ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

WILLIAM CAPACCHIONE, as Guardian for CRISTINA CAPACCHIONE, a Minor, Plaintiff, and MICHAEL P. GRANT, et al., Plaintiff-Intervenors, v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Defendants.	Civil Action No. 3:97-CV-482-P
JAMES E. SWANN, et al., Plaintiffs, v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Defendants.	Civil Action No. 1974

Swann Plaintiffs Supplemental Brief On Damages

After reviewing the Pretrial Conference Summary and Order of April 14, 1999 and the trial briefs filed by the other parties, the *Swann* plaintiffs submit this supplemental brief on the issue of damages. The Intervenors damage claims should be rejected by the Court for at least two reasons, both of which present pure issues of law

511

that do not require any prior evidentiary determinations by the Court.

1. Damages Are Not Available In Desegregation Cases

First, as noted in the Swann plaintiffs' trial brief, school desegregation cases involve equitable remedies alone. As noted by the Eighth Circuit, "[a] school desegregation case differs from much other litigation in that the main action does not result in a monetary recovery . . . The only award received by the plaintiffs in a desegregation case is simply payment of their attorney's fees." *Jenkins v. Missouri*, 967 F.2d 1248 (8th Cir. 1992).

The Intervenors cannot point to a single reported school desegregation case awarding damages. In their Brief, they cite two school cases in a footnote at the start of their discussion of "constitutional injuries," (*Graves v. Walton County Bd. of Education*, 686 F.2d 1135 (5th Cir. 1982); *Adams v. Baldwin County Bd. of Education*, 628 F.2d 895 (1980)), as if to suggest that these cases involved damage claims. They did not. Nor can the Intervenors cite any reported opinion discussing damages based, as here, on allegations of discrimination against white students by a school system under a desegregation decree. If the Intervenors are going to assert a right to damages, they should be required to offer *some* legal authority supporting that claim in the school desegregation context. They cannot do so.

2. The Court's Continuing Orders Foreclose Any Damage Claims

Second, the existing court orders preclude the Intervenors legal claims. The Intervenors almost blithely assert an equal protection claim -- that they are being assigned to schools based upon their race. Yet the court orders still in place in this case compel the

Board to undertake the very conduct that the Intervenors allege harms them. Intervenors' Brief does not elaborate on how they can maintain their damage claims in light of the fact that this Court found that the school district practiced unconstitutional segregation and has not yet relieved it of the remedial orders imposed pursuant to that finding. Instead, page 18 contains a bald, simple assertion that the Board unconstitutionally uses race in student assignment because this is a "*de facto* desegregated system." Intervenors' offer no case law describing how a school system achieves *de facto* unitary status. As shown below, this assertion is not only unprecedented but completely contrary to express language in *Board of Education v. Dowell*. 498 U.S. 237, 245, 112 L.Ed.2d 715, 727, 111 S.Ct. 630 (1991). A school system cannot be unitary until declared so by a court after a proper judicial proceeding. There has been no such declaration in this case.

a. A Non-Unitary School System Has Affirmative Obligations

Because the Board is under a continuing order compelling it to take steps to eliminate discrimination, this lawsuit is in a profoundly different posture than one involving a claim against a voluntary affirmative action or remedial program. As the Eleventh Circuit noted emphatically in reference to the 1973 orders in the Troup County case, a school board under court order to desegregate has specific affirmative duties over and above what the law otherwise requires.

> We reject the argument of the Godfrey intervenors that the permanent injunction was merely an "obey the law" injunction, imposing upon Troup County merely the same obligations that all school systems have under the Constitution and other applicable laws. Contrary to their argument, the instant permanent injunction imposed upon Troup County obligations over and above those that would be owed by a school system which had never practiced de jure segregation or a school system which had achieved "unitary status"..... A school system which had never practiced de jure segregation, or which had achieved "unitary status," would not be subject to such obligations. ..... Again, this is an obligation over and above what is per se required by the Constitution and applicable laws.

United States v. State of Georgia, _____ F.3d ____, n.4, No. 97-9199, 1999 WL 193887 (11th Cir. 1999).

The permanent injunction in Troup County required the school district to maintain and provide space and transportation for majority to minority transfer programs, an obligation it could not be subject to without a finding of *de jure* segregation or after a finding of unitary status. *Id.* Similar to this Court's 1975 *"Swann Song"* Order, the district court in the Troup County case placed that case on inactive status in 1973. The Eleventh Circuit made clear that those obligations under the order continued. "The 1973 Order . . . left the new permanent injunction in place for an indefinite period of time. Thus, the 1973 Order obviously left the matter of dismissing the case until a later time (e.g., upon reactivation of the case by either party)." *Id.*, p. 10, slip opinion.

B. **The Board Has Affirmative Obligations Under Swann**

Like the Troup County school system, CMS has remained under permanent injunctions, including specific orders regarding student assignment, imposed by the Court to remedy unconstitutional segregation. Those injunctions compel the very actions regarding student assignment which Intervenors complain are unlawful.

