

J377CHRC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 CHRISTA MCAULIFFE INTERMEDIATE  
5 SCHOOL PTO, INC., et al.,

6 Plaintiffs,

7 v.

18 Civ. 11657 (ER)

8 BILL DE BLASIO, et al.,

9 Defendants.  
10 -----x

New York, N.Y.  
March 7, 2019  
10:00 a.m.

11 Before:

12 HON. EDGARDO RAMOS

District Judge

13 APPEARANCES

14 PACIFIC LEGAL FOUNDATION  
15 Attorneys for Plaintiffs  
16 BY: CHRISTOPHER KIESER

17 MICHAEL A. CARDOZO  
18 Corporation Counsel of the  
19 City of New York  
20 Attorney for Defendants  
21 BY: THOMAS ROBERTS  
22 MARILYN RICHTER  
23 Assistant Corporation Counsel  
24  
25

J377CHRC

1 (In open court)

2 (Case called)

3 MR. KIESER: Christopher Kieser for plaintiffs.

4 MR. ROBERTS: Tom Roberts, Assistant Corporation  
5 Counsel, for the defendants.

6 MS. RICHTER: Marilyn Richter, Assistant Corporation  
7 Counsel, for the defendant.

8 THE COURT: And good morning to you all.

9 So, this matter is on for an initial pretrial  
10 conference. As the parties are aware, I recently denied  
11 plaintiffs' motion for preliminary injunction. I understand  
12 that there has been an appeal filed.

13 MR. KIESER: Yes.

14 THE COURT: So, Mr. Kieser, correct?

15 MR. KIESER: Yes.

16 THE COURT: Why don't you tell me where we are  
17 procedurally. You can remain sitting.

18 MR. KIESER: We filed our notice of appeal and will be  
19 hopefully instituting a briefing schedule at some point in the  
20 next couple of weeks in the Second Circuit. Here we have had a  
21 consultation on a discovery schedule that we've agreed on I'd  
22 say 90 percent.

23 THE COURT: OK.

24 MR. KIESER: We have one -- correct me if I'm wrong --  
25 we have one main disagreement on the discovery schedule.

J377CHRC

1 THE COURT: And what is it?

2 MR. KIESER: Plaintiffs would prefer that there is a  
3 cut-off between nonexpert and expert discovery. Both sides  
4 have indicated that we might get an expert, but it's not  
5 necessarily a given. But we'd like our experts to be able to  
6 review the entire record.

7 So, our proposal has an end date of discovery on  
8 September 27, and I think theirs is August 30. And ours would  
9 end nonexpert discovery by July 17 and then have that extra two  
10 months for expert discovery. And I think they want all  
11 discovery to end on August 30, expert and nonexpert,  
12 everything.

13 Is that correct?

14 MS. RICHTER: That is correct. We have a couple of  
15 major concerns. The first one is -- and we went through that  
16 this round -- but next year we would come up against the same  
17 deadline effectively in terms of the need to get the offers out  
18 to the high school students, the 80,000 of them approximately  
19 who are awaiting their offers, which normally go out at the  
20 beginning of March. So, what we want to do is create a  
21 schedule that would go back from there. Of course, your Honor  
22 would have adequate time to issue a determination. The parties  
23 would before that have adequate time to present their cases,  
24 whether it's going to be by cross motions for summary judgment  
25 or trial, and before that the discovery schedule.

J377CHRC

1 THE COURT: And is that date approximately February 25  
2 of 2020?

3 MS. RICHTER: Well, that was based on an extension  
4 that we did this year, but the normal schedule is in past years  
5 we've gotten the offers out March 4 or 5, which would require  
6 us to know what the discovery program parameters are by about  
7 January 28, I think it was. It was late January, which we  
8 couldn't do this year given the schedule for the preliminary  
9 injunction motion.

10 THE COURT: Were you able to get the letters out on  
11 time this year?

12 MS. RICHTER: Not by March 4 or 5. We are going to  
13 get them out, as we indicated, by March 18, but that's later  
14 than usual.

15 THE COURT: OK, so what's your position on the expert  
16 discovery issue?

17 MS. RICHTER: Well, we were hoping to have the  
18 discovery end -- we anticipated and we wanted to speak to you  
19 of course about the post-discovery scheduling, but we  
20 anticipated that if discovery ended at the end of August, that  
21 would allow, we presume, enough time to then brief or present  
22 evidence and have a determination.

