

NO. 11-2000

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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  
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

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REPLY BRIEF OF PLAINTIFF-APPELLANTS

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Mark Dorosin  
Elizabeth Haddix  
UNC Center for Civil Rights  
CB #3382  
Chapel Hill, NC 27599

Counsel for

Plaintiff-Appellants

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**ARGUMENT**

**Appellee's Mischaracterization of The Posture, Context, and Analytical Framework Of This Case Subverts the Court's Role in Ensuring Progress Toward Unitary Status, Undermines Appellants' Right to an Education Free From the Continuing Legacy of Race Discrimination, and Contravenes Established School Desegregation Precedents.**

Appellee's argument relies on a fundamental mischaracterization of both the procedural posture and controlling law of this case, and defies well-established school desegregation precedents, which the district court also failed to properly consider. There are a number of uncontroverted facts in the record that should help guide this Court's review:

- The underlying merits of this case were resolved when Pitt County Schools (PCS) (then Greenville City and Pitt County Schools) was found liable for operating a racially segregated school system. (J.A. 16-39.)
- In 2009, the district court reaffirmed that PCS has still not attained unitary status and remains under its legal obligation to affirmatively eliminate the vestiges of discrimination in the school district. (J.A. 89.)
- Appellee has never moved for unitary status. (J.A. 5-15.)
- There are no pending motions of any kind before the court. (J.A. 89, Appellee's Br. 16.)
- Appellee has not submitted a student assignment plan for court approval prior to its implementation since 1972. (Id.)

- Despite Appellants' requests, Appellee did not submit the 2011-12 student assignment plan to the court prior to its implementation. (J.A. 227.)
- The 2011-12 student assignment plan was adopted for the express, limited goal "to address the adequacy of school facilities and building capacity," and not pursuant to Appellee's to desegregate or as part of any established unitary status plan. (Appellee's Br. 7; J.A. 367-68.)

This procedural and legal context illustrates that Appellants' motion sought to ensure the board's compliance with and the court's enforcement of the existing orders in this case; and not "preliminary" relief in any sense.<sup>1</sup> Appellee erroneously asserts that the district court's request in its November 2009 order ("2009 Order") for a status report in December 2012 changed the procedural posture of the case into some pre-unitary or intermediate status that alters both the nature of the Appellants' motion and the related burden of proof. (Appellee's Br. 16 ("[t]he district court retained active jurisdiction over the question of unitary status . . . . Because the court has ordered on-going responsibilities of the parties with a deadline

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<sup>1</sup> Appellee argues for the first time in its brief to this Court that the Appellants' April 2011 motion requested a preliminary injunction. There is no reference to a "preliminary injunction" in the response that the board filed in the district court, nor is any argument presented to suggest that the board does not bear the burden of proof. (J.A. 247-63.)

for additional judicial review, the nature of Plaintiffs' motion was necessarily interlocutory and preliminary.".)

This interpretation ignores both the court's traditional oversight and monitoring role in school desegregation cases and the plain language of the 2009 Order. Nothing in the order altered the court's role in ensuring compliance with its orders, nor did the Order relieve the board of its affirmative obligations and burden of proof. No other conceptual framework is consistent with the history of this case or with school desegregation case law.

- 1. A school board under a desegregation order bears the burden of proof to show that its actions, plans or other changes made in the district are consistent with the controlling orders.**

The 2009 Order does not alter the board's ongoing obligation to comply with the desegregation orders and move the district toward unitary status. In fact, the 2009 Order expressly reaffirms that district has not complied with the court's orders. "It is time for the School Board to . . . fulfill its obligation to attain unitary status . . . . The court ORDERS the parties to work toward attaining unitary status so that the court may relinquish jurisdiction and restore to the School Board full responsibility for the operation of its schools." (J.A. 89.) The last portion of this quote is particularly noteworthy, as it acknowledges the court's

continuing role and responsibility in ensuring that appropriate remedial measures are implemented.

