IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
CORPUS CHRISTI, DIVISION.

GERTRUDIS HERNANDEZ ET AL
Plaintiffs

vs.

C.A. NO. 1384

DRISCOLL CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL
Defendants

GUS C. GARCIA,
Kingsville, Texas,
JAMES DE ANDA,
301 Wilson Building,
Corpus Christi, Texas,
FOR PLAINTIFFS.

BOONE, DAVIS, COX & HALE,
Allen V. Davis,
Owen B. Cox,
Corpus Christi, Texas,
FOR DEFENDANTS.

JANUARY 11, 1957

Plaintiffs, United States citizens of Mexican extraction, suing through their parents as next of friend, are first and second grade students in the Driscoll school. The District and its trustees, in their official capacity, are defendants. 1/ The claim is that defendants, under color of state law, have deprived, and are depriving, plaintiffs of rights secured to them by the Constitution by (a) maintaining separate classes for children of Latin-American descent in the first and second grades; and (b) using an educational system which requires a majority of such children to spend three years in the first grade before promotion to the second grade. 2/

Defendants deny any discrimination because of racial extraction and say that such children come from homes where English is not spoken, and since they are unable to speak and understand the English language when they enroll and cannot be instructed in such language as required by Texas law, 3/ it is necessary and advisable that they be taught in separate class rooms until they can go forward with the work in the same room with children who do not have the foreign language handicap; that the grouping in the first and second grades is solely because of the language handicap, as the result of a decision made in good faith by the school authorities in solving a different pedagogical problem, with which decision the courts cannot interfere.

Although at one time the Driscoll District maintained separate schools for children of anglo and Latin extraction, this was abandoned in 1949 after the issuance of instructions and regulations by the State Superintendent of Public Instruction pointing out that such separate and segregated schools were in violation of the State Constitution. At present, and since 1949, there is no separation anywhere except in the classrooms. All children of the same grade are in the same building. There is no separation in the restrooms, cafeteria, buses or playground. Apparently the children, regardless of racial extraction, associate with one another on an equal and amicable basis.

1/ The court sustained a motion to dismiss as to J.W. Edgar, State Commissioner of Education, on September 7, 1956.

2/ Allegedly in violation of 42 U.S.C.A. 1983, jurisdiction being claimed under 28 U.S.C.A. 1343 (3).

3/ Article 488, Texas Penal Code.

Driscoll is a rural community with an average attendance of 283 in all grades. Approximately 70% of the studentsare of Latin (Mexican) extraction. The percentage is higher in the first three grades-being approximately 75%. Many of the childrens' parents are migratory workers who keep their children out of school at the beginning of the school year and take them out again before the close. As a result there was, during the 1955-56 school year, an increase of 45.4% in the number of Latin-American children in March over the previous October.

With one exception hereafter discussed, so far as the record shows, none of these children were able to speak or understand the English language when they were enrolled. Spanish only was and still is spoken by the parents in the home. There is no dispute that this presents a serious teaching problem in the Driscoll school as indeed it has in other areas. The problem has been and still is the subject of many studies and treatises. It has been dealt with by different methods in various communities ranging from the system now prevailing in the Driscoll district to that of mixed classes from the outset, irrespective of ability to speak or understand English, as recommended by the witness, Dr. George I. Sanchez.4/ No doubt the varying methods depend on many factors such as the percentage or number of non-English speaking students, size and financial ability of the school, number of teachers, etc.

I am impressed with the testimony and opinion of Dr. Sanchez and his conclusion that the best method is that there be no grouping on account of the language barrier from the very beginning. Perhaps in time this will be accepted but is is not now in keeping with the opinions and recommendations of other outstanding authorities. As late as 1951 Dr. Sanchez was of the opinion that separate classes, on the same campus for the first grade only were proper where scientific tests showed that a beginner did not possess a sufficient familiarity with the English language substantially to understand class room instructions. Dr. Sanchez has altered his opinion since then. So, at the very outset, it must be accepted, on the record here, that there is nothing unreasonable about good faith grouping for language deficiencies at least for the first year. Indeed counsel for plaintiffs does not contend to the contrary.

But prior to 1955 when litigation was threatened,5/ the District maintained a system whereby practically all children of Latin-American extraction were kept in the first two grades for four years and permitted to enter the regular third grade with English speaking students who had completed the same grades in two years.6/ This pattern was followed, irrespective of individual progress and abilities, without exception for years. In 1955, after threat of litigation, defendants reduced the time for completion of the first two grades from four to three years when all children were to be put together in the third grade. This is as yet an experiment only. No scientific tests are given to determine aptitude or progress, reliance simply being had upon the judgment of the teachers, practically all of whom have had their experience and training under the old system. Of course, there could be no better test than this if the teacher's judgment is in good faith, uninfluenced by the system that has prevailed and the uniform placing of Latin-American children in their separate slots and keeping them there for the given period-four years, now three. Very few promotions have been made out of the Latin sections and then only to a higher Latin section, not an Anglo or English-speaking section.

