IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C-11946

WILLIE EUGENE PITTS, *et al.*

versus

ROBERT FREEMAN, *et al.*

ORDER

[Filed Oct. 31, 1985]

The instant action is before the court on remand from the United States Court of Appeals for the Eleventh Circuit. A summary of the case's history is necessary for an understanding of its current procedural posture. The plaintiffs filed this lawsuit in 1968, claiming that defendants operated a racially segregated school system in DeKalb County, Georgia. In 1969, the court enjoined defendants from further racial discrimination, and set forth a plan to speed desegregation.

Plaintiffs again sought the court's assistance in 1976, claiming that defendants had violated the 1969 order. In the 1976 order, the court created a bi-racial committee to advise the school board and approve zone changes and school site purchases. The court also made certain modifications in the majority to minority (M-to-M) program.

Later orders were entered in 1977 and 1979. The earlier order concerned a zone change; the latter the M-to-M program. In both decisions, the court noted that

within the county the housing patterns were changing rapidly: blacks were moving in and white were moving out. This pattern in turn caused racial transition in the schools.

The next action taken in the case concerns the remand before the court. In 1983, plaintiffs sought an injunction claiming *inter alia* that the use of portable classrooms at Redan High School and the proposed building of a new school (Redan II) within the Redan attendance zone promoted segregation. The portable classrooms and Redan II were planned to alleviate severe overcrowding within the zone. Redan II would be an 8th and 9th grade school.

The court held a trial on the merits on February 1, 2, 3, 6, and 10, 1984. At the conclusion of the trial, the court made oral findings that defendants did not intend to discriminate and that Redan II did not have an adverse impact upon integration. (Tr., Vol. V, at 824). The court also found that plaintiffs' proposed alternatives, the "Rainbow" and "Lithonia" or "Stolee" plans, would create more segregation than currently existed. (*Id.*)

On February 22, 1984, the court entered written findings of fact and conclusions of law. Noting that the school system had been converted from dual to unitary in 1969, the court determined that plaintiffs had to prove defendants' intent to discriminate. Plaintiffs did not meet this burden. Although the order did not state specifically that Redan II had a nonsegregative effect, the court's findings indicated that such was the case.

The Eleventh Circuit reversed and remanded the case on March 22, 1985. *Pitts v. Freeman*, 755 F.2d 1423 (11th Cir. 1985). Noting that the district court had stated that the DeKalb school system was unitary, the appellate court cited a line of Fifth Circuit cases establishing the procedure to be followed in concluding school desegregation cases. A previously segregated dual system does not become desegregated automatically because a

constitutionally acceptable plan is implemented. The ultimate goal is achievement of a unitary system. To conclude a case, the district court must hold a hearing to determine if the system is unitary. Plaintiffs should receive notice to allow them an opportunity to show the court why jurisdiction should be retained. Since the case was not being terminated, the district court had not followed this procedure. *Id.* at 1426.

The appellate court noted that as defendants pointed out, the use of the word "unitary" in the district court's order may not have referred to that status which closes a case, but may have meant that a constitutionally acceptable plan was implemented. Nonetheless, plaintiffs did not have to prove discriminatory intent, which is required only after a finding of full unitary status. *Id.*

The court of appeals did not suggest that a hearing be held to determine whether the system is unitary. Rather, it apparently assumed that unitary status had not been accomplished. "Until the DeKalb County School System achieves unitary status, it has an affirmative duty to eliminate the effects of its prior unconstitutional conduct." *Id.* This duty specifically includes new school construction, to insure that it does not serve to perpetuate or reestablish the dual system. *Id.* The 1969 decree applied these duties to the county. *Id.* at 1426-27. "Therefore, the . . . Board . . . has an affirmative duty to solve the Redan High School overcrowding problem in such a way that it furthers desegregation and helps eliminate the effects of the previous dual school system." *Id.* at 1427. The court went on to state that in light of the county's affirmative duty to desegregate, it was error to hold that plaintiffs had to prove discriminatory intent. "Until the . . . System . . . achieves unitary status, official action that has the *effect* of perpetuating or reestablishing a dual school system violates the defendants' duty to desegregate." *Id.* (emphasis in the original).

