

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF PENNSYLVANIA

3 KHADIDJA ISSA, ET AL) 5:16-cv-03881-EGS
4) PM PARTIAL
5 VS.)
6) August 19, 2016
7 THE SCHOOL DISTRICT OF) Allentown, PA
8 LANCASTER) 4:07 p.m.-4:26 p.m.

9 HEARING ON PRELIMINARY INJUNCTION
10 BEFORE THE HONORABLE EDWARD G. SMITH,
11 UNITED STATES DISTRICT JUDGE

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
MS. RAU			14	

E X H I B I T S

NO.	PAGE
None	

1 P R O C E E D I N G S

2 (Requested excerpt beginning at 4:07:16:)

3 THE COURT: -- so we believe that
4 having a high school degree is vital to your success
5 as a human being.

6 Secondly, we are evaluated based on the
7 number of students we do graduate, so the State looks
8 at that. They have concerns when you have many
9 dropouts, and so we want to make sure that we meet the
10 needs of our kids so they don't drop out.

11 Now throughout the case of the last
12 three and a half days they've introduced evidence to
13 suggest that children who are under 21 were not
14 enrolled. They've introduced evidence that one child
15 who was enrolled graduated in 16 months when he was
16 still only 18, about to turn 19.

17 They introduced evidence that
18 enrollment was delayed in many circumstances. And I
19 think there's a little bit of theme suggesting that
20 this was all done to manipulate the dropout rates
21 because the school and the school district is
22 evaluated, in part, based on their dropout rate. And
23 I wanted to give you an opportunity to comment on
24 that.

25 THE WITNESS: I think that I wouldn't

1 use the term that we're manipulating. I think that
2 what we're trying to do is provide -- we know first as
3 I've said over and over that you need a high school
4 degree. And I -- you know, I just believe that with
5 all my heart.

6 So I need to get those kids to get a
7 high school degree, so that's why we believe in
8 accelerating them. Because we know that they will not
9 be successful.

10 So, yeah, we're going to be evaluated
11 by the state on dropouts and graduation rates, but
12 we're also evaluated with a whole host of other
13 metrics. And that matters. Because you don't want
14 your district to be known as a failing district.

15 But I think the idea that helping these
16 kids reach the level of getting a high school diploma,
17 it's so vital and the fact that the state measures it,
18 reinforces that, how important it is.

19 So I don't see it as a manipulation, I
20 see it more as an incentive, more of the State telling
21 you, this is that important that we're going to
22 measure so, you know, do a good job and graduate those
23 kids.

24 THE COURT: Okay. Now, if I had
25 thought of the term accelerated education --

1 THE WITNESS: Uh-huh.

2 THE COURT: -- before this trial
3 started, I would've thought of advanced placement,
4 honors courses, children that have the ability to
5 accelerate. They are the best of the best.

6 I would never have thought of it as
7 being someone who can't even speak English who's come
8 from another culture and has asylum in this country,
9 sitting in a classroom being taught in a language
10 other than the language they speak, and accelerating
11 to the language such that that student in 16 months
12 can get an entire high school education or a diploma
13 that represents a high school education, and that's
14 without ever having gone through kindergarten,
15 elementary school, middle school, et cetera.

16 Can that, other than getting that piece
17 of paper as a diploma, can that 16 months really be
18 effective in trying to educate that child?

19 THE WITNESS: Yeah. You know, I don't
20 know enough about that child to know how intelligent,
21 but that does seem really far-fetched to me, 16
22 months.

23 THE COURT: And he finished at the top
24 of his class.

25 THE WITNESS: Yes. You know, I would

1 question that myself. However, I think there's been a
2 misunderstanding as to what accelerated means in this
3 case for SDOL.

4 So it doesn't mean that we're going
5 faster. Because in the traditional high school the
6 periods are 48 minutes. At Phoenix, you're getting a
7 two hour block. So that's how we're accelerating,
8 we're giving you more. The research has shown, and
9 actually again my former district, most of our schools
10 had what we called a block schedule, where instead of
11 students moving from one class to another every 48
12 minutes, our blocks were much longer, 90 minutes to 2
13 hours because teachers can get so much more done with
14 kids, especially if you look at math and science.

15 I mean, you can't conduct a science
16 experiment in 48 minutes. So many schools are going
17 towards of block schedule of 2 hours. Because one, it
18 reduces wasteful transition. So, you know, the bell
19 rings, beep five minutes in the hall going from one
20 place to another.

21 Now, students are able to stay in their
22 room for 90 minutes to 2 hours really focused on the
23 learning. That's what we mean by accelerated. So
24 we're enabling students to learn more faster.

25 THE COURT: Okay. Thank you.

1 And finally I just wanted to address
2 with you the proposals that have been put forth by the
3 plaintiffs in this matter. And I know that this is a
4 very small group of your students, and I know you
5 always have to keep in mind all of your students and
6 there are issues of budgetary concerns, et cetera, and
7 changing educational methodologies.