23 So, we had suggested to plaintiff's counsel that, you  
24 know, if they do identify an expert, to just let us know what  
25 the area of expertise is of the expert, and we can try and go

J377CHRC

1 forward with that nonparty discovery first, or give that a  
2 priority, so their expert would have all the relevant  
3 information as soon as possible, and insofar as there might be  
4 other discovery that's not within the expert's area, we could  
5 do that afterwards. So, we could compress this and have the  
6 expert discovery and the regular discovery end at the end of  
7 August.

8 And we also -- I don't know if we suggested this to  
9 you -- we looked at this last night -- we are proposing a  
10 couple of other things, one of which would be that we would  
11 forego rebuttal expert reports, which would save time.

12 MR. KIESER: I think that's fine. If we have  
13 simultaneous reports, I don't think rebuttal reports are  
14 necessary.

15 THE COURT: Let me ask this. As you folks sit here --  
16 I wouldn't hold you to this obviously -- but what types of  
17 experts are you anticipating?

18 MR. KIESER: I think on our side it's possible we may  
19 want an expert to analyze the data for disparate impact  
20 purposes, and also to prove a compelling interest is a fact  
21 question at all, I think we would want an expert to speak to  
22 that. So one or both of those questions would be the ones that  
23 we want the expert to address.

24 THE COURT: And on the City side?

25 MS. RICHTER: On the City side it would be essentially

J377CHRC

1 the same, we were thinking about the same areas for expert  
2 testimony.

3 THE COURT: So you think there is an expert out there  
4 who can come in and tell us what the compelling interest might  
5 be.

6 MR. KIESER: Well, to the extent that is a question of  
7 fact and not a question of law, perhaps. It's kind of up in  
8 the air in that regard; we're in agreement on that. So, I  
9 think to some extent it's a question of law, but to some extent  
10 it might be a question of fact. We did have experts on that  
11 in, say, Gruder there were experts on compelling interests.  
12 So, it's something we're considering.

13 THE COURT: Mr. Kieser, I suppose I don't quite  
14 understand the concern that you have with the cut-off for fact  
15 discovery and then expert discovery.

16 MR. KIESER: Well, we want to make sure -- without a  
17 hard deadline for nonexpert and expert discovery, I'm not sure  
18 that we're a hundred percent sure that our experts will be able  
19 to see the whole record, and I think it would just be easier to  
20 have a hard deadline to end nonexpert discovery and then begin  
21 like say a two month period of expert discovery, in our view.

22 I'm not sure what the Court's position is on the  
23 August versus September and whether --

24 THE COURT: Oh, I have a position on that based on  
25 this theme. You want end of August. You want end of

J377CHRC

1 September. It's going to be September 15.

2 MR. KIESER: OK. And if that's the case, then I think  
3 we could have the end of all nonexpert discovery be -- I think  
4 we had in our draft July 17, and then have the next two and a  
5 half months be -- or one and a half months -- or basically two  
6 months at that point, July 17 to September 15.

7 THE COURT: Ms. Richter?

8 MS. RICHTER: We don't know yet. You know, in my  
9 experience the burden of discovery in terms of production  
10 always falls more heavily on the defendants than on the  
11 plaintiffs.

12 MR. KIESER: Sure, in these types of cases, sure.

13 MS. RICHTER: Yes. And plaintiffs' counsel candidly  
14 admitted when they spoke to us that they anticipated that there  
15 might be voluminous document production, so we just don't know  
16 if July 17 is going to be a realistic deadline for us to  
17 accomplish all the nonexpert discovery.

18 THE COURT: Let me ask you this. Again, you know this  
19 more than I do certainly, but I understand that the Department  
20 of Education is a large enterprise, but my assumption -- and  
21 correct me if I'm wrong -- is that the data upon which the  
22 experts would rely already exists. So if you get them the  
23 numbers, the bulk of the information you will have sooner than  
24 later, and your expert can take a look at it and there will be  
25 very little sort of updated data that will come.

J377CHRC

1           MR. KIESER: Correct me if I'm wrong, I think you said  
2 on the phone that the data for this year as far as offers would  
3 not be available until May.

