IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

WILLIAM CAPACCHIONE, as Guardian for CRISTINA CAPACCHIONE, a Minor, Plaintiff, and MICHAEL P. GRANT, et al., Plaintiff-Intervenors, v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Defendants.	Civil Action No. 3:97-CV-482-P
JAMES E. SWANN, et al., Plaintiffs, v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., Defendants.	Civil Action No. 1974

SWANN PLAINTIFFS' TRIAL BRIEF

Now come the *Swann* plaintiffs, through counsel, and file this Brief on the issues for trial before the Court. A year ago, this Court asked counsel for the school district whether the board had not yet desegregated its schools. The Court will learn in the course of this trial that the answer to its seemingly rhetorical question is, sadly, "no".

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I. STATEMENT OF THE CASE

This matter was filed originally in 1965 by a group of African-American plaintiffs seeking to end segregation in the public schools of Charlotte and Mecklenburg County. The district and appellate courts upheld the school board's student assignment plan of March 1965. But the plaintiffs moved for further relief in 1968, in light of intervening Supreme Court decisions urging immediate desegregation of the public schools. Between 1969 and 1974, this Court issued approximately twenty orders directing the school board to desegregate. The Supreme Court affirmed two of those orders, from 1970, in it's landmark 1971 decision, *see*, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971). However, this Court had to issue some ten additional orders directing the Board to desegregate before placing the case on inactive status in 1975.

It was not until 1974 that the Board adopted, and the Court approved, a plan that fully involved the area known as Southeast Charlotte in the desegregation plan. The plan paired schools, set up satellite zones and established guidelines for student assignment. Notably, the July 1974 Order approving that plan specifically endorsed the use of the county-wide "optional schools" as part of the board's proposed desegregation guidelines, so long, the Court admonished, as the Board provided transportation for students attending such schools, ensured broad notification and opportunity to enroll in them, and did not allow such schools to become havens for "freedom of choice" and wreak "havoc" on desegregation. 379 F. Supp. 1102, 1103-04 (W.D. N.C. 1974).

Finally, in an order dated July 11, 1975, the court ended its active supervision of the district, but specifically noted:

> Though continuing problems remain, as hangovers from previous active discrimination, defendants are actively intelligently addressing these problems without court intervention...
>
> This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed...
>
> The duty to comply with existing court orders respecting pupil assignment of course remains. So, also, does the duty to comply with constitutional and other legal requirements respecting other forms of racial discrimination.

67 F.R.D 648, 649-50 (W.D.N.C. 1975). Far from finding the district to have achieved unitary status, the court recognized continuing vestiges of the dual system were present. The 1975 order has remained unchanged.

Four years later, this court found that "'racially neutral attendance patterns' have never been achieved" in this school district. Martin v. Charlotte-Mecklenburg Bd. of Ed., 475 F. Supp. 1318,1340 (1979). The court further found numerous other concerns leading it to conclude that "discrimination has not been ended", but left "the continuing problems of segregation[1] in the hands of the School Board...". *Id.* at 1346-47. The court found that the Board had a continuing duty to avoid resegregation while addressing the vestiges and of segregation, and correctly observed:

> The culture and attitudes and results of three centuries of segregation cannot be eliminated nor corrected in ten years ...even in the hands of people of good will... They need time to work their own experiments, and to find their own ways of producing the sustained operation of a system of schools in which racial discrimination will play no part."

Id. at 1347.

[1] For example, discovery documents show that the federal government withheld $900,000 in funding in 1978 because of internal school segregation.

In 1980, the Court reopened the case to modify its prior orders and allow any elementary school, except Hidden Valley, to have a black enrollment up to 15% above the system-wide percentage of black student enrollment.

From 1970 through 1980, and then again from 1980-1990, residential segregation in Charlotte declined. But by 1985, the number of schools out of compliance with the Court order began to increase steadily. In 1992, the Board adopted a widely-publicized plan to end the pairing of black and white schools and greatly expand the number of county wide optional or "magnet" schools in order to move away from the mandatory busing of students and comply with the Court's orders. As required by the 1974 order regarding the use of county-wide optional schools, the Board provided transportation to these schools, publicized their availability for enrollment and maintained racial guidelines for admission to avoid "havoc" in the system's efforts to comply with the court order. However, the number of predominantly black schools, and the racial proportions in them, jumped that year and have increased every year since 1992.

William Capacchione, who is white, filed suit in September 1997 alleging that the Board's use of racial goals in the magnet schools was not covered by the Court order, and thus was unconstitutional and discriminated against his daughter. She was "forced", to attend her neighborhood school, McKee Road Elementary.[2] The *Swann* plaintiffs moved to reopen *Swann*, showing the Court the existence of continuing issues of discrimination in the operation of the schools.

[2] McKee Road Elementary has among the highest test scores, the most trained and experienced faculty, and the best educational resources, in the district. In deposition, Mr. Capacchione was unable to identify a single educational resource that his daughter would have obtained at the magnet school that she did not have at McKee Road. His primary evidence of damage is that his daughter was teased by her best friend and neighbor for not attending the magnet with her.

In March 1998, the Court denied the school board's motion to dismiss Capacchione's complaint, granted the *Swann* plaintiffs' motion to reopen *Swann*, and consolidated the two actions for trial. In April 1998, the six *Grant* plaintiffs, all of whom are white, moved to intervene, complaining that the school district's continued compliance with this Court's desegregation orders was unconstitutional and discriminated against them. Like Capacchione, they seek damages essentially because the board still complies with this Court's orders. The Court allowed that motion to intervene.

Mr. Capacchione and his family moved to California prior to the start of the 1998-99 school year, and the Court entered partial judgment, dismissing any claims by him for injunctive or declaratory relief.

II. ISSUES

At the trial of this matter, the Court is faced with one fundamental question in equity -- is this school district unitary? Before reaching that issue, this Court should address, and can readily dismiss, the two separate legal claims, Mr. Capacchione's claim for damages and the similar damage claims of the Grant intervenors. The argument section below explains each of these three issues separately. But the Court should first review some of the essential facts.

III. Summary of the Facts

As the parties are submitting proposed findings of fact, the plaintiffs will here summarize some operative facts that the Court must review to determine if this school district is unitary.

A. **Student Assignment**.

The trend in student assignment is unmistakable. For the current school year, some 25 schools are out of compliance with the Court's orders and are identifiably black. Another thirteen schools are identifiably white. These numbers are increasing on an annual basis. The same trend is reflected in the number of students attending racially identifiable schools. About 30% of the black students in the district attend a school that is out of compliance with the court's orders. Again, that percentage is steadily increasing each year. A comparable number of whites attend racially imbalanced white schools.

Further, internal segregation within ostensibly integrated schools hides from the gross numbers of racial composition. The district uses tracking at the secondary level with a profound racial impact. At the elementary level, school district data shows that 35.5% of black students in racially balanced schools are nonetheless learning in segregated classrooms.

