The Importance of Full Court Involvement: A Case Study of the Rockford, IL School Desegregation Efforts

Shannon Fisk
5/15/99
3rd Year Paper

Table of Contents

I. Introduction 1

II. School Desegregation and the Effectiveness of Judicial Action 5

A. Dispute Resolution versus Structural Reform Litigation 6

B. The Legitimacy Critique 8

C. The Capacity Critique 11

D. The Value of the Critiques: Four Proposals to Test 14

III. Rockford and the Pre-People Who Care Litigation History 24

A. The City of Rockford and the Rockford School District 24

B. School Segregation in the 1960s 27

C. The QEFAC Suit and State Pressure to Desegregate 28

D. The Board Plans and Within-School Segregation 31

E. The Refusal of the Court to Step In 33

F. The Failure of State Pressure 35

G. The 1980s: Gradual Resegregation 37

H. The 1989 Reorganization Plan 39

IV. The People Who Care Litigation 42

A. The People Who Care and the Lawsuit 42

B. The Interim Agreed Order 45

C. The Second Amended Complaint 46

D. The Second Interim Order 48

E. The Failure of Settlement 50

F. The Liability Hearing and Findings 54

G. The Comprehensive Remedial Order 62

H. The 7th Circuit Appeal 69

V. Implementation of the Remedial Decree: Progress Despite Resistance 74

A. Community Protest.. 74

B. Rockford Board of Education Resistance 78

C. Remedial Results 81

D. Explanation of the Remedial Results 86

VI. Conclusion 89

I. Introduction

The 1990s have not been a good decade for advocates of school desegregation. In cities such as St. Louis and San Francisco, settlements have led to the ending of long-running attempts to desegregate the schools.[1] In the three cases dealing with the issue that have reached the Supreme Court this decade, the Court has significantly limited the role of federal courts in reforming school districts by focusing almost solely on returning districts to local control as quickly as possible.[2] In response to these rulings, numerous school districts have successfully obtained findings of "unitary status" from district courts, thereby being relieved of all court supervision of issues relating to integration.[3] In a number of cases, conservative lower court judges have moved to rapidly dismantle desegregation plans with little evidence that those plans had succeeded, that the districts would stay desegregated, or even that the school system itself wanted to be freed from judicial control.[4]

A main reason for this dismantling of school desegregation is that many segments of society have come to question the propriety and effectiveness of the efforts. Criticism of school desegregation litigation has three main bases. First, some question the harm and benefits thesis that is the social science basis for school desegregation. These critics argue that neither the harms of segregation nor the benefits of desegregation are as great as often claimed by social scientists.[5]

---

[1] *See* Caroline Hendrie, *Settlement Ends St. Louis School Desegregation Case*, EDUC. WK. ON THE WEB, March 24, 1999, <http://www.edweek.org/ew/vol-18/28louis.h18>; Caroline Hendrie, *San Francisco Desegregation Decree to End*, EDUC. WK. ON THE WEB, Feb. 24, 1999, <http://www.edweek.org/ew/vol-18/24deseg.h18>.
[2] *See* Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991); Freeman v. Pitts, 503 U.S. 467 (1992); Missouri v. Jenkins, 515 U.S. 70 (1995).
[3] Examples include Norfolk, Virginia; Dallas, Texas; De Kalb County and Savannah, Georgia; Tampa and Broward County, Florida; Wilmington, Delaware; and Columbus, Ohio. See Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, *in* LAW AND SCHOOL REFORM (Jay P. Heubert, ed., 1998) [hereinafter Orfield, *Conservative Activists*]; DAVID ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW, 214 (1995).
[4] *See* Orfield, *Conservative Activists*, *supra* note 3.
[5] *See* Missouri v. Jenkins, 515 U.S. 70, 114-138 (1995) (Thomas, J., concurring); Freeman v. Pitts, 503 U.S. 467, 500-07 (1992) (Scalia, J., concurring); David J. Armor, *Why is Black Educational Achievement Rising?*, 108 PUB.

Others question the methods used by the courts, arguing that their plans should be less comprehensive and focus on more voluntary approaches.[6] Most fundamentally, some question whether courts are the best institutional actors to address these issues both in terms of the legitimacy and efficacy of such action.[7] These arguments, along with a general public mood supportive of federalism and devolution of power, are significant factors in the Court's recent calls for ending court supervision over school districts as soon as possible.

This paper will attempt to respond to the critics, especially those who question the legitimacy and efficacy of court action, through examining school desegregation efforts in the city of Rockford, Illinois with a focus on the litigation which began in 1989 under the name *People Who Care v. Rockford Board of Education, School District #205.* Attempts to desegregate the Rockford School District ("District") started in the mid-1960s. A lawsuit, pressure by the state of Illinois, and community activism in the 1970s led to some desegregation. However, that progress was largely illusory as most of the burden of desegregation was placed on the backs of minority children and segregative patterns were often just recreated within each school. With the 1970s lawsuit dismissed and the state pressure ended, the 1980s were marked by a period of resegregation of the District. It was not until the 1990s, when the federal courts stepped in, found the District liable for intentional discrimination and issued a Comprehensive Remedial Order that any significant progress has been made in desegregating the District and improving the

---

INTEREST 65-80 (1992); DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995) [hereinafter Armor, FORCED JUSTICE].

[6] CHRISTINE H. ROSSELL, THE CARROT OF THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING (1990).

[7] GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 46-54 (1991) (arguing that gains in desegregation are due to action by Congress and the Department of Justice rather than the judiciary); Howard Kalodner, *Introduction, in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATOIN (Barabara Flicker, ed., 1990); RAYMOND WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 7 (1984) (stating that while segregation is "anachronistic … in a democracy social reform

educational opportunities for the minority (and majority) students who attend public school in Rockford.[8]

The Rockford school desegregation saga demonstrates the necessity of federal courts taking an active role in ensuring that schools are being desegregated. The District was first confronted with evidence of its discrimination and opposition to that discrimination in the mid-1960s. Some efforts were made to desegregate in the 1970s, but those efforts failed because of opposition by many school board members, the ineffectiveness of state government pressure to get the RSD to comply with state law, the failure of the federal district court to oversee the District's actions, and budgetary constraints. The initiation of the People Who Care litigation led to some progress, but there is evidence that the Rockford Board of Education (the Board) was not fully complying with the early, consensual orders between the parties. It was not until the federal district court made a liability finding against the district and issued a remedial order that significant progress was made in realizing desegregation and equal educational opportunity in the District. Even since the liability finding, progress has been difficult due to the organized opposition on the part of taxpayers and members of the Board of. The court, however, has been able to craft remedies that are successful in overcoming the opposition of various members of the school board and the community to school desegregation efforts. In the end it is clear that settlement and incremental change were inadequate to reform the school system, that a finding of

---

should be undertaken by the peoples' elected representatives, not by unelected judges."); LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION (Howard Kalodner and James Fishman, eds., 1978).

[8] As a point of clarification, the term "minority" is used in this paper to refer to African Americans and Hispanics. The term "majority" will be used to refer to whites. This is the phraseology used by the court and many of the people with whom I spoke about the case. Asian Americans, Native Americans, and other ethnic groups were not included in either definition (unless otherwise noted) because they do not constitute a substantial portion of the population of Rockford and there were no allegations of discrimination against those ethnic groups. Finally, the term "Hispanic", as opposed to "Latino", is used to stay in keeping with the phraseology used by the court.

liability and a judicial order for sweeping change was necessary, and that the court was able to implement such change despite the resistance of the school board and other actors in the case.

This paper is divided into six parts. Part II consists of an overview of the arguments surrounding the debate over the legitimacy and effectiveness of judicial action in this field. This section sets forth four debates dealing with effective school reform litigation which will be analyzed through a case study of the Rockford school desegregation litigation. Part III reviews the history of discrimination in the Rockford School District before the People Who Care lawsuit was filed in 1989. As will be seen, the pre-1989 story of the litigation is one of intentional discrimination which the state and courts in some ways made worse by stepping in and then refusing to take an active role in ensuring that an effective desegregation plan was implemented. Part IV outlines the People Who Care litigation itself, reviewing the two interim orders and their implementation, the liability findings, the Comprehensive Remedial Order, and the Seventh Circuit appeal. Part V will look at the implementation of the remedies ordered and the response of various actors within Rockford to the litigation. As will be shown, thanks to the active role of the court and the Special Master, the schools have been almost completely desegregated on an inter-district basis and some progress has been made in reducing within-school segregation and improving educational quality. This progress has come in the face of some serious resistance, which, unfortunately, did have the effect of lessening the success, and increasing the cost, of the remedies. In Part VI, I will conclude by explaining the importance of the Rockford story to the issue of school desegregation and the role of the courts.

II. School Desegregation and the Effectiveness of Judicial Action

School desegregation litigation does not fit the traditional model of litigation in which the court simply declares the rights of one individual in relation to another.[9] Instead, courts in school desegregation cases are expected to investigate a school district in terms of almost every facet of its operations[10] and then, if liability is found, to issue a remedy that often involves heavy judicial involvement in decisions regarding student assignment, spending, and educational policy. Such activity is a prime example of what has come to be known as "structural reform" litigation in which the court adjudicates the constitutional rights of groups of people in relation to a societal institution and, if liability is found, works to restructure the institution in ways to vindicate those rights.[11] While school desegregation was one of the primary motivations for this new form of adjudication, courts have now undertaken structural reform litigation in numerous other contexts including prisons, housing, and mental health institutions.[12]

Not surprisingly, a number of critics have questioned both the legitimacy of having these issues handled in the judicial system (with its un-elected judges)[13] and the capacity of the courts

---

[9] *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *Public Law Litigation*].

[10] Under Supreme Court precedent, courts in school desegregation cases work to eliminate discrimination "root and branch" in areas such as student assignment, faculty, staff, transportation, extracurricular activities and facilities. *See* Green v. County School Board of New Kent County, Virginia, 391 U.S. 430, 435-438 (1968). The examination of an additional factor, quality of education, was recognized by the Court in Freeman v. Pitts, 503 U.S. 467, 493 (1992).

[11] *See* Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms of Justice*]. The type of litigation being described here is also frequently referred to as "public law litigation" or "institutional reform litigation". *See, e.g.*, Chayes, *Public Law Litigation*, *supra* note 9; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977). The phrases are largely interchangeable.

[12] *See id.* at 2-4; Paul Miskin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 951 (1978) [hereinafter Mishkin, *Federal Courts*] (citing school desegregation and legislative reapportionment as the two areas where institutional reform litigation started).

[13] *See, e.g.*, Mishkin, *Federal Courts*, *supra* note 12, at 950-951; MICHAEL REBELL AND ARTHUR BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 5-7 (1982) (providing a review of the arguments revolving around separation of powers issues) [hereinafter Rebell, EDUCATIONAL POLICY MAKING].

to deal with reforming other governmental institutions.[14] This section, after outlining the differences between structural reform litigation and traditional forms of adjudication, will consider the legitimacy and capacity critiques. I determine that neither of these critiques fundamentally undermine the propriety of judicial action in structural reform cases, especially in the field of school desegregation. Out of the legitimacy and capacity views, however, grow a number of important debates over ways that such judicial action can be most effective.

A. Dispute Resolution v. Structural Reform Litigation

Structural reform litigation differs significantly from the traditional mode of civil adjudication in terms of the rights at issue, the structure and roles of the parties involved, the role of the judge, and the remedies that result. The traditional view of litigation, often known as the dispute-resolution model, is that of a very individualized and limited procedure for resolving particular incidents of wrongdoing.[15] In structural reform cases, however, the court is asked to look into the social conditions resulting from the actions of a particular institution and vindicate whatever public, constitutional rights are being violated.

Traditional adjudication is bipolar; it involves two private individuals whose interests are diametrically opposed.[16] Structural reform cases involve a class of plaintiffs defined by a particular characteristic (such as race or gender) and their interaction with a governmental institution.[17] The defendants are a set of bureaucratic officers that are in some way responsible for the behavior of the institution at issue.[18] These parties, furthermore, are not always completely

[14] *See, e.g.*, Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265 (1983) [hereinafter Horowitz, *Decreeing Organizational Change*]; Paul Gerwitz, *Remedies and Resistance*, 92 YALE L. J. 585, 593-612 (1983) [hereinafter Gerwitz, *Remedies and Resistance*]; DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).
[15] *See* Fiss, *Forms of Justice*, *supra* note 11, at 17.
[16] *See* Chayes, *Public Law Litigation*, *supra* note 9, at 1282.
[17] *See* Janet Koven Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57, 60 (1994).
[18] *See* Fiss, *Forms of Justice*, *supra* note 11, at 23.

opposed as the changes being sought by the plaintiffs are often supported by at least some individuals within the defendant organization.

The judge in traditional litigation serves as an impartial observer who listens to the two parties and decides which side is right.[19] This judgment is made on the basis of historical and adjudicative facts that the parties are likely to present and which are relatively easy for the judge to analyze. The judge in a structural reform case, by comparison, must take a much more active role in the case in order to ensure that all the facts needed to decide the case are before her. Furthermore, such facts are social and legislative and, therefore, require the judge to have considerably more expertise to properly evaluate them.[20]

Finally, the remedy in dispute resolution litigation is designed to compensate for the past wrong and, therefore, is retrospective, wholly dependent upon the violation found, and limited to the parties involved.[21] Such remedies are usually limited to monetary awards and/or injunctions ordering a party to discontinue specific activity. The remedial decree in structural reform cases, however, is designed to change the behavior of the institution at issue by reorganizing it. Relief, therefore, is forward looking, comprehensive, and can often affect the interests of third parties that are not involved in the litigation.[22] As the decrees call for ongoing changes in the policies of the institutions, they require that legislative decisions be made by the judge and the parties involved. Finally, ongoing judicial involvement in implementation and modification of the decree is necessary.[23]

---

[19] *See id.* at 24-27.
[20] *See* Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 12.
[21] *See* Fiss, *Forms of Justice*, *supra* note 11, at 27-28; Chayes, *Public Law Litigation*, *supra* note 9, at 1282-83.
[22] *See* Chayes, *Public Law Litigation*, *supra* note 9, at 1302.
[23] *See* Horowitz, *Decreeing Organizational Change*, *supra* note 14, at 1267-1268.

It is clear that structural reform represents a new role for the courts. Litigation to end school segregation and other constitutional wrongs in public institutions have given courts new powers to remedy wrongs that were previously considered beyond their reach. The important questions are whether courts are the proper actor to address those wrongs and, if so, how such judicial action can be most successful.

B. The Legitimacy Critique

The first major critique of structural reform litigation questions the propriety of courts, and the un-elected judges that sit on them, deciding issues involving questions of policy that are outside the realm of traditional judicial consideration and are normally determined by other branches or levels of government.[24] The legitimacy critique attacks such judicial action on the grounds that the judiciary is illegitimately involving itself in legislative and executive decision-making in a way that violates principles of majority rule and separation of powers.

The legitimacy view has some special salience in the school desegregation context. The Supreme Court's decision in *Brown v. Board of Education* and the school desegregation that followed undeniably involved a significant restructuring of a critical part of American society.[25] These cases potentially affect every child in the US in a field that is considered "perhaps the most important function of state and local governments."[26] Furthermore, remedial decrees in these cases often involve specific orders regarding issues such as educational policy, raising and spending funds, and student placement. Critics of this judicial action argue that such orders intrude upon the proper role of legislatures and school boards.[27] Such intrusion not only threatens

---

[24] *See* William Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L. J. 635, 681 (1982) [hereinafter Fletcher, *The Discretionary Constitution*].
[25] *See id.* at 673.
[26] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[27] *See* Horowitz, *Decreeing Organizational Change*, *supra* note 14, at 1289, 1303.

principles of federalism and separation of powers but it is also seen as highly anti-democratic as structural reform litigation can be used to bypass majoritarian political controls.[28] While not necessarily challenging the desirability of the results that structural reform litigation seeks, these critics believe that such results should not be imposed by un-elected bodies before whom the people are not directly represented.[29]

There are three main responses to the legitimacy critique. First, supporters of structural reform litigation point out that in reality courts are more responsive, and the other branches of government are less responsive, to the popular will than frequently.[30] While the legislative branches are directly elected by the people, in light of the importance of special interest groups, large campaign donations and 30 second televisions advertisements, it is not clear how responsive legislative bodies really are to the will of the people. It is true that judges are not directly elected by the people (though the appointment process provides at least some democratic check upon them), but the fact that court cases involve direct representation of the parties in the courtroom and that the judge must respond to the case means that it is very likely that courts will hear and respond to the will of the people directly affected by its decisions.[31]

Second, structural reform litigation deals with the constitutional rights of groups that are in the minority in society (racial minorities, patients in mental institutions, prisoner, public housing tenants, etc.). The un-elected nature of the judiciary is therefore an argument in favor of judicial involvement in these situations for two reasons. First, constitutional rights are meant to protect the individual from the will of the majority; therefore, un-elected judges are a necessary

---

[28] *See* Mishkin, *Federal Courts*, *supra* note 12, at 958.
[29] *See, e.g.*, LINO GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND SCHOOLS 16 (1976) (stating that "even if compulsory school racial integration [his words for school desegregation] could somehow be defended, the performance of the Court in imposing it could not.")
[30] *See* DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY 18 (1977).

check on the majority that is denying constitutional rights to others.[32] Secondly, as will be seen in the Rockford case, the minority groups involved in these cases are often largely ignored by the democratic system (in the case of Rockford, the school board) and, therefore, if their rights are to be vindicated, some sort of non-democratic forum will be needed.[33]

A final argument in support of the legitimacy of judicial action is that it is necessary in light of the fact that other branches of government have failed to act. The issues involved in structural reform cases are of fundamental importance to society and, therefore, they must be addressed by some governmental body. Where other governmental bodies default on these issues, the argument goes, the courts are justified in stepping in.[34]

School desegregation is one of the most notable areas where non-judicial governmental bodies have failed to act to protect the rights at issue.[35] It is true that in the 1960s significant action was taken by the US Congress and the Executive branch in support of school desegregation.[36] During the early 1970s, however, school desegregation efforts by the federal government were significantly cut-back and such efforts have not been re-instituted.[37]

---

[31] *See* Chayes, *Public Law Litigation*, *supra* note 9, at 1308; Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 10.

