

NO. 11-2000

In The
United States Court of Appeals
For The Fourth Circuit

RONDA EVERETT; MELISSA GRIMES; CAROLINE SUTTON; CHRISTOPHER
W. TAYLOR, next friends of minor children attending Pitt County Schools; THE
PITT COUNTY COALITION FOR EDUCATING BLACK CHILDREN

Plaintiff-Appellants

and

JUVENILE FEMALE 1; THE GREENVILLE PARENTS ASSOCIATION

Plaintiff-Intervenors

v.

THE PITT COUNTY BOARD OF EDUCATION

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT GREENVILLE

BRIEF OF PLAINTIFF-APPELLANTS

Mark Dorosin
Elizabeth Haddix
UNC Center for Civil Rights
CB #3382
Chapel Hill, NC 27599
Telephone: (919) 843-7896

Kenneth A. Soo
Deborah Stagner
Tharrington Smith LLP
P.O. Box 1151
Raleigh, NC 27602-1151
Telephone: (919) 821-4711

Counsel for Plaintiff-Appellants

Defendant-Appellee

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 11-2000 Caption: Rhonda Everett et al v. Pitt County Board of Education

Pursuant to FRAP 26.1 and Local Rule 26.1,

Rhonda Everett who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on October 4, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Kenneth A. Soo / Debra R. Stagner
Tharrington Smith, LLP
P.O. Box 1151
Raleigh, NC 27602-1151

Charles L. McLawhorn, Jr.
John Warner Wells, II
P.O. Box 8188
Greenville, NC 27835

/s/ Mark Dorosin
(signature)

October 4, 2011
(date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Melissa Grimes who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
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John Warner Wells, II
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Caroline Sutton who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Christopher Taylor who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
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Pitt County Coalition who is Appellant, makes the following disclosure:
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P.O. Box 8188
Greenville, NC 27835

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(signature)

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JURISDICTIONAL STATEMENT

The district court had jurisdiction in this case pursuant to 28 U.S.C. §1343(c) (civil rights), 2201 and 2202 (declaratory judgment), and 42 U.S.C. § 1983 (civil rights). On August 16, 2011, the district court entered a final order denying Appellants' motion for appropriate relief. Appellants timely filed a notice of appeal on September 15, 2011. This Court has jurisdiction pursuant 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- I. The district court erred in applying the preliminary injunction standard of review to the Appellants' motion for relief.
- II. The district court erred in failing to assign the burden of proof to Appellee to demonstrate that its actions move the district towards unitary status in compliance with the court's controlling desegregation orders.
- III. Even if the district court had properly allocated the burden of proof, Appellee failed to demonstrate that the 2011-12 Student Assignment Plan complies with the controlling desegregation orders in this case.

STATEMENT OF THE CASE

This case arises out of two school desegregation orders issued by the Eastern District of North Carolina, Order, Teel v. Pitt County Board of Education, Civ. A. No. 569 (E.D.N.C. filed August 10, 2970) and Order, Edwards v. Greenville City Board of Education, Civ. A. No. 702 (E.D.N.C. filed July 7, 1970), after full evidentiary hearings establishing that Pitt County Schools and Greenville City Schools operated racially segregated, dual

and unconstitutional school systems in violation of the plaintiffs' rights to equal protection under the law.¹ (J.A. 16-22, 23-29.) The court ordered the districts to submit desegregation plans for judicial review, a process which involved several years of rejecting, modifying and then ultimately approving the submitted plans.

The court rejected plans which it determined would continue the operation of racially identifiable schools, finding that "any school within the system showing a good student ratio balance would require enrollment" of the same ratio of Black and White students as existed within the district. (J.A. 26.) The court also specifically required that Appellee "locate any new school or addition with the objective of eradicating the vestiges of the dual school system and of eliminating the effects of segregation." (J.A. 36-37.)

In 1972, the district court removed Teel and Edwards from the active docket, subject to being reopened whenever a pleading was filed in either case to warrant reopening. (J.A. 38-39.) In 2006, the Greenville Parents Association (GPA) filed a complaint with the U.S. Department of Education Office of Civil Rights (OCR) alleging that Appellee's 2006-2007 student

¹ Appellee, the consolidated "Pitt County Board of Education," was formed following the merger of Pitt County Schools and Greenville City Schools in 1986, and is the successor in interest of the original school board defendants.

assignment plan discriminated against White students because it used racial balancing ratios to reduce racial isolation in elementary schools. As part of the settlement of the OCR complaint, Appellee agreed to return to district court and seek a declaration of the status of the Teel and Edwards orders and clarification of its obligations pursuant to those cases. (J.A. 79-80.)

On that motion, the court reopened Teel and Edwards, consolidated them, and allowed Appellants to become the substitute Plaintiffs. The court found that there was insufficient evidence to determine whether Appellee had complied with the desegregation orders since 1972, and directed the parties to engage in discovery. On August 4, 2008, the GPA filed a motion asking the court to find that Appellee had achieved unitary status and thus was no longer controlled by Teel and Edwards. Early in the discovery period, the parties participated in court-ordered mediation. Following mediation, the parties reached a settlement agreement on all matters, which was then submitted for the court's approval. (J.A. 65.)

