RECORD NO. 11-2000

In The
United States Court of Appeals
For The Fourth Circuit

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

Plaintiffs – Appellants,

and

JUVENILE FEMALE 1; THE GREENVILLE PARENTS ASSOCIATION

Intervenors/Plaintiffs,

v.

THE PITT COUNTY BOARD OF EDUCATION, public body corporate,

Defendant – Appellee.

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

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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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,

Pitt County Board of Educ. (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

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
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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
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   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:

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   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on September 28, 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:

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JURISDICTIONAL STATEMENT

Appellee Pitt County Board of Education disputes Plaintiffs-Appellants' assertion of the Court's jurisdiction in this matter. This Court has jurisdiction, if at all, pursuant to 28 U.S.C. § 1292(a)(1). The district court entered an order on 16 August 2011, denying Plaintiffs' motion for a preliminary injunction, which is not a final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This action originated in two separate suits filed in the 1960s against the former Greenville City and Pitt County boards of education. *See Edwards v. Greenville City Board of Education*, Civ. A. No. 702, and *Teel v. Pitt County Board of Education*, Civ. A. No. 569. Those suits sought desegregation of the two public school districts in Pitt County, North Carolina.

In *Edwards*, in an order filed on 7 July 1970, the district court initially rejected a desegregation plan proposed by the Greenville City Board of Education for the 1970-71 academic year, in part because the plan would have left Greenville City Schools ("GCS") with four racially identifiable elementary schools. (J.A. 23). The court subsequently approved a second desegregation plan submitted by the Greenville City Board, in an order

entered 31 July 1970. (J.A. 30). That plan used satellite busing "to accomplish [an] approximate 2-1 racial ratio in each elementary school," transporting white students to Sadie Saulter and South Greenville elementary schools, black students to Eastern and Wahl-Coates elementary schools, and both white and black students to Third Street and Elmhurst elementary schools. *Id*.

In *Teel*, in an order filed on 10 August 1970, the court approved an amended desegregation plan submitted by the pre-merger Pitt County Board designed to "eliminate the racial identity" of certain schools. (J.A. 34). The amended plan tied the total desegregation of the former Pitt County Schools to the construction of four new high schools, all of which were to be completed during the 1970-71 academic year. (*Id.*). In its order approving the plan, the court also directed the Board, "to the extent consistent with the proper administration and operation of the school system, [to] 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." (*Id*.). (emphasis added). While the two actions were removed from the pending docket and administratively closed, the court expressly retained jurisdiction over the cases. Following a period of active supervision, the district court issued orders stating that each case "had been decided upon its merits" and

was closed "statistically," subject to being reopened upon the filing of a pleading that would warrant reopening. (J.A. 38-39).

The current Pitt County Board of Education was formed in 1986 through the merger of the Pitt County and the Greenville City boards of education. Subject to the 1970 district court orders, for decades the post-merger Pitt County Board included racial balance as one of the criteria applicable to the establishment of school attendance areas. (J.A. 43). However, the *Edwards* and *Teel* actions themselves remained dormant for over 35 years, until the Board adopted a new student assignment plan in 2005 for the 2006-2007 academic year ("2006-2007 Assignment Plan").

In March 2006, the Office for Civil Rights, United States Department of Education, ("OCR") notified the Pitt County Schools ("PCS") that it had received a discrimination complaint objecting to the Board's use of race in its 2006-2007 student assignment plan. The 2006-2007 Assignment Plan was adopted under the version of Board Policy 10.107 (School Attendance Areas) in effect beginning on 21 March 2005 ("2005 Attendance Area Policy"). The 2005 Attendance Area Policy obliged PCS to balance several factors "to the degree possible" when drawing school attendance zones, including "student proximity to facilities" and "racial balance," which was defined by the policy as a racial target of 70/30. (J.A. 44). The 2006-2007

plan used satellite attendance areas, busing and racial balancing ratios to reduce racial isolation of elementary schools in the former GCS school district. (J.A. 267, ¶ 11).

As part of the settlement of the OCR complaint, in March 2008, the Board filed a motion requesting that the district court approve the Board's 2006-2007 Assignment Plan, as well as the Board's subsequent decision to reduce the importance of race in student assignment by revising its school attendance area policy.[1] (J.A. 40). Plaintiffs-Intervenors filed a Motion to Deny Student Assignment Plan and School Attendance Area Policy and for Declaration of Unitary Status on 3 July 2008. (J.A. 6, DE #19). The district court thereafter reopened and consolidated the *Edwards* and *Teel* cases and entered a scheduling order. (J.A. 6, DE #32). However, prior to completion of discovery, the parties reached a settlement as to all matters then in dispute. (J.A. 65). The parties submitted the settlement agreement to the court for approval and entry of a consent order.

