1992 WL 176953
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

UNITED STATES of America, Plaintiff,
and
Yonkers Branch, NAACP, et al.,
Plaintiff–Intervenors,
v.
CITY OF YONKERS, Yonkers Community Development Agency, Yonkers Board of Education, Defendants.
and
U.S. Department of Housing and Urban Development, Samuel Pierce, Secretary,
Added–Defendants,
and
The State of New York; Mario Cuomo, as Governor of the State of New York; the Board of Regents of the State of New York; et al., Added–Defendants.

No. 80 CIV. 6761 (LBS).
|
July 10, 1992.

Attorneys and Law Firms

U.S. Dept. of Justice, Civil Rights Division, Washington, D.C. (James P. Turner, Acting Asst. Atty. Gen., Sandra Lynn Beber, of counsel), Robert Abrams, Atty. Gen. of the State of New York, New York City (Harvey Golubock, Deputy Asst. Atty. Gen., Marion R. Buchbinder, Stephen M. Jacoby, Asst. Attys. Gen., of counsel), for U.S.

Michael H. Sussman, Goshen, N.Y., Arthur J. Levy, Brooklyn Heights, N.Y., for plaintiff-Intervenors N.A.A.C.P.

Raymond P. Fitzpatrick, Jr., Johnston, Barton, Proctor, Swedlaw & Naff Birmingham, Ala., for City of Yonkers.

Anderson Banks Moore Curran & Hollis, Mount Kisco, N.Y. (Maurice Curran, Lawrence W. Thomas, of counsel), Hogan & Hartson, Washington, D.C. (David S. Tatel, Elliot M. Mincberg, Steven J. Routh, Nancy J. Taylor, of counsel), for Yonkers Board of Educ.

OPINION

SAND, District Judge.

***1** Before this Court are the motions of the Added State and U.D.C. Defendants ("State Defendants") for summary judgment. For the prior proceedings as to this aspect of this protracted litigation, *see United States v. Yonkers Board of Education,* 893 F.2d 498 (2d Cir.1990) (appeal dismissed), familiarity with which is assumed.

State Defendants raise a number of jurisdictional claims that they are not subject to this suit, all of which claims we find to be either substantially precluded by the previous determinations in this case or to be otherwise without merit. There is no valid or substantial Eleventh Amendment claim raised by this motion. A number of other more troublesome non-merit related issues are raised, *e.g.,* laches, statute of limitations and issues of "comity."

Further, there are the merits issues which may be stated as follows:

1) Are there vestiges of segregation present in the Yonkers school system which are adversely affecting members of the plaintiff class and which are not being adequately addressed by the education improvement plans now in place pursuant to this Court's prior Orders?

2) Is there a causal relationship between wrongful acts or omissions on the part of the State Defendants or their predecessors and such vestiges of segregation, if any, as are found to exist?

3) Is the State of New York liable, and if so, to what extent if (1) and (2) are found to be present, for such costs as shall appropriately be required to address (1) above?

In support of, and in opposition to, the motion, thousands of pages of briefs and exhibits have been lodged with the Court, and the litigation gives every indication (if it continues as the Yonkers Board of Education ("YBE") and NAACP propose) of rivaling in duration and complexity the Department of Justice and NAACP's trial against the City and YBE which took over 100 days to try and resulted in this Court's extensive opinion. 624 F.Supp. 1276–1553 (S.D.N.Y.1985).

We are of the view, however, that for a number of

reasons, a more manageable and useful method exists to confront, or at least to begin to confront, the issues raised by this litigation.

If the answer to (1) above is that members of the plaintiff class are suffering injury because vestiges of segregation exist in the public school system that are not adequately being addressed, it is the responsibility of the YBE to seek relief from this Court. If such a showing is made, relief may well be available pursuant to existing Orders of this Court. No such application is pending before this Court, presumably because of the belief of the YBE, concurred in by the NAACP, that any further fiscal demands upon the Yonkers taxpayers would be inappropriate. *See* Transcript Proceedings, June 19, 1992. (Were this Court to order the City to increase its school budget to allow implementation of programs believed needed to address vestiges of school segregation, and were such demands upon the City treasury beyond its means, the Yonkers Emergency Financial Control Board, headed by an official appointed by the Governor, would intervene and the State would in this fashion become a participant in the proceedings. The issue would have been resolved with far greater expedition than has attended this proceeding.)

***2** We understand the desire on the part of the YBE and the NAACP to avoid the adverse local reaction which might result from taxpayer resentment of heightened demands on the Yonkers treasury. But there is something disquieting about an assertion that vestiges of segregation remain inadequately addressed which should be further addressed with State funds, but apparently need not be so addressed if State funding is not available.

The State Defendants urge these factors, and others, in support of their contention that the relief sought violates principles of federal-state "comity." The respondents urge that there is ample precedent for a court to impose liability upon a state subsequent to a determination of local liability for school segregation and that every such judgment against a state entails a reallocation of resources. *Cf. Milliken v. Bradley,* 433 U.S. 267, 288 (1977).

We are of the opinion that the most satisfactory method of dealing with these issues is step by step. First, we should determine whether vestiges of segregation exist in the Yonkers school system which are not being adequately addressed.

