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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JESSY CRUZ, et al.,

Plaintiffs,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

No.: RG14727139

Action Filed: May 29, 2014

OPPOSITION OF STATE BOARD OF EDUCATION, CALIFORNIA DEPARTMENT OF EDUCATION, AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION TOM TORLAKSON TO PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Hearing:

Date: October 2, 2014
Time: 2:30 p.m.
Dept.: 17

(The Honorable George Hernandez, Jr.)

INTRODUCTION

With only 24 hours' notice and no chance for thorough briefing, plaintiffs ask this Court to intervene in the scheduling problems of a high school nearly 400 miles from where this Court sits. Only three out of the 1,619 students who would be affected by plaintiffs' order have any representation in this proceeding; and only eleven have any voice at all. Moreover, because of time constraints, the evidence on which plaintiffs rely is entirely untested and often filled with hearsay or speculation.

Basic principles of due process require that before the Court enters any kind of injunctive relief, those who will be affected by it be given an opportunity to respond. Yet plaintiffs insist that the Court should order sweeping relief without even allowing the state defendants a chance to brief the issues or offer evidence in response to the hundreds of pages plaintiffs served at 11:00 a.m. the day before the hearing.

Plaintiffs' approach implicates more than simple due process, however. It raises fundamental issues of separation of powers and the degree to which courts can or should interfere with the Legislature's plenary authority over education in this state. Although they rely heavily on the California Supreme Court's opinion in *Butt v. State of California* (1992) 4 Cal.4th 668, plaintiffs neglect to point out that *no* court has ever ordered the kind of extraordinary relief they seek here. In *Butt*, the Supreme Court upheld an order that state education officials ensure that all of the schools in the Richmond school district remain open for the remaining six weeks of the school year. (*Id.* at 704.) Here, plaintiffs ask the Court to order state education officials to address a whole range of scheduling issues for individual students who want to take courses like Trigonometry and AP English.

Plaintiffs' request is unfair to everyone involved, including the Court. Issuing the relief plaintiffs seek could have enormous unintended consequences, not just on the district but on other students at Jefferson who may want or need a "Home" period or from whom the school would have to divert resources in order to comply with the Court's order. Without further fact-finding, the Court has no way to know whether the declarations of 11 students accurately represent conditions at Jefferson High School. Even if they do, the Court needs briefing on whether or not those conditions amount to the kind of "extreme circumstances" under which the California Supreme Court has said the state has a

duty to intervene. (*Butt v. State of California*, *supra*, 4 Cal.4th at 688.) And finally, if the Court finds that extreme circumstances exist, it will need briefing to help it devise "the least disruptive remedy adequate to its legitimate task." (*Id.* at 696.) None of this can occur on 24 hours' notice.

The plaintiffs' declarations are troubling, and they deserve a thorough and substantive response. That response and appropriate remedies, however, should come at the school site and school district level. The state has already begun addressing the larger systemic problems about which plaintiffs complain by directing more resources to, and requiring increased accountability for, students at schools like Jefferson High. That legislation needs to be given a chance to take effect before the Court can decide whether plaintiffs can show the kind of extreme circumstances that warranted state intervention in *Butt v. State of California* (1992) 4 Cal.4th 668. For all of these reasons, the request for a temporary restraining order should be denied.

ARGUMENT

Plaintiffs correctly state that California courts must weigh two factors in deciding whether to issue a temporary restraining order: (1) the likelihood that the moving party will prevail on the merits at trial; and (2) the relative interim harm the parties will likely sustain from the issuance or non-issuance of the temporary restraining order. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251.) They neglect to add that "'[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits.'" (*Butt v. State of Cal.*, *supra*, 4 Cal.4th at 678, citation omitted.) In other words, plaintiffs must be able to demonstrate that they are likely to obtain an order requiring state education officials to intervene in the scheduling process at Jefferson High School, a question that raises significant issues about separation of powers and the appropriate role of the courts.

I.

PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS AT TRIAL

The irony of plaintiffs' lawsuit is that it comes on the heels of the most radical restructuring of school finance and academic content undertaken by the State since the landmark ruling in *Serrano v. Priest* (1971) 5 Cal.3d 584. In just the past few years, the State has adopted the so-

called "common core standards" agreed to by a consortium of states across the nation; suspended its statewide testing program to develop entirely new methods for assessing student progress; increased K-12 funding by billions of dollars through passage of Proposition 30 in 2012; and adopted the Local Control Funding Formula ("LCFF"), which at full implementation (roughly six to seven years from now) will have added $18 billion more in state funding for K-12 education than was spent in 2012-13. (*See* Request for Judicial Notice, Exh. 1, Legislative Analyst's Office, *Updated: An Overview of the Local Control Funding Formula* (Dec. 2013) p. 8.)[1]

A significant portion of those new funds are directed toward school districts, such as Los Angeles Unified, that have higher proportions of English learners and low income students, and students in the foster care system. In fact, a district whose students are all low income and/or English learners will receive a total funding allocation that is 42.5 percent greater than that of a district with no low income or English learner students. (*Id.*, p. 5.)

Under the new law, each school district is required to engage with parents, teachers, students, principals and others in the education community to develop a Local Control and Accountability Plan ("LCAP") that establishes goals for each segment of the district student population, develops action plans and services to meet those goals, and allocates district resources toward that end. In other words, for the first time in many years, the local school community has a say in the district's allocation of funding to achieve those district-identified goals that are most important to the community, while at the same time ensuring progress in eight designated state priority areas: student achievement; student engagement; other indicators of student performance; school climate; parental involvement; basic services; implementation of common core state standards; and student access and enrollment in required areas of study. (*Id.*, pp. 10-12.) The LCAP is adopted by each local school district governing board at a public meeting, and the county office of education reviews each LCAP. (*Id.*, p. 13.) A new state body, the California Collaborative for Educational Excellence, has been established to advise and assist school districts in improving student performance. (*Id.*, p. 19.)

[1] Given the limited time available to the Court for review, the LAO report is provided as a relatively succinct summary of the major provisions of the LCFF and LCAP.

In other words, after years of studying various reform alternatives, the Legislature and Governor decided the best way to improve education for the children of this state was to send significantly more funding to districts like LAUSD with greater numbers of low income, English learners and foster youth among the student population, and to allow the district, after consultation with all segments of the school community, to set goals, establish an action plan, and allocate funds accordingly. LAUSD has determined that one of the best ways it can help students achieve college and career readiness is by allocating a portion of its new funding toward decreasing class sizes in core ninth grade English and mathematics classes to start, and funding additional support for student class registration in every school.[2] Knowing that its resources are finite, the district will set a goal to decrease core class sizes in the upper grades as it receives more funding.

LAUSD, like other school districts throughout the state, adopted its first LCAP in June of this year, and will soon begin re-engaging the community in the annual review and update of the LCAP. This review will look back at whether the District's action plan and expenditure of funds on ninth grade core courses and scheduling support achieved the goal of helping students become college and career ready. If it did not, the district will have a chance to change its goals or actions, whether by implementing new approaches to achieve existing goals, setting a different goal, or by allocating even more funding to those tasks. Plaintiffs would halt that process in its tracks by requiring court and state intervention now, in the first year of LAUSD operating under an LCAP, based on speculation that the District will do nothing to assist the students who fell behind while their schedules were being adjusted. To the contrary, plaintiffs' own declarations demonstrate that the high school has been at least partially responsive to the students' complaints, and may soon resolve additional concerns.[3]

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[2] Superintendent's Report, LAUSD's Local Control Accountability Plan (LCAP) Revised Plan (June 10, 2014), p. 27, available at <home.lausd.net/ourpages/auto/2014/G/G/56717223/Superintendent.27s%20Update%20DRAFT%20v6%0205%2014v.2%20_1_.pdf>.

[3] We note here that the students who have submitted declarations all have course schedules now, and there is time remaining for the school and district to assist those students who have fallen behind. That is entirely unlike the situation in *Butt v. State of California*, *supra*, where the schools were being closed six weeks prior to the end of the school year, with no time for planning and no time to find an alternative means for students to complete their course work.

State education defendants will demonstrate that plaintiffs' complaints are not ripe for adjudication because of the extreme changes taking place in LAUSD and other districts right now, changes that are intended to help benefit the very same students whom plaintiffs purport to represent.

No one is saying things are ideal at Jefferson or that all services slashed during the Great Recession will have been fully restored in a year or two. However, for the first time in many years, school districts are being provided significant resources to address the problems they see in their own schools. In LAUSD, district officials and governing board members are focusing on exactly the same problem identified by plaintiffs – a problem caused in no small part by a computer system installed in a rush to meet a deadline imposed by a consent decree from yet another lawsuit.[4] Lawsuits are not often the best way to solve complex social problems like how best to educate an extremely diverse student population with limited resources. That question, as courts have repeatedly held, is better left to the legislative and executive branches. (*See O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1466-1467.) Where, as here, the Legislature has taken steps to address the problems raised in plaintiffs' complaint, courts will stay their hand to give the Legislature an opportunity to implement its approach. (*See, e.g., Crawford v. Board of Education* (1976) 17 Cal.3d 280, 286 [where local school board has implemented desegregation plan, court should stay its hand even if it believes that its own plan would work more quickly]; *Wolfe v. State Farm* (1996) 46 Cal.App.4th 554, 559, 568 [affirming the lower court's demurrer on the basis that the issues raised were best addressed by the Legislature].)

II.

THE BALANCE OF HARMS WEIGHS AGAINST PLAINTIFFS

Plaintiffs devote only superficial attention to the balance of harms, and in doing so, manage to miss the point altogether. The three named plaintiffs simply assume that they speak for the entire student body of Jefferson High School, ignoring completely the due process rights of the other 1,616 Jefferson High School students. Yet there has been no finding that plaintiffs are adequate class

[4] Defendants intend to produce evidence demonstrating that the new computer system was installed pursuant to the consent decree in *Chanda Smith v. LAUSD*, C.D. Cal. No. 93-cv-07044.

representatives, or that their claims are typical of the class they seek to represent; there has been no notice to the other students who would be swept up in the relief plaintiffs want for themselves; and no opportunity for those 1,616 other students to object. Under these circumstances, there is real danger that the relief plaintiffs seek will cause substantial, unintended harm.

Given the shortness of time, the State Education defendants focus on only two ways in which other students could be harmed by the relief plaintiffs seek. First, the named plaintiffs insist that many other Jefferson High School students should be precluded from devoting even a single period out of nine available periods to non-academic pursuits. (Pls.' Ex Parte App. for TRO, ¶ 1.) That may not be at all what those other students need. The State Education Defendants expect to offer evidence in opposition to plaintiffs' motion for a preliminary injunction to show that some students use "Home" periods to work in part-time jobs or internships. Some of these students may value these opportunities, or even rely upon the income they are able to earn as a consequence. Yet plaintiffs would force such students to give up their jobs or limit their working hours, without having any notice or opportunity to voice their views about whether doing so would help or harm them. (*Id.*)

Likewise, some students use their "Service" periods to acquire job experience. According to plaintiffs' own evidence, some students "perform administrative tasks such as answering phone calls, filing, and helping out with whatever the teacher or staff needs." (Declaration of Kathryn Eidmann ["Eidmann Decl."], Exh. Z, Declaration of Marquis Jones, ¶ 21.) Others "summon other students," "help translate during student and parent meetings," or "work in the library, shelving books and assisting the librarians." (*Id.*) This gives students the opportunity to show potential employers that they have work experience, to acquire job references, and to bolster their college or scholarship applications, something that at least some of those students might be reluctant to sacrifice.

It is important to note that, according to plaintiffs' own evidence, students generally have a choice about whether to enroll in "Service" or "Home" periods, and they are generally not eligible to enroll in these periods "unless they are on track to meet their graduation requirements and are not failing any classes." (Eidmann Decl., Exh. Y, Declaration of Robert Vidana ["Vidana Decl."], ¶ 20.) Yet plaintiffs would withhold this choice from students who cannot meet the gauntlet of

additional requirements that plaintiffs would impose, including being on track to qualify for admission to a California state college or university and achieving a particular score on the California Standards Test.[5] This ignores the possibility that not all students plan to attend college; that some students *must* work if they are ever going to be able to afford to go to college; and that some students perform better in school if they have the opportunity to integrate practical work experience with traditional coursework. Any student who falls into these categories is likely to be harmed rather than helped by the relief plaintiffs seek.

Second, plaintiffs seek relief that they believe will improve their high school experience, despite the fact that such relief will almost certainly come at the expense of other students. For example, plaintiffs ask this Court to require the State to guarantee enrollment in specified classes for Jefferson High School students and add additional teachers.[6] (Pls.' Ex Parte App. for TRO, ¶ 1(c).) Yet plaintiffs do not request, and this Court could not order, the funding necessary to provide these additional classes and teachers. (*Mandel v. Myers* (1981) 29 Cal.3d 531, 539.) That means that any relief will almost certainly have to be taken from existing, finite resources, such as other classes in which other students are enrolled.

It is an unavoidable fact that finite resources force difficult, sometimes even heart-wrenching choices. As plaintiffs' own declarant explains, "schools like Fremont [High School] must

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[5] Students who take the California Standards Test receive results according to the following five achievement levels: Advanced, Proficient, Basic, Below Basic, and Far Below Basic. (California Department of Education, Evaluating NAEP and CST Results <http://www.cde.ca.gov/ta/tg/nr/naep09evalcst.asp> [as of Oct. 2, 2014].) According to plaintiffs, only students who achieve "Advanced" and "Proficient" levels can enroll in "Home" or Service" periods. (Pls.' Ex Parte App. for TRO at ¶ 1(a).)

However, the California Standards Test was part of the STAR testing system that became inoperative on July 1, 2013. On January 1, 2014, the state established the California Assessment of Student Performance and Progress system. (Ed. Code, § 60640.) That system includes new Smarter Balanced Assessments for English-language arts and mathematics that are being given statewide for the first time in the 2014-15 school year. The CST will be used at the high school level only for testing in certain science courses in the 10th grade. The required tests for 2014-15 are listed in a summary chart that may be accessed at http://www.cde.ca.gov/ta/tg/ai/caasppchart14.asp (last visited Oct. 2, 2014).

[6] At the same time, plaintiffs would prohibit the state from allowing most students to turn to community colleges or adult schools as an alternative forum for the classes they wish to take. (Pls.' Ex Parte App. for TRO, ¶ 1.)

choose between intervention [classes] and electives." (Vindana Decl., ¶ 20.) Intervention classes are available to help academically challenged students get back on track so that they can graduate from high school. (*Id.*) "Fremont has chosen to have intervention classes so as many students can graduate as possible, which means few resources remain for electives and enrichment." (*Id.*) Similarly, as noted above, Jefferson High School has made the decision to focus its resources on core courses at the ninth grade level, a thoroughly rational choice given that incoming high school students need a basic foundation if they are going to be able to advance to higher level course work.

Plaintiffs, however, want the school to offer classes like Honors American Literature, Trigonometry, AP Physics, and AP Spanish Literature. (Eidmann Decl., Exh. G, Declaration of Jesus Tamayo, ¶ 9, Exh. H, Declaration of Eduardo Tamayo, ¶ 9, Exh. I, Declaration of Jason Magana, ¶ 9.) Their desires are both understandable and commendable, but the fact remains that Jefferson High School would almost certainly have to cut services elsewhere if it is required to offer another Trigonometry class and more AP and honors classes. Plaintiffs' own evidence suggests that more electives will lead to fewer core and intervention courses. This could harm, perhaps irreparably, other Jefferson High School students who need those classes in order to graduate.[7]

As these examples illustrate, there is a real risk that ordering such sweeping relief without the benefit of meaningful notice or briefing could do far more harm than good. As the Sixth District Court of Appeal explained:

> A fundamental goal of legal education is to instill the instinctive recognition that a particular solution to a legal problem, however obvious or indisputably correct as a generality, may appear quite intolerable with the introduction of one or two additional factual details. Justice in particular cases cannot be ensured by blind adherence to broad

[7] The high school courses required for graduation are three years of English; two years of mathematics, one of which must be algebra if that course was not successfully completed in middle school; three years of history and social sciences, including one year of U.S. history, one year of world history, one semester of U.S. government and one semester of economics; two years of science, including biology and a physical science; one year of either a foreign language, visual or performing arts, or career technical education course; and two years of physical education. (Ed. Code, §§ 51225.3 & 51224.5.) The University of California and California State University systems have different course requirements for admission, including no physical education, four years of English and three years of mathematics, although neither the UC nor the CSU system requires that one of those mathematics courses be Trigonometry.

> categorical rules, because the application of rules to particular circumstances often reveals latent defects or ambiguities within the rules themselves, or conflicts with other rules, or contradictions in the common social values on which all legal principles must ultimately rest. Such conflicts must be mediated by a deliberate and careful weighing of the effects a case may have on the values and policies implicated in it. Due attention to the facts may thus produce an exception or modification to a rule that, at a more abstract level, seemed perfectly suited to the dispute at hand.
>
> (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1452-1453.)

Finally, the relief plaintiffs seek could lead to harms that flow beyond the student body at Jefferson High School because the order implicates the separation of powers between this Court and the Legislature. As discussed above, the Legislature has chosen to shift substantial new funding and responsibility for policy-setting to local school districts in an effort to solve many of the problems described in plaintiffs' complaint, while specifically carving out an oversight role for county offices of education and the state. Plaintiffs want this Court to subvert that legislative policy decision by forcing the State to wrench policy and funding control back from school districts. If the Court grants this relief, it would have to go much further than any appellate court has ever gone before. In *Butt v. State of California*, *supra*, 4 Cal.4th at 703-704, the Supreme Court agreed that state education officials must intervene in a truly extraordinary circumstance, such as when necessary to prevent the closure of an entire school district six weeks before the end of the school year. (*Id.*) Yet nothing in *Butt* clearly extends to require state education officials to intervene in scheduling problems for individual students who want better options for some of their course periods. The State Education defendants urge the Court not to push the law this far without the benefit of full and considered briefing, particularly when doing so could have the effect of usurping the Legislature's prerogative.

CONCLUSION

For all of the reasons stated above, plaintiffs' request for a temporary restraining order should be denied.

Dated: October 2, 2014

Respectfully submitted,

Robin B. Johansen
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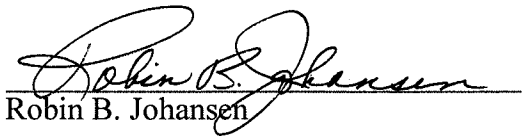
REMCHO, JOHANSEN & PURCELL, LLP

By: 
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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On October 2, 2014, I served a true copy of the following document(s):

Opposition of State Board of Education, California Department of Education, and State Superintendent of Public Instruction Tom Torlakson to Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

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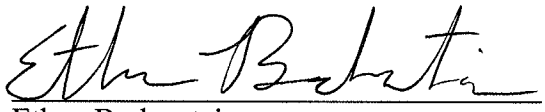
I declare, under penalty of perjury, that the foregoing is true and correct. Executed on October 2, 2014, in San Leandro, California.



Ethan Bodenstein

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