As part of the settlement approved by the court in November 2009, Appellee agreed to involve Appellants and the GPA in the planning and discussion stages of the 2011-12 student reassignment plan, and the GPA agreed to withdraw their motion for unitary status. (J.A. 81.) In approving the settlement,

the court approved Appellee's revised school attendance area policy, which replaced the prior policy's explicit racial balancing element with student diversity.² (J.A. 84.)

In its 2009 order, the court considered whether the board had eliminated the vestiges of discrimination and concluded that it had not. "It is time for the School Board to follow course and fulfill its obligation to attain unitary status so that it may reclaim complete control over its schools." (J.A. 89.) The court further ordered the parties to "work toward attaining unitary status so that the court may relinquish jurisdiction over this case and restore to the school board full responsibility for the operation of its schools." (Id.) Finally, the court ordered the parties to submit, on or before December 31, 2012, "a report detailing the School Board's efforts and progress in achieving unitary status and eliminating the vestiges of past discrimination to the extent practicable." (J.A. 89.)

On November 15, 2010, after four months of considering various student reassignment scenarios, the board selected a 2011-12 reassignment plan. (J.A. 222.) As they had done repeatedly during the reassignment process, Appellants urged the

² The revised attendance policy provides that "in seeking to maintain diversity reasonably reflective of the school system as a whole," the board will consider balancing a number of factors, including student achievement, socio-economic status, and "ethnic, racial and educational sub-groups." (J.A. 277.)

board to reconsider because the selected plan, which projected a significant increase in racially-identifiable, non-White schools with low student achievement, and opened the new elementary school as a high-minority, low achieving school would violate the court orders and move the district further away from unitary status. (J.A. 153-58, 183-93.) After the board refused to revisit its decision, Appellants filed their Motion for Injunctive and Other Appropriate Relief, on the grounds that the 2011-12 reassignment plan violated Teel and Edwards. The motion included a request for an expedited hearing, in light of the approach of the 2011-12 school year. (J.A. 90, 101.) The district court did not hold a hearing until August 16, 2011, four months after the Motion was filed and just nine days before the start of the school year. Shortly after the hearing, the district court issued its Order denying Appellants' Motion holding they had not satisfied the movant's burden under a preliminary injunction standard. (J.A. 370.)

STATEMENT OF THE FACTS

A. The student assignment plan selection process

As part of its process in selecting the 2011-12 reassignment plan, the board held two retreats, at which it presented various reassignment scenarios. The board established at the outset that its primary purpose was to reassign students in a subset of the district's schools to populate a new

elementary school (Lakeforest), relieve overcrowding at a middle school (A.G. Cox) and convert a racially imbalanced elementary school (Sadie Saulter) to a Pre-K program. Pursuant to the court's 2009 order, Appellants and the GPA were invited to participate in these retreats, which took place on July 1 and October 11, 2010. (J.A. 149, 183.) The initial reassignment proposals were developed by Operations Research and Education Laboratory (OREd),³ at the board's direction, and used only the following criteria: (1) proximity; (2) building utilization/capacity; (3) academic proficiency; and (4) impact area (identifying the particular schools to be affected). (J.A. 103, 147.)

With respect to the fourth factor, the board directed OREd to consider only the fourteen of the thirty-six schools in the district: eleven elementary and three middle schools within the J.H. Rose High School attendance area. (J.A. 118, 147.) The board directed OREd to create two reassignment scenarios: one using only proximity and capacity (to populate each of the fourteen schools at 90% of building capacity); the other adding a student achievement factor (with a targeted student achievement/proficiency index of at least 59.1%). (J.A. 147.) The board considered student achievement, not race, as its only

³OREd is an entity independent from the school board, and part of the Institute of Transportation Research and Education at North Carolina State University.

school diversity factor, although racial demographics were collected for each of the scenarios created. (Id.)

B. Requests for legal and judicial guidance

At the July 1, 2010 retreat, both Appellants and the GPA questioned the board about its stated objectives and methodology for the reassignment process. In response to specific questions as to whether a fair and reasonable reassignment plan would be possible without looking at all schools in the district, the board responded that it would not target the entire district at this time. (Id.) When it was asked whether the court's order regarding unitary status required each school to reflect the racial composition of the school system as a whole, or whether the proposals developed by OREd were in compliance with the School Attendance Areas Policy that had been approved by the court, the board provided no response. (Id.)

At the first retreat on July 1, 2010, OREd's initial proposals were presented for review. The proximity and capacity only scenario, called "ES2," projected drastically resegregative effects with significant decreases in proficiency at three schools, and opened Lakeforest with 48% proficiency and 77% Black student attendance. The second scenario, "ES4," applied the diversity factor of proficiency, and projected the most racial balance and best proficiency scores of all the proposed plans. A subsequent third scenario, "ES5," also included

proficiency but elevated proximity as the priority criteria. ES5 resulted in greater racial disparities than ES4, but the inequities were not quite as stark as ES2. (J.A. 289-301.)

After it was clear that the board would not consider a comprehensive assignment plan that would move the entire district towards unitary status (and conceivably produce an even more equitable outcome than ES4), Appellants supported ES4, which had the best overall projected outcomes for the board's criteria and resulted in the least amount of racial disparity. (J.A. 189, 195-96, 209-10.) Although it never explicitly rejected ES4, the board declined to consider it further, choosing instead to "tweak" ES5. (J.A. 190.)

