



Attorney John Cairns

Cruz–Guzman desegregation lawsuit is frontal challenge to public school choice

A Minnesota Education Policy Interview

September 14, 2018

Present

John Cairns, Janis Clay (executive director), Pat Davies, Ted Kolderie, Paul Ostrow (chair), Dana Schroeder (associate director), T. Williams. By phone: Dan Loritz.

Summary

According to Minneapolis attorney John Cairns, the class-action lawsuit *Cruz-Guzman v. State of Minnesota* is a frontal challenge to public school choice. He says plaintiffs in the lawsuit want a government-managed enrollment system that will involve the massive movement of students. He is representing two charter schools that have been allowed to intervene in the lawsuit as Defendant/Intervenors.

Cruz-Guzman is being heard in Hennepin County District Court. The case was dismissed by the Minnesota Court of Appeals in March 2017, but on July 25, 2018, the Minnesota Supreme Court ruled the case could move forward.

Cairns says the parent plaintiffs in the case argue the state has enabled racial segregation in the Minneapolis and Saint Paul school districts by allowing racially imbalanced enrollment in district-operated schools. The plaintiffs claim that racially imbalanced schools are not providing an adequate education for students. They argue, Cairns says, that the structure of the state's public education system should be found unconstitutional because it causes segregation.

Cairns says the basic premise of the plaintiffs' case is that the only way to manage public schools is to be sure they're integrated and that whether kids are learning or not isn't a factor in managing how public schools are to be run. He thinks Dan Shulman, lead attorney for the plaintiffs, wants every school in Minneapolis and Saint Paul—and maybe even in the whole metro area—to reflect the diversity of the community. Cairns says that's too hard, because now there are multiple different cultures, not only African Americans and whites. He sees that as a major difference between *Brown v. Board of Education* and today.

Cairns says that while the *Cruz-Guzman* lawsuit originally challenged segregation the plaintiffs said was caused by charter schools, after an October 9, 2018, hearing in Hennepin County District Court, it's not yet clear what specific allegations remain against charter schools in Minneapolis and Saint Paul. Cairns says Minnesota's charter school law contains a desegregation exemption for charter schools and that a number of charter schools in the metro area have enrollment of more than 75 percent students of color. But he points out that no one compels parents to enroll their children in charter schools.

Biography

John Cairns is an attorney with John Cairns Law, P.A., in Minneapolis. He founded the firm in 2008. His practice focuses on charter schools. Prior to 2008, he was a shareholder at Briggs and Morgan, P.A. During his 19 years with the firm, Cairns was a member of the Business Law Section and the Education/Tax-Exempt Organization Practice Group.

In 1969, at age 27, Cairns was elected to the Minneapolis City Council and in 1971, at age 30, he became the youngest-ever president of the city council. He was executive director of the Minnesota Business Partnership from 1979 to 1984. He was a founding member of Public School Incentives, a nonprofit organization that helped raise over \$25 million for school reform and restructuring in Minnesota. He served as a consultant for The Business Roundtable in its work to achieve public school reform on a national scale.

After Minnesota passed the nation's first charter school law in 1991, Cairns helped establish the nation's first charter schools and secured 501(c)(3) status for the schools. Thanks to Cairns' work in this area, hundreds of charter schools across the country are now benefitting from their tax-exempt status-a critical component of providing effective public education. Today, he is widely recognized as the most experienced charter school attorney in the country.

Cairns was recognized as a Super Lawyer® by *Minnesota Law & Politics* for his work on behalf of charter schools. He has also received an **AV Preeminent® Rating** from Martindale-Hubbell, the highest possible rating from his legal peers, indicating his reputation for professional excellence. He has been published in *Harvard Business Review* and *Education Week* and has spoken at various conferences on the topics of education and school reform.

He has been a board member for Illusion Theatre, the New Dance Ensemble, the Center for Victims of Torture and other nonprofits.

Born in Wilmington, Delaware, Cairns received his B.A. degree from Carleton College and his law degree from the Duke University School of Law.

Background

Continuing its focus on Minnesota's competitiveness, the Civic Caucus interviewed Minneapolis attorney John Cairns to learn more about the class-action school desegregation lawsuit *Cruz-*

Guzman v. State of Minnesota. Cairns is representing several charter schools that have been allowed to intervene in the case as Defendant/Intervenors. The Civic Caucus will interview Daniel Shulman, lead attorney for the plaintiffs in the lawsuit on October 12, 2018.

