
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.

On Appeal from the United States District Court for the
Middle District of Georgia

**POST ARGUMENT SUBMISSION OF PLAINTIFFS-APPELLANTS
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At oral argument, in connection with a discussion of the District Court's failure to apply the legal standards articulated in *McNeal v. Tate Co. Sch. Dis.*, 508 F.2d 1017 (5th Cir. 1975), this Court granted the parties leave to submit supplemental statements addressing the question whether the City of Thomasville School District ("District") assigned students to classrooms in a manner that substantially segregated them by race and afforded them different and unequal instruction from the time of its *de jure* system to the present. The evidence cited below establishes that: 1) from the point at which the District was first forced to allow some black students to attend schools with white students to the present, the District continuously has segregated classrooms by race and provided lower academic instruction to black students; 2) the District made these segregated assignments to unequal instruction under the pretense of ability grouping; and 3) the assignments segregate students by race, not achievement or poverty, and the unequal instruction offered in lower levels harmed black students' achievement.

1. The District Assigned Black and White Students to Substantially Segregated and Unequal Classrooms Immediately Upon Being Forced to Enroll Black and White Students in the Same Schools.

The testimony of witnesses who were students and teachers in the District at the time, and contemporaneous citations by the Office for Civil Rights ("OCR") -- all uncontradicted -- establish that the District assigned students to substantially segregated and unequal classrooms at the elementary, middle and high school levels in 1970, when first implementing the plans demanded by OCR. Indeed, as early as December 2, 1970, OCR indicated that, in addition to racially disproportionate faculty assignments, "racial isolation existed in classes in the Thomasville Middle and Jerger Elementary Schools" Pl. Ex. 294. As described in more detail within, Lucinda Brown was assigned to

predominately black and lower level courses, contrasted to the predominately white higher level courses, when she was transferred from the de jure black high school to Thomasville High School in 1970, Vol. IX at 147-49, and Hazel Jones observed segregated and unequal classroom assignments when she began teaching in the middle school in the 1969-70 school year, Vol. III at 23-25. And each of these witnesses testified that these practices continued to the present, Ms Brown through the experiences with her children, Vol. IX at 153-56, 166, and Ms. Jones through both the experiences with her children and as a middle school teacher and elementary school administrator, Vol. III at 13-17, 20-21, 23-27, 33-35, 111-12.

2. The District Continued to Assign Black and White Students to Substantially Segregated and Unequal Classrooms Throughout the 1970s.

Through the 1970s the District continued to deliver segregated and unequal instruction in “levels” or purported “ability groups.” See OCR documents dated October 11, 1971 and October 6 and 8, 1972, Pl. Ex. 300 at 2312; Pl. Ex. 314 at 2296-97. In the 1971-72 school year, at the elementary schools, for example, there was a level three third grade class at Jerger in which there were no white students and 19 black students. Pl. Ex. 300 at 2312; Vol. IV at 135. The following year there was a level two/three third grade class at Jerger with 25 blacks but no whites and a level three third grade class at Balfour with 16 black students and only 2 whites. Pl. Ex. 314 at 2296, 2297; Vol. IV at 136-37. Ms. Jones taught at Scott Elementary, beginning in 1969 and observed similar segregated classrooms, coupled with unequal instruction in levels. Vol. III at 13-17, 20-21.

In 1970, Ms. Jones began teaching in the middle school, where she remained until 1999. Id. at 23-25. During this time, she taught and observed students in classrooms that purportedly had been ability grouped. Id. at 23-27. Students in lower levels received

unequal instruction that focused only on basic skills, while students in higher levels were instructed in more advanced curriculum and given more enriching and diverse learning opportunities. Id. at 23-27, 33-35, 111-12. During these years, the high level classes were predominantly white and the low level classes were all or mostly black. Id. at 25, 34-35. This pattern of racially identifiable, purportedly ability grouped, courses at the middle school remained consistent from 1976 to 1999. Id. at 38. These assignments deprived Black students of opportunities for academic instruction, as they did to her son who, in the late 1970s, was placed into low level 7th and 8th grade classes, despite having earned A's in the sixth grade, thereby relegating him to basic Math rather than Algebra. Id. at 27. To the extent black students were placed in the high levels, they were high achievers, while underachieving White students were placed in high levels. Id. at 39-40. Ms. Jones understood that these classroom placements were designed to keep White students from Jerger together. Id.

