IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULEUS CHAPMAN, et al.,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF EDUCATION, et al.,

Defendants.
_____/

No. C 01-01780 CRB

MEMORANDUM AND ORDER

Now before the Court is defendants' motion for summary judgment of all claims pending against them in connection with the California High School Exit Exam ("CAHSEE").

BACKGROUND

In 1999, the California Legislature passed S.B. 2, which requires that all California high school students, starting with the class of 2004, pass the California High School Exit Exam ("CAHSEE") in order to receive a high school diploma. See Cal. Ed. Code § 60851(a). The CAHSEE contains a math section and an English language arts section; a student must pass both sections to satisfy the exit exam requirement.

In March 2001, students in the high school class of 2004 were permitted to take the CAHSEE for the first time. In March 2002, members of the class of 2004 who did not take and pass the test in 2001 were required to take the test again. Those who still have not passed the exam will be required to retake it each time it is administered until they receive a passing score. Students who do not show progress toward passing the exam must receive remediation from their school districts. See id. § 60851(f).

Under current California law, members of the class of 2004 who do not pass the CAHSEE will not receive a high school diploma. See id. § 60851(a). However, as required by law, see id. § 60857, the state has contracted with an independent third-party evaluator to review the structure and impact of the exam and to make recommendations for improving it. The evaluator's final report must be completed by May 1, 2003. After reviewing the report, the State Board of Education will have until August 1, 2003 to determine whether the CAHSEE requirement should remain in effect for the class of 2004 or whether implementation of the requirement should be delayed. See id. § 60859.

The plaintiff class consists of learning disabled students who qualify for 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 are created by a team comprised of the student (where appropriate), parents, educators, and other professionals and are designed to assess a child's current performance, set goals, and identify specialized educational and other services that a student may require.

Federal regulations require that an eligible student's IEP specifically address "any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment." 34 C.F.R. § 300.347(a)(5)(i). When an IEP team determines that a child cannot participate in a particular state-wide assessment even with modifications, the IEP must include a statement as to why the standardized assessment is inappropriate and how the child will be assessed instead. See id. § 300.347(a)(5)(ii).

California now allows learning disabled students to take the CAHSEE with any accommodations or modifications described in their IEPs or Section 504 plans. Under California law, an accommodation is "any variation in the assessment environment or process that does not fundamentally alter what the test measures or affect the comparability of scores." Cal. Educ. Code § 60850(f)(1). Students who take the CAHSEE with accommodations and earn a passing score satisfy the CAHSEE requirement and can receive a diploma. A modification is defined as "any variation in the assessment environment or process that fundamentally alters what the test measures or affects the comparability of scores." Id. § 60850(f)(5). Students who take the CAHSEE with modifications and earn a passing score have not satisfied the CAHSEE requirement. However, such students may apply to their school districts for a waiver of the

requirement. See id. § 60851(c). If a student's waiver application is approved, the student can receive a diploma.

Named plaintiffs Juleus Chapman, Jennifer Lyons, and Ryan Smiley are learning-disabled public school students. Chapman and Lyons are members of the class of 2005 and have not yet taken the CAHSEE. Smiley is a member of the class of 2004. He took the CAHSEE in March 2001, March 2002, and July 2002. In July 2002, he passed the math section of the exam. In March 2002, he received a passing score on the ELA section of the exam with the assistance of a modification (a spell-checker). He has not applied for a waiver of the CAHSEE requirement. [1]

Named plaintiff Learning Disabilities Association of California ("LDA-CA") is a volunteer organization serving individuals with learning disabilities. Plaintiffs do not claim that any of LDA-CA's members has taken the CAHSEE or been subject to the CAHSEE requirement.