At the second and final retreat on October 11, 2010, board staff proposed several new versions of ES5 which incorporated suggested changes from unidentified board members and parents. (J.A. 317-29.) Under the new versions of ES5 ("ES5A" and "ES5B"), Lakeforest Elementary school was projected to open as a racially isolated, majority Black school with very low proficiency. (Id.) The board was specifically asked, "How can we open a new elementary school that is racially identifiable with low performance . . . and follow [the] Court Order?" (J.A. 188.) The board chair then asked their counsel, "How do we address the race component?" The Board's attorney advised that "if there is a difference among the parties involved in what is

submitted to the court, it will be more difficult to defend this decision if things are more out of whack in terms of measures that count - proficiency or race." (Id.)

The board's attorney was asked whether ES5A "would be acceptable under Court order with [three schools, not including Lakeforest] having increased racially identifiable numbers." (J.A. 190.) Appellants and at least one board member asked which of the proposals would "move us toward Unitary Status," to which counsel replied "there is too much in the air." (J.A. 191-192.) The GPA insisted that the district needed "an overall comprehensive . . . plan that will move us toward Unitary Status . . . to get Pitt County Schools out from under the Court Order." (J.A. 192.) Appellant agreed, urging the board to "look at the impact this decision will make toward unitary status," and noting that ES4 "created the least amount of personal bias" and "the most equitable picture considering all factors." (J.A. 189, 193.)

Despite that input, on or about October 31, 2010, Superintendent Reep formally recommended adoption of ES5Av1 and a modified version of MS2B, which she admitted "uses proximity as a foundation." (J.A. 330.) Contrary to her July 1, 2010 declaration that "it is not acceptable to have schools with lower proficiency scores than currently exist," Dr. Reep recommended the reassignment plan which, according to the

board's own figures, projected lower proficiency scores in four schools in addition to opening a brand new school with one of the lowest proficiency composites (and starkest racial disparities) in the whole district. (J.A. 153, 343.) The recommended plan also abandoned the original proficiency target of 59.1%. The board adopted the superintendent's recommendations on November 15, 2010. (J.A. 222.)

Four new school board members were sworn in on December 6, 2010. (J.A. 226.) At that meeting, Appellants again pointed out that the 2011-12 reassignment would increase racial disparities in several of the targeted schools, and urged the board to seek the court's guidance regarding whether the reassignment plan complied with the desegregation order. (J.A. 227.) The new board declined to revisit its adoption of ES5Av1 or seek guidance from the court. Appellants sought the court's intervention on April 15, 2011. (J.A. 90.)

C. The board's 2011-12 student assignment plan

The board reported the demographics of the Pitt County Schools in 2009-10 as 38.8% White, 48.5% Black, 7.7% Hispanic, 3.3% Multi-Racial, 1.4% Asian, and 0.2% American Indian. (J.A. 354.) Under the approved assignment plan, the projected student demographics at Elmhurst Elementary, South Greenville Elementary, the new Lakeforest Elementary, and C.M. Eppes are drastically disparate from the district's overall student

demographics. (J.A. 333-35.) The plan decreases the percentage of White students at C.M. Eppes Middle to 25%; at Elmhurst Elementary to 23%; at South Greenville Elementary to 17%; and opened the new Lakeforest Elementary with only 12% White students. (Id.)

Student proficiency composites (based on 2008-09 test scores) under the approved plan drop from 66.1 to 46% at Elmhurst Elementary, from 63.7 to 53% at C.M. Eppes Middle, and opens Lakeforest Elementary with an abysmal 46% projected proficiency composite. (Compare J.A. 235-46 and 333-35.) Under ES4, the proficiency based model, Elmhurst's 2008-09 proficiency composite would have risen five percentage points to 59%, and its percentage White student population would remain at 32%; South Greenville's 2008-09 proficiency index would have risen eleven percentage points to 65%, and its White student population would rise from 21 to 33%. (Compare J.A. 235-46 and 298.) Under the approved plan, the White population at South Greenville is significantly more isolated (17%) and the school's overall proficiency is lower (52%). (J.A. 333.) Finally, seven of the fourteen targeted schools under the adopted plan exceed the 90% capacity limit, with one school over 100% projected capacity.

Of the Pitt County schools not included in the reassignment, the board's plan leaves eight schools racially

imbalanced, eight under proficiency (five at or under 49%) and eight over capacity (six 104% and 140% capacity). (Id.)

SUMMARY OF THE ARGUMENT

There was nothing preliminary or extraordinary about the relief sought in Appellants' Motion. The Motion, the record, and the overall procedural posture of the case establish that Appellants were seeking an injunction to enforce the court's existing orders in this case. Moreover, in seeking to enjoin Appellee from implementing a student reassignment that increased racial disparities among schools, Appellants urged the district court to exercise its historical power and responsibility to supervise the board's compliance with the desegregation orders currently in effect.