The District's documents corroborate Ms. Jones' testimony. Middle school Language Arts classes in 1971-72, for instance, were racially unbalanced. In one class, there were 25 black students and 3 whites and in another class, the numbers were completely reversed. Pl. Ex. 300 at 2309. The following year, there were two language arts classes with more than 20 whites but only one black student, while other classes were predominantly black. Pl. Ex. 314 at 2304. Dunlap, the 6th grade school, also had segregated language arts classrooms, with classes composed entirely of black students. Pl. Ex. 300 at 2314.

High school courses similarly were organized into racially imbalanced classrooms that were purported ability groups. Ms. Linder and Ms. Brown attended the high school

in the 1970's, and testified that higher level courses were predominately white, lower level courses were predominantly black, and black students were discouraged from taking the higher level courses. Vol. III at 139-141; Vol. IX at 147-49. Moreover, when Ms. Brown was transferred from the de jure black high school to Thomasville High School in 1970, no school official ever informed her that she would need to take certain college preparatory courses in high school if she wanted to attend college, nor was she made aware of college entrance requirements. Vol. IX at 147-49. This testimony is corroborated by District documents showing that, at the high school in 1971, the racial composition of only 5 of 50 classes came within 10 percent of the District's overall racial composition. Id. at 2317. Only 17 of the classes came within 20 percent. Id. Two classrooms were exclusively of black, and twelve were 80-90 percent black. Id. The high school's classrooms looked no different the following year. Pl. Ex. 314 at 2302-03.

3. The District Continued to Assign Black and White Students to Substantially Segregated and Unequal Classrooms Throughout the 1980s.

The record contains testimony confirming that these practices continued throughout the 1980's, resulting in segregated and unequal classrooms. Vol. III at 123-25, 28-30, 95-97; Vol. I at 28. In fact, this inequality perpetuated itself to such a degree that although one Black student had made A's and B's in and prior to high school, he had not been prepared to meet college entrance requirements, and had not been taught those basic Math skills taught to high level students in middle school. Vol. III at 28-30. Thus, this student's mother had to provide extensive remedial instruction at home. Id. at 29-30.

In addition, a report commissioned by the District in 1985 stated that the District made different texts available to seventh and eighth graders based on perceived student ability, placing students in ability groups in Science, Math and Language Arts. Vol. XII

at 198-99; Pl. Ex. 1263 at 32, 37-38, 43. That same report indicated that “ethnicity and sex are also factors considered in the grouping process.” Pl.Ex. 1263 at 43.

The fact that students were assigned to separate classes also was confirmed by District administrators in charge of middle school class assignments for the past two decades. Ms. King, that administrator from 1987 to 1996, admitted that she simply continued a grouping process in place prior to her arrival in 1987 and claimed that the assignments were based on ability, with students assigned to the four levels based on the quartiles of their achievement scores. Vol. XI at 15-16, 19, 22, 25, 27-30. As a result of the placements, White and Black students substantially were isolated from one another in different levels for instruction. Id. at 29. However, when asked by the Court, Ms. King provided no explanation for why the District structured its classrooms as it did. Id. at 29-30. Finally, Ms. King admitted that District employees took race into consideration in classroom placements. Id. at 21. Indeed, the assignment cards used to place students into levels and classes identified the students’ race. Id. at 18. These practices and their continued use through the 1990s and to the present also were confirmed by the administrator who succeeded King, Cheryl Hay. Pl. Ex. 1252 at 5-7.

4. The District Continued to Assign Black and White Students to Substantially Segregated and Unequal Classrooms Throughout the 1990s.

The assignment of students during the 1990’s was no different. Ms. Brown’s three children attended Jerger Elementary and the Middle School between 1988 and 2003. During that time, she discovered that children were being separated into different groups and classrooms for instruction and that the higher level students or classrooms were predominantly white and the lower level students were predominantly black. Vol. IX at 153–56, 166. At least six other witnesses confirmed the existence of differentiated

instruction and racially identifiable classrooms during the 1990s at the middle school. Vol. III at 157; Vol. V at 6-10; Vol. VIII at 212, 214-15, 240-42; Vol. I at 305-09; Vol. IV at 303-04.

