

before the United States Supreme Court. On December 19, 1990, this court ordered that

no further funds be allocated or committed by defendants without prior report to the attorneys for the plaintiffs and the intervenors, and subsequent approval of this court, unless otherwise ordered.

On March 31, 1992, the Supreme Court ruled on the case, holding that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." Freeman v. Pitts, 112 S. Ct. 1430 (1992). In so doing, the Supreme Court reversed the decision of the Eleventh Circuit and affirmed the decision of this court. Noting that neither party had challenged the trial court's retention of supervision over the area of "quality of education," the Supreme Court did not address the issue except to approve the court's use of equitable discretion in withdrawing its control over some areas while retaining supervision of other areas. Id. The case was remanded to the Eleventh Circuit to "determine what issues are open for its further consideration." Id. On December 7, 1992, the Eleventh Circuit affirmed this court's order of June 30, 1988 and remanded the case to this court to consider "faculty and staff assignments ... resource allocation, the quality of education ... and the good faith commitment of the school district." Pitts v. Freeman, 979 F.2d 1472, 1473 (11th Cir. 1992).

On October 29, 1992, defendants filed their motion for leave to use the bond funds. On November 9, 1992, plaintiffs responded with

their motions for a preliminary injunction and to strike defendants' motion, and plaintiff-intervenors filed a response to defendants' motion. Also on November 9, 1992, the court held a hearing in chambers on these matters. Following the hearing in chambers, all parties filed supplemental briefs. Following the Eleventh Circuit's remand, all parties filed additional briefs. Finally, on June 1, 1993, the court met in chambers with attorneys for all parties regarding these and other outstanding matters.

Defendants Motion and Arguments

Defendants' motion seeks the court's permission to use the authorized bond funds to build three new schools, Miller Road Elementary School, Stephenson Junior High School, and Stephenson High School. Defendants argue that overcrowding of predominantly black schools will be alleviated by the proposed construction and that, because of state law regarding notice to voters of the purposes for which the sale of bonds is being authorized, bond funds can only be used for those purposes included in the Statement of Intention presented to the voters.¹ Defendants also argue that overcrowding in the affected schools, exacerbated by the delay caused by the freeze on using the approved bond funds, as well as a favorable bond market make the issuance and sale of the bonds imperative at this time. Finally, defendants argue that, although the "freeze" agreement and

¹ The Statement of Intention presented to the voters in 1989 indicated that the funds were to be used, among other items, to construct an "Elementary school south of I-20 and southeast of I-285," a "High school in [the] Stephenson Road area," and a "Junior high school in [the] Stephenson Road area;" for "Improvements" and other "Renovation ... or Modernization of Existing Facilities;" and for "Computer and Educational Equipment."

order do not prohibit the issuance of the bonds, federal law, which requires that 85% of the funds be expended within three years of the sale of the bonds, constrains the sale of the bonds until the proceeds can be committed.

Plaintiffs' Motions and Arguments

In response to defendants' motion, plaintiffs filed a motion to strike defendants' motion because it is not supported by affidavits as required by Local Rule 220-1(a)(1) and because defendants did not comply with the December 19, 1990 court order. Plaintiffs also filed a motion for a preliminary injunction which would, essentially, expand the limitations of the December 19, 1990 court order by enjoining defendants from taking various specified actions without providing all parties complete data regarding the proposed action at least one month prior to submitting the proposed action to the court.² Plaintiffs argue that they have encouraged defendants to sell the remaining bonds at any time defendants deem most favorable, but plaintiffs object to approval of expenditure of the funds because defendants did not report the proposed use of funds to plaintiffs prior to filing the motion with the court. Plaintiffs argue that factual allegations about losses of funds, projections of populations, and actions of the "Mills plaintiffs" prejudice plaintiffs ability to respond because they are not supported by affidavits.

In arguing for a preliminary injunction, plaintiffs allege that defendants continue to "unilaterally, without report to the

² Although plaintiffs' motions also alleged various discovery disputes, the court dealt with those allegations in its order of November 10, 1992.

courts, plaintiffs, intervenors, or amici," act in violation of court orders by buying and selling land, constructing and closing buildings, changing attendance zones, modifying program requirements, purchasing and moving temporary classrooms, and "generally behav[ing] as if no court order is in effect, and no responsibility to inform or obtain permission exists." Plaintiffs also argue that they meet the four tests necessary for granting injunctive relief: (1) they are likely to succeed on the merits because defendants are acting in violation of the court's 1988 directive that all resources be distributed equally to all students, (2) they are suffering irreparable injury because black children are receiving an unequal and unconstitutional education, (3) the injury to plaintiffs outweighs the harm to defendants because defendants will suffer no harm by being compelled to obey the various court orders, and (4) public interest is best served by ensuring that all parties are treated equitably, that multiple changes are not required because of hasty and unscrutinized actions, and that resources are not committed "wastefully and needlessly and irrevocably."