On 4 November 2009, after careful consideration, the district court approved the parties' settlement. (J.A. 84). The court found the settlement agreement to be "fair and reasonable," concluding that "[t]he School Board's adoption of the 2006-2007 student assignment plan and revised Policy

[1] This is Board Policy 10.107 in effect beginning 17 September 2007 ("2007 Attendance Area Policy"). (J.A. 278-279).

10.107 were undertaken by the School Board in good faith compliance of the remedial plans approved by this court's 1970 desegregation orders." (*Id.*).

However, despite the parties' agreement that the issue of unitary status should no longer be before the court, and despite the withdrawal of Plaintiff-Intervenors' motion seeking declaration of unitary status, the district court pointedly did not remove the question of unitary status from its purview. (J.A. 80-82; 87-89). The court put forward its own goal to "relinquish jurisdiction over this case and restore to the School Board full responsibility for the operation of its schools." (J.A. 89). To that end, the district court ordered the parties to "work toward attaining unitary status" and 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.*). The case was administratively closed, subject to reopening upon motion of any party and "upon filing of the parties' report." (*Id.*).

As part of the settlement agreement, the Board agreed to provide Plaintiffs with certain student and teacher data and, significantly, to involve Plaintiffs and Plaintiffs-Intervenors in the planning of the next student assignment plan. (J.A. 80-81). Beginning in June 2010, and continuing over the next several months, the Board and PCS staff consulted with experts and

involved stakeholders – including Plaintiffs – in the process to develop a student reassignment plan, which was made necessary by the opening of one newly constructed elementary school and in order to better match student enrollment to existing capacity in three middle schools. (J.A. 266-267). The new 2011-2012 student assignment plan ("2011-2012 Assignment Plan") was adopted by the Board on 15 November 2010. (J.A. 269, ¶ 23).

Five months later, on 15 April 2011, Plaintiffs filed a Motion for Injunctive and Other Appropriate Relief, Attorney's Fees and Costs, which in part sought to enjoin implementation of the Board's 2011-2012 Assignment Plan. (J.A. 90). Plaintiffs sought an expedited hearing on the motion and asked the court to require the Board to submit "a student assignment plan which moves the district toward unitary status" within 10 days from the entry of an order by the court. (J.A. 101). The Board opposed Plaintiffs' motion and timely submitted a written Response and Memorandum of Law along with supporting affidavits on 6 May 2011. (J.A. 247-369). The district court set the matter for hearing, allotting the parties one hour per side for argument. (J.A. 14, DE #88).

On 16 August 2011, the district court entered an Order denying Plaintiffs' Motion for Injunctive and Other Relief. (J.A. 84). Plaintiffs filed a Notice of Appeal on 15 September 2011. (J.A. 14, DE #95). The matter is

before this Court on Plaintiffs' appeal of the district court's denial of their motion for injunctive and other relief.

STATEMENT OF THE FACTS

The circumstances giving rise to the instant dispute are a result of actions taken by the Pitt County Board of Education to address the adequacy of school facilities and building capacity. The Board periodically prepares a Long-Range Facilities Plan ("LRFP"), and its current plan extends through the year 2012. (J.A. 367, ¶ 2). Consistent with the Board's LRFP, project recommendations were made in March 2009 with an eye to ensuring that classrooms met state standards, to accommodating current and expected growth, and to more effectively utilizing existing school capacity. (J.A. 281-282; 367, ¶ 6).

In accordance with its long-range plan, the Board built a new elementary school, Lakeforest Elementary, which opened in August 2011. (J.A. 266, ¶¶ 2,3; 368 ¶ 8). With a student capacity of 742, Lakeforest is a large, modern facility and was sited based on projections that student population around the school site will continue to grow. (J.A. 266 ¶ 3; 368 ¶ 8). It is also a neighborhood school, offering stability to a community that has been subject to frequent reassignments in the past. (J.A. 267, ¶ 9). In addition, Lakeforest will enable greater parental involvement due to its

location, the presence of sidewalks, and overall accessibility. (J.A. 368, ¶ 9).