Plaintiffs filed a first amended complaint in December 2001. In February 2002, this Court issued a preliminary injunction ordering the defendants to permit students to take the CAHSEE with any accommodations or modifications described in their IEPs or Section 504 plans; to develop an "alternate assessment" to the CAHSEE; and not to deny any requests for waiver of the CAHSEE requirement pending further court order. See Chapman v. CA Dep't of Educ., 229 F. Supp. 2d 981 (N.D. Cal. 2002). Defendants appealed this Court's order to the Ninth Circuit, which on September 4, 2002 issued a ruling affirming in part and reversing in part the preliminary injunction. Defendants petitioned the Ninth Circuit for rehearing. On December 19, 2002, the Ninth Circuit issued an amended memorandum clarifying its earlier ruling. On December 27, 2002, the Circuit issued a mandate, indicating that plaintiffs' petition for rehearing would not be granted.

The parties have briefed defendants' motion for summary judgment in light of the Ninth Circuit's ruling. It now falls to this Court to determine which of plaintiffs' claims survive the Ninth Circuit's decision, and which of those can be resolved by summary judgment.

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[1] On February 18, 2003, plaintiffs filed a second amended complaint that adds five new plaintiffs, all of them current or former students in the class of 2004 at California public schools. See 2d Am. Compl. ¶¶ 31-35.

DISCUSSION

Only claims that are ripe for adjudication may proceed to summary judgment. See Scott v. Pasadena Unif. School Dist., 306 F.3d 646, 654 & n.9 (9th Cir. 2002) (noting that court's jurisdiction is circumscribed by ripeness considerations). To be ripe, a claim must raise issues that are "definite and concrete, not hypothetical or abstract." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000). "A case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur." Porter v. Jones, 2003 WL 253236, at *5 (9th Cir. Feb. 6, 2003) (quoting Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996)).

According to the Ninth Circuit, the bulk of plaintiffs' claims in this case are not yet ripe. Specifically, the Circuit has ruled that with the exception of plaintiffs' claim regarding their ability to take the CAHSEE with accommodations and modifications, "plaintiffs' challenge to the administration of the CAHSEE is not currently ripe for adjudication." See Smiley v. Calif. Dep't of Educ., 2002 WL 31856343, at *1 (9th Cir. Dec. 19, 2002). Moreover, since defendants "need experience with administration of CAHSEE to further develop and refine the test, to decide whether there should be a delay in the date for imposing it as a requirement for a high school diploma, and for working out the waiver process by which students with disabilities may obtain diplomas," plaintiffs' "accommodations claims are not yet ripe" to the extent that they "allege potential future harms caused by the possible denial of a waiver of CAHSEE requirements or of a diploma." Id. Finally, the Ninth Circuit held that "[p]laintiffs' claim regarding alternative assessment is also insufficiently ripe for adjudication on a statewide basis at the present time." Id.

Since the state now permits learning disabled students to take the CAHSEE with all necessary accommodations and modifications, it follows from the Ninth Circuit's ruling that *none* of plaintiffs' claims regarding test "administration" are ripe at this time. Accordingly, the only claims that remain in play following the Ninth Circuit's ruling are those that do not pertain to test administration, the potential future denial of a diploma, or the development of an alternate assessment.

Plaintiffs argue that the Ninth Circuit's ripeness determinations were based on the state of the record as it existed when the case went up to the Circuit, and that their claims have ripened in the intervening months because they have been forced to take or consider such measures as enrolling in costly

private schools or moving to other states to evade the exit exam requirement. [2] While plaintiffs cannot challenge "contingent future events that may not occur as anticipated, or indeed may not occur at all," Texas v. United States, 523 U.S. 296, 300 (1998), the ripeness doctrine "recognizes that there is a need to decide a case when the prospect or fear of future events may have a real impact on the present affairs of the parties and cause potential harm." United States v. Jose, 71 F.3d 1484, 1486 (9th Cir. 1995), rev'd on other grounds, 519 U.S. 54 (1996). The Ninth Circuit acknowledged as much by indicating that claims stemming from the uncertainty created by the CAHSEE waiver process are presently ripe for adjudication. See Smiley, 2002 WL 31856343, at *1. The sorts of harms identified by the plaintiffs in their second amended complaint flow from this uncertainty and thus fall within the Circuit's ripeness analysis. By the same token, the fact that plaintiffs have suffered these harms does not alter the conclusion that plaintiffs' other claims--i.e., those relating to test administration, diploma denial, and alternate assessment--are unripe at this time.