The court of appeals thus remanded "for the district court to do what it expressly declined to do before: examine the segregative and desegregative effects of the defendants' actions." *Id.* The appellate command does not require the district court to select the most desegregative alternative. *Id.* "[T]he district court should study . . . alternative solutions to the overcrowding problem to find the solution that best solves the problem in light of the valid educational concerns and other practicalities voiced by the defendants if the system is attempting to achieve greater desegregation." *Id.* If progress on Redan II has mooted an injunction against its construciton, the court possibly could enjoin use of the facilities as planned. *Id.* Finally, the appellate court stated that some of the district court's findings argued in favor of defendants' plans, but that erroneous standards were used.

The court held a telephone conference with counsel for plaintiffs and defendants on July 3, 1985. The court requested that the parties comment as to the course of action to be taken in view of the remand. In its letter of July 12, 1985, defendants stated that the court should not receive additional evidence. At the trial, the parties had presented evidence of Redan II's effects, as well as that of plaintiffs' alternatives. Defendants therefore believed that the court should determine specifically the segregative effect of these alternatives.

Plaintiffs' letter of July 15, 1985 noted that Redan II is almost complete. Therefore, the court should determine how the school must be used. Plaintiffs offered two suggestions for the use of Redan II. The first was for an 8th grade school with students transferring across attendance zones. Its second option was for a 7th and 8th grade school. This plan also would require students from different zones to attend other schools.

Plaintiffs presented no evidence and little explanation of these options. It requested that defendants analyze the

alternatives. At that point, plaintiffs could respond to the analysis, and the court could rule on the alternatives.

After reviewing the above mentioned letters, the court decided that a hearing would be helpful. Accordingly, a hearing was held on August 23, 1985, with counsel for all parties present. Plaintiffs suggested that the court redraw attendance lines to conform with their new alternatives. They claimed that such action would provide a greater desegregative effect than defendants' proposal, because more schools would be included.

Defendants asserted that the court should reanalyze the record and compare their plan with plaintiffs' old alternatives. Additionally, they presented charts showing the percentages of black enrollment in the elementary and secondary schools covered by plaintiffs' proposals, as well as a comparison of the new proposals using fall 1984 actual enrollments. The charts showed that black enrollment is rising in every cited school. The comparison indicated that the plaintiffs' plans would increase black enrollment in Redan II to make it a majority black school.

Plaintiffs informed the court that they had prepared a more complete description of their plans. They requested some time to present their own analysis, which the court granted. Defendants were given an equal amount of time to respond. Additionally, defendants agreed to provide the court with the actual 1985 enrollment figures, which would be available around September 20, 1985. In answer to the court's question, plaintiffs averred that they agree to the accuracy of these numbers.

Plaintiffs filed a letter with a brief analysis of their plans.[1] Because plaintiffs had not filed a brief, defend-

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[1] Local Rule 215-2(b), NDGa., restricts letter communication to the court. In the instant case, both sides have been filing lettrs instead of motions or briefs. Therefore, the court puts the parties on notice that any further communication with the court should

ants informed the court that they were not going to respond. Defendants instead filed the actual 1985 figures. Plaintiffs have not replied to or commented upon these figures. Therefore, the court has before it the original evidence in the case, plaintiffs' brief description of its plans including its estimates of attendance, and defendants' charts as presented at the hearing and as updated in its September 24, 1985 submission.

Obviously, the court would prefer more information to evaluate the alternatives. Unfortunately, the court was not given this data, and thus must base its decision upon the information before it.

First, the court concludes that it must evaluate and compare defendants' plan and plaintiffs' new alternatives. The previously proposed plans assumed that Redan II would not be built. With its construction virtually complete, however, these plans lose their efficacy. Plaintiffs agree with this observation. Additionally, the Eleventh Circuit held that the district court on reconsideration need not enjoin the planned expansion of Redan High School if construction of the facilities has mooted such action. "[H]owever, the defendants will proceed at their own risk. One result could be the enjoined use of the facilities as planned." 755 F.2d at 1427. The progress of construction has mooted the option of enjoining the building of Redan II. Therefore, the court must consider whether defendants' plan should be enjoined in favor of plaintiffs' new alternatives.

