CASE NO. 04-11063-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHERNIKA HOLTON, ET. AL., Plaintiffs-Appellants and Cross-Appellees, v. **CITY OF THOMASVILLE SCHOOL DISTRICT,** Defendant-Appellee and Cross-Appellant**.**	Nature of Proceeding: Appeal from Final Judgment Court below: United States District Court for the Middle District of Georgia, Thomasville Division, Case No. 6:98-CV-63 (CDL)

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE AND CROSS-APPELLANT

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Argument and Citations of Authority

Appellants' attorney stated at oral argument that the School District has continuously employed its current student grouping practices since the School District's Desegregation Plan was implemented in 1970. The School District's attorney responded by stating that the evidence does not support this statement. At the conclusion of oral argument, the Court asked both parties to brief this matter simultaneously.

The School District does not know what evidence Appellants will rely upon now to support their argument. In their briefs, however, Appellants primarily relied upon evidence relating to the racial makeup of elementary and high school classes in the early 1970's and evidence relating to the racial makeup of middle school classes in the years just before trial. (See, Brief of Plaintiffs-Appellants and Cross Appellees, p. 9 and Reply Brief of Plaintiffs-Appellants and Cross Appellees, pp. 17-18). This evidence simply shows that some racial imbalances existed in certain elementary and high school classes in the early 1970's and in certain middle school classes in the late 1990's and early 2000's. The evidence provides no information about the grouping practices used for more than twenty years. Further, the evidence does not show what grouping practices were used by

the School District in the 1970's and it does not show that the School District used the same student grouping practices in the elementary and high school in the early 1970's that is used in the middle school now. As noted by the School District's attorney at oral argument, the evidence does not support Appellants' statement that the School District has continuously employed its current student grouping practices since the School District's Desegregation Plan was implemented in 1970.

The only evidence cited by Appellants that arguably relates to continuous grouping practices by the School District is testimony of Hazel Jones. Mrs. Jones was employed by the School District for 32 years as a teacher and as a principal. Vol. III, pp. 8-9. Appellants cite Mrs. Jones' testimony as support for their statement that "these segregative patterns remained consistent from 1976 to 1999." Brief of Plaintiffs-Appellants and Cross Appellees, p. 9. Mrs. Jones was employed by the School District for 32 years as a teacher and as a principal. Vol. III, pp. 8-9. Mrs. Jones demonstrated repeatedly at trial that her testimony was not trustworthy. For example, Mrs. Jones testified that she chose to send her two youngest children, Arthur Jones and Cynthia Jones, to Scott Elementary School rather than Douglass Elementary School. Vol. III, p. 12. The evidence showed, however, that Douglass Elementary School was not even in existence when Mrs. Jones' two youngest children attended elementary school. Arthur Jones was born on July 29, 1967 and Cynthia Jones was born on May 18, 1971. Vol. III, p. 10. Douglass Elementary

School did not exist from 1970 through 1992. (See, Stipulation of Facts, ¶'s 2 and 7).

Appellants cite Mrs. Jones' testimony to support their statement that "these segregative [grouping] patterns remained consistent from 1976 to 1999." Brief of Plaintiffs-Appellants and Cross Appellees, p. 9. During this time, Mrs. Jones was a sixth-grade teacher at MacIntyre Park School.[1] Mrs. Jones testified that the classes she taught at MacIntyre Park were "high achievers." Vol. III, p. 37. According to Mrs. Jones, her classes at MacIntyre Park were 80 percent Caucasian and 20 percent African-American. Vol. III, p. 34. Mrs. Jones, however, provided no testimony indicating that the same grouping practices were used throughout this time period. Moreover, Mrs. Jones demonstrated that her testimony was not reliable. Mrs. Jones initially testified that the students in her classes were known as the "Jerger team". Vol. III, p. 24. Mrs. Jones' further testified that these students in the "Jerger team" classes came from Jerger and Scott Elementary Schools. Vol. III, p. 24. According to Mrs. Jones, these students "had been together since kindergarten." Vol. III, p. 39. Mrs. Jones also testified that the students in the "lower level" classes – the classes that she said were 100 percent African-American – came from Douglass and Harper Elementary Schools. Vol.

[1] All of the School District's fifth and sixth-grade students were taught at MacIntyre Park from the 1975-76 school year through the 1992-93 school year. (See, Stipulation of Facts, ¶'s 5 and 7). All of the School District's sixth, seventh and eighth grade students were taught at MacIntyre Park from the 1993-94 school year until Mrs. Jones' stopped teaching at MacIntyre Park in 1999. (Stipulation of Facts, ¶ 7).