Also as part of the Board's long-range plan, Sadie Saulter was converted from an elementary school to a Pre-K center and district office space. (J.A. 281-282). The Sadie Saulter school is an old building, and it provided less square footage per classroom and less parking than is desirable. (J.A. 368, ¶ 10). The school also suffered declining enrollment over the past six years. (J.A. 350-355). Meanwhile, Ridgewood Elementary, which opened in 2008 at full capacity (742 students), has since has grown to over 1000 students. (*Id.*; J.A. 368, ¶ 11). Thus, to accommodate growth, in addition to opening Lakeforest, capacity for 300 more students was added through expansion and renovation of Eastern Elementary School. (J.A. 266, ¶ 3; 368, ¶ 6).

Finally, A.G. Cox Middle School, which has a capacity of 800 students, had been significantly overenrolled and was projected to be 400 students over capacity by 2014, while C.M. Eppes and E.B. Aycock middle schools together had approximately 575 seats of unused capacity before the reassignment. (J.A. 267, ¶ 6; 283-284). The reassignment plan allows PCS to address overcrowding at A.G. Cox without new construction. (J.A. 267, ¶ 6).

The Board undertook planning for its 2011-2012 student reassignment process in compliance with its revised Policy 10.107, the 2007 Attendance Area Policy. While the new policy de-emphasized race as a factor in achieving diversity, it did not signal an abandonment of the Board's commitment to achieving unitary status. Rather, the revised Board Policy 10.107 was intended to address the shortcomings of the previous policy and to improve overall student academic performance by giving the Board more flexibility in drawing school attendance zones. (J.A. 278-279). The policy broadly defines student diversity to encompass not only race, but also factors such as student achievement and socio-economic status. (*Id.*). Notably, unlike previous attendance area policies, the 2007 Attendance Area Policy does not contain a target racial balance ratio. Moreover, this is the policy which had been consented to by Plaintiffs as part of the settlement agreement, and which had been approved by the district court's November 2009 Order. (J.A. 81, 87).

On 7 June 2010, the Operations Research and Education Laboratory ("OREd") of North Carolina State University made a presentation to the Board to explain the background, process and methodology for developing a reassignment plan. (J.A. 268, ¶ ¶ 13, 14; 103-146). On 1 July 2010, Dr. Michael Miller of OREd presented two plans to the Board: ES 2 & MS

2 (based on proximity/capacity) and ES 4 & MS 3 (based on proximity/capacity/ proficiency). (J.A. 268, ¶ ¶ 15-17, 19; 289-298). The elementary model that balanced proficiency among schools (ES 4) created many "satellite" neighborhoods. (J.A. 268, ¶ 18). After discussion, the Board asked for a "middle ground" map, which would balance proficiency to the degree possible while limiting the number of "satellite" neighborhoods. (J.A. 268, ¶ 20). A third plan called ES 5 was developed and presented at the August 16 board meeting. (J.A. 268, ¶ 21; 299-301). Ultimately, ES 5 provided better diversity than the ES 2 proximity/capacity scenario and fewer satellite areas than the ES 4 model.

At the point of initial presentation, each proposed reassignment plan was driven purely by computer data based on the selected criteria. The computer software utilized by OREd does not take into account human factors that may be important to correct and, therefore, further modification of the ES 5 plan was undertaken based on community input and criteria in the Board's assignment policy. (J.A. 268-269, ¶ ¶ 22, 30). To facilitate this process, the Board held information and public comment sessions at schools and other locations in August, September and October. (J.A. 267-268, ¶ ¶ 7-22). There was also opportunity for public input at regular board meetings, and a public hearing was held on November 8. (*Id.*). In addition, in

accordance with the settlement agreement and the district court's November 2009 Order, Plaintiffs were invited to, and did, participate in workshop retreats to consider the redistricting process on 1 July 2010 and 11 October 2010. (J.A. 274-276; 149-158; 183-194). At the end of this process, the final version of ES 5 recommended by the Superintendent (ES 5A v1) was adopted by the Board on 15 November 2010. (J.A. 269, ¶ 23; 330-336; 217-224).

Following the approval of the new student assignment plan, numerous additional steps were necessary to prepare for the opening of a new school year. (J.A. 270, ¶ ¶ 33, 34). School bus routes had to be analyzed for potential problems in the plan. Current student data had to be entered into the planning software. Students and families had to be notified of school assignments – entailing verification by each affected school of student addresses, and printing and mailing of approximately 3000 reassignment letters – individual student records transferred to the appropriate school, and new bus routes needed to be created. Letters notifying parents of school assignments were sent by 1 April 2011, and at the time of Plaintiffs' filing their motion for injunctive relief, the school system was in the phase of processing transfer requests. PCS undertook a comprehensive transition

plan to ensure a smooth school opening in August 2011. This process would have been derailed by granting the relief sought by Plaintiffs.