As the court reads the Eleventh Circuit's mandate, the next step is to determine whether defendants considered integration in formulating their plan, and to "examine the segregative and desegregative effects of the defendants' actions." 755 F.2d at 1427. To complete this task,

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be my way of briefs or motions and not letters. Defendants may continue to file their annual reports with the court as they have done in the past.

the court can look to some of the evidence presented in the trial which discussed the effect of the Redan II plan. Defendants have supplemented the evidence with actual 1984 and 1985 enrollment figures.

The reason behind defendants' plan is overcrowding in the Redan attendance zone. No one disputes that Redan High School is overcrowded. Defendants' solution was to build Redan II as an 8th-9th grade facility. Plaintiffs concede that Redan II would relieve overcrowding, but allege that it merely was a means of keeping Redan majority white and surrounding districts majority black. They claim that Redan II's effect would be further segregation, not integration.

The evidence presented at trial demonstrates that defendants took desegregation into consideration when deciding upon the Redan II plan, and that their alternative does not have a segregative effect. Instead, it aids integration. First, it opens up space for M-to-M transfers to Redan, which previously had not existed. Dr. Armor, defendants' witness, testified that many black students in DeKalb County had sought M-to-M transfers to other white schools. He did not believe that Redan would be an exception. More integration within Redan thus would occur. Additionally, the M-to-M openings would attract black students from neighboring majority black schools, which would increase desegregation in those areas.

At trial, the evidence indicated that the Redan zone had a growing indigenous black population. The number of black children in that area's schools was predicted to rise and approximate the county wide school system's white/black ratio. At the time of trial the school system was 38% black. Currently, it is 40% black. Redan's black population is growing. The area is developing into a stable naturally integrating community. To tamper with it could well upset the racial balance.

Defendants' 1984 and 1985 enrollment figures validated its trial evidence. In 1984, the percentage of black

students in Redan High School rose from 16% to 17.1%. The 1985 figures showed an increase to 22.3%. These numbers bear out predictions of increased black growth in the Redan area. The growing black school population is indigenous, because no M-to-M transfers are possible.

Defendants also used the recent enrollment figures to calculate the proposal's effect on racial composition of Redan II. Under the plan without M-to-M transfers, the 1984 black percentage would be 19%; the 1985 percentage is 24%. With 100 M-to-Ms, blacks will make up 31% of the student body. Two hundred M-to-Ms would result in a 36% black population. Because the current black ratio of white to black children countywide is 60/40, the M-to-M transfers will move Redan closer to the ideal rate. Even without M-to-Ms, the growing indigenous black population will result in more of an ideal racial balance in Redan schools.

The court also has examined some effects of Redan II that could be considered segregative. Redan still will be a majority white school, and Southwest DeKalb and Towers will be majority black schools. This flaw is not fatal, however. The main effect of Redan II will be to alleviate overcrowding, to accommodate growing black school population, and to provide space for M-to-Ms. This in turn will further integrate these schools from which the M-to-M students come.

The evidence therefore indicates that defendants have considered Redan II's effect upon desegregation, and have included integration as an objective in their planning. Redan II will have an overall positive desegregative effect. It will not reestablish or perpetuate a dual school system. Therefore, the court moves on to the next step: the analysis of the parties' alternatives to the overcrowding to find the solution that best resolves the problem, taking into account valid educational concerns and practicalities. 755 F.2d at 1427. To perform this study, the court first will discuss plaintiffs' plans to ascertain whether they are

segregative or desegregative. Next, the court will compare the three plans to determine which will best rectify the overcrowding situation with desegregative effect.

Plaintiffs' first option would make Redan II an 8th grade school. Eighth graders from Redan, Towers, and Southwest DeKalb would transfer into the new school. Two hundred fifty Redan High students from the upper grades would go to Southwest DeKalb High, and 175 would attend Avondale High. The plan contemplates redrawing of attendance zone lines; plaintiffs, however, did not present the exact location of the new lines. This alternative would increase racial balance at the new school, relieve overcrowding at Towers and Redan, provide more racial balance at Southwest DeKalb, and retain the 9th-12th grade curriculum.[2]

A close look at the first option indicates that it probably would not achieve its desegregative purpose. Based on 1984 figures, plaintiffs estimated that 55% of the new school's population would be black. Defendants used the 1984 and 1985 enrollment figures to determine that the

