Attorney Dan Shulman

Lawsuit says segregated schools not providing adequate education; Legislature should order metrowide desegregation remedy

A Civic Caucus Minnesota Education Policy Interview

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Attorney Dan Shulman speaks about the *Cruz-Guzman v. State of Minnesota* class-action desegregation lawsuit, which he filed in November 2015. Plaintiffs in the case argue that segregated schools do not provide an adequate education, as Shulman says an earlier lawsuit determined the Minnesota State Constitution requires. He believes the Legislature must provide a metrowide desegregation plan to remedy the state's failure to provide an adequate education to all students.

Present

Steve Anderson, Janis Clay (executive director), Pat Davies, Paul Gilje, Ted Kolderie, Paul Ostrow (chair), Dana Schroeder (associate director), Clarence Shallbetter, Dan Shulman, Ellen Shulman, T Williams.

Summary

Cutting the seven-county metro area into wedges and using busing to desegregate the schools within each wedge is a possible remedy to school segregation, according to Minneapolis attorney Dan Shulman, plaintiffs' counsel in the *Cruz-Guzman v. State of Minnesota, et al.* class-action desegregation lawsuit. He believes a metrowide desegregation remedy is necessary to prevent white flight. Shulman says he filed *Cruz-Guzman* in Hennepin County District Court in November 2015, because school segregation was worse at that point than in 1995, when an earlier desegregation lawsuit was filed.

The State moved unsuccessfully in district court to throw the *Cruz-Guzman* case out. The State then appealed that decision to the Minnesota Court of Appeals, which agreed with the State that the lawsuit was not justiciable-that is, able to be decided by the courts. But the Minnesota Supreme Court overturned the Court of Appeals decision and remanded the case to Hennepin County District Court, saying the case was justiciable.

In its decision, the Supreme Court said, "It is self-evident that a segregated education is not general, uniform, thorough, and efficient." All four of those qualities are required by the education clause in the Minnesota State Constitution. Shulman says the 1993 Minnesota Supreme Court ruling on education funding in *Skeen v. State* found that the State Constitution establishes a fundamental right to an "adequate education," even though those exact words do not appear in the State Constitution.

Shulman says schools that are segregated by race and socio-economic status provide an unequal and inadequate education. He says the courts must determine whether the State is fulfilling its duty under the State Constitution's education clause. If it says "no," Shulman says, then the court would enter an order saying the State can't continue the violation and must fix it. He says because of separation of powers considerations, the remedy would be up to the Legislature to determine.

Shulman says the plaintiffs are assembling a task force to come up with desegregation remedies. He believes that limited school choice is acceptable, but says the state's Open Enrollment program is inherently unequal because the state doesn't provide transportation for students to schools outside their home districts.

Biography

Dan Shulman is an attorney at Gray Plant Mooty law firm in Minneapolis and plaintiffs' counsel in *Cruz-Guzman v. State of Minnesota, et al.*He has been a trial lawyer in Minneapolis for 48 years.

Shulman has been chief counsel in antitrust litigation involving major industries in a variety of cases since 1970, ranging from data storage, media, food, oil and gasoline, airlines, consumer electronics, medical electronics, health care, thoroughbred horses and many other areas. He has also been counsel in trademark and patent infringement actions and has an active *pro bono* civil rights practice. He continues to author and lecture extensively and has been the chair of the Sedona Conference antitrust law program every year since its inception in 1998.

Shulman is admitted in all Minnesota State and Federal courts, the U.S. Supreme Court, U.S. Tax Court and the U.S. Courts of Appeals for the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.

He has been named as the following: "Minnesota Super Lawyer ®" by Thomson/Reuters, 2006-2017; The Best Lawyers in America ©, 1993-2019; "The International Who's Who of Competition Lawyers & Economists,"*U.S. Plaintiff,* 2014; "Minnesota's Best Lawyers," *Minnesota Monthly,* 2009; and "North Star Lawyers," Minnesota State Bar Association, 2015-2016. He has been selected a Minnesota Lawyer of the Year in 2012 and 2018 by *Minnesota Lawyer Weekly* .

Shulman attended Harvard Law School, where he received his J.D. degree, *cum laude*, in 1970. He received his M.A. degree from Yale University in English Literature in 1967and his undergraduate degree from Harvard University, with honors, in 1965.

