IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
OLD WASHINGTON DIVISION
No. 6:69-CV-702-H
6:65-CV-569-H

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

Plaintiffs,

v.

JUVENILE FEMALE 1 and THE GREENVILLE PARENTS ASSOCIATION,

Plaintiffs-Intervenors,

v.

THE PITT COUNTY BOARD OF EDUCATION, public body corporate,

Defendant.

RESPONSE TO MOTION FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND ATTORNEY'S FEES AND COSTS AND MOTION TO STAY DISCOVERY

Ronda Everett, Melissa Grimes, Caroline Sutton, Christopher W. Taylor, and the Pitt County Coalition for Educating Black Children (together as "Plaintiffs") file this Response to Plaintiffs-Intervenors' Motion for Declaratory Judgment, Injunctive Relief and Attorney's Fees and Costs ("Motion for Declaratory Judgment") and Plaintiffs-Intervenors' Motion to Stay Discovery. For the reasons described below, Plaintiffs respectfully request that both motions be denied.

Alternatively, Plaintiffs respectfully request that the Court deny the Motion to Stay Discovery, and, further request that the Court to delay a ruling on the Motion for Declaratory Judgment until the completion of discovery and the development of an evidentiary record before the Court.

STATEMENT OF THE CASE

On July 31, 1970, the Court approved an amended school desegregation plan submitted by the Greenville City Board of Education in Edwards v. Greenville City Board of Education ("Edwards"). (Order dated July 31, 1970). On August 10, 1970, in Teel v. Pitt County Board of Education ("Teel"), the Court approved a plan requiring the desegregation of public schools operated by the Board of Education of Pitt County Schools.

On January 17, 1972, the Court removed Edwards from the active docket, "subject, however, to being reopened at such time as any pleadings or paper is filed therein, that would warrant the reopening of this case." (Order dated January 17, 1972). Likewise, on March 8, 1972, the Court removed Teel from the active docket, also subject to a motion to reopen the case where warranted. (Order dated March 8, 1972). No pleading was filed in either case from the entry of the 1972 Orders until the present-day Pitt County Board of Education ("Defendant" or "Board") filed pleadings on March 18, 2008 to reopen the case, amongst other requests.

As part of the settlement of a 2006 complaint filed with the Office for Civil Rights, United States Department of Education ("OCR"), alleging that Defendant adopted a racially discriminatory school assignment plan in October 2005, Defendant agreed to file a motion in Court seeking a declaration of the status of the Edwards and Teel cases, and the Board's obligations pursuant to those cases. (Resolution Agreement attached as Ex. 15 to Df.'s Motion

for Court Approval of Student Assignment Plan and School Attendance Area Policy, "Df.'s Mot. Ct. Approval Plan" [DE #7]).

In response to Defendant's request to reopen the desegregation cases and for court approval of its 2006-2007 redistricting and 2007 revised attendance area policy, the Court invited all interested parties to participate in a hearing on July 9, 2008. Subsequent to the Court's invitation, an individual parent, on behalf of her minor child, and a parents association filed a motion for declaration of "Unitary Status" [DE #19].

At the July 9, 2008 hearing, several interested parties filing statements in support of and in opposition to Defendant's requests, including: four parents on behalf of their minor children; a coalition of community organizations; an individual parent on behalf of her minor child; a parents association; and Defendant.[1] At the hearing, pursuant to Defendant's motions, the Court reopened and consolidated the school desegregation cases. [DE #32.]

Despite having before it written briefs in support of and in opposition to the Board's request, and having heard oral arguments to the same, the Court held in abeyance Defendant's request to sanction its 2006-07 assignment plan and 2007 attendance area policy. The Court rejected the arguments of both Plaintiffs-Intervenors and Defendant that the Court could decide the challenged issues solely on the pleadings and the existence of the dormant desegregation orders, without any evidence related to school operations between 1972, when the Court

[1] Represented by attorneys from the UNC Center for Civil Rights, four individual families (together as "Respondents"), by invitation of the Court, filed a "Notice of Intent to Participate in the July 9, 2008 Hearing and Motion for Court Approval of the School Assignment Plan and School Attendance Area Policy of the Pitt County Board of Education." [DE #15]. The Pitt County Coalition for Educating Black Children filed *pro se* a statement in support of the school board's diversity policies. [DE #28]. Represented by the Center for Civil Rights, three of the four Respondents, Ronda Everett, Caroline Sutton, and Christopher W. Taylor, as well as the Coalition, have been substituted in for the original plaintiffs in the reopened and consolidated above-captioned case. [DE #s 29, 35-36, 37]. Plaintiffs respectfully request that the Court consider the merits of the previously filed pleadings in support of Defendant's 2006-07assignment plan and 2007attendance area policy before becoming parties of record in this case. Specifically, Plaintiffs request that Court incorporate in by reference their statements of the case in docket entry numbers 15, 28 and 36.

removed the desegregation cases from its active docket, and 2005, when Defendant adopted an assignment policy and redistricted the student attendance zones in the subsequent year. The Court reasoned that it lacked sufficient evidence of the school conditions that prompted the redistricting to rule on the merits of Defendant's request. 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.