4/ Professor and Consultant in Latin American Education, Chairman, Department of the History and Philisiphy of Education, The University of Texas.

5/ This action was filed November 22, 1955.

6/ Under this policy the first grade generally required three years, divided into (a) a beginner's class; (b) low first and (c) high first, each requiring one year. After an additional year in a separate class in the second grade, the child was permitted to go into the mixed third grade.

All students in both the Latin and Anglo sections of the second grade have satisfactorily completed their first grade work. There are students of varying abilities in both sections: good, average and below average in both groups. These use the same books and materials and all have sufficient knowledge of English to understand instructions. But defendants contend that the average Latin student is not able to compete on an equal basis if placed in the Anglo second grade section because of his or her vocabulary being less adequate that that of the Anglo child; that it therefore is to the best interest of the Latin child to continue in the Latin section.7/ Defendants also say, however, that the inability to compete continues to some degree even after integration in the third grade and even higher. Formerly there was segregation in separate buildings and on separate campuses, based on the same arguments, through the sixth grade.

Defendants agree that there should be no discrimination or separate instruction because of descent or ethnic group from which a student comes; and they contend that there is no such discrimination in the Driscoll schools, that the grouping has been solely due to English language deficiency, that the line has been drawn by a good faith decision, presumptively reasonable.8/ Defendants state the question very clearly on brief, as follows:

> "The only question which the court should decide is whether such grouping is done, no matter where the line is drawn, because the children are of Latin descent, or whether it is done because of a good faith decision by the school authorities as to where the line should be drawn because of language handicap. The question to be decided here should be whether what is done at Driscoll is done because the children are of Latin descent, or...because of what the school authorities have in good faith decided is the best way to try to remove the language handicap and teach the children."

The foregoing is a generally correct statement of the issue but it overlooks the fact that the Driscoll school authorities have drawn the line, not only for beginners but through the first and second grades, not on a basis of individual aptitudes or attainments, but against all children of Latin-American extraction as a class. This is a modified continuation of the old policies under which all such children once were segregated on separate campuses through the first six grades. That the line is drawn on a racial rather than a merit basis is evidenced by the overall facts and the refusal in September 1955, to place a beginning Latin child, Linda Perez, who could speak no spanish, in the Anglo section until after a lawyer's services had been secured. In the twelve years that the present superintendent has been at Driscoll this is the only Mexican child that had been placed in the Anglo section and then only after the Lawyer's intervention.

At present tests are being given beginner Latin children to determine their ability to speak, understand and be instructed in English. But no tests are given or contemplated beyond the beginner's test to determine whether an individual child is capable of going into the regular first or second English-speaking grade. This will not do.

7/ In brief defendants point out various bits of testimony by some of the minor plaintiffs which allegedly show their inability to speak or understand the English language. As observed by the Court at the conclusion of the evidence, these children appeared to be as bright as Anglo children of the same age; and, I add, their mistakes were no more than those that might have been made by any other child under the excitement or other emotions of a first appearance in court.

8/ Trustees of Pleasant Grove Ind. Sch. Dist. v Bagby (Tex. Civ. App.) 237 S.W. (2) 750, cert. den. 342 U.S. 821; Foley v. Benedict, 122 Tex. 193, 55 S.W. (2) 805.

It is in contravention of the principles enunciated in the Texas case of Independent School District v. Salvatierra (Tex Civ. App.), 33 S.W. (2) 790, relied upon by defendants in support of the elementary proposition that it is for the school authorities to plan methods of instruction, classify and group the pupils so as to bring to each one the greatest benefits according to his or her individual needs and aptitudes; and that whatever may be the effect or incidents of the general plan as working an unlawful discrimination in any given case, the courts may not condemn the whole plan nor lay down arbitrary tests and rules by which the school must be operated so as to prevent discrimination.

