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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

LORENZO AVILA,

Plaintiff,

vs.

BERKELEY UNIFIED SCHOOL DISTRICT, et al.,

Defendants.

No. RG03-110397

ORDER ON DEMURRER OF DEFENDANTS BERKELEY UNIFIED SCHOOL DISTRICT AND MICHELE LAWRENCE

The Demurrer of Defendants Berkeley Unified School District and Michele Lawrence (when referred to collectively, "Defendants") came on regularly for hearing on February 20, 2004, in Department 31 of this Court, the Honorable James A. Richman, presiding. Defendants appeared by Jon B. Streeter. Plaintiff Lorenzo Avila ("Plaintiff") appeared by John H. Findley.

I. INTRODUCTION AND SUMMARY

Plaintiff's action challenges the constitutionality of the New Voluntary Plan to Achieve Racial Desegregation of All Public Schools in the City of Berkeley ("the Voluntary Racial Desegregation Plan" or "the Plan") of Defendant Berkeley Unified

School District ("BUSD"), essentially asserting that the Plan violates Art. I, §31 of the California Constitution, enacted as, and hereinafter referred to as, "Proposition 209." The Complaint alleges three causes of action: (1) declaratory relief, (2) injunction, and (3) damages. The first two causes of action are asserted against both named defendants, BUSD and Michele Lawrence, its Superintendent; the third is against BUSD only, and is on behalf of Plaintiff's two sons, Francisco Ching Avila ("Paco") and Pablo Ching Avila ("Lito").

Defendants filed a Demurrer, asserting essentially that Plaintiff's interpretation of Proposition 209 would conflict with the Equal Protection Clauses of the California and United States Constitutions, and with Govt. Code §8315. Plaintiff's opposition fundamentally argued that the Plan, on its face, amounts to unconstitutional discrimination or preferential treatment based on race, and Plaintiff's counsel confirmed at oral argument that the first cause of action is a facial challenge to the Plan.

Against that background, the Court has considered the moving papers and the opposition thereto, as well as the arguments presented at the hearing. Based thereon, and good cause appearing, the Court concludes as follows: (1) the first cause of action does not state, and cannot state, a facial challenge to the Plan, and the demurrer to the first cause of action is SUSTAINED WITHOUT LEAVE TO AMEND; (2) the demurrer to the second cause of action is likewise SUSTAINED WITHOUT LEAVE TO AMEND, for failure to state a claim; and (3) Plaintiff may be able to state a claim based on an as applied challenge to the Plan, and the demurrer to the third cause of action is

SUSTAINED WITH LEAVE TO AMEND. The reasons follow.

II. ANALYSIS

A. The Voluntary Racial Desegregation Plan

The Plan is attached to and incorporated into the Complaint, and may therefore be considered in ruling on the demurrer. (Complaint for Declaratory and Injunctive Relief and Damages, filed August 6, 2003, at 6:15-16; see *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) The Plan expressly states that it was adopted in light of the BUSD's finding that it had faced *de facto* segregation and continued to "struggl[e] to meet its goals of racial diversity," and in light of BUSD's obligation to "take reasonable steps to ameliorate the harmful effects of racial isolation." (Complaint, Exh. 1 at 1-2b, 4, 8, 9, 15.) The latter obligation is based on well-established interpretation of the Equal Protection Clause of the California Constitution, that school districts have a "constitutional duty under state law to undertake reasonably feasible steps to alleviate school segregation regardless of cause. In carrying out its duty [a school district] may utilize any or all desegregation techniques, including pupil assignment and pupil transportation." (*Crawford v. Board of Education of the City of Los Angeles* (1980) 113 Cal.App.3d 633, 651, judgment affirmed by *Crawford v. Board of Education of the City of Los Angeles* (1982) 458 U.S. 527; see also *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876; *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937; *Crawford v. Board of Education* (1976) 17 Cal.3d 280.)

The Plan requires all parents, regardless of race, to choose three schools they

prefer their child to attend, in light of which choice BUSD then applies several factors to assign the child to one of the chosen schools. The factors include space availability, the child's residence, the child's socio-economic situation, and race/ethnicity. The Plan also directs that BUSD use such factors to assign students in a manner that "strives" to have a school's demographics for each grade level reflect BUSD's demographics for that grade level, within +/- 5%, at least for any racial group that makes up at least 25% of the District's population. The Plan is a so called "controlled choice" plan, one that by its terms helps ensure that "all students will have an equal chance of attending their preferred schools subject to" two additional criteria: available space and racial balance. (Complaint, Exh. 1 at 15.)

B. The First Cause of Action

The first cause of action seeks declaratory relief that the Plan "on its face" (Complaint, paragraph 1) violates Proposition 209. (See Complaint, paragraph 3.)