One cause of these imbalances is the magnet program itself. There is evidence that the Board has not monitored effectively the impact of the magnet programs on the sending schools. In fact, the magnets have created or exacerbated racial imbalances in predominantly black, non-magnet schools. The programs also sometimes create the illusion of desegregation by placing magnet programs inside schools that are racially imbalanced. Such programs often do not actually integrate the classrooms in a school, as the students in some magnets do not attend classes with students in the "regular" program. Thus, magnet programs can appear to balance attendance numbers at the building without desegregating the classrooms in the building.

The plaintiff-intervenors however look only at the gross, building-level data. They claim that the trend towards segregation is the result of demographics, not of school board policy, and that the board cannot be held responsible legally for these trends. However, data from the intervenors own expert indicates that the most significant demographic trend is the dispersal of blacks -- that the County has become less segregated residentially over the same time that the schools have become more segregated. By the intervenor's evidence, the school system should be easier to desegregate now, not harder.

Most importantly, the demographics of Charlotte are not those of DeKalb County, Ga., the locus of the Supreme Court's decision in *Freeman v. Pitts*, 503 U.S. 467, 118 L. Ed. 2d 2108, 112 S. Ct. 1430 (1992). In DeKalb County, the black population had exploded from 5% to 47% of that county's population in approximately fifteen years, and the county had split into two sharply distinct racial areas. The Supreme Court found that such an extreme level of demographic change overwhelmed the DeKalb school board's ability to deal with the resulting imbalances in its schools. It could do nothing short of massive bussing to remedy the situation; something the parties agreed was not a viable option. *Id.*, 503 U.S. at 481, 118 L. Ed. 2d. at 128. Those sorts of changes simply have not occurred in Charlotte.

In Charlotte-Mecklenburg, the percentages of blacks and whites has stayed fairly constant over thirty years. The percentage of black students in the district has risen only incrementally since 1980 – from about 38% then to about 41% today. The most notable demographic change has not been polarization of the county into two racial zones, but the dispersal of the black population throughout the county. Logically, with bussing in use,

the increase in school segregation in a district becoming more integrated residentially shows a failure by the district to take advantage of the generally improved demographics. By utilizing midpoint schools, for example, as written Board policy espoused.

The intervenors' emphasis on demographics masks the true issues of decision making by the school board. Unlike DeKalb County, racial demographic change in Charlotte-Mecklenburg is not overwhelming the board and leaving it unable to respond to imbalance in its schools. The early orders in this case admonished the Board to site schools in order to promote integration. It has not. And, since 1992, southeast Charlotte has once again removed itself from full involvement in desegregation.

Indeed, the intervenors ignore evidence that it is the board's school assignment decisions that have increased racial imbalances. Crestdale Middle School provides an illustration. The record shows that the school board paid a premium to purchase land near Highway 74 to site a new school there that could be easily integrated with transportation. But when the school opened, the board bowed to political pressure to fill the sparkling, state-of-the-art school with students from southeast Charlotte. Rather than open as a school with 40-45% black students as planned, the new school is only 16% black, almost all of them assigned by individual request under a Majority to Minority transfer plan. The racial composition of other middle schools in the east side of Charlotte became more imbalanced as a result of this decision.

The board already uses a desegregation tool not available in *Freeman*, and has the advantage of a demographic trend opposite from that of *Freeman*, both of which should assist, not impede, desegregation. Yet, the schools have become more segregated.

B. Faculty Assignment

The trend to segregation in faculty assignment is also unmistakable, and has two aspects. First, the number of schools with racially imbalanced faculty is increasing dramatically. This school year, there are 40 schools where the faculty composition varies by more than 10% from the system average, a standard cited with approval in *Freeman*. That figure is up from 31 schools in 1997-98, 28 in 1996-97 and 19 in 1994-95.

Second, the statistical correlation between the racial composition of a school's student body and its faculty has increased dramatically since 1992. The data shows a strong statistical correlation between the race of the students at a school and that of the faculty. Thus, between the trends in student and faculty assignment, the district is moving away from, rather than toward, "a system without a 'white' school and a 'Negro' school, but just schools." *Green v. County School Board of New Kent County,* 391 U.S. 430, 442, 88 S. Ct 1689, 1696, 20 L. Ed. 2d 716, 726.

C. Facilities

The inequity in facilities is a central concern of this case, and a profound distinction from *Freeman*. There, the Plaintiffs "conceded" that the district had achieved unitary status regarding facilities. 503 U.S. 484, 118 L.Ed.2d 130. Here that is not the case.

Some thirty years ago the board closed many of its "black" schools because their conditions were so inferior. Today, about 80% of the predominantly black schools need to be bulldozed or completely renovated. There will be testimony at trial about the appalling physical conditions in many of the predominantly black schools. Superintendent Smith, for example, has testified to his shock when he arrived at seeing

the physical condition and disrepair of Charlotte's predominantly black schools. The only evidence from the intervenors to contradict this factual reality is the assertion by one of their experts, who has no professional training in facilities' evaluation, and apparently has never testified as a facilities expert, that he visited thirteen of the district's 130 schools and found their condition "satisfactory."

If the school district is to move towards unitary status, it must first address the inequities in physical facilities.

D. Material Resources

The inequities in physical facilities are compounded by the disparities in basic educational resources at those same schools. Evidence at trial will show that the board has attempted to establish a base line of material resources at each grade level, from basic classroom supplies, to library books, to computers. It has found that predominantly black schools need twice as much money per pupil as predominantly white schools to reach that base line.[3]

E. Transportation

There is continuing concern that blacks bear a disproportionate burden in being transported for racial balancing, particularly since the end of depairing. There are no white satellite zones into predominantly black schools, for example; only black satellite zones into white schools, or, oddly, black zones into predominantly black schools. And, because the board has not built or expanded schools in the urban part of the county or in suburban areas already integrated, black students must be transported to find seats.

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[3] Data on the most important resource, teachers, presents very serious concerns as well. That issue is discussed in section F, "Quality Education".

F. Extracurricular Activities

The evidence will show racial disparities in co-curricular organizations that are inextricably linked to racial disparities in curricular enrollments, which leads to perhaps the most disturbing evidence of continuing discrimination: what is called in *Freeman*, "quality of education."

G. Quality of Education

This term is an umbrella of issues related to equal opportunities in education, something the intervenors' expert agrees is a valid issue for Court review in this case. The concerns come in several categories.

First are the concerns about teachers. The data show that teachers in the predominantly black schools tend to be less experienced and less educated than elsewhere in the system. Of particular concern, as noted by outside observers, is the high rate of teacher turnover in the predominantly black schools and a much higher proportion of new teachers there. In these same schools, unsurprisingly, the rates of suspension and other forms of lost student time are among the highest in the district.

Second are issues of student achievement. This Court originally ordered desegregation, in part, to address gross disparities in student achievement. The Board has not yet begun to address that issue effectively. The intervenors claim that these achievement disparities are solely the result of socio-economics rather than race discrimination by the district, and that the disparities are comparable to national trends. The facts show otherwise.

Socio-economics clearly do not explain significant facts. For example, the data show that the scores on end of year tests of the group of white students poor enough to

qualify for free and reduced lunch are consistently similar to the scores of black students who are not subsidized. That is, broadly speaking, middle and upper income blacks in the district score comparably to the poorest whites. Something is wrong with that picture. It surprises many to lean that, nationally, the test score gap has closed measurably since 1970. In many categories, it had been cut in half by 1988. The intervenor's expert's black/white testing data does not show any comparable closing of the gap in Charlotte.

