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A Class Action Lawsuit for the Right to a Minimum Education in Detroit

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A Class Action Lawsuit for the Right to a Minimum Education in Detroit

TRANSCRIPT OF PROCEEDINGS held at Northwestern University Pritzker School of Law, 375 East Chicago Avenue, Chicago, Illinois on the 8th day of March, 2019, at 9:25 a.m.

INTRODUCTION BY: ANNA CHOI, KRISTEN FROESE, KYLA TAYLOR, Symposium Directors, Northwestern University Pritzker School of Law Students, JD '19.

MODERATOR: DESTINY PEERY, Associate Professor of Law at Northwestern Pritzker School of Law.

INTRODUCTION BY: LISA SCRUGGS, Partner, Duane Morris LLP.

PRESENTER: CARTER G. PHILLIPS, Partner, Sidley Austin LLP.

At the time Mr. Phillips delivered his remarks, the case in the Sixth Circuit was in the process of being briefed, but briefing was suspended to allow the parties to discuss possible settlement options. Those efforts were not successful, and the case was fully briefed some months later, although the positions of the Defendants shifted some as a consequence of the 2018 Michigan State elections. The Governor and a majority of the School Board were no longer willing to defend the district court's decision on the merits of the Plaintiffs' due process argument. They did continue to challenge the district court's ruling that the State and its officials are responsible for the condition of the school system in Detroit. Only two existing members of the State Board of Education argued in favor of affirmance on the merits of the constitutional issue. The case was argued before a three-judge panel of the Sixth Circuit on October 15, 2019. The argument was attended by approximately 200 Detroit school children and their parents who took buses from Detroit to Cincinnati to watch.

On April 23, the Sixth Circuit handed down a landmark decision recognizing that there is a fundamental right to a minimum education, which means at least a right of access to literacy and that the children's complaint adequately stated a claim that Michigan violated their rights.[1] *In the wake of the court's opinion, it is unclear what will happen next. The Governor and other Michigan officials can seek rehearing en banc or seek Supreme Court review or they could forgo those options and allow the case to return to the district court either to proceed with discovery and/or possible settlement. A thorough analysis of the Sixth Circuit's decision is, however, beyond the scope of this symposium.*

[1] Gary B. v. Whitmer, No. 18-1855, 2020 WL 1951894 (6th Cir. 2020).

MS. CHOI: I have the pleasure of introducing Mr. Carter Phillips, immediate past chair of Sidley's Executive Committee and was managing partner of its D.C. office from 1995 to 2012. He served as law clerk to both Judge Robert Sprecher of the Seventh Circuit and Chief Justice Warren Burger of the U.S. Supreme Court. Mr. Phillips has also served as Assistant to the Solicitor General and argued nine cases on behalf of the federal government in the U.S. Supreme Court. Since joining Sidley, he has argued seventy-six cases in the Supreme Court, which are the most of any lawyer while in private practice. More recently, in the class action lawsuit *Gary v. Snyder*,[2] Mr. Phillips has argued that the public students of the city of Detroit have the right to the most fundamental building block of basic education: literacy. And he will be expanding on that case today.

Thank you.

MR. PHILLIPS: Just to be clear about this, I was not practicing law when *Brown vs. Board of Education* was decided, so my starting blocks on law and education began a tad later than that.[3]

I was around, however, in the 1978 Term when the U.S. Supreme Court decided the Columbus School busing case. I clerked for Chief Justice Burger that Term and I worked on the case. And just as an aside, it's one of those memories that gets etched in your brain and never goes away. The 1978 term was the last term in the U.S. Supreme Court in which they had no page limits on briefs. The briefs filed in that case were 500 and 600 pages long on both sides, went into extraordinary detail about how the public-school systems had been allowed to become segregated over time.

My experience with the case has to be viewed in the context of what school busing meant to me at the time in light of my life experiences. I graduated from law school, I spent a year clerking in the Seventh Circuit, then I clerked on the Supreme Court; I grew up in a largely segregated school system in Canton, Ohio. The City had one section that was virtually all white and another that was predominantly African American, and then ten years later I was thrown into a huge school busing case and I see the graphic nature of the details of how Columbus was segregated. How do you fix it? At that time, busing seemed like a relatively easy solution to the problem.

The idea of a fundamental right to education I think in some people's minds probably seemed like an easier fix or one way to get at that problem. Another thought about how to solve the problem was simply adopt the busing remedy across school boundaries and across city boundaries that would dramatically change the segregation that existed in many public school systems that were a function of housing segregation.