For example, on February 5, 1970, this Court specifically ordered:

5. That no school be operated with an all-black or predominantly black student body.

6. That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.

9. That the defendants maintain a *continuing* control over the race of children in each school, just as was done for many decades before *Brown v. Board of Education*, and maintain the racial make-up of each school (including

any new and any re-opened schools) to prevent any school form becoming racially identifiable. (emphasis added)

13. That the Board adopt and implement a *continuing* program, computerized or otherwise, of assigning pupils and teachers during the school year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation.(emphasis added)

16. The duty imposed by the law and by this order is the *desegregation of schools and the maintenance of that condition*.....(emphasis added)

17. The choice or approval or partial approval of any proposed desegregation plan is subject to all of the requirements and restrictions of the preceding sixteen paragraphs . . .

311 F. Supp. 265, 268-269. That order was affirmed on appeal by the Supreme Court.

Two months after the Supreme Court decision, on June 21, 1971, the District Court issued an Order that read, in part:

4. The Defendants are enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body. The movement of children from one place to another within the community and the movement of children into the community are not within the control of the school board. The assignment of those children to particular schools is within the total control of the school board. The defendants are therefore retrained from assigning a child to a school or allowing a child to go to a school other than the one he was attending at the start of the school year, if the cumulative result of such an assignment in any given period tends substantially to restore or to increase the degree of segregation in either the transferor or the transferee.

328 F.Supp. 1346, 1349-1350.

On October 21, 1971, the District Court issued another Order, that included the following command: "Defendants are expressly directed not again to put upon any order an interpretation which causes or tends toward segregation or re-segregation." 334 F.Supp.623, 629.

On June 19, 1973, the Court entered a scathing Order, finding continuing discrimination in the district, including black children bearing the burden of student assignment changes, 362 F.Supp. 1223, 1232, and of mobile classrooms being used to increase capacity at outlying "white" schools, *id.*, at 1233. The Court reasserted:

> 1. That the previous orders of this court affecting desegregation of schools remain in effect and be followed by defendants.
>
> 2. That defendants refrain from giving any effect to the "feeder" plan, or any other re-zoning plan, which in any way restricts or handicaps the assignment of pupils as necessary to comply with this order.
>
> 4. For the 1974-75 *and following years*, defendants are directed to prepare a new plan for pupil assignment and desegregated school operation.... (emphasis added)

Id., at 1238.

On April 3, 1974, the District Court found that its order of February 5, 1970, which "included among its remedial measures a direction that the defendants adopt and implement a continuing program of pupil assignment for the purpose of maintaining the schools in a desegregated condition, . . . has never been followed . . ." *Order*, April 3, 1974, p. 1. The Court directed the Board to cooperate with the Citizens Advisory Group to prepare a student assignment plan. *Id.*, p. 4. On July 30, 1974, the Court approved "guidelines, policies and plan," 379 F.Supp. 1102, 1105, including the use of countywide optional schools. The Court emphasized, "[e]xcept as modified herein, all previous orders of court remain in effect." *Id.*

Then, on July 11, 1975, the Court put the case on the inactive docket, noting that the "case contains many orders of continuing effect, and could be re-opened upon a proper showing . . ." 67 F.R.D. 648, 649. After thanking many persons involved, the

Court observed that the school system's "duty to comply with existing court orders respecting student assignment of course remains." *Id.*

C. The *Swann* Orders Remain In Place

As in Troup County, the 1975 Order putting this case in inactive status left this Court's injunctions in place until the case was dismissed at a later time. It has not yet been dismissed, so the injunctions remain in place. *United States v. Georgia* reiterated that the Troup County case could not be dismissed, and the permanent injunction could not be lifted, until there was "a *judicial determination* that the school district has implemented a desegregation plan in good faith and that the vestiges of discrimination have been eliminated to the extent practicable." *Id.*, at 11, *citing, Lee v. Etowah County*, 963 F.2d 1416 (11th Cir. 1992)(emphasis added). There has been no such determination in this case. Until there is one, the injunctions remain in effect.

D. The Orders Preclude The Damage Claims

Intervenors do not admit directly this fundamental problem – that the existing injunctions both allow and require the race conscious actions of the school system for which they seek damages. They attempt to dodge it. In open court last week, counsel for Intervenors asserted that there was no difference between a unitary and non-unitary school district for purposes of their constitutional claims. In fact there is a fundamental difference. And it is a difference that the Intervenors clearly recognize.

They acknowledge in their trial brief that unitary status is the "threshold issue" in the case. *Intervenors Brief*, p. 19. They know that this Court's determination of that issue is the lynchpin of this matter. But they avoid any direct discussion of that threshold

question's impact on their damage claims. They, instead, attempt to bypass the existing court orders to bring their damage claims.

