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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

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| J. and R. DOE, ET AL, | § | |
| PLAINTIFFS | § | |
| VS. | § | CIVIL ACTION NO. TY-77-261-CA |
| JAMES PLYLER, ET AL, | § | |
| DEFENDANTS | § | |

MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT OF ITS BEING ISSUED

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW J. DOE, et al, plaintiffs in the above entitled and numbered cause and move this Court to issue a preliminary injunction and in support would show the Court as follows:

I.

A PRELIMINARY INJUNCTION IS PROPERLY ISSUED IN THIS CAUSE.

A preliminary injunction is within the province of the trial court's discretion. The purpose of a preliminary injunction is to maintain the status quo pending a final determination of the action prior to the final hearing. The "status quo" sought to be maintained by the plaintiffs herein is their attendance in the public schools of the Tyler Independent School District (hereinafter Tyler I.S.D.) without the payment of tuition fees. Most of the minor plaintiffs attended the Tyler schools last year while the remainder (N. Roe and R. Loe) attended the Tyler Head Start program preparatory to entering the first grade in the school years 1977-1978. The controversy herein arose on or about July 15, 1977, when the Tyler I.S.D. implemented a policy requiring tuition payments for those aliens unable to

present "documentation that he or she is legally in the United States, or (is) a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." On August 31, 1977, the first day of school in the Tyler I.S.D., none of the minor plaintiffs was permitted to attend school and, as of the date of this hearing for a preliminary injunction, are not attending any school in the Tyler I.S.D. The "status quo" is generally defined as the "last uncontested status which preceded the pending controversy." Westinghouse Elec. Corp. V. Free Sewing Machine Co., 256 F.2d 806, 808 (7th Cir. 1958); cited with approval in National Ass'n of Letter Carriers v. Sombrotto, 449 F.2d 915 (2nd Cir. 1971). The last uncontested status of the plaintiffs was their attendance in the Tyler schools and the plaintiffs seek to have the Court enjoin the defendants, their agents, employees and those acting in concert with them from preventing the registration, enrollment and attendance of the plaintiffs and all others similarly situated in the Tyler I.S.D. and further enjoin the defendants, their agents, employees and those acting in concert with them from charging these plaintiffs and all others similarly situated a tuition fee for their attendance.

The courts have generally looked to four factors in determining if a preliminary injunction should properly issue. In First Citizens Bank and Trust Co. v. Camp, 432 F.2d 481 14 FR Serv. 2d 998 (4th Cir. 1970) the Court set forth these factors: (1) Have the plaintiffs made a strong showing that they are likely to prevail on the merits? (2) Has irreparable harm in the absence of relief been shown? (3) Would the issuance of a preliminary injunction harm other parties in the proceedings? (4) Where does the public interest lie? See also Weber v. Continental Motors Corp., 305 F.Supp. 404 (S.D.N.Y. 1969).

The first factor, the likelihood of the plaintiffs prevailing on the merits, does not require absolute certainty. If the balance of hardships is substantially in the plaintiffs' favor, it "will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2nd Cir. 1953). In the instant case, the plaintiffs have clearly raised serious and difficult questions as to the constitutionality of Section 21.031 of the Texas Education Code and the policy promulgated and enforced by the Tyler I.S.D. pursuant to it. Plaintiffs' brief in support of their motion for preliminary injunction, filed September 6, 1977, articulates several areas of law which cast in serious doubt the statute's constitutionality. A review of that brief indicates that the questions raised are neither insubstantial nor frivolous. Another factor to consider is the openness of the particular area of the law under challenge. See e.g. Dorfmann v. Boozer, 414 F.2d 1168 (C.A.D.C. 1969). The statute challenged herein was made effective September 1, 1975 and the Tyler I.S.D. policy was implemented July 15, 1977. The statute has never been interpreted and its uniqueness also speaks to the difficulty of the issues involved.

The second factor, the likelihood of irreparable harm in the absence of a preliminary injunction, is manifest. None of the plaintiffs are now attending school and may not attend school in the foreseeable future. None can produce the documents required by the Tyler I.S.D. and none live in families that can afford to pay the tuition fee. Given the length of time that may pass before this case can be reached on the merits, it is reasonable to assume that the plaintiffs will miss at least one year of school. Additionally, the language difficulties of the plaintiffs, all of whom speak Spanish as their native language, means an extended absence from school would impose even more serious hardship than would normally be the case.

The Courts have long viewed compulsory absences from school with great concern and have imposed due process limitations on school officials expelling or suspending students for more than a minimum number of days. See e.g. Goss v. Lopez, 95 S.Ct. 729 (1975); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961); Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1944); Texarkana Independent School District v. Lewis, 470 S.W.2d 727 (Civ. App., 1971).

While the Supreme Court may have found no fundamental right to education in San Antonio I.S.D. v. Rodriquez, 411 U.S. 1 (1973), Justice Powell noted that the finding may have been different had there had been an absolute denial of educational opportunities rather than simply relative differences in spending levels. Whatever interpretation may subsequently be applied to Rodriquez, it is clear that education is a right not lightly denied. The harm that may accrue to the plaintiffs, by their total exclusion from education for a period of what may be years, is indeed irreparable.

The third factor, the substantial harm that the defendants may incur, is essentially a balancing test. Would the defendants be harmed to a substantial degree more than the plaintiffs should a preliminary injunction issue? It is clear, in this instance, that they would not. Until this year all of the named plaintiffs and the class they represent were attending the Tyler schools (including the Tyler Head Start program). Until this year these children attended the Tyler schools, for up to six years, without apparent harm to the defendants. It is hardly credible that another year more or less, pending final resolution of this case, would cause nearly the harm to the defendants as would clearly be caused to the plaintiffs. The balancing interests are clearly on the side of the plaintiffs with only minimal, if that, harm to the defendants.

Finally, the question of where the public interest lies is on the side of the plaintiffs. An educated populace is the basis of our democratic institutions. A denial of educational opportunities is repugnant to our notions that an informed and educated citizenry is necessary to our society. This interest was clearly articulated by the Supreme Court in Brown v. Board of Education, 374 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) where it was stated:

> "Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where that state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. at 493

And specifically in Texas, "a free public education is not simply a privilege; it is a right guaranteed by the Texas Constitution." Karr v. Schmidt, 320 F.Supp. 728 (W.D. Tex. 1970), rev'd on other grds, 460 F.2d 609 (5th Cir. 1972).

The plaintiffs and those they seek to represent have moved this court for a preliminary injunction. The harm to the plaintiffs, without a preliminary injunction, would be substantial and irreparable. A year of schooling can never be replaced. The child is a year older, a year behind his or her classmates, a year of doing nothing but staying at home. As a public service advertisement states, "a mind is a terrible thing to waste." Under the Tyler I.S.D. policy, many, many young minds will go to waste this year.

Under the principles and case law cited, the plaintiffs have demonstrated their entitlement to a preliminary injunction. The harm to them is enormous, the harm to the defendants is minimal. No public interest is served by keeping these

children out of school and the plaintiffs have raised serious and difficult questions of constitutional law. The overburdened docket of this court should not be the factor forcing these children to remain out of school, uneducated, for what could be a long time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter Roos, hereby certify that a true and correct copy of the foregoing has been hand delivered this the 8th day of September, 1977, to Mr. John C. Hardy, 200 Peoples National Bank, South, Tyler, TX.

Peter D. Roos
PETER ROOS