Smiley v. Cal. Dep't of Educ., 45 Fed. Appx. 780
United States Court of Appeals for the Ninth Circuit
August 14, 2002, Argued and Submitted, San Francisco, California ; September 4, 2002, Filed
No. 02-15552, No. 02-15553
Reporter: 45 Fed. Appx. 780 | 2002 U.S. App. LEXIS 18466

RYAN SMILEY, by his guardian ad litem Krista Smiley; JENNIFER LYONS, by her guardian ad litem Susan Lyons, on behalf of themselves and all others similarly situated; LEARNING DISABILITIES ASSOCIATION OF CALIFORNIA; JULEUS CHAPMAN, by his guardian ad litem Monique Chapman, Plaintiffs-Appellees,

v.

CALIFORNIA DEPARTMENT OF EDUCATION; DELAINE EASTIN, Superintendent of Public Education; CALIFORNIA STATE BOARD OF EDUCATION, Defendants-Appellants, and FREMONT UNIFIED SCHOOL DISTRICT; SHARON JONES, Superintendent of Fremont Unified School District, Defendants. RYAN SMILEY, by his guardian ad litem Krista Smiley; JENNIFER LYONS, by her guardian ad litem Susan Lyons, on behalf of themselves and all others similarly situated; LEARNING DISABILITIES ASSOCIATION OF CALIFORNIA; JULEUS CHAPMAN, by his guardian ad litem Monique Chapman, Plaintiffs-Appellees, v. CALIFORNIA DEPARTMENT OF EDUCATION; DELAINE EASTIN, Superintendent of Public Education; CALIFORNIA STATE BOARD OF EDUCATION, Defendants-Appellants, and FREMONT UNIFIED SCHOOL DISTRICT; SHARON JONES, Superintendent of Fremont Unified School District, Defendants.

Appeal from the United States District Court for the Northern District of California. D.C. No. CV-01-01780-CRB, D.C. No. CV-01-01780-CRB.

Charles R. Breyer, District Judge, Presiding.

Counsel: For RYAN SMILEY, JENNIFER LYONS, Learning Disabilities Association of California, JULEUS CHAPMAN, Plaintiffs-Appellees (02-15552, 02-15553): Sidney M. Wolinsky, Esq., Melissa W. Kasnitz, Esq., DISABILITY RIGHTS ADVOCATES, Oakland, CA.

For RYAN SMILEY, Plaintiff-Appellee (02-15552, 02-15553): Elizabeth J. Cabraser, Esq., LIEFF, CABRASER, HEIMANN AND BERSTEIN LLP, Eve H. Cervantez, Esq., LIEFF, CABRASER, HEIMANN AND BERNSTEIN, LLP, San Francisco, CA.

For JENNIFER LYONS, Learning Disabilities Association of California, JULEUS CHAPMAN, Plaintiffs-Appellees (02-15552, 02-15553): Elizabeth Joan Cabraser, Esq., Eve H. Cervantez, LIEFF, CABRASER, HEIMANN & BERNSTEIN, San Francisco, CA.

For California Department of Education, DELAINE EASTIN, California State Board of Education, Defendants-Appellants (02-15552, 02-15553): Michael E. Hersher, Esq., CALIFORNIA STATE DEPARTMENT OF EDUCATION, Sacramento, CA.

For California Department of Education, DELAINE EASTIN, California State Board of Education, Defendants-Appellants (02-15552, 02-15553): Douglas M. Press, Esq., San Francisco, CA.

For California Department of Education, DELAINE EASTIN, California State Board of Education, Defendants-Appellants (02-15552, 02-15553): Teresa L. Stinson, Esq., CALIFORNIA ATTORNEY GENERAL'S OFFICE, San Francisco, CA.

For Fremont Unified School District, Defendant (02-15552, 02-15553): James R. Hawley, Esq., HOGE FENTON JONES AND APPEL, San Jose, CA.

SHARON JONES, Defendant (02-15552, 02-15553): No Appearance.

Judges: Before: HALL, McKEOWN, and CLIFTON, Circuit Judges.

Opinion

MEMORANDUM *

Before: HALL, McKEOWN, and CLIFTON, Circuit Judges.

With respect to paragraphs 1 and 2 of the district court's preliminary injunction order dated February 21, 2002, the State Defendants claim that those provisions, which permit all members of the plaintiff class to take the California High School Exit Examination ("CAHSEE") with the necessary accommodations and modifications, are already in effect. To avoid any ambiguity on this point, we therefore decline to modify paragraphs 1 and 2 of the district court's order.

The challenge to the waiver provisions of the CAHSEE is not currently ripe for adjudication as to claims relating to potential future harms caused by the possible denial of a waiver. See Texas v. United States, 523 U.S. 296, 300, 140 L. Ed. 2d 406, 118 S. Ct. 1257 (1998) (noting that the ripeness doctrine is triggered when the claims at issue relate to "contingent future events that may not occur as anticipated, or indeed may not occur at all" (internal quotation marks omitted)).

The challenge is ripe as to the claim that the uncertainty of the waiver process burdens students' rights to participate in the examination by forcing them to choose between forgoing the use of modifications or risking the denial of a waiver. Because they have alleged a real and immediate injury to all learning disabled students whose IEPs indicate the use of modifications, the plaintiffs have standing to raise this claim. See City of Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983).

However, though the right to participate in statewide testing requires that participation must be meaningful, see 20 U.S.C. § 1412(a)(17)(A); H.R. Rep. 105-95, 1997 U.S.C.C.A.N. at 98-99, it does not require us to prohibit the state from exercising its traditional authority to set diploma requirements. Consequently, the plaintiffs have not met their burden to demonstrate probable success on the merits or a sufficiently serious question going to the merits to make the issue a fair ground for litigation. See Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998).

The challenge to the putative failure to establish an alternate assessment process is also insufficiently ripe for adjudication at the present time. See Texas v. United States, 523 U.S. at 300.

Therefore, we REVERSE the district court's order with respect to paragraphs 3-5 and 8 of the preliminary injunction and REMAND with directions to dissolve those portions of the preliminary injunction.

REVERSED in part and REMANDED. Each party is to bear its own costs on appeal.