With these parameters in mind, the Court will consider each of the claims asserted by plaintiffs in their second amended complaint.

A. IDEA Claims

The Individuals with Disabilities Education Act ("IDEA") requires, among other things, that all students with disabilities be included in statewide assessment programs and that the state develop and conduct alternate assessments for those children who cannot participate in state and district-wide assessment programs. See 20 U.S.C. § 1412(a)(17)(A). Plaintiffs allege that the CAHSEE violates both of these requirements. See 2d Am. Compl. ¶¶ 192-93.

Plaintiffs' allegation that the state has violated the IDEA by failing to develop an alternate assessment was held by the Ninth Circuit to be unripe. See Smiley, 2002 WL 31856343, at *1. Plaintiffs' recent amendment of the complaint to add new plaintiffs who cannot access the test under any circumstances does not cure the ripeness problem. So long as enforcement of the exit exam requirement

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[2] Of the four new plaintiffs who complain of being forced to take such drastic measures, only one has actually taken them. See 2d Am. Compl. ¶ 31 ("*If* Ashley has not passed the CAHSEE by the end of her junior year (June 2003), her parents have to decided to . . . place her in a private school . . . ."); id. ¶ 33 ("[I]f he has not passed the CAHSEE by the end of his junior year (June 2003), he will move to Nevada . . . ."); id. ¶ 35 ("Ashton's mother is currently making plans to send Ashton to Massachusetts . . . ."). The one student who has in fact moved away passed the ELA portion of the exam before doing so. See id. ¶ 34.

remains a mere contingency, the state need not provide an alternate assessment. Accordingly, this claim will be dismissed without prejudice.

Plaintiffs' claim concerning access to the CAHSEE is more complex. As plaintiffs acknowledge, students with disabilities are now permitted to take the CAHSEE with all necessary accommodations and modifications. While this is sufficient to satisfy the inclusion requirement as a literal matter, plaintiffs further allege that such inclusion is not meaningful because their participation in the exam is burdened by the vagaries of the state's waiver process. Specifically, plaintiffs claim that the uncertainty of the process by which they may obtain a waiver forces them to make a Hobson's Choice between, on the one hand, taking the test with modifications and facing possible denial of a waiver, or, on the other hand, taking the test without modifications and risking a lower score. With respect to this narrow claim, the Ninth Circuit found that plaintiffs have standing to sue at the present time because they have "alleged a real and immediate injury to all learning disabled students whose IEPs indicate the use of modifications." Id.

In the next breath, however, the Ninth Circuit stated that "the IDEA does not encompass restrictions on the state in the exercise of its traditional authority to set diploma requirements." Id. On this basis, the Circuit reversed the portion of this Court's preliminary injunction that temporarily enjoined the defendants from denying a waiver to any learning-disabled student because such an injunction "requires more of state officials than is necessary to assure their compliance with federal law." Id. (quoting Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995)). The question that lingers in the wake of the Ninth Circuit's ruling is what relief, if any, plaintiffs could obtain that would address the problems created by the uncertainty of the waiver process without encroaching upon the state's "traditional authority" to set educational standards.

This question must be considered in light of alterations that the waiver process has undergone while this matter has been in litigation. Whereas waivers were previously obtainable only from the California Board of Education, revisions to the Education Code effective January 2003 now permit parents and guardians of learning-disabled students to seek waivers directly from local school districts. See Cal. Educ. Code § 60851(c). Since the amended law does not alter the discretionary nature of the waiver process, it does not eliminate the uncertainty that gives rise to plaintiffs' claim. However, the possibility exists that such uncertainty could be ameliorated or even eliminated by the policies and procedures that school districts

adopt to discharge their new responsibility. In addition, the devolution of decision-making authority to the local level may impact plaintiffs' claim insofar as the named defendants in this lawsuit--the state Department of Education and Board of Education--no longer have control over the waiver process.