Their discussion of "Constitutional Injuries" on pages 24 through 26 of their Brief restates in each subpart their predicate assumption necessary to establishing each damage claim: that the court orders no longer apply to student assignment because "CMS has been desegregated for many years in student assignment to the extent practicable." *Id.*, at 24 -26, subparts 2(A) - 2(D)(each repeating same language). In other words, they reassert, again without explication or citation to authority, their unelaborated claim on page 18 that CMS has been *de facto* unitary with regard to student assignment; that is, without any determination by a court.

The Intervenors' damage claim is premised on unprecedented jurisprudence the declaration that the passage of time has created *de facto* partial unitary status and voided the continuing orders in this case without hearing or determination by this Court; and that the Board acts unconstitutionally, as a result, in continuing to follow the Court's orders. This concept not only has absolutely no basis in the law of school desegregation; it is completely contrary to expressly held principles. "[A] school district cannot be said to have achieved 'unitary status' unless it has eliminated the vestiges of prior discrimination *and has been adjudicated as such through the proper judicial procedures*." *Board of Education v. Dowell*, 498 U.S. 237, 245, 112 L.Ed.2d 715, 727, 111 S.Ct. 630 (1991)(emphasis added). The need for an orderly judicial dismissal of the injunctive orders, as opposed to the passage of time standard created out of thin air by the Intervenors, is obvious. "If such a decree is to be terminated or dissolved, (the original

plaintiffs) as well as the school board are entitled to a like statement from the court." *Id.*, 498 U.S. at 246, 112 L.Ed.2d at 727.

Under *Dowell* and its progeny, including *United States v. Georgia*, this Court's orders remain in effect until the school district achieves unitary status pursuant to a proper judicial proceeding. To date, there has been no such proceeding. The Intervenors' literally unprecedented proposition that this Court's prior orders have been dissolved *de facto* implicitly concedes that if the court orders are still in effect, Intervenors have no claim for damages. That is the reason they concoct that the orders have been dismissed or nullified with the passage of time. The Intervenors assertion of *de facto* unitary status is creative, but fabricated. Because their damage claims depends on a completely unsupported and unsupportable legal premise, they fail as a matter of law.

Notably, the Intervenors' brief does not identify a single decision that involves a damage claim against a court-ordered remedial plan, let alone a damage claim against a school system for complying with an existing court order. All of the case authority they cite to argue "compelling interests" and "narrow tailoring" involve attacks on *voluntary* affirmative action plans not Court ordered ones. Intervenors fail to address in any way whatsoever the effect of a court-ordered remedy on their constitutional analysis. *See, e.g., United States v. Paradise*, 480 US 149, 167, 94 L.Ed2d 203, 221, 107 S.Ct. 1053 (1987)(court finding of discrimination and subsequent remedial order provides compelling interest in remedy). Instead, they pretend, as they must, that the orders in this case have expired.

E. The Sole Issue Is Unitary Status

Because they have no damage claims, the Intervenors' only possible legal claim is that the school district should now be declared unitary. The *Swann* plaintiffs recognize that unitary status is the issue before this Court. And it is precisely because the unitary status inquiry is a matter in equity that the Intervenors' do not have a claim for damages.

CONCLUSION

The Court commented at the pretrial conference that the portion of the Swann plaintiffs' Proposed Issues addressing the damage question was "presumptive." In fact, it is the Intervenors claim for damages that is presumptive. They presume that damages are available in school desegregation cases. They also presume that this Court's injunctions regarding student assignment dissolved at some point in time without any determination and declaration by this Court that school system had achieved unitary. Without any legal authority to support either presumption, the Intervenors damage claims must be dismissed as a matter of law.

Respectfully submitted this 19th day of April, 1999.

ELAINE JONES
Director-Counsel
NORMAN J. CHACHKIN
GLORIA J. BROWNE
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

JAMES E. FERGUSON, II, N.C.Bar#: 1434
ADAM STEIN, N.C.Bar#: 4145
S. LUKE LARGESS, N.C. Bar# 17486
Ferguson, Stein, Wallas, Adkins, Gresham
& Sumter, P.A.
741 Kenilworth Avenue, Suite 300
Charlotte, NC 28204
(704) 375-8461

CERTIFICATE OF SERVICE

I certify that I have served the foregoing **Supplemental Brief on Damages** on opposing counsel by placing a copy thereof enclosed in a postage prepaid properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed to:

John O. Pollard, Esq.
Kevin V. Parsons, Esq.
McGuire, Woods, Battle & Boothe, L.L.P.
101 South Tryon Street
3700 NationsBank Plaza
Charlotte, N. C. 28280-0001

James G. Middlebrooks, Esq.
Irving M. Brenner, Esq.
Smith, Helms, Mulliss & Moore, LLP
P. O. Box 31247
201 North Tryon Street
Charlotte, N. C. 28231

This, the 19 day of April, 1999.

S. LUKE LARGESS
N.C. Bar Number 17486
Ferguson, Stein, Wallas, Adkins
Gresham, & Sumter, P.A.
Suite 300 Park Plaza Building
741 Kenilworth Avenue (28204)
Post Office Box 36486
Charlotte, N. C. 28236-6486
(704) 375-8461