There is no dispute in this case that Pitt County Schools has not eradicated the vestiges of segregation and thus has not attained unitary status. Half a century of school desegregation law clearly establishes that, given the uncontested pre-unitary posture of this case, the burden is on the school board to prove that its actions are in compliance with its affirmative duty to eradicate the vestiges of the racially discriminatory dual system. By erroneously placing the burden of proof on Appellants, the court absolved Appellee of its obligations under the law and the court's authority in this matter, and abdicated

its historical and continuing role to oversee, enforce and effectuate the controlling law of the case.

ARGUMENT

STANDARD OF REVIEW

The district court decision is based on errors of law. The Court should therefore apply the de novo standard in its review of this case. "No deference . . . is owed to the district court on conclusions of law, including the district court's understanding of controlling law or the various burdens of proof and presumptions; . . . such conclusions of law are reviewed de novo." Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 379 (4th Cir. 2001).

DISCUSSION OF THE ISSUES

I. The district court erred in applying the preliminary injunction standard of review to the Appellants' motion for relief.

Appellants did not request a preliminary injunction in this matter, nor would they have had cause to do so. The lower court's erroneous determination that the motion below sought preliminary injunctive relief assumes that Appellants have requested a judicial determination of some independent legal claim. The fundamental concept of a preliminary injunction requires some pending proceeding which has not yet been decided. According to Black's Law Dictionary, a preliminary injunction is "A temporary injunction issued before or during trial to prevent

an irreparable injury before the court has a chance to decide the case." Black's Law Dictionary 359 (2nd ed. 2001) (emphasis added). Preliminary injunctions are an extraordinary remedy whose primary function is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981); In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003). In addition, the Supreme Court has established that, because a preliminary injunction provides relief before trial, a plaintiff must demonstrate that it will likely succeed on the merits of its claims at trial. Winter v. Natural Res. Def. Council Inc., 555 U.S. 7, 20 (2008).

Although Appellants' motion was neither premised on the likelihood of prevailing on some future motion or claim, nor an attempt to preserve the status quo pending some potential or imagined legal action, the court begins its discussion in the August 16, 2011 order with an evaluation of the burden of proof for a preliminary injunction. (J.A. 372.) The order contains no identification of the motion or claim to which the requested injunction is preliminary, nor does it acknowledge that the merits of the case have already been resolved in Appellants' (or their predecessors in interest's) favor.

There is no other proceeding to which this motion could be appended or to which it could otherwise be considered

"preliminary." There is no pending complaint or trial in this matter; there is thus no basis to treat the Appellants' motion as a preliminary injunction. Appellants have not filed, nor do they intend to file, a new complaint or other independent pleading whose underlying merits have yet to be adjudicated. On the contrary, the underlying merits in this case were adjudicated in 1970, when the court found that the city and county school boards were each legally liable for operating a racially segregated school system, and that the districts had the affirmative duty to eradicate the vestiges of those dual systems. (J.A. 30-37.)

As late as 2009, the (now merged) district had still not attained unitary status, and at the end of 2010, the district took action regarding student assignment which Appellants believe fails to comply with their affirmative duty. (J.A. 84-89.) The Appellants' motion sought to permanently enjoin Appellee's 2011-12 reassignment plan pursuant to the desegregation orders controlling this case.⁴ "Once a court has rendered a decision on the merits of an action, only a permanent

⁴ In its analysis of Rule 65 of the Federal Rules of Civil Procedure, Moore's Federal Practice also includes a discussion of the relationship between injunctive relief and the court's contempt powers to ensure compliance with its orders. The overlap of these issues reinforces the underlying themes in Appellants' motion seeking to enforce the existing court orders in this case. 13-65 Moore's Federal Practice §65.20 (2011).

injunction may be granted.” 13-65 Moore’s Federal Practice - Civil §65.05 (2011).

A. There is no basis to conclude that Appellants’ motion sought relief preliminary to a potential future adjudication of unitary status.

To the extent Appellee may argue, and the district court may have wrongly presumed, that Appellants’ motion is preliminary to an adjudication of unitary status, such a position or presumption finds no support in the record in this case. Neither party has sought a unitary status determination, which, as the district court correctly determined in 2008, would require a full evidentiary hearing. (J.A. 67.) In November 2009, the district court ratified both the board’s use of student assignment policies that expressly consider race, as well as the continuing vitality of the existing desegregation orders and the court’s oversight responsibility, noting “[i]t is time for the School Board to follow course and fulfill its obligation to attain unitary status.” (J.A. 89.) The court ordered the parties to submit, “on or before December 31, 2012, a report detailing the School Board’s efforts and progress in achieving unitary status and eliminating the vestiges of past discrimination to the extent practicable.” (Id.) (emphasis added).

The board impossibly argues that the motion is both too late and too early. Too late because, if Appellants prevail,

the board would need months to create a reassignment plan that will be in compliance with the desegregation order. Too early because it claims that under the 2009 order, Appellee is not required to make any showing regarding a unitary status plan or its progress toward eliminating the vestiges of segregation until the end of 2012. (J.A. 261.)