About *Cruz-Guzman v. State of Minnesota.* *Cruz-Guzman v. State of Minnesota* is a class-action lawsuit that seeks to desegregate Twins Cities-area public schools. The parent plaintiffs in the lawsuit argue the state has enabled racial segregation in Minneapolis and Saint Paul—the Court has limited the case to these two school districts only by allowing racially imbalanced enrollment in district-operated schools. It is yet unclear as to what specific allegations remain against charter schools in Minneapolis and Saint Paul, after a hearing conducted in Hennepin County District Court on October 9, 2018.

Plaintiffs claim that racially imbalanced schools are not providing an adequate education for students.

The Minnesota Constitution, in Article XIII, Sec. 1, says, "The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."

While there is no explicit constitutional requirement for an "adequate education," attorney John Cairns said the *Skeen v. State* case on education funding in the 1990s implied such was the case. In that case, the parties agreed that what Minnesota was then doing was providing an adequate education, notwithstanding alleged funding imbalances.

A Minnesota Court of Appeals panel dismissed the Hennepin County *Cruz-Guzman v. State of Minnesota* case in March 2017, saying that whether students of color are getting an adequate education is a question for the Legislature, not the courts. But on July 25, 2018, the Minnesota Supreme Court said in a 4-2 decision that the lawsuit could move forward.

The Supreme Court ruled that (1) the Minnesota Constitution's Education Clause "imposes an explicit 'duty' on the Legislature to provide an adequate education" for all of Minnesota's K-12 public school students; and (2) "there is no breach of the separation of powers for the [judiciary] to determine the basic issue of whether the Legislature is meeting the affirmative duty that the Minnesota Constitution places on it."

Justice Barry Anderson and Chief Justice Lorie Gildea dissented. Despite the "appalling" performance of Minneapolis and Saint Paul schools, Anderson said, the courts should not intervene where the Legislature and the governor have failed. "As attractive as that option might seem, ultimately, we lack authority to address what is fundamentally a political question," he wrote.

Defendants in the lawsuit are the State of Minnesota, the Minnesota Senate, the Minnesota House of Representatives, the Minnesota Department of Education and its commissioner, Dr. Brenda Cassellius. Defendant-Intervenors in the case are two charter schools, Higher Ground Academy in Saint Paul and Friendship Academy of the Arts in Minneapolis. A third charter school—Paladin Career and Technical High School in Blaine—was a Defendant-Intervenor until the Court limited plaintiffs' claims to Minneapolis and Saint Paul district-managed schools.

Discussion

Minneapolis public school teachers went on strike in April 1970. Minneapolis attorney John Cairns, who was then a member of the Minneapolis City Council, said that teachers had the right to "meet and confer" at that time, but not to go on strike. In 1972, following the strike, the Minnesota Legislature enacted the state Public Employees Labor Relations Act (PELRA), which gave teachers and other public employees the right to bargain collectively.

Cairns said at the time of the strike, teachers claimed the Minneapolis School Board had not been responsive to their requests for help for students with learning disabilities and for those who started school unprepared and to their requests for changing the ways schools were governed.

He said once the strike started, the teacher negotiators met for an entire weekend. Eventually, Cairns said, the majority of the teachers said, "Forget about the kids; we just want to get paid more." The school board accepted that. Four of the nine negotiators resigned, as they did not support an outcome limited to teacher salary only. "The issue of whether kids were learning fell by the wayside," Cairns said.

The Minnesota Business Partnership did an education study in 1983-1984. When Cairns was executive director, the Minnesota Business Partnership did a national study concluding that funding was not a critical issue in states like Minnesota, but the quality of learning outcomes was. The recommendation was restructuring how public education was managed, with particular emphasis on strategies such as open enrollment and higher quality roles for teachers. Charter schools were a logical outcome of these recommendations.

Cairns said by the time of the second round of funding to continue the study, New America Schools, which now mostly consisted of state superintendents and school district superintendents, wasn't interested any more. "They said we were too aggressive," he said. "They didn't want to spend any money on a different kind of system. They just wanted to change the system as it is."

In 2014-15, for the first time in the U.S., there were more students of color in public schools than white students. Cairns made that statement and said in Minneapolis and Saint Paul and the first-ring suburbs, except for Edina, there is no majority (50 percent or more) of any racial or ethnic group in the public schools.