Contrary to Plaintiffs' broad assertions, the 2011-2012 Assignment Plan does not portend a shift to more racially-identifiable, non-White schools with lower academic achievement. For example, in opening one new school (Lakeforest) with a projected African-American enrollment of 78% and white enrollment of 12%, the Board also closed an old school (Sadie Saulter) with an African-American enrollment of 90% and white enrollment of 5%. (J.A. 333; 355). While the percentage of black students attending South Greenville Elementary was expected to increase under the reassignment plan (79% projected, compared to 66% current actual enrollment), the projected proficiency measure for South Greenville was also expected to increase (52% projected, compared to 50% actual). (J.A. 333). Finally, while the percentage of African-American students at Elmhurst and C.M. Eppes was also projected to increase from current levels, the reassignment plan actually was expected to bring the school-level racial balance more into line with district-wide enrollment at four other schools: Creekside, Eastern, A.G. Cox, and E.B. Aycock. (J.A. 335). In sum, Plaintiffs' selective use of statistics do not paint a complete picture, either of

the 2011-2012 Assignment Plan or of the Board's overall efforts and progress toward unitary status.

Finally, Plaintiffs unfairly discount the Board's continuing efforts to improve academic achievement for all students in the school district. PCS developed an academic improvement plan to address student performance at all schools that have a composite achievement score[2] below 60 percent, regardless of whether the school was affected by reassignment. (J.A. 269, ¶ ¶ 24-27; 330-332). Under the improvement plan, schools with composite achievement scores below 60 percent will be assigned a teacher leadership cohort of three to five teachers specially selected based on experience, credentials, and a record of improving student growth. (*Id.*). The concept of teacher leadership cohorts is a research-based strategy for improving instruction. (*Id.*). In addition, under the academic improvement plan, targeted schools will offer extended learning time for students, after the regular school day, three to four days each week. (*Id.*). Students who participate in extended learning time will be provided transportation home,

[2] The composite achievement score includes students' scores on both end-of-grade reading and math tests. Proficiency projections utilized for the reassignment plan were not composites and included only end-of-grade reading scores. PCS students on average have lower proficiency scores in reading than in math. Had composite proficiency projections been used for the reassignment plan, rather than reading alone, the projections of proficiency would have been higher overall. (J.A. 331, 342).

and the district's goal is to gain community support for extending the school day for all students at any school with a composite achievement score that remains below 60 percent. (*Id.*). The academic improvement plan is funded for the first three years by a federal Race to the Top grant. (*Id.*). For any schools that continue to have composite achievement scores below 60 percent after the first three years, the district plans to use federal Title I funds to continue the program. (*Id.*).

SUMMARY OF ARGUMENT

(1) Plaintiffs' Motion for Injunctive Relief was brought pursuant to Rule 65 of the Federal Rules of Civil Procedure. This rule governs preliminary injunctions and restraining orders. Plaintiffs' motion was properly treated by the district court as a motion for a preliminary injunction. The district court applied the correct standard and properly placed the burden on Appellants.

(2) If Plaintiffs' motion was not for a preliminary injunction, then this Court lacks jurisdiction to consider the instant appeal. The district court has specifically retained and is exercising on-going jurisdiction over the case. In addition, the court has expressed its clear intention to take up the issue of unitary status after submission of the parties' reports no later than 31

December 2012. Therefore, the denial of Plaintiffs' motion for appropriate relief is not a "final order" pursuant to 28 U.S.C. § 1291.

(3) Assuming, *arguendo*, that Appellants are correct in asserting that the Board must bear the burden of proof in the face of Plaintiffs' challenge to the 2011-2012 Assignment Plan, the district court's decision should nonetheless be affirmed. In compliance with the controlling November 2009 Order in this case, the Board applied its revised Policy 10.107 in establishing a partial reassignment plan and included the Plaintiffs in the planning process. The Board presented sufficient evidence to establish that its 2011-2012 Assignment Plan does not move the Pitt County Schools away from attaining unitary status.

