IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULEUS CHAPMAN,

Plaintiff,

v.

CA DEPT OF EDUCATION,

Defendant.
_____/

No. C 01-01780 CRB

ORDER CERTIFYING CLASS

In 1999 the California Legislature passed S.B. 2, which requires that all California high school students, starting with the class of 2004, pass an exit exam to graduate. Cal. Ed. Code § 60851(a). Plaintiffs in this action allege that the exit exam requirement, as currently structured, illegally discriminates against disabled students. Plaintiffs have moved for an order certifying this case as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2). Plaintiffs propose that individuals Juleus Chapman, Jennifer Lyons, and Ryan Smiley, and the organization Learning Disabilities Association of California act as class representatives and that Disability Rights Advocates and Lieff, Cabraser, Heimann & Bernstein, LLP act as class counsel.[1]

INTRODUCTION

Plaintiffs Juleus Chapman and Jennifer Lyons are public school students in the class of 2005 (freshmen) with dyslexia. Plaintiff Ryan Smiley is in the class of 2004 (sophomore). He suffers from

[1] Plaintiffs also moved the Court for partial summary judgment. The Court has reserved its ruling on that motion.

dyslexia and dysgraphia (a writing disability which affects letter spacing, spelling, and word choice). Plaintiff Learning Disabilities Association of California ("LDA-CA") is an organization consisting of parents, teachers, and other professionals working with disabled children.

Defendants are: 1) the California Department of Education, 2) the California Board of Education, 3) Delaine Eastin, State Superintendent of Public Instruction and Director of Education for the California Department of Education, 4) the Fremont Unified School District ("Fremont"), and 5) Sharon Jones, Superintendent of Fremont. The law requires the Superintendent of Public Instruction, defendant Delaine Eastin, to develop and implement the exit exam.

Plaintiffs allege that defendants have failed to: 1) provide an "alternate assessment" to the exit exam, 2) provide reasonable accommodation for taking the exit exam, 3) adjust the curriculum of disabled students so that they are prepared for the exit exam, and 4) ensure the validity of the exit exam itself. The First Amended Complaint states causes of action under: 1) the Americans with Disabilities Act, 2) the Rehabilitation Act of 1973, 3) the Individuals with Disabilities Education Act, 4) the Educate America Act, 5) the Improving America's Schools Act of 1994, 6) California Education Code § 60850, 7) California Government Code § 11135, 8) the due process clause of the federal constitution, and 9) the equal protection clause of the California constitution. Plaintiffs seek declaratory and injunctive relief only.

BACKGROUND

The exit exam was administered to freshmen in the class of 2004 on a voluntary basis in March 2001. In March of this year, the exit exam will be administered to all members of the class of 2004 (sophomores) who have not already passed the exam.

Named plaintiffs are educated in accordance with personalized plans mandated by federal law: either an Individualized Education Program ("IEP") pursuant to the Individuals with Disabilities Education Act ("IDEA"), or a Section 504 Education Plan ("504 Plan") pursuant to the Rehabilitation Act of 1973. These plans, created by educators, parents, and children, specify the educational needs, including curriculum, of individual disabled children. Among the items detailed in the plans are accommodations for test taking during school. Pursuant to these plans, plaintiff Chapman uses a laptop computer for school tests. Smiley uses a calculator and a laptop computer, and has his test presented orally. Lyons is permitted to use a spell checker, a calculator, a computer, a scanner, and a tape recorder.

DISCUSSION

I. Legal Standard

Plaintiff bears the burden of proving that certification is appropriate. See In re Northern Dist. of Calif., Dalcon Shield IUD Prod. Liab. Litig. , 693 F.2d 847, 854 (9th Cir. 1982). Class actions must satisfy all four requirements set forth in Federal Rule of Civil Procedure 23(a) as well as one of the categories set forth in Rule 23(b). Rule 23(a) allows class certification where "the proponent shows: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1237-38 (9th Cir. 2001).

Certification is appropriate under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

II. Class Definition

Plaintiffs move to certify a class of: "All students with disabilities who have been or will be required to take the California High School Exit Exam." Defendants counter that this class definition is too broad because all students with disabilities do not qualify for, or even need, test accommodations, modifications, or alternate assessment. If a class is to be certified, defendants argue that it should consist only of individuals that cannot read or write at the grade level required for the exit exam and who cannot pass with the accommodations and modifications currently provided for under California law.

The Court agrees that the proposed class definition is too broad. Indeed, the proposed language would seem to include children with physical disabilities who face no disadvantage whatsoever related to the exit exam. The Court is convinced that a narrower and more precise class definition is appropriate. Accordingly, the court will consider certification in the context of the following potential class definition:

> All students eligible for an Individualized Education Program ("IEP") pursuant to the Individuals with Disabilities Education Act or a Section 504 Education Plan ("504 Plan") pursuant to the Rehabilitation Act of 1973, who have taken or will be required to take the California High School Exit Exam.

This definition was developed with the input of the parties at oral argument. It recognizes that some students may be eligible for IEPs or 504 plans even though they are not currently participating in one.

III. Rule 23(a) Requirements

A. Numerosity

There are several hundred thousand potential class members. This requirement is clearly satisfied.

B. Common Questions of Law or Fact

Plaintiffs seek only declaratory and injunctive relief. Specifically they seek to ensure that the exit exam requirement is applied consistent with state and federal law. Courts generally consider such programmatic challenges to present common questions. See id. at 56-67; see also Armstrong v. Davis, 2001 WL 1506518, 13 (9th Cir. 2001) ("We have previously held, in a civil-rights suit, that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.") (internal citation omitted). Indeed, injunctive actions generally are considered to present common questions. See Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57 (3rd Cir. 1994) ("[B]ecause they do not also involve an individualized inquiry for the determination of damage awards, injunctive actions by their very nature often present common questions satisfying Rule 23(a)(2).") (internal citation omitted).

In this case, while factual circumstances of the class members may vary somewhat, the legal questions are largely identical. The action is based primarily on defendants actions, not plaintiffs' individual circumstances. The question is whether the exit exam has been, and will be, administered in compliance with state and federal law. There is little need for individualized inquiry and the commonality requirement is satisfied. See Califano v. Yamasaki, 442 U.S. 682 (1979).

C. Typicality

While the requirements of commonality and typicality overlap they are distinct requirements. See Baby Neal, 43 F.3d at 56. "Typicality . . . is said to require that the claims of the class representatives be typical of those of the class, and to be satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Armstrong v. Davis, 2001 WL 1506518, 13 (9th Cir. 2001) (internal citation omitted).

Defendants argue that the particular disabilities of the three named plaintiffs are unique and therefore the plaintiffs are not typical. Defendants' argument misunderstands the typicality requirement. "Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice."

Baby Neal, 43 F.3d at 58. Accordingly, the fact that individual members of the class may be entitled to differing remedies (e.g., alternate assessment or various reasonable accommodations) does not render the named plaintiffs' claims atypical. All claims arise out of the administration of the exit exam. The named plaintiffs present typical claims because all class members are affected by the systematic administration of the exit exam requirement.

As to typicality, this case is almost identical to Armstrong, where the Ninth Circuit concluded that, "[t]he plaintiffs all suffer a refusal or failure to afford them accommodations as required by statute, and are objects of discriminatory treatment on account of their disabilities" in finding that the claims of the named plaintiffs where typical. Armstrong v. Davis, 2001 WL 1506518, 14 (9th Cir. 2001) (internal citation omitted).

The typicality requirement is satisfied.

D. Adequacy of Representation

The adequacy of representation focuses on two questions: "(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" In re Mego Financial Corp. Securities Litigation, 213 F.3d 454, 462 (9th Cir. 2000). Defendants have pointed to no potential conflict of interest, and the Court cannot identify one. Further, there is no real question about the competence of named counsel, or the vigor with which they will prosecute the action. Plaintiffs are represented by Disability Rights Advocates ("DRA") and Leif, Cabraser, Heimann & Bernstein, LLP. This requirement is satisfied.

IV. Rule 23(b)(2) Requirements

Plaintiffs assert that class certification is appropriate under Rule 23(b)(2). That rule provides for certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). As set forth above, this language describes the instant action. Indeed, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of where Rule 23(b)(2) applies. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997).

Defendants concede the general applicability of this section. They contend, however, that certification is premature. They argue that a proper class can be defined only after the policies and

procedures surrounding the exit exam are solidified and the characteristics of students adversely affected, if any, are determined.

However, Rule 23(c)(1) provides that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Furthermore, class certification should ordinarily be decided before a dispositive motion, including a motion for summary judgment, is resolved.[2] See Wade v. Kirkland, 118 F.3d 667, 670 (9th Cir. 1997); Wright v. Schock, 742 F.2d 541, 545 (9th Cir. 1984). While defendants emphasize the dynamic nature of the policies and procedures governing the exit exam requirement, a few basic facts remain. Under current law, members of the class of 2004 must pass the exit exam to graduate, and they must take the exam in March.

CONCLUSION

The plaintiffs have met their burden of showing that class certification is appropriate. The Court hereby certifies the following class:

> All students eligible for an Individualized Education Program ("IEP") pursuant to the Individuals with Disabilities Education Act or a Section 504 Education Plan ("504 Plan") pursuant to the Rehabilitation Act of 1973, who have taken or will be required to take the California High School Exit Exam.

The Court further certifies individuals Juleus Chapman, Jennifer Lyons, and Ryan Smiley, and the organization Learning Disabilities Association of California as class representatives and Disability Rights Advocates and Lieff, Cabraser, Heimann & Bernstein, LLP as class counsel.

IT IS SO ORDERED.

Dated: January 16, 2002

/s/
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

[2] Besides the motion for partial summary judgment which was filed concurrently with the motion for class certification, plaintiffs have also filed a motion for preliminary injunction.