Cairns said another difference from the days of the Supreme Court's 1954 *Brown v. Board of Education* decision is that we now have some sense of how kids learn and what they're learning and are they learning. "It's by far an imperfect system and there's no wide consensus on how to understand whether kids learn or not," he said.

In 1995, the Minneapolis NAACP and Dan Shulman, now lead attorney for the plaintiffs in the *Cruz-Guzman v. State of Minnesota* lawsuit, filed a similar class-action desegregation lawsuit, *N.A.A.C.P., Minneapolis Branch v. Metro. Council*. The case was settled in 2000, when the state agreed to bus low-income students to suburban schools. Cairns said the settlement allowed more freedom for kids of color to go to school outside of Minneapolis and more incentives to bring white kids into the city.

The Choice is Yours (TCIY) program, which grew out of the settlement, is a school-choice program through the Minnesota Department of Education for families who qualify for free or reduced-priced lunches and live in the city of Minneapolis. To enroll in certain suburban districts, such as Hopkins, the student and family must live in North Minneapolis. The program provides the students with free transportation to and from school, something that is not provided to students under the state's regular Open Enrollment program.

Cairns mentioned the FAIR school, a fine arts school with campuses in Crystal and downtown Minneapolis, which also grew out of the settlement. The FAIR School was originally part of the independent West Metro Education Program (WMEP) School District, which was formed to promote integration between suburban and urban students. Today the schools are run by the Robbinsdale Area Public Schools and the Minneapolis Public Schools.

But there is little evidence that the negotiated result of this case has produced better learning outcomes for participating students, Cairns said.

An interviewer pointed out that there might be diversity in a school's total student body, but the actual classes might not reflect that diversity. He asked whether that is taken into account and Cairns said it's not.

There are now 3,500 to 4,000 charter schools in the U.S. Cairns made that statement and said there are 3.5 million to 4 million students in charter schools nationwide, accounting for five to six percent of public school enrollment.

He said he and others are saying we shouldn't try to fix current the current school system. "Money's not going to fix it; they've already got plenty of money," he said. "There are too many institutional barriers, so we're just going to work on creating better schools and hope they get replicated."

The school system consists of school board members, the administration and the teachers, Cairns said. "The only thing they ever agreed on was money," he said. "They would never agree on how to manage a school. They would never agree on how to have different kinds of schools for different kinds of kids."

The *Cruz-Guzman* case is a frontal challenge to public school choice. Cairns made that statement and said the plaintiffs want a government-managed enrollment system that will involve a massive movement of kids. He said the case includes language like "charter schools cause segregation."

The case, Cairns said, is premised on the same theory that the NAACP and others have held since *Brown v. Board of Education*: the only way to manage public schools is to be sure they're integrated. "After that, you can do whatever you want to do," he said. "Whether kids are learning or not isn't a factor in managing how public schools are to be run. That's the basic premise of this case."

Cairns said the plaintiffs argue that the structure of the state's public education system should be found unconstitutional because it causes segregation. The plaintiffs present data that there are a number of schools that are more than 80 percent kids of color. "I don't think [Dan] Shulman even recognizes that it's a different time," Cairns said. (Shulman is lead attorney for the plaintiffs.) "We

have schools that are Hmong, East Asian, West African, East African and Hispanic," Cairns said. "The diversity differs from site to site. That's true in traditional district schools, as well as in charter schools."

The case, Cairns said, is framed as if there were one group of children of color-African American-and one group of white children. He said the federal government has compromised the original *Brown v. Board of Education* ruling, eventually going to whether the districts *intended* to cause segregation. If they intended to cause segregation, he said, they could be managed by the courts.

Cairns said the *Cruz-Guzman* plaintiffs "are making a case against choice, as much as anything."

There's a feeling that institutions that bind communities together are disappearing. An interviewer made that comment and said people don't feel an attachment to their own communities. "If kids are not going to school in their own neighborhood, that's one more major institution where we're losing our sense of community," the interviewer said.

Cairns said that's a really critical issue. "The new cultures coming to the metro area want to live near each other-and they do," he said. A lot of charter schools in the metro area are more than 75 percent kids of color. Sometimes, they're a mix of cultures, he said.

Cairns said Higher Ground Academy, a charter school in Saint Paul with very good academic outcomes, is about 95 percent East African. Originally, the enrollment included many African Americans. "But the population growth in Saint Paul is East African, Hispanic and Hmong, not African American," he said. Higher Ground now enrolls just a few African American students.