ARGUMENT

I. Plaintiffs' Motion For Injunctive And Other Appropriate Relief Was A Motion For A Preliminary Injunction Pursuant to Rule 65 Of The Federal Rules Of Civil Procedure, And As Such, The District Court Applied The Correct Legal Standard.

Plaintiffs argue at length that their motion for injunctive relief, brought pursuant to Rule 65 of the Federal Rules of Civil Procedure, sought permanent, not preliminary, injunctive relief. This assertion is inconsistent with both the language Plaintiffs' motion and the context in which it arose.

It simply is not correct to say, as Plaintiffs have, that their motion could not be a motion for preliminary injunction because there is no "motion

or claim to which the requested injunction is preliminary," and "[t]here is no pending complaint or trial in this matter." (Appellant's Brief pp. 14, 15). The district court's November 2009 Order went beyond the relief specifically requested by the parties in their consent motion for approval of the settlement agreement. The court, *sua sponte*, recognized the need to finally address the issue of unitary status on its merits and ordered the parties to submit a report no later than 31 December 2012, detailing the Board's progress toward attaining unitary status and eliminating the vestiges of past discrimination. Thus, even though all pending motions were dismissed, the district court retained active jurisdiction over the question of unitary status and signaled a clear intent to address the issue on its merits after submission of the parties' report. Because the court has ordered on-going responsibilities of the parties with a deadline for additional judicial review, the nature of Plaintiffs' motion was necessarily interlocutory and preliminary to the district court's review of – and possible final decision on – the Board's attainment of unitary status.

Further, the posture of this case immediately leading up to the district court's review necessarily leads to the conclusion that Plaintiffs' motion was for preliminary injunctive relief. As noted above, the Plaintiffs' motion was brought pursuant to Fed. R. Civ. P. 65, which addresses preliminary

injunctions and temporary restraining orders. Nothing in the motion's language plainly indicated that permanent or final relief was requested. In addition, Plaintiffs requested an expedited hearing, and the only evidence was submitted in the form of unattested exhibits and affidavits. Each side was allotted up to one hour to present arguments before the court. It is well established that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at a preliminary injunction hearing." *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981). More importantly, the parties generally will not have had "a full opportunity to present their cases." *Id.* Here, the Board clearly did not have a full opportunity to present its case in the context of a final decision on the merits.

In 2008, after the reopening and consolidation of the *Edwards* and *Teel* cases, the district court had ordered discovery to be completed – on both the Board's motion for approval of its 2006-2007 Assignment Plan and the Plaintiff-Intervenors' motion to declare the Pitt County Schools unitary and no longer subject to the 1970 desegregation orders. In fact, Plaintiffs' motion acknowledges that "the Court further concluded that it needed evidence about what actions have been taken by Defendant between 1972

and 2005 to comply with the desegregation orders, as well as evidence as to whether and why Defendant's school system remains segregated by race, in order to adjudicate whether the desegregation orders permit Defendant to redistrict and revise its attendance area policy." (J.A. 93) (emphasis added). Discovery was never completed, however, and the district court ultimately did not have the opportunity to hear evidence and rule on the merits of the Board's attainment (or not) of unitary status, because the parties reached a settlement of all issues then in dispute.

Notwithstanding the district court's approval of the parties' settlement agreement, however, and despite the fact that there was no pending motion by any party to lift the 1970 desegregation orders, in its November 2009 Order the court recognized that it was time to consider doing so. The district court ordered the parties to file a report no later than December 2012 and clearly contemplated a full review of the Board's progress toward unitary status after that time.

The Plaintiffs' motion to enjoin the 2011-2012 Assignment Plan, which asserted that the plan was "regressive" and would move the district further away from unitary status, preempted the process and time line for further review that was set by the court in November 2009. The Board's partial reassignment plan was intended to populate one new school and

improve utilization of existing school capacity. It was developed according to the Board's revised Policy 10.107, which was approved by the controlling November 2009 Order in this case, and the Board included Plaintiffs in the planning process as required by the settlement agreement. In response to the Plaintiffs' motion, the Board pointed out that a determination on unitary status is a "fact-intensive inquiry" based on multiple factors, including but not limited to student assignment. *See, e.g.*, *United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670, 676 (M.D.N.C. 2009); *see also Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 312 (4th Cir. 2001) (noting that the district court's decision on unitary status "was not reached in haste; it was the result of a two-month hearing and an examination of extensive testimony and evidence relating to every aspect of CMS's educational system."). The Board asked the court not to make a decision about its progress toward unitary status – or lack thereof – based only on a truncated review of the 2011-2012 Assignment Plan and without the benefit of evidence and testimony relating to the entirety of the PCS educational system.

