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

MINUTE ORDER

DATE: 02/01/2013 TIME: 09:00:00 AM DEPT: 54

JUDICIAL OFFICER PRESIDING: Raymond Cadei
CLERK: D. Ahee, K. Pratchen
REPORTER/ERM: S. Adams CSR# 12554
BAILIFF/COURT ATTENDANT: C. Chambers

CASE NO: **34-2013-00135574-CU-MC-GDS** CASE INIT.DATE: 01/10/2013
CASE TITLE: **Law School Admission Council, Inc. vs. The State of California**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Preliminary Injunction

APPEARANCES
Robert E Darby, counsel, present for Plaintiff(s).
Christine M Murphy, counsel, present for Defendant(s).
Julie M. Capell appeared on behalf of Plaintiff, Matthew Wise and Eddie Washington appeared on behalf of defendant.

Nature of Proceeding: Ruling on Submitted Matter (Motion for Preliminary Injunction) taken under submission 2/1/2013

TENTATIVE RULING

Plaintiff Law School Admission Council's ("LSAC") Motion for Preliminary Injunction is ruled upon as follows.

In this action, LSAC challenges a recently-enacted statute, Assembly Bill 2122 (codified at Education Code §99161.5), on constitutional grounds.

Factual Background

LSAC is a non-profit Pennsylvania corporation that provides services to law schools with LSAC membership. Among these services is the development and administration of the Law School Admission Test ("LSAT") to potential law school applicants. LSAC develops, administers, and scores the LSAT four times each year, and after each exam transmits applicants' scores to law schools as directed by each applicant.

As required by the Americans with Disabilities Act ("ADA"), LSAC provides various reasonable accommodations to test-takers with documented disabilities who are unable to take the LSAT under standard conditions. The most commonly requested accommodation is additional testing time. (Vaseleck Decl. ¶10.) It is LSAC's position that providing additional testing time affects the scores of test-takers who receive that accommodation. LSAC contends that "studies have shown that LSAT scores earned with additional testing time are not comparable to LSAT scores earned under standard time conditions and tend to over-predict how the examinee will perform in his or her first year of law school." (Opening Memo. 2:14-17, citing Vaseleck Decl. ¶14, Ex. 2.)

Because of this perceived lack of correspondence between scores earned with an accommodation of extra time and scores earned under standard conditions, LSAC prepares a unique letter to law schools when it reports the scores of examinees who received extra time. This practice is referred to by the parties as "flagging". A "flagged" exam score is reported to law schools accompanied by a letter stating that that applicant took the LSAT under nonstandard time conditions, that research indicates that such scores do not have the same meaning as scores earned under standard time conditions, and that the score should be interpreted with great sensitivity and flexibility. (Vaseleck Decl. ¶15, Ex. 3.) The letter also includes an admonition that "civil rights statutes prohibit discrimination against persons with disabilities." (Vaseleck Decl. ¶15, Ex. 3.)

"Flagged" score reports also differ from standard score reports in another respect. A standard score report also includes a percentile ranking and the score band within each examinee's score fell for that test administration, relative to other examinees. (Vaseleck Decl.¶17.) However, LSAC does not include this information for "flagged" scores because it contends these scores are not comparable to scores achieved with standard testing time.

In September of 2012, apparently in response to LSAC's practice of "flagging", the Legislature enacted Assembly Bill No. 2122, which added section 99161.5 to the Education Code. Section 99161.5 became effective on January 1, 2013. Section 99161.5 is directed specifically to "[t]he test sponsor of the Law School Admission Test", and imposes a number of requirements regarding accommodations for examinees with disabilities and reporting of test scores to law schools. Specifically, section 99161.5 requires LSAC to provide accommodations to examinees with disabilities, to disclose to the public its process for determining whether to grant an accommodation, and to establish a timely appeals process for denials of accommodation. (Educ. Code §99161.5(a)(1)-(3).) With regard to reporting of test scores, section 99161.5 prohibits LSAC from notifying "a test score recipient that the score of any test subject was obtained by a subject who received an accommodation pursuant to this section" (§99161.5(c)(1)), and prohibits LSAC from withholding "any information that would leave a test score recipient to deduce that a score was earned by a subject who received an accommodation pursuant to this section." (§99161.5(c)(2).). Section 99161.5(c)(3) provides that subdivision (c) does not constitute a change in the law, but is instead declaratory of existing law.

LSAC now moves for a preliminary injunction enjoining enforcement of section 99161.5 while this action is pending on the grounds that LSAC is likely to prevail on the merits of its constitutional challenge to the statute.

In deciding whether to enter a preliminary injunction, the court must evaluate two interrelated factors: (1) the likelihood that the applicant will prevail on the merits at trial, and (2) the interim harm that the applicant will likely suffer if preliminary relief is not granted, as compared to the likely harm that the opposing party will suffer if the preliminary injunction issues. (*See, e.g., Langford v. Superior Court (Gates)* (1987) 43 Cal.3d 21, 28.) One of these two factors may be accorded greater weight than the other depending on the applicant's showing. (*See Commons Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 447.)

