SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 06/01/2009 Time: 11:19:45 AM Dept: 54

Judicial Officer Presiding: Judge Shelleyanne W L Chang
Clerk: E. Higginbotham,J. Hart

Bailiff/Court Attendant: None
ERM: None

Case Init. Date: 11/12/2008

Case No: 34-2008-00026507-CU-CR-GDS Case Title: California Education Committee LLC vs. Jack OConnell in his official capacity as California Superintendent

Case Category: Civil - Unlimited

Event Type: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

Causal Document & Date Filed:

Appearances:

Nature of Proceeding: Hearing on Demurrer (Matter Taken Under Submission 5/12/09)

TENTATIVE RULING

The demurrer of Defendant Jack O'Connell, in his official capacity as California Superintendent of Public Instruction, in support of which Equality California and Gay-Straight Alliance Network filed and served an amici curiae memorandum, is ruled upon as follows.

The complaint filed by plaintiffs California Education Committee, LLC and Priscilla Schreiber is for declaratory and injunctive relief. Plaintiffs challenge Senate Bill (SB) 777's "redefinition of the term 'gender'" in the Education Code "both facially and as-applied as it will be impossible for school administrators and educators to enforce this new definition. Further, it will be impossible for administrators and educators to know whether they themselves are violating the nondiscrimination provisions of the Education Code or the Penal Code." Comp., ¶ 1.

Plaintiffs make the following allegations. SB 777 amended Education Code § 220 to read, "No person shall be subjected to discrimination on the basis of . . . gender. . . ." SB 777 also added Education Code § 210.7, which states that gender "means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." Finally, SB 777 repealed Education Code § 220 which had defined "sex" as "the biological condition or quality of being a male or female human being." According to plaintiffs, SB 777 "places educators in the impossible position of (1) reading the minds of individuals to determine the individual's self-defined sexual identity so as not to inadvertently discriminate against an individual based upon their self-defined sex and (2) protecting the privacy and safety of all students from persons of the opposite sex." Comp., ¶ 18.

Plaintiffs further allege that after SB 777 was passed, two students at an unnamed public school, K.S. and B.B., were adversely affected. One of them, B.B., a male, "was required to change his clothes in the same locker room where a "biologically female student" who "represent[ed] herself as a male" had been permitted to change clothing. Comp., ¶¶ 19-20. Further, both K.S. and B.B. are concerned that SB 777,

"will require teachers, administrators, and school districts to permit children of the opposite sex to enter locker rooms and restrooms in the future. Additionally, K.S. and B.B. do not have a reasonable opportunity to know what is prohibited, so that they or their parents may act accordingly." Id., ¶ 23.

Defendant's demurrer to the first and second causes of action, violation of the Due Process Clause of the Fourteenth Amendment to the US Constitution, and violation of the California Constitution, Article 1, Section 7, is sustained without leave to amend for failure to state facts sufficient to constitute a cause of action. CCP § 430.10(d).

Plaintiffs allege in these causes of action that Education Code §§ 220 and 210.7 are void for vagueness, both facially and as-applied. They allege that the statutes "fail to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. Further the laws are vague because, first, they may trap the innocent by not providing fair warning; and, second, they invite arbitrary and discriminatory application." Comp., ¶ 29; see also ¶ 33. In addition, plaintiffs argue in their opposition memorandum that Education Code §§ 220 and 210.7 are facially vague for two reasons. First, because the statutes prohibit discrimination based on gender "while providing a definition of 'gender' that forecloses definite foreknowledge necessary for compliance." Memo., p. 9. Further, plaintiffs argue, those charged with complying with the statutes "may face a shifting target," as individuals may "change their self-conceived gender identity." Id. Second, because the statutes provide "no guidance whatsoever . . . with regard to the other source, standard, or criteria for establishing or ascertaining an individual's 'gender identity.'" Id., p. 10.

