**Cause No. D-1-GN-11-003130**

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| **THE TAXPAYER & STUDENT FAIRNESS COALITION, et al** | * | **IN THE DISTRICT COURT** |
| **VS.** | * | |
| **JOYCE COLEMAN, et al** | * | **TRAVIS COUNTY, TEXAS** |
| **VS.** | * | |
| **MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY, et al** | * | **250th JUDICIAL DISTRICT** |

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**ORDER DENYING MOTION TO RECUSE**

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1. On June 2, 2014 the State of Texas filed a Motion to Recuse Judge John K. Dietz in the captioned case. On the same day Judge Dietz declined to recuse voluntarily and, pursuant to Rule 18a, referred the matter to Third Region Presiding Judge Billy Ray Stubblefield. On June 4 Judge Stubblefield appointed the undersigned judge to hear and decide the motion. The court set a hearing for June 20. All parties were notified.

2. On June 20 the court called the matter for hearing. All parties announced ready. A record was made by Court Reporter Brenda Wright. The exhibits offered by both sides were admitted without objection. (The decision whether some of the exhibits should remain sealed was reserved until later.) The court then heard arguments about the law and the evidence.

3. The court made several rulings on June 20, which are restated and memorialized below in ¶¶ 4-7:

**4. Documents.** Some documents had been sealed and kept confidential by Judge Dietz.[1]

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[1] At one hearing Judge Dietz explained that the important thing would be his *ultimate decision* and his *ultimate findings* and conclusions, not the *thought process* that led up to the

Many of these had been furnished to the State before the hearing. Others were produced to the State in open court pursuant to the court's instructions. The court gave the State until noon on Monday, June 23 to review these documents and make any further arguments based upon them.

**5. Sealing of documents.** Concerning sealing of documents, the court made the following rulings.

(a) This court, assigned only to decide the recusal motion, will not modify Judge Dietz's rulings concerning sealing of documents in the underlying case.

(b) The court allowed relevant sealed documents to be presented in the recusal hearing. The court has considered these documents and they will remain part of the recusal record for the appellate courts in the event of an appeal.

(c) Documents sealed in the underlying case but used in the recusal hearing will remain sealed unless Judge Dietz or an appellate court says otherwise.

**6. Discovery.** The State's request for discovery from Judge Dietz was denied.

**7. Recusal.** The court stated its intention to review the evidence and to make a recusal ruling by the end of the day on Monday the 23rd.

Having reviewed the evidence from the June 20 hearing, and having considered the "State Defendants' Supplemental Briefing," filed this date, the court now makes the following additional rulings.

## I. PHASE 1—Trial.

8. In phase 1 Judge Dietz wanted the lawyers to be preparing their Findings of Fact and Conclusions of Law (FF/CL) during the trial instead of waiting until the close of evidence. This would serve two purposes. First, it would prod the lawyers to keep in mind the ultimate FF/CL as they tried the case. Hopefully they would know whether their evidence fit their proposed FF/CL and vice versa. Second, preparing and revising their FF/CL from

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decision: "I think my position is the one that I previously stated, that what's relevant is my order and my findings of fact, and how I got there is a matter of judicial work product and that I intend to try to preserve that . . . ." (3-19-14 hearing, PX-34, page 39)

the beginning would also help shorten the "lag time" between the close of evidence and the signing of a final judgment.

9. At same time, Judge Dietz had another concern. He wanted to protect the lawyers' thought processes by keeping the proposed FF/CL confidential and not disclosing them to the opposing lawyers.

10. With all this in mind, he suggested a procedure that he had used in an earlier school-finance trial: As the case progressed the lawyers would prepare and submit their draft FF/CL to him, without service on other lawyers. Of course, everyone would eventually see the FF/CL and have full opportunity to criticize them and make suggestions. All sides agreed to this procedure, which was memorialized in the pretrial order signed on April 16, 2012 (PX-5). In the pretrial scheduling order the judge and all parties agreed that their draft FF/CL would be "filed with the court without service on other parties."