[32] *See* Chayes, *Public Law Litigation*, *supra* note 9, at 1307.

[33] *See* Fiss, *Forms of Justice*, *supra* note 11, at 6; Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 9.

[34] See Fletcher, *The Discretionary Constitution*, *supra* note 24, at 637. *See also*, Horowitz, *Decreeing Organizational Change*, *supra* note 14, at 1286 (citing the failure of other branches of government to act as one of the main arguments put forth in support of institutional reform litigation).

[35] *See* JENNIFER HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 134 (1984) (stating that "were it not for the courts, there would be little reduction in racial isolation, especially in big cities and the North.") [hereinafter Hochschild, THE NEW AMERICAN DILEMMA]; Fiss, *Forms of Justice*, *supra* note 11, at 6-7.

[36] *See* Gerald Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 46-54 (1991) [hereinafter Rosenberg, THE HOLLOW HOPE]; Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 813 (1991). The 1964 Civil Rights Act had two provisions regarding school desegregation. Title IV authorized the Department of Justice to file school desegregation lawsuits. Title VI prohibited the provision of federal funds to discriminatory institutions. The Department of Health, Education and Welfare used Title VI to eliminate funding under the Elementary and Secondary Education Act to schools that were segregated. See id.

[37] *See* Neal Devins, *Judicial Matters: Review of The Hollow Hope: Can Courts Bring About Social Change?*, 80 CAL. L. REV. 1027, 1043 (1992). Federal programs which provided funding for school desegregation efforts were

Furthermore, in most instances, state and local governments and schools boards have failed to voluntarily address problems of school segregation.[38] This failure of all other governmental actors to tackle the problem of school desegregation has led scholars who are otherwise skeptical of the legitimacy of judicial action to reform institutions to conclude that, by default, the courts must assume the job of remedying school segregation.[39]

C. The Capacity Critique

Capacity critics argue that the courts do not have the institutional ability to successfully achieve institutional reform. It is generally accepted that judges are well suited to deciding whether constitutional rights have been violated by the institution being sued.[40] Many question, however, whether the court has the ability to formulate and implement an effective remedy. This criticism revolves around two areas of alleged weaknesses of the judiciary: (1) its inability to compile and adequately analyze the social data involved in these cases and (2) its lack of powers to enforce a remedy.

Remedial decrees are mainly legislative in nature in that they involve the alteration of approaches to policy by governmental actors.[41] Formulation of such decrees involves consideration of social conditions and the effects that changes in policy would have on those conditions. Capacity critics argue that judges are not well-suited to deciding these issues of social

---

largely eliminated in the early 1980s. Also during the 1980s, the Department of Justice frequently advocated terminating desegregation plans and failed to filed any major new school desegregation suits. *See* GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEGREGATION AND POVERTY SINCE 1968 23-24 (1993).

[38] *See* Howard Kalodner, *Introduction, in* LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 2-3 (Howard Kalodner and James Fishman, eds., 1978) [hereinafter Kalodner, *Introduction*].

[39] *See id.* at 23-24; Howard Kalodner, *Overview of Judicial Activism in Education Litigation, in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 4 (Barbara Flicker, ed., 1990); Mishkin, *Federal Courts, supra* note 12, at 952.

[40] *See* PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS, 156 (1983) [hereinafter Schuck, SUING GOVERNMENT]; Fiss, *Forms of Justice, supra* note 11, at 6-17.

[41] *See* Horowitz, *Decreeing Organizational Change, supra* note 14, at 1267.

policy. First, much of the data may never be presented to the judge as the parties are not required to provide an overview of all the relevant information and the rules of evidence may exclude much of the social science data.[42] Furthermore, judges are used to hearing historical facts about what the parties did, and, therefore, they have little experience in analyzing the social data that is presented.[43] Finally, judges tend to be generalists who are unlikely to have any expertise in the policy area being dealt with.[44]

Even if a proper remedy is developed, the capacity critics question whether implementation of such remedies will be effective. Implementation of a remedy is mainly an administrative or legislative process that the courts lack the tools to carry out.[45] The main problem is that the court lacks sufficient powers to compel recalcitrant parties to comply with its decrees. The courts rely basically on two tools for motivating compliance: (1) moral persuasiveness and (2) contempt sanctions.[46] Moral persuasiveness is often of limited value, especially where the public officials who the court is trying to persuade are being pressured by voters to not comply. The contempt power, meanwhile, is seen as good at stopping people from doing certain things, but as not effective in getting individuals to carry out actions.

The response to the capacity critics is two-fold. First, the critics have ignored the strengths that the courts and judges have. For example, the rules of discovery, and the adversarial

---

[42] *See* Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 11-12; Gerwitz, *Remedies and Resistance*, *supra* note 14, at 596. Two recent court of appeals have set forth very high standards for admission of social science data designed to show the detrimental effects of discrimination in schools on educational achievement. *See* Wessmann v. Gittens, 160 F.3d 790, 804-07 (1st Cir. 1998) (holding defendant's studies showing a relationship between teachers' attitudes and the achievement of students inadimissible); People Who Care v. Rockford Board of Education, School District #205, 111 F.3d 528, 536-37 (7th Cir. 1997) (finding inadmissible plaintiffs' studies showing the relation between the history of discrimination by the school district and an academic achievement gap between minority and majority students on the grounds that the studies failed to specifically quantify the amount of the gap caused by such discrimination).

[43] *See* HOROWITZ, THE COURTS AND SOCIAL POLICY 45 (1977).

[44] *See* Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at 132-33.

[45] *See* Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 14.

[46] *See* Schuck, SUING GOVERNMENT, *supra* note 40, at 163-167.

relationship of the parties, will help ensure that the judge obtains whatever data is needed to properly decide the case.[47] The judge can also be assisted in fact-finding and remedial implementation by court appointed special masters, experts, and oversight commissions.[48] Proceedings are also limited to a single institution which means that the facts presented are likely to be more focused and specific and the remedy crafted can be tailored to the specific situation at hand.[49] Finally, the fact that the court retains jurisdiction means that it is able to monitor compliance closely and modify the remedies if the need arises. In fact, a review of 65 federal court cases involving educational policy reform issues found that "the data largely rebuts the criticism that the judiciary lacks the resources, expertise, or comprehensive perspective needed to implement educational reform successfully."[50]

Secondly, while the critics have pointed out some weaknesses of the courts and judges in these cases, they have done nothing to show that other governmental bodies would be more successful at handling these problems.[51] Structural reform issues are extremely complex, and there is little evidence that administrative agencies or state legislators have more success at tackling those problems than the court do. For example, one of the biggest difficulties facing the courts in structural reform cases is opposition from the public and various actors within the

---

[47] *See* Chayes, *Public Law Litigation*, *supra* note 9, at 1308.
[48] *See* Karla Grossenbacher, *Implementing Structural Injunctions: Getting A Remedy When Local Officials Resist*, 80 GEO. L. J. 2227, 2251-53 (1992); David Kirp and Gary Babcock, *Judge and Company: Court Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981).
[49] *See* Chayes, *Public Law Litigation*, *supra* note 9, at 1038.
[50] Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 210; *see also* Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at 134-36; Michael Rebell and Robert Hughes, *Efficacy and Engagement: The Remedies Problem Posed By Sheff v. O'Neill and a Proposed Solution*, 29 CONN. L. REV. 1115, 1144 (1997) (stating that "the mixed record of success in both federal and state institutional reform litigation stems, we believe, not from any inherent institutional incapacity, but rather ... from a reluctance to utilize fully the courts' inherent institutional strength.")
[51] *See* Fiss, *Forms of Justice*, supra note 11, at 33. Even critics such as Donald Horowitz admit that the effectiveness of other branches needs to be studied. *See* DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY 294 (1977).

institution. Such opposition, however, is also likely to impede any attempts by the legislature or an administrative agency to address the problem.[52]

D. The Value of the Critiques: Four Proposals to Test

As I have argued above, neither the legitimacy nor the capacity critique provides an argument justifying wholesale abandonment of structural reform litigation, especially in the school desegregation context. These critiques are valuable, however, because they raise a number of debates as to how structural reform litigation can be more effective. Four of these debates will be considered in this paper: (1) comprehensive versus incremental change, (2) settlement versus full litigation, (3) the importance of the support of the public and/or actors within the institution, and (4) mandatory versus voluntary or market based remedies.

1. Comprehensive versus incremental change

A common debate in the field of social change is whether such change should be incremental or sudden and comprehensive. Advocates of the incremental view argue that the best approach to changing a social condition is through small initiatives implemented gradually over time.[53] This approach has the advantage of avoiding the disasters that can occur if comprehensive changes that end up making the situation worse are enacted. Incremental change can also be more effective because it allows for experimentation and adjustment of the reform process as it is being carried out.[54] The incremental approach is not necessarily based in either of the critiques of structural reform litigation mentioned above. For example, one could believe that courts are perfectly capable of reforming organizations, but still hold that such change, regardless of what

[52] *See* Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 214 (noting that while school desegregation efforts by courts often meet entrenched resistance, such resistance would also be encountered by other governmental actors).
[53] *See* DAVID BRAYBROOKE AND CHARLES LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS (1970).
[54] *See* Hochschild, THE NEW AMERICAN DILEMMA, supra note 35, at 35-37.

governmental actor undertakes it, should be limited and gradual. However, in arguing for small changes over time, the incrementalist sets forth a vision of the judicial role that is much less sweeping than that embodied in the remedies sought by many structural reform advocates.

In the school desegregation context, incrementalism calls for plans which rely on voluntary transfers (which are encouraged through the establishment of specialized magnet school programs) and are phased in over a number of years or only applied to a few grades.[55] To the extent that the institutional organization of the school system is changed, such changes should address only a couple of features of that organization at a time.[56] Finally, the goals regarding racial compositions of the schools, educational improvements, etc. should be quite flexible so that they can vary in light of changing demographics, etc.[57]

In her book, The New American Dilemma, Jennifer Hochschild criticizes the incrementalist approach to school desegregation. She argues that the gradual implementation of school desegregation is ineffective because it allows opposition to build.[58] Resistance to school desegregation is usually heavy in the year that a plan is implemented, but subsides as parents begin to realize the benefits of the efforts in terms of improved academic achievement and better race relations.[59] By dragging out implementation, however, the incrementalist approach creates a situation where the uncertainties inherent in school desegregation last longer and the benefits of desegregation are realized more slowly. Opposition (and the white flight and racial tension that results from it), therefore, tends to grow rather than subside as the plans is implemented.[60]

---

[55] *See id.* at 46 - 79.
[56] *See id.* at 80 - 88.
[57] *See id.* at 88 - 91.
[58] *See id.* at 47.
[59] *See* Christine Rossell, *Desegregation Plans, Racial Isolation, White Flight and Community Response, in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 38-39 (Christine Rossell and Willis Hawley, eds., 1983).
[60] *See* Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at 54.

The incremental approach, furthermore, by relying on voluntary transfers and not changing the institution as a whole, can create a more invidious form of within-school segregation.[61] Very few white children volunteer to transfer, and, therefore, if desegregation is to occur, the burden of transfers often falls on the backs of students of color.[62] Furthermore, the gifted and magnet programs relied on to encourage white student transfers are usually filled with mostly white students and, therefore, create a situation where discrimination against minority student is used to justify improved educational opportunities mainly for whites.[63] Finally, by failing to change the structure of the institutions (by, for example, working to change the attitudes of teachers and administrators) many students of color in the "integrated" schools are effectively re-segregated and provided lower quality education through educational tracking systems and subjection to harsher disciplinary proceedings.[64]

Hochschild offers both a negative and a positive argument. Her negative argument, as set forth above, is that "slight or partial movements to desegregate schools do little good (and considerable harm) to minorities."[65] Her positive argument is that comprehensive school desegregation that addresses the entire district, sets up concrete goals, and works to change the practices of the school district can be effective.[66]

---

[61] "Within-school segregation" refers to segregation of students within a school at the classroom level. For example, a school may be 70% white and 30% minority and, therefore, seem integrated. Within-school segregation may still occur, however, because when one looks at the classes in the school, many of the classes may be 95% white while others are 95% black. "Inter-school segregation" is segregation between schools, so that one school is virtually all white and another school is virtually all students of color.

[62] *See* WILLIS HAWLEY, STRATEGIES FOR EFFECTIVE SCHOOL DESEGREGATION: A SYNTHESIS OF FINDINGS 8-9 (1981).

[63] *See* Kimberly West, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 YALE L. J. 2567, 2577-79 (1994).

[64] *See* Angela Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J. L. & SOC. PROBS. 469 (1996); Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at 83-85; Janet Eyler, et. al, *Resegregation: Segregation Within Desegregated Schools*, *in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 126-143 (Christine Rossell and Willis Hawley, eds., 1983).

[65] *See* Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at xi.

[66] *See id.* at 190.

The Rockford school desegregation story offers a perfect setting in which to examine the incremental versus comprehensive debate. The 1970s were marked by litigation in which the judge refused to take an active role and only incremental change was implemented. This, as Hochschild's theory would suggest, led to a situation of resegregation and unequal burdens on minority students that was in many ways worse for the students of color. In the 1990s, however a finding of liability was made and a comprehensive remedial order was handed down. While implementation has been difficult, significant positive change has resulted from this activity.

2. Settlement versus full litigation

Regardless of what kind of change is desired, a second question to be addressed is what litigation strategy is most effective at obtaining such change. The debate here is mainly over whether the plaintiffs should try to settle the case with the defendants or should seek a finding of liability through full litigation of the matter. Settlement will normally involve the parties sitting down together, bargaining over what changes should be made in the institution, and signing a consent decree listing various activities to be taken by the defendants. The decree is approved by the judge, who then has enforcement power over its provisions.

A number of arguments are offered in favor of settlement. Settlements avoid the time and cost involved in protracted litigation and trials.[67] They are, therefore, more efficient for not only the parties, but also the court as it helps free up the court docket. Second, many parties will choose the certainty involved in settling rather than running the risk of a more adverse decision handed down by a judge.[68] Finally, the fact that the parties are actively involved in constructing the decree can lead to two added benefits. First, their direct knowledge of the institution and

[67] *See* Eric Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J. L. & SOC. PROBS. 83, 100 (1994) [hereinafter Rosand, THE OBSTACLES TO COMPLIANCE].
[68] *See* JUDITH RESNIK, JUDGING CONSENT 21 (1996), *reprinted from* 1987 U. CHI. LEGAL F. 43 [hereinafter Resnik,

problems at issue will enable the parties to craft a more effective remedy.[69] Second, the fact that the defendant is involved in creating the remedy is believed to increase the chances of compliance.[70]

Critics of settlement question these benefits and also raise a number of problems with settlement. First, there is little empirical evidence for the claim that the recent trend in favor of settlement has reduced court dockets.[71] This seemingly illogical result is due to the fact that the possibility of settlements have led more plaintiffs to file suits that they might not be able to win in court but which could lead to a settlement. Secondly, critics point out that the "consent" given by the parties may often be illusory as a party with fewer resources may feel that it has no choice but to settle.[72] Furthermore, there are a number of remedies (such as abrogation of a union contract) that are necessary to effectively solving the institutional problems being litigated but that plaintiffs may not be able to get through a consent decree. There is also little evidence that defendants comply with consent decrees more readily than with court ordered plans,[73] and where they do not comply, settlement provides less of a basis for court enforcement of the defendant's duties.[74] Finally, settlement is seen as detrimental because it prevents courts from carrying out their critical role of determining issues of constitutional rights and justice.[75]

The Rockford case study once again provides a good background upon which to examine these theories about the value of settlement versus full litigation. The plaintiffs in the second lawsuit filed against the Rockford school district entered into two separate consent decrees with

---

JUDGING CONSENT].
[69] *See* Rosand, *The Obstacles to Compliance, supra* note 67, at 101-102.
[70] *See* Lloyd Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 727 (1986).
[71] *See* Resnik, JUDGING CONSENT, *supra* note 68, at 43.
[72] *See* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1076-1078 (1984).
[73] *See* Resnik, JUDGING CONSENT, *supra* note 68, at 43.
[74] *See* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1084 (1984).

the defendant. As will be seen, the plaintiffs were unable to get the results they desired through those consent decrees. Defendants saw settling mainly as a way to take the heat of court pressure off of them for awhile. Plaintiffs, however, found it very difficult to get the defendants to carry out the agreements. Furthermore, the plaintiffs were also unable to get the all of the provisions that they needed to achieve full desegregation under the consent decrees. In light of these problems, there was little choice for the plaintiffs but to pursue a liability finding at trial.

