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Education

AFTER THE COURT'S RULING--WHAT'S NEXT FOR THE SCHOOLS

Ross Sandler David Schoenbrod

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Justice Leland DeGrasse on January 9, 2001 ruled in the *Campaign for Fiscal Equity* [a1] case that children attending New York City's public schools suffer illegal discrimination under federal law and violation of their right to a sound basic education under the state constitution. He ordered the state to design, put in place, and implement reforms sufficient to wipe out the violations by September 15, 2001. No one, not even those closest to the litigation, expect that the state will meet that deadline. Consider that the state and city have yet to fully comply with an order to fix the city's special education program that a federal judge entered 22 years ago in another case (*Jose P.*). Fixing special education with its 166,000 students has turned out to be a huge job, but it is far smaller than the one imposed by Justice DeGrasse which deals with the entire school system of 1.1 million students and 1,100 buildings.

In assessing the job before them, the litigators might look for guidance in the litigation over New York City's foster care and child protective services. The initial case (*Wilder*) was filed in 1973. A consent order was entered in 1987, but things did not get better. Following the murder of six-year-old Eliza Izquierdo in 1995, another case was filed (*Marisol*).

The City refused to settle and used the three years of litigation to build new leadership ***2** at the Administration for Children's Services (ACS), analyze deficiencies at the agency, issue its own comprehensive reform plan, and begin to demonstrate that it meant business. On the eve of trial the parties settled. 5 *City Law* 1 (1999). The City would continue on its own reform course without a court-ordered, minutely directive decree so long as ACS demonstrated good faith in its efforts. To evaluate that good faith, the parties agreed to the appointment of a five-person expert panel which would act as monitor and advisor to the City, but whose recommendations need not be followed if the City had a better idea or a different time line for reform. This novel arrangement was to last for two years. If the City showed progress and good faith during this period, court supervision would be ended entirely, which is what happened on December 15, 2000.

The foster care system is not entirely fixed, but during the five year period dating from 1995 when *Marisol* was filed and the court stood ready to step in, progress was made, so much so that the independent monitors applauded the efforts and achievements of the City. Rare indeed is an institutional reform case judged successful, and rarer still does court supervision end on time. *Marisol* offers important lessons for Justice DeGrasse and the lawyers who now face the thorny problem of designing a remedy and making it stick.

Responsibility for planning and implementation should stay with the constitutionally responsible officials. In *Marisol* the court never told officials what to do to cure the violations. Instead it allowed them to design, modify and follow their own reform plan. This kept the onus of reform on the politically accountable branches of government and out of the court, and allowed the flexibility that ACS needed to make adjustments in the face of unexpected events and new ideas.

Justice DeGrasse is off on the right foot by refusing to issue a reform order of his own and by demanding that education officials come up with the remedy, but no one can rationally expect officials by September 15, 2001 to have designed sufficient reforms to correct all of the violations found by the court, much less to have adopted and implemented them. The list is daunting. Justice DeGrasse ordered the state to take “necessary steps” to ensure children are provided with:

• Sufficient numbers of qualified teachers, principals and other personnel;

• Appropriate class sizes;

• Adequate and accessible school buildings;

• Sufficient and up-to-date books, supplies, libraries, education technology and laboratories;

• Suitable curricula;

• Adequate resources for students with extraordinary needs; and

• A safe, orderly environment.

***3** Almost all large urban school systems could be faulted in many of these respects. Each of these elements is essential, but none has been definitely defined. Levels of adequacy and sufficiency are debatable. Public expectations are contradictory and changeable. If people had agreed on solutions there would have been little need for a lawsuit. Courts may be able to define a floor beneath which education must not fall, but how to lift the system above that floor and how much more beyond the bare minimum ought to be done are issues that ultimately must be answered by elected officials who can tax, respond to real world pressures, cobble out acceptable compromises, and answer to the public through periodic elections. If the court has any remedial role, it is to set the ball in motion and then get out of the way.

Limit the court and the advocates' control of decisions. It is tempting for courts at the remedy stage of an institutional reform case to designate plaintiffs and their attorneys as lead agents of change. Judges do this by signing detailed orders negotiated by plaintiffs' attorneys and then delegating to them the job of policing and enforcing the order. Plaintiffs' attorneys in the process become side-saddle commissioners able to hold hostage every innovation and change, and compel decisions that they favor. But plaintiffs' attorneys have a narrow focus even when they advocate reform of the entire education system. Despite plaintiffs' attorney's high standing as advocates, they still do not pay all the taxes; they do not represent other equally compelling needs like health services and housing which also have a relationship to educational achievement; and they do not have all the answers.

The Supreme Court said it best in 1973 in the *Rodriguez* case when it refused to find in the federal constitution a requirement that expenditures for education must be equal. “On even the most basic questions in this area scholars and education experts are divided . . . . The ultimate wisdom is not likely to be divined for all time by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from imposing . . . inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”

Consolidate legal obligations. Judge Robert Ward in the *Marisol* case abrogated the older *Wilder* settlement and, equally importantly, forbade any new class actions from being brought during the two year period allocated to the *Marisol* order. This limitation prevented the prosecution, for example, of a new class action limited to gay foster care children because

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the lawsuit would have diverted agency officials from reform, and the members of that sub-set were going to benefit from a successful completion of the larger *Marisol* effort.

