

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

PARENTS AGAINST CONTROLLED)
CHOICE, an unincorporated association; et al.,)
)
Plaintiffs,)

CASE NO. 97 C 50326

COPY

vs.

BOARD OF EDUCATION, ROCKFORD)
SCHOOL DISTRICT NO. 205, Winnebago)
and Boone Counties, Illinois, a municipal)
corporation,)
)
Defendant.)



SD-IL-0001-0015

**MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS**

A. Background

The background statement by RSD is an accurate and sufficient statement, to which
Plaintiffs agree.

B. Argument

1. Plaintiffs herein are not estopped or bound by *res judicata*.

RSD first argues that the Plaintiffs are barred from seeking relief -- minority Plaintiffs having been represented by the PWC class and non-minority Plaintiffs by RSD -- by operation of *res judicata* and collateral estoppel. The same argument was presented in Martin v. Wilks, 490 U.S. 755 (1989), and there rejected by the Supreme Court. There, the Court recognized that the rule preventing "impermissible collateral attack" commanded the approval of the great majority of the Federal Courts of Appeal, nevertheless the Supreme Court held with the contrary

view, 490 U.S. at 762. While Martin v. Wilks involved a consent decree, there is nothing in the decision to suggest, nor is there any policy reason to support, the proposition that a third party's right may be adversely affected, without notice or joinder, by a court order resulting from a litigated matter. Whether a matter is contested or agreed between certain parties has no effect on the interest of a third party in preserving his or her rights. What matters is that the third party should not, and cannot, be deprived of an interest without notice or joinder. The Supreme Court recognized the policy and arguments RSD here proffers, but held instead in favor of the rights of those not party to the original litigation.

2. RSD attempts to justify race-conscious de-segregation as a proper remedy for discrimination.

The authority RSD presents to justify the race-based student assignment plan applies to situations in which the actor was determined to have been responsible for prior *de jure* racial segregation, and is today of less certain persuasiveness in view of recent pronouncements in cases such as Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), and People Who Care v. Rockford Board of Education, 111 F.3d 528 (7th Cir. 1997). More basically, approval of a race-conscious student assignment plan requires acceptance of factual findings justifying such a plan. Acceptance of such factual findings as binding on the Plaintiffs here effectively deprives them of a hearing on their complaint, and makes any rights recognized in Martin v. Wilks illusory.

A race-conscious student assignment is, according to the 7th Circuit opinion in People Who Care, "highly suspect...and has to be justified by solid evidence." To say only that it has already been ordered in this school district begs the question whether "Controlled Choice" is justified by the past misconduct of RSD, and whether it is sufficiently narrowly drawn so as to be

as non-intrusive as practicable in impacting on students' rights to be free from racially discriminatory state action. That determination is not so simple a question as to be decided on RSD's Motion to Dismiss. In Freeman vs. Pitts, 503 U.S. 467 (1992), the court cautioned that:

Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.

If under Martin v. Wilks, the Plaintiffs here have the right to be heard, then they have the right to challenge whether, first, a race-conscious assignment plan is justified at all, and, even if so, whether the particular "Controlled Choice" plan comports with controlling law.

C. Conclusion

The Plaintiffs allege that they are being harmed by racially motivated student assignment decisions of RSD. In this they are situated similarly to the firefighter Plaintiffs in Martin v. Wilks. There the Supreme Court ruled that neither *res judicata* nor collateral estoppel served more important ends than allowing the Plaintiffs to assert their rights when they discovered the City of Birmingham was discriminating against them on the basis of race. Here, the Plaintiffs discovered after the implementation of "Controlled Choice" that their ability to attend neighborhood schools was to be controlled based on race. Justice Scalia concurring in Freeman, recognized as one of the "...ordinary principles of our law, of our democratic heritage, and of our educational tradition...that it is "desirable" to permit pupils to attend "schools nearest their homes"..." Under Martin v. Wilks the Plaintiffs should be heard.

WHEREFORE, Plaintiffs ask that this Court deny the Motion to Dismiss, and order that the Defendant seasonably plead to the complaint.

Respectfully submitted,

PARENTS AGAINST CONTROLLED CHOICE, an
unincorporated association, et al., Plaintiffs

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