New Yorkers For Students' Educ. Rights v State of New York
2020 NY Slip Op 30207(U)
January 29, 2020
Supreme Court, New York County
Docket Number: 100274/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS (NYSER), MIRIAM ARISTY-FARER, MILAGROS ARCIA, G. CHANGLERTH, KIM DA SILVA, MONA DAVIDS, JANELLE HOOKS, NICOLE JOB, MERCEDES JONES, SONIA JONES, JAMAICA MILES, SAMANTHA PIERCE, SAM PIROZZOLO, HEIDI TESKA-PRINCE, BETHAMY THOMAS, ELIZABETH VELASQUEZ, and CORY WOOD,

Index No. 100274/2013

Plaintiffs

- against -

DECISION AND ORDER

STATE OF NEW YORK,

Defendant

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APPEARANCES:

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LUCY BILLINGS, J.S.C.:

Plaintiffs claim that the New York City and other specified school districts in New York do not provide students the

opportunity for a sound basic education because defendant provides inadequate funding to address educational deficiencies leading to poor performance. Defendant moves to compel nonparty New York City Department of Education (NYCDOE) to permit defendant's experts, former superintendents of public schools in New York, to observe 33 NYCDOE schools, including the schools that plaintiffs' children attend and otherwise randomly selected, to enable the experts to evaluate the teaching, technology, and facilities in NYCDOE schools. C.P.L.R. §§ 3120(1)(ii), 3124. Defendant also moves to compel NYCDOE to produce data that the Rand Corporation used to analyze NYCDOE's Renewal Schools Program. C.P.L.R. §§ 3120(1)(i), 3124. Rand Corporation's analysis studied the effect of additional funding on student performance.

I. SITE VISITS

Assuming plaintiffs present prima facie evidence of their claims, to defend this action defendant must be prepared to show that the New York City school district is not plagued by gross and glaring inadequacies that deny students the opportunity to receive a sound basic education or at least that any such inadequacies are not caused by the lack of public education funding. Aristy-Farer v. State of New York, 29 N.Y.3d 501, 510 (2017); Paynter v. State of New York, 100 N.Y2d 434, 440 (2003); New York City Parents Union v. Board of Educ. of the City School

Dist. of the City of N.Y., 124 A.D.3d 451, 451 (1st Dep't 2015). Defendant must show that the district's schools are equipped with minimally adequate physical facilities, instrumentalities of learning, and, most importantly, teaching. Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893, 909 (2003); Paynter v. State of New York, 100 N.Y2d at 438-39. Defendant must show that New York City's public school teachers, principals, and other personnel are qualified for their positions and that teachers maintain rapport with students and integrate technology in their teaching methods, which defendant maintains are best examined through expert site visits when schools are in session. Defendant seeks to rely on evidence other than evaluations of personnel and other data compiled by the district itself, especially evaluations of qualitative factors.

Defendant maintains that the quality of the school district's physical facilities and learning environment, whether schools are overcrowded, conduct classes in spaces other than classrooms, and house sufficient science laboratories, libraries, music and art facilities, and gymnasiums, also is best examined through expert site visits when schools are in session. According to defendant, whether schools offer up-to-date instrumentalities of learning, such as textbooks, computer hardware, calculators, compasses, protractors, art supplies, and musical instruments, in sufficient quantities are best examined

Plaintiffs and NYCDOE contend that site visits to 33 schools are not the best means to evaluate district-wide failures caused by inadequate funding and that the action will turn on statistical evidence, aggregate data, and systemic patterns. Plaintiffs concede, however, that prior decisions on similar claims have relied on experts' observations and empirical studies. E.g., Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d at 909-10. NYCDOE concedes the importance of using multiple measures and that NYCDOE itself uses classroom observations to evaluate the success, strengths, and weaknesses of teachers, programs, and the organization of schools to support student achievement. Aff. of Michelle Paladino ¶¶ 11-13; Aff. of Kamele McLaren ¶ 3.

The materiality and necessity of disclosure to defendant's defenses are not determined by plaintiffs, a nonparty witness, or the court second guessing defendant's theory of its defense and the means defendant finds will assist it and be useful in preparing its defense. Madia v. CBS Corp., 146 A.D.3d 424, 424-25 (1st Dep't 2017); Cortes v. ALN Rest., Inc., 137 A.D.3d 467, 467 (1st Dep't 2016); Zupnick v. City of New Rochelle, 173 A.D.3d 947, 949-50 (2d Dep't 2019); D'Alessandro v. Nassau Health Care Corp., 137 A.D.3d 1195, 1196 (2d Dep't 2016). It is impossible to conclude that defendant's proposed method of disclosure will not produce any relevant evidence or is not reasonably calculated

to lead to any information bearing on plaintiffs' claims or defendant's defenses. It is reasonable for defendant to believe that identification of specific district-wide failures depends at least in part on evaluation of failures in individual schools and that systemic patterns and the conclusions to be drawn from aggregate data may not be determined without assessing the aggregated elements that form the system and pattern. Defendant also is entitled to verify information provided by NYCDOE and proposes that the means of verification are classroom observations while school is in session. Although plaintiffs and NYCDOE believe NYCDOE's information is all that is necessary, they do not propose a superior means of verification.

At minimum, defendant's proposed site visits are sufficiently related to the issues in the litigation to render the visits a reasonable means of defendant's preparation for trial. Under these circumstances, the court must permit the requested method of disclosure, unless it is unduly burdensome. C.P.L.R. § 3101(a); Madia v. CBS Corp., 146 A.D.3d at 424-25; City of New York v. Maul, 118 A.D.3d 401, 402 (1st Dep't 2014); Zupnick v. City of New Rochelle, 173 A.D.3d at 949-50; D'Alessandro v. Nassau Health Care Corp., 137 A.D.3d at 1196. Questions whether the 33 schools are representative of the district and whether the proposed observations will yield probative evidence are issues for cross-examination, for motions

or objections regarding admissibility, and for summation at trial. Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 A.D.3d 554, 555 (1st Dep't 2015). See Cortes v. ALN Rest., Inc., 137 A.D.3d at 467; Zupnick v. City of New Rochelle, 173 A.D.3d at 950.