At one end of the spectrum stand the advanced and gifted classes, where blacks are woefully underrepresented. At the other end are special education classes, where blacks are over-represented, and more likely to be diagnosed as retarded or behaviorally handicapped.

Part of the explanation comes from the manner in which the district groups and tracks students, which has a dramatic effect on student achievement. Few blacks are enrolled in advanced courses, or in the courses in lower grades that are prerequisite to the advanced classes. While the intervenors seem to argue that blacks either do not qualify or do not seek out these courses, the data shows a more pernicious problem. A review of Sixth Grade CAT test data shows starkly that black and white students with similar test scores that year were often placed in different tracks in later years. Black students were placed in lower level classes than whites with similar Sixth Grade test scores. With placement flows a decline in goals, expectations, and achievement.

Finally, there is the issue of student discipline. Not only are black students disciplined in larger numbers than non-blacks, they also are more likely to receive a more severe punishment than a non-black for the same offense. A higher percentage of blacks who commit a specific disciplinary offense are suspended from school than non-blacks

who commit the same offense. That is true for every category of offense but the zero tolerance violations – weapons and drugs, which are applied uniformly. In every category where discretion is allowed, black students are more likely than whites to be suspended from school.

IV. ARGUMENT

A. Unitary Status

The issue properly before this Court is whether the Charlotte-Mecklenburg school district is unitary. Once found to have violated the constitution, a school board must follow a court's orders until there is a judicial determination that it has remedied its actions and their consequences. That is, a court must determine that a school system has taken "all steps necessary to eliminate the vestiges of segregation ...[to ensure that] .... the injuries and stigma inflicted upon ... black students are ... no longer present." *Freeman*, 503 U.S. at 485. Until there is such a judicial determination, this school board must comply with the Court's remedial orders.

Two points must be kept in mind. First, a school board remains under the obligation to meet the court's orders until freed from it. The intervenors case is built in substantial part on a theory that the Board has been *de facto* unitary. There is no such creature. Counsel for the intervenors argued a variant of this theme in *United States v. Georgia*, _____ F.3d ____, No. 97-9199, (11th Cir. April 8, 1999), a case involving unitary status of the Troup County, Ga. schools. (A copy of the yet to be published decision is attached.) Counsel urged at trial that the language in a decision deactivating the case in 1973 had rendered the school district unitary. Last week, the Eleventh Circuit disagreed; declaring that unitary status could only be determined after a fact-finding

hearing convened for that purpose. That is the case that will be tried before this Court. No other mechanism can make this school system. And, until it is declared unitary, a school board has "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 511, (Blackmun, J., concurring, quoting Green, citations omitted).

Second, the intervenors focus on the issue of student assignment and ask the court to declare the district unitary in that singular respect. *Freeman* makes it clear that the trial court must look at the entire operation of the school district before determining if it is unitary in whole or any part. Since it is "the operation of a racially segregated school *system* that must be remedied," *Freeman,* 503 US at 510 (Blackmun, J., concurring), all of the various facets of the school system "must be free from discrimination" before it is completely unitary. *Id.*, at 486 (Kennedy, J.). Or, as stated by Justice Scalia, the courts must "afford remedies that eliminate not only the discrimination but its identified consequences." *Id., at* 506.

Freeman makes unmistakable the obligation of a trial court to look at all evidence of both past and present discrimination in determining the question of unitary status. Thus, the *Freeman* trial court acted properly in deciding

> to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, *and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the Court's decree.*

Id., at 492 (emphasis added).

Freeman also emphasized that the *Green* factors are not a rigid framework, and that each factor is not to be viewed in isolation from the others. In fact, "two or more *Green* factors may be intertwined or synergistic in their relation so that a constitutional

violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well." *Id., at* 497. That is, "The components of a school desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge upon the success or the failure of another." *Id., at* 497-98, *quoting, Vaughns v. Bd. of Educ. of Prince George's County*, 742 F Supp 1275, 1291 (D. Md. 1990). As described by Justice Souter, the trial court should be concerned that a "vestige of discrimination on one factor will act as an incubator for resegregation on others." *Id., at* 508.

Thus, a trial court must weigh carefully the systemic impact of even a partial declaration of unitary status. *Freeman* established a three-part inquiry for deciding whether a trial court should relinquish control of all or any particular facet of a school system.

1. Compliance with Order

A trial court must first consider "whether there is full and satisfactory compliance with the court's decree in those aspects of the system where supervision is to be withdrawn." 503 US at 491. That is, the district must look at whether the vestiges of segregation have been eliminated to the extent practicable. *Bd. of Educ. Oklahoma City v. Dowell.* 498 US 237, 249-50. In making this inquiry, the Court must be mindful of and apply the presumption that current disparities are traceable to the unconstitutional prior discrimination.

a. The Presumption

It remains an established principle of school desegregation that, "once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there

arises a presumption, . . . that any current racial imbalance is the product of that violation." *Freeman v. Pitts*, 503 U.S. at 505, 112 S.Ct. at 1453, 118 L.Ed.2d at143 (Scalia, J. concurring). This presumption imposes on the party seeking to end the desegregation order "the substantial burden of demonstrating the absence of a causal connection between any current condition of segregation and [the constitutional violation]." *Brown v. Board of Educ. of Topeka,* 978 F.2d 585, 590 (10th Cir. 1992). Since the Charlotte-Mecklenburg Schools have not been declared unitary, this burden rests on the intervenors to show that there is no causal connection, even one that is "subtle and intangible, " *Freeman*, 503 US at 496, between constitutional violations found in the past by this court and current discriminatory conditions.

The Fourth Circuit has embraced this burden shifting framework in desegregation cases, holding that the burden of proving discriminatory intent or a constitutional violation in present-day disparities shifts only after a school system has been found unitary. *See, School Bd. of the City of Richmond, VA. v. Baliles,* 829 F.2d 1308 at 1311 (4th Cir. 1987)("It is well established that once a court has found an unlawful dual school system, the plaintiffs are entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rest on the defendants."); *Riddick by Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521 at 538 (4th Cir. 1986), *cert. denied,* 479 U.S. 938, 107 S.Ct. 420, 93 L.Ed.2d 370 (1986); *Vaughns v. Bd. of Educ. of Prince George's County,* 758 F.2d 983, 991 (4th Cir. 1985)("[b]ecause the County's school system had not attained unitary status, it is settled law that plaintiffs were entitled to a presumption that current . . . disparities were

causally related to prior segregation and that the burden of proving otherwise rested on defendants").

Because the intervenors seek a declaration that the school system is unitary, the burden of overcoming the presumption is theirs. *Freeman* reaffirmed that the party seeking a unitary declaration " bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation." *Freeman v. Pitts*, 503 U.S. at 494, 118 L.Ed. 2d at 137. In *Keyes v. School District*, the Court also rejected the idea that the passage of time might cause the burden to shift, holding "[c]ertainly plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation.'" *See*, 413 U.S. at 211 n. 17, 93 S.Ct. at 2699 n. 17.