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[2] Plaintiffs submitted the following list of schools impacted under the 8th grade plan:

	Before	8th Grade Plan
Towers High School	66% Black 64 over capacity	57% Black 76 under capacity
Southwest DeKalb High School	93% Black 100 under capacity	74% Black at capacity
Avondale High School	67% Black 168 under capacity	61% Black at capacity
Redan High School	21% Black 841 over capacity	21% Black at capacity

The court notes that plaintiffs have referred to Redan II as the Miller Grove School. For ease of reference, the court will continue to use the term Redan II.

percentage of black students in Redan II would be 56%. Thus Redan II, located in an area which has an indigenous growing black student population and is approaching the "ideal" racial mix, would be transformed into a majority black school. This plan would lower the black population in Towers and Southwest DeKalb, but these schools admittedly would remain majority black.

Another problem with plaintiffs' 8th grade option is the line redrawing. As stated earlier, plaintiffs did not illustrate their new attendance zones. The residential areas within Redan that are contiguous to Towers and Southwest DeKalb tend to be black. Redrawing Towers and Southwest DeKalb lines to include contiguous portions of Redan thus would add more blacks to the former zones. Additionally, Redan would become more white. Even a new district created from contiguous portions of the three zones would be majority black. This result surely does not further integration.

The only way to include white population centers within Towers and Southwest DeKalb would be to create non-contiguous districts. Such blatant gerrymandering would result in children having to travel past their old schools a greater distance to their new schools. Additionally, it would ruin the Redan area's natural desegregation process.

Another difficulty with plaintiffs' first option is the inclusion of Avondale for relief of Redan's overcrowding. As the court stated in its oral findings at trial, whether Avandole and Redan are contiguous is questionable. (Tr, Vol. V, at 825). The two zones touch each other only at one point. Children transferred from Avondale to Redan, and vice versa, would have to travel through the Towers district. As the court previously found, such a situation is untenable.

An additional concern is which high schools the Redan II students will attend. Plaintiffs did not specify whether

students would return to their original areas after 8th grade. If so, little will have been accomplished by plaintiffs' option except disruption.

The more likely plan would have these students attending Redan High School, as part of the new attendance zone. If this occurs, Redan High would become a majority black school. Plaintiffs' estimates and predictions do not take into account the growing number of indigenous blacks in the Redan area. Their plan would disrupt this natural desegregative tendency, a trend which experts agree is a good way to integrate. (*See, e.g.*, test. of Dr. Stolee, Tr, vol. II, at 190-91; test. of Dr. Armor, Tr, vol. III, at 388.)

Plaintiffs' 8th grade plan also would shut off M-to-M transfers into Redan. The 8th grade school would be majority black, thus preventing black students from transferring in. The high school would be majority white, at least at first, but at capacity. Dr. Armor estimated that numerous blacks would want to transfer into Redan, based upon the experience of other DeKalb schools.

Plaintiffs' estimates also do not provide for the phenomenon of "white flight." At trial, Dr. Armor described white flight in the school desegregation context as the failure of white students to attend the school to which they have been assigned manditorily. (Tr, vol. III, at 356-57). Referring to plaintiffs' original plans, Dr. Armor testified that from 25 to 50% of the white students whom the district transferred probably would not attend their new school. (Id. at 441-44). These figures were based upon studies conducted by Dr. Armor in other cities.

No estimates are available for plaintiffs' present alternatives, which were formulated after trial. Nonetheless, plaintiffs should have, but apparently did not, take into account the possibility of white flight. If it occurred at the rates predicted by Dr. Armor for the other plans, the desegregation value of plaintiffs' current op-

tions would be diminished. In summary, plaintiffs' 8th grade option may lead to greater segregation, and would block the natural integrated growth of the Redan area.[3]

Plaintiffs' second option is a 7th and 8th grade school including 7th grade students in the elementary schools of the following attendance zones: Rainbow, Fairington, Canby Lane, Woodridge, Redan (portion), and Mainstreet. Eighth grade students at Towers, Southwest DeKalb, Redan, and Lithonia High Schools also would attend Redan II. Additional, 175 Redan upper grade high school students would transfer into Avondale High and 133 would attend Southwest DeKalb High. This option would result in an integrated new school, relief from overcrowding at Rainbow, Mainstreet, and Redan Elementary Schools, and Towers, Lithonia, and Redan High Schools. Additionally, a special incentive grant from the State might be available.[4]