8 But the first and perhaps the foremost
9 thing that they've requested in their proposed order,
10 was that by beginning of the school year, you enroll
11 and permit all school aged plaintiffs and class
12 members, and I'm interpreting class members to be
13 these refugees who are between the age of 17 and 21 to
14 attend the main high school McCaskey. That's their
15 first request, is that they not be sent to Phoenix.

16 And right now I believe based on the
17 testimony there are 18 students at Phoenix. And I
18 believe it is their goal that those 18 students, not
19 just these six, but all 18 go to McCaskey. The
20 remaining, we'll find that out.

21 So that's the first request. The
22 second request I think you're already doing. Because
23 that is by that same date, that is the beginning of
24 the school year, you ensure that the plaintiffs and
25 the similarly situated people are properly assessed

1 for language proficiency, which I assume you already
2 do, and receive an appropriate and adequate program of
3 language instruction --

4 THE WITNESS: Uh-huh.

5 THE COURT: -- which based on what I've
6 heard at McCaskey there certainly is. Including --

7 THE WITNESS: At Phoenix too.

8 THE COURT: At Phoenix too, but I mean,
9 if this were followed, they would already be at
10 McCaskey. Including assignment to the international
11 school if appropriate, ESL instruction, modifications
12 in the delivery of instruction and testing to
13 facilitate their achievement of English proficiency
14 and state academic standards, and interpretation and
15 translation services to enable plaintiffs and their
16 parents to meaningfully participate in education
17 decisions.

18 Now, they took this right from the law,
19 from Pennsylvania law. So I have no doubt that you're
20 already doing number two.

21 THE WITNESS: Uh-huh.

22 THE COURT: The third thing they're
23 requesting is that the plaintiffs and the other
24 refugees have equal access to the full range of
25 educational opportunities provided to the peers

1 including curricular and non-curricular programs and
2 activities.

3 Here, they're talking about, based on
4 what I've heard so far that the students that are
5 Phoenix have much more difficulty participating in
6 sports at McCaskey and the other extra-curricular
7 activities school play, band, whatever because of the
8 difficulty of being at Phoenix.

9 If they're transferred to McCaskey,
10 already that's less of an issue, but they want to make
11 it clear that the students also get to participate in
12 all that.

13 THE WITNESS: And they do have the
14 opportunity, yes, they can take the bus to get there.

15 THE COURT: That's why I didn't think
16 this would be a problem.

17 By the way, two students and the others
18 weren't asked, two of the students testified they walk
19 45 to 50 minutes each day to Phoenix and home. Do you
20 know why they're not taking the bus?

21 THE WITNESS: So we have standards
22 around busing. So for a high school student, you have
23 to live two miles or more away to get a bus.

24 THE COURT: Okay.

25 THE WITNESS: The little ones, I think

1 the middle schoolers is like a mile and a half, and
2 the little ones it's a mile.

3 THE COURT: Now, the final thing they
4 requested is to cease excluding class members, that is
5 refugees from enrollment at McCaskey, and they're
6 talking about refugees aged 17 to 21, to cease
7 excluding them from enrollment at McCaskey.

8 So you can see this is very similar to
9 number one. They don't want this policy of
10 automatically sending all 17 to 21 year olds to
11 Phoenix Academy, they want them to go to McCaskey, if
12 appropriate go to the international school and get
13 their instruction at that school.

14 So that's what they're requesting,
15 that's what this four days is certainly now going to
16 go to five, I know Attorney O'Donnell was hoping we
17 could finish today, that obviously was not the case.

18 That's what this is all about because
19 this is just the preliminary injunction, but this is a
20 very important part of this whole case.

21 THE WITNESS: Uh-huh.

22 THE COURT: Because a lot of this
23 evidence has come out now will be in the court file
24 automatically into the final injunction hearing.

25 And the reason that they're doing all

1 this is because the Equal Education Opportunity Act
2 and Castenada factors are very powerful to protect
3 children with respect to ESL and with respect to EL or
4 ELLs coming in the school.

5 So at the end of the day, as it now
6 stands, that's what they are seeking. And it's
7 presumed that's what you're opposed to, because
8 otherwise we wouldn't be going through all this.

9 THE WITNESS: Right.

10 THE COURT: Do you feel comfortable
11 trying to explain to me why you're opposed to the
12 relief that's being sought, as -- and let me rephrase
13 that.

14 Sometimes people don't like to concede
15 that they've done anything wrong, because they don't
16 believe they have done anything wrong. And sometimes
17 by conceding to the request of the plaintiffs, the
18 defendants think they're conceding they've done
19 something wrong.