Appellee's interpretation of the 2009 order is overly narrow and, as discussed below, contrary to controlling desegregation law. The order established that Appellee has not attained unitary status and still has the affirmative obligation to eliminate the legacy of de jure segregation. The fact that the order requires the parties to report on the progress toward unitary status before the end of 2012 should not be construed to suggest that the court has abandoned its oversight responsibility in the interim, or that the parties are prohibited from seeking judicial guidance or otherwise invoking the court's authority until that time. In fact, given the court's reassertion of its authority and oversight role, its mandate that the parties work together on a student assignment plan in the three year period, and the lack of more specific guidance in the 2009 order, it is entirely appropriate that the parties would now seek additional guidance in moving toward unitary status. Appellee's position, on the contrary, suggests

that in 2009 the court both re-established and abandoned (or at least, postponed for three years) its oversight of this case.

B. The district court's erroneous application of a preliminary injunction standard of review abdicates the court's historical role in desegregation cases.

The Appellants' motion for relief was expressly based on Appellee's failure to comply with the controlling desegregation orders in this case, and asked the court to exercise the traditional judicial oversight that has proven necessary in cases across the nation to ensure that school districts progress effectively toward unitary status. "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971); see, also, Raney v. Bd. of Educ., 391 U.S. 443, 449 (1968) (the court's role is to supervise implementation of the student attendance plan in a pre-unitary school system); Whittenberg v. Greenville Sch. Dist., 607 F. Supp. 289, 298 (D.S.C 1985) (court conducted multiple hearings (in 1969, 1970, 1976, 1984, and 1985) to review school districts' implementation of its original 1963 desegregation orders). The district court

oversight and implementation role is most clearly described in Green et al. v. County School Board of New Kent County:

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . . It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as more feasible and more promising in their effectiveness. . . . Moreover, whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

391 U.S. 430, 439 (1968) (emphasis added).

Judicial guidance, evaluation and oversight are particularly needed and have been repeatedly requested in the present case. During the 2010 deliberations over the challenged assignment plan, members of the school board specifically questioned the superintendent and the board's counsel as to whether the plan would be in compliance with the desegregation orders, and whether it would move the district toward unitary status. (J.A. 154, 188, 190-93.) Additionally, Appellants expressly requested that the board seek guidance and approval from the court before proceeding with final adoption of the student assignment plan, yet the board refused to seek that guidance. (J.A. 227.)

Courts have recognized the importance of judicial intervention and oversight in cases involving pre-unitary school districts. See, e.g., Vaughns v. Prince George's County Bd. of Ed., 574 F. Supp 1280, 1341-42 (D. Md. 1983) (noting that defendant school board might "justifiably seize upon" lack of direction from the district court to explain the board's "actions and non-actions" which led to their failure to comply with their affirmative duty). Appellants filed their motion in an effort to secure this critical oversight. By erroneously considering the motion as seeking preliminary relief, the court acted as if it did not have the authority or duty to provide such oversight. This error requires that the Court reverse the ruling below.

II. The district court erred in failing to assign the burden of proof to Appellee to demonstrate that its actions move the district towards unitary status in compliance with the court's controlling desegregation orders.

The lower court's misunderstanding of the posture of this case and the relief requested resulted in it incorrectly assigning the burden of proof to the Appellants. (J.A. 374.) The record in this case, as well as an extensive body of school desegregation law, demonstrates that the burden of proof in this matter should have been placed on Appellee. "It is well established that once a court has found an unlawful dual school system, the plaintiffs are entitled to the presumption that

current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." School Bd. v. Baliles, 829 F.2d 1308, 1311 (4th Cir. 1987) (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979) (Dayton II); Vaughns v. Bd. of Educ., 758 F.2d 983, 981 (4th Cir. 1985)). This Court further noted that its ruling on the burden of proof was broad and definitive, and rejected the notion that the school board only bears the burden of proof in cases involving student placement. "We find nothing in Vaughns that supports such a narrow interpretation. Our decision there clearly states that in school desegregation cases the burden does not shift back to the plaintiffs until the school system achieves unitary status. The allocation of the burden is not related to the nature of the educational disparity." School Bd. v. Baliles, 829 F.2d at 1311.

Indeed, this Court has expounded on the nature of the board's burden. "In the process of dismantling a dual system, a school board must not take any action that would impede the process of converting to a unitary system. The board is under a heavy burden of showing that any action it takes that continues the effects of the illegal dual system serves a legitimate end." Pleasant v. Stanly County Bd. of Educ., 690 F. Supp. 1478, 1481 (M.D.N.C. 1988); see also Green, 391 U.S. at 440 ("It is incumbent on the school board to establish that its proposed

plan promises meaningful and immediate progress" to eliminate the vestiges of racial discrimination).

While the burden of proof ends once a school district has been declared unitary, "[I]n a school system that has not become unitary . . . the board must show that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination." Riddick v. Sch. Bd., 784 F.2d 521, 535 (4th Cir. 1986). Courts considering school desegregation cases have been uniform in their assessment that there is a bright-line determination regarding the allocation of the burden of proof: a judicial determination that the school district has attained unitary status. Until that point, the burden of proof remains on the school board. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007); Riddick, 784 F.2d at 535; Pleasant, 690 F.Supp. at 1481.