Likelihood of Prevailing on the Merits

LSAC contends that Education Code §99161.5 is unconstitutional on the following grounds: (1) that it violates LSAC's right to equal protection under the laws of this state; (2) that it violates LSAC's right to freedom of speech; (3) that it is an unconstitutional "special law"; and (4) that it is an unconstitutional bill of attainder.

Equal Protection

The Constitution of this state provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;" (Cal. Const. art. I, § 7(a).) LSAC argues that Education Code §99161.5 violates this constitutional provision because it applies only to the "test sponsor of the Law School Admission Test" and not to other similarly situated testing entities. LSAC disputes any purported legislative finding that LSAC is differently situated from other testing entities, and thus that its singular treatment under section 99161.5 is not inconsistent with the equal protection guarantee.

In opposition, the Defendants State of California, Governor Edmund G. Brown, Jr., Attorney General Kamala Harris, and Superintendent of Public Instruction and Director of Education (collectively, "State") contend that LSAC is in fact differently situated from other testing entities, and that the Legislature's classification as established by section 99161.5 is supported by a rational basis. The State notes that equal protection does not require "uniform operation of the law with respect to persons who are different." (*People v. Guzman* (2005) 35 Cal.4th 577, 591.)

In reviewing a challenge on equal protection grounds, courts apply varying degrees of scrutiny based upon the particular classification drawn by the legislation at issue. (*See Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 289-299.) Where a statute implicates neither "suspect classifications" nor "fundamental interests", the court reviews an equal protection challenge to the statute under "the rational relationship or rational basis standard." (*Id.* at 299.) The State contends, and LSAC did not initially appear to dispute (see Opening Memo. 5:27), that the "rational basis" analysis is the proper standard of review for this constitutional challenge. The Court notes that LSAC argues on reply that the Court should apply "strict scrutiny" in considering its equal protection challenge because section 99161.5 implicates fundamental free speech rights. However, because the Court finds that section 99161.5 does not satisfy the rational basis test, it need not consider the statute's fate under a strict scrutiny analysis.

The State contends that the legislative history of Education Code §99161.5 demonstrates the Legislature's rational basis for its statutory classification of LSAC. The Bill Analysis for A.B. 2122 includes discussion of the fact that LSAC's practices with regard to granting accommodations for disabled examinees and "flagging" differ from those of other testing entities such as Educational Testing Service and the College Board which administer the Graduate Record Examination and the Scholastic Aptitude/Assessment Test. (*See* State RFJN Ex. A, 90-92.) The analysis notes that "this bill targets LSAC because their process regarding accommodations creates significant barriers for people with disabilities while other test sponsors no longer flag scores and have less burdensome requirements for requesting accommodations." (*Id.* at 92.) The bill author indicated that the proposed legislation was intended to curtail LSAC's practice of "flagging": "[U]nder LSAC's policies, when a student obtains extra time based on a cognitive or physical disability, this or score is identified and a letter is sent to law schools notifying that an accommodation was granted and advising that the score should be interpreted with great sensitivity. This practice is referred to as 'flagging' and it creates a chilling effect that discourages individuals from requesting testing accommodations." (*Id.* at 90.) The analysis also suggests future application of the bill's requirements "to all test sponsors." (*Id.* at 92.)

LSAC contends that the State is "simply wrong" in asserting that LSAC's accommodation policies are substantially different from those of other test sponsors. (Opening Memo. 7:16.) LSAC argues that other testing entities "also inform score recipients when scores have been achieved with certain types of accommodations, because of concerns about score comparability." (Opening Memo. 7:21-22.) LSAC also contends that the documentation it requires applicants seeking accommodation to submit is "very similar to those of other sponsors of standardized admission tests." (Opening Memo. 8:5.) LSAC asserts that "the problem with A.B. 2122" is that "[i]t was not based upon any effort to craft balanced legislation that addresses a legitimate need and is supported by objective evidence." (Opening Memo. 8:21-23.)

It is not the role of this Court to opine regarding whether the Legislature has successfully crafted

"balanced legislation", or whether the statute will result in beneficial policy. As the Supreme Court has noted:

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* So long as the challenged distinction bears some rational relationship to a conceivable legitimate state purpose, it will pass muster; once we identify 'plausible reasons' for the classification our inquiry is at an end."

(*California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 208-209 (quotations, citations omitted; emphasis in original).) In reviewing whether a provision of law meets the "rational basis" standard, the Court does not consider the merit or wisdom of the Legislature's determinations. (*See Stinnet v. Tam* (2011) 198 Cal.App.4th 1412, 1426. ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").)

Nevertheless, "equal protection does require...that the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 436, quotations, citations omitted.) A reviewing court is to "undertake...a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals by inquiring whether the statutory classifications are rationally related to the realistically conceivable legislative purposes." (*Id.*, quotations, citations, and emphasis omitted.) Further, "statutes may single out a class for distinctive treatment only if that classification bears a rational relationship to the purposes of the statute." (*Britt v. City of Pomona* (1990) 223 Cal.App.3d 265, 274.) In order to satisfy the rational basis standard, "there must be a rational basis for the *difference in treatment* of those similarly situated. In other words if a rational classification is applied unevenly, the reason for singling out a particular person must be rational and not the product or intentional and arbitrary discrimination." (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 607, emphasis in original.)