20 Sometimes they truly believe it's not
21 in the best interest of the students, there could be a
22 variety of reasons why this requested relief would not
23 be appropriate to the school district.

24 From a budgetary standpoint, while
25 that's not an appropriate factor under the guidelines,

1 I don't see the budgetary issue. I know you've got to
2 key 350 students at Phoenix, and I don't know if
3 that's an issue or not. But it seems to always have
4 350 students as required.

5 What is it about that relief that you
6 are most opposed to, least opposed to, or that you
7 feel comfortable talking about?

8 THE WITNESS: I think that our biggest
9 -- one of our biggest concerns is that the School Code
10 gives the authority to the Board of Directors to place
11 students in a school. And there's a real concern of
12 taking away the authority of a School Board in making
13 those decisions.

14 THE COURT: Okay. That's a very fair
15 answer.

16 THE WITNESS: That's one of the
17 concerns, yes.

18 THE COURT: Thank you very much.
19 Attorney O'Donnell, do you have any questions in light
20 of the Court's questions?

21 MS. O'DONNELL: I don't -- I guess the
22 only question is, do we convene for the day and
23 reconvene on Monday morning?

24 THE COURT: Are you suggesting that
25 it's Friday afternoon and you have a two hour drive to

1 get home?

2 MS. O'DONNELL: No, no, I'd love to
3 stay here --

4 THE COURT: Let me first ask Mr.
5 Rothschild. Do you have any questions in light of the
6 Court's question?

7 MR. ROTHSCHILD: I do have a couple,
8 Your Honor.

9 THE COURT: And his might solve the
10 problem.

11 MS. O'DONNELL: No, I don't think.

12 THE COURT: This could take to 5:30.
13 I'm just kidding.

14 MR. ROTHSCHILD: I can tap dance or
15 something if we just want to kill time.

16 EXAMINATION

17 BY MR. ROTHSCHILD:

18 Q. The 80 -- the research talked about the
19 benefits of the 80 minute block. That's research that
20 is based on experience of English language speakers,
21 right?

22 A. I don't recall if it was one or the other,
23 but in my former district, we had very many ELL
24 learners, and actually now that I recall, it was
25 something that our ELL coordinators again were in

1 favor of because it was giving the student the
2 opportunity to participate in a longer lesson, and
3 that enables teachers to differentiate.

4 So in a 90 or 2 hour block, you know, I
5 might do a mini-lesson and then do something else. So
6 it just gave teachers more opportunities to interact
7 with kids in different ways.

8 Q. And I was thinking about it as you were
9 talking about it, that you have these 80 minute
10 blocks, so I think what you're saying is, and I'll
11 just use rough math, you get through more content
12 faster because you're doing 80 minutes on Monday,
13 whereas at McCaskey you're doing 40 minutes on Monday,
14 right?

15 A. Yeah.

16 Q. Roughly?

17 A. Uh-huh.

18 Q. But these students are actually learning
19 English at the same time, right? That's part of what
20 they're doing, and part of what's going to allow them
21 to access the curriculum that they're having in their
22 content classes.

23 A. Exactly.

24 Q. Right. And so if they get that -- let's
25 assume it's day one at school, and they have their ESL

1 class and then they just get 40 minutes of social
2 studies, you know, they've got the English language
3 acquisition that's occurred that day, and then they
4 get 40 minutes of social studies. The next day,
5 they're going to get 40 minutes more, actually in this
6 situation, a couple of hours more, and get their next
7 40 minutes.

8 But at Phoenix, they're getting that first
9 80 minutes instruction when they've only had that
10 first day of ESL, right?

11 A. No, I'm sorry, I don't think that that's
12 correct.

13 Q. Okay.

14 A. So they're getting their ESL in a two hour
15 block. And they're doing it in a way that they're
16 both learning direct English, you know, over
17 conjugating verbs and all of that, but they're also
18 doing it through an authentic text. Right.

19 So you're not just learning English sort of
20 wrote without talking and using the words. So I think
21 it's better for kids to have a two hour block, really
22 be able to spend time.

23 So the pace -- when you refer to pace, you -
24 - it seems to me the way I understand what you're
25 saying is that the teachers are talking faster so they

1 get more in. No. They're doing -- instead of doing
2 two days' worth of lessons on two separate days --

3 Q. Right.

4 A. -- they're doing it in one day. I think
5 that's better for kids.

6 Q. Right. But those students who have got the
7 two lessons in one day, pretend it's the first day of
8 school, they've only had one day of their ESL as they
9 then have that whole 80 minutes of the content
10 education, right? Whereas at the international school
11 you're getting three hours of ESL, one of them is the
12 skills class, two are regular ESL and then 40 minutes
13 of content, and by the time they get that second day
14 and get their next 40 minutes, they will have had
15 three more hours of ESL.