The parties' briefs do not address the impact of this change in the law. Accordingly, the Court will defer ruling until the parties have had the opportunity to brief this issue. In particular, the parties should address whether the amendment to section 60851(c) affects the ripeness of plaintiffs' IDEA claim; whether summary judgment of the claim is appropriate; whether the local districts have become indispensable parties to this litigation; and whether it is possible in light of the new law to adjudicate plaintiffs' claim on a statewide basis.

B. Due Process Claims

Plaintiffs allege that the exit exam requirement violates their due process rights because it makes receipt of a diploma contingent on passage of an exam that tests material that students are never taught, because the exam does not test the constructs it is intended to test, and because the exam has not been validated for the specific purpose for which it is used. See 2d Am. Compl. ¶¶ 200-03 . A fundamental component of a valid due process claim, however, is the deprivation of a protected interest. See Mishler v. Nevada State Bd. of Med. Examiners , 896 F.2d 408, 409 (9th Cir. 1990). Here, no student has been denied a diploma as a result of the exit exam requirement. Accordingly, plaintiffs' due process challenge falls squarely within the class of claims that "allege potential future harms caused by the possible denial of a . . . diploma." Smiley, 2002 WL 31856343, at *1. According to the Ninth Circuit, such claims "are not yet ripe." Id. As such, they will be dismissed without prejudice.

The same analysis applies to plaintiffs' claims directed at the sufficiency of the notice that plaintiffs have been given with respect to the exit exam requirement. See 2d Am. Compl. ¶ 204. Claims challenging the sufficiency of notice are procedural due process claims. See Fuentes v. Shevin, 407 U.S. 67, 80 (1972). Because there has yet to be a deprivation of any plaintiff's protected interest in a diploma, plaintiffs do not have a valid due process claim at this time. Plaintiffs' notice-related claims will therefore be dismissed without prejudice as well.

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C. ADA Claims

Plaintiffs also allege that defendants have administered the CAHSEE in a way that discriminates against them on the basis of their disabilities in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973. Under the Rehabilitation Act, no disabled individual "shall . . . be excluded from the participation in . . . any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Under the ADA, disabled individuals "shall [not] be discriminated against . . . in the full and equal enjoyment of [public] goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(a). As defined by the ADA, "discrimination" includes "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, [etc.]" 42 U.S.C. § 12182(b)(2)(A)(ii).

While a public entity may be required to make reasonable modifications to its programs to bring them into compliance with the acts, the entity need not make alterations that are "fundamental" or "substantial." Alexander v. Choate, 469 U.S. 287, 300 (1985). "Reasonableness depends on the circumstances of each case, and requires a 'fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards.'" Bird v. Lewis & Clark College, 303 F.3d 1015, 1021 (9th Cir. 2002) (quoting Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002)).

To the extent that plaintiffs' ADA claims implicate the way in which the CAHSEE is administered or challenge defendants' development of an alternate assessment, those claims are either unripe in light of the Ninth Circuit's ruling or moot in light of students' present ability to take the test with all necessary accommodations and modifications. Other of plaintiffs' allegations, however, can be read to state a claim that treating test scores received with modifications differently than scores received without modifications amounts to disability discrimination. See id. ¶¶ 177-79, 181, 188. This Court expressly declined to reach such a claim in its preliminary injunction order, see 229 F. Supp. 2d at 991, and hence the claim was not before the Ninth Circuit on appeal of that order. Like plaintiffs' IDEA-based challenge to the uncertainty created by the waiver process, the possibility that defendants might give differential treatment to scores

received with and without modifications forces disabled students to choose between taking the test with modifications (and risking that their scores will be discounted or invalidated) or without them (and risking a failing score). In this way, plaintiffs "have alleged a real and immediate injury to all learning disabled students whose IEPs indicate the use of modifications," and thus arguably have stated a claim that survives the Ninth Circuit's ripeness analysis. Smiley, 2002 WL 31856343, at *1.