Subsequent to the July 9, 2008 hearing, in an order entered on July 22, 2008, the Court granted the substitution of the above named individuals, on behalf of their minor children, and organization ("Plaintiffs") for the original plaintiffs in the desegregation cases and granted the intervention of an individual parent, on behalf of her minor child, and the parents association, as Plaintiffs-Intervenors. [DE #37]. Parties of record now represent a spectrum of families whose children are enrolled in Pitt County Schools.

In the same July 22, 2008 ruling, the Court "order[ed] that discovery be had on these motions and direct[ed] the parties to comply with the Order for Discovery Plan," subsequently entered by the Court. [DE #s 37-38].

On August 4, 2008, Plantiffs-Intevenors filed a Motion for Declaratory Judgment, Injunctive Relief, and Attorney's Fees and Costs. [DE #39]. On August 20, 2008, Plaintiffs-Intervenors filed a Motion to Stay Discovery to which Defendant consented. [DE #43].

Pursuant to the Court's request for a discovery plan, the parties held a discovery plan conference, in accordance with Rule 26(f) of the Federal Rules of Civil Procedure, on August 21,

2008. The parties reached consensus on a discovery plan, which will be filed with the court on or before September 4, 2008, pursuant to the federal rules.

In addition to Plaintiffs' requests in this Response, matters pending before the Court are: 1) Defendant's motion for Court approval of its use of race in the student assignment plan for the 2006-07 school years; 2) Defendant's motion for approval of its current student attendance zone policy, which emphasizes a broad range of diversity factors, including race, as relevant to student assignment decisions; 3) Plaintiffs' motion in support of Defendant's use of race in the student assignment plan for the 2006-07 school years; 4) Plaintiffs' motion in support of Defendant's current student attendance zone policy; 5) Plaintiffs-Intervenors' motion to deny Defendant's student assignment plan; 6) Plaintiffs-Intervenors' motion to deny Defendant's school attendance area policy; 7) Plaintiffs-Intervenors' motion that the Court declare the school system unitary; 8) Plaintiffs-Intervenors' motion for declaratory judgment, injunctive relief, and attorney's fees and costs; and 9) Plaintiffs-Intervenors' motion to stay discovery.

STATEMENT OF THE FACTS

Since there has been no discovery or additional factual development in this case subsequent to Plaintiffs' previously filed pleadings in this matter, Plaintiffs respectfully request that the Court incorporate by reference the statements of facts plead in docket entry numbers 15, 28 and 36.

ARGUMENT

I. PLAINTIFFS-INTERVENORS' ARGUMENT IS INAPPROPRIATE BOTH PROCEDURALLY AND SUBSTANTIVIVELY.

A. Plaintiffs-Intervenors' Motion is Procedurally Defective.

The procedural parameters related to declaratory judgments are controlled by Rule 57 of the Federal Rules of Civil Procedure. In interpreting the scope and meaning of Rule 57, courts

and commentators have recognized that a party must bring *an action* for declaratory judgment pursuant to the Federal Rules of Civil Procedure. "Because an action for a declaratory judgment is an ordinary civil action, a party may not make a *motion* for declaratory relief, but rather, the party must bring an *action* for a declaratory judgment." Int'l Bhd. of Teamsters v. E. Conference of Teamsters, et al., 160 F.R.D. 452, 456 (S.D.N.Y. 1995); Barmat, Inc. v. United States, 159 F.R.D. 578, 582 (N.D.GA 1994) ("The procedural posture of this case does not clearly lend itself to declaratory relief. . . . Generally, declaratory judgments are sought by petition or complaint, rather than by motion, by parties to a controversy.")

The district court in International Brotherhood denied a motion for declaratory judgment, explaining that:

> [W]here the Federal Rules of Civil Procedure specifically address a subject, a litigant is not free to disregard the requirements that the Rules impose. . . . In the instant case, plaintiffs have moved this Court for an order declaring that plaintiffs have certain rights . . . and the Federal Rules have established a procedure for a litigant who seeks such a declaration: an action for a declaratory judgment pursuant to Rule 57. Because plaintiffs seek a declaratory judgment, and because Rule 57 governs an action for a declaratory judgment, plaintiffs must comply with Rule 57's requirements.
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> . . . Insofar as plaintiffs seek a motion for a declaratory judgment, plaintiffs' motion is denied because such a motion is inconsistent with the Federal Rules.