"It's a parent's choice," Cairns said. "The parents are choosing this kind of school situation. If these kids are well educated and come out ready to learn, understand, read, write and do math, they'll be better prepared to have a chance of finding community."

"I think Shulman wants every school in Minneapolis and Saint Paul-and maybe even in the whole metro area-to reflect the diversity of the community," Cairns said. "But it's too hard, because now there are multiple different cultures in those schools, not only African Americans and whites. It has no relevance to whether kids are learning. That, to me, is the major difference between *Brown v. Board of Education* and today."

"This is a hot debate all over the country," he said. "We happen to have the one case that's going to be litigated."

Cairns said Shulman believes the definition of integrated is the percentage of kids in the school who are white and nonwhite. Schools with 80 percent kids of color are considered hyper segregated, Cairns said.

He said New City Charter School, a K-8 school in Minneapolis, is probably the most racially diverse school in the city. "I don't know which Minneapolis traditional district schools are racially balanced," he said.

Intervening in the *Cruz-Guzman* case on behalf of charter schools, Cairns and Jack Perry of Briggs and Morgan, P.A., are asserting that the Minnesota charter school statutes are

constitutional. That includes, Cairns said, the desegregation exemption, which was one of the exemptions from various rules and regulations that were part of Minnesota's original charter school law.

Cairns said Myron Orfield, a former Minnesota legislator who now directs the Institute on Metropolitan Opportunity at the University of Minnesota Law School, and his brother, Gary Orfield, co-director of the Civil Rights Project at UCLA, "have always hated public school choice. They think that's the most pernicious thing that happens in the whole public education arena."

Cairns said that's because parents have exercised the choice to put their children in schools with people like themselves. He said charter schools have never managed nor *can* they by law manage enrollment, except for caps on the total number of students who can enroll in a school. "The government does not compel enrollment in charter schools," he said.

Cairns said when several charter schools tried to intervene in the *Cruz-Guzman* case, Shulman said the case is not about charter schools. In response, Cairns said, Hennepin County District Judge Susan Robiner said 33 percent of the paragraphs in the lawsuit dealt with charter schools. She approved the three charter schools as Defendant-Intervenors over Shulman's strenuous objection, Cairns said.

The plaintiffs in the case see the Constitutional right of every child to have an adequate education determined by who's sitting next to each other. An interviewer made that statement. He asked if we assume that the results of a public charter school system are segregation, but also a significant reduction in the gap between kids of color and white kids, how do we wrestle with that conflict?

Cairns responded that it's a conundrum. He referred to Cheryl Brown Henderson, daughter of the late Rev. Oliver L. Brown, who, in the fall of 1950, along with 12 other parents, led by attorneys for the NAACP, filed the lawsuit that became *Brown v. Board of Education*. Henderson is founding president of the Brown Foundation for Educational Equity, Excellence and Research, and owner of Brown & Associates, an educational consulting firm.

Cairns said that at a national meeting in April 2018, Henderson said she didn't care who was sitting next to her child, as long as her child were learning. Cairns said that theory is growing more today than even five years ago.

He said many charter schools around the country-and in Minneapolis and Saint Paul-are managed so that kids are more effective learners, as measured by achievement tests. Cairns said that's because there are consequences for adults if the kids don't show signs of learning. People can lose their jobs if the school is closed or transformed with a whole new set of people coming in.

"There must be some confidence that the kids are learning," he said. "That's where we want the focus of this case to be. Shulman doesn't care about any of that. He doesn't care whether kids learn or not. He says the only thing that makes any difference is who's sitting next to each other."

Of the approximately 50 charter schools in Minneapolis and Saint Paul, there are about 10 that are racially diverse. Cairns made that statement. He pointed out that one charter school, Nova

Classical Academy in St. Paul, has 99 percent white students, but said that's the only one in Minneapolis and Saint Paul with a predominantly white enrollment.

What if *Brown v. Board of Education* were reviewed by the Supreme Court and partially overturned? An interviewer asked this question and said the Court could partially overturn the *Brown* decision by saying the quality of kids' education (e.g., are they learning what is needed to be known) is what counts—that separate ethnically can, in fact, be equal in education outcomes. He asked Cairns if he were concerned that some people might use this to start hacking away at the premise of *Brown*.

Cairns responded that to some extent, that's happening. He said the District of Columbia and three states—Florida, Indiana and Louisiana—now have educational vouchers that can be used at private schools. He said people have studied the voucher programs and found that the kids using them to transfer to private schools are all doing worse than in their previous schools.