As both defendant and amici point out, however, to support a "facial challenge to the constitutional validity of a statute," a party "must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable prohibitions." Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1084. See also Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1201 ("a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications."). Thus, an immediate and accurate identification of every individual's gender in every application of the challenged statutes is not required for Education Code § 210.7's definition of "gender" to pass constitutional muster. Further, plaintiffs' allegations regarding vagueness are not only conclusory, they are belied by other allegations in the complaint. For example, plaintiffs appear to allege that a school district has already applied the statutes. Comp., ¶¶ 20-22. Yet plaintiffs do not allege that the school administration was "foreclosed" from statutory compliance because of Education Code § 210.7's definition of "gender." On the contrary, plaintiffs' factual allegations relating to the third cause of action and the alleged invasion of B.B.'s privacy reflect the unnamed school administration's compliance with the statutes.

Plaintiffs also fail to allege facts demonstrating that a person of ordinary intelligence could not obtain, without benefit of "mind-reading," the "foreknowledge necessary for compliance." Although Education Code § 210.7's definition of gender is considerably broader than the definition of "sex" stated in former Education Code § 212, that fact alone is insufficient to demonstrate that a determination of gender is necessarily burdensome or that compliance with the statutes is impossible. As defendant points out, Education Code § 210.7's definition of "gender" has been used elsewhere since at least 2005 without issue. See Penal Code § 422.56(c) and Government Code § 12926(p). Although that fact alone does not make the Education Code sections constitutional, it does belie plaintiffs' conclusory allegation that the definition of gender "forecloses" compliance with non-discriminatory statutes. Moreover, although the criteria or manner in which an entity, e.g., school district, establishes to "ascertain[] an individual's gender identity," could possibly be "misguided," i.e., unconstitutional, any challenge to the Education Code statutes based on criteria or manner would be an as-applied challenge, not a facial one. Finally, the above analysis would also apply where the gender identity of an individual changed more than once.

Plaintiffs also argue in their opposition memorandum that Education Code §§ 220 and 210.7 are vague as-applied here because K.S. and B.B. have been deprived of their protected right to due process. "Plaintiff B.B. has been forced to use bathroom and locker room facilities with persons of the opposite sex, and Plaintiff K.S. and B.B. can never know when or how the gender of classmates will be interpreted and applied." Memo., p. 11. (The court notes that plaintiffs do not allege in their complaint that B.B "has been forced" to use a bathroom "with persons of the opposite sex.") Further, according to plaintiffs, K.S. and B.B. "are also placed under the persistent threat of inadvertently discriminating against whatever 'gender' a teacher has decided belongs to one of their classmates, without any way of knowing beforehand." Id.

Preliminarily, the court notes that plaintiffs' allegations regarding the unnamed school district's application of Education Code §§ 220 and 210.7 are less than forthright. Indeed, they do not specifically allege that the district's actions resulted from its application of those statutes. Rather, they simply make a post hoc ergo propter hoc allegation that after the passage of SB 777, a "biologically female student in [K.S. and B.B.'s] class began to represent herself as a male in the seventh grade." Comp., ¶ 20. Further, plaintiffs allege that E.S., K.S.' mother, "was later told by the superintendent of the school district that under a 'new policy' transgendered students can use whatever facility they identify with." Id., ¶ 22. Even assuming that the "new policy" plaintiffs allege was one adopted by the unnamed school district pursuant to Education Code §§ 220 and 210.7, as was the case with plaintiffs' facial challenge, plaintiffs fail to allege facts sufficient to support an as-applied challenge. In other words, plaintiffs fail to state facts demonstrating why K.S. and B.B. would never know the gender of their classmates if, or example, the school's policy allowed a transgender student to use their locker room. Similarly, plaintiffs fail to allege how K.S. and B.B. might inadvertently discriminate against one of their classmates because of that policy. Further, the allegation that B.B. "was required to change his clothes in the locker room . . . while the female student was changing" in the same room, Comp., ¶ 20, does not demonstrate that B.B. was denied his right to due process. Plaintiffs do not allege that B.B. was even aware that the transgender student was in the locker room with him, let alone that either one was observed or noticed by the other.