The precedents regarding the burden of proof when a non-unitary school district takes substantive steps that may impact the progress toward unitary status are clear: the burden rests with the school board to prove to the court that its actions will eliminate the dual system. Green v. County School of New Kent County, 391 U.S. 430, 439 (1968) ("It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation . . . . [t]he availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method."); Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979) (while the district remains non-unitary, the board bears a "heavy burden of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends."); Hoots v. Commonwealth of Pennsylvania, 539 F. Supp. 335, 339 (1982), aff'd, 703 F.2d 722 (3d Cir. 1983) ("The burden is on the School Board to show that the plans . . . are the most effective means of accomplishing complete desegregation."); Riddick v. Sch. Bd., 784 F.2d 521, 535 (4<sup>th</sup> Cir. 1986) (in a non-unitary system, the board is not

barred from ever changing its desegregation plan, but "the board must show that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination."). Given that there is no dispute that the school district has not achieved unitary status, the burden should have been on the board to prove that the 2011-12 student assignment plan is consistent with the controlling court orders and fulfills the board's duty to eliminate the vestiges of discrimination in the district.

The board mischaracterizes the court's request for a report in 2012 as a release from this affirmative duty and burden of proof. It treats the reporting timeline as a pre-unitary or intermediary stage that allows the board to take retrogressive actions in contravention of standing court orders, free from the established burden of proof in school desegregation cases. This novel reframing attempts to eliminate the court's oversight role in ensuring the non-unitary districts make effective progress to remedy discrimination, and inappropriately treats a non-unitary district under a reporting requirement like a district that has already been found unitary. See, School Bd. v. Baliles, 829 F.2d 1308, 1311 (4<sup>th</sup> Cir. 1987) ("in school desegregation cases the burden does not shift back to the plaintiffs until the school system achieves unitary status").

2. The express language of the November 2009 Order preserves the status quo ante in this case

The 2009 Order reaffirmed that the Appellee has not attained unitary status and the court's continuing jurisdiction over the school district and also requires that, by December 31, 2012, the parties submit "a report detailing the School Board's efforts and progress in achieving unitary status and eliminating the vestiges of past discrimination . . . ." (J.A. 89 (emphasis added)).) Despite this reporting requirement, the procedural posture of the case (and resulting burdens of proof on Appellant) remains the same as before the 2009 Order. In Teel and Edwards, the court had resolved the merits, removed the cases from its active docket, and retained continuing jurisdiction to ensure compliance with its orders. After a period of active litigation concluded by a settlement, the court's 2009 Order returned to the status quo ante, tracking the language of the earlier orders by stating that all remaining motions are dismissed and that "[t]his case shall be administratively closed, subject to being reopened upon motion of any party to this action . . . ." (J.A. 89.)

Appellee asserts that the 2009 Order created some alternative "active" jurisdiction. (Appellee's Br. 16.) However, by its express language, the court reiterated that the procedural posture of the case remained exactly as it had been

prior to the 2009 Order. The court also acknowledged that the school board remained under its affirmative obligations to remedy the effects of discrimination, and that the court stood ready to intervene to ensure that those obligations were met. (J.A. 38-9.) See, Green, 391 U.S. at 429 (“[t]he court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.”); Raney v. Board of Education, 391 U.S. 443, 449 (1968) (“the district courts should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved.”) Appellee’s intimation that the court’s continuing jurisdiction over the question of unitary status was somehow different after the 2009 order (Appellee’s Br. 16 (“the district court retained active jurisdiction over the question of unitary status and signaled a clear intent to address the issue on its merits,”)) ignores the fact that the board’s progress in remedying racial discrimination has always been the basis of the court’s oversight since its original ruling on the merits.

As the plain language of the 2009 Order shows, the court’s request for a general update – not uncommon in courts’ continuing supervision of non-unitary cases – has no substantive

bearing on the procedural posture of case, but merely requires that the parties provide a report to the court in 2012. The reporting requirement does not change the analytical framework of this case or alter the Appellee's duties and burden as a non-unitary district. It in no way promises an actual finding of unitary status nor removes any duties or burdens from the district. Just as before the 2009 Order, Appellee is not unitary in whole or in part and remains under a full affirmative duty to desegregate. As noted above, there is no "intermediate" status in school desegregation cases; school districts are either non-unitary or unitary.