"It's not surprising," he said. "If a kid walks in with a voucher to a private school like a St. Paul Academy, Blake or Breck, and is unprepared and the school admits that kid who's so far behind, what's a teacher supposed to do? That kid can't learn. It's fine ideologically. Ideology is driving public policy without any attention paid to whether it actually works."

Cairns pointed out that most of the money in voucher programs is going to subsidize the tuition of kids already in private school.

Most traditional school districts are run for the benefit of adults. Cairns made that statement and said, "And if the kids can learn along the way, that's fine. Most systems are so rigid and so locked in. Many people around the country believe it's not worth trying to change the system anymore."

He said if the Legislature gives Minneapolis another \$20 million or \$100 million, that money is already spent before it ever lands in the accounts of the district. "They can't do anything with it," he said. "They can't decide to do something different, they can't spend it differently, and they can't change the way in which the school functions, unless the teachers union agrees. And they'll never agree."

"There are some incredibly good teachers in the Minneapolis and Saint Paul systems, who do all sorts of great things," Cairns continued. Teachers who run effective programs would rather not even be known, because if they stick their heads up too high, this old saw comes back: 'We're all the same.'"

He said teachers have told him that if their students are learning and students in other classrooms are not, they're not going to tell anyone what they do or brag about it. If they do, their colleagues will tell them, "You're making us look bad."

He said the paired Minneapolis district schools Hale (K-4) and Field (5-8) work really well. "There's a culture there of sensitivity among parents, teachers and the administration," he said. "Charter schools that have a really good program also involve the parents."

The plaintiffs in *Cruz-Guzman* want the court to declare the current system unconstitutional and order the Legislature to "fix it." Based on hearings with Judge Robiner since this interview took place, it is clear that all agree that the only issue before the court is whether, if the Minneapolis and Saint Paul systems are found unconstitutional, the outcome will be a directive to the Legislature to fix it.

Cairns said the challenge Shulman has is that somebody has to define "adequacy." Cairns said the court is going to do that, but said there is controversy over whether the court should be involved in that definition at all.

There is a concern when you believe the solution to some of these problems is through litigation. An interviewer made that statement and said if you litigate something and the outcome doesn't fit, then you have to go back to the litigation process. He said the arbitration process is much better, because people can agree on what outcomes they're looking for, how to measure them and what timelines should be set for accomplishing them.

Cairns responded that it won't be until June 2019 that the parties understand how the *Cruz-Guzman* case is going to be narrowed. Mediation would not start until July 2019. Then at the end of 2019, there will be motions to dismiss the case. Unless the case is settled somehow, he said, it will be litigated in trial in the spring of 2020.

Getting rid of school districts would not be a bad outcome of the case. Cairns made that remark and said the districts are a barrier. "The teachers union doesn't want to go school by school," he said. "That's the worst outcome for them, because it takes away from the centralized control, which they have between the teachers union leadership and the school board."

Things have changed since the *Brown* decision in 1954. An interviewer made that remark and said in the 1950s, segregation was an affirmative action by a political body controlled by white people telling black people where they could and couldn't go to school. Today, what's described as segregation is the result not of a political decision but of people of color choosing where their kids go to school.

"That's a fundamental confusion at the heart of this whole debate," the interviewer said. "We have the situation that it's been turned upside down. Some white people still want to tell people of color where to go to school."

Part of what makes this so challenging is that we're looking at one institution to solve an intermixed problem. An interviewer made that comment and said, "If we can't change the conditions around where I can live and what kinds of options are available to me as to where I can work and what kind of living I can earn, it's extremely difficult to expect the schools to provide equal education and equal opportunities, because people coming into the schools are anything but equal."

My hope is that teachers would step up and say we've got to do this differently. Cairns made that comment and said teachers are key to the whole system. But it's difficult as long as teacher contracts so limit what teachers are willing to do.

An interviewer said that when teachers unions first started in New York, the decision was made that teachers would be allowed into economic issues, but not into professional issues. He said school boards have always prevailed in legislatures here and in any other state to block teachers from being allowed into discussions about learning. "That has fundamentally shaped teachers unions' behavior," he said.

"That decision about keeping the teachers out of the learning decision is a decision that can be reversed," the interviewer said. "If that happens, teachers and their organizations are likely to behave quite differently. That is the potential in the movement toward the real delegation of meaningful authority to schools. Teachers are the only ones who know the kids as individual, real people and can adapt learning at the school level determined by what the students need."