4           MS. RICHTER: Right. And that's something else I want  
5 to discuss.

6           MR. KIESER: So in order to assess the potential  
7 disparate impact I think we would want to compare who would  
8 have gotten in under the current plan to who would have gotten  
9 in had the old plan been in place. So, to do that we would  
10 obviously need the data from this year.

11          MS. RICHTER: We certainly would be able to provide  
12 before then the historic data.

13          MR. KIESER: The historic data, sure, we're going to  
14 ask for that, and that's something I think that we probably  
15 won't have too much of a dispute over.

16                 So, yeah, I mean we're not a hundred percent set on  
17 exactly what we're going to be asking for, but I think that  
18 July 17 should be reasonable given that most of the data is  
19 probably things that we're not going to be fighting over.

20          MR. ROBERTS: I would just say it seems to me if  
21 you're going to put it at September 15, it seems to me the fact  
22 discovery should go into sometime in August.

23                 I'm not sure. I mean really other than having a  
24 contest of academics who will come out and say what they've  
25 already researched -- and we cited them -- both of us cited



J377CHRC

1 them in the briefs, and you alluded to them in your opinion --  
2 other than sort of having a contest of experts, I don't  
3 understand what lawyers as discovery are going to do. I mean  
4 maybe we end up putting an expert on the stand who for ours  
5 says, yes, diversity does help students and theirs says, no, it  
6 has no educational advantage at all, and maybe you want to go  
7 through that, but I'm not sure what we as lawyers do to prep  
8 that.

9 THE COURT: Well, why don't we do this -- and  
10 obviously, you know, we're working backwards, right, and you  
11 folks haven't been shy about giving me deadlines -- so, why  
12 don't we do this: Why don't we set fact discovery for mid  
13 August? Because by then you will have gotten most of the  
14 information I believe that the experts would need, and then  
15 whatever residual stuff you get the experts should be able to  
16 accommodate in his or her conclusions, and cut-off for all  
17 discovery for -- what is mid-September?

18 DEPUTY COURT CLERK: September 15 is a Sunday.  
19 September 16. Monday, September 16.

20 THE COURT: Monday, September 16 cut off of all  
21 discovery. OK?

22 MS. RICHTER: Fine.

23 THE COURT: And otherwise you are agreed on all the  
24 other internal dates on the discovery schedule?

25 MR. KIESER: I believe so. Would you like us to go

J377CHRC

1 through the form and give you the dates that we have?

2 THE COURT: Yeah, if you haven't done that, why don't  
3 you do that.

4 MR. KIESER: We both have drafts.

5 THE COURT: OK. I'm going to want an actual one from  
6 one of you.

7 MR. KIESER: We can file something.

8 THE COURT: Yeah.

9 MR. KIESER: But do you want me to read it off just  
10 for now?

11 THE COURT: Sure.

12 MR. KIESER: Number one, we don't consent to a  
13 magistrate.

14 Number two, the case is not tried before a jury.

15 THE COURT: Please slow down.

16 MR. KIESER: Number three, joinder of additional  
17 parties by May 31.

18 Amended pleadings by May 31.

19 Initial disclosures by March 29.

20 First set of interrogatories by April 12, and then  
21 responses 30 days thereafter.

22 Local Rule 33.3 will apply.

23 First set of requests for production by April 12.

24 Nonexpert discovery -- which is what we were just  
25 talking about, I guess, is going to be August -- do we have a

J377CHRC

1 date for that?

2 DEPUTY COURT CLERK: August 15, it's a Thursday.

3 MR. KIESER: And the only amendment we had to your  
4 form is 8C. They want to note that if we want to depose Mayor  
5 De Blasio or Chancellor Carranza, that they are going to object  
6 to that. We don't have any objection to including that in the  
7 scheduling order.

8 Number nine, further interrogatories. And this says  
9 including expert interrogatories. So I'm not sure if that's --  
10 because we are setting expert discovery for later, so I think  
11 maybe delete that expert interrogatories part.