16 A. I don't think what you're saying is
17 accurate.

18 MR. ROTHSCHILD: Okay. No further
19 questions, Your Honor.

20 THE COURT: Thank you very much,
21 Counselor. Attorney O'Donnell, anything further for
22 the witness?

23 MS. O'DONNELL: No, Your Honor.

24 THE COURT: Now, you were suggesting
25 the schedule -- oh, I'm sorry, ma'am, you may finally

1 step down. Thank you very much.

2 Attorney O'Donnell, what is your
3 suggestion?

4 MS. O'DONNELL: I'm -- I mean, I don't
5 know what everyone else's availability is, but I'd
6 like to at least try one more witness before we break.
7 I mean, if I could finish tonight I would love to, but
8 if we can't, then we just start again on Monday. I
9 mean, I'm not going to rest my case now.

10 THE COURT: Right, oh, no, I know. I
11 think we're going to go into Monday no matter what. I
12 don't know how we can -- how many more witnesses do
13 you have?

14 MS. O'DONNELL: I have at least three
15 or four.

16 THE COURT: Yeah, we're going to go
17 into Monday. Unfortunately, I know you were hopeful
18 to finish today.

19 MS. O'DONNELL: I was. I was. Okay.
20 So I guess we're -- on Monday --

21 THE COURT: The question is whether you
22 would like to put another witness on today, which I
23 would be glad to let you do, or whether you would just
24 like to bring the witnesses back on Monday and have
25 them all testify then.

1 MS. O'DONNELL: I can get my witness,
2 but cross-examination will take some time, so why
3 don't we start again on Monday.

4 THE COURT: Okay. And, Mr. Rothschild,
5 do you have any objection to us breaking at this time
6 and beginning on Monday?

7 MR. ROTHSCHILD: I think if I take a
8 team vote, I know what the answer will be, but I want
9 to confer with my colleagues.

10 THE COURT: Certainly.

11 (Pause)

12 MR. ROTHSCHILD: Your Honor, we have no
13 objection for convening for the day. Mr. Walczak
14 wanted to assure one other scheduling --

15 THE COURT: Certainly, sir.

16 MR. WALCZAK: So, Your Honor, based on
17 what we've heard we actually feel like we need to call
18 one --

19 THE COURT: Rebuttal witness.

20 MR. WALCZAK: -- on redirect, a witness
21 on redirect. So we issued a subpoena to Maryanne
22 Ortiz, who is the ESL teacher who has been spoken of
23 here. We do not believe that her testimony will be
24 long, but based on what we've heard, we think that
25 some of the testimony about what actually happens in

1 Phoenix needs to be clarified, so we have as to this
2 afternoon subpoenaed Ms. Ortiz to be here on Monday.
3 It sounds like she can probably be here Monday
4 afternoon as opposed to Monday morning. But I just
5 wanted to let Your Honor know that.

6 I'm a little nervous about the number
7 of witnesses we have left, and I think it's our
8 speculation that we're thinking the rest of the
9 witnesses should be briefer. I'm pretty sure that our
10 cross-examinations are not going to be --

11 THE COURT: We have Ms. Heisey
12 testifying, and that's the principal of Phoenix,
13 correct?

14 MS. O'DONNELL: Former principal, yes.

15 THE COURT: Former principal, that's
16 going to be a long testimony. Once you start cross-
17 examining her, you're going to beat her up. Oh, I'm
18 sure you will do just fine under --

19 MS. O'DONNELL: Thank you, Your Honor.

20 THE COURT: -- the withering cross-
21 examination.

22 MR. WALCZAK: Very gentle, Your Honor.
23 I know Your Honor said Tuesday is out, so we have to
24 finish on Monday.

25 THE COURT: We pretty much do have to

1 finish on Monday. I mean, we can pick another day
2 later in that week, but --

3 MR. WALCZAK: That's getting close.

4 THE COURT: -- we're running out of
5 time. We're running out of time.

6 MR. WALCZAK: Does it make sense to
7 start a little bit earlier on Monday?

8 MS. O'DONNELL: It really doesn't for
9 me, I mean I can be here by 9:30.

10 THE COURT: Okay. I noted that Dr. Rau
11 suggested that she wanted to resolve this issue by
12 cooperation, et cetera. Her opportunity has not
13 passed by any means.

14 So if there is a possibility that if
15 there's a meeting of the minds between the school
16 district and the students, you may not even need
17 Monday.

18 Everyone have a wonderful weekend,
19 hopefully it'll be nice weather, and I think Monday
20 it's supposed to be a little cooler, a little more
21 fall like. Have a good weekend.

22 THE CLERK: All rise.

23 (Proceedings concluded for the day at 4:26 p.m.)

24 * * * * *

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CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

SHEILA ORMS, APPROVED TRANSCRIPTIONIST

Dated: August 22, 2016

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