But I quote from that case as follows: 9/

> "In this case this court can say no more than that the school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, and exclude them from schools maintained for children of other white races, merely or solely because they are Mexicans. An unlawful discrimination will be effectuated if the rules for the separation are arbitrary and are applied indiscriminately to all Mexican pupils in those grades without apparent regard to their individual aptitudes or attainments, while relieving children of other white races from the operation of the rule, even though some of them, as for instance those who tardily enter the terms, may be subject to the classification given the Mexican children. To the extent that the classification is arbitrarily imposed upon those of one race, but relaxed in its application to those of the other races so as to exclude the latter from its operation, it constitutes an unlawful racial discrimination.
>
> "These conclusions bring us back to the question of remedy. No court may lay down a set of rules by which the school board and faculty shallgrade, classify and assign the pupils, for such are purely administrative functions inherent in the local school authorities and wholly foreign to the prerogatives of the judiciary. Those rules, by whatever authority promulgated, must be more or less flexible and adjustable to the peculiar needs of each school, grade, and class, as well as to the instructional needs of the individual pupils. Only the school authorities there on the ground as each pupil is presented for admission, may properly, reasonably, justly, or effectively grade, classify and assign the applicants."

The same principles are stated in Mendez v. Westminster School District, (D.C., Cal.) 64 F. Supp. 544, 550, 10/ as follows:

> "It has been held that public school authorities may differentiate in the exercise of their reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils. And foreign language handicap may be to such a degree in the pupils in the elementary schools as to require special treatment in separate classrooms. Such separate allocations, however, can be lawfully made only after credible examination by the appropriate school authority of each child whose capacity to learn is under consideration and the determination of such segregation must be based wholly upon indiscriminate foreign language impediments in the individual child, regardless of his ethnic traits or ancestry." 11/

9/ Emphasis mine throughout unless otherwise indicated.

10/ Affirmed, 9 Cir., 161 F (2) 774.
11/ Quoted also in Gonzales v. Sheely, (D.C., Ariz.), 96 F. Supp. 1004,1009.

Here there is no pretense of individual tests after the beginners' class. While the claim is made that the judgment of the teacher is an adequate substitute for the test, the fact remains that no child has been promoted from the Latin to the English-speaking, section. The few promotions that have been had were always to a higher Latin section. 12/

Defendants say that to mix the Latin and Anglo students before the third grade will retard the English speaking students. It is admitted that within the Anglo, as well as the Latin groups, there are students varying abilities-high, average and below, in varying degrees. If individual tests were used, and the individual abilities of the students recognized, there would be no retarding of any child, regardless of racial extraction. Defendants do not have separte sections, in either group, for the highly intelligent, the average, etc. So, theoretically, the better students in either group might be retarded by the slower ones; but defendants have grouped all pupils, regardless...of capabilities, into each section with the result that all children of Mexican extraction are in one group and all of Anglo in the other, irrespective of individual abilities.

This is not a line drawn in good faith, based upon individual ability to speak and understand the English language. It is the very opposite. It is unreasonable race discrimination against all Mexican children as a group throughout the first two grades. That it has this effect cannot be disputed. If scientific or good faith tests were given the result might not weigh so heavily. But where, as here, no such tests have been give, it is unreasonable on its face; and, when considered along with the other facts and circumstances enumerated,

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12/ The Superintendent expressed the view that once a child is within a room there would be nothing particularly to be gained to pick that child out and place him in another room in order that he might be mixed. Whereupon the Court said: "Looks to me like it would be an incentive to the other if they saw merit being recognized that way." On brief defendants' counsel say:

> "If the Court will give that thought further consideration, we believe it will be seen that such a method would call for a recognition of a difference in descent, and would imply that those who are not of Latin descent are superior to those of Latin descent and their company should be preferred. When we are seeking to do away with distinctions or differences resulting from racial or ethnic differences, we would be defeating our purpose if we followed a plan which caused small children to think that it is a desirable reward to be taken out of a group which happens to be of Latin descent and placed with a group which happens to be of Anglo descent."

The foregoing clearly demonstrates that the present discrimination is based upon race rather than English speaking ability. If indeed the Anglo group were designed for English-speaking students, as defendants contend it is, rather than upon racial origin, as it is, promotion to that group would be a proper incentive, a recognition of individual merit with no racial connotations.

it compels the conclusion that the grouping is purposeful, intentional and unreasonably discriminatory.13/

Plaintiffs ask that defendants be restrained from (a) continuing the system of separating children of Mexican descent arbitrarily, unreasonably and discriminately; (b) separating students for language deficiency in any grade beyond the first and then only after individual and scientific tests as in the Delgado case, footnote 13 supra; and (c) continuing the separation of any student who during the initial scholastic year acquires a sufficient familiarity with the English language to understand instructions in first year subject matter. I do not believe the court has the right to "draw the line" beyond the first year any more than defendants have to draw it as they have. Setting a period of one or two years for all so called non-English students ignores individual capabilities. While the evidence in this case preponderates to the effect that in most schools one year of beginner's instruction generally is deemed sufficient, I cannot say that this has been shown so clearly that the court can "draw the line" at that point and say to the District "You must admit all children who could not speak or understand English a year ago into the first grade regardless of the lack of progress some of them may have shown." That would be just as improper as it is for the District to say "All of you who could not speak and understand English a year ago must spend two or three years more in segregated classes regardless of the progress you may have made and of your present ability to speak, understand and be instructed in English."