Background

Continuing its focus on Minnesota's competitiveness, the Civic Caucus interviewed attorney Dan Shulman to learn more about the class-action school desegregation lawsuit *Cruz-Guzman v. State of*

*Minnesota.*Shulman is representing the plaintiffs in the lawsuit. On November 26, 2018, the Court certified a plaintiff class consisting of students enrolled in the Minneapolis and St. Paul School Districts in schools having less than 20 percent or more than 60 percent minority children or children on free-or-reduced-price lunch. The case is tentatively scheduled for trial in January 2020.

On Sept. 14, 2018, the Civic Caucus interviewed John Cairns, attorney for several charter schools that have been named Defendant/Intervenors in the case.

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 plaintiffs in the lawsuit argue the state has enabled racial segregation in Minneapolis and Saint Paul 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 state constitutional requirement for an "adequate education," the *Skeen v. State* case on education funding, which was decided in 1993, declared that students in Minnesota have a fundamental right to an adequate education. 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 reversed the Court of Appeals ruling and aid in a four to two 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 in their dissent, 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- also has been a Defendant-Intervenor, although the Defendant-Intervenors have said they expect to drop Paladin as a party in due course.

Discussion

There is a history here that goes back to slavery. Attorney Dan Shulman made that statement and said Minnesota has one of largest achievement gaps in the country between black and white students. He said it also has one of the largest disparities in wealth between blacks and whites.

In 1972, Shulman said, Judge Earl Larson, in his rulingin *Booker v. Special School District 1,* found the Minneapolis school district had intentionally caused segregation, in violation of the Fourteenth Amendment to the U.S. Constitution. Judge Larson found that the school district's actions had increased and fostered racial segregation.

He enjoined the district from further racial discrimination and ordered the district to take affirmative action to eliminate the effects of its prior discrimination. Judge Larson had judicial oversight over the Minneapolis school district's desegregation efforts for 10 years, until he relinquished control of the case .

Federal rulings have allowed schools to resegregate. Shulman made that statement and said nothing in the U.S. Constitution provides the right to an adequate education. But the Minnesota Constitution requires a "general and uniform system of public schools" and that the Legislature shall provide funding so the system is "thorough and efficient."

After schools began to resegregate because of a federal retreat on *Brown v. Board of Education*, Shulman said a new kind of lawsuit began to be filed in state courts against tates failing to provide adequate education under the education clauses in state constitutions.

Shulman said *Sheff v. O'Neill,* a 1989 Connecticut lawsuit,isone of the leading cases regarding school segregation. The plaintiffs argued their constitutional rights were violated because the concentration of African American students in a particular school district was a violation of the state's right to equal education. In 1996, the Connecticut Supreme Court ruled that the state had an affirmative obligation to provide its students with equal educational opportunity through integrated education. The state then moved to establish various voluntary integration options.

Shulman said the 1993 Minnesota Supreme Court ruling on education funding in *Skeen v. State* found that the state constitution establishes a fundamental right to an "adequate education," even though those exact words do not appear in the Minnesota Constitution. In the *Skeen* case, Shulman said, the court said school funding cannot be found to be sufficient if students are not receiving an adequate education .

By 1995, Shulman said, the Minneapolis public schools were again segregated by race and socio-economic status. "It's a separate type of education," Shulman said. "Therefore it's unequal and inadequate."

In 1995, the Minneapolis NAACP and Shulman filed a similar class-action desegregation lawsuit, *N.A.A.C.P., Minneapolis Branch v. State of Minnesota* .The case was settled in 2000, when the state agreed to bus low-income students to suburban schools through The Choice is Yours (TCIY) program. TCIY 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.

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. Shulman called TCIY a "highly successful" program.

The FAIR school, a fine arts school with campuses in Crystal and downtown Minneapolis, 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.

"We settled the case," Shulman said, "because we got a program, TCIY, and we hoped it would be a meaningful first step toward ending segregation. Cases like this can be litigated for years. But the settlement was *not* a meaningful step towards ending segregation. It got much worse over time."