Plaintiff-Intervenors' Arguments

Plaintiff-intervenors agree that the overcrowding is severe and argue that it is having a disproportionate impact on black students. Although plaintiff-intervenors support the immediate sale of the remaining bonds, they argue that there are better ways to alleviate the overcrowding than those proposed by defendants. Expressing concern about the use of mobile classrooms - trailers - which negatively impact the quality of education, plaintiff-

intervenors argue that the number of trailers at a school should be taken into consideration in determining the severity of overcrowding. Plaintiff-intervenors argue that adherence to the usage stipulated by the Statement of Intention need not be as strict as defendants suggest and provide specific instances of discrepancies between actual expenditures to date and expenditures stipulated in the Statement of Intention. Arguing that priority in solving the overcrowding problems should be given to areas where overcrowding is the greatest and to areas where overcrowding currently exists, plaintiff-intervenors point out that the worst overcrowding currently exists in elementary schools. Plaintiff-intervenors also express concerns about the proposed junior and senior high schools: 1) plaintiff-intervenors have received no information about the junior high school; 2) both the junior and senior high schools, to be built adjacent to each other, will be "half empty when they open;" and 3) the relief to be provided by Stephenson Junior High School will have a negative racial impact.³ Plaintiff-intervenors recommend: 1) that only one large building or two small adjacent buildings be built in the Stephenson Road area to serve as a combined junior/senior high school; 2) that an elementary school be built at the Miller Road site; and 3) that any remaining funds be used to build elementary schools at the Marbut Road site, the Misty Waters site, or adjacent to Miller Grove Junior High School or to build additions to existing schools. Plaintiff-intervenors argue

³ Miller Grove Junior High School, 91% black, will still be overcrowded after Stephenson Junior High School opens whereas neither Stephenson Junior High School, 58% black, nor Stone Mountain Junior High School, 60% black, will be overcrowded.

that all of these recommendations would be consistent with the Statement of Intention. Finally, plaintiff-intervenors point out that defendants have failed to mention other projects which were included in the Statement of Intention. They argue that all items should be explained before use of the bond funds is approved.

After the Eleventh Circuit decision remanding the case to this court, plaintiff-intervenors filed a supplemental brief in which they argue that the court needs to continue to supervise the building of new facilities because of the Fourteenth Amendment requirement that any action with a discriminatory impact must be justified by a nonracial explanation. Plaintiff-intervenors allege that the proposed building program will have a discriminatory impact and that defendants have not offered a nonracial explanation. Plaintiff-intervenors also point out that the Supreme Court stated that the district court may retain remedial supervision of even areas in which unitary status has been achieved if those areas have a synergistic effect on areas in which unitary status has not been reached. Plaintiff-intervenors suggest that this court make specific findings and conclusions as to the synergistic effect of all areas, not just the student assignment and faculty assignment areas specifically mentioned by the Supreme Court.

Both plaintiffs and plaintiff-intervenors argue that the court cannot release defendants from supervision in any area until it has evaluated the relationship between all of the Green factors to determine which are inter-related. Although not specifically stated, both groups of plaintiffs suggest that the synergistic relationship

between the factors needs to be briefed, and possibly argued, after time for discovery, that the court make specific findings of fact regarding the relationship, and that the court continue to supervise the use of bond funds until the relationship of various factors has been specifically determined.

Defendants' Arguments in Response to Plaintiffs and Plaintiff-Intervenors

Defendants argue that they have not violated the December 19, 1990 order as they have neither allocated nor committed funds and they have communicated with plaintiffs about the bonds. As for the alleged violations of Rule 220-1(a), defendants point out that the motion also violates the timing requirements of Rule 220-1 but indicate that in a 23 year old case such violations are unavoidable. Defendants not only state that they understood that their motion could not be decided solely on affidavits, they argue that the essential facts are conceded by all plaintiffs: severe overcrowding exists, construction of new school buildings would remedy the overcrowding, a favorable bond market currently exists, and lead time is needed before the bonds can be sold and the buildings completed. Defendants reassert that, under the Georgia law, the Statement of Intention is binding as to how bond funds may be spent. They argue that the appropriate time to object to the bond issue or to the validity of any project in the Statement of Intention was May 22, 1989, at the bond validation hearing. Finally, defendants suggest that plaintiff-intervenors are merely trying to second guess the decisions of the school board and they argue that educational decisions should be made

by the school board and not by the court.

After the Eleventh Circuit decision remanding the case to this court, defendants filed a supplemental brief in which they argue, citing the Supreme Court decision in this case, that this court maintains only supervisory, not remedial, powers over the areas of student assignment, physical facilities, extracurricular activities, and transportation. Because the order regarding the use of bond funds was imposed before the Supreme Court decision, defendants argue, the legal basis for the order no longer exists. Because the purpose of the construction, to relieve overcrowding, is unrelated to race; because the majority of the students who will benefit from the construction are black; because "[t]here is no constitutional right to have school authorities build a school in one place rather than another;" because, as this court stated in its order of October 6, 1977, "the only question before the court is whether the plan proposed by a duly elected school board is constitutional;" and because the use of the bond funds "in accordance with the requirements of Georgia law in no way would affect Defendants' remedial obligations in this court," defendants argue that the December 19, 1990 injunction should be lifted, the bonds should be sold, and the funds should be used to build the schools proposed by the DeKalb County School System.