Given that the court has already ruled on the merits of the underlying claims and found the district liable for maintaining a dual district, all subsequent hearings and motions (including the one that is the basis for this appeal, and the report due in 2012) are properly characterized as determinations of the district's compliance with past orders. Appellants' motion appropriately and expressly sought the court's intervention, which it invited in its 2009 Order, to enjoin the board from implementing an assignment plan inconsistent with the continuing injunctive requirements of the desegregation orders. (J.A. 90-101.)

The board's recharacterization of the case suggests that the court should treat Appellants' motion as somehow seeking a ruling that the district is not unitary - a procedural impracticality, since the court has already ruled that the district is not unitary. As the prayer for relief makes clear, the Appellants' motion seeks both to permanently enjoin the implementation of the 2011 reassignment plan because it is inconsistent with the board's affirmative duty to desegregate and to invoke the court's traditional oversight role to order (and review) a new student assignment plan that will move the district toward unitary status. (J.A. 101.) See Raney, 391 U.S. at 449.

**3. The 2009 Order did not approve the 2011-12 assignment plan or otherwise insulate it from review**

Appellee intimates that the 2009 Order, by requesting a general report in 2012, somehow "pre-approved" the 2011-12 student assignment plan and simultaneously prohibited any further review by the court until the reporting deadline. (Appellee's Br. 22-24.) The 2009 Order did approve two separate matters before the court at that time, but not the 2011-12 student assignment plan (or anything else that may happen before December 2012).

First, the 2009 Order retroactively approved the board's 2006-07 student assignment plan as consistent with the controlling desegregation orders. (J.A. 89.) The 2006-07 plan was a specific student assignment proposal that was expressly adopted to achieve increased racial balancing in a subset of the district's schools. Like the 2011-12 assignment plan, the board implemented the 2006-07 plan without seeking the court's prior approval or guidance. When the 2006-07 plan was challenged in a federal administrative complaint, the Office of Civil Rights, acknowledging the court's continuing jurisdiction, required the parties to seek judicial guidance. (J.A. 40-53.) The 2006-07 plan had already been abandoned by the time it was approved in the 2009 Order. (Id., at 52.)

The 2009 Order also approved the board's subsequent 2007 attendance policy, Policy 10.107, a generic set of guidelines for future student assignment plans that expressly includes student achievement, race and socio-economic status as methods to ensure diversity. (J.A. 278-9.) Despite Appellee's contentions to the contrary, there was never court approval or other agreement among the parties to the 2011-2012 assignment plan, the first purportedly developed pursuant to the attendance policy since its adoption in 2007. (Appellants' Br. 7-10.)<sup>2</sup>

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<sup>2</sup> Although Policy 10.107 contains express language regarding the diversity factors, the board refused from the outset of the

Appellee now seems to argue that the court's 2009 approval of Policy 10.107 in some way equates to the approval of any plan ostensibly developed pursuant to its guidelines, and that any challenge to such a plan cannot be considered (except as a preliminary injunction, with the related inversion of the standard desegregation case burden of proof) until a full unitary status hearing is conducted at some point in the future. (Appellee's Br. 19-21, 23 ("the district court . . . has approved a plan for going forward agreed to by all parties.")) This argument fundamentally misreads the scope and language of the 2009 Order, which only approved the adoption of the Policy 10.107, and does not change the procedural framework of the case or its non-unitary posture.

Consider ES2/MS2, the pure proximity assignment option developed pursuant to Policy 10.107 and presented to the board on July 1, 2010. (J.A. 149.) ES2 would have created several severely hypersegregated and racially isolated schools, including three schools with less than 15% and one school with 0% white students. (J.A. 292.) According to Appellee's characterization of the 2009 Order, because ES2 was developed

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reassignment process to consider either race or socio-economic status in making the reassignment decision, and also determined that it would only consider a small subset of schools in the district. (J.A. 133, 147-8, 184-5.) Thus the board neglected even to follow the policy as approved by the court or as initially supported by the Appellants.

under the Policy 10.107, anyone challenging the plan, which resegregates the schools and violates the court's mandates, would bear the burden of proof rather than the school board implementing this retrogressive assignment model. Appellee provides no explanation or other legal support for its position that the approval of the general attendance policy reverses the standard burden of proof. However, by refusing to approve ES2 on the grounds that it would be too resegregative, the board shows that it understands that not every plan resulting from Policy 10.107 fulfills its duty. (J.A. 190.) It is inapposite now for the board to claim court sanction, reversal of the burden of proof, and even immunity from challenge, for another flawed assignment model that increases segregation in the district. (See Appellant's Br. 25-34.)