The Pitt County school district has not been declared unitary, and the school board has never moved for unitary status. Any doubts about whether the district had achieved unitary status since the case was removed from the active docket were resolved when the court reopened the case and reasserted its jurisdiction three years ago. At that time, the court expressly ruled that the district is not unitary, that the board must fulfill its affirmative constitutional obligations, and that the court would again exercise its historical oversight of

the district's transition to unitary status. (J.A. 84.) The court also ordered the parties to report back to the court on the progress towards unitary status no later than the end of 2012. (Id.) There is no evidence anywhere in the record that the district has attained unitary status. In considering the Appellants' motion, the burden of proof should therefore have been on Appellee.

In Vaughns v. Prince George's County Board of Education, plaintiffs challenged racially discriminatory assignments to special education and academically gifted programs. Although the district court found that the school system had not attained unitary status, it nonetheless concluded that "the burden of proving the causal connection between the prior unconstitutional condition and the need for ancillary relief is upon those who attack." 574 F.Supp 1280, 1296 (D. Md. 1983). Upon review, this Court specifically reversed the lower court on that issue, noting that the district court committed reversible error when "it failed to give effect to the presumption to which plaintiffs were entitled and which it was the Board's burden to overcome that present racial disparities are causally related to the prior unconstitutional segregation." Vaughns v. Bd. of Educ., 758 F.2d at 986. The Fourth Circuit's position on this issue was emphatic. Although the district court had conducted a two month trial and developed a full evidentiary record, the Fourth

Circuit found the error in assigning the burden fatal and reversed.

Because the County's schools system had not attained unitary status, it is settled law that plaintiffs were entitled to a presumption that current placement disparities were causally related to prior segregation and that the burden of proving otherwise rested on defendants . . . the district court's fact finding was tainted by the failure to recognize the existence of the presumption and the proper burden of proof, and we cannot say on the record that the error was harmless because the presumption was rebutted or that defendants satisfied their burden of proof.

Id. at 991-92.

In the present case, Appellants' challenge to the board's 2011-12 reassignment plan was premised on the allegation that the plan fails to comply with the controlling desegregation orders in this case and with Appellee's affirmative duty to eradicate the vestiges of race discrimination. The motion contained detailed allegations demonstrating not only the plan's failure to remedy the continuing effects of segregation, but also its effect of increasing racial disparities in student assignment. Given that the district is not unitary, the burden properly rested on Appellee to prove that the 2011-12 reassignment plan is consistent with the court's existing orders. As in Vaughns, the lower court's failure to assign the burden of proof to the appropriate party fatally tainted its ruling. Affirming a decision based on this erroneous allocation of the burden of proof would be tantamount to abandoning the

court's historic and continuing responsibility for oversight of a still segregated (pre-unitary) school system's progress toward unitary status, and its compliance with the court's authority to enforce its orders.

III. Even if the district court had properly allocated the burden of proof, Appellee failed to demonstrate that the 2011-12 Assignment Plan complies with the controlling desegregation orders in this case.

Although the district court found that Appellee's plan resulted in racial disparities in the district's schools, it concluded that the plan was somehow consistent with Appellee's affirmative duty to move toward unitary status and not a violation of the desegregation orders governing this case and. (J.A. 375.) In addition to the fundamental error in misallocating the burden of proof (discussed in Argument II, supra), the court's substantive analysis of the board's compliance with the controlling orders mischaracterizes the posture of the case and directly conflicts with settled school desegregation precedents.

A. Appellee failed to meet its substantial burden to justify continuing racial disparities in schools

The district court relied on language from Swann to justify its finding that the racial disparities resulting from the 2011-12 student assignment do not violate the desegregation orders in this case. Appellee similarly relies on language in Freeman v. Pitts, 503 U.S. 467 (1992) and Riddick, supra, to bolster its

claims that the admittedly racially imbalanced schools are consistent with its obligations to create a unitary system.

(J.A. 258-60.) These references are inapposite to this case, as they focus specifically on the school boards' implementation of a detailed, measurable plan to eradicate the vestiges of discrimination. No such plan exists in the present case.⁵

Moreover, each of these cases reaffirms the continuing burden on the board in a pre-unitary district to demonstrate, by detailed evidence, that any continuing disparities are "not traceable, in a proximate way to the prior violation." Freeman, at 494.

The Court's ruling in Swann came following the development, implementation, and review of a series of detailed school desegregation plans (created by both the school board and the court). In assessing the extensive record, the Court made very clear that, when a school system has still not completed the task of remedying the effects of past segregation, "the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially

⁵ To the extent the lower court or Appellee suggests that the 2007 Student Assignment policy constitutes a unitary status plan, such a conclusion is erroneous. Appellee's policy is a set of general, discretionary guidelines limited to student assignment. It is not and can in no way be considered a plan for unitary status, especially given how Appellee manipulated it in this reassignment to prioritize proximity over any other criteria, including those specifically related to diversity.

disproportionate in their racial composition. . . . The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.” Swann, 402 U.S. at 26.

In Freeman, the Court’s analysis of the racial disparities in student assignment was premised on its decision to uphold the district court’s finding that the school system had already achieved unitary status with regard to that component of the controlling desegregation order. Freeman, at 493. As such, the Court’s discussion of demographics and its more laissez-faire approach to student racial imbalances begins with the finding that the original underlying constitutional violation has been fully remedied.⁶ In cases like the present one however, where there has been no judicial finding that the district has fully addressed the underlying constitutional violations of racial imbalances in student assignment, “that condition must be remedied.” Id. at 494.