12 But further interrogatories shall be served no later  
13 than June 15.

14 Requests to admit shall be served no later than July  
15 15.

16 We can move maybe that date back. I don't know.  
17 Because we had the --

18 MS. RICHTER: You need the 30 days.

19 MR. KIESER: But I think it's fine. Yeah, July 15 is  
20 fine.

21 Expert reports, are we moving that date? We have it  
22 as August 5 on ours. So I think -- is that -- I think we want  
23 to move it back to the -- well, to the 16th, because that will  
24 be the end of fact discovery.

25 THE COURT: OK.

J377CHRC

1 MS. RICHTER: So July?

2 MR. KIESER: August 16. Because that will be the end  
3 of fact discovery.

4 Rebuttal experts we're not going to have.

5 Expert depositions shall be completed, and this will  
6 be by September 16, because we had on here the 27th and they  
7 had August 30.

8 And all discovery concluded by September 16. And  
9 that's it.

10 THE COURT: OK. So just one of you file that on ECF,  
11 and I will so order it.

12 Now, since it was mentioned, what's the basis -- I  
13 guess De Blasio I can understand a little bit, but what's the  
14 basis for objecting to Carranza's deposition?

15 MS. RICHTER: Well, as a general rule, commissioners,  
16 the heads of agencies, it is disfavored under the law to have  
17 them deposed, certainly in situations where there are other  
18 people who can provide the information. And we believe that  
19 will be the case, but we haven't looked into that fully.

20 MR. KIESER: We haven't researched it. We believe we  
21 might want to depose him, but we haven't researched the issues,  
22 so I can't really speak to that. It may be relevant to the  
23 intent issue.

24 THE COURT: Let me ask another question. The City  
25 indicated in its papers that Mayor De Blasio is not an

J377CHRC

1 appropriate party in this case. How do the parties want to  
2 approach that?

3 MR. KIESER: I figure if we do move to depose him,  
4 then you could raise that. Right? But other than that, it's  
5 probably not going to have an effect on the case.

6 THE COURT: Because as it stands he is still in,  
7 right?

8 MS. RICHTER: Yes, we're not sure. We may just note  
9 that as a general rule the mayor is not a proper party because  
10 the Department of Education is an independent legally sueable  
11 separate entity, and legally they have the authority to  
12 institute programs like this.

13 MR. KIESER: And we didn't respond to the argument in  
14 the PI because it was not relevant to the PI. Sure.

15 THE COURT: OK. Very well. Is there anything else  
16 that we need to do today?

17 MS. RICHTER: Yes, your Honor, there is one other  
18 thing.

19 Mr. Kieser mentioned May. By May we will have --  
20 sometime in May -- we're not sure exactly when -- we will know  
21 who will be in the discovery program this summer. At that  
22 point we believe there is a significant possibility that this  
23 will show that there has been no adverse impact on Asian  
24 American students when compared to, let's say, the program as  
25 it existed last year.

J377CHRC

1           If that is the case, we believe that this is an  
2 unusual case. These cases generally somebody has been rejected  
3 from the program, or the policy clearly will have an adverse  
4 impact or effect on somebody based on their race or ethnicity,  
5 and at this point nobody knows what the effects of the policy  
6 are going to be here. And we believe that if in fact the  
7 policy that's being challenged does not result in any adverse  
8 impact on Asian American students, then there is no claim.

9           So, what we were hoping, we have been trying to figure  
10 out how to incorporate that into possible scheduling. And we  
11 had discussed with plaintiffs' counsel the possibility of  
12 waiting until May to see that, rather than going through  
13 discovery.

14           We understand that could be a problem given that we  
15 need to finish discovery quite quickly. There is the  
16 possibility of also just doing limited discovery like the  
17 initial disclosures and serving the initial sets of requests,  
18 or -- and this we have not had an opportunity to discuss with  
19 plaintiffs' counsel, because we just thought of this -- if in  
20 fact when we have that data, we would probably want to ask that  
21 in that circumstance we be able to move for summary judgment  
22 because there would be we believe no cause of action stated,  
23 and then have the discovery stayed. But we wanted to broach  
24 this today, but, as I say, we don't know what the data is going  
25 to show in May when it's final.

J377CHRC

1           MR. KIESER: Our position is that if the data is  
2 helpful to them, they should use it, but we should continue to  
3 stay on the regular discovery plan.