3. The necessity of support of the public and/or actors within the institution

A number of both critics and supporters of structural reform litigation have argued that a necessary factor for success of a remedial order in this type of litigation is support for change of at least some actors within the institution being sued and support, or at least a lack of organized resistance among the public at large.[76] Strong and sustained resistance to change among institutional actors and/or the public is likely to have very detrimental effects on any attempt to implement comprehensive remedial orders.

There are actually three levels of actors to be concerned with here. First, there are the "street-level bureaucrats" (in the case of school desegregation, the teachers and administrators) who are most responsible for carrying out day to day operations of the institution.[77] Resistance among this group can impede change because these individuals are the parties who are most directly responsible for carrying out the procedures necessary for desegregation.

Second is the higher level actors (superintendents and school board members) who set the basic policies and procedures for the institution. Their level of support of the remedial attempts is

---

[75] *See id.* at 1089; H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431 (1986).
[76] *See, e.g.*, Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 684 (1993); Rosenberg, THE HOLLOW HOPE, supra note 36, at 36; Rebell, EDUCATIONAL POLICY MAKING, *supra* note 13, at 212 - 14.
[77] Schuck, SUING GOVERNMENT, supra note 40, at 66-81; MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: THE

important for two reasons. First, they can refuse to enact the type of policy directives (passage of tax levies, funding of educational programs, etc.) that are necessary to reforming the institution. Second, since the board often has ultimate control over the hiring and firing of school staff, the attitudes of these individuals is likely to play a key role in determining how active the ground-level staff will be in carrying out the directives of the remedial order.[78]

Finally, there is the public at large (which in the case of schools can be divided between parents with children in school and individuals without children in the school).[79] Their views of school desegregation are important for a number of reasons. First, in most districts, they elect the school board members. Secondly, active opposition among parents is likely to make school administrators less zealous in their activities in support of school desegregation. Finally, parents can undermine the school desegregation efforts by removing their children from the schools. This final action is known as "white flight" and will be addressed in the next section.

Clearly, support for (or at least a lack of active opposition to) school desegregation efforts among some or all of these actors makes implementation of such efforts much easier and greatly increases the likelihood of the effectiveness of that effort. To state that obvious conclusion, however, is not to say that court action in the face of resistance is completely futile. As will be seen in the Rockford case, the courts have managed to develop a number of tools for either overcoming or circumventing such resistance.

The first such tool is the use of contempt sanctions. While judges are fairly reluctant to cite parties for contempt, and there are horror stories of parties that are willing to pile up large

---

DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

[78] *See* Kalodner, *Introduction, supra* note 38, at 3.

[79] The general pattern of public opinion on school desegregation efforts is resistance for the first couple of years, followed by gradual acceptance as the public realizes that the court order is not going to go away, that school desegregation is not as bad as they feared, and that there are benefits to the efforts. *See* Hochschild, THE NEW

contempt fines rather than comply,[80] we will see in the Rockford case that often the mere threat of such contempt can get a resistant party to comply with the remedial order.

Second, the court can often protect the school administrators who wish to implement remedies from the opposition of the public or higher level administrators. The court orders themselves can be used as a shield for such supportive administrators who, when criticized for their actions, can reply that they had no choice but to abide by the law.[81] In the Rockford case, however, the court went even further by setting up a separate administration for carrying out the remedies. An administrative body was established that was answerable to the special master and the judge, instead of the superintendent and the board. This effectively circumvented the opposition of the Rockford Board of Education to the school desegregation efforts.

4. Mandatory versus voluntary or market based remedies

The third way that the courts have been able to overcome opposition (or at least avoid potential opposition) to school desegregation remedies is to develop desegregation tools that incorporate public choice in their implementation.[82] The goal of such plans is to avoid creating significant opposition among parents who have children in the public schools. The key concern here is avoiding (or at least minimizing) white flight, namely white students leaving the school system to attend either private schools within the city or public schools in neighboring districts

AMERICAN DILEMMA, *supra* note 35, at 52; Telephone interview with Dr. Bob Dentler, court expert.

[80] Perhaps the most blatant example of such intransigence in the face of sanctions occurred in Yonkers, New York where the city council refused to approve the construction of affordable housing as ordered by the district court. The court levied ever increasing sanctions against both the individual council-members and the city itself to try to coerce compliance. While the Supreme Court eventually struck down the sanctions direct against the individual council-members, the sanctions against the city itself were upheld. The city council refused to vote in favor of the affordable housing until the sanctions reached $1 million dollars per day. *See* Spallone v. United States, 493 U.S. 265, 268-273 (1990).

[81] *See* Rosenberg, THE HOLLOW HOPE, supra note 36, at 34.

[82] *See id.* at 36 (citing allowance for market implementation of court decisions as a way for courts to overcome the judiciary's lack of powers of implementation).

that are not covered by the desegregation orders.[83] At first glance it seems odd to consider the reaction of majority parents in crafting plans that are designed to remedy discrimination against minority students. However, consideration of white flight is necessary for two reasons. First, if a large number of white people leave the public schools, desegregation of the schools is very difficult as there are too few white students to integrate with minority students. Second, if the desegregation plan leads to significant racial hostility, then the benefits of desegregation (increased inter-racial contact, educational achievement, and self-esteem for minority students) are less likely to be realized.[84]

Early plans relied on mandatory student reassignment and busing to achieve desegregation.[85] By setting racial composition guidelines for the schools in the district, and then mandatorily assigning students to the schools on the basis of those guidelines, mandatory plans are quite successful in desegregating the schools, at least in the short run.[86] The problem, however, is that mandatory busing is widely unpopular among white parents and leads to (or is at least perceived to lead to) significant white flight from school districts.[87] While many experts have argued that the decline in the proportion of whites in urban school districts is due to other factors such as a lower birthrate among whites and a general migration to the suburbs by whites

[83] The ability of a court to order an inter-district desegregation remedy was virtually eliminated by the Supreme Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), in which the Court stated that such a remedy is only justified when the neighboring districts are found in some way responsible for the segregation within the district originally sued. This burden is close to impossible to meet.

[84] *See* Gerwitz, *Remedies and Resistance, supra* note 14, at 617.

[85] *See* Armor, FORCED JUSTICE, supra note 5, at 11-13. The use of mandatory busing was approved by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[86] *See* Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at 72-73; WILLIS HAWLEY, STRATEGIES FOR EFFECTIVE SCHOOL DESEGREGATION: A SYNTHESIS OF FINDINGS 8 (1981)

[87] *See* Armor, FORCED JUSTICE, *supra* note 5, at 12-13; CHRISTINE ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING? 75-108 (1990).

(and middle-class minorities),[88] the public and most courts have come to accept the view that mandatory busing is not a successful desegregation tool.[89]

The option offered by many critics of mandatory busing is voluntary plans in which students have the option of transferring to any school in which they would be in the racial minority.[90] The theory behind voluntary plans is that white flight is not the result of racism, but rather is mainly a response to the transaction costs involved in school desegregation (increased transportation time, adjusting to a new school in a new neighborhood, etc.).[91] Therefore, incentives such as magnet schools and specialized educational programs, along with facility improvements, are offered to attract students to schools that they would not otherwise choose to attend. The problem with purely voluntary plans is that it is not clear that they are truly effective in achieving desegregation, especially in districts that have over 30% minority enrollment.[92]

These two options place judges who are trying to craft a student assignment plan in a tough place. The mandatory plans appear to achieve greater desegregation, at least in the short run. However, such plans can lead to significant protest and white flight that undermine their long term effectiveness. The other option, a voluntary plan, is much less likely to lead to

---

[88] *See* Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education, IN* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 61-63 (Gary Orfield and Susan Eaton, eds. 1996); GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERMS OF SEGREGATION AND POVERTY SINCE 1968 6 (1993); BRIAN FIFE, DESEGREGATION IN AMERICAN SCHOOLS: COMPARATIVE INTERVENTION STRATEGIES 167 (1992).

[89] *See* Christine Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WILLIAM & MARY L. REV. 613, 630 (1995) (stating that since 1981, only two new mandatory reassignment plans have been ordered by courts and both of those were in Mississippi).

[90] *See* Armor, FORCED JUSTICE, *supra* note 5, at 13; CHRISTINE ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING? 28 (1990).

[91] *See* Christine Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WILLIAM & MARY L. REV. 613, 630 (1995); Gerwitz, *Remedies and Resistance, supra* note 14, at 635.

[92] *See* BRIAN FIFE, DESEGREGATION IN AMERICAN SCHOOLS: COMPARATIVE INTERVENTION STRATEGIES 137 (1992); Christine Rossell, *Desegregation Plans, Racial Isolation, White Flight, and Community Response, in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 16 (Christine Rossell and Willis Hawley, eds. 1983); WILLIS HAWLEY, STRATEGIES FOR EFFECTIVE SCHOOL DESEGREGATION: A SYNTHESIS OF FINDINGS 8 (1981); *but see* CHRISTINE

opposition, but also tends to be less successful. As will be seen in the Rockford case study, judges have found a third way, often referred to as Controlled Choice. This approach allow parents to rank the top three schools they want their children to attend. Those choices are honored as much as possible in keeping within a set of racial fairness guidelines to ensure that the schools are desegregated. As will be seen, this melding of public choice with a mandatory back-up has led to a largely successful plan which has desegregated the Rockford schools, led to relatively little white flight, and is supported by both the majority and minority parents in the district.

III. Rockford and the Pre-People Who Care Litigation History

A. The City of Rockford and the Rockford School District

Rockford is a city of about 140,000 people located ninety miles north of Chicago. As of 1990, approximately 15% of the population was African American while Hispanics constituted 4.2% of the city's residents.[93] The city still has a fairly significant manufacturing base and, while there were some significant economic problems in Rockford in the 1980s, the economy now is stable with a 10.5% poverty rate and unemployment around 5%.[94] Rockford is fairly segregated residentially. The Rock River runs through the city dividing an area known as the Southwest Quadrant (SWQ) from the rest of the city. 70% of Rockford's African American community

---

ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING? 80 (1990).

[93] *See* UNITED STATES DEPARTMENT OF COMMERCE – BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK (1994).

[94] Telephone interview with Mayor Charles Box. The unemployment rate for the United States as a whole in April of 1999 was 4.3%. *See* BUREAU OF LABOR STATISTICS, ECONOMY AT A GLANCE, <http://stats.bls.gov/eag.table.htm>, *visited* May 8, 1999. The poverty rate in the United States was 13.3% in 1997 (the latest year for which numbers are available). *See* UNITED STATES CENSUS BUREAU, POVERTY IN THE UNITED STATES: 1997, <http://www.census.gov/hhes/www/poverty.html>, *visited* May 8, 1999.

resides in the SWQ, where they make up 60% of the residents.[95] Furthermore, both the majority and minority residents of the SWQ have, on average, a lower socio-economic status than residents in the other parts of Rockford.[96] In the rest of the city, African Americans make up only 4.7% of the population.

Politically, Rockford is a mixed story. The city itself is narrowly Democratic; the Rockford City Council has an 8-6 Democratic majority and the Mayor is a Democrat.[97] The US Congressional District in which Rockford is located is represented by a conservative Republican, Donald Manzullo, who only narrowly lost the city of Rockford itself.[98] Elections are close and neither the mayor nor the city council-members seem to widely advertise their party affiliations.[99] Furthermore, despite these slight Democratic leanings, the city of Rockford has a conservative, anti-tax reputation that fits in well with its conservative surroundings.[100]

Rockford School District #205 (RSD) covers all of the city of Rockford and parts of the surrounding areas. In 1989, the District had 26,757 students; an additional 6437 (19.4% of the total) school-aged children in Rockford attended private school in 1989.[101] The public school

---

[95] *People Who Care v. Rockford Board of Education School District #205*, 1991 WL 299104 (N.D.Ill), Sept. 12, 1991, at 3. [hereinafter, all cases from this litigation with this title will be cited simply as People Who Care].
[96] Telephone Interview with Lewis Jordan, chair of the Rockford NAACP; Telephone Interview with Michael Alves, court expert.
[97] *See* ROCKFORD BOARD OF ELECTION COMMISSIONERS, PAST ELECTIONS: 1997 CONSOLIDATED - ACCUMULATED TOTALS, <http://www.inwave.com/eleciton/npast.html>, *visited* May 7, 1999. The Mayor, who was first elected in 1989, and was re-elected in 1993 and 1997, happens to be African-American. Both the Mayor, and some critics of the school desegregation efforts, point to this fact as evidence that Rockford is not nearly as prejudiced as its history of residential and school segregation make it seem. Interviews with Mayor Charles Box, School Board Vice President Ted Biondo, Tax Protestor Attorney Michael O'Brien.
[98] *See* MICHAEL BARONE AND GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1998 509 (1997).
[99] For example, the webpage for the Mayor of Rockford does not ever mention his party affiliation. *See* CITY OF ROCKFORD WEBPAGE, MAYOR'S OFFICE <http://www.ci.rockford.il.us/Mayor/Mayor.htm>, *visited* May 7, 1999.
[100] *See* Elizabeth Austin, *A River Knifes Through It: Nature Split Rockford First, But It Has Taken A Desegregation Lawsuit To Truly Divide The City*, CHI. TRIB. MAG., Sept. 27, 1998, at 10 [hereinafter Austin, *A River Knifes Through It*]; MICHAEL BARONE AND GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1998 508-510 (1997).
[101] SCHOOL DISTRICT DATA BOOK PROFILES, ROCKFORD SCHOOL DISTRICT 205, GENERAL CHARACTERISTICS PROFILE – DETAILED (1989) <http://govinfo.library.orst.edu/cgi>, *visited* Feb. 23, 1999.

student body was 22% (5,873) African American and 4.5% (1,211) Hispanic.[102] As of 1987, the racial composition of the students residing in the Southwest Quadrant was 73% minority; the number for the Northwest and Southeast Quadrants was 13%, while the Northeast Quadrant was only 3% minority.[103]

In 1989, the District operated 49 schools; 39 elementary schools, 5 middle schools and 5 high schools.[104] That year, the RSD spent $4600 per student, which was below the state of Illinois average of $4882.[105] Total expenditures for the District that year were $122.5 million.[106] The District is fairly reliant on local taxpayers for its funding; in 1989 45.7% of the RSD's revenues were from local taxes.[107] The District is even more reliant on local taxpayers today as the state of Illinois does not help local districts fund school desegregation.[108] Two important facts stand out about the District's finances. First, the taxpayers in Rockford have always been very opposed to taxation, which has led the District to the verge of bankruptcy on at least two occasions before the People Who Care litigation started.[109] In 1989, the District ran a $13 million deficit.[110] Secondly, as will be seen in more detail later, even when money was spent on

---

[102] *See id.*
[103] *Plaintiff's Third Amended Complaint*, People Who Care v. Rockford Board of Education, School District #205, Civil Action No. 89 C 20168 (N.D.Ill), June 18, 1993, at 15 [hereinafter *Third Amended Complaint*]. Note that the Plaintiff's Third Amended Complaint incorporates all of the First and Second Amended Complaints.
[104] *See id.* at 13.
[105] SCHOOL DISTRICT DATA BOOK PROFILES, ROCKFORD SCHOOL DISTRICT 205, SCHOOL DISTRICT FINANCES – FINANCIAL PROFILE – DETAILED (1989) <http://govinfo.library.orst.edu/cgi>, *visited* Feb. 23, 1999.
[106] *See id.*
[107] *See id.*
[108] Telephone Interview with Michael Alves, court expert.
[109] *See* Austin, *A River Knifes Through It*, supra note 100, at 10. In 1941, the schools were shut down for six weeks after the voters had refused to pass three education tax referendums in six years. In 1976, the school board only got the voters to pass a referendum to address a financial crisis in the district by cutting all extras such as high school sports. *See id.*
[110] *See id.*

education, it was spent inequitably so that the predominantly minority schools in the SWQ were significantly underfunded.[111]

B. School Segregation in the 1960s

In the 1960s and earlier, the Rockford School District was segregated in the traditional Northern way: through the purposeful drawing of district boundary lines so that black and white students were in different school attendance zones.[112] In 1965, the Superintendent of the District warned that the system was illegally segregated, but the Rockford Board of Education ("Board") ignored his warning.[113] When the Superintendent proposed a plan for desegregation in 1968, the Board rejected the plan and then fired the Superintendent.[114] These occurrences are quite typical of the pattern of behavior that would come over the next thirty years, in which the District would be alerted of desegregation problems, a plan would be proposed, and then the Board would either reject the plan or fail to implement it effectively.