11. Phase 1 began on October 15, 2012 and ended with a ruling on February 4, 2013 that the Texas school finance system was unconstitutional.

## II. PHASE 1—EVENTS AFTER THE RULING.

12. After he had ruled, Judge Dietz wanted the lawyers to submit to him their proposed FF/CL, again without sending copies to the opposing parties. After the evidence closed and he had ruled, there was no danger of thought processes being disclosed. And everyone knew who had prevailed on the various issues. On February 13 (PX-13) there was discussion about whether the prevailing parties would submit proposed FF/CL. An ISD lawyer asked whether the court would want the prevailing parties to submit proposed findings to the court on the issues they had won. (In this court's experience, it is the widespread and common practice in Texas state courts for judges to rely on the prevailing party to help draft FF/CL.) The lawyer expressed this in court on February 13, 3013, and the judge agreed:

> *Mr. Trachtenberg*: "[M]y understanding of findings is you only need findings that support your judgment, right? I mean, you don't need findings on claims that haven't prevailed and wouldn't support the ultimate judgment. Is that your understanding, too?
>
> *The Court*: (Nods head affirmatively).

13. The evidence supports the conclusion that the State understood this procedure full well, a conclusion that this court expressly makes:

- No one disagreed with the court's adoption of Mr. Trachtenberg's suggestion.

- Two weeks later, a February 25 email exchange (PX-14) between the judge's staff attorney, the State, and an ISD lawyer (Mr. Trachtenberg) engaged in discussion of the content of the "Charter School" FF/CL. The email chain also discussed setting up telephone calls involving these three persons. (It is clear that no one contemplated participation by other parties.) This email chain shows that the State knew about and participated in ex parte *discussion* on an aspect of the case in which the State was one of the prevailing parties, and that adverse parties who had lost this issue were not included in the discussion.

- One week later, the State again revealed that it knew the prevailing parties would submit their proposed FF/CL to the court, *without copying the opposing lawyers.* On March 4, 2013 the State sent an ex parte email to the court (PX-15), copied only to Mr. Trachtenberg (aligned with the State as a prevailing party on the Charter School issue). This email did three things: It sent the court proposed FF/CL concerning the claims of the Charter School plaintiffs, it sought to introduce some new reasoning, and it invited the court to suggest any other additions or deletions.

- At an August 20, 2013 hearing (PX-26), with all sides present, there was discussion about the FF/CL; no one questioned or objected to the process that all sides had been following.

14. At this time other things were happening. On August 2 Judge Dietz sent all parties a "working version" of the Judgment and the FF/CL (DX-47). He also scheduled a "working session" to discuss the judgment and FF/CL (PX-24). This email said, "It is the Court's intent that the Court will draft the Final Judgment, and the prevailing parties will carry the burden of finalizing the FOF/COL." On August 12, the State formally asked that all proceedings and correspondence with the parties be on the record (DX-42). And on September 12 the judge said future communications would be through his clerk and all proceedings on the record (DX-4). The State says this "revoked" any consent that it had given. But these events must be considered in light of the events in open court on December 16, when the judge told the lawyers that for Phase 2 he wanted to return to the Phase I procedures, as discussed in ¶ 16 below.

15. Would it have been preferable to be explicit on this matter, better to expressly raise the topic and discuss it in a hearing? Absolutely. When a court substantially deviates from the usual rules of procedure and ethics, it is best to have an express understanding and agreement. But the question in this recusal matter is not "best practices" but whether Judge Dietz's impartiality may be reasonably questioned.

## III. PHASE 2—Trial.

16. Phase 2 began when Judge Dietz reopened the evidence on June 19, 2013 to consider the recent actions of the Texas Legislature (session ended on May 27, 2013). On December 16, 2013 he emailed all the parties (PX-32) and said he intended to follow the same FF/CL procedures that were used in Phase 1—the parties would submit to him their proposed FF/CL without copying opposing lawyers. No one objected to this. No one questioned it or asked for clarification. Everyone acquiesced.

