. In order to obtain injunctive relief, Plaintiffs must demonstrate the harm that they will suffer if the injunction is not granted outweighs the harm to Defendants if it is. Plaintiffs must also demonstrate a likelihood that they will ultimately prevail on the merits of their action. (*Hunt v. Sup. Ct.* (1999) 21 Cal.4th 984, 999.) The greater Plaintiffs’ showing in one category, the less need be shown in the other. (*Butt v. State of California, supra* at 678.)

Plaintiff’s argue first that the balancing of harms tilts heavily in their favor. The evidence submitted by Plaintiffs on this issue includes the declarations of each of the named representative Plaintiffs, as well as the declarations of various educators and educational consultants and experts, speaking to the practical

realities attendant to life without a high school diploma, as well as the emotional toll attendant to the resulting disadvantages and stigma. Prospective harm to a student who is otherwise fully qualified to graduate is sufficiently clear.

Remaining for a fifth or subsequent year in an already stressed district or attending community college when the student might otherwise be accepted to a four year institution all demonstrate significant risk of harm. Defendant's attempts to discredit Plaintiffs' evidence on this issue are not persuasive.

Nor do Defendants' arguments regarding the harms on the other side of the balance carry great weight. Defendants assert that if the preliminary injunction is granted educational standards would be lowered, and that students, colleges and universities, and the California economy will be harmed. These arguments, and Defendants' supporting evidence, however, dwell heavily on establishing the importance of the CAHSEE generally, both to improving the quality of education and to the potential positive economic impacts of those improvements. This approach demonstrates either a misunderstanding or a mischaracterization of the extent of the relief sought herein.

Plaintiffs are not challenging the CAHSEE itself, and are not seeking to enjoin the continued administration of the tests, or efforts to prepare students state wide to be able to pass it. They seek only to delay the implementation of the diploma condition, and only as it affects this year's graduating class.

There is no persuasive credible evidence of harm flowing to any one from granting the requested relief. Colleges and universities, and prospective employers

each are still free to make appropriate decisions to offer or decline admission or offer employment based on a full range of factors. In toto, the Court finds that the evidence of potential harm weighs heavily in favor of Plaintiffs.

C. Likelihood of Success

As to likelihood of ultimate success on the merits, Plaintiffs argue first that the diploma condition should be enjoined because Defendants have failed to comply with §60856, which requires the State Board of Education, in consultation with the Superintendent of Public Instruction, to “study the appropriateness of other criteria by which high school pupils who are regarded as highly proficient but unable to pass the high school exit examination may demonstrate their competency and receive a high school diploma.” Plaintiffs assert that Defendants conducted no such study. The evidence, however, does not support this assertion. The evidence shows, at best, that Defendants were late in their efforts to conduct a study, but is not sufficient, in and of itself, to support Plaintiffs’ request for preliminary injunctive relief.

Plaintiffs’ constitutional arguments, however, are well taken and well supported. Access to a public education is a fundamental personal interest in California, as set forth in the Article IX, §5 of the California Constitution. The unique importance of public education in California requires careful scrutiny of state interference with basic educational rights. (*Butt v. State of California, supra*, 4 Cal.4th at 683-685.) Defendants attempt to distinguish the case at bar as one that does not involve “education” per se, but only the issuance of a diploma. The Court

does not agree. Plaintiffs, and the members of the class they represent, have met all of the requirements that would, before now, have entitled them to a diploma of graduation. They now face the prospect of having the final fruits of those substantial efforts withheld. In the Court's view an education itself and the certification of that education with its attendant benefits, is a distinction without a difference in this context. A diploma can fairly be characterized as an "educational opportunity," denial of which is subject to strict scrutiny . (*Id.*)

Plaintiffs assert that they have been denied due process, as well as equal protection. With respect to due process, having considered the authorities cited by Plaintiffs, the Court finds their application to the facts of this case less than compelling. For example, while the case of *Debra P. v. Turlington*, 644 F.2d 397, 403 (5th Cir. 1981) is of interest because it involves a similar exit exam being given in Florida, the challenge asserted by the plaintiffs therein was to the validity of the entire testing procedure. Here, the test itself is not so much under direct attack as is the provision of educational resources needed to adequately prepare students to take the exam. The Court does agree, however, with Plaintiffs' assertion that Defendants' efforts to establish and ensure curricular and instructional validity in California are meaningfully less in comparison with efforts Florida undertook to provide opportunity for all of its students.