Here the Court will find growing imbalances in student and faculty assignment. It will learn that near one-third of the black students attend segregated schools, with substandard facilities, lacking in equal basic resources where the teachers have less experience and training. The Court will also learn that black students are steered away from demanding courses, are over-represented in special education and are disciplined more often and more severely. As a consequence, they lag behind in achievement. This is not *Missouri v. Jenkins*, 515 U.S. 70, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995), where efforts at remediation had tried and failed. This is the school system creating barriers to achievement.

The intervenors must overcome the presumption, as well as the common sense conclusion, that these present problems are remnants of segregation. Their main argument is that demography explains all imbalances, that the buildings in majority black neighborhoods are just plain old, and that blacks do poorly only because they are poor.

But the school imbalances are contrary to the overall residential demographic trend since 1970, which indicates that the schools should be easier to integrate now, not more difficult. The age of the buildings does not begin to explain the way they are maintained, the educational resources they offer, or the experience and training of their staffs. And the record on achievement shows that the board has never systematically and continually addressed the racial barriers to black students' academic achievement.

2. Synergy and Interdependence

If this Court concludes that the Board has eliminated the vestiges of segregation in some aspect of the school system, it must then determine whether retention of judicial control over that aspect of the system "is necessary or practicable to achieve compliance in other facets of the school system." 503 U.S. at 497. *Freeman*, which involved no issues of facility equality, explicitly recognized that "[r]acial balancing in elementary and secondary school student assignments may be a legitimate remedial device to correct other *fundamental inequities* that were caused by the constitutional violation. *Id. (emphasis added).* The *Freeman* Court went on to cite examples of cases where it and other courts had found a synergy, or interdependence, between distinct aspects of a school system *(see citations at* 503 U.S. 497), but noted that at the *Freeman* trial "[t]here was no showing that racial balancing was an appropriate mechanism to cure deficiencies in this case." 503 U.S. at 498.

Unlike *Freeman*, there will be a showing here that student assignment is an essential mechanism for maintaining a modicum of racial equity until the school board addresses the needs of the predominantly black schools. To declare student assignment unitary and relinquish control would wreak havoc on black students and parents, ordering

them back into the very situation this court tried to abolish years ago – racially isolated, inferior schools that cast a stigma on the children attending them. Post-*Freeman,* courts that have applied the interdependence analysis have declined to release an aspect of school operations form supervision. *See, Jenkins v. Missouri,* 122 F.3d 588 (8th Cir. 1997); *Stone v. Prince George's County*, (1992 WL 238254)(4th Cir.)(unpublished opinion, citing *Freeman* to affirm decision of district court as to interdependence of *Green* factors in *Vaughns v. Prince George's County*, 742 F.Supp. 1275 (D. Md, 1990); *Mannings v. Hillsborough*, 24 F. Supp. 2d 1277 (M.D. Fla. 1998). Because of the interdependence of the Green factors here, this court cannot relinquish control of student assignment at this time.

3. Good Faith.

The third step in the court's inquiry into relinquishing partial control is to determine whether the school district has "demonstrated, to the public and *to the parents and students of the once disfavored race*, its good-faith commitment to the whole of the court's decree." *Freeman*, 503 U.S. 491, 118 L.Ed.2d 135, (emphasis added). The key here is that the Court must find not merely that it is satisfied with the board's commitment to desegregation, but that the public, especially the minority community, has "assurance against further injuries or stigma." 503 U.S. 498, 118 L.Ed.2d 139. One need only look at the current condition of the predominantly black schools, or witness the astonishment of some black parents when they see the patently superior conditions at predominantly white schools, or learn that middle class black students are scoring on tests at the same level as white students in poverty, to understand that the school board has not

yet done enough to show the minority community that it is committed to the equal protection guarantees of the Constitution.

In sum, because of the multiple problems of race discrimination and inequity, the school system is not now unitary. That is the sad answer to the Court's question of one year ago.

B. The Intervenors Do Not Have Damage Claims.

The Court should dispense with the damage claims at the outset of these proceedings. The intervenors theorize that they are somehow entitled to damages. It is imperative that this Court cut through that legal fiction. This litigation properly involves only the equitable powers of this Court. Until this district is declared unitary, it remains under an affirmative obligation to follow the Court's orders and not only may, but also must take race into account. No authority supports the proposition that a non-unitary school district can be held liable for following a court's mandate.

The issue is solely whether the school board has eliminated past and present discrimination against black students, which it is the intervenors' burden to prove, and what continuing or further equitable remedies for that discrimination are necessary. Beyond those questions, there is no legal or factual basis to support the intervenors claim for damages.

To find legal liability against a school board because it followed this Court's orders, which the Supreme Court affirmed, would establish an astounding legal precedent – that a public body cannot rely on the orders of a court or the holdings of the highest

court in the land, to guide its actions. That is a precedent that even Mr. Capacchione agrees does not exist.

1. **Capacchione's Damage Claim Should Be Dismissed**.

In response to the school board's motion in October 1997 to dismiss Mr. Capacchione's complaint, Plaintiff's counsel noted that his client challenged the magnet program on the essential premise that the program fell outside the Court's orders. He agreed then that he could not challenge the magnet program if it had been adopted by the Board in order to meet its obligations under the Court order. *Plaintiff's Brief Opposing Defendants' Motion to Dismiss*, p.1. Capacchione's lawsuit is based on his factually and legally mistaken belief that the magnet program was not promulgated to meet the Court's desegregation orders in general, and was not covered by the Court's July 1974 order specifically. Instead, he claims that the magnet plan was a wholly independent and unlawful effort by the school board to attain diversity through racial discrimination. *Id.* at pp. 4, 6, & 7 (Capacchione "does not challenge any order of this Court").

The Board asserted in its motion to dismiss that it had adopted the magnet program as a means of complying with this Court's orders. Capacchione argued stridently that this was an issue of *fact* that could not be raised properly at the Rule 12 stage of the proceedings and could not constitute grounds for granting the motion to dismiss. He objected to the Board putting factual assertions before the Court at that time. *Id.* at p. 15-16. He recognized that he could not -- and insisted that he did not -- collaterally attack the *Swann* orders. He acknowledged that it would be an impermissible collateral attack if the magnet program were covered by the Court's orders. He asked, in the alternative to dismissing his claim, that the Court allow him to intervene in the

reopening of *Swann*. *Id.*, at p. 8. Capacchione thus demonstrated his awareness of a central legal issue that the other intervenors ignore – one party cannot sue another for following a binding court order; the only remedy is to seek modification of the order.

2. **Capacchione Has No Standing For The Issues In *Swann*.**

Under this Court's Order of partial summary judgment against Capacchione, he no longer has standing to intervene in *Swann*. The remedies and issues in *Swann* are solely equitable, and Capacchione's claims for injunctive and declaratory relief have been dismissed. Thus, Capacchione can remain in this lawsuit only if he can show as a matter of fact that the magnet program was not adopted and operated in an attempt to meet the Board's obligations under, and was not covered by, the Court's orders. He must also show that operating such programs in a non-unitary district was unlawful. He faces insurmountable problems in making this showing.