While the Board presented substantial evidence surrounding the adoption and effects of its 2011-2012 Assignment Plan, the Board also requested that if the district court determined that a review of progress

toward achieving unitary status was warranted prior to the scheduled December 2012 report, that the court permit sufficient time to enable the Board to present evidence on all relevant aspects of its efforts and progress toward attaining unitary status. Without a complete picture of the school system's efforts and results district-wide, the Board contended that the court could not undertake a meaningful review of the Board's progress toward eliminating the vestiges of past discrimination to the extent practicable.

There is clear authority for the district court to order an expedited decision on the merits of a case and consolidation with a hearing on the application for preliminary injunctive relief. *See* Fed. R. Civ. P. 65(a)(2). However, Plaintiffs did not utilize this procedure and did not clearly request such a hearing, nor did the district court indicate that it would conduct a full hearing on the merits. "Before such an order may issue . . . the courts have commonly required that 'the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.'" *Camenisch*, 451 U.S. at 395. *See also Gellman v. Maryland*, 538 F.2d 603, 604 (4th Cir. 1976) (same); *Singleton v. Anson County Bd. of Educ.*, 387 F.2d 349 (4th Cir. 1967) (recognizing that court may, in an appropriate case,

hear a motion for preliminary injunction and conduct a hearing on the merits at the same time, especially where "piecemeal vindication of civil rights by way of preliminary injunction is inappropriate").

In this case, the proceedings before the district court on Plaintiffs' motion were clearly in the nature of a hearing on a preliminary injunction. The court was not asked by Plaintiffs to conduct a full trial on the merits of the Board's progress toward unitary status, and the court did not do so. The nature of the proceedings permitted the Board to present partial evidence relevant to one aspect of unitary status – student assignment – but the Board certainly did not have a full opportunity to present its case on all relevant aspects of unitary status.

When the district court does take up the issue of determining whether unitary status has been attained, the Board will bear the burden of proof. *See*, *e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation."); *Riddick v. School Bd. of the City of Norfolk*, 784 F.2d 521, 535 (4th Cir. 1986) (holding that the school board bears burden to show that continued existence of one race schools "are genuinely nondiscriminatory and not vestiges of past discrimination."). Because Plaintiffs' motion was a request for preliminary injunctive relief,

however, both by its designation of Rule 65 and in the context in which it arose, the district court properly applied the preliminary injunction standard and placed the burden on Plaintiffs, not the Board. (J.A. 372-373).

II. Denial Of Plaintiffs' Motion for Injunctive And Other Appropriate Relief Was Not A Final Order Pursuant to 28 U.S.C. § 1291 And It Is Not Immediately Appealable Except As An Interlocutory Appeal Pursuant To 28 U.S.C. § 1292(a)(1).

There is no question that the district court maintains jurisdiction over this matter. The court's 4 November 2009 Order specifically states that the case may be reopened upon motion of a party and upon filing of the parties' report on unitary status on or before 31 December 2012.

Consistent with its on-going jurisdiction, the district court has set forth a path for the parties to follow with the ultimate goal of relinquishing judicial oversight of PCS. The court ordered the parties to work together toward attaining unitary status, and for the parties to provide the court with a report no later than December 2012. The 2009 Order recognized the Board's agreement to involve Plaintiffs and Plaintiff-Intervenors "in the planning and discussion stages of the next student assignment plan." There is no dispute that Plaintiffs were included and did participate in the process. (Appellant's Brief, p. 6; J.A. 149, 183).

Between the entry of orders statistically closing the *Edwards* and *Teel* cases in 1972 and the filing of the Board's motion for approval of its

assignment plan in 2008, there was no activity in either of these cases. The district court noted in its November 2009 Order that at the time the original action was initiated, "racial segregation in housing, transportation, education, employment and facilities was widespread . . . . At the time, judicial intervention was needed to eliminate the unconstitutional de jure system; but it was not intended to be permanent." (J.A. 88). The court also recognized that "the world we live in today is far different than what existed at the time this court ordered desegregation of the Greenville City and Pitt County Schools." (*Id.*). Therefore, despite the parties' agreement that the court should not take up the question of unitary status, the court was not prepared to allow the issue to languish without resolution indefinitely. "Returning schools to control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Freeman*, 503 U.S. at 490.