Here, the State asserts that the legislature has a legitimate interest in curtailing discriminatory practices within the state, and that Education Code §99161.5 furthers that interest by enjoining LSAC's "flagging" practice. The State also asserts that the unique classification of LSAC under the statute is supported by a rational basis because other testing entities do not engage in "flagging." The State contends that it is appropriate to direct section 99161.5's provisions only to LSAC because LSAC engages in flagging and other testing entities do not. Even assuming the State is correct that only LSAC engages in flagging (as discussed below, LSAC presents evidence that other testing entities also annotate scores), there is nothing in the record to indicate that the other testing entities could not, at some point, change their practices to include flagging of test scores earned with a disability accommodation. Were they to do so, their use of the practice would not be unlawful under section 99161.5, while LSAC would be enjoined from engaging in the same activity. Thus, the purported reason for singling out LSAC from other testing entities is based upon the other entities' voluntary election to forego this practice at present. Section 99161.5 creates a statutory classification based on the identity of the various testing entities, given their current practices, rather than on the practices themselves. Based on the current record, therefore, the Court cannot conclude that the stated goal of the statute, enjoining practices that discriminate based on disability, is rationally related to the statutory classification. The classification is simply not drawn to achieve that goal because it is directed to a particular entity, not to a particular practice.

As the State argues, "[i]t is true...that courts do not force policymakers to tackle an entire problem at one time." (*Walgreen Co., supra*, 185 Cal.App.4th at 442.) However, "even when a classification is considered an incremental or partial step in addressing a problem, the differentiation must still be based

on 'some plausible reason, based on reasonably conceivable facts.'" (*Id.*, quoting *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1204.) The legislature's legitimate interest in prohibiting discrimination is not in dispute. However, legislation that seeks to further this interest must not single out one particular entity for regulation without a rational basis for doing so. The reasons presented for limiting application of section 99161.5 to LSAC only, specifically, that LSAC engages in flagging while other testing entities do not, are simply not plausibly related to the stated goals of the statute. First, as noted above, other testing entities may change their practices to engage in flagging, and would be permitted to do so under section 99161.5, while LSAC would not. Second, LSAC presents evidence that other testing entities do report scores earned with extra time differently than standard scores. (Capell Decl. Ex. 4.) LSAC's evidence indicates that the Association of American Medical Colleges, the American Osteopathic Board of Emergency Medicine, and the North American Board of Naturopathic Examiners provide score recipients with an annotation indicating that a score was earned under non-standard time conditions. (*Id.*) The State does not appear to dispute this evidence. Given that other testing entities would be permitted to engage in flagging under the statute, and that some other testing entities actually do engage in flagging, the anti-discrimination purposes of the statute are not rationally served by exclusively targeting LSAC for regulation.

At this juncture, LSAC has met its burden to show that it is likely to prevail on the merits of its claim that Education Code §99161.5 violates LSAC's right to equal protection because it lacks a rational basis for directing its prohibitions to LSAC exclusively, and not to other testing entities. The Court's finding in this regard is for the purposes of this motion only, and is based upon the showing presently before the Court.

Having concluded that LSAC has demonstrated a likelihood of prevailing on the merits of its equal protection claim, the Court need not address LSAC's remaining arguments that section 99161.5 violates its free speech rights, is an improper special law, and/or is a bill of attainder.

Balance of Harms

LSAC contends it will suffer irreparable harm if a preliminary injunction is denied because it will be subjected to infringement of important constitutional rights. LSAC also asserts that maintenance of the status quo, that is, enjoining enforcement of the newly-effective statute, will not harm the State's interest in preventing discrimination because existing laws are in place to maintain protections against discrimination. LSAC notes that section 99161.5 purports to be merely declaratory of existing law.

The State contends that a failure to enforce 99161.5 "would continue to deny disabled applicants the reasonable accommodations and fair treatment to which they are entitled under the ADA [Americans with Disabilities Act]." (Brown/Harris Opp. 20:7-8.) However, as noted above, injunction of enforcement of section 99161.5 would not prevent the continued applicability of existing laws, such as the ADA.

In light of LSAC's showing that it is likely to prevail on the merits of its constitutional claim, the Court concludes that the risk of infringement of constitutional rights is sufficient harm to warrant injunctive relief.

The motion for preliminary injunction is granted.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.

COURT RULING

The matter was argued and submitted. After hearing oral argument the Court affirmed its tentative ruling with the following modification: Mr. Torlakson is not enjoined in the preliminary injunction. Plaintiff was ordered to prepare a formal order and submit to opposing counsel for approval as to form. Defendant's waived personal service.

Defendant's request for a stay of the preliminary injunction was taken under submission.

SUBMITTED MATTER RULING

Having taken the State's request to stay the preliminary injunction pending appeal under submission, the Court now rules as follows.

The request for stay is denied.

As discussed at the hearing, the prevailing party is to submit a formal order for the Court's signature.