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United States District Court,
S.D. New York.

Elsa GULINO et al., Plaintiffs,
v.
THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and the New York State Education Department, Defendants.

No. 96 Civ. 8414(CBM). | March 13, 2003.

Opinion

MEMORANDUM OPINION AND ORDER

MOTLEY, J.

***1** This court has received two letter requests, one from each defendant in this case. The first, from defendant Board of Education ("BOE" or "the Board") states that it intends to call two witnesses in its case in chief and requests permission to have one of them, Dr. Rudy Crew, testify telephonically from his home state of California. The only justification offered for this request is that "Dr. Crew ... lives and works in California, and ... it would be a hardship for him to have to travel to New York City to testify." Plaintiffs oppose this request.

Federal Rule of Civil Procedure 43(a) provides that "for good cause shown in compelling circumstances and upon appropriate safeguards, [a court may] permit presentation of testimony in open court by contemporaneous transmission from a different location." The advisory committee's note on that section, however, cautions that such permission should not be granted lightly:

> The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

Fed.R.Civ.P. 43 advisory committee's note (1996 Amendment). In light of that admonition, the Board's request is denied. If Dr. Crew is to appear as a witness, he will have to do so in court in the Southern District of New York.

The second request, from defendant State Education Department ("SED" or "the Department"), asks that the court reconsider its oral order that SED make an offer of proof for each witness it intends to call in the future. The court issued this order out of concern over the amount of repetition in the subject matter of SED's witnesses' testimony. For example, at least six testified at some length about the importance of a strong background in the Liberal Arts and Sciences for teachers. The Department has already called over fifteen witnesses, whose testimony has occupied three full weeks of trial time. In this request, it states that it will need approximately ten more days.

The Department argues that if the court is concerned with "waste of time, or needless presentation of cumulative evidence," it would be better to deal with those issues when they actually arise at trial than to require offers of proof in advance. Fed.R.Evid. 403. The court, however, is concerned that SED may call witnesses whose testimony is of no probative worth, as happened with Frank Arricale. *See* Trial Transcript at 2920-22. To bring such witnesses to court only to have them sent home without testifying is inconvenient for the witnesses and a waste of time for the court. For that reason, SED's request that the court reconsider its order is denied.

The offers of proof need not be lengthy; they must, however, identify at least one area of testimony to be elicited that has not yet been elicited. Since the parties will have submitted preliminary findings of fact, it should be relatively easy to identify such areas.

***2** Finally, the Department requests that, in the event the court declines to reconsider its order, it be allowed to submit the offers of proof to the court alone, since plaintiffs would derive an unfair advantage from advance notice of the subject of SED's witness's testimony. This request is granted. The offers of proof are to be submitted to the court by Wednesday, April 2, 2003.