First, the evidence developed in discovery, including the testimony of persons involved in the decision to move towards greater use of magnets, the substantive content of the documents the board and staff reviewed in considering and adopting the magnet plan in March 1992 (including the so-called Stolee report), and the contents of the several Magnet School Assistance Program (MSAP) applications and reports to the federal government, permit no dispute that the magnet plan was intended to meet the Board's obligation under the Court's order to operate desegregated schools.

Capacchione's second problem involves the July 1974 Court order expressly approving the Board's use of county-wide "optional" schools, an option that the Board exercised from that time forward. The reality is that the 1992 magnet program did not introduce magnets, but merely expanded their number. The Board has operated

countywide magnets at several schools since the 1974 order, including "open" programs at West Charlotte High School, Piedmont Middle School, and Irwin Ave. Elementary School, and "traditional" schools at Elizabeth and Myers Park elementary schools and Hawthorne Middle School. To say that the Court's 1974 order did not address magnet schools is simply wrong as fact and law.

Finally, the testimony of Capacchione's and Grant's joint expert, Dr. Armor, is completely contrary to the intervenors' theory that this district's use of magnets is unlawful or discriminatory. Dr. Armor testified that magnet schools are a standard tool for accomplishing desegregation widely accepted by the courts. He himself has drawn up desegregation plans based on race-conscious magnet schools. *Armor, Dep.*, p 163, ll 23-24, p 180, ll 16-25. Like CMS's program, his own proposals use racial goals and hold seats to accomplish desegregation. *Id.*, p 165, ll 1-25. Moreover, Dr. Armor testified that he had not reviewed the CMS magnet programs, including the one at issue in Capacchione's case, and had no opinion as to their lawfulness. *Id.*, p 185, ll 11-12. Dr. Armor explained simply that he was not working for Mr. Capacchione, but just for the other intervenors. *Id.*, ll 9-10.

Given the uncontestable facts that (1) the magnet programs at issue were adopted by the Board to meet its obligations under the court order; (2) the court order of July 1974 expressly permitted, indeed encouraged, the use of such schools, and the Board has operated them for 25 years; and, (3) Capacchione's purported expert witness (a) has not analyzed, and does not have an opinion as to, whether the school board operates its magnets in a discriminatory or unlawful fashion – indeed, he advocates their use as a desegregation tool; and (b) that he does not work for Capacchione; Mr. Capacchione

cannot put on any factual evidence, expert testimony or legal basis to remain in this lawsuit. He is left only with the claim that he has been damaged by the Board's compliance with the Court's July 1974 desegregation order. This is a claim he conceded over a year ago that he could not bring.

The Court should dismiss him from this litigation.

3. **The Intervenors Do Not Have A Legal Basis to Seek Damages**.

Some of the reasons for dismissing Capacchione from this suit apply equally to the damage claims of the other intervenors. They, too, seek damages for discrimination stemming solely from actions taken by the Board to comply with this Court's orders. The intervenors make this claim without any case authority that holds or even implies that a school board can be liable for damages to white persons for desegregating its schools under a post-trial order, affirmed by the Supreme Court, to remedy long-standing discrimination against black students. *See, e.g, United States v. Paradise,* 480 U.S. 149, 167 (defendant had a compelling interest in complying with the district court order after a finding of discrimination).

In discovery and pleadings, the intervenors have asserted that the school system has been unitary with regard to pupil assignment for years, so the board has violated the intervenors civil rights by continuing to use race-based student assignment. They also have claimed at different times that this Court in previous orders declared the district unitary in other aspects, thereby removing that factual issue from the case. It is not clear that the intervenors will advocate both of those positions before this Court, but it is critical that this Court recognizes the legal fallacies in these propositions.

Until *Freeman* was decided, there was no such creature as "partial' unitary status in the Fourth Circuit. Under *Riddick v. School Board of Norfolk,* 784 F.2d 521 (4th Cir. 1986), and *Bradley v. School Board of Richmond* 462 F.2d 1058 (4th Cir. 1973), the law was clearly established that a school district in this Fourth Circuit could be declared unitary only after it had remedied all aspects of discrimination in its system. Indeed, it was the conflict between the circuits on the issue of incremental versus wholesale unitary status that led the Court to grant certiorari in *Freeman.* No District Court in this circuit had the authority to grant partial unitary status prior to *Freeman.*

Moreover, in *Martin, ante,* this Court expressly rejected the argument posited here, that the Board must stop taking race into account. The Court found numerous continuing, *interdependent* problems of discrimination that precluded it from relieving the Board of its student assignment obligations.

For these reasons, prior orders of this court referring to "unitariness" in some aspect of school operations had no legal effect. This school board simply had no legal basis to understand that it was "partially" unitary. In short, the intervenors' argument that the Board acted unconstitutionally regarding student assignment prior to 1992 is barred as a matter of law.

To prove that the Board violated their civil rights after *Freeman*, the intervenors must establish not only that the district was partially unitary sometime after 1992, but also that the board decided in bad faith not to seek unitary status for the intended purpose of violating the intervenors' civil rights, rather than in a good faith belief that it was not yet unitary. There is no evidence to support a finding of bad faith.

Prior to a declaration of unitariness, this Board is not just permitted, but is required, to take race into account in assigning students until a court relieves it of that obligation following a proper hearing. Absent a showing that it was unlawful for the Board to comply with this Court's orders, none of the plaintiff intervenors has a claim of liability, let alone damages. If, however, this Court nevertheless concludes that it was unlawful for the Board to comply with the Court's own orders, it must then consider evidence of actual damages. The *Swann* plaintiffs believe that none has been presented in discovery.

4. **School Desegregation Cases Do Not Permit Monetary Damages**.

The intervenors' claims for damages also ignores the unique nature of school desegregation litigation. These are cases involving equitable relief only. As the Supreme Court noted in *Swann* and repeated in *Freeman*, "a school desegregation case does not differ fundamentally from the other cases involving the framing of *equitable* remedies to repair the denial of a constitutional right." 402 U.S. at 15-16, *quoted in Freeman at* 503 U.S. 487 (emphasis added). Even in cases such as *Jenkins v. Missouri*, 967 F.2d 1248 (8th Cir. 1992), and *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977), where state governments were directed by a court to pay a portion of the cost of remedial plans, those payments went to the school districts to run programs -- none of the individual plaintiffs received money. As noted by the Eighth Circuit, "[a] school desegregation case differs from much other litigation in that the main action does not result in a monetary recovery ... The only award received by the plaintiffs in a desegregation case is simply payment of their attorney's fees." *Jenkins v. Missouri*, 967 F.2d 1248 (8th Cir. 1992).

If these intervenors believe that circumstances have changed such that the Court's remedies are now improper, their lawful remedy is to have the Court's order modified, lessened or withdrawn, not to obtain monetary relief.

5. **The Intervenors Have Not Shown Evidence of Compensable Injuries.**

Assuming, *arguendo,* that the board could somehow be liable for nominal damages because it violated the intervenors' rights by following this Court's orders, the intervenors have not demonstrated that they have suffered actual damages. As this court is aware, under *Price v. City of Charlotte,* 93 F.3d 1241 (4th Cir. 1996), the intervenors must present evidence of actual compensable injury to recover damages.[4] They have not.