17. The evidence portion of Phase 2 effectively ended on February 7, 2014, although the court had not announced a ruling and still had (and has) jurisdiction and plenary power over the case. The evidence portion of this phase was clearly closed; the court allowed the parties to double-check and review their records to make sure that all their exhibits had been admitted and that nothing had fallen through the cracks. (2-7-14 hearing, PX-33, pages 72-76)

18. At a hearing on March 19, 2014 Judge Dietz reviewed the FF/CL procedures they had been following (PX-34). The State told the court that it had no objection to the FF/CL procedures that had been followed to that point. But, it said, the court has now ruled, and there is no longer a need to protect thought processes. Judge Dietz agreed and ordered the ISD plaintiffs to produce correspondence that had previously been confidential (PX-34, pages 35-40). Mr. Mattax (representing the State) said:

> [A]t the beginning of the second phase of the trial . . . I understood and acquiesced in the concept that for the plaintiffs to reveal their proposed findings of facts to the defendants prior to the trial occurring may reveal some of their thought processes, and therefore, I did not pursue that at that point. My position now would be that anything that's been shared with the Court after the trial wouldn't reveal that, and I think that the findings of fact that they have proposed to the Court can be made part of the record, the open part of the record (3-19-14 hearing, PX-34, page 38).

The judge then said: "[I]t's my intention from today forward to share what's been done

up to now and to give you what I do until I sign the findings of fact on a go-forward basis." (PX-34, page 40)

19. At the next hearing (May 14, 2014, PX-36) an ISD attorney suggested it was time to share the proposed FF/CL with all parties. Judge Dietz said immediately: "It was supposed to be effective March the 19th." The documents were sent to the State on the next day, May 15.

20. On June 2 the State filed this Motion to Recuse. (An amended motion with minor revisions was filed later with the court's permission.) As grounds, the motion says the ex parte communications show that Judge Dietz's impartiality might be reasonably questioned.

## IV. CONCLUSIONS AND FINDINGS.

The court makes the following findings and conclusions.

21. The State distinguishes between (a) "one-way submissions" without service and (b) "collaborative back-and-forth conversations" between judge and counsel. There certainly was discussion-correspondence-collaboration between the judge and his staff and the ISD plaintiffs, who were the prevailing parties on the bulk of the case. The evidence shows Word documents back and forth with edits and proposed edits, emails with discussion, and an occasional reference to a phone call.

22. On the matter of "one-way submissions" vs. collaboration in drafting FF/CL, the court makes the following observations. The State knew that the ISD plaintiffs would be drafting proposed FF/CL and sending them to the court. Submissions from a prevailing party cannot be expected to be neutral and dispassionate, especially in a case like this one. It seems implicit that this procedure contemplated some feedback in each direction, some back-and-forth discussion. All parties must have understood that there would be some give and take, such as: "Let's keep *A*, omit *B*, and modify *C*. Why do you suggest *D*? *E* seems better, but I am interested in your explanation for preferring *D*." Is it the better practice to be explicit when deviating from usual procedures? Absolutely! But, as said above, the inquiry in this recusal proceeding is not best practices but whether a judge's impartiality can be reasonably questioned.

23. In most cases, the kind of discussion in the previous paragraph would not be done ex parte. The procedure followed in this case was rare, and perhaps unique. But this is not

an ordinary case.

- There was a 13-week trial, followed by a 3-week trial.
- The court admitted 20,000 exhibits and considered approximately one million pages of evidence.
- The most recent draft FF/CL document is 272 pages and has 1252 FF and 118 CL. (These numbers may be a bit low because at the June 20 hearing one attorney mentioned 350 pages and 1600 findings.)
- In one email Judge Dietz mentions that he has spent two weeks editing one section (40-pages) of the FF/CL.
- One email from him to all the lawyers was sent at 8:40 p.m., a time when many people his age are getting ready for bed.
- The issues in this case are difficult, complex, and almost guaranteed to go to the Texas Supreme Court for a final decision.