By 2015, segregation was much worse than in 1995, when the first case was filed. Shulman made that statement and said he filed *Cruz-Guzman v. State of Minnesota* in Hennepin County District Court in November 2015. He said the State moved in district court to throw the case out, but lost. The State appealed that decision to the Minnesota Court of Appeals, which agreed with the State that the lawsuit was not justiciable-that is, able to be decided by the courts.

The plaintiffs filed a petition for review with the Minnesota Supreme Court within a week of the Court of Appeals ruling, Shulman said. The Supreme Court granted the petition and reversed the Court of Appeals ruling and remanded the case to Hennepin County District Court. The four-Justice majority held that the case was justiciable. It said the role of Courts is to interpret the law, including provisions of State Constitutions, and determine whether the law is being complied with. It also said, "It is self-evident that a segregated education is not general, uniform, thorough, and efficient ." Two justices dissented-they said the case was not justiciable . After the Supreme Court decision, Hennepin County District Court Judge Susan Robiner entered a scheduling order setting a tentative trial date for January 2020.

One of the problems of an education-adequacy lawsuit is what the remedy should be. "A remedy is essential," Shulman said. "The court answers 'yes' or 'no' to the question of whether the state is fulfilling its duty under the State Constitution's education clause. If it says 'no', then it enters an order saying the State can't continue the violation and must fix it. The remedy is for the Legislature to determine."

He said the Court does not craft the remedy because of separation of powers considerations . "That's why the courts send the decision on the remedy to the Legislature. The purpose of the court is to say whether the education clause is being violated."

Shulman commented on an October 6, 2018, opinion piece in the *Star Tribune* by Katherine Kersten of the Center of the American Experiment about the *Cruz-Guzman* lawsuit. Headlined "Sweeping lawsuit would create a general mess," the piece tried to spread fear, uncertainty and doubt, Shulman said. "Kersten said we want to disrupt everything," he said, "and that the court will uproot everything that's going on."

Shulman said Kersten didn't disclose in her piece that the Minnesota Supreme Court is not the first court to confront the issue of whether educational adequacy is a justiciable issue. He said 27 state Supreme Courts have heard cases over whether it is justiciable. Of that group, 22 said it is and five said it's not.

Would a court desegregation decision apply to school districts, schools and classrooms? An interviewer asked that question and Shulman replied that a decision would apply to all three, emphasizing that classrooms cannot be segregated. "This has public-policy importance," Shulman said. "We're talking about the futures of our children, our community and our country. The incidence of segregated education falls 100 percent on the children and zero percent on the people who cause it. It locks people out from opportunity."

Shulman continued. "The two years of appeals I had to go through on this case damaged tens of thousands of students for two years."

Experts from all over the country will be testifying in the *Cruz-Guzman* case about the evils of segregation . Shulman named two of the experts:

- ucker Johnson, associate professor in the Goldman School of Public Policy at the University of California, Berkeley. (He is the son of former Minneapolis School Superintendent Carol Johnson, Shulman pointed out.) Shulman discussed Johnson's 2016 article "Long-run Impacts of School Desegregation & School Quality on Adult Attainments," in which Johnson followed the life trajectories of a number of people born between 1945 and 1968. According to Shulman, Johnson found that blacks in desegregated chools significantly increased their adult earnings, improved their adult health status and lowered their risk of incarceration.

- Sean Reardon, professor of Poverty and Inequality in Education at Stanford University and senior fellow at the Stanford Institute for Economic Policy Research. Shulman said Reardon has found that one of the greatest determinants of whether a school is providing a successful education is the ratio of students of poverty in a school. He has found that the more students of poverty in a school, the lower the outputs of education at the school. Shulman said Reardon notes that often race and economic status are cofactors.

The plaintiffs in *Cruz-Guzman* are working to get a seven-county, metrowide desegregation plan. Shulman said one such plan would cut the metro area into sectors, using busing within each sector to achieve desegregation in the sector's schools.

The interviewer asked how school choice would work under a metrowide plan. The interviewer said it seems like somebody would have to tell students where to go to school. Shulman replied that there would be limited choice under a desegregation plan and that lotteries would likely be used to determine which students could attend which schools. And, he said, racial balance at each school would have to be within a range reflective of the metro area.