160 F.R.D. at 455-6.[2]

In the instant case, Plaintiffs-Intervenors can only seek a declaratory judgment through the institution of a declaratory judgment action in accordance with the Federal Rules of Civil Procedure. Plaintiffs-Intervenors cannot circumvent the Federal Rules by filing a motion

[2] The Court went on to note that even if it considered plaintiffs' motion for declaratory judgment as a motion for summary judgment (and thereby consistent with the Federal Rules of Civil Procedure), the motion would nonetheless still be denied, because plaintiffs failed to meet their burden under summary judgment and cite any evidence in the record to demonstrate the absence of any genuine issue of fact. Id.

seeking the same in the current litigation. As such, Plaintiffs-Intervenors' motion should be denied.

Moreover, even if the Court chooses to exercise its discretion and consider Plaintiffs-Intervenors otherwise defective motion as a summary judgment motion, it should still be denied because Plaintiffs-Intervenors fail to meet their burden of proof under Rule 56 of the Federal Rules of Civil Procedure. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (The moving party bears the burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." (quoting FED. R. CIV. P. 56(c)). Therefore, based upon the above analysis of the governing Federal Rules of Civil Procedure regarding an action for declaratory judgment or a motion for summary judgment, the Plaintiffs-Intervenors' "Motion for Declaratory Judgment" must be denied.

B. Declaratory Judgment is a Substantively Inappropriate Means to Adjudicate the issues Before the Court.

Declaratory judgment actions provide a specialized form of relief in the judicial system. This unique cause of action is designed to allow a party threatened with potential legal liability to seek an adjudication of its rights without having to wait for or risk the commencement of legal action against that party. "Stated differently, declaratory judgment relief creates means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached a stage at which either party may seek a coercive remedy or in which a party entitled to a coercive remedy fails to sue." 12-57 Moore's Federal Practice - Civil § 57.04.

Courts have held that a declaratory judgment action is not the appropriate procedural avenue to adjudicate past conduct, when damages have already accrued. See, e.g., Crown Cork & Seal Co., Inc. v. Borden, Inc., 779 F. Supp. 33 (E.D. Pa. 1991) (Declaratory Judgment Act is

designed to settle legal rights before rights have been violated or relationships disturbed, not to prevent the burdens or costs of litigation after violations have occurred). Declaratory judgments actions are designed to allow parties to clarify legal rights and obligations before the matters at issue ripen into violations of law or a breach of duty, and thereby avoid incurring damages. United States v. Undetermined Quantities of an Article of Drug etc., 1987 U.S. Dist. LEXIS 15942 (D. Colo. 1987). Declaratory judgment actions also are appropriate in situations where such actions may promote judicial efficiency and fully resolve and terminate the controversy between the parties. See, e.g., Societe de Conditionnement en Aluminum v. Hunter Eng'g Co., Inc., 655 F.2d 938, 943 (9th Cir. 1981); Reynolds v. Stahr, 758 F. Supp. 1276, 1281 (W.D. Wis. 1991).

In the instant case, both the current procedural posture and the substantive legal issues demonstrate that the declaratory judgment *motion* filed by Plaintiffs-Intervenors is an inappropriate means to adjudicate the issues pending before the Court. This is not a case where the Court solely is being asked to prospectively clarify the parties' rights in anticipation or avoidance of some potential harm. Rather, this Court, in Edwards and Teel, found that Defendant, the successor-in-interest to the merged Greenville City and Pitt County Boards of Education, unconstitutionally operated racially segregated public school systems. As a remedy to decades of *de jure* discrimination, the Court ordered the desegregation of those systems. (See Orders dated July 7, 1970, July 31, 1970, and Aug. 10, 1970). Thus, there are long-standing desegregation orders in place designed to remedy the harm endured by all students, particularly students of color, under a *de jure* dual education system. The declaratory relief sought by Plaintiffs-Intervenors would not address this past harm.

Plaintiffs-Intervenors challenged the redistricting plan implemented to effectuate the desegregation orders. The challenged 2006-07 redistricting has already been implemented and significant opposition and resistance to the redistricting occurred. To the extent any party has been harmed by that redistricting, that harm has already occurred. In addition, when the redistricting failed to achieve Defendant's stated goals, Defendant revised its attendance area policy in 2007. Although Defendant has yet to redistrict pursuant to its revised policy, to the extent that Plaintiffs-Intervenors foresee being harmed by any redistricting pursuant to the 2007 policy, such alleged harm is likely to be the same (or a continuing) harm alleged in the earlier redistricting. In short, Plaintiffs-Intervenors and Defendant primarily request that the Court adjudicate past conduct and alleged past violations of rights. Accordingly, a motion for declaratory judgment is inappropriate.

Further, the other primary purposes behind the Declaratory Judgment Act are absent here. Declaratory judgment actions are designed to fully resolve the controversies among parties or promote judicial economy. Here, however, some relationships among the parties and in the community around this issue already have become strained. Also, while Plaintiffs-Intervenors' motion was filed to avoid the burdens of "lengthy and protracted litigation," a declaratory judgment ruling will likely not promote judicial economy or resolve the controversies among the parties. See Plaintiffs-Intervenors' Mem. in Supp.of Mot. for Declaratory J. at 3 [DE #40]. Even if the Court were to grant Plaintiffs-Intervenors' motion (or rule in Defendant's favor without discovery or a trial), the Court is nonetheless ultimately obliged under school desegregation jurisprudence to evaluate the district in six areas of school operation to determine whether *de jure* discrimination has been eliminated root and branch. Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968). A consideration of whether Defendant's actions in 2006-07 and

2007 effectuate those orders is intricately related to that broader evidentiary determination and cannot be circumvented.

The nature and purposes of the Declaratory Judgment Act are inapposite to the facts, history, and controlling legal precedents of the consolidated school desegregation case before the Court. Judicial economy may in fact be best be served by taking advantage of the opportunity, with all interested parties before the Court, to pursue discovery, develop of a full evidentiary record, hold a substantive hearing on Defendant's compliance with the controlling orders and, if found deficient, craft a remedy that will effectively implement those orders. Thus, Plaintiffs-Intervenors' motion should be denied and discovery allowed to proceed.

If the Court concludes however, that declaratory relief should be considered in this matter, it should nonetheless stay a ruling on Plaintiffs-Intervenors' motion until after discovery. See, Chedestar v. Town of Whately, 279 F. Supp. 2d 53 (D.C. Mass 2003) (holding that a court is authorized to stay ruling on declaratory relief until after discovery or trial).

II. THE COURT SHOULD ALLOW DISCOVERY TO PROCEED AND A FULL EVIDENTIARY RECORD TO BE DEVELOPED BEFORE RULING ON THE PENDING ISSUES.

A. Discovery Is Necessary for the Court to Effectively Evaluate Defendant's 2006-07 Student Assignment Plan and 2007 School Attendance Area Policy.

Plaintiffs-Intervenors' Motion for Declaratory Judgment and their related Motion to Stay Discovery are designed to have the Court determine both the constitutionality of Defendant's 2006-07 student assignment plan and 2007 school attendance area policy, and the continuing applicability of the Court's orders in Edwards and Teel, without any discovery or the development and introduction of any substantive evidence of Defendant's attempts or abilities to address the effects of *de jure* racial segregation. Although opposed to Plaintiffs-Intervenors' preferred outcome, Defendant agrees that the Court may rule on the validity of its plan and

policy solely based on the skeletal pleadings on record before it. Defendant, thus, joins in Plaintiffs-Intervenors' Motion to Stay Discovery.

Plaintiffs-Intervenors and Defendant seemingly take the position that the Court has only two mutually exclusive options before it. Both parties state in their pleadings that the Court can either: (1) make a declaratory ruling on the legitimacy of the 2006-07 assignment plan and 2007 attendance area policy without any discovery or evaluation of substantive evidence; or (2) proceed with a hearing on Plaintiffs-Intervenors' Motion for Declaration of Unitary Status. Pursuant to the parties' Rule 26(f) discovery plan conference discussed above, the parties have agreed that to adjudicate the unitary status issue, they must engage in extensive discovery. See Df.'s Supplemental Mem. of Law in Support of Mot. Ct. Approval Plan, fn. 1 [DE #22] ("As the Court is well aware, contested unitary status inquiries involve fact-intensive and time-consuming litigation . . . ."). Thus, the discovery plan adopts the latter option to proceed with the unitary status hearing.

However, Plaintiffs assert that the very limited procedural process sought by Plaintiffs-Intervenors and Defendant undermines and undervalues the scope of the unique role and duty of the district courts in school desegregation matters. In Green v. County Sch. Bd. of New Kent, the United States Supreme Court held:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. 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. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then

> the plan may be said to provide effective relief. . . . Moreover, whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state-imposed segregation had been completely removed.

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

The clear message from Green and its progeny, and from the experience of school districts throughout the nation, is that a district court's role is not limited to entering a desegregation order, relying on the school board's good faith implementation for a number of years, and then re-asserting jurisdiction to determine whether unitary status has been attained. See, e.g. Green, 391 U.S. at 439-40; Freeman v. Pitts, 503 U.S. 467, 492 (1992) (a district court "should address itself to whether [a school board] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable'") (citing Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991). The United States Supreme Court clearly anticipates a continuing role for district courts as school districts move from a *de jure* dual to a *de facto* unitary system, including general monitoring, as well as directly intervening when necessary.

Martin v. Charlotte-Mecklenburg Bd. of Education exemplifies the scope of a district court's oversight role and procedurally is directly on point to the case as bar. 475 F. Supp. 1318 (W.D.N.C 1979). In Martin, the school system operated under desegregation orders entered in a related proceeding. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In 1974, the Charlotte-Mecklenburg Board of Education adopted a pupil assignment plan designed to effectuate the desegregation orders and further integrate the school system. A group of white parents filed suit challenging the use of race in the school board's 1974 student reassignment plan. In determining the merits of the plaintiffs' claims, the district court noted that "[t]here is no way to do this without a factual survey of the Charlotte-Mecklenburg schools and how they

got where they are, and why the Board considers race, among other factors, in pupil assignment." Martin, 475 F. Supp. at 1321.

The district court in Martin recognized the necessity of conducting an extensive factual analysis of the school system's operations in the wake of a challenge to an assignment plan, even though it was the third major federal case (in addition to the continuing litigation in Swann) involving the Charlotte-Mecklenburg school system filed in eight years. See Moore et al. v. Charlotte-Mecklenburg Board of Education, et al., 402 U.S. 47 (1971); Cuthberston et al. v. Charlotte-Mecklenburg Board of Education, 535 F.2d 1249 (4th Cir. 1976). Despite the extensive litigation history and continuous federal court supervision of the desegregation efforts of the Charlotte-Mecklenburg school system, the district court in Martin still required the development of a full evidentiary record to adequately evaluate the plaintiffs' challenge to an assignment plan.

In the instant case, Plaintiffs-Intervenors, like the plaintiffs in Martin, are challenging a specific school assignment plan adopted by Defendant pursuant to existing desegregation orders and its affirmative duty to desegregate the *entire* school system. Plaintiffs-Intervenors' Motion for Declaratory Judgment asks the Court to make a determination about the permissibility of *one* assignment plan, affecting a relatively limited number of schools operated by Defendant, and to limit Defendant's remedial authority to implement race-conscious measures that impact the *entire* school system.[3] Plaintiffs-Intervenors further request that the Court make a determination

[3] The 2006-07 redistricting impacted five elementary schools in the Pitt County school system-- Eastern, Elmhurst, Sadie Saulter, South Greenville, and Wahl-Coates. Defendant operates an additional thirty schools-- Belvoir Elementary; Pitt Memorial Hospital; Northwest Elementary; Pactolus Elementary; Bethel Elementary; Falkland Elementary; Sam D Bundy Elementary; W H Robinson Elementary; Creekside Elementary; H B Sugg Elementary; Grifton Elementary; Ayden Elementary; G R Whitefield Elementary; Winter Green Primary; Winter Green Intermediate; Stokes Elementary; Chicod Elementary; AG Cox Middle; Ayden Middle; Ayden-Grifton High; CM Eppes Middle; DH Conley High; EB Aycock Middle; Farmville Middle; Farmville Central High; Hope Middle; JH Rose High; North Pitt High; South Central High; and Wellcome Middle.

about an attendance area policy that upon implementation may impact the *entire* Pitt County School system. Plaintiffs-Intervenors' ask the Court to make these significant determinations without having any substantive evidence on the record regarding the segregated status of the school system, the existence or effectiveness of past school board policies designed to comply with Edwards and Teel, or the good faith or reasonableness of Defendant's decisions to adopt the 2006-07 assignment plan and 2007 attendance area policy.

Unlike the procedural history in litigation to desegregate Charlotte-Mecklenburg Schools, there has been virtually no judicial oversight of Defendant's compliance with the orders in Edwards and Teel, or of the district's progress towards "a unitary system in which racial discrimination would be eliminated *root* and *branch*." Green, 391 U.S. at 437-38 (emphasis added); see also Dowell, 498 U.S. at 237; Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001).[4]

The last action taken by the Court on this matter was its 1972 orders removing Edwards and Teel from the active docket. In the intervening 36 years, there have been substantial changes to the school system, including the merger of the Greenville City and Pitt County school systems, the elimination of some schools and construction of others, and the adoption of a myriad of school board assignment plans and attendance area policies that potentially affect the fundamental desegregation criteria established in Green. Given this significant history, and the ongoing mandate of the existing desegregation orders, it is imperative that the Court allow discovery to proceed and a full evidentiary record to be developed.

[4] Although the Teel order expressly required Defendant to file preliminary reports with the Court detailing the number and race of students, teachers and school personnel in each grade and each school in the system, those reports were only requested through March 1971. See Order dated August 10, 1970. Plaintiffs assert that, there is no evidence before the Court that Defendant complied with the order by filing those reports.

A detailed evidentiary record will allow the Court to more effectively analyze Defendant's 2006-07 student assignment plans and 2007 attendance area policy to ensure that Defendant is complying with Green and its progeny. The development of an evidentiary record also provides the Court with information to evaluate Defendant's effectiveness in fulfilling this Court's mandates pursuant to Edwards and Teel.

The Court has a unique opportunity in this case. Having gathered all of the interested parties to the bar, it may be possible through this action, with the Court's oversight and guidance, and a complete evidentiary record, to collaboratively develop a roadmap and timeline for the district to effectively eliminate the effects of segregation and attain unitary status. Allowing discovery to commence, so that all parties and the Court will have an accurate understanding of what has been done and what remains to be done, is the first step in that process.

B. Plaintiffs-Intervenors' Interpretation of the Desegregation Orders in Edwards and Teel Misconstrues the Language of the Orders and Context in which the Orders Were Entered.

Plaintiffs-Intervenors base their argument for a declaratory judgment on a fundamental misreading of the Edwards and Teel orders. In their motion and supporting brief, Plaintiffs-Intervenors argue that the controlling desegregation orders *prohibit* Defendant from considering race in complying with those orders. Plaintiffs-Intervenors interpretation of that portion of the former Greenville City School's desegregation plan expressly prohibiting discrimination and segregation in extra-curricular activities, transportation, and athletics fundamentally misconstrues the context in which the Court entered the order, as well as the clear intent of the Court's desegregation order and Defendant's attempt to comply with the Court's directive.

The amended desegregation plan approved by the Court in its July 31, 1970 order was Defendant's second attempt to satisfy the Court's desegregation mandate. The first plan

proposed by Defendant was rejected for failing to "disestablish the segregated school system." (Order dated July 7, 1970 attached as Ex. 1 to Df.'s Mem. of Law in Support of Mot. Ct. Approval Plan [DE #8]). The amended desegregation plan specifically addressed each of the areas the Court cited in rejecting the Defendant's initial plan: assignment of students, faculty and staff, extra-curricular activities, and transportation.[5]

The amended desegregation plan expressly obligates Defendant to reassign students and utilize bussing to meet targeted racial student balances in all of the schools in the system. The plan also requires Defendant to assign faculty and personnel to "establish a racial ratio . . . which approximates the ratio of black and white teachers in the system as a whole. . . . Total staff and faculty desegregation will be effected." (Order dated July 31, 1970, attached as Ex. 2 to Df.'s Mem. of Law in Support of Mot. Ct. Approval Plan [DE #8]). The desegregation plan concludes that "No discrimination will be employed in extra-curricular activities nor in the transportation of children. . . . No student will be segregated or discriminated against on account of race or color. . . ." Id.

Read within the context of the entire desegregation plan (and the Court's earlier rejection of Defendant's preceding plan), it is clear that the "Racial Non-Discrimination" portion of the desegregation plan refers to remedying the effects of the *de jure* segregation of African American students in the facilities, transportation and extra-curricular activities of the school system. Plaintiffs-Intervenors' interpretation of this portion of the plan requires the Court to ignore the rest of the language of the order, the history of segregation in the school system, the Court's attempts to remedy it effects, and the general jurisprudence of school desegregation.

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[5] These factors generally mirror the factors established for measuring the effectiveness of a school board's desegregation strategy established in Green.

Similarly, Plaintiffs-Intervenors' narrow focus on the term "non-racial" in the Teel order reads that phrase out of context and, in so doing, distorts the Court's use of the term and the overall intent of the desegregation order. As in Edwards, the Court in Teel initially rejected the former Pitt County School Board's initial desegregation plan. The August 10, 1970 order approving the amended desegregation plan contains even more detailed and specific analysis of school assignment, including the construction of new schools. The order also expressly refers to the assignment of teachers and personnel to achieve balanced racial ratios in the school system. The Court addresses additional Green factors and orders Defendant to "administer all school activities, services, facilities and programs on a non-racial basis." (Order entered August 10, 1970, attached as Ex. 4 of Mem. of Law in Support of Mot. Ct. Approval Plan [DE# 8]).

Read in the context of the entire order and in light of the history of segregation in the school system, it is clear that the intended use of the term "non-racial" in the Teel order is to eliminate the ongoing impact of *de jure* discrimination against African American children in the school system. Plaintiffs-Intervenors' interpretation of this language is inconsistent with the rest of the order and the Court's express imposition on Defendant to take affirmative, race-conscious steps to disestablish all aspects of the segregated school system.

Moreover, Plaintiffs-Intervenors' convoluted interpretation of the language of the Edwards and Teel orders would have the effect of incorporating the jurisprudential equivalent of a unitary status determination (and the concomitant limitations on the use of race in a post-unitary setting) into the very rulings requiring the implementation of race-conscious desegregation plans.[6] If Plaintiffs-Intervenors' analysis were correct, then the extent of

[6] Plaintiffs-Intervenors ignore that the legal issues of race-neutrality raised in McFarland (later Meredith) v. Jefferson County Public Schools, 330 F.Supp.2d 834 (2004), only were introduced after the school system had been declared unitary, unlike the Pitt County School System, which remains dual and subject to Edwards and Teel. See Parents Involved in Community Schools v. Seattle School Dist. No. 1 et al., 127 S. Ct. 2738 (2007).

Defendant's obligation to take affirmative steps to desegregate would have been limited to the 1970-71 school year. The idea that the Court intended to both require and prohibit the use of race-conscious measures to desegregate *de jure* segregated school systems is inconsistent with the express language and intent of the Edwards and Teel orders, the Court's continuing jurisdiction over these matters, and the well established precedents that hold that a school system found to operate a *de jure* segregated system has an affirmative duty to take all the necessary steps, including implementing race-conscious measures, to move from a *de jure* dual system to a *de facto* unitary system.

C. Plaintiffs-Intervenors' Motion for Declaratory Judgment is an Attempt to Attain a Unitary Status Declaration without the Requisite Trial.

As discussed above, the Edwards and Teel desegregation orders expressly authorize and require Defendant to take affirmative, race-conscious steps to eliminate the legacy and impact of *de jure* segregation. The United States Supreme Court has held that schools systems subject to court orders to desegregate must continue to comply with those orders until a subsequent court order specifically determines that the system has attained unitary status (thereby rendering the desegregation order unnecessary). See, e.g., Dowell, 498 U.S. at 249 (judicial orders are binding authority until modified or dissolved); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35, 439-49 (1976) (a school board was obliged to follow the court's desegregation order until modified of reversed by the court, despite defects in the original order).

In order for a court to determine whether a district subject to a desegregation should be declared unitary, and thus released from the court's continuing jurisdiction, the court must consider whether: i) the school district has complied with the desegregation order in good faith, for a reasonable period of time, and ii) the impacts of prior *de jure* segregation have been eliminated to the extent practicable. Belk, 269 F.3d at 318 (citing Dowell, supra.). The specific

criteria courts are required to review in evaluating whether the impact of segregation has been eliminated are set out in Green and include: student assignment, faculty recruitment and assignment, staff recruitment and assignment, and parity regarding transportation, extra-curricular activities, and school facilities. In addition, the United States Supreme Court has also held that district courts, in their discretion, may consider ancillary factors in evaluating a school system's efforts to eliminate the effects of segregation. Freeman, 503 U.S. at 492. These discretionary factors include: quality of education, Coppedge v. Franklin County Bd. of Ed., (E.D. NC 2002); teacher quality, Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 57 F. Supp. 2d 228, 270 (1999); student achievement (id. at 272), and student discipline, (id. at 273-74).

Green and its progeny have established that a court must undertake a comprehensive factual analysis of a broad range of factors in order to rule that a school system has achieved unitary status and should be relieved of its obligations under existing desegregation orders. In addition, the Green factors must be analyzed not merely at the moment of the court's review, but longitudinally, at a minimum since the time of the court's last review, in order to assess both the school system's good faith and its progress toward achieving unitary status. See, e.g., Freeman, 503 U.S. at 492 ("Unitariness is less a quantifiable moment in the history of a remedial plan than it is the general state of successful desegregation."); Capacchione, 57 F. Supp. 2d at 232 (the district court looked to student enrollment data over the entire twenty-eight year period the school district had been under court order).[7]

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[7] The comprehensive nature of the requisite Green review underlies the need for discovery *before* the Court makes any substantive ruling in this matter. In the case at bar, there has been *no* Court review of Defendant's policies or its progress towards eliminating the effects of segregation since the 1971orders in Edwards and Teel. Moreover, Defendant's attendance policies submitted for the Court's review effect only four elementary schools in the system. There is no information in any of the pleadings before the Court related to any of the other Green factors for those schools, and nothing at all about any of the other thirty plus schools or the district as a whole.

In both their Memorandum in Support of the Motion for Declaratory Judgment and Motion to Stay Discovery, Plaintiffs-Intervenors concede that they seek to avoid the lengthy trial a unitary status determination would likely require. (Plaintiffs-Intervenors' Mem. in Support of Mot. Declaratory J. at 5 [DE #40]); Plaintiffs-Intervenors' Mot. to Stay Discovery at 2 [DE #43]). Yet, the relief sought in the Motion for Declaratory Judgment is an attempt to reach the same ultimate outcome as a unitary status determination--a court declaration that Defendant has eliminated the vestiges of *de jure* segregation and that remedying past injustices is no longer a compelling interest justifying race-conscious measures--without the development of any of the mandatory evidence or proof required under Green to declare a system unitary. An effective determination of unitary status, without the development of any factual record is inconsistent with precedent and contrary to the Court's obligation to ensure the elimination of *de jure* segregation.

If Plaintiffs-Intervenors want the Court to determine that the existing desegregation orders should be dissolved and the Court's jurisdiction over this matter be terminated, there is a well-established procedure for seeking such relief—requesting a determination of unitary status. Plaintiffs-Intervenors' Motion for Unitary Status is still pending before the Court. That motion—and the attendant discovery and trial required for the Court to rule on it—is the appropriate procedural avenue for a determination that Defendant has completely fulfilled its obligations under Edwards and Teel and for a ruling that limits the consideration of race in Defendant's policies and practices. To attempt to short circuit that process by filing the Motion for Declaratory Judgment and Motion to Stay Discovery is both procedurally and substantively improper. Thus, Plaintiffs-Intervenors' Motion for Declaratory Judgment, Injunctive Relief, and Attorney's Fees and Cost, as well as Motion to Stay Discovery should be denied.

D. The Court Already has Determined that Discovery is Necessary to Adjudicate this Matter.

As noted in the Statement of the Case, supra, the Court conducted a hearing in this matter on July 9, 2008. Amongst other pleadings, pending before the Court at that time were: Defendant's Motion for Court Approval of Student Assignment Plan and School Attendance Policy and Plaintiffs-Intervenors' Motion for Declaration of Unitary Status, as well as their related supporting memoranda. The Court only heard oral argument on Defendant's request for the Court to sanction its 2006-07 redistricting and 2007 adoption of a revised attendance area policy.

Following the hearing, the Court declined to rule on Defendant's motion. The Court expressly rejected the suggestion that it could issue a decision on the permissibility of Defendant's 2006-07 assignment plan and 2007 attendance area policy in the absence of evidence related to: 1) the context in which Defendant adopted the redistricting plan and attendance area policy; 2) the extent to which the school system has remained segregated over the past 36 years; and 3) what progress, if any, Defendant made over the last 36 years to comply with Edwards and Teel.

The Court reaffirmed its intent to proceed with discovery and the development of a full evidentiary record in this matter when it entered its orders on July 22, 2008. Specifically referring to Defendant and Plaintiffs-Intervenors' pending motions, the Court "orders that discovery be had on these motions and directs the parties to comply with the Order for Discovery Plan that will be issued by the clerk forthwith." (See Order entered July 22, 2008, at pp. 3-4). Contemporaneously, the Court took the first procedural step to formally begin the above-referenced discovery process and issued its Order for Discovery Plan, requiring the parties to hold a Federal Rules of Civil Procedure 26(f) meeting by August 21, 2008, and submit a

discovery plan to the Court by September 4, 2008. (See Order for Discovery Plan entered July 22, 2008). The parties have complied with the Court's orders, holding the Rule 26(f) meeting on August 21, 2008 and joint discovery plan will be filed shortly.

Since the hearing on July 9, 2008, the Court has received no evidence with regard to any of the pleadings pending before the Court. The Court has no more information in the record than it did when it initially declined to rule on the pleadings and ordered discovery on the pending motions. Plaintiffs-Intervenors' Motion for Declaratory Judgment and Motion to Stay Discovery (the latter of which is joined by Defendant) are attempts to reargue for a ruling on the very pleadings this Court held in abeyance on July 9, 2008, and to avoid the discovery that the Court has determined is necessary to resolve the pending issues and fulfill its obligations under Green and its progeny. In light of the Court's statements and express orders on the issue of evidence and discovery, Plaintiffs-Intervenors' motions should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Plaintiffs-Intervenors' Motion for Declaratory Judgment, Injunctive Relief, and Attorney's Fees and Costs because the request is procedurally and substantively inappropriate. Plaintiffs further request that the court to deny Plaintiffs-Intervenors' Motion to Stay Discovery because discovery is required for the Court to: (i) effectively judge the legality of Defendant's redistricting and adopting of a new attendance area policy; (ii) accurately interpret its own desegregation mandates in Edwards and Teel; and (iii) comply with school desegregation jurisprudence requiring district courts to assess a school board's compliance with desegregation mandates.

In the alternative, Plaintiffs respectfully request that the Court deny Plaintiffs-Intervenors' Motion to Stay Discovery and delay any ruling on Plaintiffs-Intervenors' Motion for

Declaratory Judgment until after discovery is completed and a full evidentiary record is before the Court. Plaintiffs assert that ruling on Plaintiffs-Intervenors' declaratory judgment motion absent discovery of the school conditions that prompted Defendant's challenged actions are contrary to controlling law and inconsistent with the obligations of the Court and Defendant to effectuate the Court's desegregation orders to achieve a school system where the consideration of race is eliminated.

Respectfully submitted, this the 25th day of August, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Response to Motion for Declaratory Judgment, Injunctive Relief, and Attorney's Fees and Costs* and *Motion to Stay Discovery* was served upon the below listed individuals by electronically filing the document with the Clerk of the Court on this date using the CM/ECF system.

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This the 25th day of August, 2008.

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