More importantly, the court agrees with defendant that the unnamed school district, not defendant, is the appropriate party against which to bring an as-applied challenge. Plaintiffs do not allege that it was defendant's application of Education Code §§ 220 and 210.7 that resulted in the unnamed school district's action of permitting the transgender student to use the same locker room used by B.B. Indeed, other than identifying him in paragraph 10, plaintiffs do not mention defendant in the entire complaint. Further, although defendant must "execute . . . the policies which have been decided upon by the" State Board of Education and must "[s]uperintend the schools of the state," Education Code §§ 33111 and 33112, it is the school districts which have the "primary responsibility to insure compliance with applicable state and federal laws and regulations." 5 CCR § 4620. Finally, plaintiffs' cases do not require a different result. In Butt v. State of California (1992) 4 Cal.4th 668 the issue was not an as-applied constitutional challenge, but whether "the State has a constitutional duty . . . to prevent the budgetary problems of a particular school district from depriving its students of 'basic' educational equality." Id. at 674. And in California Assn. of Private Special Education Schools v. Department of Education (2006) 141 Cal.App.4th 360, an as-applied challenge, plaintiffs alleged in their second amended complaint that "in suspending or revoking certifications, [the department and Superintendent O'Connell] do not provide notice and an opportunity for hearing prior to the effective date of the suspension or revocation." Id. at 367. Here, as stated above, plaintiffs do not allege that defendant did or failed to do anything.

Defendant's demurrer to the third cause of action, violation of the California Constitution, Article 1, Section 1, is sustained without leave to amend for failure to state facts sufficient to constitute a cause of action. CCP § 430.10(e).

Plaintiffs allege in the third cause of action that Education Code §§ 220 and 210.7 "are in contravention to the rights of safety and privacy and amount to a serious invasion of those interests." Comp., ¶ 37. Specifically, they allege that "B.B.'s privacy rights were violated when he was forced to share a locker room with a person of the opposite sex." Id. In addition, plaintiffs argue in their opposition memorandum that B.B. has a "legally protected privacy interest in changing his clothes without observation from a person of the opposite sex" and that such an expectation is a reasonable one. Memo., p. 13.

As stated above, however, plaintiffs do not allege in their complaint that B.B. either observed or was observed by the "biologically female student" in the locker room, or that B.B. was even aware of the other student's alleged presence in the locker room. Plaintiffs merely allege that B.B. "was present in the locker room while the female student was changing." Comp., ¶ 20. Thus, the pleading is inadequate to allege any invasion of privacy, let alone a "serious" one. Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 40. Similarly, plaintiffs' allegation that Education Code §§ 220 and 210.7 contravene the right of safety is conclusory and is unsupported by any allegations. Indeed, it is unclear to whose safety plaintiffs are referring. Finally, as with plaintiffs' as-applied challenge, this cause of action should be brought against the unnamed school district. According to the complaint, it is that district's conduct, not defendant's, that allegedly resulted in B.B.'s loss of privacy. Hill, 7 Cal.4th at 40; American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 330.

Plaintiffs neither suggest how they might amend their complaint nor request leave to do so. The court sees no manner in which the complaint may be amended to state a cause of action. Therefore, leave to amend is not granted.

Defendant's request for judicial notice is granted.

Defendant's counsel shall prepare for the court signature an order and a judgment of dismissal pursuant to CRC rule 3.1312.

COURT RULING

The matter was argued and submitted. The Court takes this matter under submission.

SUBMITTED MATTER RULING

The tentative ruling is affirmed with the following addition.

At hearing, plaintiffs pointed out that they had requested leave to amend in the conclusion of their opposition memorandum of points and authorities. However, neither in that memorandum nor at hearing, did plaintiffs provide the court any basis upon which they would file an amended complaint. Plaintiffs, therefore, did not meet their "burden of proving the possibility of cure by amendment." Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, 78.

Declaration of Mailing:

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.
Dated: June 1, 2009
J. Hart, Deputy Clerk **/s/ J. Hart**

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