Well, in the 1978 term, the Court did hold that the Columbus school busing remedies were appropriate and affirmed them. Unfortunately though, the Court, in *Milliken*,[4] had previously decided that inter-district remedies were unavailable. In *San Antonio Independent School District v. Rodriguez*,[5] the Court said there is no fundamental right to education, but did recognize that there could be a situation where a school district essentially provides no education. That might be something different, but the idea of a

[2] Gary B. v. Snyder, 313 F. Supp. 3d 852 (E.D. Mich. 2018).
[3] Brown v. Board of Education, 347 U.S. 483 (1954).
[4] Milliken v. Bradley, 418 U.S. 717 (1974).
[5] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

fundamental right was simply not available. That was a close decision. It took litigators out of the business of going to federal court, in general, trying to figure out a way to improve the quality of the school systems. And it has been like that for a long time.

That being said, there has been a lot of development in the law in the state courts. There are state constitutional protections. Every state has an express constitutional right to some form of education. You would hope in general that the shift from federal court litigation to state court litigation wouldn't necessarily mean the end of law as a motivator or a driver in the improvement of the school systems.

You fast-forward, and I have a relationship with Public Counsel,[6] which is I think is the largest public interest law firm in the country, operated out of Los Angeles. They have individuals who had gone into the Detroit public school system and met with some of the people on the ground. As Dr. Payne's slides pretty graphically show, Detroit is an order of magnitude down the charts from every other school system. That is by itself pretty eye-popping. If you go into the school systems or certainly have been into the schools themselves, the drinking fountains do not work, and even if they did, I am not sure that I would want to drink the water that they are providing anyway in Michigan these days. But they don't work, so that's one. Two, the toilets typically do not work. You have thirty-five students and six textbooks, so not every student gets a textbook. If you get a textbook, that's great, right? Of course, it is. What's the copyright date? 1998. That's a little out of date and getting worse. And there is not much evidence of any effort to improve on these conditions.

Teachers—well, at least every classroom ought to have a teacher, right? Well, not in the Detroit schools. There are instances where the teaching is done for eighth grade students by eighth grade students, sixth grade students by sixth grade students—not in all cases, but in some instances. And Detroit is the only school system in the State where teachers do not need to be certified. There are a lot of substitute teachers. The tenure of a teacher in the Detroit public school system is quite short compared to other school districts. It is a profoundly distressing situation.

I have to say as a litigator: I am sort of torn about whether, even as bad as these conditions are, you really want to go to federal court. Do you want to litigate this? The law is not on our side in general. If the State flatly were to refuse to allow students to have an education, then there are remedies that could be made available to them. But that is easy because then you just say let these kids go to the schools. But they're already in the schools. The problem is how do you improve the quality of the schools to get them even to a level of minimal acceptability.

In any event, at the end of the day, we decided that the right thing to do was to file a lawsuit and bring it as a class action on behalf of students attending the worst schools in the Detroit public school system. Candidly, most of our analysis was about six or seven of the schools, and we had about a half dozen students. The process is a little tricky because you have to coordinate with the teachers. It is usually easier to seek help from former teachers because they are out of the system but have a great deal of information about how schools operate. Also, they don’t have to worry about retaliation.

[6] *See generally* PUBLIC COUNSEL: NATION’S LARGEST PRO BONO LAW FIRM, http://www.publiccounsel.org/ (last visited April 24, 2020).

And so, we drafted a 114-page complaint and filed it in the Eastern District of Michigan.[7] In response, we got what we expected, which was a motion to dismiss.

Who are the defendants in a case like this? The other advantage of Detroit is that it had been taken over in the administration of the schools by the state board of education for more than a decade. The Board recognized that the City and its school system were in a state of utter financial despair, and so the State exercised its emergency powers. The state school board appointed emergency personnel to run the school system, and so you could much more readily hold the state board of education members and the governor responsible for the conditions in Detroit because they had been the frontline decision-makers for the schools for years. One of the problems in general is you don't have that kind of a system where the State has responsibility and thus could be ordered to provide a meaningful remedy. You're just filing against a city, so the remedies that might be available will be limited. But that made choosing Detroit as a test case much easier.

If you go back to, for instance, the Kansas City desegregation case where both the state and the city were held liable for the desegregated conditions in Kansas City, the state was forced to provide significant amounts of funding that the City itself would never have been able to provide. Now, whether that money was properly spent and whether Kansas City got all the bang for its buck is a separate issue. We can talk about that in another setting.

But in Detroit, at a minimum, we had access via litigation to the kinds of people who could develop the resources that would allow us to think seriously about improving the conditions in that school system. That's one tactical issue. You've got to sort it out. You've got to find your plaintiffs, you've got to find your defendants, and then you have to come up with sort of what's your basic theory of the case.