III, p. 35. Mrs. Jones' testimony was shown to be particularly unreliable on cross-examination. For example, with respect to her direct testimony that the students in the "lower-level" classes came from Douglass and Harper Elementary Schools, Mrs. Jones admitted on cross-examination that there was no Douglass Elementary School for most of the time period she testified about. Vol. III, p. 115-116. Mrs. Jones therefore admitted that her earlier testimony that students from Douglass Elementary School were assigned to a team of "low achievers" was not true. Vol. III, p. 116. Mrs. Jones also admitted that her testimony that there was a "Jerger team" was erroneous. Vol. III, p. 118. After being shown evidence that African-Americans made up more that 60 percent of the student body at Jerger Elementary School for at least five (5) of the years she testified about, Mrs. Jones changed her earlier testimony that the students in the upper-level classes came from Jerger and Scott Elementary Schools. When confronted with this evidence, Mrs. Jones testified that the students in these classes came "from all schools." Vol. III, pp. 119-120.

Appellants state that Mrs. Jones testimony about the assignment of students was uncontradicted. As shown above, Mrs. Jones' testimony about the matter was contradicted on several occasions and proved to be totally unreliable. Mrs. Jones' testimony therefore does not support Appellants' arguments.

"Neither federal law nor the Georgia State Department of Education mandates or prohibits the grouping of children for instructional purposes in regular classrooms. The decision whether to implement these programs is made by the local school district." Georgia State Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1409 (11th Cir. 1985). "It is well-established in this circuit that ability grouping is not per se unconstitutional, even when it results in racial disparity in a school district's classrooms. Id. at 1412-1413.

As noted by Judge Marcus at oral argument,

> This circuit's precedent establishes that, despite any resulting numerical racial disproportionality, achievement grouping is permissible in a school district that has not been declared fully unitary "if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.

Id. at 1414. However, this Court has noted that the key factor in determining whether a School District's current grouping practices are based on the present results of past segregation is whether current students attended inferior segregated schools under a dual school system:

> The student population in McNeal, however, included black children who had attended inferior segregated schools. The McNeal court's concern was that the prior "lack of educational quality would predictably cause students from the inferior system to immediately be resegregated within the lower classroom sections. Id. at 1020. This reasoning is not pertinent here where the district court found that no student presently in the certified class had ever attended a segregated school. The fact that the grouping of the predecessors to the members of this class may have been influenced by their attendance

> at segregated schools is not relevant to the constitutional validity of the grouping systems at issue here.

Id. at 1415.

While the district court may not have precisely articulated the standard outlined in Georgia State Branches of NAACP v. State of Georgia for permitting achievement grouping in school districts that have not been declared unitary, the district court's Order should not be disturbed. It is undisputed that no student enrolled in the School District at the time of trial attended school in the dual school system once operated by the School District. In fact, it is undisputed that any student enrolled in the School District at the time of trial was even born at the time a dual school system was in operation. As shown by Georgia State Branches of NAACP v. State of Georgia, the fact that the grouping of parents or grandparents of current students may have been influenced by their attendance in the dual school system is not relevant to the constitutional validity of the grouping practices at issue here. Thus, the fact that no student enrolled in the School District at the time of trial attended school in the dual school system, particularly when coupled with the absence of evidence demonstrating that the School District has continuously employed its current student grouping practices since the School District's Desegregation Plan was implemented in 1970, establishes that the School District's current grouping practices are not based on the present results of past segregation.

Moreover, the district court's express findings show that the district court determined that the School District's current grouping method is not based on the present results of past segregation. The district court expressly found that financial circumstances, not race or past segregation, resulted in the racial imbalances sometimes seen in the School District's classrooms.

> The Court finds that these placements are not being made due to the race of the student. Many of these low income students are simply perceived as not being prepared when they first arrive at school. Due to their impoverished environment, they do not receive the background and support that is often so critical for being ready to learn.

District Court Order, p. 34.

The district court expressly found that the School District carried its burden of proving that racial imbalances that existed in the School District, including the racial imbalances that existed with respect to the racial composition of classrooms, "were not traceable in a proximate way to its previous de jure segregated system." District Court Order, p. 52. While the district court did not use the exact language outlined in Georgia State Branches of NAACP v. State of Georgia, the district court's finding is certainly tantamount to a finding that School District's current grouping practices are not based on the present results of past segregation. Thus, there is no reason to disturb the district court's Order.

Respectfully submitted this 14th day of February, 2005.

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Certificate of Compliance

I, Jerry A. Lumley, Attorney for Defendant-Appellee and Appellant Thomasville City School District, hereby certify in accordance with FRAP 32(a)(7)(C), that Appellee's Reply Brief complies with the type-volume limitation set forth at FRAP 32(a)(7)(B). According to the word processing system used to prepare Supplemental Brief of Defendant-Appellee and Cross Appellant, the number of words in Supplemental Brief of Defendant-Appellee is 2025.

This 14th day of February, 2005.

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Certificate of Service

I, Jerry A. Lumley, hereby certify that I have this day served the foregoing **Supplemental Brief of Defendant-Appellee and Cross-Appellant** upon counsel for all parties in this action by placing a copy of same in the United States Mail with adequate postage affixed to assure delivery addressed to:

Derek Black
Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

This 14th day of February, 2005.

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