Ellen Shulman, principal of Anwatin Middle School in Minneapolis and Dan Shulman's daughter, said Anwatin is a magnet school. She noted that magnets in Minneapolis were developed to cause desegregation, but they have become more white because of school choice. "If choice is involved, people who are more aware of choices get the first choice," she said. Ellen Shulman said using lotteries would be more effective in making magnet schools more racially balanced.

She noted that Minneapolis Southwest High School's foundation has about $200,000 it can use for supplementing education at the school. She said, in comparison, Anwatin has raised only about $1,000.

"Follow the money," an interviewer commented. "Southwest has a slush fund because of who goes there."

Another interviewer said, "The whole current system of education is failing everybody. Shifting kids around won't solve the problem.

Shulman referred to a study that tracked the effects of desegregation for a 20-year period, from the *Brown v. Board of Education* decision in the 1950s up to the late 1970s. He said the study showed that where desegregation was vigorously pursued, the achievement gap was halved.

The plaintiffs are putting together a task force to come up with desegregation plans. Dan Shulman said so far, the task force includes Myron Orfield, a former Minnesota state legislator and now director of the University of Minnesota's Institute on Metropolitan Opportunity ; Orfield's brother, Gary Orfield, research professor, UCLA Graduate School of Education and co-director of The Civil Rights Project at UCLA; and a former suburban school superintendent.

A reform-oriented governor might tell the state attorney general to accept the *Cruz-Guzman* complaint. An interviewer made that statement and said that would allow the state to address corresponding issues of adequacy all across the education system.

Shulman responded that the interviewer was addressing issues about the pedagogy of the teaching. But, he said, "Even if the pedagogy is reformed, it still won't work if minorities and poor kids are segregated."

To what degree is the *Cruz-Guzman* case accepting that there may be segregated schools that are doing well by measures of achievement? An interviewer asked that question and Shulman responded that there are a few segregated charter schools that are doing well. The interviewer replied, "If you break them up because they don't fit the mix, you end what they were doing."

Shulman pointed out that charter schools in Minnesota are exempt from desegregation rules and said that is unique to Minnesota. "If choice has no limits on it," he said, "my kids will get a better education if they're not sitting next to black kids or poor kids. Is that a choice we should allow?"

The interviewer noted that in North Minneapolis, a substantial number of black families are sending their kids to suburban schools. Shulman said that will be part of the desegregation remedy. The interviewer said charter schools are a secondary place where black families in North Minneapolis are sending their kids.

He said the remedies Shulman is discussing are essentially saying to parents, "We're going to take care of your choice decisions." Shulman responded that limited choice is acceptable.

At an Oct. 9, 2018, hearing on the *Cruz-Guzman* case in Hennepin County District Court, Judge Susan Robiner accepted that the class represented in the case comprises the children in Minneapolis and Saint Paul public schools. Shulman made that statement and said he doesn't care if charter schools are added to the case or not. He said if the court finds a violation in the lawsuit, it would be that the defendants have segregated the Minneapolis and Saint Paul school districts and must remedy the situation.

He reiterated that a remedy of metrowide desegregation is important to prevent white flight. Shulman said he doesn't think the plaintiffs need to show there was intent to cause segregation on the part of the defendants. Under the Constitution's equal protection clause, there is no need to prove there's an intent to discriminate.

He does think, however, that some things the state has done have shown intent. As an example, he noted that the state changed the school desegregation rule in 1999, so that there must be a showing of intent to discriminate and the desegregation cannot include the suburbs. He said this allowed the Minneapolis and Saint Paul school districts to revert to neighborhood schools.

Open enrollment is inherently unequal because the state doesn't provide transportation for students to schools outside their home districts. Shulman made that statement and said he has no problem with open enrollment, but only if it's inherently equal.

In 1971, the Legislature redid funding of the state's schools. An interviewer made that point and asked whether the Legislature will take on desegregation with the same degree of interest. Shulman replied, "I want the hammer of a court order over the Legislature. The Supreme Court has given me a silver bullet: that it's self-evident that a segregated form of public schools is not general and uniform. Our last resort is the courts. We haven't had a solution any other way."

Shulman said he had not spoken yet with any legislators about the issue.

An interviewer commented, "The only excuse legislators can give for voting for the wedge method of desegregation is that they had to do it."