The 1960s also saw a major protest over discrimination in the schools. On April 25, 1969, after school administrators had failed to respond to grievances presented to them by a group of black students, approximately 200 students and parents protested outside of West High School. The protesters carried signs calling for more black teachers and counselors and for increased black participation in extracurricular activities such as cheerleading.[115] Forty of the protesters were arrested and convicted by a jury of violating city anti-picketing and anti-noise ordinances.

[111] Telephone Interview with Michael Alves, court expert. Even Ted Biondo, the Vice President of the Rockford Board of Education and a key opponent of the People Who Care litigation, admits that the SWQ schools were under funded. Telephone Interview with Ted Biondo.

[112] *News and Views: Racial Segregation in Education As an Art Form*, J. OF BLACKS IN HIGHER EDUC., Mar. 31, 1994, at 14.

[113] CHRONOLOGY OF SEGREGATION IN ROCKFORD PUBLIC SCHOOLS, CITIZEN'S ADVISORY COMMITTEE 1 (Sept. 18, 1997) [hereinafter CHRONOLOGY].

[114] *See id.*

[115] Grayned v. City of Rockford, 408 U.S. 104, 105 (1972)

The convictions were upheld by the state supreme court.[116] The case then went to the U.S. Supreme Court, where the anti-picketing ordinance was struck down on First Amendment grounds, but the anti-noise ordinance convictions were upheld.[117]

C. The QEFAC Suit and State Pressure to Desegregate

During the 1970s, under pressure from the state of Illinois and a lawsuit filed by a community organization known as Quality Education For All Children (QEFAC), the District made some efforts to desegregate its schools. These efforts, however, failed in the long run because the District and the Board ranged from complacent to actively opposed to school desegregation. Additionally, the federal district judge on the case, Judge William Bauer,[118] refused to step in and take an activist position in ensuring that the RSD enact and faithfully implement an effective plan for desegregation. In fact, in many way, the actions taken by the school board actually made the situation worse for minority students.

The QEFAC suit was filed in 1970 as a class action alleging that the District had intentionally created a racially segregated system in violation of the 14th Amendment of the U.S. Constitution. In 1971, the Illinois State Board of Education ("State Board") became involved in the litigation when it enacted desegregation requirements for school districts. In 1972, the State Board cited the Rockford School District for having 13 of its schools out of compliance with its rules.[119] In response to the state pressure, a citizen committee recommended a plan that would

---

[116] City of Rockford v. Grayned, 46 Ill.2d 492, 263 N.E.2d 866 (Ill. 1970)

[117] Grayned v. City of Rockford, 408 U.S. 104, 105 (1972)

[118] Judge Bauer now sits on the 7th Circuit Court of Appeals and is one of the judges on the three member panel to which all appeals of the People Who Care case have been directed. *See* People Who Care, 111 F.3d 528, 532 (7th Cir. 1997).

[119] Quality Education For All Children v. School Board of School District #205 of Winnebago County, Illinois, 362 F.Supp. 985, 991 (N.D.Ill. 1973) [hereinafter QEFAC I]. The state rules, entitled "Rule Establishing Requirements and Procedures for the Elimination and Prevention of Racial Segregation in Schools", were promulgated under the Armstrong Act, a 1963 amendment to the Illinois School Code calling for the revision of attendance units "in a

use pairing and clustering of schools in order to desegregate them. The Board rejected this plan and instead adopted a voluntary, open enrollment plan that included establishment of four magnet schools and relied heavily on voluntary transfers. Observers believed the plan showed a lack of sincere effort by the District, pointing to the fact that it was a total of three pages long, had no timetables, did not provide any specific minority enrollment percentage guidelines, and had no mandatory reassignment provisions.[120]

QEFAC filed a motion to enjoin the School Board from carrying out the plan. The plaintiffs alleged eight specific types of discriminatory conduct in the District: (1) failure to comply with the state's rules on desegregation, (2) violation of state law through the use of at large school board election procedures, (3) creation of racial imbalance through the drawing of attendance boundaries, (4) creation of an imbalance of underachievers through the drawing of attendance boundaries, (5) discriminatory bussing of students, (6) racially discriminatory faculty assignments, (7) discriminatory construction of schools, and (8) enactment of discriminatory curriculum programs.[121]

Fairly extensive evidence of racial segregation was found by the court. Of the 71 schools operated by the District at the time, 21 were virtually all white and 12 were heavily black.[122] In 1972, nearly 90% of the students in the district attended racially identifiable elementary

---

manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality." *See* 105 ILL. COMP. STAT. 5/10-21.3.

The Rules held that a school was in non-compliance if its minority enrollment deviated from the district's overall minority enrollment by more than 15%. Upon a notice of non-compliance, the school district was to submit a plan within 90 days of a notification of non-compliance. A compliant plan had to set forth specific actions and timetables, employ all methods that are educationally sound and administratively feasible, could be based on voluntary methods but only if such methods actually eliminated segregation, ensure that burdens of desegregation was shared equally by all, and forbid within-school segregation. See QEFAC I, at 988.

[120] *See* People Who Care, 851 F.Supp. 939, 1050 (N.D. Ill. 1994) [hereinafter Magistrate Mahoney's Report and Recommendation].

[121] *See* QEFAC I, 362 F.Supp. 985, 987-990 (N.D.Ill. 1973)

[122] *See* CHRONOLOGY, *supra* note 113, at 1.

schools.[123]While minority enrollment in the District was only 15%, over 44% of minority students attended schools that were over 50% minority.[124] Furthermore, there were widespread inequities in facilities and materials between schools that were predominantly white and those that were predominantly black. An independent audit of school facilities done in 1972 found that identifiably black schools scored a 2.45 (on a four point scale with 4 being the highest) while predominantly white schools received a 2.57.[125] Of the District's teaching staff, only 5.95% of the 1,679 teachers were black. Finally, there was a significant disparity in test scores between black and white students. Among 7th graders, black students on average scored 40% lower than whites in reading and 35% lower in math. Additionally, minority underachievement was greater at schools cited for non-compliance with the state desegregation standards.[126] Finally, the court noted that, when properly funded, special programs can dramatically improve the academic performance of underachievers.[127]

Despite all of this evidence, the court refused to determine at this point that the schools were "de facto racially segregated."[128] Judge Bauer did note, however, that the evidence "strongly

[123] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 112, at 1073.
[124] *See* QEFAC, 362 F.Supp. 985, 991 (N.D.Ill 1973).
[125] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 112, at 1082.
[126] *See* QEFAC I, 362 F.Supp. 985, 998 (N.D.Ill. 1973).
[127] *See id.* at 999.
[128] *See id.* at 1001. Judge Bauer appears to have made an error of law here. He states that "it is well settled that after a determination has been made that a current condition of segregated schooling exists within a school district, the state and the local school board automatically have an affirmative duty to effectuate a transition to a racially non-discriminatory school system. Judge Bauer cites *Keyes v. School District #1, Denver, Colorado*, 413 U.S. 189 (1973), for this proposition. The opinion then goes on to imply that a finding that the district is "de facto racially segregated" would trigger the affirmative duty to desegregate. In fact, however, *Keyes* sets up an affirmative duty to desegregate only if there is a finding of de jure segregation by a school district. *See* Keyes, 413 U.S. at 208-209. The reason for Judge Bauer's apparent error is not clear. However, it is important to note that there was considerable dispute over the validity of the de facto/de jure distinction at the time. *See* Keyes, 413 U.S. at 214 - 254 (Powell, J. concurring in part, dissenting in part). Furthermore, Judge Bauer's decision was handed down only two months after the *Keyes* decision. In light of this, the Judge may have been mistaken as to the proper standard or merely misstated the proper test.

suggest a problem of minority isolation."[129] Furthermore, the opinion held that the voluntary plan offered by the Board was impractical and would not effectively solve the segregation problem.[130] Instead of enjoining the plan, however, Judge Bauer simply ordered the District, the state, and the plaintiffs to continue to work to develop an effective plan.

D. The Board Plans and Within-School Segregation

In response to the continuing QEFAC suit and state pressure, the Rockford Board of Education issued a number of plans that it claimed would desegregate its schools. These plans had a number of characteristics in common that, while changing the racial composition of the schools somewhat, did little to truly integrate the District. Most importantly, the Board consistently proclaimed its opposition to mandatory reassignment and busing of students.[131] In light of this opposition, all of its plans relied mainly on voluntary student transfers in which white students from school on the east side of town were encouraged to attend schools in the SWQ by the establishment of magnet, gifted, and alternative programs in the SWQ schools. The Board's opposition to busing for desegregation purposes, however, only applied to majority students.[132] Many minority students were mandatorily bused to predominantly white schools due to the fact that there was not enough capacity in the SWQ schools for all of the neighborhood students, especially after space was taken up in those schools by the magnet and alternative programs filled mainly with white students from the east side schools.

The desegregation created by these student movements was also largely illusory as students were frequently segregated within the schools. The magnet classes (which were predominantly filled with white students) were often kept separate from the classes attended by

[129] *See id.* at 1001.
[130] *See id.* at 1002.
[131] *See* Magistrate Mahoney's Report and Recommendation, supra note 120, at 1072.

the neighborhood students. These classes were often held on different floors of the schools,[133] and these students often even used different entrances and bathrooms and ate lunch at different times.[134] As will be seen in more detail later, minority and majority students were also re-segregated through an academic tracking system that led to racially imbalanced classes throughout the District.[135] These within-school segregation practices would become the main basis for the finding of liability during the People Who Care litigation.

As noted previously, scholars and other commentators have frequently observed that school districts that do not really want to integrate their schools will use tracking programs, establishment of gifted programs, disciplinary practices, and other methods in order to help ensure that children of different races are kept apart.[136] If the moving of students is done mainly to create a façade of desegregation which in reality is covering up for the fact that within the schools the same segregation and educational inequities are continuing, the whole effort seems pointless. Two of the main benefits of desegregation are that minority academic achievement increases in integrated schools[137] and desegregation leads to improved race relations from increased interracial contact.[138] Within-school segregation eliminates those benefits by minimizing interracial contact and denying minority students the increased educational resources and improved teacher behavior towards them that results in gains in academic achievement. In

---

[132] *See id.*

[133] Telephone Interview with Jack Packard, chair of the Citizen's Advisory Panel.

[134] *See News and Views: Racial Segregation in Education as an Art Form*, J. OF BLACKS IN HIGHER EDUC., March 31, 1994, at 14.

[135] *See* Jeannie Oakes, *Two Cities: Tracking and Within-School Segregation, in* BROWN V. BOARD OF EDUCATION: THE CHALLENGES FOR TODAY' SCHOOLS 81-90 (Ellen Condliffe Lageman and Lamar Miller, eds. 1996).

[136] *See, e.g.,* Janet Eyler, et al., *Resegregation: Segregation Within Desegregated Schools, in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 128 (Christine Rossell and Willis Hawley, eds. 1983).

[137] *See* Rita Mahard and Robert Crain, *Research on Minority Achievement in Desegregated Schools, in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 121 (Christine Rossell and Willis Hawley, eds., 1983). The improvement in minority academic achievement is not due to the "whiteness" of the school, but rather is due to the better resources available in those schools and the fact that teacher expectations are higher of students in such schools. *See id.*

fact, the "desegregation" efforts can actually be detrimental as minority students who are disproportionately placed in lower academic tracks or denied access to the gifted programs are often stigmatized.[139] Unfortunately, such resegregation within schools is a typical response to school desegregation, especially when courts and/or plaintiffs are not keeping a careful eye on the districts.[140]

E. The Refusal of the Court to Step In

While the District was developing plans that merely transferred segregation from an inter-district to a within-school basis, the court refused to take an active role in ensuring that an effective plan was enacted and implemented. The first plan that the District offered after *QEFAC I* was decided, the Grade Exchange Plan, offered the district court a perfect example of the problems with the District's approach to remedying segregation. The Plan involved the busing of entire classrooms to schools outside their neighborhoods in order to alleviate segregation. This plan, however, exempted the overwhelmingly white schools located in the Northeast Quadrant, would have placed disproportionate transportation burdens on minority students in the District and, by keeping classrooms intact, simply created segregation within schools. Judge Bauer rejected this plan, but still maintained that the District was making good faith efforts to develop a plan to meet its responsibilities.[141]

---

[138] *See* WILLIS HAWLEY AND SUSAN ROSENHOLTZ, ACHIEVING QUALITY INTEGRATED EDUCATION 7-9 (1986).
[139] *See* Kimberly West, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 YALE L. J. 2567 (1994).
[140] Telephone Interview with Michael Alves, court expert (stating that "there are a lot of Rockfords in America); *see also* Kevin Wellner and Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 452 (Fall 1996) (noting that the use of ability grouping and other techniques to maintain segregation increased in response to desegregation mandate of Brown); Angelica Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J. L. & SOC. PROBS. 469, 472-473 (1996) (same).
[141] Quality Education For All Children v. School Board of School District #205 of Winnebago County, Illinois, 385 F.Supp. 803, 808-809 (N.D. Ill. 1974) [hereinafter QEFAC II]

The Board then proposed a plan that relied on open enrollment and encouragement of voluntary transfers through the establishment of magnet and target schools. The only real desegregative component of the plan was a proposal to establish integrated Special Interest Centers to which students would be bussed for a total of 15 days per year. Judge Bauer, in *QEFAC II*, allowed the plan to be implemented but rejected it as the ultimate solution as there were serious questions as to whether the plan was feasible and whether the plan would sufficiently integrate the district.[142] The court also rejected plans proposed by QEFAC and the teacher's union which relied mainly on mandatory student reassignments.

The important point in the *QEFAC II* suit was that the judge specifically refused to "become an activist and formulate a program of integration for the School District."[143] Instead the parties were ordered to continue to meet and try to develop an acceptable plan. While the court reviewed a couple of more plans (which were variations of the plans described above), its participation in the case dropped off fairly quickly. After 1975, the district court assumed a "very passive role" in the Rockford case and eventually the QEFAC suit was dismissed without prejudice in 1981.[144]

This passive role of the court throughout the 1970s was a serious mistake. The plans developed in the 1970s did lead to some progress in desegregating the Rockford schools, at least on an inter-district basis. For example, by 1980, the number of elementary students attending racially identifiable schools had declined to 50%, from its 1972 high of 90%.[145] As previously shown, however, these plans weighed heavily on minority students and did not achieve any real integration. Minority students were being bused without getting the benefits of desegregation; in

---

[142] *See id.* at 818.
[143] *See id.* at 824.
[144] Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1061.

fact these students were arguably worse off now because of the institution of tracking programs. Having stepped into the fray in 1970, the court pushed for change. By refusing to take an activist role, however, the court allowed a District that already had a record of noncompliance to establish incremental desegregation plans that did little to change the school system as a whole. These plans were largely ineffective in achieving desegregation and in many ways actually made the situation even more inequitable. This part of the case seems to confirm Hochschild's thesis that "slight or partial movements to desegregate schools do little good (and considerable harm) to minorities."[146]

F. The Failure of State Pressure

As the court faded into the background, the State Board became the only governmental actor pushing for desegregation in the District. Such pressure was largely unsuccessful. In 1976, the state cited the Board for being out of compliance with the rules as the district had never submitted an acceptable desegregation plan, many schools did not meet the standard of having minority enrollment within +/- 15% of the district average, and minority students were bearing an undue burden of the desegregation that was occurring. The Board was warned that it had one year to comply or else it would be placed on probation, which involved a recommendation that state and federal funds be cut off. The Board responded with a plan that the State Board rejected. On March 10, 1977 the RSD was placed on probation.

Two months later, the Board issued a plan that the State Board temporarily approved. The plan provided that all but two of the District's schools would have under 50% minority enrollment to be achieved by pairing predominantly minority and majority schools and busing between them. Soon after obtaining approval, however, the District began ignoring the

[145] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 112, at 1073.

agreement.[147] Parental protest led the Board to change the plan in ways that effectively ended the mandatory busing of white students, but continued to bus minority students. This plan led to some progress in terms of district-wide segregation, but by 1978, 19 of 68 schools in Rockford were still out of compliance with the state's rules.[148]

During this time an additional federal court suit was filed against the State Board for failing to effectively enforce the state desegregation rules in the cities of Rockford, Peoria, and Joliet. Plaintiffs lost this case at the district court and court of appeals levels on the grounds that the state statute did not create a federal cause of action and that there was no federal constitutional violation as the plaintiffs had failed to allege segregative intent by the ISBE.[149]

In 1980, the State Board voted 15-0 that Rockford's school desegregation plan was inadequate and that it had to enact a plan that included mandatory student assignment provisions by 1981. This vote was based largely on the fact that the District had met the desegregation goals it had set forth for itself in only 2 schools.[150] Instead of following the State Board's orders, the Rockford Board of Education dropped its numerical integration goals and reaffirmed its official opposition to mandatory student reassignments. Before the State Board could act to enforce its findings against the District, however, the rules that it had promulgated were held to violate the Illinois Constitution by a state appellate court. This decision would be affirmed by the Illinois

[146] Hochschild, THE NEW AMERICAN DILEMMA, *supra* note 35, at xi.
[147] Interview with Andrew Campos, member of the Citizens' Advisory Committee and original member of People Who Care.
[148] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1070.
[149] *See* Coates v. Illinois State Board of Education, 419 F.Supp. 25 (N.D. Ill 1976); Coates v. Illinois State Board of Education, 559 F.2d 445 (7th Cir. 1977).
[150] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1071.

Supreme Court on the grounds that the State Board of Education did not have the authority to adopt the desegregation rules.[151]

As this overview shows, state government action was equally unsuccessful in getting the District to desegregate its schools. Over a period of ten years of pressure, the State Board got the District to issue only one plan that would meet the standards, and then the District purposefully did not implement that plan. With no real enforcement powers (outside of a recommendation that funding be cut off) the State Board had no way to get the District to comply with it's rules. In light of this, it seems fair to say that, at least in the 1970s, state government action was not an effective alternative to the federal court involvement that should have occurred.

G. The 1980s: Gradual Resegregation

With neither the federal court nor the state government pressuring the Board to desegregate, the 1980s were marked by a gradual resegregation of the Rockford public schools. The basic framework of the plans enacted in the 1970s; namely voluntary transfers for whites to magnet and gifted programs in the SWQ combined with mandatory busing of black students and tracking within the schools, remained largely unchanged. In addition, the Board took a number of steps during the decade that led to greater isolation of minority students in the District. Soon after the QEFAC case was dismissed and the state rules were struck down, the Rockford Board cut funding for the alternative programs, began charging students for transportation to those programs and eliminated the position of the Director of Integration. Further actions included the restriction of transportation options for some students, the closing of schools and the redrawing

[151] *See* Aurora East Public School District, No. 131 v. Cronin, 92 Ill.2d 313, 442 N.E.2d 511, 66 Ill. Dec. 85 (Ill. 1985).

of school boundaries.[152] In many cases, the Board knew ahead of time that its actions would result in greater segregation.[153]

The effects of these actions were increased segregation across the district. For example, while the number of students attending racially identifiable elementary schools had declined to 50% by 1980, by 1987 that number was up to 65%. Despite the fact that mandatory, one-way busing of black students was still occurring, by the 1988-89 school year six schools had more than 50% minority enrollment, 63% of the elementary schools were racially identifiable and 33% of the middle and high schools were racially identifiable.[154]

It is not fully clear why no challenges were brought to the District's actions during the 1980s, but a few guesses can be ventured. First, the nation had been swept by conservative political sentiment culminating in the election of Ronald Reagan as President. Reagan's Justice Department significantly cut back on school desegregation enforcement actions that had been undertaken by previous administrations.[155] At the state level, while the law calling for districts to desegregate remained in effect, the rules implementing the law had been struck down and state bureaucrats were probably wary in the conservative atmosphere to try to develop and enforce new rules. Locally, challenges probably did not arise sooner because Rockford was hit by a major economic downturn in the 1980s.[156] In 1982, the city's unemployment rate hit 25% and in 1986 Money Magazine listed Rockford last on its list of the 300 best places to live, largely because of

---

[152] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1073 – 1077.
[153] *See id.* at 1075. For example, in one case, the Board had been presented with a report from the District staff that certain actions could result in de jure segregation and yet, one week later, the Board approved those actions. *See id.*
[154] *See id.* at 1077.
[155] *See New and Views: Racial Segregation in Education as an Art Form*, J. OF BLACKS IN HIGHER EDUC., March 31, 1994, at 14.
[156] *See* Ron Grossman, et al., *In North, Desegregation Still Unfinished Business: Rockford's Slow Pace City Is Just Beginning to Meld What Has Been a Dual System*, CHI. TRIB., May 17, 1994, at 1.

its economic woes.[157] In light of these problems, it is probably not surprising that little pressure was brought upon the District to change its ways. Unfortunately, the words of one of the Board members in the 1980s seems very true that "unless outside pressure was present, the RBE undertook no steps in an effort to desegregate Rockford schools."[158] While some school districts voluntarily initiate desegregation efforts, the Rockford School District took the opposite approach and acted in ways that it knew would resegregate the schools.

H. The 1989 Reorganization Plan

The lack of any significant challenge to the Board's segregative actions ended in 1989 when the RBE, by a 6-1 vote, enacted the 1989 Reorganization Plan ("Plan"). Entitled "Together Toward A Brighter Tomorrow," the Plan created a firestorm of protest. The Plan called for, among other things, the closing of nine schools, the redrawing of attendance zones, and the ending of some volunteer school transfer options. The announced purpose was to save approximately $7.4 million, which would have offset the District's projected deficit for 1989-90. The Plan, however, would have closed both the naturally integrated West High School and a number of elementary schools in the SWQ, placed disparate burdens and educational disadvantages on minority children in the schools, and greatly increased racial segregation in the District

The school closings proposed under the Plan were problematic for a number of reasons First, in closing West as a high school, the Board was eliminating an extremely popular high school that was also the one high school in the District that was integrated naturally. Unlike the other high schools in the District, West did not rely on mandatory student assignments or the placement of gifted classes for its desegregation. Second, of the nine schools being closed, 5 of

[157] *See* Austin, *A River Knifes Through It, supra* note 100, at 10.

them were located within the SWQ. Furthermore, this disparity came about because of white parent protest over the closing of West. In an earlier version of the Plan, the Board had proposed completely shutting down West. But then a group of parents (the majority of whom were white) protested the closing and in the final Plan, the RBE proposed to leave West open as a middle school. This led, however, to a proposal for the closing of three additional schools, all in the SWQ.[159]

The second major problem with the Plan was that it would have placed nearly half the minority students in the District into one highly segregated complex of "mega-schools" located in the SWQ.[160] One of the schools would have housed 1227 students, more than twice the number of students in any other elementary school and four times the average size. Another predominantly minority school would have had an enrollment of 876 students, over 300 more than the largest predominantly white elementary school.[161] These provisions of the Plan were opposed not only because of the segregative effect they would have but also because many felt that such large schools were not very conducive to improving educational achievement.[162]

Finally, two of the provisions of the Plan would have direct effects on desegregation in the District. By proposing to draw elementary school boundaries so that students could attend schools in "the general area of their homes," the plan effectively eliminated the mandatory reassignment system that was responsible for most of the desegregation that had been achieved up to that point.[163] Furthermore, the Plan had a provision allowing for minority students to voluntarily transfer to other schools for desegregation purposes, but they were limited to only 5

---

[158] Unnamed RBE member quoted in Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1075.
[159] *See* Third Amended Complaint, *supra* note 103, at 28.
[160] Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1108.
[161] *See* Austin, *A River Knifes Through It*, *supra* note 100.
[162] Telephone Interview with Jack Packard, chair of the Citizens Advisory Panel.

of the 22 elementary schools with above average white enrollment.[164] The court later found that the Plan would have greatly increased racial isolation. Specifically, the court noted that enactment of the Plan would have led to the following change in segregation among elementary students:[165]

Type of School	1988-89 % Minority	1989 Plan % Minority	Change
Identifiably Minority	56.8	67.2	+10.4
Desegregated	38.6	22.5	-16.1
Identifiably White	4.6	10.3	+5.7

Type of School	1988-89 % White	1989 Plan % White	Change
Identifiably Minority	15.6	10.9	-4.7
Desegregated	42.9	27.3	-15.6
Identifiably White	41.5	61.8	+20.3

As these numbers show, the Plan would have drastically decreased the percentage of students attending desegregated schools while increasing the percentage of whites in identifiably white schools and the number of minority students in identifiably minority schools. Not surprisingly, the 1989 Reorganization Plan served as the trigger for the People Who Care lawsuit.

IV. The People Who Care Litigation

[163] *See* Third Amended Complaint, *supra* note 103, at 22.
[164] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1111.
[165] *See id.* at 1103.

A. The People Who Care and the Lawsuit

Soon after the 1989 Reorganization Plan was announced, a community organization was founded by Ed Wells, a Rockford resident, to oppose the plan. The organization, People Who Care, is a multi-racial group of parents, schoolchildren and community organizations. The People Who Care tried for about two months to mediate a settlement with the District, but representatives of the District would only meet with members of the People Who Care once. After the meeting, the Board promptly voted to refuse to reconsider the plan.[166] In response, the People Who Care did two things. First, it attempted to get more representation on the Rockford Board of Education. Elections for the seven member Board had always been at large. Under that system, the Board, from 1965 to 1989, had a total of three African-American members, no Hispanic members and only two members who were from the SWQ (out of 50 total over that time period).[167] Illinois law allowed for each district to change to elections based on geographic sub-districts if 5% of the residents signed a petition to get such an initiative on the ballot.[168] The People Who Care was successful in its petition drive and the initiative passed in 1989. After some delay due to the fact that the first electoral map that the District proposed was found to illegally dilute the vote of the African-American community, the first elections for the Board under the new districting plan took place on March 17, 1992.[169] This change in election formats

---

[166] *See* Third Amended Complaint, *supra* note 103, at 30.
[167] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1171.
[168] *See* 105 ILL. COMP. STAT. 5/9-22.
[169] *See* People Who Care, 1991 WL 299104 (N.D.Ill, Sept.12, 1991). The judge found that the defendant's proposed map violated the §2 of the Voting Rights Act, under the three part test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Namely, there is an African American community in Rockford that was significantly large and geographically compact to constitute a majority in a single district; that such community was politically cohesive; and other factors, such as low income levels and depressed housing conditions, exist so as to evidence minority vote dilution. This cohesive African American community resided in the SWQ, yet the District's proposed plan split the SWQ among three districts. Plaintiff's plan was found lacking as it violated state law requirements that the sub-districts be compact and contiguous. Therefore the parties were ordered to work together to develop a plan that would meet the requirements of both the VRA and state law. See id. at 5. A plan presented by the Plaintiffs was then approved of in October 1991. *See* People Who Care, 1991 WL 299103 (N.D.Ill., Oct. 21, 1991).

has led to an increase in the number of votes in support of desegregation efforts on the Board. In the end, however, that victory was hollow because there is still not a majority on the Board who are supportive of the efforts. In the past, usually only one of seven members consistently voted for the "pro-desegregation" side. Now the Board is split with four members against desegregation efforts and three in support. Furthermore, as will be seen, the Board is more polarized, proceedings are more divisive, and people on both sides of the case have questioned the quality of school board members since these changes were instituted.[170] In the end, the People Who Care attempts to increase their representation on the school board show how difficult it can be for groups representing the interests of a minority to obtain changed through democratic processes.

The second major action taken by People Who Care was to file suit in the federal district court of the Northern District of Illinois on May 11, 1989. The original suit featured both an organizational representation claim by People Who Care and a class action with 11 named student plaintiffs.[171] Of these students, nine were African-American or Hispanic and two were white.[172] The plaintiff's original complaint set forth four basic complaints. The majority of the claims were based on the segregative and disparate impacts of the 1989 Reorganization Plan that

[170] Telephone Interview with Michael O'Brien, attorney for the tax protesters; Telephone Interview with Michael Alves, court expert; Interview with Robert Howard, lead plaintiffs' attorney; Telephone Interview with Lewis Jordan, President of the Rockford NAACP (describing the Board of Education as "like a hospital board without any doctors on it.")

[171] Interview with Robert Howard, lead plaintiffs' attorney. The organizational representation component of the suit was dropped in 1992 as divisions began to appear in the People Who Care organization. *Id.* These divisions were created by two issues. First, some members began to question whether the litigation had moved too far away from its original focus on educational quality issues and too much towards a school desegregation suit. Interview with Christine Rossell, expert witness for teachers' union (stating that Ed Well, the founder of People Who Care, is "absolutely sick" with how this case has turned out); interview with Lewis Jordan, chair of Rockford NAACP (stating that Ed Wells never expected the suit to go the way it has). Second, some of the members of People Who Care were also teachers and, therefore, members of the teachers' union. The teachers' union was upset that some of the provisions of the consent decrees intruded upon their contractual employment rights. Interview with Robert Howard, lead plaintiff's attorney. For an interesting article arguing that there is a disconnect between what the civil rights lawyers try to obtain and what the clients really want in school desegregation litigation see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, IN* LIMITS OF JUSTICE: THE COURTS ROLE IN SCHOOL DESEGREGATION 569-611 (Howard Kalodner and James Fishman, eds.,

were discussed previously. Secondly, the plaintiffs alleged that desegregation that had occurred in the district had disproportionately burdened minority students. In the 1988-89 school year, 2100 students had been mandatorily reassigned away from their neighborhood schools, of those students, 98% were minorities. Overall, about 32% of minority students and 6% of white students in the Districts were bused for desegregation purposes. Not only were a significantly larger percent of minority students bused, but busing for minority students was mandatory while busing for white students was voluntary through the alternative programs.[173]

Next, People Who Care argued that the desegregation achieved through the voluntary transfers of white students to alternative programs was largely illusory due to the substantial segregation within the schools where those programs were housed. The programs the voluntary transfers enrolled in were 75 to 87% white, while the schools those programs were located in were only 39% white.[174]

Finally, the plaintiffs pointed out that only 7% of the staff members of the District were black or Hispanic even though the District had promised the court in 1972 (during the QEFAC litigation) to increase its minority staff levels to 15% of the Districts workforce.[175]

The plaintiffs alleged that the District had engaged in the conduct at issue with discriminatory intent and in violation of the 14th Amendment and 42 U.S.C. §1983.[176] They requested the issuance of a temporary restraining order and a preliminary injunction against the District to prevent the Board from enacting the 1989 Reorganization Plan.[177]

1978).
[172] *See* Third Amended Complaint, *supra* note 103, at 9-10.
[173] *See id.* at 18-19.
[174] *See id.* at 19.
[175] *See id.*
[176] *See id.* at 39.
[177] *See id.* at 41.

B. The Interim Agreed Order

Defendant's, wishing to avoid both a hearing on a preliminary injunction that had been scheduled by the court and future litigation over the issue of school segregation, worked to settle the suit almost immediately.[178] Within two months of filing, the parties reached an interim settlement, entered by the court on July 7, 1989. The Interim Agreed Order modified the 1989 Reorganization Plan in ways designed to maintain the status quo. For example, the order included agreements to operate West High School as a middle school and to keep all ten SWQ schools open.[179] The Order also worked to preserve and improve desegregation as it called for the locating of elementary alternative programs in SWQ schools, the establishment of a magnet school which would receive supplemental funding of $350 per pupil, and the undertaking of a comprehensive desegregation planning process.[180] The Order also had a significant education quality focus in that it required the District to spend $1.25 million on supplemental education programs in the SWQ. Finally, the District was to ensure that the SWQ schools were of the same physical quality as the schools in the rest of the district.[181] The method for funding everything agreed to under the Order was left up to the Board. The Agreement did foreshadow one future problem when it noted that the agreements regarding the placement of educational programs could require the "temporary suspension" of the part of the collective bargaining agreement between the school district and the teacher's union, the Rockford Education Association, IEA-NEA.[182]

[178] Interview with Robert Howard, lead plaintiffs' attorney.
[179] *See* Interim Agreed Order, People Who Care v. Rockford Board of Education, School District #205, Civil Action No. 89 C 20168 (N.D. Ill. July 7, 1989), at 6.
[180] *See id.* at 7, 8, 16-19.
[181] *See id.* at 10-12.
[182] *See id.* at 15.

C. The Second Amended Complaint

In the Interim Agreed Order the parties specifically noted that the plaintiffs would maintain their claim that the Board intentionally operated a dual system and that the court would retain jurisdiction over the case. While the original complaint and Interim Agreed Order focused mainly on stopping the Reorganization Plan and improving schools in the SWQ, the focus of the case now started to shift to traditional school segregation allegations. On November 9, 1989, the plaintiffs filed their Second Amended Complaint alleging over 30 years of intentional segregation and discrimination against black and Hispanic students.[183] According to plaintiffs, every aspect of the school system from student and faculty assignment to extracurricular activities and facilities was tainted by such conduct.[184] The complaint listed a litany of 21 practices that the defendants used to establish and maintain segregation in the schools, such as drawing of school attendance zones, siting of buildings, closing of schools.[185] In light of the allegations put forth it was clear that in many aspects "desegregation had kind of passed Rockford by" to the point where this was "like a 1960s or 1970s case being brought in the 1990s."[186]

The plaintiffs' case, however, also maintained a significant focus on disparities in the quality of education provided to students of different races.[187] For example, the plaintiffs' complaint also alleged 22 separate actions that discriminated against minority students by denying them the educational opportunities afforded to white students. These actions included the use of tracking programs, the provision of inferior facilities and materials in predominantly

---

[183] *See* Third Amended Complaint, *supra* note 103, at 44
[184] *See id.* at 44-45.
[185] *See id.* at 45-47.
[186] Telephone Interview with Eugene Eubanks, Special Master.

minority schools, operation of racially identifiable extracurricular activities and the appointment of faculty to minority schools who were less experienced than the teaching staff in white schools.[188] This dual focus of the complaints filed by the plaintiffs would lead to remedies that would involve not only the reassignment of students to ensure racial balance, but also the enactment of programs to equalize educational opportunity. These efforts would create two major areas of controversy; the first being over placement of teachers in these programs and the second over funding of such programs.

One major mistake at this point was a failure by the plaintiffs to attempt to get the state of Illinois involved by naming the Illinois State Board of Education as a defendant. State governments are almost always a party in school desegregation suits and their presence is important because of the financial resources and budgetary discipline they provide.[189] Both the plaintiffs' lead attorney and other lawyers involved in the case agree that the failure to name the state as an original defendant was "a serious error."[190] The Rockford Board of Education sued the Illinois State Board of Education for contribution in 1995 and the plaintiffs tried to intervene soon after that. Plaintiffs' motion was denied and the suit was dismissed.[191]

---

[187] *See* Peter Schmidt, *Education Bias Is Issue in Ill. District Desegregation Case*, EDUC. WK. ON THE WEB, April 14, 1993 <http://www.edweek.org>.
[188] *See* Third Amended Complaint, *supra* note 103, at 48-51; interview with Robert Howard, lead plaintiffs' attorney.
[189] Interview with Janet Pulliam, attorney for Special Master Eubanks. Ms. Pulliam went on to comment that both the Special Master and Magistrate Judge are very skilled on public finance issues, so they are doing a fairly good job of filling the role of budget disciplinarian that the state normally plays.
[190] Telephone interview with Tom Lester, District's attorney; interview with Robert Howard, lead plaintiffs' attorney.
[191] *See* Rockford Board of Education, School District No. 205 v. Illinois State Board of Education, 150 F.3d 686 (7th Cir. 1998). The Board's claim for contribution was dismissed on the grounds that it was untimely and that the Board had no federally protected interest to sue upon. *See id.* at 688.

In attempting to intervene, the plaintiffs argued that the state of Illinois was a party responsible for the segregation under *United States v. City of Yonkers*, 96 F.3d 600 (2nd Cir. 1996). Interview with Robert Howard, lead plaintiffs' attorney. In *Yonkers*, the Second Circuit found that the state of New York could be named as a defendant in the school desegregation suit because: (1) liability was created under 42 U.S.C. §1983 by the fact that the officials knew of the nature, cause, and extent of the segregation and knew, or should have known, that such segregation was de jure, (2) officials had a duty under state law to intervene to remedy the unlawful segregation, and (3) the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1703 (c)-(d), abrogated the 11th Amendment

D. The Second Interim Order

On April 21, 1991, the parties managed to agree on another set of actions to be undertaken by the Defendant under a Second Interim Order. This Order contained provisions relating to both desegregation and improving educational quality. In terms of integration, the Order provided for elimination of tracking unless it was based on non-discriminatory and objective standards, a program to improve the human relations attitudes of teachers and staff, development of a uniform discipline code, studying of a student assignment desegregation plan based on parental choice, and consideration of the impacts on integration of any Board action.[192] The Order also set forth the definition of an integrated school as one whose minority enrollment is within 15% of the district-wide proportion[193] and set a deadline of October 1993 for the integration of all elementary schools in the District through methods "which comport with equitable allocation of burdens."[194]

The major focus of the Order, however, was spending on educational facilities and programs. The RSD agreed to establish three magnet schools (including the one called for by the Interim Agreed Order that had not yet been established), build one new school and reopen another, all in the SWQ.[195] The Order also called for the placement of additional alternative and gifted programs in SWQ schools and set forth racial enrollment quotas for such classes requiring from 15 to 50% minority enrollment. Finally, the Order included provisions for the spending of

---

immunity of the states in this area. The Seventh Circuit did not address this argument, instead the plaintiffs' motion to intervene was denied on the grounds that there was no evidence that the People Who Care would not get all of the equitable relief it was entitled to without state involvement. *See* Rockford Board of Education, School District No. 205 v. Illinois State Board of Education, 150 F.3d 686, 688 (7th Cir. 1998).

[192] *See* Second Interim Order, People Who Care v. Rockford Board of Education, School District #205, Civil Action No. 89 C. 20168, (N.D.Ill. April 21, 1991), at 9-24 [hereinafter Second Interim Order].

[193] Such a standard is within the range of variance normally allowed in school desegregation plans. *See* Armor, FORCED JUSTICE, *supra* note 5, at 159 (noting that during the 1970s, a +/-10% standard was normally used but that since then it has become more common to see +/-15% or +/-20% standards).

[194] *See* Second Interim Order, *supra* note 192, at 49.

at least $2 million annually on supplemental education programs directed at minority students, equity in all physical resources of the schools, and the lengthening of the high school class day from six to seven hours.

Finally, the Order addressed the issue of funding these remedies under the Illinois Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act").[196] The Tort Immunity Act provides that a taxing entity can levy property taxes at a level sufficient to "pay any tort judgment or settlement for compensatory judgments."[197] The Board lawyer thought that this act would be a good way to obtain the money needed to fund the programs that were being agreed to and the plaintiff's lawyer and the District superintendent agreed.[198] There was some question, however, whether the Tort Immunity Act actually covered situations such as remedies under a school desegregation case. Some argued that the act was meant to only cover traditional torts, such as if a student was injured at school due to the District's negligence.[199] The court, however, stated in the Second Interim Order that the remedial programs being ordered constituted the payment by the District of a liability, tort judgment or settlement and, therefore, the Tort Immunity Act could be used to raise funds for such programs.[200] As will be seen, this usage of the Tort Immunity Act is now widely challenged which is thereby creating uncertainty about the financial future of the District.

E. The Failure of Settlement

[195] *See id.* at 31-41.
[196] 745 ILL. COMP. STAT. 10/9-101 *et. seq.* (1994).
[197] 745 ILL. COMP. STAT. 10/9-102 (1994).
[198] Telephone interview with Jack Packard, Chair of the Citizens' Advisory Panel.
[199] Telephone interview with Michael O'Brien, attorney for the tax protesters.
[200] *See* Second Interim Order, supra note 192, at 76-80. This language was later issued by the district court judge as a conclusion of law after a hearing on motions pertaining to the Second Interim Order. *See* People Who Care, 1991 WL 299105 (N.D.Ill. Oct. 4, 1991).

Some progress was achieved under the two settlements. Early implementation went fairly well and large amounts of money were spent by the District on some of the projects that had been agreed to.[201] The District spent more than the $1.25 million on supplemental education programs in the 1989-90 school year, as required under the Interim Agreed Order.[202] Furthermore, the District levied and spent $7.8 million in 1991, $9.8 million in 1992 and $11.8 million in 1993 under the Tort Immunity Act.[203] All told, approximately $44 million was spent between 1989 and 1993 on building and improving schools in the SWQ, establishing supplemental education programs, and providing transportation for all students involved in desegregation transfers. In fact, so much money was spent on improving the facilities in the District that at least some of the opponents of the litigation have accused the District of being a "friendly adversary" which did not really fight the case.[204]

The District's actions between 1989 and 1993 do not support the friendly adversary view, however. The Board did comply with some of its agreements[205] and it probably could have resisted more than they did.[206] However, on a number of occasions the Board requested reductions in Tort Immunity levies or was found to be out of compliance with its commitments. In 1991, the court granted plaintiffs' request to appoint a Monitor (Dr. Eugene Eubanks, who

---

[201] Interview with Robert Howard, lead plaintiffs' attorney; telephone interview with Eugene Eubanks, Special Master; telephone interview with Jack Packard, chair of the Citizens' Advisory Panel.
[202] *See* People Who Care, 1990 WL 304277 (N.D.Ill. June 19, 1990).
[203] *See* In re Application of County Collector of the County of Winnebago, Illinois, 96 F.3d 890 (7th Cir. 1996).
[204] Telephone Interview with Ted Biondo, Vice President of Rockford Board of Education; Telephone Interview with Michael O'Brien, attorney for the tax protesters. The concept of a friendly adversary in school desegregation cases suggests that the school district is not defending itself fully because it realizes that if it is found guilty of discrimination, it will be ordered to spend significant amounts of money that it would otherwise not have. The most famous example of this is in the *Missouri v. Jenkins* litigation, where the Kansas City school district and plaintiffs effectively worked together to get almost $1.2 billion to spend on turning virtually every school into a magnet school. Many argue that such a situation raises questions about the legitimacy of school desegregation litigation as the legal system is based on the idea that both parties will be diametrically opposed to each other. Telephone Interview with Michael O'Brien, attorney for the tax protesters.
[205] Telephone Interview with Eugene Eubanks, Special Master.
[206] Telephone Interview with Jack Packard, chair of the Citizens' Advisory Panel.

would later become the Special Master) to oversee the defendant's compliance with the Interim Agreed Order.[207] Later that same year, the court had to order the District to issue the $15 million in bonds necessary to begin the various school construction proposals it had agreed to under the Second Interim Order.[208]

Things became even worse after the Rockford Board of Education elections in 1992.[209] The newly elected board has a 4 to 3 majority strongly opposed to the school desegregation efforts. Under the new Board, compliance problems became acute. The Board refused to hire or pay consultants that it had agreed to under the Second Interim Order and failed to carry out its agreement to rehabilitate one of the high schools in the SWQ.[210] In 1992, the court, stating that "defendant merely seeks delay," rejected the Board's proposals to lower its Tort Immunity levy and to study alternatives to a renovation program it had agreed to.[211] Later that same year, the court approved the Magistrate Judge's findings of "numerous specific instances of misconduct on the part of the RBE" and granted supplemental remedial relief.[212]

A second problem with the settlement agreements arose when the Rockford Education Association, the union representing the teachers in the Rockford schools, challenged §B.11 of the Second Interim Order which abrogated the collective bargaining agreement between the union and the District. The collective bargaining agreement set up a teacher placement procedure that relied almost solely on seniority. The Order, however, stated that the teachers in the magnet schools, alternative programs and supplemental educational programs were to be chosen on the

[207] *See* People Who Care, 1991 WL 166960 (N.D.Ill., Jan 14, 1991).
[208] *See* People Who Care, 1991 WL 299105 (N.D.Ill., Oct. 4, 1991).
[209] Interview with Robert Howard, lead plaintiffs' attorney.
[210] See id.
[211] *See* People Who Care, 1992 WL 184303 (N.D.Ill., May 22, 1992).
[212] *See* People Who Care, 1992 WL 300998 (N.D.Ill., Oct. 13, 1992).

basis of six factors, only one of which was seniority.[213] These provisions, according to plaintiffs' attorney, were necessary to the success of the educational improvement programs, as it was critical to be able to select teachers on the basis of capabilities rather than seniority.[214] The dispute over §B.11 was a key factor leading to a liability hearing in the case.

The Rockford Education Association had tried to intervene in the fall of 1989 as it was worried that the Interim Agreed Order would impact on the employment rights of its members. The district court denied the motion to intervene as there was no abrogation of the collective bargaining agreement in the Interim Order.[215] As soon as the Second Interim Order was signed, however, the teachers' union was allowed to intervene as that Order did specifically abrogate the collective bargaining agreement.[216] The union immediately sued to challenge not only §B.11, but also other provisions that would affect its members' interests such as establishment of teacher training programs, reductions in class sizes, and extension of the school year at one of the magnet schools. The case went to the 7th Circuit Court of Appeals, which vacated the portions of the Order that overruled the seniority provisions of the collective bargaining agreement. The appeals court held that since there had not been a finding of intentional discrimination in the case as of yet, the parties could not agree to, nor could the court order, the abrogation of the teachers' seniority rights.[217] Under *Swann v. Charlotte-Mecklenberg Board of Education*,[218] remedies for illegal school segregation could include altering of teachers' contracts. However, no such illegal segregation had yet been found in this case and, therefore, the parties were powerless to alter the

---

[213] *See* Second Interim Order, *supra* note 192, at 28-29. The other five selection criteria were education, experience, attendance, prior evaluations, and the staff member's ability to work with parents, staff and students. These criteria were further defined by the court in *People Who Care*, 1991 WL 299102 (N.D.Ill., July 23, 1991).
[214] Interview with Robert Howard, lead plaintiffs' attorney; *see also* Peter Schmidt, *Educational Bias Is Issue in Ill. District Desegregation Case*, EDUC. WK. ON THE WEB, April 14, 1993 <http://www.edweek.org>.
[215] *See* People Who Care, 1989 WL 197569 (N.D.Ill., Dec. 15, 1989).
[216] Telephone Interview with Stephen Katz, attorney for the Rockford Education Association.
[217] *See* People Who Care, 961 F.2d 1335 (7th Cir. 1992).

rights of third parties such as the teachers' union.[219] The opinion did seem to imply that if a liability finding was made against the District, the abrogation of the teachers' contract would be allowed.[220]

The progress of the case under the two settlement agreements seems to confirm the arguments offered against settlement.[221] First, the plaintiffs and the court were unable to get the defendants to comply with basic provisions of the agreement such as refurbishing schools, hiring consultants and funding programs. Despite repeated trips back to court to reinforce the agreements made, the defendants refused to fully comply. Second, the rulings on the abrogation of the teachers' collective bargaining agreements, made it clear that the settlements would not be able to provide one of the key provisions needed to achieve real change at the schools; the reassignment of teachers.[222] Finally, the Interim Orders had not solved all of the segregation problems, especially within-school segregation.[223] The settlement cannot be described as a complete failure. Under the settlement agreements, the 1989 Reorganization Plan was stopped and significant amounts of money were spent on supplemental education programs and on improving facilities in the SWQ. However, as the critics of settlement predicted, compliance with the interim orders was lacking and the orders did not lead to the kind of fundamental change needed in the Rockford Public Schools.

---

[218] 402 U.S. 1, 91 S.Ct. 1267 (1971).
[219] *See* People Who Care, 961 F.2d 1335, 1339 (7th Cir. 1992). The 7th Circuit specifically refused to decide whether the parties could consent to an alteration of a third party contract such as this one after a shortened factual inquiry leading to a finding of probable success on the merits. *See id.* at 1338.
[220] Interview with Robert Howard, lead plaintiffs' attorney.
[221] See supra p. 18 and corresponding notes.
[222] Some parties in the case cite the collective bargaining agreement abrogation issue as the trigger for the case going to a liability hearing. Telephone Interviews with Stephen Katz, attorney for the Rockford Education Association; Jonathan Rothstein, attorney for the plaintiffs; Dr. Bob Dentler, court expert. Plaintiffs attorney Robert Howard, however, noted that the District's lack of compliance was also a key factor in holding a liability hearing.
[223] For example, while the District had officially eliminated its tracking system as required under the Second Interim Order, the court found strong evidence that tracking was still occurring as of the 1994 school year. *See* People Who

F. The Liability Hearing and Findings

The plaintiffs filed a motion for a permanent injunction against the District on October 30, 1992. On April 2, 1993, the injunction hearing began. That hearing lasted 24 days and involved 30 witnesses for the plaintiffs, nine witnesses for the defendants, 150 depositions and a total of 3500 pages of testimony.[224] The liability hearing was presided over by the Magistrate Judge Mahoney, to whom the case had been transferred to by District Court Judge Roszkowski on September 8, 1992.[225] On May 5, 1993, the parties agreed that all present and future remedial matters would be decided by the Magistrate Judge.[226] On the same day, Dr. Eugene Eubanks (who was the already the Monitor) was appointed as Special Master over the case.

Magistrate Judge Mahoney issued his Report and Recommendation on November 3, 1993. In analyzing the case against the District, Mahoney looked at all of the aspects of school operations, as required under *Green v. County School Board of New Kent County, Viriginia.*[227] Education disparities, a factor whose consideration was allowed in *Freeman v. Pitts* were also weighed heavily.[228] The Magistrate's 537 page report found that the District had raised "discrimination to an art form" in "consistently and massively" violating the Equal Protection Clause.[229] While some have argued that the Magistrate's statements were exaggerated,[230] it

---

Care, 1996 WL 364802 (N.D.Ill. 1996); telephone interview with Harriet Doss-Willis, expert witness for the plaintiffs.
[224] *See* People Who Care, 851 F.Supp. 905, 909 (N.D.Ill. 1994). [hereinafter Judge Roszkowski's Order].
[225] Magistrate Judge Mahoney had the authority to preside over the hearing under the Federal Magistrates Act, 28 U.S.C. §636(b)(1)(B). The substantial involvement of Magistrate Judges in hearing cases raises some constitutional issue as these are Article I judges and therefore are not subject to the same protections as regular federal court judges. The Federal Magistrates Act, however, was upheld as constitutional in *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406 (1980).
[226] *See* 28 U.S.C §636(c)(1). This provision allowing for the holding of an entire trial before a Magistrate Judge on the consent of the parties has been upheld by all nine circuit courts of appeals that have considered the issue. *See* KMC Co. Inc. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (collecting cases).
[227] 391 U.S. 430 (1968).
[228] 503 U.S. 467 (1992); Peter Schmidt, *Judge Rules Ed. Practices Led to Segregation in Ill. District*, EDUC. WK. ON THE WEB, November 10, 1993 <http://www.edweek.org/ew/vol-13/10rock.h13>.
[229] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 939.

seems pretty clear that the liability findings were incontrovertible.[231] The Magistrate found the District to have discriminated in 11 specific areas. While many of these actions have been touched on earlier in the paper, following is an outline of the major findings to give the reader an idea of how much discrimination had permeated the RSD.

1. Student Tracking and Ability Grouping

The most significant basis for the findings of liability was the discriminatory usage of a tracking system to segregate students on the basis of race. Tracking, or ability grouping, is an approach to education that calls for the grouping of students in classrooms on the basis of their ability to learn.[232] The general consensus on tracking, however, is that while it may provide some educational benefits to those in the very highest track (usually labeled the "gifted" class), tracking has no effect on educational outcomes for those in the middle tracks and actually hurts the education of those in the lowest tracks.[233] Tracking is seen as most educationally sound when it is based on objective standards, when the tracks are flexible so that students can move up (or down) in the system, and when there is a focus on helping the students in the lower tracks improve educationally. In reality, however, black and Hispanic students tend to be over-represented in the lowest tracks and most systems are very rigid so that, once placed in the lowest track, students rarely escape.[234]

---

[230] Telephone Interview with Stephen Katz, attorney for the Rockford Education Association.
[231] Telephone Interview with Jack Packard, chair of the Citizens' Advisory Panel.
[232] *See* Angelica Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J. L. AND SOC. PROBS. 469, 470 (1996).
[233] WILLIS HAWLEY AND SUSAN ROSENHOLTZ, ACHIEVING QUALITY INTEGRATED EDUCATION, 19-27 (1986); Janet Eyler, et al., *Resegregation: Segregation Within Desegregated Schools, in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 131 (Christine Rossell and Willis Hawley, eds., 1983).
[234] *See* Jeannie Oakes, *Two Cities: Tracking and Within-School Segregation, in* BROWN V. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY'S SCHOOLS 82 (Ellen Condliffe Lagemann and Lamar Miller, eds., 1996); *Revisiting Brown, supra* note 219, at 474-477.

The court found that the ability grouping practices in the District "did not represent a trustworthy enactment of any academically acceptable theory or practice of tracking."[235] The District had a four track system that disproportionately placed black and Hispanic students in the lowest tracks up until at least 1989. For example, in the 1987 grade 5 gifted program, none of the 50 students were black or Hispanic. These disparities could not be explained by group differences in achievement level. The record was "replete with situations" in which white students who scored below the national mean on standardized tests were placed in the honors track while minority students who scored in the 99th percentile on those tests were placed in basic classes.[236] Furthermore, the Rockford tracking system was quite rigid in that students rarely moved out of the track they were originally placed in. Finally, the tracking system was found to serve no remedial function for minority students.[237]

The Magistrate found that the District had segregated its students through tracking, had caused such segregation through the use of invalid testing procedures and rigidity, and intended such results in the sense that it knew about them and did nothing to change them.[238] Such a basis for finding a school district to be segregated is rare; normally tracking is challenged in districts where there is a pre-existing desegregation order.[239] The only other case on record where a

---

[235] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 940. Note that much of the Magistrate's findings on the issue of tracking was based on the testimony of Dr. Jeannie Oakes, an education expert from the University of California at Los Angeles. Her findings on the Rockford case are described in her *article Two Cities: Tracking and Within-School Segregation, in* BROWN V. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY'S SCHOOLS 81-90 (Ellen Condliffe Lagemann and Lamar Miller, eds. 1996).
[236] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 949.
[237] *See id.* at. 999.
[238] *See id.* at 1001.
[239] *See* Kevin Wellner and Jeannie Oakes, *(Li)ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 454, 455 (Fall 1996). Examples of challenges to tracking systems in school districts operating under school desegregation orders include Quarles v. Oxford Municipal Special School District, 868 F.2d 750 (5th Cir. 1989); Vaughs v. Board of Education of Prince George's County, 758 F.2d 983 (4th Cir. 1985); Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403 (11th Cir. 1985); McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975).

successful challenge to a tracking system was part of an original finding of discrimination was a 1968 challenge brought against the Washington D.C. school system.[240]

2. Segregation Of Students By Race Within Schools

In addition to the discriminatory tracking described above, the RSD also undertook a number of activities that, while leading to "numerical" desegregation between school, actually served to segregate students within schools. For example, during the 1970s, the District used a method called "intact busing," in which entire classrooms of students would be bused to a school for desegregation purposes, but then that class would remain intact and the bused children would not get a chance to interact with the neighborhood students at the school. In some instances, busloads of minority children bused to a predominantly white school were forced to stay on the bus in the morning until classes started, while the white neighborhood students were out on the playgrounds.[241]

Within-school segregation was also increased by the District's preference for partial-site alternative programs as opposed to full-site magnet schools.[242] Under partial-site alternative programs, predominantly white classes would be placed in predominantly minority schools, but the classes are kept separate from the regular curriculum and, therefore, there is little interaction between the white and minority students. Such programs can actually be even more stigmatizing than traditional segregation as the alternative programs are allegedly designed to desegregate the

[240] *See* Hobson v. Hansen, 269 F.Supp. 401 (D.C.D.C. 1968), *aff'd* Smuck v. Hansen, 408 F.2d 175 (D.C. Cir. 1969).
[241] *See* Magistrate Mahoney's Report and Recommendation, supra note 120, at 1005.
[242] *See id.* at 1002.

school, yet actually serve to label the neighborhood students who are not in the alternative programs as inferior.[243]

3. Student Assignment

The Board also undertook a number of actions that served to preserve segregation between the Rockford public schools. One method used was to operate identifiably white schools significantly over capacity rather than shifting the extra students to neighboring schools that were integrated. For example, Bell elementary school had no more than one minority student from 1973 to 1978. For that time, the school operated at 123% of capacity even though three neighboring, integrated schools only had 70% to 84% of capacity.[244] The court also found that the District had intentionally gerrymandered school attendance areas, located new schools, reassigned students from closed schools, and manipulated school feeder patterns in ways that would maintain or promote segregation.[245]

4. Facilities and Equipment Disparities

The court found significant disparities in the quality of the facilities and equipment in predominantly minority and majority schools.[246] The buildings in the SWQ tended to be older and more poorly maintained. Predominantly minority classes also had an insufficient number of textbooks (and those they had were often quite dated) and a lack of supplies. A 1990 study (ordered under the Interim Agreed Order) found that predominantly black schools had 40% less equipment than identifiably white schools. These inequities were magnified by a Board policy that allowed individuals who gave gifts to the District to have complete control over which

---

[243] *See* Kimberly West, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 YALE L. J. 2567, 2577 (1994).
[244] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1045-1047.
[245] *See id.* at 1079-1081.
[246] *See id.* at 1082-1097.

school would get that gift. As a result, of the gifts given to Rockford middle schools, only 0.6% of them went to middle schools in the SWQ. The same number was 11% for elementary schools and 17% for high schools.

5. Employment Discrimination

There was evidence of disparities in the hiring of minority staff, especially teachers. The court noted that the percentage of minority teachers in the District was virtually the same in 1991 (7.2%) as it had been in 1974 (7.0%). This was true despite the fact that during the QEFAC litigation of the 1970s, the District had set as one of its desegregation goals that it would increase minority representation in the teaching faculty to 15%. Furthermore, the District was under a state law obligation to enact an affirmative action program for the hiring of teachers, which it had failed to do.

The court made a finding of intentional discrimination based on this evidence.[247] The 7th Circuit would later overrule this finding as not supported by the record.[248] According to Johnathan Rothstein, the plaintiffs' attorney who handled the employment discrimination part of the case, one of the reasons the plaintiffs were unable to make a stronger showing on the employment discrimination claim was that the District did not keep applicant flow data that usually serves as the basis for such a claim.[249]

6. Inequitable Access to Transportation

As mentioned earlier, the Board's desegregation policies of the 1980s placed an undue transportation burden on minority students as they were mandatorily reassigned to schools outside their neighborhoods while few white students were ever involuntarily bused for

---

[247] *See id.* at 1129.
[248] *See* People Who Care, 111 F.3d 528, 534 (7th Cir. 1997).
[249] Telephone Interview with Johnathan Rothstein, attorney for the plaintiffs.

desegregation purposes.[250] In addition, the minority students often had to pay for their transportation while white voluntary transfers did not. The reason for this was that the District provided transportation for any voluntary transfer who lived more than 1.5 miles away from the school they were attending, regardless of how close to a city bus stop they lived. Mandatorily reassigned students, however, only received transportation if they lived more than 1.5 miles from both the school and a city bus stop.

7. Extracurricular Activities

The minority students who were reassigned were also effectively shut out of extracurricular activities for two main reasons.[251] First, the District did not provide transportation in the late afternoon or early evening and, therefore, it was much more difficult for students who were forced to attend school outside of their neighborhoods to get home. Secondly, selection for the activities, especially cheerleading, was based on subjective criteria which resulted in under-representation of minorities in such activities.

8. Bilingual Education

The court found that the District's bilingual education program was discriminatory in five ways that often reflected the findings of discrimination in other areas.[252] First, the bilingual programs, which were only placed at some of the schools in the district, were frequently moved from school to school in order to help the District achieve numerical desegregation. This movement placed an unfair burden of desegregation efforts upon the students enrolled in these programs. Second, the classes were segregated within the receiving schools. Third, the students attending these classes received inferior transportation. Fourth, there were no bilingual special

[250] *See* Magistrate Mahoney's Report and Recommendation, *supra* note 120, at 1154-1177.
[251] *See id.* at 1180-1182.
[252] *See id.* at 1184-1191.

education programs. Finally, the quality of education provided in these programs was inferior to that provided in other classes.

The Magistrate Judge also made findings of intentional discrimination based on the 1989 Reorganization Plan (as discussed above) and the composition of the Rockford Board of Education. Finally, the District was cited for discriminatory assignment of staff (minority staff placed predominantly in identifiably minority schools).

The parties were permitted to submit objections to the Magistrate's Report and Recommendation.[253] The district court judge then made a de novo determination of the challenged portions of the Magistrate's findings. In his Order, the only significant part of the Magistrate's findings that the district court judge rejected was the finding of discrimination in assignment of staff. The court agreed with the factual findings on this issue that minority teachers were largely isolated in identifiably minority schools. This pattern, according to the court, was due to the seniority provisions of the collective bargaining agreement between the District and the teachers' union, rather than intentional discrimination.[254] In the end, however, the district court judge strongly affirmed the Magistrate's finding of liability against the District, stating that "the cumulative evidence overwhelmingly supports such a finding" and that "no finder of fact, be it judge, jury, or administrative body, could have reached any other conclusion."[255] In light of this, it is perhaps not surprising that the Board decided not to appeal the liability findings.

G. The Comprehensive Remedial Order

School desegregation suits are usually held in two stages. First is the liability hearing. Assuming that liability is found, then the remedial stage of the trial begins. Generally the local

[253] *See* 28 U.S.C. §636(b)(1)(C).
[254] Judge Roszkowski's Order, *supra* note 224, at 923-924.
[255] *See id.* at 932.

school district presents a proposed remedial plan which is then commented upon by the parties and used as the basis for a comprehensive remedial order by the court. In this case, however, the District (harkening back to its behavior in the QEFAC cases) failed to present an adequate plan, instead largely proposing to continue its current activities.[256] This led the Magistrate to order the Special Master to develop a comprehensive remedial order. Dr. Eubanks put together a team of education and school desegregation experts, examined educational research and submitted a plan to the court.[257] A hearing was held on the plan, with the parties challenging various portions of it.[258] The Magistrate then decided on the challenges and issued a Comprehensive Remedial Order that largely reflected the Special Master's proposals.[259]

The hearings on the proposed remedy, which took place from October 16, 1995 to March 21, 1996 (with some breaks in between) were separated into three separate segments: Educational Components, Student Assignment, and Faculty Assignment/Student Achievement. So that the school district could get started with remedial implementation, the court issued a segment of its remedial order after each hearing. The remedial order covered 30 different topics, ranging from a student assignment plan and funding issues to staff development programs and the establishment of a research and evaluation office. Following is a review of the major provisions set forth in the CRO.

---

[256] Telephone Interview with Eugene Eubanks, Special Master.
[257] *Id.*
[258] This procedure for developing the comprehensive remedial order placed Special Master in the unusual role of almost being an active litigant in the case, as he had to defend his plan from challenges by both parties and he was allowed to do party-like things such as seeking and resisting discovery. This led to a further unusual development when the court held that Dr. Eubanks, who is not a lawyer, could hire a lawyer to help him defend the plan. Telephone Interview with Janet Pulliam, attorney for Special Master Eubanks. On appeal, the 7th Circuit did question the propriety of this arrangement of Special Master as litigator, but found that the parties could not challenge the arrangement at that time as they had not yet been injured by any action of the Special Master. *See* People Who Care, 111 F.3d 528, 540 (7th Cir. 1997).
[259] Telephone Interview with Dr. Bob Dentler, expert hired by the Special Master.