An award of compensatory damages to those seeking to overturn a desegregation order on the grounds of the alleged "injuries" described in discovery would disdainfully trivialize the import of the original desegregation cases, where not a single plaintiff received a dime despite suffering the deprivations and gross injustices inflicted by *de jure* segregation -- injuries which the intervenors recognize were horrendous. They, also, were injuries whose remnants and present manifestations create more obstacles to, and deprivations of, educational opportunity than any that the intervenors will ever have to experience.

In sum, the parties have a vigorous dispute about the need for further equitable remedies at this time. The Court should focus on that issue at equity, its sole and proper concern, and jettison the claims for damages as improvident and not cognizable under the law.

[4] The Court will recall in the *Price* cases that the City of Charlotte did not attempt to rely on the consent decree as a defense. In this case, the Order is a bar to the damage claim.

IV REMEDY

If the Court finds that the school district is not unitary, as it should under the facts and law, then it would be appropriate for the Court to ask that Board to present a plan for achieving unitary status. The Board has held public hearings in which it has described its proposal to the community. The *Swann* plaintiffs will comment on that plan in more detail at an appropriate time. But they do have concerns that the Board's plan to move in three years to a "controlled choice" scheme is unwarrantedly optimistic about the time it will take to rebuild and renovate the sixteen predominantly black schools identified in the plan. That is a principal cornerstone to any choice scheme. The Court should ensure the foundation is in place, before declaring this district unitary.

If the Court finds the district unitary, it simply must dismiss the case and have no further jurisdiction over the school system.

CERTIFICATE OF SERVICE

I certify that I have served the foregoing **TRIAL BRIEF** on opposing counsel by placing a copy thereof enclosed in a postage prepaid properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed to:

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-9199

D. C. Docket No. 1: 69-CV-12972-RLV

UNITED STATES OF AMERICA, et al.,

Plaintiffs-Appellants,

versus

STATE OF GEORGIA, Meriwether County,
MERIWETHER COUNTY, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(April 8, 1999)

Before ANDERSON and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

ANDERSON, Circuit Judge:

I. OVERVIEW

The United States and Charles Ridley et al. (collectively "Plaintiffs") appeal from the district court's order of September 30, 1997 ("1997 Order"), ruling that continued federal court

supervision of the Troup County School District was inappropriate. The district court based its decision on its interpretation of a previous order in the case, entered many years earlier by the three-judge district court in United States v. Georgia, No. 12, 972 (N.D. Ga. July 23, 1973) ("1973 Order"). The 1973 Order involved the Troup County School District and numerous other school districts in the area. The 1997 Order construed the 1973 Order as having found that the Troup County School District had achieved "unitary status," and went on to conclude that federal court oversight of the district was therefore no longer proper. The district court accordingly vacated its prior order approving a 1995 consent decree entered into by the parties outlining a new desegregation plan and dismissed the case. Plaintiffs contend that the district court misinterpreted the 1973 Order by incorrectly reading it as having bestowed "unitary status" on the Troup County School District and therefore wrongly dismissed the case. For the reasons stated below, we agree. Accordingly, we reverse and remand.

II. FACTS AND PROCEDURAL HISTORY

This case began as a statewide suit filed by the United States on August 1, 1969, against the State of Georgia and eighty-one public school districts, including that of Troup County, to desegregate the schools in those districts. On December 17, 1969, the United States District Court for the Northern District of Georgia issued a detailed regulatory injunction, specifying the defendants' duties under Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954). In

1970, Charles Ridley and others joined the suit, intervening on behalf of black schoolchildren in the aforementioned districts.

The cases were then transferred to the federal judicial districts within which the defendant school districts were located. On June 7, 1973, the district court for the Northern District of Georgia ordered the parties to show cause why certain school districts, including Troup County, should not be dismissed from the suit. On July 11, 1973, the United States filed a response to the order, arguing that although the school districts had become unitary in the sense required by the then-existing Supreme Court precedent, the districts should not be dismissed from the case and should not be released entirely from court supervision. The United States suggested that the Troup County case be placed on the inactive docket, be placed under a less detailed permanent injunction (than the 1969 one), and recommended that the injunction automatically expire after seven years of substantial compliance. The United States' response attached a proposed order.

On July 23, 1973, a three-judge court for the Northern District of Georgia entered an order incorporating almost verbatim the proposed order suggested by the United States, with one relevant exception noted below. The 1973 Order noted that certain school districts, including Troup County, had become "unitary" in the sense required by Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), Green v. New Kent County School Board, 391 U.S. 430, 88 S.Ct. 1689 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971). Following the United States' suggestion, the 1973 Order did not dismiss Troup County from the case. Rather, the court placed the case on the inactive docket, dissolved the detailed regulatory injunction set into place by the 1969 Order, and substituted a new permanent

injunction,[1] which followed almost verbatim the permanent injunction in the United States' proposed order, with one exception. The proposed order had included a subparagraph (g) providing that the new permanent injunction would automatically expire after seven years of substantial compliance; however, the 1973 Order did not incorporate that paragraph; it excluded entirely the automatic dismissal provision suggested by the United States. Rather, the 1973 Order placed the case on the inactive docket for an indefinite period of time, subject to reactivation upon application of any party. No party appealed the 1973 Order.

In the ensuing years, issues arose as to whether Troup County was meeting its desegregation obligations. Consequently, in May 1995, the parties reactivated the Troup County case by submitting a consent decree positing a new desegregation plan. The district court, per Judge Vining, approved and entered the consent decree on May 31, 1995, which imposed various obligations on the Troup County School District. The consent decree also provided that if Troup County would satisfactorily implement the decree's terms for a three-year period, the county could then apply to the court, seeking a declaration of "unitary status" and a dismissal from the case.

In August 1996, James and Sandra Godfrey and others (collectively "Godfrey intervenors") moved to intervene, seeking to modify the 1995 consent decree and ultimately to

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[1] The 1973 Order imposed upon Troup County certain general obligations prohibiting discriminatory actions (which might well have imposed upon Troup County nothing more than the same obligation that all school systems have to obey the Constitution and applicable laws), but in addition imposed the following obligations upon Troup County: (1) to maintain a majority-to-minority transfer plan incorporating free transportation and an obligation to make space available; (2) to ensure that all school construction, school consolidation and site selection (including location of any temporary classrooms) be done in a manner which will prevent the recurrence of the dual school structure; and (3) to permit transfers either outside the district or into the district only where the cumulative effect thereof will not reduce desegregation in either district.

vacate it. At a hearing before Judge Vining on June 23, 1997, the Godfrey intervenors argued that the 1973 Order had conferred a finding of unitary status on the Troup County School District, thereby indicating that retention of federal court jurisdiction or supervision was inappropriate. The court thereupon terminated the hearing and requested briefs on that threshold issue raised by the Godfrey intervenors.