Do you have a right to a certain quality of education? That's a tough sell, especially when you are taking the long view. At some point, you think—if I win this in the district court, that's great, but it's not going to live long. If I'm going to the Court of Appeals, that's great. It's still not going to live long. At the end of the day, I have to find a way perhaps to move this case to the U.S. Supreme Court.

But our basic theory was, look, these kids' proficiency scores are unbelievable. One percent proficient in some subjects is as good as some of these schools get. Some were at zero percent. Now, there are a few schools that get them up to two or three percent, but that is an extraordinarily pathetic proficiency. There are a lot of illiterate children in Detroit's public school system.

What is the theory that you want? Is ten percent good enough, or is that not the remedy we are seeking? How do you get at this and how do you get around the fact that the Court said there is no fundamental right to education or to even any kind or type of education?

We decided to go with three basic legal theories. One, we took on the fundamental right issue and said that we still think there is a fundamental right to education. It is a core building block of every other constitutional right in our system. If you are not literate, you cannot exercise the right to vote meaningfully. You cannot do anything else that the Constitution allows. You won't even understand what the *Miranda*[8] warnings mean. You

[7] Complaint, Gary B. v. Snyder, 313 F. Supp. 3d 852 (E.D. Mich. 2018) (No. 16-CV-139292), 2016 WL 4775474.

[8] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

couldn't even read the *Miranda* warnings, et cetera, and all the other rights are attached to this core capability. That is the first argument in the case. That's a holding that a district court cannot make unless it just ignores the law as laid down by the Supreme Court. For a district court to so hold would be short-lived. The Sixth Circuit would reverse that ruling promptly, but if the case is before the Supreme Court we needed to place that marker, so we would have the broader argument available. So that's in place.

To me, the stronger argument is the sort of negative due process argument, which says that the State of Michigan compels these children to be in a building for seven hours a day, five days a week. And if I came over and said to you as a government official, I'm going to put you in a building for seven hours a day, five days a week, and do nothing but leave you in the building, you would quite legitimately sue me on the theory that I have deprived you of your liberty and have given you nothing in return. That is effectively what Detroit did and what the state board of education has done to the students in Detroit, Michigan. They put them in a building. And worse than that, as I said earlier, they put them in a building where the facilities are horrific. I forgot to mention the fact that the heaters do not work and the air conditioning doesn't work, so you have temperatures literally ranging from around thirty-two degrees to ninety degrees, and you leave the children in there with no ability to learn. And to me, that remains the most powerful of our legal arguments because the state is going to have to come up with some rational explanation for why conditions have been allowed to deteriorate to this level, making it impossible for children to learn anything. I'll come back in a few minutes and tell you how we lost that argument in the district court.

The third theory is the equal protection theory. And again, that was kind of a rough way to go, but the reality is that the vast majority of the students in our class are students of color: African American and Hispanic. And therefore, to allow a system like this to so wildly operate in a racially disparate fashion at least should shock most people's notions of equal protection. But then again, the problem here is that it is not a complete correspondence between the victims of state action and their race. Whites attend these schools too. And the Supreme Court is pretty stingy about what equal protection actually protects and what must be proven for challenges along these lines. It has to be intentional discrimination. And that was going to be pretty tough to prove under these circumstances. However, it is in the case, and is one of our core theories.

The state did move to dismiss, and that was not a surprise. There were some preliminary issues. Were they the right defendants to be sued? Did we have standing? The standing of students is kind of hard to doubt given the conditions of the schools. But in any event, they raised those issues. The district court ruled in our favor across the board on all of those questions, so it teed up the constitutional issue very cleanly from our perspective. With respect to the fundamental right to some form of education protected by due process, the judge said the law does not really let him go there.

With respect to what I call the negative theory of due process, i.e. that the school board cannot warehouse children for an extended time, the district court said that this theory was not actually in our complaint. I mean, read the complaint yourselves. If you accept the notion that you should read complaints with all reasonable inferences favoring the complaining party, I do not know how—other than not wanting to deal with that issue because it is really hard. I do not see how the judge reached that conclusion in this case, but we will see what happens on appeal.

At that point, we could have asked to amend the complaint. But the reality is that the theory is in there. The other side could have joined with us on that very issue, but it was a source of a substantial portion of the oral arguments. It is really hard for me to understand how you dodge it that way. And then finally on equal protection, the Court basically went with the *Rodriguez* argument.[9] There is no fundamental right to education and so the case was subject to rational review.