The evidence at trial demonstrated that the continuing placement practice of placing students into different levels of instruction in the 1990s meant that students in the lower level classes received a lesser education than students assigned to the upper level classes. Three of Willie Mae Lewis's daughters attended the District's schools, with one, Shantoria, being placed in the lowest level classes. Vol. III at 205, 231-33. Whereas the daughters in higher levels were expected to do homework regularly, complete projects and handle challenging curricula and tests, Shantoria was not. *Id.* Shantoria's instructors spent little time instructing students; rather, the learning consisted largely of completing worksheets during class, after which the students would play or talk. *Id.* at 260-63. Moreover, her courses did not introduce her to more advanced work in subsequent grades. *Id.* This was not the case for individuals in higher level classes. *Id.* at 262-264. At least three other parents or students testified as to the differences in curricula, books, and instruction between the levels during the 1990's, with the highest levels being predominantly white and the lower levels being predominantly black. Vol.VIII at 213, 292-94; Vol.IV at 318-19; Vol.I at 310. Moreover, as one teacher who taught during the 1990's explained, when her classes were predominantly black, administrators allowed white students to transfer out of the class. Vol.V at 33. Conversely, Shantoria was denied the opportunity to leave her low level classes for two years. Vol. III at 231-32, 235-37, 258.

5. The District Rejected Its Own Administrators Education- and Equity-Based Reforms of Classroom and Course Assignment Practices In The Mid And Late 1990s.

In the mid and late 1990s, three middle school administrators--Mr. Rocker, Ms. Newton, and Mr. Fuller-- pointed out that these practices were discriminatory and unfair to black students and suggested that they be eliminated. Vol.II at 54-55, 57-58, 223-24, 232-238; Pl. Ex. 695; D. Ex. 375; Vol.IX at 220-27. The District nevertheless refused to eliminate these practices. Vol.II at 58, 59; Pl. Ex. 1252 at 19-21; Vol.XI at 85, 92; D. Ex. 851; Vol.IX at 225-227

While Assistant Principal of the Middle School, Rodney Rocker observed Ms. King dividing student placement cards into separate stacks according to race during the process of assigning students to classes. Vol.II at 52-54; Pl. Ex. 695; D. Ex. 375. He expressed concern to Ms. King, telling her that he believed that this was not fair to and discriminated against black students. Vol.II at 54-55; Pl.Ex. 1252 at 23-25. She responded by stating “Rocky, if we don’t group like this, MacIntyre Park may become an all African American school.” Vol.II at 54-55; Pl. Ex. 695; D. Ex. 375. He then expressed concern to other District administrators, including the superintendent, but they were averse or non-responsive. Vol.II at 58, 59; Pl. Ex. 1252 at 20-21. Although the superintendent recruited Mr. Rocker for the express purpose of promoting him to principal the following year, after raising these concerns, he was not promoted. Vol.II at 42, 45-46, 58, 84.

Similarly, the next middle school Principal, Sherrell Newton, also learned that the District was segregating white and black students into separate classrooms; placing black students into lower levels and white students into higher levels. Vol. II at 187–91, 206.

Although the District told her this was the result of students' ITBS math scores, Ms. Newton reviewed those scores and determined that students were being segregated notwithstanding their test results. *Id.* at 201, 206-07, 222-23.