It should also be noted that, unlike Pitt County Schools, the DeKalb County school system and its comprehensive school desegregation plans and methods had been under the district

⁶In describing the scenario in Dekalb County, the Court refers to the “resegregation” of the schools, further indication of its conclusion that, with regard to student assignment, the district had achieved unitary status. Id. at 495.

court's continuing scrutiny over the 17 years since the original court orders. Id. at 472-73.

Although Riddick is also a post-unitary status case (and thus subject to an entirely different standard of proof, see Argument II, supra), in discussing the effects of a unitary finding, this Court further emphasized the substantial burden on a pre-unitary school board proposing actions that exacerbate or fail to address racial disparities. "Rescission of a voluntary desegregation plan itself may be found to be an act of segregation for a school board which has been found to have practiced de jure segregation and not completed the transition from a dual to a unitary school system." Riddick, 784 F.2d at 535 (emphasis added). The Court additionally recognized that the overriding responsibility of a school board that has maintained a dual system is the elimination of the vestiges of past discrimination. While the board is permitted to make policy changes, any revisions in assignment (or other aspects related to remedying the dual system) must be proven to affirmatively further that duty. "The Board cannot satisfy its duty by merely abandoning its prior discriminatory purpose." Id.

Appellee has failed to present any substantive evidence that its 2011-12 reassignment is consistent with its admitted obligations to remedy the continuing effects of de jure

segregation. Appellee concedes that its actions will increase racial isolation at three existing schools, and admits that it opens a brand new school, a tabula rasa, with one of the lowest percentages of White students in the district. (J.A. 255.)

Appellee provided no evidence regarding its refusal to address the continuing and persistent racial imbalances at a number of other schools across the district. (J.A. 98-99.) As the Supreme Court established in Dayton II, the school board's knowledge that its actions will have resegregative consequences "may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct."

Dayton II, 443 U.S. at 536 n.9 (emphasis added) (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979)). Despite its acknowledgement of the resegregative impacts of the 2011-12 plan, Appellee makes no showing as to how this plan affirmatively furthers its obligations under the desegregation orders or moves the district towards unitary status. Instead, Appellee relies on the minimalist argument, rejected in Riddick, supra, that the process used to develop the 2011-12 plan was "race-neutral." (J.A. 259.)

The remainder of Appellee's argument focuses on its goal to improve academic achievement in the district generally. (J.A. 256.) While student achievement may be considered an ancillary factor in determining unitary status, it supplements but does

not supplant the board's duty to redress disparities in the core factors set out in Green. See, Freeman, 503 U.S. at 492; Cappacione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 269-70, (W.D.N.C. 1999) aff'd in part, vacated in part, rev'd in part sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ., 233 F.3d 232 (4th Cir. 2000) on reh'g en banc, 269 F.3d 305 (4th Cir. 2001) and aff'd in part, rev'd in part sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001). Appellee failed to produce any evidence to meet its substantial burden to demonstrate that the reassignment plan is consistent with its obligation to move the district toward unitary status.

B. Appellee rejected a less discriminatory student assignment plan

In developing scenarios for the 2011-12 reassignment, Appellee rejected an alternative plan produced by their own contractors that produced more equitable racial balance in the schools and more effectively accomplished the board's stated goals. The selected plan produced marginally "better" outcomes on only one factor, proximity, which contrary to proficiency or socio-economic status, is not a measure or proxy for diversity.⁷ Despite its agreement that the district is not unitary and thus

⁷ It should be noted that at the outset of the reassignment process the board expressly rejected considering socio-economic status, the primary element to ensure diversity in Policy 10.1.107, as a criteria. (J.A. 168-69.)

still under the desegregation orders, and in the face of questions by individual board members and residents (including Appellants) about the other criteria and the legal implications of choosing the more segregative plan, Appellee, without further review, analysis or explanation, rejected the alternative that was more consistent with its obligations to create a unitary system. (J.A. 154, 188, 190-93) The Supreme Court made clear in Wright v. Council of City of Emporia that substantial

explanation is required when more effective alternatives exist:

As we said in *Green v. County School Board, supra*, the availability of "more promising courses of action" to dismantle a dual system "at the least . . . places a heavy burden upon the board to explain its preference for an apparently less effective method."

407 U.S. 451, 467 (1972) (quoting Green, 391 U.S. at 439).

Although the record establishes, and the district court acknowledged, that Appellee rejected the student reassignment plan that was more effective in eliminating racial disparities, (J.A. 375) the court nonetheless upheld that action, holding that Appellee "utilized a methodical, reasonable and race-neutral process in developing the plan," and therefore "the fact that the plan results in schools that do not reflect the racial composition of the school system as a whole does not mean the plan is unconstitutional." (J.A. 375.)

This analytical framework is erroneous as a matter of law. Reliance on a purported "non-racial" process does not insulate Appellee's conduct from strict judicial oversight. "The Supreme Court emphasized that the measure of the . . . conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." Dayton II, 443 U.S. at 538. The board's rejection of an alternative assignment plan more consistent with its affirmative obligations under the court's orders further demonstrates the board's failure to meet its substantial burden to produce compelling evidence that the 2011-12 reassignment plan complies with court's authority.