After receiving the parties' briefs, the district court issued an order on September 30, 1997, construing the 1973 Order as a declaration of "unitary status." Holding that federal court jurisdiction and supervision thereafter was inappropriate, the court vacated its 1995 Order approving the consent decree. The Order also granted the Godfrey intervenors' motion to intervene for the limited purpose of allowing them to participate in this appeal. All other pending motions were dismissed as moot. Plaintiffs then filed timely notices of appeal.[2]

III. DISCUSSION

In this appeal, Plaintiffs and Troup County urge us to reverse the district court's order of September 30, 1997. They argue that the 1973 Order, though it mentioned the term "unitary," did not constitute a finding that Troup County had achieved "unitary status." They argue that the 1973 Order did not dismiss the case, but, quite the contrary, issued a permanent injunction and placed the case on an inactive docket subject to reactivation upon application by any party.

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[2] The Godfrey intervenors' subsequent motion for summary affirmance of the district court's order was denied by this court. Their motion for expedited appeal, however, was granted. Plaintiffs' motion for summary reversal of the district court order is still pending before this court, and is now denied as moot in light of our disposition of this appeal.

Furthermore, they argue that all the parties to this case have for 24 years operated under the assumption that they were subject to federal court supervision, relying upon the obvious import of the 1973 Order and also relying upon numerous decisions in this and companion cases (which were also subject to the 1973 Order). Several of these decisions were previous opinions by the district court for the Northern District of Georgia, but one was rendered by the Eleventh Circuit itself, Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985). On the other hand, the Godfrey intervenors argue on appeal that the court below correctly interpreted the 1973 Order.

We agree with Plaintiffs and Troup County. It is clear to us that the 1973 Order was not intended to be a finding that Troup County had achieved "unitary status."[3] It is clear that the 1973 Order did not dismiss the case or end federal court jurisdiction or supervision thereof; to the contrary, it imposed upon Troup County a permanent injunction and placed the case on its inactive docket, subject to reactivation upon application by any party. First, we discuss the case law which sets out the appropriate analysis for the determination as to whether a school district has achieved "unitary status." Then we set forth the reasoning which leads us to our interpretation of the 1973 Order.

A. The Relevant Case Law

The appropriate analysis for determining whether or not a school district that has practiced de jure segregation has achieved "unitary status" is well established by the case law in this circuit

[3] We assume arguendo that the district court's interpretation of the 1973 Order is a finding of fact subject to the clearly erroneous standard of review. We hold that the district court's assessment of the order was clearly erroneous.

and the Supreme Court. Drawing upon Freeman v. Pitts, 503 U.S. 467, 112 S.Ct. 1430 (1992), and Board of Education of Oklahoma City v. Dowell, 498 U.S. 236, 111 S.Ct. 630 (1991), this circuit in Lockett v. Board of Education of Muscogee County, 111 F.3d 839 (11th Cir. 1997), set forth the following analysis:

> Utilizing sound discretion after such a careful factual assessment, a district court must determine (1) whether the local authorities have eliminated the vestiges of past discrimination to the extent practicable and (2) whether the local authorities have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan. Lee v. Etowah County Bd. of Educ., 963 F.2d 1416, 1425 (11th Cir. 1992) (citing Dowell, 498 U.S. at 249-50, 111 S.Ct. at 638).
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> In determining whether the local authorities have eliminated the vestiges of de jure segregation as far as practicable, a district court must examine six facets of school operation: student assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, and facilities. ... In its discretion, a district court may consider other facets.

Id. at 842. Upon finding that a school system has achieved "unitary status," the district court must end its supervision of the school system and dismiss the case. Id. (citing Dowell, 498 U.S. at 248, 111 S.Ct. at 637, and Freeman, 503 U.S. at 489, 112 S.Ct. at 1445). Of course, a finding of "unitary status" and an order dismissing the case, thus ending federal court jurisdiction over and supervision of the school district, would be wholly inconsistent with the continuation of any federal court injunction. See Freeman, 503 U.S. at 491, 112 S.Ct. at 1445 ("A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.").

B. Interpretation of the 1973 Order

We turn now to the reasons leading to our interpretation of the 1973 Order. The plain language and context of the 1973 Order, the historical context, and precedent all point ineluctably to the conclusion that the 1973 Order was not intended to be a finding of "unitary status" and an end to federal court jurisdiction over and supervision of the Troup County School District.

1. The Plain Language and Context of the 1973 Order

The 1973 Order did not dismiss the case, and did not end federal court jurisdiction over and supervision of the school district. Quite the contrary, although vacating the more detailed earlier injunction, the 1973 Order issued a new permanent injunction, imposing certain obligations on Troup County.[4] The fact that the 1973 Order imposed this permanent injunction upon Troup County is wholly inconsistent with an end to federal jurisdiction over and supervision of the school district. It follows logically that the 1973 Order could not have been intended as a finding of "unitary status."

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[4] We reject the argument of the Godfrey intervenors that the permanent injunction was merely an "obey the law" injunction, imposing upon Troup County merely the same obligations that all school systems have under the Constitution and applicable laws. Contrary to their argument, the instant permanent injunction imposed upon Troup County obligations over and above those that would be owed by a school system which had never practiced de jure segregation or a school system which had achieved "unitary status." For example, the permanent injunction imposed upon Troup County an obligation to maintain a majority-to-minority transfer plan, and obligated Troup County to make space available for such transfers, and obligated Troup County to provide free transportation for such transfers. A school system which had never practiced de jure segregation, or which had achieved "unitary status," would not be subject to such obligations. Similarly, the permanent injunction imposed upon Troup County an obligation not to permit transfers either outside the district or into the district where the cumulative effect thereof would be to reduce desegregation in either district. Again, this is an obligation over and above what is per se required by the Constitution and applicable laws.

As the above discussion of the relevant case law reflects, a crucial finding required in any determination that a school system has achieved "unitary status" is a finding that the vestiges of past discrimination have been eliminated to the extent practicable. See e.g., Lockett, 111 F.3d at 842. However, the language of the 1973 Order is searched in vain for any mention at all of vestiges of discrimination. The matter simply was not addressed, and therefore the 1973 Order could not have been intended as a finding of "unitary status."

Similarly, instead of dismissing the case, as would be appropriate upon a finding of "unitary status" and an end of federal jurisdiction and supervision, the 1973 Order placed the case on an inactive docket subject to being reactivated by application of any party. Again, this feature of the 1973 Order is inconsistent with the interpretation urged by the Godfrey intervenors.

The context of the 1973 Order also supports our interpretation. The Show Cause Order that preceded the 1973 Order required the parties to show cause why the case should not be dismissed. In its response, the United States specifically opposed dismissing the case. Rather, the United States recommended dissolution of the previously entered detailed injunction and substitution of a new permanent injunction, the terms of which were set forth in an attached proposed order. The United States also represented in its response that it would monitor the school district's compliance by analyzing the reports to be filed by the school system and investigating any complaints.

The 1973 Order incorporated almost verbatim the proposed order suggested by the United States. The significance of this context is that, although the Show Cause Order had contemplated dismissing the case, the 1973 Order obviously acceded to the government's recommendation that the case not be dismissed. Instead, the Order imposed a new permanent injunction upon Troup

County and placed the case upon the inactive docket subject to being reactivated upon application of any party. The 1973 Order departed from the proposed order in only one way which has any relevance to this case. The proposed order had provided for automatic dismissal of the case after seven years of substantial compliance with the new permanent injunction. The 1973 Order did not incorporate that provision; rather, it left the new permanent injunction in place for an indefinite period of time. Thus, the 1973 Order obviously left the matter of dismissing the case until a later time (e.g., upon reactivation of the case by any party).