Where the district court has actively exercised its jurisdiction and its oversight, has approved a plan for going forward agreed to by all parties, and has set a schedule for reviewing the ultimate issue of unitary status on the merits, an appellate court should be reluctant to step in prematurely to review an interlocutory order without clear authority to do so. Plaintiffs have provided no such authority. "By statute, Courts of Appeals 'have

jurisdiction of appeals from all final decisions of the district courts of the United States[.]' A 'final decision' is typically one 'by which a district court disassociates itself from a case.'" *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (internal citations omitted). The U.S. Supreme Court has recognized that "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Id.* (internal citations omitted).

If, as Plaintiffs assert, their motion was not one for preliminary injunctive relief, then its denial is not immediately appealable pursuant to 28 U.S.C. § 1292(a)(1). It also is not a final order pursuant to 28 U.S.C. § 1291, because the district court has retained on-going and active jurisdiction of the case. Nor does it fall within the small category of orders which, while not ending the litigation, are nonetheless be considered "final" because they are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action. *See, e.g., Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

An early desegregation case from the Second Circuit Court of Appeals, while arising in a different posture than the instant case, is

nonetheless instructive. In *Taylor v. Board of Education of New Rochelle*, the plaintiffs sought declaratory and injunctive relief with respect to the school board's maintenance of a segregated elementary school system. 288 F.2d 600 (2d Cir. 1961). The district court held that the school board had violated the plaintiffs' constitutional rights as defined in *Brown v. Board of Education*, and ordered the defendant to present a plan for desegregation by a date certain. *Id.* at 601. The school board sought immediate appellate review, but the Second Circuit Court of Appeals held that the order was not a final decision within the meaning of 28 U.S.C. § 1291, because it "constituted only a determination that plaintiffs were entitled to relief, the nature and extent of which would be the subject of subsequent judicial consideration." *Id.* at 602. The court also rejected the school board's contention that the requirement to submit a desegregation plan was a mandatory injunction which could be immediately appealed. The court concluded that it had "no power to entertain the Board's appeal until the District Court has finished its work by directing the Board to take or refrain from action." *Id.* Further, the court stated that while it did "not regard the policy question as to the timing of appellate review to be fairly open . . . the balance of advantage lies in withholding such review until the proceedings in the District Court are completed." *Id.* at 605 (emphasis added).

In this case, the proceedings in the district court are not completed. The district court reopened its oversight of the now-consolidated *Edwards* and *Teel* cases, and it has actively engaged the parties in a process for a review of progress toward unitary status, with the goal of ultimately relinquishing judicial control over the Pitt County Schools. (J.A. 87-89). The district court has determined that it will review the Board's progress toward unitary status upon submission of a report by the parties to be completed by December 2012. The court properly rejected Plaintiffs' motion to require PCS to abandon its 2011-2012 Assignment Plan[3] and to submit a new plan "which moves the district toward unitary status" within 10 days of the court issuing an order on the matter. Given the on-going jurisdiction of the district court over the case, it is appropriate and necessary for this Court to withhold review until the lower court conducts its review of the Board's progress toward unitary status and issues a final appealable decision.

[3] Again, as noted elsewhere in this brief, the 2011-2012 assignment plan was developed after extensive consultation with Plaintiffs and in accordance with the Board's revised Policy 10.107, in compliance with the controlling 2009 Order.

III. The Board's Reassignment Plan Does Not Violate the District Court's Order Or Move the Pitt County Schools Further Away From Attaining Unitary Status.

As discussed at length above, either the Plaintiffs' motion was one for preliminary injunction and, in such case, the district court properly allocated the burden to Plaintiffs, or the denial of Plaintiffs' motion was not a final decision subject to appeal and this Court has no jurisdiction to review it. However, assuming *arguendo* that the Board must bear the burden of proof in defending its 2011-2012 Assignment Plan under these circumstances, the evidence presented by the Board was clearly sufficient to establish that the plan does not move PCS further from a unitary system.

A school district that has not achieved unitary status is not barred from ever changing a desegregation plan. *Riddick*, 784 F.2d at 535. Plaintiffs' motion broadly asserted that "opening a new school (Lakeforest Elementary) with a racially-identifiable (non-White) student body, and increasing racial isolation of non-White students at Elmhurst Elementary and South Greenville Elementary" was in contravention of the 1970 desegregation order and "mov[es] the district further away from unitary status in contravention of " the November 2009 Order. (J.A. 100). This position has numerous flaws. As an initial matter, "[t]he constitutional command to desegregate schools does not mean that every school in every

community must always reflect the racial composition of the school system as a whole." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971). Even the "continued existence of a small number of one race schools" within a school district that has not yet achieved unitary status does not necessarily establish a constitutional violation. *Riddick*, 784 F.2d at 535.