The Court begins with certain well settled principles, the first of which is that a legislative act is presumed to be constitutional. (7 Witkin, *Summ. Calif. Law* (9th ed. 1988), Constitutional Law, §58, pp. 102-103, and cases there collected.) "[A] statute is not facially unconstitutional simply because it may not be constitutionally applied to some persons or circumstances; at a minimum, its unlawful applications must be substantial and real when judged in relation to the statute's plainly legitimate sweep. [Citations omitted.] Indeed, it has been said that a statute will be upheld against facial attack if an appellate court can conceive of a situation in which the statute could be applied without entailing

an inevitable collision with and transgression of constitutional provisions." (*In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 49-50.)[1]

"A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation omitted.] To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [internal quotations omitted; ellipses in original].)

[1] The parties have not cited, and the Court has not found, legal authority applying any different standard to judicial review of the constitutionality of a school district's actions. Indeed, both sides rely on cases involving statutes and ordinances, and neither side asserts that any different standard applies to consideration of the constitutionality of the Plan. In short, it appears that BUSD's Plan is entitled to the same presumption of constitutionality as other legislative enactments -- especially in light of the mandate for education of children. Specifically:

"'The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution.' [Citation omitted.] To carry out this responsibility the state has created local school districts, whose governing boards function as agents of the state. [Citations omitted.]" (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 951-952.) In particular, "[t]hese local boards historically and traditionally have undertaken the assignment of pupils to individual schools within the district.... 'A local board of education has power, in the exercise of reasonable discretion, to establish school attendance zones within the district, to determine the area that a particular school shall serve, and to require the students in the area to attend that school.'" (*Id.* at 952, quoting *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 878.)

Here, Plaintiff alleges that the Voluntary Racial Desegregation Plan violates Proposition 209, the relevant portion of which provides as follows: "The state [including school districts] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Plaintiff's facial challenge to the Plan asserts that the Plain is unconstitutional because it considers elementary students' race and ethnicity as one factor in assigning students to BUSD's various elementary schools. The Court is not persuaded.

As noted, the pleadings demonstrate that several factors are involved in school assignment under the Plan, including the choice of the parents, the location of the child and his or her siblings, the residence of the child, the child's socio-economic background, and the child's race or ethnicity. In other words, race and/or ethnicity is but one of several factors BUSD applies to assign students to its elementary schools. In some instances, the other factors may already result in balanced enrollment of different racial and ethnic groups in each school. If the implementation of the Plan might not result in a single pupil's school assignment being changed based on the pupil's race, the Plan cannot be unconstitutional on its face. Put another way, it is not impossible to "conceive of a situation in which the statute could be applied without entailing an inevitable collision with and transgression of constitutional provisions." (*In re Marriage of Siller, supra,* 187 Cal.App.3d at 50.) In sum, the Plan does not on its face discriminate against, or grant preferential treatment to, any individual or group on the basis of race, color, ethnicity, or

national origin. The Court cannot conclude that any consideration of race -- one of several criteria -- makes the Plan unconstitutional.

Such a conclusion is buttressed by the well settled mandate that, whenever possible, the Court is required to harmonize new and previously existing constitutional provisions: "So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, 'In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.'" (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868, quoting *Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.)

Applying this rule, Defendants argue that Plaintiff's interpretation of Proposition 209 would conflict with California Constitution, Art. I, §7(a), the Equal Protection Clause of the Constitution, which, not incidentally, has been held to make education a "fundamental interest." (*Crawford v. Board of Education of the City of Los Angeles* (1976) 17 Cal.3d 280, 297.) As Justice Tobriner there noted: "Given the fundamental importance of education, particularly to minority children, and the distinctive racial harm traditionally inflicted by segregated education, a school board bears an obligation, under article, 1, section 7, subdivision (a) of the California Constitution, mandating the equal protection of the laws, to attempt to alleviate segregated education and its harmful consequences, even if such segregation results from the application of a facially neutral state policy." (*Crawford v. Board of Education of the City of Los Angeles, supra,* 17

Cal.3d at 297; see also *McKinny v. Board of Trustees of the Oxnard Union High School Dist.* (1982) 31 Cal.3d 79, 85, 92.)[2] The Court agrees with Defendants. Although Proposition 209 specifically applies to public education, its text does not mention voluntary desegregation plans or otherwise indicate that prohibited discrimination or preferential treatment includes a race-conscious school assignment plan that seeks to provide all students with the same benefit of desegregated schools.

Plaintiff's claimed application of Proposition 209 would also be inconsistent with Govt. Code section 8315, which provides that "'Racial discrimination' or 'discrimination on the basis of race' for the purposes of Section 31 of Article I of the California Constitution shall have the same meaning as the term 'racial discrimination' as defined and used in paragraphs 1 and 4 of Article 1 of Part I of the International Convention on the Elimination of All Forms of Racial Discrimination." Govt. Code section 8315 also

