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

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

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.)

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

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

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

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