The Board no longer operates any school that could be accurately labeled a "one race" school. (J.A. 355). In fact, under the challenged student assignment plan, the school that persistently remained closest to meeting that definition – Sadie Saulter – is no longer operated as an elementary school and the students have been reassigned to other schools.

A careful examination of the facts establishes that the Board utilized a methodical, reasonable and race-neutral process in developing its student reassignment plan. PCS sought to effectively utilize existing and new facility capacity, in alignment with the district's Long Range Facilities Plan, while taking into account both proximity and proficiency in student assignment. PCS welcomed input from all community members, including affected African-American communities. The Board's 2011-2012 Assignment Plan was developed after extensive consultation with Plaintiffs as required by both the settlement agreement and in compliance with the controlling 2009 Order in this case. Further, the assignment plan was

developed in accordance with the Board's revised Policy 10.107, the 2007 Attendance Area policy, which also was approved by the court's 2009 Order.

The Board also learned from its recent past experience with reassignment. For example, the 2006-2007 Assignment Plan, which redistricted the Greenville-area elementary schools, utilized "satellite" areas and assigned relatively distant, predominately white neighborhoods to Sadie Saulter Elementary and South Greenville Elementary to improve racial diversity at those schools. (J.A. 267, ¶ 11). The 2006-2007 Assignment Plan did not achieve the desired improvement in racial and socio-economic diversity. In fact, implementation of the plan was accompanied by a decline in the number of white students attending the former Greenville City elementary schools. (J.A. 351-355). The total number of white students attending Sadie Saulter, South Greenville, Elmhurst, Eastern, and Wahl-Coates dropped from dropped from 1,005 in 2005-2006 to 664 in 2006-2007 to 473 in 2010-11, even as the number of black students at the same five schools during the same period of time remained roughly constant, and even as the number of black and white students has remained roughly constant

district-wide.[4] (*Id.*). The 2011-2012 Assignment Plan was developed in the context of this history and in acknowledgment of the reality that parents who are dissatisfied with their child's school assignment have other options.

The U.S. Supreme court has recognized that school districts are under no obligation to continue to implement "'awkward,' 'inconvenient, and 'even bizarre' measures to achieve racial balance in student assignments in the late phases of carrying out a decree, when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces." *Freeman*, 503 U.S. at 493. A "racial imbalance in student attendance zones [is] not tantamount to a showing that [a] school district [is] in noncompliance with [a desegregation] decree or with its duties under the law." *Id.* at 494.

The 2007 Attendance Area Policy eliminated racial balancing ratios and increased reliance on other measures of diversity. The Board followed the 2007 policy in developing and adopting its 2011-2012 Assignment Plan. Plaintiffs specifically agreed that the revised 2007 Attendance Area Policy "complies with the Board's obligations under *Edwards* and *Teel* and other existing law," and the district court entered an order based on the parties'

[4] For 2010-2011, student enrollment in PCS is 48.3% black and 38.9% white. (J.A. 355) This compares to a county population that is 34.1% black and 58.9% white. P.L. 94-171, 2010 Census Redistricting Data, available at http://factfinder2.census.gov.

agreement. (J.A. 81, 84). The Board also included the Plaintiffs and Plaintiffs-Intervenors in the planning and development process for the student reassignment process, also in compliance with the 2009 Order. The court's mandate that the parties work together cannot reasonably mean that Plaintiffs have veto power over any choice of a student assignment plan that they do not prefer. Plaintiffs' eleventh-hour motion attempting to halt the practical implementation of the court-approved 2007 Attendance Area policy, following a process which Plaintiffs agreed to and were involved in, was properly rejected. Assuming the Board was required to prove that the 2011-2012 Assignment Plan was not regressive, the Board fully satisfied this burden.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's Order denying Plaintiffs' Motion for Injunctive and Other Appropriate Relief, Attorney's Fees and Costs in its entirety.

Respectfully Submitted,

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Dated: November 30, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 30th day of November, 2011, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 30th day of November, 2011, I caused the required number of bound copies of the Brief of Appellee to be hand-filed with the Clerk of the Court.

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