Ms. Newton therefore proposed several alternatives to these segregative practices, including heterogeneous grouping, that would have integrated the classrooms. Vol. II at 223-24. Ms. Hay, however, refused to do so because the Superintendent, Dr. Shiver, told her not to make any changes. *Id.* at 237-46. Dr. Shiver then met with Ms. Newton and told her these changes were unacceptable because a white board member and white parents were opposed to the changes, that "he had had an agreement of some type with the group from Jerger in terms of how their students were going to be placed into teams," and that the changes might cause "white parents [to] pull their children out of the system." *Id.* at 232-38; Pl. Ex. 774 at 2; see also Vol. X at 244-45; Vol. IX at 197, 199; Pl. Ex. 1253 at 10-11. Ms. Newton "told him that [she] could not understand why students who passed prealgebra in seventh grade could not go into algebra in the eighth grade, and why there were only white students in the algebra class." *Id.* at 245-46. When Shiver persisted in his refusal, she told him she "wanted an algebra class that was equal to the one that he had for white students, for black students, and he said okay. [She] couldn't believe it. [Her] mouth just kind of hung open, but that's what he said." *Id.*

In the end, Ms. Newton could only direct Ms. Hay to organize homerooms through a random distribution of students. However, Ms. Newton wrote Dr. Shiver a letter about the District blocking her integrative measures, in which she stated "the basic problem here is segregated classes of White students as the norm. A selection process in which criteria and reasons are created to have all White classes is wrong. I will not

support this. Nor will I be held responsible for decisions which I am against and which are illegal." Pl.Ex. 663; Vol. II at 249. He again responded negatively to her proposed changes, Pl. Ex. 664, and after only three months in her position, the District removed her as principal of the middle school and later reversed even the actions she took to integrate the non-instructional homeroom classrooms. Vol. I at 143-45; Vol. II at 223-24, 232-38; Pl.Ex. 664; Vol. XI at 85, 92; D. Ex. 851.

Mr. Fuller became principal of the middle school in 1998 and in 2002 also attempted to change the assignment practices, but the parents from the majority-white Jerger elementary school lobbied against the change, Vol. IX at 220-24, including by submitting their own plan as an alternative to Fuller's school improvement plan proposing to change the composition of the classes. Mr. Fuller's school improvement plan was rejected and that was his last year as principal. Id. at 225-27.

6. The Evidence Demonstrates That District's Assignment Practices Segregate Students By Race, Not Achievement Or Poverty, and Harm Black Students' Achievement and Educational Opportunities.

Analysis of the District's data show that achievement does not explain students' Level placement. First, student achievement scores largely do not correspond with their Level placement, as above-average black students are placed in the lowest Level, Pl.Ex. 1212, table 15, and well-below-average white students are placed in the highest Level. Pl.Ex. 1212, table 17. Second, each Level is composed of students with a very wide range of achievement scores--"heterogeneous" rather than the "homogeneous" grouping the District claims to create.. Vol.VIII 53-54; Pl. Ex. 1212. Third, measured by both achievement scores and prior Level placement, black students are systematically assigned to lower Levels than comparable white students. Vol.VII 339-41; Pl. Ex. 1211.

Socioeconomic status does not account for this difference. Vol.VIII 62-66; Pl.Ex. 1215. In short, the assignments do not create groups of similarly performing students, but consistently place black students in lower Levels than whites with comparable achievement scores, prior placements and socio-economic status. The evidence further demonstrates that these racially biased placements lead to increased scores for whites and lowered scores for blacks, Vol.VIII 33-40; Pl.Ex. 1213, expose black students to lowered “quality,” “pace,” and “coherence” of instruction and “expectations,” Vol.VIII 45-46; see also testimony of Armento, Morrell and Ryan at Vol. VI, and substantially deny black students access to courses necessary to qualify for college preparatory diplomas and higher education: in 2000-01, 95% of whites graduated with such diplomas, but only 53% of blacks did so. Vol.VIII 66, 72-74; Pl.Ex. 1238.

Conclusion

Appellants respectfully suggest that this evidence demonstrates that the District has operated in violation of this Court’s McNeal standards continuously since 1970, and intentionally discriminates against Black students in denying them a desegregated and adequate or equal education. Accordingly, Plaintiff-Appellants respectfully request that this Court direct that they promptly be afforded relief by the District Court.

Respectfully Submitted,

DATE: February 10, 2005

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CERTIFICATE OF SERVICE

We hereby certify that the foregoing Post Argument submission was filed with the Clerk this 10th day of February, 2005, via Federal Express. I further certify that two copies of the foregoing Post Argument submission were served this day via United States Postal Service, postage prepaid, upon:

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