In this Court's view, Plaintiffs' equal protection arguments, as supported by *Butt v. State of California*, *supra*, are far more compelling in this circumstance. The record is replete with evidence regarding the historical problems that the

public school system throughout the state has had with regard to scarcity of resources, and the disparate effect of this scarcity of resources on schools serving economically challenged neighborhoods and communities. Of import in developing and spotlighting the data on these disparities was the class action litigation initiated in May, 2000, called *Williams v. State of California* (Sup.Ct. San Francisco, No. CGC-00-312236). The ultimate settlement of *Williams* in August, 2004 resulted in new legislation defining standards and creating an accountability system. This legislation has been in effect for less than two years, and the evidence shows that remedial measures are far from complete.

There is evidence in the record that shows that students in economically challenged communities have not had an equal opportunity to learn the materials tested on the CAHSEE, that some schools have yet to fully align their curriculums to the State's content standards, and that demonstrates that the negative effects of scarcity of resources continue to fall disproportionately on English language learners, particularly with respect to the shortage of teachers who are qualified to teach these students.

Finally, and perhaps most significantly, in the fall of 2005, legislation was enacted allocating \$20 million to be used for "intensive instruction and services" for members of the Class of 2006, calling for allocating \$600 per senior who had not yet passed one or both parts of the exit exam. When these funds were distributed, however, they were allocated only to schools with a failure rate of 28% or above. As a result, 166 entire school districts, and nearly half of the

seniors who had not passed the exit exam as of the start of the current academic year, did not receive an allocation from this \$20 million. There is also evidence that some schools that did receive an allocation have not had time to use those funds to benefit the Class of 2006. Plaintiffs are likely to prevail on their claim that the State's arbitrary distribution of the \$20 million allocated for remediation purposes constitutes an additional violation of the equal protection clause.

Defendants have not identified any compelling State interest that was accomplished by assisting only some of those students, based solely on whether they lived in a district where more than 28% of the seniors had not passed the test.

Defendants claim that the \$20 million was distributed to school districts, and not to individual high schools. Thus, Defendants argue, even if there was no money allocated for a particular high school, that does not mean that that high school did not receive any money. Defendants contend that individual school districts may have decided to give some money to high schools that did not qualify for the funding. There is no evidence before the Court to support this assertion. However, even if it were true, Defendants concede that 166 school districts did not receive any of the \$20 million.

Finally, citing *Butt*, the State argues that school districts should be given discretion with respect to how they use funds. The issue here is not how the districts used these funds, but that students in many districts never received the benefit of any of these funds.

E. Evidentiary Objections

Defendants have objected to some of the evidence submitted by Plaintiffs. Most of the objections go to the weight of the evidence and not admissibility. Many of the objections refer to the secondary evidence rule. That rule provides that a court shall exclude secondary evidence of the content of a writing if the court determines that “a genuine dispute exists concerning material terms of the writing and justice requires the exclusion” of the evidence, or that “admission of the secondary evidence would be unfair.” (Evidence Code §§1521(a)(1)-(2).) The Court does not find a genuine dispute with respect to any of the evidence presented by Plaintiffs or that admission of the secondary evidence would be unfair. Defendants also make various relevance objections. Those objections are overruled. Finally, Defendants note that three of the declarations submitted by Plaintiffs did not comply with Section 2015.5 of the California Code of Civil Procedure. The Court accepts Plaintiffs representation that errata forms correcting that deficiency for two of the witnesses have already been obtained, and that an errata form will be obtained from the third witness as soon as possible. Plaintiffs are directed to file such errata forms post haste.

III. Injunctive Relief Granted

The Court acknowledges that, on the current state of the record, it is impossible to identify which class members can conclusively trace the cause of their failure to pass the CAHSEE to the adverse impact of the conditions which lead to the *Williams* suit and settlement, or to the lack of access to the \$20 million

remediation fund, and no suggestion has been made of a workable mechanism for doing so. The Court recognizes that the relief requested herein may inure to the benefit of some class members whose failure to pass the CAHSEE was not caused by these factors. However, faced with the prospect that the diploma condition, with its potentially devastating effects, will be imposed on many, if not all, class members because of system wide disparities as to "opportunities to learn" the material tested, the Court concludes that an injunction that may result in a windfall benefit to some is preferable to the alternative of no relief for those who are truly victims of a system which, although it shows signs of recovery, is still unwell. Accordingly,

IT IS HEREBY ORDERED that the Motion for Preliminary Injunction is GRANTED.