Judgment will be entered declaring the District's separate grouping of students of Mexican extraction is arbitrary and unreasonable because it is directed at them as a class and is not based upon individual capacities; (2) that any grouping, whether in the beginning or subsequent years, must not be based upon racial extraction but upon individual ability to speak, understand and be instructed in the English language; and (3) that individual capacities and abilities in this respect must be determined in good faith by scientific tests recognized in the field of education.

13/ It also violates instructions and regulations promulgated by the State Superintendent of Public Instruction in 1948 after an agreed judgment in the unreported case of Delgado v Bastrop Independent School District (D.C., Tex.-Judge Rice), (Def. Rx. 1, pp 72-75). Those instructions, so far as pertinent here, are as follows;
"2. These instructions and the above-mentioned judgment recognize that it is permissible to have separate classes in the first grade for any students who have language difficulties, whether the students be Anglo American, Latin American or any other origin; such separate classes shall be formed only for instructional purposes, on the same campus and with the same school facilities as are available to all other first grade students. Such classes may be formed only after a language test has been applied to all first grade pupils. The separate classes, therefore, will be comprised of all students with language handicaps, regardless of their native tongue. These separate classes should be formed only for students who clearly demonstrate that they do not understand English sufficiently to follow even the simple class-room teaching process. Since this separation is permissible only for the purpose of familiarising the pupils with the English language to the extent that they can understand class-room instructions, said pupils cannot be separated in any other school activities or facilities. All of said pupils, therefore, are entitled to the same cafeteria and lunchroom facilities, as all other pupils, to join participation in school contests, dramatics, musical organizations, play grounds, recesses, and organized sports, and to joint participation in all other activities which are generally considered part of the educative process."

Injunction will issue prohibiting grouping upon any other basis, the injunction to be effective at the commencement of the scholastic year 1957-58. This will give the school authorities ample time to formulate a program accordingly without undue interference with its current work.

Defendants' final contention on brief is that there is no evidence that plaintiffs adequately represent the class they purport to represent and that, therefore, plaintiffs may not maintain the action under Rule 23 (a). This contention comes a bit late and is overruled.

While defendants did deny in their formal pleadings that plaintiffs were entitled to bring the suit as a class action, the District filed a counter-claim against the parent plaintiffs "both individually and as representative of all of the parents residing within the boundaries of the Driscoll School District who are of Mexican or other Latin-American descent and who have children in the first and second grades or children of pre-school age, as a class.." The District further alleged that the class was so numerous as to make it impractical to bring them all before the court and the "above named Parent Plaintiffs will fairly insure the representation in this court of all of the members of said class," etc. A mandatory injunction was prayed for "requiring said Parent Plaintiffs and all members of the class they represent to speak only the English language in the presence of their children...and requiring said parents to not permit their said children to associate and play with persons who do not speak English," etc. Plaintiffs did not deny these allegations by the District so they stand admitted.1/

When counsel were asked at the outset to make a statement of their contentions, defendants' counsel understandably failed to mention that there was any dispute as to plaintiffs' right to maintain the suit as a class action. No doubt if counsel had mentioned it some additional evidence would have been offered. In any event, I hold the evidence is sufficient.

The clerk will notify counsel to submit an order in accordance with this memorandum.

James V. Allred
Judge

Brownsville, Texas

1/ Defendants' counter claim is of course denied.

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TELEPHONE
MURRAY 6-1561

July 23, 1962

Among the Valiant

Mr. James De Anda
Attorney at Law
301 Wilson Building
Corpus Christi, Texas

Dear Jimmy:

Enclosed herewith you will find my personal check in the amount of $5.00 which will serve as my contribution to the "Among the Valiant" Fund.

As you know, Ed, as executive secretary of the Texas Forum, sent out a special notice, probably at Hector's request, asking that contributions be made to the Fund in lieu of sending flowers to the funeral of Hector's boy.

By this kind gesture Hector has shown the same decency and the same guts which has won him the respect and admiration of our people and recognition of the President of the United States. Long live Hector and the Forum. I am only embarrassed that because of conditions or circumstances facing me at the present time my contribution is so small. Please receive my best personal regards.

Sincerely,

R. P. (Bob) Sanchez

RPS:fr
Enc: 1
CC: Dr. Hector P. Garcia