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[3] The court is uncertain how Redan High School would remain 21% black if Redan II is 56% black and would send its students to Redan High. Additionally, 425 children will go from Redan High to Southwest DeKalb and Avondale Highs. These children must be white to lower the latter schools' black population. Subtracting these students from Redan's white population will increase the proportion of blacks to whites, assuming that the number of black students remains constant. Therefore, plaintiffs' assertion that Redan High will remain 21% black after its plans are put into effect can be correct only if a proportionate number of black children leave Redan High.

[4] Plaintiffs presented the following list concerning the effect of their 7th-8th grade plan:

	Before	7-8th Grade Plan
Redan High School	21% Black 841 over capacity	21% Black at capacity
Southwest DeKalb High School	93% Black 100 under capacity	87% Black at capacity
Avondale High School	67% Black 168 under capacity	61% Black at capacity

[Continued]

Plaintiffs' second suggestion creates problems similar to their first option. The 1984 enrollment figures indicate that blacks would amount to 45% of Redan II's students. In 1985, black enrollment would rise to 47%. These figures would exceed the ideal county-wide balance. The projected continuing indigenous black growth could lead to a majority black school in a few years. This plan also would lower black proportions in surrounding areas. Yet, these other schools' basic racial composition would not be altered; they would remain majority black.

Plaintiffs attached a map which showed the proposed zone for 7th graders. The court is not certain whether the map indicates from where the 8th graders would come, or which Redan High students will transfer into other areas. The latter students apparently would have to be white to reduce Avondale's and Southwest DeKalb's

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[4] [Continued]

Towers High School	66% Black 64 over capacity	63% Black 24 over capacity
Lithonia High School	37% Black 231 over capacity	37% Black 190 over capacity
Rainbow Elementary School	97% Black 137 over capacity	
Fairington Elementary School	65% Black 81 under capacity	
Canby Lane Elementary School	93% Black 62 under capacity	
Woodridge Elementary School	17% Black at capacity	
Redan Elementary School	15% Black 329 over capacity	
Mainstreet Elementary School	18% Black 158 over capacity	

Plaintiffs have not yet supplemented their elementary school figures with 1985 enrollment data. The court therefore cannot determine how plaintiffs' plan will affect the racial composition of these schools.

black percentages. Thus they would have to come from areas of Redan which are not contiguous to the latter zones. As stated in the discussion of the 8th grade plan, such gerrymandering would result in children travelling past their old schools. As with the 8th grade plan, the inclusion of Avondale High also poses the problem of non-contiguous zone formation.

An additional drawback of the 7th and 8th grade plan is its inclusion of Lithonia, which all parties have conceded is a stable naturally integrated community. Its proportions of black students approximates the county-wide figure of 40% To include Lithonia would upset its racial balance.

As with plaintiff's first option, white flight could diminish severely the second plan's supposed integrative effect. Additionally, Redan II would be a majority white school, but just barely. Although it could accommodate M-to-M transfers, the areas's continued black growth indicates that soon Redan II will be a majority black school.[5] The 7th-8th grade plan would upset the Redan area's naturally occurring integration.

Plaintiffs' main argument is not so much that defendants' option is segregative, but that defendants should do more. In other words, defendants should use Redan's overcrowding to decrease black population at numerous other schools, some of which are contiguous. As the Eleventh Circuit noted, the court need not pick the most desegregative option available. 755 F.2d at 1427. After reviewing each alternative, however, the court concludes that defendants' plan provides more long term desegregative effect. Redan is becoming a naturally integrated community. The 1985 enrollment figures bear out Dr. Armor's predictions on this matter. Plaintiffs' options would disrupt that trend. In the words of Dr. Stolee, "if

[5] Which high school Redan II students will attend also is a question under this option. For an analysis of this subject, as well as of white flight and M-to-M, see the discussion *supra* at 10-13.

it ain't broke, don't fix it." (Tr. vol. II, at 190). (discussing Lithonia).