24. It is not clear whether the State's lawyers consciously knew about, acquiesced in, and accepted "back and forth" discussions between the judge and the ISD plaintiffs, without the knowledge or participation of other parties. The record does not contain any *express* agreement by the State or anyone for ex parte *discussions or conversations*. But the State had some awareness of the procedure, as revealed in the two emails mentioned in ¶13 above. This is credible evidence that the State understood that all prevailing parties were submitting proposed FF/CL directly to the court, without copies to opposing lawyers, and that there would be some dialogue between prevailing parties and the court. The State points out that the ISD plaintiffs and the court had many more exchanges than these. Undoubtedly this is true, perhaps because the ISD issues were much larger and more difficult.

25. It appears that the parties and the judge had different understandings on whether there would be back and forth discussions between the judge and the prevailing parties on the issues they won. Judge Dietz's understanding was reasonable, and he acted in good faith. In light of the evidence, this court concludes it was reasonable for Judge Dietz to believe that everyone understood (and agreed to) the ex parte procedure, including the discussions with the prevailing parties about the FF/CL on their parts of the case.

26. The court expressly finds that when Judge Dietz and his staff engaged in discussions with the prevailing parties about the contents of his FF/CL, he believed that all parties had agreed to let such discussions take place. This belief was reasonable in light of all the circumstances—in particular, the scheduling orders, emails, and statements in court on the record.

27. The State suggests that Judge Dietz knew that ex parte FF/CL discussions were beyond the agreement of all the parties, and that he nevertheless went ahead with the ex parte procedure. The court rejects this suggestion. The evidence does *not* warrant the conclusion that the judge simply decided to communicate ex parte and to hide it from some of the parties, knowing that it was wrong. On the contrary, the ex parte discussions about FF/CL were done innocently, with the judge thinking there was agreement and no objection.

28. The evidence does warrant the conclusion—and this court concludes and finds—that Judge Dietz thought the ex parte procedure, including some discussion back and forth, was being done with the knowledge and acquiescence of all the parties. This court emphatically rejects any suggestion that Judge Dietz intentionally or knowingly engaged in ex parte discussions without thinking that the parties had agreed to allow this.

29. The recusal inquiry is not whether the ex parte FF/CL procedure was wise or proper, but whether the circumstances justify the conclusion that Judge Dietz's impartiality can be reasonably questioned. In retrospect, with the experience of this case in mind and with 20-20 hindsight, one might suggest that courts should periodically review the procedures being followed, with all parties present. When a court is deviating from the usual procedures with the consent of the parties, the best practice would be to revisit the matter periodically and be sure that everyone understands and continues to consent.

30. This court is not finding that the State waived its rights under Rules 18a and 18b. Instead the court finds that because there was substantial agreement and acquiescence by the State in the ex parte procedures that Judge Dietz followed, his impartiality cannot be reasonably be questioned within the meaning of Rule 18b. This court does not doubt that the State was surprised to learn the extent of the discussions between the judge and the ISD plaintiffs who prevailed on some highly important issues in the case. But the court finds that Judge Dietz believed that all parties understood the procedure and accepted it without objection. This court *emphatically rejects* any suggesgtion that Judge Dietz realized and knew that the State dissented from the ex parte procedure and that he nevertheless engaged in it, knowing that it was unethical.

31. The efficiency intervenors note that they have not participated in any of the "waiver" conduct that the respondents attribute to the State. The court does not rest this recusal ruling on waiver, but on its conclusion that Judge Dietz used the ex parte FF/CL procedures because he reasonably thought the parties understood them and consented, either expressly or implicitly, and his conduct does not justify recusal under Rules 18a and 18b.

32. The circumstances shown by the evidence do not justify recusal. The State's Motion to Recuse Judge Dietz is respectfully **denied**.

33. The State's request for further discovery is respectfully **denied**.

**SIGNED:** June 23, 2014

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**JUDGE DAVID PEEPLES**