If Appellee's reframing is adopted, the merits of the reassignment plan can only be considered if and when the district court makes some future final decision on unitary status, effectively denying any relief to those students currently subject to the 2011-12 plan. This flawed analysis means that even though Appellants allege immediate and substantial adverse effects on students as a result of 2011-12 assignment plan, the board bears no responsibility to demonstrate to the court, as Green and its progeny require, that the plan moves the district towards unitary status. Ironically,

while acknowledging that it is still not unitary and is subject to the court's continuing jurisdiction, Appellee argues that such jurisdiction also insulates its actions from the burden of proof on judicial review, or any substantive review until the court considers removing the district from its oversight.

4. **The typical desegregation paradigm for review of board plans applies here**

A model for district court oversight of non-unitary school systems has developed through established precedents. Although the specifics of each case vary, following a ruling on the merits that the district is non-unitary, the school board is given the opportunity to develop plans to remedy the existing vestiges of race discrimination. These plans are in turn submitted to the court for its review and approval before implementation. If upon review, the court determines that the proffered plans will not effectively move the district toward unitary status, it will reject the plan and ask the board to develop a new one. "We charged the district courts in their review of particular situations to . . . consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." Green, 391 U.S. at 436-37 (quoting Brown v. Bd. of Ed., 349 U.S. 294, 301 (1955)). See also, Freeman v. Pitts, 503 U.S. 467, 472-3 (1992) (school board and federal government

developed desegregation plan submitted to and approved by court as a consent decree, court retained jurisdiction); Wright v. Council of Emporia, 407 U.S. 451, 455-56 (county submitted alternative desegregation plans to the court, which ultimately rejected both in favor of plan submitted by the plaintiffs); Crawford v. Bd. of Ed., 458 U.S. 527, 529-30 (1982) (following a finding that the board violated the constitutional rights of plaintiffs, district court ordered board to develop a desegregation plan, rejecting the first but approving the second one submitted).

The history of this case also reflects this model. Both the city and county predecessors to the current board submitted initial desegregation plans that the district court rejected, forcing the boards to revise and resubmit more substantive proposals to remedy race discrimination in the schools. (J.A. 18-19, 27-8.) During the development of the 2011-12 assignment plan, Appellants (and others) asked that the board take similar action with regard to the plan under consideration. (J.A. 227.) Not only would such a step have been consistent with the desegregation precedents described above, but would have ensured full and independent review of the plan before the board expended the resources of implementation.

This is not to say that a non-unitary school board may never proceed with district changes without pre-approval from

the court. If a board implements a plan without prior approval however, it must bear the risk that the court will reject the change and not be able to rely, as both Appellee and the district court did here, on the "great disruption" or administrative hardships of changing a plan already underway. (J.A. 376, Appellee's Br. 11-12.) Similarly, the board decision to proceed without prior court approval cannot be a maneuver to relieve it from the burden of proof. Whether the proposed change is brought into court before implementation or after, the board retains the burden to prove that such changes effectively further desegregation.

Finally, Appellee conceded it would have to bear the burden of proof to defend the assignment plan and suggested that it would be submitted to the court. At the board's October 2010 meeting, Appellee's counsel advised the board that "if there is 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 court-proficiency and race." (J.A. 188.)

**5. This appeal is properly before the Court**

Appellee also argues that this Court lacks jurisdiction to hear this appeal, because it is interlocutory. (Appellee's Br. 22-26.) As stated above, the underlying merits of the equal protection violations in this case have already been resolved

and a final decision issued. The board remains under the court's jurisdiction to ensure that the judgment and the terms of the desegregation orders are fully and faithfully executed. Thus there is no interlocutory aspect to this appeal.