Justice DeGrasse is in a similar situation because his findings and order embrace the entire educational enterprise. He should consider expanding his order to prevent additional class action lawsuits from being brought and, even better, secure from other plaintiffs and judges authority to halt continued enforcement of existing class action orders. These include court orders on special education, bi-lingual education, and school facilities, each of which deals with a sub-set of Justice DeGrasse's case and each of which attempts to lock in special advantages for one group or another. If the entire system is broken, as Justice DeGrasse has found, then the entire system has to be repaired. Prior orders limit options, lock-in past assumptions, and favor reform in parts of the system rather than the whole.

Accept the reality that substantial time and sustained leadership are required. Altering the culture of any large institution takes time, often as long as fifteen years, and cannot be accomplished at all without sustained positive leadership. In *Marisol* it took ACS the better part of three years just to produce a plan and put new leadership in place, and an additional two years to begin to demonstrate the benefits and practicality of its plan. ACS throughout the period has been fortunate to have had as its only commissioner Nicholas Scoppetta who enjoys the personal support of Mayor Rudolph Giuliani. Yet with all that has been achieved, the outside monitors still caution that reforms are not yet complete, and that much more work is required.

The real strength of Justice DeGrasse's order with its unrealistic September 15, 2001 date is in its political impact. Justice DeGrasse has called the question on the quality of New York City's public schools. He has lifted that issue to the political high ground inhabited by the constitution and anti-discrimination laws. Having announced that the officials in charge of education have violated the law, these officials are now obligated to bring themselves into compliance. But what is it that they must do? What legal measure should Justice DeGrasse apply that will allow him eventually to terminate the lawsuit? One can easily imagine that shifting education standards and unexpected problems could extend court management for decades. Here again *Marisol* is instructive.

Define satisfactory performance in terms of good faith. Justice DeGrasse's long opinion recites as proof of violation the high dropout statistics, poor test results, lack of certified and competent teachers, awful learning conditions, outdated books, oversized classes, few sports and arts programs, and inequitable ***4** and incoherent state funding formulas. At the remedy stage, however, the legal question is not what is wrong, but what must be done to make the system comply with legal obligations. The answer to that question will of necessity be far short of perfection. Everyone wants good schools and good education outcomes, but that is a societal goal, not a legal standard.

Justice DeGrasse stated in his order of January 31, 2001 that he will keep jurisdiction of the case “as long as necessary” to ensure that the violations are corrected. In *Marisol,* however, Judge Ward stated that his jurisdiction would end when the City demonstrated its good faith by pursuing its reform plan for a two-year test period-not that all violations would be eliminated by that date, but rather that the City would have sufficiently demonstrated that it could be allowed to manage its responsibilities without direct court supervision. Judge Ward was signaling that the job of the court is twofold: enforce the law and restore control to elected officials.

How to define good faith? Judge Ward in *Marisol* left the definition to the expert panel which adopted a definition worth repeating. “We asked ourselves questions like the following,” the panel wrote:

> To what extent has ACS identified, both on its own initiative and with the Panel's assistance, the key changes needed to reform the system? How quickly and how thoroughly has it responded to each

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> of these needs? How relevant have its responses been? To what extent has it secured the resources needed to make change possible? How thoroughly has it communicated its vision of change and work to influence other key stakeholders whose actions are also essential to the reform effort?

Marisol of course is not a perfect match. Foster care is run by a single agency where the mayor controls both appointments and resources, while public education is controlled by many elected and appointed officials, each of whom possesses independent authority impacting on the funding, resources and policies of education. That reality will not disappear no matter how hard Justice DeGrasse swings his judicial stick. If the Legislature and City Council do not appropriate sufficient funds, or the administrators do not become excellent, wise and charismatic, there is little the judge can do but fulminate and order that they do better. This reality is the flaw in the case: calling the goal of a good education system a legal obligation does not change the essential difficulties in creating that system.

A good faith test makes clear at the beginning that the writ of the court does not extend so far that it can dictate how much government must tax and spend, and how the resources are to be applied to education. The threat that the court will run the schools is simply not credible.

A good faith test allows the court to maximize what it can do: compel officials over whom it does have authority to act appropriately within their powers. In New York State, the constitution places responsibility on the Legislature to provide for a sound basic education, but the Legislature is not a defendant in the case and cannot be compelled by the court to tax and appropriate. The court can, however, compel the Governor and other state and city education officials to define an improvement program sufficient to bring the schools into compliance, and then to request adequate funding and legislation from the Legislature. Producing the plans would demonstrate good faith, establish a base line against which to judge progress, and inform the political debate over how much funding and what changes in governance will be necessary to achieve these goals.

The state's education bureaucracy is let off the hook when a court takes on the bureaucracy's duties or appoints others in place of the constitutionally-responsible institutions. Plans that emanate from the courthouse will never have as good a chance for success as those that arise out of and are embraced by the bureaucracy.

Putting aside any question about the merits of the court's finding of liability, the Campaign for Fiscal Equity litigation is already a milestone in the history of New York State public education. Unwise or restrictive choices however, could turn the case into a millstone around the neck of the education system that will frustrate reform and reformers alike for a generation.

Footnotes

Note

1. Ross Sandler, Professor of Law and Director of the Center for New York City Law, and Professor David Schoenbrod, both of New York Law School, are in the process of completing a book on judicial remedies against state and local governments.

a1 *Campaign for Fiscal Equity v. State of New York,* 2001 N.Y. Misc. LEXIS 1 (Sup. Ct. N.Y. Cty.).

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