C. Appellee has failed to create a plan for achieving unitary status

In 2009, the district court reopened this case, held that the school district had not achieved unitary status and remains under the court's jurisdiction, ordered the parties to work together on developing the 2011-12 student assignment plan, and instructed them to report on the progress toward unitary status on or before December 31, 2012. (J.A. 84.) The court gave the parties no other guidance on how to proceed, although its reassertion of jurisdiction was clear. During discussions of the student assignment plan, Appellee's counsel specifically

noted that if there were disagreements over the plan, the court would need to resolve those disputes and would do so against the backdrop of the desegregation orders. (J.A. 188.)

Appellants took seriously the language and intent of the 2009 order, and its stated goal: that the district develop a plan to move to unitary status. The parties are now at the end of the second year of the three year window described in the 2009 order. Thus far the only concrete steps taken by Appellee in any way connected to any of the Green factors is the student assignment plan at the core of this proceeding, which as previously noted only addresses a portion of the district.

Appellee has not produced or sought input to develop a comprehensive unitary status plan. Unlike the engaged oversight reflected in the Teel and Edwards orders (and in nearly every school desegregation case cited in this brief), the court has neither ordered Appellee to develop a plan nor been given the opportunity to review proposals which would impact the Green factors (like this reassignment plan) before the board begins implementation. The fundamental issue in this case, whether the 2011-12 reassignment moves the district away from unitary status, demonstrates the critical need for additional and engaged judicial oversight to achieve the goal of unitary status in Pitt County.

There is no clear plan for getting the district to unitary status, and the board's adoption of the 2011-12 reassignment demonstrates that neither the Appellants nor the court can wait until December 2012 to begin to develop one. Without a clear plan in place now with targets, benchmarks, and measurable outcomes on all of the Green factors, it will be impossible for the court to evaluate the board's progress or good faith in eliminating the vestiges of discrimination.

Appellants' motion asked the district court to assert its oversight role and order Appellee to submit a student assignment plan for judicial review. While it may have been hoped in 2009 that the parties would be able to agree on the path to unitary status, given the board's unilateral power to establish school policy and its failure to effectively address its continuing obligations to comply with the court's authority, it seems unlikely that meaningful collaboration will occur. This Court should reverse the decision below and remand this case with specific instructions to the district court to take an active and engaged role in supervising this process by requiring Appellee to develop a detailed, specific plan for unitary status. Absent such a plan, the district court cannot fulfill its role in ensuring that the vestiges of discrimination are finally eliminated "root and branch."

CONCLUSION

The district court committed reversible errors of law in treating Appellants' motion as one seeking a preliminary injunction, failing to assign the burden of proof to the school board, and in concluding that the 2011-12 student assignment plan is consistent with the court's controlling authority and orders in this case. The ruling should be reversed and the case remanded with instructions that the court order the board to develop and submit for review a new student assignment plan that moves the district towards unitary status to be put in place as soon as possible and no later than the beginning of the 2012-13 school year.

REQUEST FOR ORAL ARGUMENT

Appellants move, pursuant to F.R.A.P. and Local Rule 34(a), for oral argument in this case. The appeal is not frivolous and addresses continuing constitutional violations resulting from the Appellee's failure to comply with the existing desegregation orders governing the school district.

This case concerns one of the school districts in the country that still remain under federal court jurisdiction. While there have been numerous decisions over the past several years regarding districts that are seeking or have already attained unitary status, the dispositive issues in this case, including the scope and breadth of the affirmative duty of

school boards that have not remedied the vestiges of de jure discrimination, have not been recently or authoritatively decided. Given the lengthy history of this case, its unique procedural posture and the underlying questions about the court's role in enforcing its existing desegregation orders, the Court's decisional process would be significantly aided by oral argument.

This the 31st day of October, 2011.

/s/ Mark Dorosin
Mark Dorosin, NC State Bar No. 20935

/s/ Elizabeth Haddix
Elizabeth Haddix, N.C. State Bar No. 25818

Attorneys for Plaintiff-Appellants
UNC Center for Civil Rights
CB#3382
Chapel Hill, North Carolina 27599
mdorosin@email.unc.edu
emhaddix@unc.edu
Telephone: (919) 843-7896
Facsimile: (919) 843-8784

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2000

Caption: Everett et al v. The Pitt County School Board

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(s) Elizabeth Haddix

Attorney for Plaintiff-Appellants

Dated: October 31, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing APPELLANTS' BRIEF was served upon the individuals listed below by electronically filing the document with the Clerk of the Court on this date using the CM/ECF system and by placing a copy of same in the U.S. Mail., first class postage paid.

Kenneth A. Soo
Tharrington Smith LLP
P.O. Box 1151
Raleigh, NC 27602-1151
Attorneys for Appellee

Charles L. McLawhorn, Jr.
John Warner Wells, II
P.O. Box 8188
Greenville, NC 27835
Attorney for Plaintiff-Intervenors

This the 31st day of October 2011.

/s/ Mark Dorosin
Mark Dorosin, N.C. State Bar No. 20935