Appellants' motion sought an order permanently enjoining the board from implementing the 2011-12 assignment plan and compelling it to come forward with an alternative plan that moves the district toward unitary status. Although the district court applied the incorrect standard of review, its denial of Appellants' motion is nonetheless a final decision conclusively approving the 2011-12 student assignment plan (a question distinct from the previously reached resolution of the underlying merits), and thus is ripe for appeal.

Assuming arguendo that, because the court retains jurisdiction over this case until the district is found unitary, an appeal of any decision of the court prior to such a finding is interlocutory, this matter is nonetheless properly before this Court. 28 U.S.C. §1292(a) (1) specifically grants jurisdiction over decision "granting, continuing, modifying, refusing or dissolving injunctions."

Considering appeals in three cases where a party challenged the district court's decision approving a desegregation plan for a district that had already been found liable and over which the court exercised continuing jurisdiction, the Sixth Circuit held

“that the challenged orders in these appeals are presently appealable because they amount to mandatory injunctions under 28 U.S.C. § 1292(a) (1).” Liddell v. Board of Education, 693 F.2d 721, 724 (6<sup>th</sup> Cir. 1981). The Ninth Circuit reached a similar conclusion in Diaz v. San Jose Unified School Dist., 861 F.2d 591 (9<sup>th</sup> Cir. 1988). Denying the school board’s motion to dismiss an appeal challenging its new student assignment plan, the appellate court first recognized that the underlying dispute had been decided and the court’s continuing jurisdiction was supervisory in nature. The opinion further noted that the plaintiffs alleged immediate adverse impacts as a result of the assignment plan, and that “delay in review would deny relief to those plaintiffs who are currently subject to the plan.” Id. at 594. The court concluded that the district court’s order approving the plan must therefore be treated as an appealable final order.

It is imperative that this Court recognize the appropriate context of Appellants’ motion and the critical juncture at which this case now stands. Appellee remains under the court’s jurisdiction and has still not fully complied with its affirmative legal obligation to eradicate the vestiges of discrimination. Despite the district court’s dicta about the changes in society and the passage of time, its precatory language regarding local autonomy, and the pendency of a status

report, the board's long delay in complying with the controlling orders in this case cannot serve as the basis for failing to fully review and substantively address the immediate and irreparable impacts of the 2011-12 student assignment plan. This Court must focus on the appropriate procedural posture of the case and the effect of the district court's orders:

We have no doubt whatever that the federal District Court . . . had the power and the duty . . . to protect or effectuate its judgments. Whether . . . called a permanent injunction, a temporary injunction, a restraining order, or merely a stay to protect and effectuate its judgment is . . . of no material consequence. It is substance, not form, which is important. . . . A federal court should not, when prompt action is required, be compelled to indulge in useless formalities in protecting its judgments from being emasculated . . . .

U.S. v. Texas, 356 F. Supp 469,471-2 (E.D. Tex. 1972) (quoting Thomason v. Cooper 254 F.2d 808, 811 (8<sup>th</sup> Cir. 1958)).

The district court committed reversible errors of law in failing to assign the burden of proof to the school board, ruling that the 2011-12 student assignment plan is consistent with the court's controlling authority and orders in this case, and denying Appellants' motion. The ruling should be reversed and the case remanded with instructions that the court order the board to develop and submit for review a student assignment plan that most effectively completes desegregation of and eliminates the vestiges of race discrimination in the district, to be put in place no later than the beginning of the 2012-13 school year.

This the 14<sup>th</sup> day of December, 2012.

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

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

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

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. \_\_\_\_\_ Caption: \_\_\_\_\_

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The undersigned hereby certifies that the foregoing APPELLANTS' REPLY 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, which will send notice of such filing to the following registered CM/ECF users:

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

*Attorneys for Appellee*

This the 14<sup>th</sup> day of December 2011.

The undersigned further certifies that on this day the required number of paper copies of the APPELLANTS' REPLY BRIEF were filed with the Clerk of Court by placing same in the U.S. Mail, first-class, postage paid.

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