2. The Historical Context

In addition to the plain language and the context of the 1973 Order, the historical context also supports our interpretation of the 1973 Order. The Godfrey intervenors rely upon the following language from the 1973 Order:

> [T]he Troup County School District ... [has] for three school years complied with the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), and has become "unitary" in the sense required by the Supreme Court's decisions in Greene [citation omitted] and Swann [citation omitted].

We believe that this language, and its use of the term "unitary" must be understood in light of the meaning which courts in this circuit, in and around the 1973 time frame, were giving to the term "unitary." The panel in Lee v. Etowah County Board of Education, 963 F.2d 1416, 1419 n.3 (11th Cir. 1992), citing and quoting from Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985), aptly described the meaning which courts in this circuit had previously attributed to the term "unitary," and distinguished that earlier meaning from the meaning of "unitary status."[5] To summarize, under the terminology prevalent at the time

[5] It is useful to recite Note 3 from Lee in full:

of the 1973 Order, a school district was often found to be "unitary" merely because it had not operated segregated schools as proscribed by Swann for a period of several years. Although labeled "unitary" during the 1973 time frame, the school districts involved may still have been operating educational systems bearing the vestiges of discrimination and thus were still subject to federal court supervision. That is, they had not yet achieved "unitary status." As described above and as described in Lee v. Etowah County, "unitary status" requires a judicial determination that a school district has implemented a desegregation plan in good faith and that the vestiges of discrimination have been eliminated to the extent practicable.[6]

> Much confusion has arisen from the use of the terms "unitary" and "unitary status." In Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n. 12 (11th Cir. 1985), this court defined a "unitary" school system as one that "has not operated segregated schools as proscribed by cases such as Swann [v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)] . . . for a period of several years." The court stated that a school system that "has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures." Id. This court later rejected this labeling system and argued that the term "unitary" should be used "only when referring to the status that a school board must achieve to be freed from district court jurisdiction." Pitts v. Freeman, 887 F.2d 1438, 1445 n. 7 (11th Cir. 1989), rev'd on other grounds, 503 U.S. 465, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992).
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> To minimize confusion, we discourage the future use of the term "unitary" to describe a system that has not eliminated the vestiges of past discrimination to the extent practicable but is merely currently in compliance with a court-imposed desegregation plan; nevertheless, we assume for the purposes of this opinion that the district court used the term "unitary" at this stage of this litigation to convey just such a meaning.

Lee, 963 F.2d at 1419 n.3.

[6] The Supreme Court has also recognized the different meanings which courts have attached to the term "unitary." See Board of Ed. of Oklahoma City v. Dowell, 498 U.S. 237, 245, 111 S.Ct. 630, 635 (1991) (citing Georgia State Conf. and other cases, the Court recognized that "a school district could be called unitary and nevertheless still contain vestiges of past discrimination").

Interpreting the 1973 Order in the context of its time, we believe that the 1973 Order's reference to the term "unitary" was not meant to embody a finding of "unitary status." Rather, the mention of the term "unitary" in the 1973 Order merely meant that Troup County no longer officially sanctioned a dual school structure.[7] Not constituting a finding of "unitary status," the 1973 Order did not end federal court supervision of the case.

This historical context undermines the primary argument of the Godfrey intervenors in this case. Based on the mere fact that the 1973 Order used the term "unitary," the Godfrey intervenors argue that the 1973 Order must have intended to accomplish all that later courts required to establish "unitary status." The historical context explains that the 1973 court meant something entirely different. The use of the term "unitary" in the 1973 time frame was entirely consistent with the court's failure, so far as the text of the 1973 Order itself or the record in this case indicates, to make any determination as to whether or not the vestiges of discrimination had been eliminated to the extent practicable. The 1973 meaning of the term "unitary" is also consistent with the fact that the 1973 Order did not dismiss the case, but rather issued a permanent injunction and kept the case open on its inactive docket, subject to reactivation upon application of any party. While these things are consistent with the 1973 meaning of the term "unitary," they are of course flatly inconsistent with the achievement of "unitary status," which

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[7] This belief is reinforced by the similar situations involved in Steele v. Board of Public Instruction of Leon County, 448 F.2d 767 (5th Cir. 1971), and Youngblood v. Board of Public Instruction of Bay County, 448 F.2d 770 (5th Cir. 1971). In those two cases, the former Fifth Circuit vacated the orders of two district courts which had dismissed two desegregation cases after finding that the school systems were desegregated and "unitary" in nature. The plaintiffs in both cases argued that the cases should not be dismissed, but should instead be placed on the inactive docket for the next three school years at which time dismissal after notice and hearing could be considered. The former Fifth Circuit agreed and remanded the cases with instructions for the district court to reinstate the actions.

would require a determination that the vestiges of discrimination had been eliminated to the extent practicable and would call for dismissal of the case and withdrawal of federal jurisdiction and supervision.

3. Precedent

Finally, binding precedent supports our interpretation of the 1973 Order. The very 1973 Order at issue in this case was before this Court in Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985). That case involved the Coweta County School District, not the Troup County School District, but the same order was before the Court, because the 1973 Order governed both the Coweta and Troup County School Districts. See United States v. Georgia, No. 12, 972 (N.D. Ga. July 23, 1973). Although this Court noted that the 1973 Order had referred to the Coweta County School District as "unitary," this Court held that the school district had yet to achieve "unitary status" and found that the case was not a concluded case. Georgia State Conference at 1413-14 & nn. 11-12. And although the parties to this case were not parties in the Georgia State Conference case, that panel's conclusion with respect to the posture of United States v. Georgia, No. 12, 972, is entitled to weight pursuant to the doctrine of stare decisis. There is no indication that the facts relevant to this Court's discussion in Georgia State Conference were notably different than the operative facts in the instant record.

IV. CONCLUSION

Based on the foregoing reasons, it is clear that the 1973 Order was not intended as a finding that Troup County had achieved "unitary status" as of that time.[8] Our interpretation of the 1973 Order is clear from the plain language of the 1973 Order itself which is flatly inconsistent with having been intended as a finding of "unitary status." Our interpretation is also supported by the historical meaning of the term "unitary" in the 1973 time frame, and by precedent. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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[8] Nothing in this opinion should be read as commenting on whether the Troup County School District has indeed achieved "unitary status" since the 1973 Order. Thus, Troup County is in no way prohibited from seeking a declaration of "unitary status" at the earliest possible juncture. Our holding today confirms only that the 1973 Order does not constitute a finding of "unitary status" so as to make it inappropriate for the district court to have retained jurisdiction and supervision of this case over the intervening years. Our holding today does not pretermit appropriate proceedings in the future, pursuant to Lockett v. Board of Education of Muscogee County, 111 F.3d 839 (11th Cir. 1997), which might culminate in a finding of "unitary status."