4           And, also, the fact that next year the discovery  
5 program will be 20 percent as opposed to 13 percent of each  
6 specialized high school, we think it's very possible that  
7 whatever disparate impact does exist could be different in  
8 2020. So, we're not going to concede based on one year of data  
9 that there is no disparate impact. I mean certainly we concede  
10 that it's relevant, but I don't think that the entire case  
11 should be stayed just waiting for the one year of data. I  
12 think we should go through and they could make their arguments  
13 and we can make ours, and if the case is dismissed at summary  
14 judgment, then, you know, obviously that will happen.

15           But I think the regular discovery -- we should stick  
16 to the regular schedule, especially because if we wait until  
17 May and the data does show a disparate impact, then we're going  
18 to be two months behind.

19           MS. RICHTER: That's why we came up with this  
20 alternative, where we would not do that now, because nobody  
21 knows. And that's the kind of strange posture in this case.  
22 Nobody knows what the effect, if any, of these challenged  
23 changes are going to be. But once we do know, if in fact it  
24 doesn't show any disparate impact, I don't understand what the  
25 basis of a claim is here. If there is no policy that is having

J377CHRC

1 an adverse impact on Asian Americans, I don't see how that  
2 creates an equal protection --

3 MR. KIESER: We would still allege that -- well, given  
4 the City's modeling and that the program will expand in 2020 --  
5 that the 2020 data may show a disparate impact. Now, I don't  
6 know how -- I mean I think the 2019 data will show it, but I  
7 don't have the data, so we can't obviously say that.

8 THE COURT: We are all talking hypothetically here.  
9 But let me ask you this, Ms. Richter. Do you know what the  
10 percentage of discovery program kids were Asian American last  
11 year?

12 MS. RICHTER: We didn't put that in our papers, and I  
13 don't know, but plaintiffs did, and they said it was --

14 MR. KIESER: I believe it was 64 percent.

15 MS. RICHTER: I think you said 63 percent.

16 MR. KIESER: I think it was 67 two years ago and 64  
17 last year, but I could be -- and I believe that in your  
18 answer -- I'm not sure if you addressed that or not. It's been  
19 a while. But I don't think you dispute that.

20 MS. RICHTER: Well, we would have to check. But  
21 assuming it was 63 percent last year, we don't have final  
22 figures, we don't even have really good preliminary data, but  
23 it looks like, you know, just a little bit that we've been able  
24 to kind of look at, it may be in that same ballpark this year  
25 in terms of the Asian American participation in the discovery



J377CHRC

1 program.

2 MR. KIESER: I think there are two separate ways to  
3 measure the disparate impact: There is the participation in  
4 the discovery program and then there is the total enrollment  
5 overall -- or offer rate. I think the offers matter more than  
6 enrollment.

7 THE COURT: How would offers be affected? Because of  
8 the fewer number of seats?

9 MR. KIESER: Because now only 87 percent of the seats  
10 are available without the discovery program. So according to  
11 their filings, the cut-off for admission without the discovery  
12 program has gone up by five points because of the discovery  
13 program changes; it's gone up from 481 to 486.

14 So, that's a separate impact that we don't know how it  
15 will play out. So, I mean, I'd like to continue with the  
16 discovery schedule.

17 THE COURT: Like I said, we're talking hypothetically  
18 here, and you're the ones that are under the gun in terms of  
19 scheduling next year, so guide yourselves accordingly.

20 MS. RICHTER: May we -- once we know in May where we  
21 are with the facts, if it looks like -- as we believe it may --  
22 that we in fact don't have a disparate impact shown, that we  
23 could advise the Court and counsel and see what we would like  
24 to do in that circumstance?

25 THE COURT: Sure. I mean if there is agreement, I'm

J377CHRC

1 happy to do whatever you folks want, but if it sounds like  
2 there likely will not be agreement that that set of data for  
3 one year will affect the ultimate outcome of the case --

4 MR. KIESER: That's correct.

5 THE COURT: Very well. Anything else?

6 MR. KIESER: No.

7 MS. RICHTER: No, your Honor.

8 THE COURT: OK. So please file that by end of day  
9 today the schedule, and we are adjourned. Thank you folks.

10 MR. KIESER: Thank you.

11 MS. RICHTER: Thank you.

12 (Adjourned)

13

14

15

16

17

18

19

20

21

22

23

24

25