Superintendent for Public Instruction, State Department of Education, State Board of Education and State of California are enjoined and restrained, during the pendency of these proceedings, from denying any high school senior who is a member of a 2006 graduating class and who is otherwise eligible to graduate and receive a diploma from participating in graduation exercises and receipt of such diploma solely on the ground that such student has not passed all parts of the CAHSEE.

This order shall not serve to prevent any party, person or entity from annotating a diploma to indicate that a graduating student has passed all parts of the CAHSEE, or otherwise reporting a student's status as having passed or not

passed all portions of the CAHSEE to the extent such information is authorized to be disclosed under existing law.

Additionally, in the interest of clarity, the Court emphasizes that this order: (1) shall *not* stay the continued administration of the CAHSEE itself; (2) shall not stay efforts to assist all students to prepare adequately for the exam; and (3) does not address the imposition of the diploma condition on future graduating classes.

IV. Case Management

1) A further Complex Case Management Conference (“CCMC”) and CRC Rule 1852 Case Conference is hereby set for July 27, 2006 at 2:00 p.m. in Dept. 20 of the above-entitled court.

2) Counsel are directed to meet and confer in advance of the CCMC to address the following issues to be considered at the CCMC:

(a) A review of the then current issues presented in the case, including each theory and defense, the facts supporting each position taken in the form of a brief factual summary assisting the Court in understanding the then current posture of the case, the relief sought. The Court notes that counsel have already provided the Court with extensive briefing and evidentiary material relating to the history of these proceedings. Accordingly, the focus shall be on developments following the date of this order and in particular what steps each party contends must be taken to eliminate the conditions the Court has found by this order to warrant injunctive relief.

(b) Any contemplated change in composition of the parties plaintiff and/or

defendant.

(c) Proposed deadlines and limits on joinder of parties and amended or additional pleadings.

(d) Class discovery and class certification including:

(e) A proposed schedule for the conduct of the litigation including, but not limited to, a discovery plan, a plan for hearing remaining law and motion, and a projected trial date;

(f) An identification of all potential evidentiary issues involving confidentiality or protected evidence;

(g) A detailed description of the procedural posture of the case, describing any outstanding procedural problems, including, but not limited to related actions pending in any jurisdiction and the potential for coordination or consolidation;

(h) The status of discovery, including a description of all anticipated discovery and incomplete or disputed discovery issues;

(i) Requests for, or opposition to, any ADR proceedings, including but not limited to mediation and/or judicially supervised settlement conferences. If party proposed mediation or other form of ADR involving an ADR neutral, each party shall propose candidates to so serve;

(j) Bifurcation or severance of issues for trial;

(k) Consideration of the appointment of one or more experts pursuant to Evidence Code §730 to assist the court and, in particular, with regard to

resolving disputes concerning interpretation of statistical data;

(l) Calendar conflicts for any attorney, witness, or party, and any other matter which may affect the setting of a trial date;

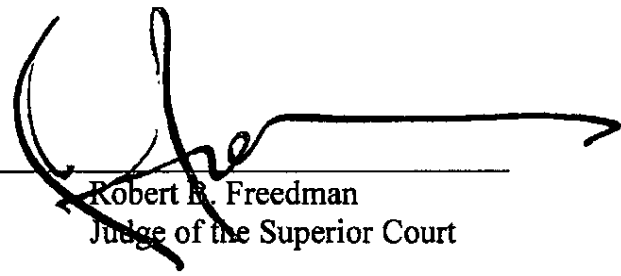
(m) Suggestions for streamlining the litigation, including, but not limited to, a master file system, the use of e-filing, and the use of a web-page maintained by counsel for the purpose of posting the litigation schedule and agenda.

(n) Any other matters suggested by counsel.

3) Case Management Statements shall be filed and served at least 5 court days before the CCMC. Joint statements are encouraged but not required.

4) The court will consider requests to advance all or a portion of the CCMC for good cause shown.

MAY 12, 2006
Date



Robert R. Freedman
Judge of the Superior Court

Action No. JCCP004468

DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below, I mailed (first Class, postage pre-paid) a copy of Order Granting Preliminary Injunction and Case Management Orders to the persons thereto, addressed as follows:

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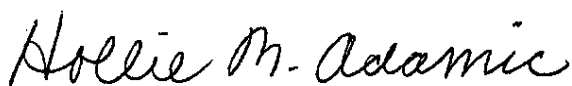
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Executed on May 12, 2006 at Oakland, California


By Hollie M. Adamic, Courtroom Clerk