The principal burden or disruption that NYCDOE claims is that students may question why the expert is in their classrooms, which will necessitate explaining the classroom visitor's purpose to students. Surely school officials can truthfully explain that purpose other than by describing it as "an effort to block possible additional funds to their school" and in a manner that will not arouse students' anxiety. McLaren Aff. ¶ 3.

NYCDOE has agreed to permit one of defendant's experts to tour and photograph each of the 33 schools' facilities when the school is not in session. Defendant further seeks permission for one of defendant's experts to conduct classroom observations no longer than 15 minutes per class throughout a single day at each of the 33 schools. Defendant's experts have conducted such observations in other school districts in this action and in other similar actions without any complaints of disruption. See Cortes v. ALN Rest., Inc., 137 A.D.3d at 467. Defendant does not seek to interview any NYCDOE employees.

C.P.L.R. § 3120(1)(ii) permits defendant to enter property in the possession or control of an entity served with a subpoena,

as NYCDOE was here, to inspect the property and any specifically designated operations on the property, here teaching and learning in classrooms on school property while the school is in session. Defendant's proposed site visits thus fit within C.P.L.R. § 3120(1)(ii)'s scope. Cortes v. ALN Rest., Inc., 137 A.D.3d at 467; Iskowitz v. Forkosh Constr. Co., 269 A.D.2d 131, 132-33 (1st Dep't 2000); Greenidge v New York City Tr. Auth., 267 A.D.2d 80, 80 (1st Dep't 1999); Zupnick v. City of New Rochelle, 173 A.D.3d at 949.

II. DATA USED IN THE RAND CORPORATION'S REPORT

According to the Rand Corporation's report on the New York City Renewal Schools Program, its analysis used data obtained from NYCDOE, which defendant now seeks. NYCDOE has directed defendant to all such data that does not identify students, including the Renewal Schools, comparator schools, and weights assigned to the comparator schools.

In any school district like New York City that receives federal funding, 20 U.S.C. § 1232g protects educational records that identify students from disclosure. An exception to this protection permitted NYCDOE to share student identifying data with the Rand Corporation because it was conducting a study for NYCDOE to improve instruction. 34 C.F.R. §§ 99.31(a)(6)(i). Another exception permits NYCDOE to share this information to comply with a lawful subpoena or a court order, Staten v. City of

New York, 90 A.D.3d 893, 895 (2d Dep't 2011); Newfield Cent. School Dist. v. New York State Div. of Human Rights, 66 A.D.3d 1314, 1317 (3d Dep't 2009), but under this exception, unlike when NYCDOE shared the data with the Rand Corporation, NYCDOE must notify all parents of affected students or the students themselves if at least 18 years of age about the disclosure, or NYCDOE would risk losing its federal funding. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. §§ 99.31(a)(9)(ii), 99.33(b)(2).

NYCDOE provided Rand Corporation student identifying data on over 1,100,000 students who attended NYCDOE schools during 2012-17. Many of these students are no longer attending NYCDOE schools. Locating these students or their parents 3-8 years later and notifying them would be unduly burdensome, if not impossible. See Forman v. Henkin, 30 N.Y.3d 656, 665 (2018). Given all the other data to which NYCDOE has directed defendant, data provided to Rand Corporation, and volumes of NYCDOE's own reviews and reports, Paladino Aff. ¶¶ 11-13, defendant has not shown a specific need for the additional student identifying data sought. Andon v. 302-304 Mott St. Assocs, 94 N.Y.2d 740, 747 (2000); Pellot v. Tivat Realty LLC, 173 A.D.3d 498, 498-99 (1st Dep't 2019); Matter of Souza, 80 A.D.3d 446, 446 (1st Dep't 2011); Tomaino v. 209 E. 84 St. Corp., 68 A.D.3d 527, 530 (1st Dep't 2009). In fact, defendant concedes that, if Rand Corporation aggregated the individual student level data to the

individual school level, eliminating the student identifying data, to produce the Rand Corporation's conclusions that were based on individual schools, not on individual students, the school level data likely would satisfy defendant's needs.

III. CONCLUSION

For all the reasons explained above, the court grants defendant's motion to compel nonparty New York City Department of Education (NYCDOE), within 20 days after entry of this order, to permit one of defendant's experts to visit and observe each of the 33 NYCDOE schools defendant has specified. C.P.L.R. §§ 3120(1)(ii), 3124. The expert may tour and photograph each school's facilities when the school is not in session. When the school is in session, the expert may observe classes for up to 15 minutes per class throughout a single day at each school. Defendant's experts may not interview any NYCDOE employees at the school while it is in session.

The court also grants defendant's motion to compel NYCDOE, within 20 days after entry of this order, to produce the following data to the extent that NYCDOE has not already produced the data to defendant:

(1) All data that NYCDOE provided to the Rand Corporation for analysis of NYCDOE's Renewal Schools Program and that does not identify students,

(2) Any student level data aggregated to the school level

that does not identify students and is in NYCDE's control, and

(3) All data to which the Affidavit of Michelle Paladino ¶¶ 11-13 refers.

C.P.L.R. §§ 3120(1)(i), 3124. The court denies defendant's motion to the extent that its motion seeks further disclosure.

DATED: January 29, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.