[2] In 1979, subsequent to the California Supreme Court's decision in *Crawford v. Board of Education of the City of Los Angeles*, the Equal Protection clause was amended to "remove 'busing' (pupil school assignment and pupil transportation) from the arsenal of techniques available to a state court to alleviate racial school segregation caused by economic, geographic, and demographic factors and not by intentional segregation with discriminatory purpose." (*Crawford v. Board of Education of the City of Los Angeles* (1980) 113 Cal.App.3d 633, 649-651 [holding that, absent intentional segregative state action, trial court could not order busing of students, but "Board remains subject to its constitutional duty under state law to undertake reasonably feasible steps to alleviate school segregation regardless of cause"]; see also California Constitution, Art. I, §7(a).) This amendment did not alter school districts' constitutional obligation to redress segregation. (*Crawford v. Board of Education of the City of Los Angeles, supra,* 113 Cal.App.3d at 651.) In particular, the 1979 amendment does not affect the present controversy because it included the following provision, which remains a part of the Equal Protection clause: "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan...." (California Constitution, Art. I, §7(a).)

quotes from that Convention: "'1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' [¶] '4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'" The Voluntary Racial Desegregation Plan, on its face, does not have "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing," of the "human rights and fundamental freedoms" of any student.

Crawford v. Huntington Beach Union High School Dist. (2002) 98 Cal.App.4th 1275, the case heavily relied on by Plaintiff, is not availing. The issue there involved a setting where a "one-for-one same race exchange policy" was applied to student transfers. (*Id.* at 1277.) Reversing summary judgment for the District, the Court of Appeal found the policy was constitutionally impermissible because "White student open enrollment transfers out of the school and non-White student transfers into the school are limited to a

one-for-one basis.... [T]he policy creates different transfer criteria for students solely on the basis of their race. A White student may not transfer from Westminster High School to a different school until a White student chooses to transfer in and fills the void. A non-White student must wait to transfer into Westminster High School until a non-White student transfers out thereby creating essentially a 'non-White opening.'" (*Id.* at 1284.) BUSD's Voluntary Racial Desegregation Plan here contains no such differential criteria for school assignment. In any event, it appears that the interpretive mandate to harmonize new and existing constitutional provisions was not raised in *Crawford v. Hungtington Beach*, as the principle is nowhere mentioned in the decision.

Hi-Voltage Wire Works, Inc. v. City of San Jose (2000) 24 Cal.4th 537, and *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, also cited by Plaintiff, are equally unsupportive. In both *Hi-Voltage* and *Connerly* the California Supreme Court invalidated enactments that gave advantages in public contracting or hiring based on race, ethnicity, and/or gender. The court in *Hi-Voltage* considered discrimination as meaning "distinctions in treatment" and a preference as "giving of priority or advantage to one person ... over others." (*Hi-Voltage, supra,* 24 Cal.4th at 559-560.) In the context of hiring and contracting, discrimination and preferential treatment are a significant concern because not all applicants will receive employment or a contract. By contrast, every BUSD student must be assigned to a school, and the Plan does not discriminate against, or provide preferential treatment to, any student based on race. It merely considers race and ethnicity as one of multiple factors in seeking to achieve desegregated schools for all

students.

In sum, the Voluntary Racial Desegregation Plan passes constitutional muster. It is not a quota. It does not provide for special notice. And it does not show favoritism. It provides for race or ethnicity as one of many criteria for the placement of children in elementary schools, to "strive" to have each school's demographics within plus or minus 5% of the district-wide demographics. The Plan does not on its face violate the California Constitution

For each, and all, of the reasons set forth above, Defendants' Demurrer to the first cause of action for declaratory relief is SUSTAINED WITHOUT LEAVE TO AMEND for failure to state a cause of action.

C. The Second Cause of Action

Plaintiff's second cause of action is for injunctive relief, seeking to enjoin the implementation of the Plan. "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168, citing *Williams v. Southern Pac. R. R. Co.* (1907) 150 Cal. 624.) Therefore, the Demurrer to the second cause of action is SUSTAINED WITHOUT LEAVE TO AMEND for failure to state a cause of action. However, Plaintiff is granted leave to include a request for injunctive relief in his prayer for relief, if legally supported by any cause of action he can successfully plead.

D. The Third Cause of Action

At the hearing, counsel for Plaintiff asserted that the third cause of action was in

essence an "as applied" challenge, apparently seeking damages for his minor children Paco and Lito.

"An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana, supra,* 9 Cal.4th at 1084.)

Here, Plaintiff has not alleged facts supporting that Defendants have applied the Voluntary Racial Desegregation Plan in a manner that discriminates against, or grants preferential treatment to, students based on race, color, ethnicity, or national origin. However, Plaintiff may be able to do so, and therefore the Demurrer to the third cause of action is SUSTAINED WITH LEAVE TO AMEND for Plaintiff to allege, if possible, all requisite elements of such a claim.

III. CONCLUSION

Based on the above, Defendants' demurrers to the first and second causes of action are SUSTAINED WTIHOUT LEAVE TO AMEND, and BUSD's demurrer to the third

cause of action is SUSTAINED WITH LEAVE TO AMEND. Plaintiff shall have 20 days to amend. Defendants shall have 20 days thereafter to respond. Defendants shall file and serve a Notice of Entry of Order within ten days of receipt of this Order. Time to amend or respond runs from the service of Notice of Entry of Order on Plaintiff. (See Code Civ. Proc. §472b.)

Dated APR - 6 2004

James A. Richman
Judge of the Superior Court