The YBE alleges the existence of the following seven vestiges of segregation:

> (1) the level of minority achievement; (2) the self-esteem and attitudes of students toward education and the educational process; (3) the relationships between majority and minority students; (4) the attitudes and effectiveness of teachers and administrators in educating majority and minority students in integrated schools and classrooms; (5) the continuing need for adjustments in curriculum and programs to facilitate quality education in integrated environments under the existing desegregation remedy; (6) the continued disparities in the quality of school facilities and resources; and (7) community perceptions concerning the Yonkers schools and the quality of education under the current desegregation plan.

As to the first alleged vestige based on test scores, the State Defendants urge that in our liability opinion, we noted that, unlike attendance zone changes or school openings, "whose numerical and racial impact can be fairly readily evaluated" (624 F.Supp. 1438, n. 110), academic performance is influenced by "factors over which the Board has no control, such as socioeconomic factors." *Id.,* n. 110 at p. 1439. This Court went on to state:

> In the absence of concrete and similarly persuasive evidence demonstrating the accuracy and statistically meaningful nature of the purported correlation between achievement test scores and the conduct of Yonkers school officials, we are unwilling to conclude on the basis of minority students' lower achievement test scores that such students have been denied the educational opportunities afforded other students in the district.

624 F.Supp. at n. 110, p. 1438–1439.

The State Defendants urge that:

> Although the above showing could not be made while the *de jure* segregation was still in effect, the Board, more than five years after the schools have been desegregated, and when none of the students below sixth grade have ever attended *de jure* segregated schools in Yonkers, attempts to make the necessary showing now. It does not succeed.

***3** Added State and U.D.C. Defendants' Reply Memorandum, p. 114.

On the record now before the Court, the YBE proffers expert testimony to support its claims that all seven vestiges do exist. The State Defendants counter with controverting expert testimony.

We do not believe that we can definitively determine on this motion and record whether such vestiges remain in the Yonkers school system. Further, we believe that this is a sufficiently discrete issue from the questions of State-related causation, liability, and relative responsibility to make bifurcation of this issue feasible. If, after an evidentiary hearing, the Court finds no such vestiges to be present, the State Defendants will, of course, be entitled to dismissal of the action as against them. If no such vestiges exist, there will be no basis for imposing State liability and the following language of the court in *Kelley v. Bd. of Educ. of Nashville & Davidson Cty.* will *then* become relevant:

> The issue before us is not whether children in the Metro schools will receive the benefits of the enhanced educational programs that the district court ordered Metro to develop and implement. The educational components of Metro's desegregation plan have already been affirmed by this court (687 F.2d 814 (6th Cir.1982), *cert. denied,* 459 U.S. 1183, 103 S.Ct. 834, 74 L.Ed.2d 1027 (1983)), ... Neither the district court's broad power to require that the Metro schools be desegregated nor its power to require appropriate action to eliminate any lingering consequences of *de jure* segregation is in question here, and the vitality of the Supremacy Clause of the United States Constitution will not suffer in any way from our reversal of the district court's order. The contest between Metro and the State of Tennessee is a contest not about desegregation, but about money.

836 F.2d 986 (6th Cir.1987).

If the Court finds such vestiges to be present and inadequately addressed, it must and will make further inquiry and take action. Whether State-related causation exists, and if so, whether the State is liable or has valid defenses, *e.g.,* laches or limitations, can then be addressed and addressed more concretely than on this motion for summary judgment. Also, one can then ascertain, if State liability is found, what would be a fair and appropriate allocation of State–City responsibility.

The State Defendants will, of course, be parties to the evidentiary hearing as to the existence of vestiges of segregation and be bound by the Court's findings. Since we have found to be without merit the State Defendants' jurisdictional claims that they are not properly subject to this suit, requiring, as we do, that they participate in this hearing and be bound by its findings imposes no inappropriate hardship upon them. Moreover, entirely apart from the question of State liability, the State has an ongoing interest and responsibility for education which makes it even more fitting that its representatives participate in this hearing than if the State's sole concern was one of liability for past actions.

***4** (If it were established that unaddressed vestiges of segregation remain, the climate might also be more conducive to a consensual resolution of the remaining issues in this litigation.)

The question may occur to the parties whether this Court is merely denying the motion for summary judgment because of the presence of material questions of fact, and bifurcating the resulting trial on the merits. We intend to do something more than that. We put all parties on notice that if vestiges of segregation are found to exist and to be inadequately addressed, the Court will consider what action is appropriate and will not be limited to the relief sought by the YBE and NAACP against the State. If no vestiges exist, this litigation against the State will, of

course, be dismissed.

CONCLUSION

For the reasons set forth above, the Court will proceed to determine, after a trial on the merits, the question whether inadequately addressed vestiges of segregation remain in the Yonkers school system. This question has three components: (1) what vestiges, if any, exist; (2) what steps are presently being taken to address such vestiges, if any are found to exist; (3) the adequacy of (2) and availability of more effective measures. All other issues will be deferred for later consideration.

The parties, after conferring with each other, are to advise the Court by August 17, 1992 what witnesses and exhibits they will seek to introduce at such trial and its estimated duration.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1992 WL 176953