

2003 WL 1858160

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United States District Court,  
S.D. New York.

Elsa GULINO et al., Plaintiffs,  
v.

THE BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF THE CITY OF NEW  
YORK and the New York State Education  
Department, Defendants.

No. 96 Civ. 8414(CBM). | April 9, 2003.

Upon receipt of offers of proof submitted in camera by defendant State Education Department in class action brought by African American and Latino teachers, the District Court, Motley, J., held that: (1) expert witness would not be permitted to testify since witness' testimony would not assist court in determining whether or not the tests at issue were job-related; (2) class members who were not named plaintiffs would not be permitted to testify since their testimony would be cumulative of that of named plaintiffs; and (3) Department would be allowed to examine briefly the named plaintiffs regarding their teaching performance and qualifications.

Order in accordance with opinion.

## Opinion

### **MEMORANDUM OPINION AND ORDER**

MOTLEY, J.

\*1 The court is in receipt of offers of proof submitted *in camera* by defendant State Education Department ("SED") for the remaining witnesses it intends to call in its case in chief. Having reviewed said offers of proof, the court concludes that with the exception of the witnesses named below, all of the witnesses offered by SED may testify, subject to the provisos that their testimony not be cumulative and that neither their direct nor their cross examination last more than two hours. Additionally, since plaintiffs and defendant Board of Education were not privy to these offers of proof, nothing in this order shall be understood to prevent either party from objecting to SED's witness's testimony in court.

***Defendant SED may not call the following witnesses:***

#### **1. Walter Cooper**

<sup>[1]</sup> The court is not persuaded that Dr. Cooper's testimony will assist it in determining whether or not the tests at issue are job-related. Plaintiffs dispute neither that students graduating from New York public high schools should be well prepared to enter the work force nor that there should be "high standards for teachers and for students." Cooper, ¶ 3.<sup>1</sup>

Furthermore, the court has already heard from several witnesses, including Carl Hayden, former Chancellor of the Board of Regents, regarding the 655 Reports (SED Ex. 299-322), which, according to those witnesses, made clear to "the Regents that many teachers were uncertified or teaching out of their area of certification and that this was contributing to low student performance." Cooper, ¶ 4. The Board of Regents is composed of multiple distinguished members, each of whom, presumably, brings a unique background and perspective to the table. That uniqueness, however, cannot serve as the justification for presenting testimony that is wholly cumulative.

Accordingly, the court rules that SED may not call Dr. Cooper to testify.

#### **2. Plaintiff Class Members Jacqueline Garnett, Maria Colon, Carolyn Lee and Nia Greene.**

<sup>[2]</sup> These class members are not named plaintiffs and the court believes their testimony will be cumulative given that SED will be allowed to call the named plaintiffs listed *infra*.

Accordingly, the court rules that SED may not call the class members listed above.

***Defendant SED may call the following witnesses:***<sup>2</sup>

#### **Named Plaintiffs Elsa Gulino, Mayling Ralph White, Michelle Macklin and Peter Wilds**

In its decision disposing of the various motions for summary judgment filed in this case, this court ruled that the educational backgrounds and teaching qualifications of individual class members was not relevant to the issue of whether plaintiffs could show that the use of the tests at issue had a disparate impact on African American and

Latino teachers. *See Gulino v. Board of Educ. of City School Dist. of City of New York*, 236 F.Supp.2d 314, 341–42 (S.D.N.Y.2002). The court later granted plaintiffs’ motion in limine to preclude the same testimony in SED’s case in chief. Tr. at 3–9.

\*2 <sup>131</sup> Now, however, defendant SED submits that “plaintiffs have raised the issue of teacher performance and qualifications as relevant to whether the plaintiffs should be subject to the test requirements” and so SED should be allowed to explore plaintiffs’ performance histories and teacher qualifications. Wilds et al. at 2.

The court will therefore allow SED to examine briefly the named plaintiffs listed above regarding their teaching performance and qualifications. Defendant SED’s examination of such plaintiffs should be quite brief.

### **Frank Arricale**

The court previously ruled that Mr. Arricale would not be allowed to testify. Upon reconsideration, it has decided to allow SED to examine him, briefly, regarding the teacher

shortage alluded to by various previous witnesses, as well as regarding “the use of tests particularly respecting education personnel—to determine whether applicants for professional posts have properly satisfied minimum qualification tests.” Arricale, ¶ 5. However, no further testimony is needed regarding whether it is important to place qualified teachers in underperforming schools. As the court has already indicated, that proposition is self-evident; the question at issue in this case is whether the challenged tests actually measure whether those who are required to take them are in fact qualified.

### **Rebuttal Evidence**

The court intends to require offers of proof from all parties regarding witnesses to be called during the rebuttal phase of this trial. Before the conclusion of either defendant’s case in chief, however, it would be premature to expect parties to make such offers of proof.

### Footnotes

- 1 This opinion will attribute quotations from SED’s offers of proof by the name of the witness(es) offered followed by the paragraph or page containing the quotation.
- 2 As noted in the introductory paragraph to this Order, SED may call the remaining witnesses for whom it made offers of proof (excepting those listed in sections 1 & 2). The court explicitly lists the named plaintiffs and Mr. Arricale since there was some ambiguity regarding whether SED would be allowed to examine them.