As noted above, students who take the CAHSEE with modifications and receive a passing score will not be denied a diploma if they apply for and obtain a waiver of the exit exam requirement. In effect, therefore, plaintiffs' claim is that it violates the ADA to require students whose passing scores were obtained with modifications to seek such a waiver in order to receive a diploma. See Compl. ¶ 148 ("The waiver scheme effectively transforms a student's right to appropriate accommodations into a theoretical possibility, at an indeterminate future time, which could only be obtained, if at all, by pursuing a complicated, uncertain, and humiliating process.").

Plaintiffs must show more than differential treatment, however, to prevail on a claim under the ADA or the Rehabilitation Act. Compliance under the Acts does not require perfect identity of accommodations; rather, "the central inquiry is whether the program, 'when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.'" Bird, 303 F.3d at 1021 (quoting Barden v. City of Sacramento, 292 F.3d 1073, 1075-76 (9th Cir. 2002)). Accordingly, a public entity "[does] not necessarily fail to make reasonable modifications simply because some aspects of the program [do] not conform to [the plaintiff's] expectations." Id. So long as the entity has afforded "meaningful access" to its programs, it has satisfied the requirements of the ADA and Rehabilitation Act. Id. (quoting Hunsaker v. Contra Costa County, 149 F.3d 1041, 1043 (9th Cir. 1998)).

Whether students who must seek waivers in order to obtain a diploma have "meaningful access" to the CAHSEE program depends heavily on the mechanics of the waiver process. As noted above, authority over waiver applications was transferred from the California Board of Education to local school districts at the beginning of 2003. Accordingly, it may be difficult to assess the extent of the burden imposed by the waiver requirement until local districts have had the opportunity to develop and implement waiver processes. See Scott, 306 F.3d at 663 ("Without knowing the conditions under which . . . a policy is to be

implemented, no court can make a true determination as to whether the policy as practiced [will violate the law].").

Again, therefore, the change to section 60851(c) of the Education Code may materially affect the ripeness and/or the merits of plaintiffs' claim. As indicated above, the Court is reluctant to rule without the benefit of additional briefing from the parties in this regard. In particular, the parties should indicate their views with respect to ripeness, the amenability of this claim to summary judgment on a statewide basis, and what sort of waiver process, if any, would afford "meaningful access" to learning-disabled students.

D. Declaratory Judgment

Plaintiffs' second amended complaint adds a new claim for declaratory judgment under 28 U.S.C. § 2201. Under the Declaratory Judgment Act, one can challenge a statute prior to its application or enforcement provided "there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). Here, plaintiffs' prayer for a declaratory judgment that defendants have violated the ADA, IDEA, and Constitution mirrors plaintiffs' other substantive claims. As such, the ripeness considerations relevant to plaintiffs' other claims apply with equal force to their claim for declaratory judgment. See NAACP v. City of Richmond, 743 F.2d 1346, 1351 n.3 (9th Cir. 1984) ("Questions of ripeness frequently arise in cases seeking declaratory relief which anticipate actions or events."). The Court thus finds that the inclusion of this additional claim for relief does not affect the suitability of this action for adjudication at the present time or otherwise alter the analysis set forth herein.

CONCLUSION

Having considered "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967), the Court hereby DISMISSES as unripe all claims with the exception of plaintiffs' challenges under the IDEA, the ADA, and the Declaratory Judgment Act to the process for obtaining a waiver of the exit exam requirement. As discussed more fully above, the parties are directed to submit additional briefing in connection with these claims.

Both parties shall file opening briefs on or before April 18, 2003. Responsive briefs shall be due on or before May 9, 2003. The Court will schedule a hearing if necessary to assist in resolving the issues presented.

IT IS SO ORDERED.

Dated: March 12, 2003

/s/
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

JULEUS CHAPMAN,

Plaintiff,

v.

CA DEPT OF EDUCATION,

Defendant.
_____/

Case Number: CV01-01780 CRB

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 13, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: March 13, 2003

Richard W. Wieking, Clerk
By: Barbara Espinoza, Deputy Clerk