

1997 WL 311943

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United States District Court, S.D. New York.

UNITED STATES of America, Plaintiff, Yonkers  
Branch—NAACP, et al., Plaintiffs—Intervenors,  
v.  
YONKERS BOARD OF EDUCATION, et al.,  
Defendants.

No. 80 Civ. 6761(LBS).

|  
June 9, 1997.

OPINION AND ORDER

SAND, District Judge.

\*1 In the wake of the Court of Appeals decision, *United States v. City of Yonkers*, 93 F.3d 600 (2d Cir.1996) and in the absence of any stay pending a ruling by the Supreme Court of the United States on the State's petition for *certiorari*,<sup>1</sup> the City of Yonkers, with the support of the Yonkers Branch of the NAACP and the Yonkers Board of Education, moves for entry of an order requiring the Added State Defendants<sup>2</sup> to provide relief to further the Educational Improvement Plan I (EIP I) ordered by this Court in 1986. 635 F.Supp. 1538. This plan, as amended from time to time, is the remedial portion of the School Desegregation Order (SDO) and paragraph J thereof, 635 F.Supp. 1551, requires the City of Yonkers to provide the necessary funding for its implementation.

The City takes the position that it lacks adequate resources to implement EIP I and it looks to the State for resources to supplement its contribution towards that remedy. The City asserts that the Court of Appeals decision, finding that various State officials contributed to the segregated conditions in the Yonkers Public Schools (YPS) in violation of 42 U.S.C. § 1983 and the Equal Protection Clause, enables this Court now to enter an order compelling State contribution to the costs of effective implementation of EIP I. The City suggests a mechanism for determining the nature and amount of such contribution, which we shall discuss below.

The State defendants oppose the motion and urge that the City's proposed order is premature. The State's position is that several proceedings and findings by the Court must occur before a judgment may be entered compelling the State to contribute to EIP I.

There is some merit to the position taken by each side on these issues and a solution which we believe adequately addresses the matter. We agree that the State has a right to assert various defenses prior to ultimate entry of a judgment. We agree with the City that there is much that need be done and that expedition is required.

The City urges the Court to refer to the Monitor, Dr. Joseph M. Pastore, Jr., questions relating to the division of responsibility between State and City officials and the determination of what concrete steps should be taken to enable full implementation of EIP I. Dr. Pastore has acted as the Court's monitor pursuant to paragraph L of SDO since 1986 and has mediated and resolved since that time the disputes which have arisen annually between the City and the Yonkers Board of Education with respect to the school budget<sup>3</sup> and the City's obligation to fund implementation of EIP I. He has deservedly won the respect and admiration of all participants who have appeared before him.

Even if the State is correct that it would be premature to enter an order now, declaring State liability, it is surely not premature to review and reaffirm what need be done and advise the Court as to how the burden should be distributed to implement EIP I. District Courts often bifurcate liability and remedy and indeed when circumstances make it appropriate to do so, engage in reverse bifurcation, *i.e.* a determination of damages and remedy prior to a determination of liability. *Fed.R.Civ.P.* 42(b); *Fed.R.Evid.* 611(a) ("The court shall exercise reasonable control over the ... order of ... presentation of evidence ...."); see *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir.) ("The decision to bifurcate is within the discretion of the trial judge."), *cert. denied*, 498 U.S. 920, 111 S.Ct. 297, 112 L.Ed.2d 250 (1990); see, e.g., *In re: Paoli Railroad Yard PCB Litig.* —F.3d —, No. 95–2098, 1997 WL 239652, at \*4 (3d Cir. May 12, 1997) (causation tried before liability); *Cimino v. Raymark Indus., Inc.*, 751 F.Supp. 649, 665–66 (E.D.Tex.1990) (damages tried before liability); *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 Harv. L.Rev. 1481, 1591–93 (1995) (discussing reverse bifurcation as a method of managing cases presenting complex evidentiary issues); Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 Wm. &

Mary L.Rev. 475, 564–65 (1991) (same)

\*2 As to the prerequisites for liability, the Court has met with the parties and established a schedule for discovery and for hearings to begin on July 7, 1997, on certain liability issues (e.g. whether vestiges of segregation remain today). However, there is no need to await the outcome of those hearings, nor for that matter, a ruling on the petition for certiorari, before the Monitor's proceedings can go forward. It is therefore,

ORDERED that

1. All parties, including the defendant State officials are directed to participate in good faith in the Court's monitoring process under the aegis of Dr. Joseph M. Pastore, Jr. For the purposes of this process, the Monitor is to assume *arguendo* (and without prejudice to the Court's ultimate determination of various legal matters relevant to State liability which are now unresolved) that the State, together with the City of Yonkers, has some obligation to provide the Yonkers Board of Education with resources<sup>4</sup> necessary to implement EIP I. This reference is solely with respect to EIP I and is not to be expanded to include other matters (e.g. EIP II) except with the consent of all parties or by Order of this Court.

2. The purpose of the proceedings is to enable the Monitor to Report and Recommend to the Court what steps, if any, need be taken to implement fully EIP I including, but not limited to, the proportion of EIP I related costs which the State Defendants should bear.

3. Any disputes arising out of the monitoring process shall be brought to the Court's attention by Dr. Pastore or upon application of any party.

4. Each party, of course, has the responsibility to determine who shall participate on its behalf in the Monitoring process. It is the spirit and intent of this Order that the participants on behalf of the State, should include senior level experienced educators designated by the State Education Commissioner.

5. Dr. Pastore is to submit an initial report to the Court within thirty (30) days of the entry of this Order and is to advise the Court promptly if he concludes that any party is not complying in good faith with this Order.

6. Regardless of the status of proceedings before the Monitor, the defendant City of Yonkers is directed to maintain its level of assistance to the YPS by provision of a level of funding for the YPS in accordance with the funding pattern in existence for the ten (10) year period prior to entry of this Order.

SO ORDERED.

#### All Citations

Not Reported in F.Supp., 1997 WL 311943

#### Footnotes

<sup>1</sup> The State failed to seek a stay until after the mandate had issued. The Court of Appeals denied the State's subsequent motion for a stay without prejudice to renewal if *certiorari* is granted.

<sup>2</sup> The defendant State officials are the members of the Board of Regents, Carl T. Hayden, Louise P. Matteoni, Jorge L. Batista, Edward J. Meyer, R. Carolos Carballado, Adelaide L. Sanford, Diane O'Neill McGivern, Saul B. Cohen, James C. Dawson, Robert M. Bennet, Robert M. Johnson, Peter M. Preyor, Anthony S. Bottar, Merryll H. Tisch, Harold O. Levy, and Ena L. Farley, and the State Education Commissioner, Richard P. Mills, all sued in their official capacities.

<sup>3</sup> Yonkers is one of the five cities in New York State in which the School Board has no independent taxing authority but relies on the municipality for its revenues.

<sup>4</sup> Although the emphasis of the City's motion is on a fiscal contribution and the proportions of EIP I related costs which the State Defendants should bear on an annual basis, consideration might also be given to a State contribution by way of goods and services (e.g. specialized teachers, programs, supplies, etc.).