We then appealed the case to the Sixth Circuit, as we expected to do from the outset of the litigation. We were deeply ambivalent about proceeding in the district court. On the one hand, we wanted to get past the motion to dismiss and then engage in discovery and find out exactly how did the school system turn out the way it did and who really is responsible. I think it would probably give me a much better sense of what is a meaningful and possible remedy.

One thing that you do not think about as much when you are thinking about bringing a lawsuit like this is: what happens—a dog chases a car, all right. What happens if the dog catches the car? Well, this is the same situation. What happens if the court actually says, Okay. Fine. You win. Now, what? And I'll come back to that in just a minute or two.

But that is a significant part of what we knew was going to happen—that we were not going to win in the district court. We did hope that we would get discovery. But if you do not go through discovery, then the case moves through the system more rapidly. Everything was going along just fine. We filed our opening brief, which I liked a lot. And then a funny thing happened on the way to court. The election happened, and Michigan completely flipped. It went from being a largely Republican state to largely a Democratic state at least among its statewide officials.

And where the Republicans were prepared to argue in opposition to our position that a lot of this could be blamed on parents and their lack of enthusiasm for education, which I thought was an appalling position to take, Democrats were not prepared to make that argument. Generally, I think, they were not all that keen on trying to defend in court the status quo in the Detroit public school system.

As you might imagine, there are conversations going on. I cannot reveal much about them other than that I think that their original brief was due to be filed on or about election day. They still have not filed a brief at this point, and we are not pushing them to file a brief. I should also say that I accepted the invitation to make this presentation long before all of these changes. When I was invited I expected by now our position would have been fully briefed and I would be getting ready for the Sixth Circuit argument. My hope was to discuss the strategy for the appeal.

As I stand here right now, I might be back in another couple of years if you have another one of these symposiums, I'd be happy to talk about the oral argument and the court of appeals decision and where we go from there.

What I'm focused much more on now is: if we agree that there is a problem in Detroit, and nobody can look at those statistics and not believe that there is a problem in Detroit, and you do not want to litigate the issues at this stage, then what do you do? How do you fix the problem?

We know that one option is to declare it an emergency and point to specific people who did not get the job done. Maybe part of that is figuring out who did the appointing and

[9] *See generally* Rodriguez, 411 U.S. 1.

why and how people were selected. I do not know the answer to those questions. At least I am not confident about what the answers are.

But in a lot of ways, there are opportunities out there. It will be an interesting several months. And in the conversation, you might say, did he not bring this as a test case? Isn't this the opportunity to try to create fundamental rights in some way or another? And the answer is yes. That was at least part of the theory, but it is also true that were are just trying to help students in Detroit. And we cannot ignore that. They are our clients in this situation. And the reality is that every day that passes is a day they to live without access to literacy. And that is, at least from my perspective, heartbreaking. I am concerned about that. And that to me trumps trying to create a new broad-based full-on education ruling going forward.

I will be candid with you. I would have probably had a slightly more optimistic view of this litigation if Merrick Garland had been confirmed to the Supreme Court and if Justices Gorsuch and Kavanaugh had not been confirmed to the Supreme Court. It is I think really hard for me to think that either our first or third theories will get much traction realistically. The second one, which I think will continue to be difficult for the Court, is the notion that you can warehouse children for hours on end and provide them literally with nothing. This is very difficult to justify regardless of ideology. My hope is that we will see improvement and that we will be able to sit down and come up with a set of solutions to the Detroit school system that the state school board will accept.

The defendants face a tough situation too. They know that the law in general is on their side, and so they are not in some sense compelled, certainly not compelled after the district court's ruling, to approach the issue in a particular way. We will sit down and see.

At the end of the day, when I started this and part of the reason I was asked to be one of the lawyers bringing the case, is because I am a “Supreme Court” lawyer at least in some sense. And the expectation was that, eventually, this case is going to end up in the Supreme Court. My hope today now is that this case does not need a Supreme Court lawyer. What this case needs are educational experts who can come and devise creative solutions to real academic problem. We are enlisting their assistance, so don’t worry I am not the person who is going to figure all this out. I have no expertise there and no desire to undertake that particular task. I just have to get the information and sit across the table. And hopefully, ultimately, we will improve Detroit and its school system for its children. If we have to take the litigation somewhere else down the road, there is time enough for that.

So that is the class action litigation in Detroit, literally up to the minute. It is an exciting opportunity at this point and not nearly the depressing one that I went through for the first year of the litigation. It is nice to have this sort of fundamental political shift now, so we will see how it all plays out. Thank you for having me here.