LEGAL ANALYSIS

In its order of March 23, 1992, the Supreme Court held that a court may consider "quality of education" in determining whether a school system has achieved unitary status sufficient for the court to relinquish supervisory control. Freeman v. Pitts, 112 S. Ct. 1430

(1992). In remanding the case to the district court, the Eleventh Circuit specified several areas to be considered in determining whether continued supervision of the DeKalb County School System was necessary, including "the quality of education." Pitts v. Freeman, 979 F. 2d 1472 (11th Cir. 1992). As this court has, as yet, made no finding that the quality of education is sufficiently uniform to relinquish supervisory control of the DeKalb County School System, the court maintains supervisory control of that area. All parties agree that overcrowding impacts the quality of education and that the bond issue was passed for the specific purpose of relieving overcrowding in the DeKalb County School System. It is, therefore, not necessary for the court to address any of the Green factors discussed in the order of June 30, 1988, which was the subject of the appeal to the Eleventh Circuit and the Supreme Court, to determine that the court still has jurisdiction to supervise the use of the bond funds.

Georgia law requires that the purpose of a bond issue be advertised to the public prior to the referendum to determine whether the bonds shall be issued. O.C.G.A. § 36-82-1(b). The statement of intention is binding in the expenditure of the bond funds "unless the governing body of such counties uses such bond funds for the retirement of bonded indebtedness." O.C.G.A. § 36-82-1(d). If the county determines that a project described in the statement of intention is not necessary, the county "shall use such bond funds for the payment of all or any part of the principal and interest on any bonded indebtedness of such county then outstanding." Id. Thus, once a bond issue has been approved by the citizens of a county, use of the

funds from that bond issue is limited to the purposes described in the statement of intention for the bond issue or to reduce the bonded indebtedness of the county. The funds may not be used for projects not described in the statement of intention.

The Statement of Intention presented to the voters prior to the approval of the bond issue at question indicated that the funds were to be used, among other items, for an "Elementary school south of I-20 and southeast of I-285," a "High school in [the] Stephenson Road area," and a "Junior high school in [the] Stephenson Road area." The three schools proposed in defendants' motion for leave to use bond funds fit the description in the Statement of Intention. Although defendants had originally planned to construct the proposed elementary school at a different site, the Miller Road site fits the description in the Statement of Intention and is, therefore, permissible under Georgia law.

The court is concerned about the severe overcrowding in parts of the DeKalb County School System. Although the court believes that other sites might have been chosen to provide more effective relief to the most severe overcrowding, the court finds that the proposed buildings will relieve overcrowding in severely impacted areas and in schools which are predominately black. The court further finds that, as the Statement of Intention specifically stated that funds would be used for a junior high school and a high school in the Stephenson Road area, funds intended for the junior and senior high schools may not be used instead to build more elementary schools. Finally, the court finds that any further delay in approving the use

of bond funds will merely exacerbate the overcrowding problem.

As suggested by plaintiffs, Local Rule 220-1(a) requires that "when allegations of fact are relied upon, [a motion shall be accompanied] by supporting affidavits." L.R. 220-1(a), NDGa. Although defendants did not strictly comply with the local rule, neither plaintiffs nor plaintiff-intervenors dispute the basic facts that the schools are overcrowded and that building the proposed schools will alleviate that overcrowding in areas which are predominately black. The court finds that, in submitting the motion for leave to use bond funds, defendants complied with the December 19, 1990 order that no funds be allocated or committed without prior report to the attorneys for the plaintiffs and the intervenors and without approval of the court.

CONCLUSIONS

Having found that it maintains supervisory control over the quality of education in the DeKalb County School System and that overcrowding impacts the quality of education, the court finds that it has jurisdiction to approve or disapprove the use of bond funds to alleviate overcrowding by building new schools. Having found that Georgia law limits the use of bond funds to those purposes included in the statement of intention issued prior to approval of the bond issue, that the proposed buildings meet the descriptions within the Statement of Intention issued prior to approval of the 1989 bond issue, that the proposed buildings will alleviate overcrowding in predominately black areas of the DeKalb County School System, and that further delay in releasing the bond funds will exacerbate

overcrowding, the court finds that defendants should be permitted to issue the remaining bonds for the purpose of building the Miller Road Elementary School, the Stephenson Road Junior High School, and the Stephenson Road High School and for other purposes described in the Statement of Intention. The court hereby grants defendants' motion for leave to use bond funds. So that the court may be assured that the bond funds not budgeted for school construction will be used to improve the quality of education where most needed, the court directs defendants to submit to the court within 30 days of this order a plan for the expenditure of those funds.

Having found that defendants have not violated the December 19, 1990 order and that there is no dispute as to the basic facts upon which defendants' motion was based and having granted defendants' motion, the court finds that there is no factual or legal basis for plaintiffs' motions. The court hereby denies plaintiffs' motions.

IT IS SO ORDERED this 1st day of July, 1993.


WILLIAM C. O'KELLEY
Chief United States District Judge

ENTERED BY CLERK

JUL 1 1993

BY
L.D.T., CLERK
DEPUTY CLERK