SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 12/19/2008 Time: 11:55:12 AM Dept: 54

Judicial Officer Presiding: Judge Shelleyanne W L Chang
Clerk: M. Milbourne

Bailiff/Court Attendant:
ERM:

Case Init. Date: 09/04/2008

Case No: 34-2008-00021188-CU-MC-GDS Case Title: California School Boards Association vs. The California State Board Of Education

Case Category: Civil - Unlimited

Event Type: Motion - Other - Civil Law and Motion

Causal Document & Date Filed:

Appearances:

Nature of Proceeding: OSC Re: Preliminary Injunction

TENTATIVE RULING

Plaintiffs California School Boards Association and Association of California School Administrators motion for preliminary injunction, in which the Superintendent of Public Instruction and the California Teachers Association join, is granted.

The court commends all parties for their excellent memoranda.

A brief introduction is appropriate. In 1997, California developed two 8th grade assessments: an Algebra I test for students taking algebra and a General Mathematics Test (GMAT) for all other students. The current GMAT was developed in 2002. In 2007, the US Department of Education (USDOE) determined that the GMAT was an "out-of-level assessment" because it measured 6th and 7th grade content and therefore did not comply with the No Child Left Behind Act (NCLB). In March 2008, the California Department of Education (CDE) proposed a plan that would revise the GMAT to comply with NCLB. It stated at that time that it would not be appropriate for all students to take the Algebra I test. Defendant State Board of Education (SBE) approved by an 8-0 vote CDE's "recommendation to develop a grade eight mathematics test aligned to Algebra 1 standards." CDE developed a new GMAT "blueprint," which was to be presented at SBE's June 2008 meeting. The matter was continued to July 9, 2008. At that meeting, by an 8-1 margin, SBE directed its and CDE's staff to work with USDOE to develop a compliance agreement making the Algebra I test "the sole test of record" for the purposes of NCLB. On SBE's agenda for its November 2008 meeting was an item entitled "Consideration and Approval of a Timeline Waiver Agreement for the Purpose of Demonstrating Compliance with the Algebra I Assessment Requirements" of NCLB. Plaintiffs filed their complaint, which includes a request for injunctive relief, on September 9, 2008. The court issued a temporary restraining order on October 28, 2008, enjoining SBE from taking any action to implement its July 9, 2008 decision and set this date for a hearing on plaintiffs' request for a preliminary injunction. As a result of the temporary restraining order, SBE ceased negotiating with USDOE regarding a timeline waiver.

"[I]n evaluating a request for a preliminary injunction a court must consider two factors - both the likelihood of success on the merits, and the relative harms that would flow from denying or granting a preliminary injunction." White v. Davis (2003) 30 Cal.4th 528, 560.

With respect to the first factor the court must consider, the likelihood of success on the merits, plaintiffs raise two independent grounds in support of their motion. First, they contend that SBE "violated the Bagley-Keene Open Meeting Act by failing to give the public notice that it was considering reversing its prior decision to use a revised GMAT and was contemplating a dramatic change in the mathematics curriculum." According to plaintiffs, the July 9, 2008 agenda, and accompanying material, refers only to the "Revised General Mathematics Blueprint." See Comp., Exhibits A and B. Thus, the public would not have been on notice that SBE was considering designating the Algebra I test for purposes of NCLB compliance.

There is no dispute that the Act applies here or that notice "shall be given and also made on the Internet at least 10 days in advance of the meeting." Gov't Code § 11125(a). Further, the notice "shall include a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed in either open or closed session." Id., subd. (b). The court agrees with plaintiffs that the "Agenda - July 9-10, 2008" does not provide notice to the public that SBE was considering making Algebra I the "sole test of record" for purposes of NCLB. Neither the "Subject" description in Item 10 nor the "item attachments" suggest that such a proposal was under consideration. SBE's contention that the public was "involved" and that SBE substantially complied with the Act, is unconvincing. The court has reviewed the letters and other communications dated between March and July 2008 that SBE offered. Although during that time some individuals, many of whom were active in the field of education and were thus aware of issues regarding NCLB compliance, exchanged views both for and against a "Revised General Mathematics Blueprint," awareness by those few individuals does not satisfy the requirement that the general public be informed. "The people of this state do not yield their sovereignty to the agencies which serve them." Gov't Code § 11120. "The people insist on remaining informed so that they may retain control over the instruments they have created." Id. The court declines to find that "the people" consists of only those few individuals privy to information not generally available to the public.

The cases SBE cites do not support its argument. In Regents of University of California v. Superior Court (1999) 20 Cal.4th 509, the issue before the Court was "whether the right of action granted by [Government Code] section 11130.3(a) under the Bagley-Keene Open Meeting Act is limited by the 30-day statute of limitations contained therein." Id. at 526. The Court did not consider an issue similar to the one before this court. In North Pacifica LLC v. California Coastal Com. (2008) 166 Cal.App.4th 1416, the "Commission sent out the 'Commission Notice of Appeal" . . . 22 days prior to the January 11, 2006 meeting." Id. at 1432. On December 30, 2006, the Commission posted a report that "provided interested persons and the public detailed information about the substance of the meeting." Id. Thus, the issue in North Pacific, like the one in Regents, is unlike the one before this court.

Further, the court does not agree with SBE's contention that plaintiffs must demonstrate prejudice. SBE relies, again, on North Pacific. Preliminarily, the court notes that a petition for review of that case is pending in the California Supreme Court. Further, the only authority that that court cited regarding prejudice was Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 556, a Brown Act case. The court in Cohan, however, did not cite any authority for its determination that prejudice was required under the Brown Act. The court did cite Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 427, n.15, another Brown Act case, but the citation to Griffis occurs before, not after, the proposition that "[a]ppellants must show prejudice." Cohan, 30 Cal.App.4th at 556. Moreover, note 15 in Griffis does not mention prejudice.

Moreover, even if prejudice were required, the court fails to see what "distinguishes" this case from plaintiffs' cases, Santa Barbara Sch. District v. Superior Court (1975) 13 Cal.3d 315, 335 and Carlson v. Paradise Unified Sch. Dist. (1971) 18 Cal.App.3d 196, 200. In those cases, a school district's agenda failed to advise the public about possible school closings. "This was entirely inadequate notice to a citizenry which may have been concerned over a school closure." Id. Although, as discussed above, certain individuals, many with a professional interest in education, were aware that making the Algebra I test "the sole test of record" for purposes of NCLB was being discussed, there is no evidence that the "citizenry," e.g., parents or other interested individuals, "which might have been concerned," were also apprised. Id. Thus, plaintiffs have met any burden of demonstrating prejudice.

As to the first ground raised by plaintiffs, the court finds that for the purposes of this motion, plaintiffs are likely to prevail on the merits.

Plaintiffs' second ground in support of their motion is that SBE "violated the Education Code provisions governing assessments." According to plaintiffs, "those provisions require that assessments be aligned with the state's existing content standards, content standards that do not require eighth graders to take Algebra I. The statutory scheme creating the content standards and the assessment system contain[s] specific delegations of authority and procedures for implementation; fundamentally, [SBE] exceeded [its] statutory authority over both assessments and modifications to the content standards."

Specifically, plaintiffs content that SBE exceeded its authority in two ways. First, Education Code § 60604(a) provides that "The Superintendent [of Public Instruction] shall design and implement . . . a statewide pupil assessment program." In addition, section 60642.5 provides that the Superintendent, with SBE's approval, "shall provide for the development of any assessment instrument, to be called the California Standards Test, that measures the degree to which pupils are achieving the academically rigorous contend and performance standards." According to plaintiffs, it was SBE, not the Superintendent, which "designed" and "developed" the Algebra I as the sole assessment for 8th grade. Second, section 60642.5 requires that assessment be aligned with the content standards. The current content standards, however, do not require 8th graders to take Algebra I. Therefore, plaintiffs argue, an Algebra I assessment for all 8th graders is not "aligned" with the content standards. Finally, by requiring all 8th graders to take an Algebra I test, and thereby effectively requiring all students to study Algebra I, SBE is amending the content standards. Plaintiffs contend SBE lacks authority to do so.

SBE counters that because an Algebra I assessment is already in existence, it was neither designing nor recommending a proposed assessment, responsibilities which are the Superintendent's. Further, according to SBE, using an Algebra I assessment does not alter existing content standards because SBE in July 2008 merely directed staff to develop an agreement with USDOE where all 8th graders would be tested with the existing Algebra I examination. SBE did not require action by any school in California to meet that testing requirement. SBE also contends its responsibility to "align" assessment with content standards is not absolute, but is required only "[t]o the extent feasible." § 60605(d). Moreover, citing to Plaintiffs' Exhibit N, SBE argues that the Algebra I assessment is aligned with Algebra I content, the "minimum . . . content standards" for 8th graders. Finally, SBE contends that even if it's July 2008 decision "modifies content standards," SBE has the authority to do so under NCLB, which provides that the "state education agency," i.e., SBE, may "satisfy NCLB by 'adopting academic standards and academic assessments that meet the requirements of this subsection, on a statewide basis, and limiting their applicability to students served under this part' or else by 'adopting and implementing policies that ensure each local educational agency in the State that receives grants under this part will adopt curriculum content and student achievement standard.' 20 USC § 6311(b)(5)."

Plaintiffs have the better argument. As they point out, the current content standards clearly anticipate that not all 8th grade students will be instructed in Algebra I. Thus, by requiring Algebra I testing for all students, SBE would effectively eliminate, i.e., amend, at least the non-Algebra portion of the content standard because all 8th graders will have to take algebra in order to pass the Algebra I test. Moreover, NCLB does not require Algebra I testing. There is no evidence before the court that a modified GMAT that did not test 6th and 7th content would fail to satisfy NCLB. Therefore, "aligning" assessment with current content standards by a means other than the exclusive use of the Algebra I test appears "feasible." Further, SBE's claim that its July 2008 action did not require any school to take any "immediate action," is shortsighted. As discussed below, systemic shortcomings would arguably require immediate action. In addition, even if immediate action were not required, that fact has no bearing on whether SBE exceeded its statutory authority. Finally, the court agrees with plaintiff that SBE's authority under the NCLB as the "state education agency," is limited by California law, Education Code §§ 12000 et seq. The intent of those statutes is that SBE "cooperate with the government of the United States." § 12032. They do not permit SBE to take any action that is inconsistent with California law, however. As stated above, there is no evidence before the court that the adoption of a modified GMAT would not satisfy the "cooperation" requirement.

As to the second ground raised by plaintiffs, the court finds that for the purposes of this motion, plaintiffs are likely to prevail on the merits.

With respect to the second factor the court must consider, the relative harms that would flow from

denying or granting a preliminary injunction, plaintiffs contend that school districts throughout the state "will immediately be required to begin taking extensive steps to prepare students to take the Algebra I" test. Plaintiffs contend that the cost of implementing SBE's July 2008 action will ultimately be $3.1 billion. Moreover, there will be an immediate impact regarding the selection and purchase of instruction materials. According to McFadden, Management Services Executive for the Association of California School Administrators, implementation of SBE's July 2008 action will immediately impact three areas: "(1) the selection and purchase of instructional and supplemental materials; (2) professional development and teacher hiring; and (3) the provision of appropriate instructional intervention resources for students who will not be able to meet this new academic standard."

SBE counters that its July 2008 action and the timeline waiver will have no immediate effect on how schools do business. According to SBE, a timeline waiver would require full compliance in four years. In other words, "by the end of 2011-2012 school year, the Algebra I end-of-course examination will be the sole test of record for federal accountability purposes of 8th grade mathematics." Thus, "[s]chools can meet the Fall 2009 deadline to provide students with standard-aligned materials. Finally, schools can fail to make adequate progress for two years, i.e., through 2014, before they are "identified for school improvement." SBE also argues that if it "is not allowed to go forward with its July 2008 action and the proposed timeline waiver" with USDOE, "SBE will not be allowed to retain $1 million in administrative funds." According to SBE, "California has until December 22, 2008, to 'show cause' why USDOE should not withhold these funds. USDOE took this action" in part because "the state has not made meaningful progress to develop any action plan and timeline to come into compliance." Finally, SBE suggests that far more than $1 million may be at risk.

Again, plaintiffs have the better argument. Although the court is not entirely convinced by plaintiffs' litany of untoward consequences, the court is persuaded by their contention that SBE's July 2008 action would require immediate "systemic changes" to ensure that those students in lower grades, "particularly fifth grade students will be prepare to take the Algebra I test by the 2011-2012 school year." According to plaintiffs, almost one-half of all 5th grade students are not proficient in mathematics. Moreover, approximately one-third of the state's middle school Algebra I teachers are either underprepared or teach out-of-field. The court is convinced that immediate action would be necessary to ameliorate these, and other, systemic shortcomings. Those actions, of course, would entail significant costs. Further, the fact that schools can "fail" for two years before being "identified for school improvement" is of little consolation. Finally, the harm plaintiffs describe looms large compared to the harm SBE says it will suffer. First, even if the court were to deny the preliminary injunction, the litigation would remain, a fact that would not be lost on USDOE on December 22, 2008 when it decides whether or not to retain $1 million. Similarly, if plaintiffs prevail at trial, as the court finds likely, then California would be back in the same position it is now with respect to "not [making] meaningful progress." In that case, today's "immediate harm" would at most be delayed rather than prevented. Second, USDOE's November 21, 2008 letter states that if "California cannot show cause, the Department will withhold $1,000,000 of California's fiscal year 2008 Title I, Part A administrative funds, which will then revert to the local educational agencies in California." SBE's Exhibit 14. The withholding, therefore, results not in the loss of educational funds to California, but in the redirection of those funds to local educational agencies. Third, nothing in USDOE's November 21, 2008 letter indicates that it is anticipating a more onerous withholding.

The court finds that "the balance of harms 'tips' in" favor of plaintiffs. White, 30 Cal.4th at 561.

Having found that plaintiffs are likely to prevail on the merits and that they would suffer a greater relative harm, the court grants their request for a preliminary injunction.

Defendant's objections to Request for Judicial Notice, exhibits K, R and Y are sustained. Plaintiffs' requests for judicial notice are otherwise granted. Defendant's other objections are overruled. Plaintiffs' objection to Merle dec., ¶16 is sustained. Plaintiffs' remaining objections are overruled. Plaintiff's request for judicial notice is granted.

Plaintiffs' counsel shall prepare for the court's signature a order pursuant to CRC rule 3.1312.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission, the Court now rules as follows: The Court affirmed the Tentative Ruling.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: December 22, 2008

M. Milbourne, Deputy Clerk _____

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