Plaintiffs' plans would increase the black populations of Redan II and the high school. These schools, along with Towers, Southwest DeKalb, and Avondale, would be majority black. The plans are not defined clearly. They do not account for possible white flight. M-to-M transfers would be lessened or eliminated.

In return for the problems caused by plaintiffs' plans, some surrounding schools will have a lower percentage of black students. This is a positive desegregative result. It is not enough, however, to override the negative implications of transforming Redan from a naturally integrating area into a majority black resegregated zone. This especially is true because the other schools will remain majority black.

Plaintiffs also protest that defendants' plan will place the burden of integration upon black students by way of the M-to-M program. A plan which depends upon voluntary desegregation has the advantages of allowing individuals to make their own choices and not to feel as though important decisions have been taken out of their hands and forced upon them. Obviously, if voluntary desegregation does not or cannot accomplish its goals, a mandatory plan will be necessary. In the instant case, defendants' plan, which is voluntary, accomplishes its desegregative objectives.

First, the court has determined on more than one occasion that recent racial school proportions are due to housing patterns rather than to a dual system. Second, voluntary desegregation by way of M-to-M transfers has worked well. Dr. Armor testified at trial that M-to-M transfers have increased the number of blacks at majority white schools in the county. He believed that the same pattern would be repeated in Redan. Defendants estimated that M-to-M transfers could increase Redan II's black population to as much as 36%. M-to-M trans-

fers also could provide space at the majority black schools for white M-to-M transferees.

Additionally, white flight may occur in a mandatory plan. Of course, the possibility of white flight is not enough to eliminate a desegregation plan. It should be considered, however, when comparing various alternatives. Plaintiffs did not take potential white flight into account. Thus, their calculations of the black percentages at Towers, Southwest DeKalb, and Avondale could be too low. Even without white flight, these schools still would be majority black under plaintiffs' plans. Finally, the Redan schools could be converted into majority black schools. This would ruin Redan's progress toward becoming a stable, naturally integrating community.

These factors demonstrate that defendants' plan of voluntary integration has a good chance of success. Conversely, the negative effects of plaintiffs' mandatory desegregation plans indicate that their alternatives will not promote integration as much as plaintiffs allege.

The defendants have acted in good faith to institute a solution to Redan's overcrowding that will increase integration. Therefore, plaintiffs' plan are not necessary: their integrative effect is no greater than, and actually is less than, that of defendants' alternative. Additionally, plaintiffs' options raise more valid educational concerns. First, they are more disruptive, involving the transfer of students who may not wish to attend another school. Second, defendants reject as educationally unsound the idea of placing 7th graders with students in the higher grades. A third factor is that defendants believe that separation of eighth and ninth graders from the upper classes would be beneficial. Although the court does not presume to set educational policy for the schools, defendants' educational concerns appear valid and reasonable.[6]

[6] Plaintiffs mention that the 7th-8th grade option possibly could garner state funds, but did not discuss this idea further. Defendants did not respond. Additional state funding could be a positive educational factor. Without more information, however, the court cannot determine the likelihood of such funding, or what its effect would be.

Additionally, plaintiffs noted that their plans would leave 9th-12th grade curricula intact. They did not point out why this would be beneficial. Assuming that it is, defendants have stated that separating 9th graders from older students also would have positive effects.

In summary, the court has analyzed the alternatives and has balanced them in light of their segregative and desegregative effects and valid educational concerns. The court finds that the long term effects of defendants' plan will be to increase desegregation, and that plaintiffs' plans will increase segregation in the long run. An important factor in this determination is Redan's apparent change into a more integrated community. Plaintiffs' plan would disrupt this transformation by making Redan High and Redan II into majority black schools. Finally, defendants have legitimate educational reasons for implementing their plan. On balance, defendants' alternative will foster integration and accommodate educational needs.

In the instant case, defendants have considered integration as an objective. As the court noted in its oral findings at trial, defendants should continue to take desegregation into account in its future school policy decisions. In this way, defendants can fullfill their mandate to solve school problems in a way that furthers desegregation. 755 F.2d at 1427.

The court denies plaintiff's request to enjoin implementation of defendants' plan.

IT IS SO ORDERED this 31st day of October, 1985.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge