

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,
Plaintiffs,

v.

GEORGE W. ROMNEY, Secretary of
the Department of Housing and
Urban Development, et al.,
Defendants.

NO. 66 C 1459

NO. 66 C 1460
(consolidated)

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR
A RULING ON THE PROPRIETY OF CONSIDERING METROPOLITAN
RELIEF AND IN SUPPORT OF THE ENTRY OF FEDERAL DEFENDANTS'
PROPOSED JUDGMENT ORDER

INTRODUCTION

On January 29, 1973, the attorneys for the plaintiffs filed a Motion for a Ruling on the Propriety of Considering Metropolitan Relief, and a memorandum in support thereof. The plaintiffs interpose this motion in an effort to induce the court to defer its ruling on the proposed final judgment orders filed on April 26, 1972 by the Department and on September 25, 1972 by plaintiffs. Such action on plaintiffs' part makes it increasingly obvious that they are not interested in bringing this litigation, at long last, to final judgment. Rather, they wish to prolong further this suit by indulging in yet another stalling tactic. Plaintiffs act as if the extensive hearings which were held on this case from November 27 through 29, 1972, never took place, and instead of going forward with this litigation, seek to retreat to a prior stage in these proceedings. The court should not indulge

plaintiffs' fantasy that issues that have been fully briefed, were never written; that oral arguments that have been presented, were never heard. It is time for a decision.

The instant motion for the court to determine that it is necessary and appropriate to consider a metropolitan plan blithely ignores the fact that such an approach already has been addressed to the court. A metropolitan wide plan was the heart of plaintiffs' proposed final judgment order. The plaintiffs had every opportunity to present the evidence they desired at the lengthy November hearing, not only as to whether the court should consider a metropolitan plan, but also as to whether it should order the implementation of such a plan. There is no justification for retravelling that ground again. Likewise, the plaintiffs move the court to order the Department and CHA to prepare metropolitan wide plans for affording the plaintiffs complete relief. The Department's position on this issue has been repeated ad
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infinitum. On the first page of the Department's April 26 response, it is noted:

"As this court has been previously advised, the United States Department of Housing and Urban Development (HUD) does not have the legal authority to initiate or develop plans for the implementation of the federally assisted low rent housing programs in the City of Chicago or the Chicago metropolitan area. Development of such plans rests with the specific localities seeking HUD assistance. The President in his Statement on Federal Policies Relative to Equal Housing Opportunity of June 11, 1971, defined the role of this Department in the operation of Federal Housing and Urban Renewal Programs as follows:"

1/ See generally the Memorandum in Opposition to Plaintiffs' Motion to Require Defendant George W. Romney, Secretary of the Department of Housing and Urban Development, to Propose Comprehensive Plans Which can be Metropolitan in Scope to Correct the Effects of Past Racial Discrimination (hereinafter referred to as HUD's December 17th Memorandum) filed December 17, 1971.

'The Federal Program role -- as the governing statutes made clear -- is essentially one of responding to local or private initiatives, rather than one of imposing its programs on State and local governments.

'In none of HUD's grant programs does the Department act directly. The Department builds no housing, develops no land use plans, clears no slums and constructs no sewers. Instead, HUD provides, within its statutory and regulatory framework, financial assistance to local developers and agencies, both public and private, who build and manage housing, and engage in planning and community development activities.

'The extent to which HUD program activity is dependent on local initiative and execution is frequently overlooked, but is an important element in considering policy issues. Sites for HUD-assisted housing must be selected and acquired by local sponsors -- public or private -- and housing developed on those sites must conform to local zoning and local building codes. Planning performed with HUD assistance is done by State and local governmental bodies. Community development activities -- urban renewal, water and sewer, or open space projects, for example -- are initiated and executed by local governments.'

Thus, it should be apparent to all that these chapters in the Gautreaux litigation have already been written. The evidence has been presented; and the arguments have been heard by the court. The cause of justice will not be furthered by engaging in the plaintiffs' dilatory maneuvers.

The plaintiffs' memorandum in support of their newest pleading adds no new dimensions to the litigation; it is merely a recapitulation of plaintiffs' misunderstanding of HUD's responsibilities. The Department has fully addressed these issues. The opposing viewpoints have been fully presented to the court, and the court has had the benefit of both written responses and oral arguments. On the basis of the evidence presented and

the status of the law, the court should now enter its final order granting the relief it deems appropriate. In reaching such decision, the Department urges the court to take account of the observations herein set forth.

ARGUMENT

THE OPINION IN BRADLEY v. MILLIKEN IS
INAPPOSITE TO THIS CAUSE OF ACTION.

The rationale for plaintiffs' motion is premised on the opinion in Bradley v. Milliken, (Slip Opinion Nos. 72-1809 - 72-1814), (6th Cir. 1972). Plaintiffs would like the court to believe that the Bradley decision affords some type of legitimacy to the relief they seek; but, upon analysis, manifest distinctions of fact and law between the two cases emerge. As this court is well aware, there is a profound difference between school cases and housing cases. In San Antonio Independent School District v. Rodriguez, 41 L.W. 4407 (1973), the Supreme Court recognize the vital role of education in a free society and that education is perhaps the most important function of state and local government. In Bradley v. Milliken, supra, at pp.57-59, the Court set forth that the State of Michigan guarantees to each of its citizens an education. However, in respect to housing, the Supreme Court in Lindsey v. Normet, 405 U. S. 56 at p. 72 (1972) stated:

"We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill.****

"Absent constitutional mandate, the assurance of adequate housing ***[is a legislative, not a judicial function.]"

The State of Illinois has not categorized a right to a house for each of its citizens. Nor, is there a federally protected right to low-income family public housing. In James v. Valteria, 402 U. S. 137 (1971), the

Supreme Court recognizes that low-income public housing is primarily a local option program to be accepted by all the people of the community and not a program that is mandatorily required in every community.

In Bradley v. Milliken, supra, the state itself was a party defendant to the action-- thus reflecting the primary role and responsibility of the state in the field of education. In the present consolidated cases, the state has never been named a defendant, which reflects plaintiffs' own recognition of the remote role which the state plays in the field of public housing. Moreover, in Bradley v. Milliken, supra, the court made specific findings as to the state's duties in the field of education, and found on the basis of the facts presented, that the state had violated those duties. Obviously, based on such findings, it is far easier for the court to order that remedial relief be obtained from "the creatures of the states." In this case, plaintiffs seek relief from the offspring without even naming the progenitor, much less having an evidentiary basis to conclude that the state or its political subdivision violated some duty owed to the plaintiffs. cf. Gregory v. City of Chicago, 394 U. S. 111 (1969); cf. Thompson v. City of Louisville, 362 U. S. 199 (1960).

Even though plaintiffs here refused to name as a party the very entity against which they ground their claim to metropolitan relief (the state)^{2/}, they do name the Secretary of the Department of Housing and Urban Development. It should be noted that in Bradley v. Milliken supra, HUD's federal

^{2/} Although the plaintiffs would have this court believe otherwise, the State of Illinois, a nonparty, when exercising power wholly within the domain of state interest, is insulated from federal judicial review. This court has not found that the State of

counterpart, the Department of Health, Education and Welfare, was not a party to the litigation. Perhaps, the Bradley plaintiffs did not seek to impose remedial sanctions or otherwise obtain relief from a federal department, because they recognized that a federal agency must labor under statutory constraints, and cannot assume to itself the legal authority to initiate or develop plans for the implementation of its programs, when Congress has not granted the federal agency that authority. Certainly the decision in Bradley v. Milliken, supra, furnishes no precedent for an order which directs an executive department of the federal government to prepare a metropolitan wide plan. It should be further noted that in none of the cases to which the plaintiffs' attorney alluded in oral argument - (Shannon v. Romney, 436 F.2d 809 (3rd Cir. 1970); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); Garrett v. City of Hamtramck, 335 F. Supp. 16 (D.C. S.D. Mich., 1971)) - was the Department ordered to engage directly in planning activities which went beyond the statutory authority which Congress conferred.

Finally, in Bradley v. Milliken, supra, the court had already determined that a plan, which was metropolitan in scope, was necessary to afford the

2/ continued. Illinois in the creation of its political subdivisions and the state local housing authorities used said creations as an instrument to circumvent any federally protected right of the plaintiffs. Gomillion v. Lightfoot, 364 U.S. 339 (1960); cf. Wright v. Council of City of Emporia, 407 U. S. 451 (1972); cf. United States v. Scotland Neck Board of Education, 407 U. S. 484 (1972). Nor, can the plaintiffs seriously argue that the finding by this court of violation of constitutional rights by one political agency of the state (the CHA) can be imputed to the State of Illinois and the other political subdivisions and state local housing authorities within the State of Illinois. The plaintiffs' cannot resort to a theory of vicarious liability to legitimate their metropolitan relief. Bradley v. School Board of the City of Richmond, Va., 462 F.2d 1058 (4th Cir., 1972), cert. granted, December, 1972.

plaintiffs complete relief, and that a Detroit-only plan was inadequate for such purpose. Such a finding has not been made in the Gautreaux litigation; although precisely this issue is before the court for decision, on the basis of the testimony and documentary evidence introduced at the November hearings. In the Department's view it is by no means clear from the record in the instant case that a metropolitan remedy is necessary as a matter of law or fact to accord the plaintiffs the relief to which they are entitled.^{3/} The only evidence to support plaintiffs' claim for metropolitan relief was the testimony of Philip Hauser. Hauser testified that as a result of demographic shifts in the population of the City of Chicago as well as other urban cities, the entire geographic area of the City of Chicago will be within the limited public housing area as defined by the judgment order entered July 1, 1969 by the year 2000. Such testimony does not support plaintiffs' entitlement to metropolitan relief. As the Supreme Court in Swann v. Board of Education, 402 U. S. 1, at pp. 31-32, stated:

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally"

^{3/} In Swann v. Board of Education, 402 U.S. 1, at 16 (1971), the Supreme Court in considering the scope of the equitable power of the court stated: "As with any equity case, the nature of the violation determines the scope of the remedy." Since CHA's plenary jurisdiction is limited to the City of Chicago and the nature of the constitutional violation of CHA and HUD relates only to the City of Chicago, this court is limited to fashioning a remedy within the geographic area of the City of Chicago based on the record and the parties before this court. This court has already fashioned such a remedy for these plaintiffs. Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (D.C. Ill. 1969).

"required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." [Emphasis added.]

Swann v. Board of Education, 402 U. S. 1, at pp. 31-32.

There is certainly no evidence in this record that any of the party-defendants has attempted to fix or alter demographic patterns to affect the racial composition of the areas where public housing is to be located under the basic judgment order. Based on plaintiffs' demographic evidence, this evidence would not justify an alteration in the basic judgment order in this cause. ^{4/} Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (D.C. Ill. 1969).

For the reasons heretofore cited, the Department believes the Bradley decision is inapposite to the situation presented. However, it is amusing to note to what length the plaintiffs have gone to avoid doing what the opinion on which they rely tells them they must do. Although all the relevant evidence is before the court, they do not wish the court to decide whether a metropolitan wide plan is necessary, but only that it is appropriate to consider such a plan. The later ruling would clearly amount to interlocutory order, of the same character as the March 24, 1972

^{4/} The proposed judgment order which was submitted by HUD requires HUD to utilize its "best efforts" to implement the basic judgment order in this cause.

order in Bradley v. Milliken, supra (See plaintiffs' Exhibit B).

The reason behind the plaintiffs' hesitancy at this point is obvious. If the court ultimately rules that a metropolitan wide plan is necessary, Bradley v. Milliken, supra, requires that they must join as parties to the action those parties who will be affected by a plan encompassing such area, a step which plaintiffs curiously seem unwilling to take. It must be remembered that HUD has never questioned the desirability of a metropolitan wide plan, but rather has interposed various legal objections to the particular plan plaintiffs have proposed and the manner of, and responsibility for, its implementation. The court has already observed that CHA has hardly made strenuous objection to a metropolitan wide approach. If the court rules on the evidence that complete relief demands a metropolitan wide plan, now is the appropriate time for plaintiffs to ask leave to join the additional parties needed for further proceedings in this case.

The plaintiffs suggest that if the court rules favorably on the propriety and necessity of considering a metropolitan remedy in this case, plaintiffs, at some future "appropriate" time, will ask leave to join five named housing authorities in the Chicago urbanized area. However, plaintiffs have never asserted and do not now assert that any of these authorities have violated the rights of the plaintiffs or have been lax in using their best efforts in providing low-income housing within their respective areas of operation. It should be observed that in the case of the three county housing authorities, their areas of operation consist either of unincorporated

areas within the counties, or municipalities for which no housing authority has been created, and with whom they have signed Cooperation Agreements. These are not the parties whose policies will be affected by the entry of the type of metropolitan wide plan which plaintiffs are proposing. The naming of these proposed additional parties alone will not be sufficient to provide the full relief plaintiffs are seeking. In order to introduce public housing units into the communities in the urbanized area, it is necessary for the plaintiffs to name as parties defendant all those communities which heretofore have been unwilling to sign a Cooperation Agreement with a local housing authority. This lawsuit has already been needlessly prolonged because the plaintiffs refused to recognize that the relief they were seeking demanded that the City of Chicago be joined as a party defendant and that there be findings on the record of the City's unlawful conduct. There will be many more years of continued frustration if the court allows the plaintiffs to continue their piecemeal approach. We urge the plaintiffs to stop taking one half-step measure after another -- if plaintiffs are advocating the type of metropolitan plan which they advocated in the prior proceedings, they should do precisely what "their own case" tells them: Name all those parties who will be affected by the proposed plan, all 193 suburban communities, their mayors and their councilmen. (TR 366, HUD Exhibit B). ^{5/} If this court determines that a metropolitan wide

^{5/} "TR" refers to the transcript of these proceedings which were held on November 27th through November 29th, 1972.

plan is in fact necessary, this is the path to complete relief.

THIS COURT SHOULD ENTER THE PROPOSED
JUDGMENT ORDER WHICH HAS SUBMITTED BY
THE SECRETARY OF HOUSING AND URBAN
DEVELOPMENT.

Much more directly in point than the Bradley, supra, school case to the present stage of this litigation is the recent opinion of the three-judge district court in the Sixth Circuit (A.J. Celebrezze, Battisti, and Lambros), and the separate opinion and order of Judge Battisti in the case of Mahaley, et al. v. Cuyahoga Metropolitan Housing Authority, (CMHA), et al. (Slip Opinion No. C 71-251, decided February 22, 1973).^{6/} Very simply stated, the three-judge court, which was constituted because the constitutionality of the federal statute was challenged, held that the Cooperation Agreement requirement of the U. S. Housing Act of 1937, as amended, was constitutional. Title 42, United States Code, Section 1415 (b)(7). The court stated that there was nothing on the face of that law, or as that law was being applied, which was unconstitutional.^{7/} It then determined that the only issue left in the case was whether the cities who were named defendants had so used the law as to discriminate against blacks. The court felt that this was not a matter for decision by the three-judge court, and it therefore remanded the case to Chief Judge Battisti

^{6/} Copies of the opinions are attached as Appendix A to this memorandum.

^{7/} The plaintiffs' proposed judgment order contemplates by-passing or, in other words, to enjoin the application of various federal and state statutes which would redesign the low-income housing program from a local option program for a community to one of mandatory obligation upon local communities within the self-denominate geographic area by the plaintiffs. The by-pass provision in plaintiffs' proposed judgment order will eliminate rights conferred by these statutes on nonparties. Rees v. City of Watertown, 86 U. S. 107 (1873); Hedges v. Dixon County, 150 U. S. 182 (1893).

for consideration of those claims.

Thereafter, Judge Battisti found that:

- a. Both the City of Cleveland and the suburbs were highly racially segregated;
- b. There was a great need in both the suburbs and the City of Cleveland for low-income housing;
- c. A large percentage of the Cuyahoga Metropolitan Housing Authority's (CMHA) waiting list was black;^{8/}
- d. CMHA had made efforts to negotiate with the various suburban communities but they had either refused or ignored such efforts; and
- e. There was no good reason for the suburbs not to have entered into such agreement.

Accordingly, the Judge found that their reason for refusing to enter into Cooperation Agreements was that they were intending to exclude blacks.

Several important factors should be noted about the decisions in Mahaley v. (CMHA), supra. First, five suburbs were named as defendants in the lawsuit. Although CMHA was ordered to develop a plan which reflected the needs of each suburban community for low-income housing and which indicated the number of units which would be used to house those residents of the City of Cleveland who wish to move into that community, the court stated that the plan could only be effectuated as to the specific defendant suburban municipalities.

Further, the court left open the right of the suburbs to present reasons

^{8/} CMHA is a housing authority which, under Ohio law, possesses metropolitan-wide jurisdiction.

why they opposed the CMHA plan. The court cautioned, however, that unless the reasons were constitutionally permissible and met the compelling interest test, the court would conclude that the suburbs' failure to sign a Cooperation Agreement was for racially discriminatory reasons, and would take appropriate judicial action.

In this cause of action, the plaintiffs have long refused to join the suburban communities in which they desire this court to order the placement of low-income housing. Even at this stage, their brief actually argues against such joinder, although it is manifest that only by such joinder will plaintiffs be able to obtain the relief they are seeking. Rule 19, of the Federal Rules of Civil Procedure.

Secondly, although HUD was named a party defendant in the consolidated Mahaley v. (CMHA), supra, cases, plaintiffs' purported cause of action against the Department was stated exclusively in the first count. The court entered summary judgment for the defendants on this count. The only reference to HUD in the second count was the claim for relief, by way of a claim which Judge Battisti flatly rejected. Although, as yet, there has not been a formal dismissal of the Department, there has been neither a finding against the Department, nor relief ordered against this Department.

In light of the opinion of the Seventh Circuit Court of Appeals in this case, we do not argue at this point for dismissal. However, HUD renews its request that the court enter a simple "best efforts" order as the most appropriate relief against the Department, as the Court of Appeals has stated on two separate occasions. Gautreaux v. Romney, 448 F.2d 731

(7th Cir.,1971); Gautreaux v. Romney, 457 F.2d 124 (7th Cir.,1972).

Finally, it should be emphasized that in Mahaley v. (CMHA), supra, the court did not impose any extra-legal, supra-statutory duties on the parties. CMHA is a county-wide housing authority and it has jurisdiction to build public housing in those communities with which it has executed a Cooperation Agreement. As previously stated, the primary jurisdiction of CHA, on the other hand, is confined to the City of Chicago and it has made known its views as to being designated the all-purpose agent to carry forth plaintiffs' designs. -

Furthermore, in Mahaley v. (CMHA), supra, HUD was not ordered to assume a planning authority it did not have, nor was it ordered to disregard the basic enabling statutes and regulations which happened to interfere with plaintiffs' proposals. The court recognized and preserved Congress' decision as to what the federal program role in housing and urban development programs was to be. The opinion, by inference, directed HUD to continue the requirement that communities enter into a Cooperation Agreement to be eligible for low-rent public housing assistance, by deciding the Congressional imperative was constitutional both on its face and as applied. The court placed the onus where it rightly ought to be, and found it unlawful for suburban communities to refuse to enter into Cooperation Agreement for racially discriminatory reasons. As HUD has contended on numerous occasions in this litigation, the Gautreaux plaintiffs ought to have directly confronted the real barrier to a metropolitan approach to the public housing problem rather than continuously attempting to utilize kamikaze legal theories that produce only more litigation and no housing.

Finally, as this court has come to realize, HUD's responsibility under the federal public low-income family housing program is to provide financial assistance to locally developed plans for such housing. See HUD's December 17th Memorandum.

During the hearing concerning plaintiffs' metropolitan plan, HUD's evidence reveals that there is a serious question as to HUD's financial capabilities to make plaintiffs' proposed metropolitan plan or any other metropolitan plan for public low-income family housing workable and workable now. (TR 330-348); Swann v. Board of Education, *supra*, at p. 31. See also the budget and program estimates for the Department of Housing and Urban Development which is contained in The Budget of the United States Government, Fiscal Year 1974, Appendix, U. S. Government Printing Office, Washington, D.C., 1973, attached as Appendix B of this memorandum. Based upon the present record in this cause, the court should enter HUD's proposed judgment order.

If the court determines on the basis of the evidence presented at the November hearings that plaintiffs are correct in their assertion that metropolitan relief is necessary to afford them complete relief, HUD urges that the plaintiffs be required to take the necessary next step: join the suburbs as defendants, and present evidence that their failure to enter into Cooperation Agreements is for racially discriminatory motives. Only by adopting a forthright strategy in this lawsuit, instead of continuous end runs, will plaintiffs obtain the complete relief they profess to be seeking.

CONCLUSION

It is the opinion of the Department that the plaintiffs have resolutely followed a strategy geared to deterring the ultimate resolution of a lawsuit which has extended now for seven years. They call the court's attention to the Sixth Circuit Bradley decision, but then they refuse to follow the path that the court directed. They ignore the Mahaley v. (CMHA), supra, decision which clearly indicates that suburban communities should not only be joined, but be found guilty of unlawful conduct, as a necessary prerequisite to the ordering of metropolitan housing relief. Plaintiffs, in fact, appear bent on the very course that the Court of Appeals admonished against, i.e., continued interference with the programs and actions of an already beleaguered federal agency. Gautreaux v. Romney, supra.

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Based on the foregoing, HUD believes that it is now clearer than ever that it is appropriate to enter the final order the Department proposed in its April 26, 1972 submission.

Respectfully submitted.

JAMES R. THOMPSON
United States Attorney

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