1. Student Assignment Plan: Controlled Choice

The court was faced with three basic student assignment plans. The first was a mandatory reassignment plan that would involved the forced movement of students to schools outside of their neighborhoods.[260] The court rejected this proposal, saying that forced busing was a "dated approach to desegregation" that would lead many parents to leave the district and would do nothing to improve educational quality.[261]

The other two proposals were variations on a relatively new approach to student assignment known as Controlled Choice. Controlled Choice allows parents to rank-order a number of schools which they want their children to attend and then tries to honor those choices as much as possible while maintaining racial balance at the schools.[262] In this way, Controlled Choice tries to take a middle ground between mandatory plans (which rely on forced busing and can lead to white flight) and voluntary plans (which rely on incentives to encourage students to voluntarily transfer to schools that are predominantly of the opposite race). Such plans generally have five characteristics that are necessary for its effective implementation. First, they eliminate neighborhood based school attendance boundaries and instead splits the district into a few racially balanced zones from which the students can choose schools. Second, racial fairness guidelines are designed, generally allowing each school's minority proportion to vary from the district average by +/-10-15%. Third, parents are allowed to make multiple choices, but there is no guarantee that they will receive any of those choices. Fourth, active outreach through parent information centers, advertising and mailings is performed so that parents are well informed of

---

[260] The mandatory assignment plan was actually a sham. It was drawn up by one of the Special Master's experts on the request of the Magistrate. However, the Magistrate had no intention of accepting the plan; he merely wanted it out there so that Controlled Choice would look more acceptable to the parties. Telephone Interview with Dr. Bob Dentler, expert hired by the Special Master.
[261] People Who Care, 1996 WL 364802 (N.D.Ill. 1996), at 39 [hereinafter CRO].

their options. Finally, some exceptions are usually provided for students who are already enrolled in a school or who have a sibling in a school.[263]

There are a number of benefits to Controlled Choice plans. First, by eliminating neighborhood student assignment zones, it equalizes burdens of transportation. Furthermore, since most students get one of their ranked choices, most busing that occurs is by choice rather than forced.[264] The choice aspect of the plan is also expected to cause less white flight from the district than a mandatory plan would.[265] Finally, a successful plan will include an educational improvement component. The choices made by parents every year can be used to identify schools that are under-chosen. Those schools should then be targeted for improvement through increased funding and duplication of programs located in schools that were over-chosen.[266]

The court ordered a Controlled Choice plan for all elementary schools in the District combined with the addition of magnet schools, a change in the District's grade configurations, and facility improvements.[267] It split the District into three zones: West, Northeast, and Southeast. Students in the West zone could list any school on their choice list, those in the Northeast or Southeast could only list schools in their own zone or the West zone. The plan was phased in; only applying to students who were entering kindergarten, 7th grade or 9th grade; transferring to the District; or choosing not to stay in their current school. The racial variation standard was set at +/-15% of the district minority proportion. The District was also ordered to

---

[262] *See* CHARLES WILLIE AND MICHAEL ALVES, CONTROLLED CHOICE: A NEW APPROACH TO SCHOOL DESEGREGATION, EDUCATION AND SCHOOL IMPROVEMENT, 1996 [hereinafter Willie, CONTROLLED CHOICE].

[263] *See* Eileen Fava, *Desegregation and Parental Choice in Public Schooling: A Legal Analysis of Controlled Choice Student Assignment Plans*, 11 B. C. THIRD WORLD L. J. 83, 92 (1991).

[264] For example, under Controlled Choice plans, 80% of students in Cambridge, Massachusetts have received their first, second or third choice. In St. Lucie County, Florida, 90% of students received their first choice. *See* CRO, *supra* note 248, at 41.

[265] For a skeptical analysis of this claim see Christine Rossell, *Controlled Choice Desegregation Plans: Not Enough Choice, Too Much Control?*, 31 URB. AFFAIRS REV. 55, 55-69 (Sept. 1995).

[266] *See* Willie, CONTROLLED CHOICE, *supra* note 262, at 9-10.

develop a Parental Information Center to assist parents in making informed choices of schools. Finally, the court, noting the fact that the Board often did not support desegregation efforts, placed control of the plan with a newly created Department of Desegregation, the staff of which could not be fired unless the Special Master agreed.

The Magistrate also ordered the construction of two new elementary schools, a new middle school, the reopening of another school and the development of three more magnet programs. Finally, the court ordered the district to shift its grade configuration so that 6th grade would become part of middle school instead of elementary school. This was done to help relieve the severe under-capacity problem that existed in SWQ elementary schools. All told, the court estimated that the student assignment portions of the decree would lead to $48million in one-time costs.[268]

2. Faculty Hiring and Placement

The remedial order also addressed the problem of minority under-representation in the District teaching faculty.[269] Holding that the finding of intentional discrimination justified a raced-conscious remedy, the court ordered the District to achieve a level of 13.5% minority teachers as soon as practicable. Furthermore, the District was ordered to make sure that the minority faculty ratio after any reduction-in-force layoffs was the same as it was before such layoffs.

As for the placement of teachers, the Magistrate found that despite the fact that there was no finding of discrimination in placement, the collective bargaining agreement provisions

---

[267] *See* CRO, *supra* note 261, at 36-45.
[268] *See id.* at 47.
[269] *See id.* at 58.

regarding seniority could still be abrogated.[270] The Magistrate reasoned that the racially identifiable placement pattern was a vestige of past discrimination, as without such discrimination, minority teachers would have more equal seniority. The District, therefore, was granted the ability to place a minority teacher in any vacancy for which he or she was qualified despite the seniority provisions in the collective bargaining agreement. The eventual goal was to ensure that the percentage of minority faculty in any school would not exceed the district-wide percent of minority teachers by more than 5%.

3. Student Achievement

The court noted that there was a significant gap between the academic achievement of minority and majority students in the District. For example, the achievement scores of white students were more than twice that of African American students.[271] On the basis of testimony from at least four social scientists, the court held that the "District's intentional discrimination was a substantial factor that proximately caused the achievement gaps."[272] The court then took the unprecedented step of ordering the District to close those gaps by at least 50% over the next four years.[273] Alternatively, the District could achieve unitary status as to this issue if 90% of the District's minority students were brought up to within one year of their grade level in reading and math.

4. Within School Segregation

The court found within-school segregation to be the most pervasive student enrollment problem in the District. To remedy it, the court first called for the elimination of the tracking

---

[270] *See id.* at 59-65.
[271] *See id.* at 67.
[272] *See id.* at 73.
[273] While provisions requiring a school district to close the academic achievement gap between minority and majority students are occasionally included in consent decrees, such provisions have almost never been ordered by courts.

system.[274] Then the court took another unprecedented step by setting up racial quotas for classes, saying that no classroom should have a minority enrollment that is more than +/-5% the proportion of minorities in the appropriate pool of students who could take such class.[275] The remedial decree did exempt elective classes from this standard and allowed gifted programs to continue under a +/-15% standard.[276]

5. Miscellaneous Provisions

The decree ordered numerous other changes in the District's operations. A few highlights include the continued operation and financing of supplemental education programs that were started under the interim orders,[277] an order forbidding the reference of a higher percentage of minority students for discipline until a uniform disciplinary code based on objective criteria was created,[278] a racial quota for cheerleading squads and a goal of a +/-15% standard for participation in all other extracurricular activities,[279] and requirements that all students finish math through geometry and science through chemistry before being allowed to graduate.[280]

6. Governance

The remedial order effectively put the Special Master and a group of administrators who answer to the Special Master in charge of ensuring that the remedial orders were carried out. The Special Master's wide ranging powers were continued and any action he takes in regard to the remedies was effective immediately without board ratification. Furthermore, Magistrate ordered

---

Interview with Janet Pulliam, attorney for Special Master.

[274] *See id.* at 7.

[275] *See id.* at 83.

[276] The remedial order required the elimination of the four level tracking system but preserved the gifted programs. Gifted programs only involve the very highest achieving students, usually the top 1 to 2% of the student body and, therefore, preservation of such programs in de-tracking efforts will not serve to recreate the widespread segregation and educational disparities caused by tracking.

[277] *See* CRO, *supra* note 261, at 9-11.

[278] *See id.* at 77.

[279] *See id.* at 79.

the creation of a Department of Desegregation with the mission of implementing the desegregation programs. The nearly 400 staff members in the District who are involved with the implementation of the remedies, including the staff of the Department of Desegregation are answerable to the Special Master and the Magistrate Judge rather than the Board.[281] Some argue that the remedial order effectively set up a parallel administration to carry out the remedies.[282] While the Special Master denies this charge, pointing out that he does not sign any of these people's checks,[283] it is clear that the Magistrate Judge set up a system for administering the remedies that would be insulated from pressure from the board.

7. Finance

The court finally addressed the issue of finance. Seemingly sensitive about the protests that had occurred already over the cost and method of finance of the previous school desegregation attempts, the Magistrate noted that it had chosen "the most economical" remedies possible and that there were no planetariums, Model United Nations, or 25 acre farms being ordered here, unlike in *Missouri v. Jenkins.*[284] The court then refused to interfere in the District's internal budgeting decisions, instead simply noting that funding for the remedies would continue to come from the Tort Immunity Act levies. Usage of such levies was capped at $25 million per year, with allowance for a 4% increase each year for four years. The District was also ordered to issue $48 million in bonds under a separate section of the Tort Immunity Act for the funding of the construction programs.

---

[280] *See id.* at 10.
[281] *See id.* at 87.
[282] Telephone Interviews with Charles Box, Rockford Mayor; and Tom Lester, attorney for the Rockford Board of Education.
[283] Telephone Interview with Dr. Eugene Eubanks, Special Master
[284] CRO, *supra* note 261, at 90-91.

H. The 7th Circuit Appeal

Both the plaintiffs and defendant appealed portions of the remedial order to the 7th Circuit Court of Appeals.[285] The Board challenges focused primarily on the provisions of the remedial order which set forth specific racial guidelines for certain school operations. The plaintiffs' appeal focused mainly upon a number of provisions that the Magistrate Judge had refused to include in the remedial order.

The 7th Circuit opinion, written by Judge Posner, was scathing. After acknowledging that a district court has broad discretionary powers to craft an equitable remedy in these cases, Judge Posner listed seven limits upon that remedial power.[286] The 7th Circuit then struck down a number of provisions of the remedial decree that it felt violated these limits upon the district court's equitable powers.[287]

First, Posner held the provisions for a 13.5% minority teacher hiring goal and abrogation of seniority protection in cases of teacher layoffs invalid.[288] The opinion noted that there was no finding of intentional discrimination in hiring by the district. Furthermore, Posner found "scanty" evidence on the record that minority students would benefit from the increase in minority faculty, and whatever benefit would accrue to minority students did not outweigh the harm done to white teachers and applicants under these provisions.[289]

---

[285] Under the Federal Magistrates Act, final judgments entered by a Magistrate Judge are to be appealed directly to the appropriate court of appeals just as any other judgment of the district court would be. *See* 28 U.S.C. §636(c)(3).
[286] *See* People Who Care, 111 F.3d 528, 533-35 (7th Cir. 1997). The seven limits mentioned are: (1) the decree cannot command the defendants to do something beyond their control, (2) interests of innocent third parties must be fully considered, (3) the importance of separation of powers and federal-state comity must be recognized, (4) the court must be sensitive to the practical limitation of the federal judiciary as an administrative body, (5) decrees which prohibit conduct are preferable to those that impose affirmative duties, (6) the remedy must be tailored to the violation, (7) the guideline for the admissibility of expert testimony applies to social science testimony as well as that of natural science. *See id.*
[287] *See id.* at 534.
[288] *See id.*
[289] *See id.*

Next, the court struck down the provisions of the remedial order pertaining to tracking and classroom racial composition. Judge Posner stated that the legal system is not the proper forum for deciding whether tracking is good educational policy and whether it harms minority students.[290] He then noted that the violation found was merely that the District had improperly used tracking to segregate students. The solution, therefore, was not to prohibit tracking, but rather to require the District, if it wishes to track, to use "objective and nonracist" criteria for tracking students.[291] Furthermore, the court found that the +/- 5% classroom integration standard for non-tracked classes was too tight and remanded for a looser standard.[292] On remand, the Magistrate Judge instituted a +/- 12% quota.[293]

The appeals court opinion also rejected the provision of the remedial decree that required the District to close the academic achievement gap between minority and majority students by 50% over four years. The court found that none of the social science studies presented by the plaintiffs were admissible for the purpose of proving that the history of discrimination by the District had caused the achievement gap.[294] The reasoning was that those studies, which had tried to control for the effects of poverty and discrimination by the schools, had failed to correct for other variables such as societal discrimination, educational attainment of the child's parents, etc. In light of this, there was no basis, according to the court, for holding the District responsible for closing any part of the academic achievement gap.

The Seventh Circuit's opinion also struck down a number of other parts of the Magistrate Judge's remedial order including the racial quotas for cheerleading and other extra-curricular

---

[290] *See id.* at 536.
[291] *Id.*
[292] *See id.* at 537.
[293] *See* Vernita Hervey, People Who Care Case Summary - Tracking and Ability Grouping, Oct. 10, 1998.
[294] *See* People Who Care, 111 F.3d 528, 538 (7th Cir. 1997).

activities, the prohibition on referring a higher percentage of minority students than of majority students for discipline, and limits on the enrollment of minority students in compensatory education programs.

Finally, the Court addressed the issue of the funding of the remedies. It upheld the order that the District issue $48 million in bonds under the Tort Immunity Act and struck down the $25 million annual limit upon property tax levies under the same act for funding compliance with the decree. The 7th Circuit went on to note that if the District were "stymied" by state law from funding it desegregation efforts, the district court could "as a last resort" command the state to come up with the money under *Missouri v. Jenkins.*[295]

This opinion has been widely criticized by a number of school desegregation advocates.[296] The critics focus on a number of issues such as the 7th Circuit's willingness to disregard the findings of fact made by the district court, limit the equitable discretion of that court, and downplay the harms of school segregation and the benefits of desegregation. For example, Judge Posner describes the benefits of having an increased number of minority teachers as "conjectural" and seems to question the harms caused by the educational tracking that took place in Rockford by stating that grouping students by age is a type of tracking.[297] Other criticism focused upon the extremely high admissibility standard that the court applied in excluding the social science data upon which the Magistrate Judge decide that half the academic achievement gap between

---

[295] *See id.* at 540.
[296] *See, e.g.,* Gary Orfield, *Conservative Activists and the Rush Toward Resegregation, in* LAW AND SCHOOL REFORM (Jay P. Heubert, ed., 1998); Patricia Williams, *The Theft of Education*, THE NATION, May 19, 1997, p.10; Interview with Jeannie Oakes, plaintiffs' expert on tracking issues; Interview with Michael Alves, court expert on student assignment. One individual involved in the case only half-jokingly referred to the case as "People Who Care versus Judges Who Don't".
[297] *See* People Who Care, 111 F.3d 528, 535-36 (7th Cir. 1997).

minority and majority students in the District was attributable to the history of discrimination in the District.[298]

Leaving aside the issue of the soundness of the 7th Circuit's decision as a whole, the fact of the matter is that it did relatively little harm to the remedial decree that the Magistrate Judge had handed down.[299] The limited effect of the decision is due to two reasons. First, much of the remedial decree, such as the student assignment plan, the construction and facility improvement provisions, and the supplemental education programs, were not challenged.[300] Second, all was not lost even where the court did strike down provisions of the remedial order. While the racial quotas that were ordered by the Magistrate Judge were either struck down or loosened, the 7th Circuit did reaffirm the fact that the school district had to stop discriminating in those areas. For example, while the court allowed tracking to go on, it stated that any such tracking program had to be based on "objective and nonracist" criteria.[301] The Board decided that such criteria could not be met and, therefore, discontinued its tracking programs (though, as we will see later, there is some evidence that tracking has effectively continued to a lesser extent).[302]

In the end, the liability hearings were critical for setting the stage for sweeping change in the Rockford Public Schools. The plaintiffs obtained a comprehensive remedial order, that even after the losses on appeal, contained approximately 75% of the remedies they wanted.[303] These remedies included a student assignment plan that set forth strict racial balance guidelines, orders for millions of dollars in spending on new schools and facilities improvement, and the establishment of magnet schools and supplemental education programs. Getting full court

---

[298] Interview with Jeannie Oakes, plaintiffs' expert on tracking; Interview with Janet Pulliam, attorney for Special Master.
[299] Interview with Robert Howard, lead plaintiffs' attorney.
[300] *See* People Who Care, 111 F.3d 528, 533 (7th Cir. 1997).
[301] *See id.* at 536.

involvement also brought in a large number of experts, under the guidance of a Special Master, and allowed the court to set up a parallel administration to carry out the desegregation remedies. Finally, the liability hearing brought to light substantial evidence of discriminatory practices in many facets of school operation from tracking to extra-curricular activities. While the remedies for these problems were struck down, exposing these problems and having a court reaffirm a policy of non-discrimination in those areas is of significant value. In light of the history of the desegregation attempts before the liability hearings, it seems unlikely that this much progress could have been made without undergoing full litigation.

V. Implementation of the Remedial Decree: Progress Despite Resistance

Implementation of the various provisions of the remedial decree began in the spring of 1996, with the Controlled Choice plan first used to assign students to schools in the 1996-97 school year. The school desegregation efforts, not surprisingly, met with opposition from many different sectors. Community organizations were established to challenge both the student assignment plan and the funding of the programs in the decree. A majority of the Board of Education also opposed the efforts by refusing to levy the funds necessary to carry out the efforts and by challenging in court numerous actions taken under the remedial order. Despite these challenges, major parts of the decree have been implemented with some success. The intransigence of the Board and community protest (along with the fact that all the provisions for a more equitable distribution of teaching staff were struck down) has made progress less successful than it could have been otherwise. Despite these difficulties, the school desegregation efforts have led to positive change in the Rockford schools.

---

[302] Interview with Robert Howard, lead plaintiffs' attorney.
[303] *Id.*

A. Community Protest

There has been significant community resistance to the desegregation efforts in Rockford. While there are no reports of the violence or organized picketing that marked school desegregation efforts in cities such as Boston and Little Rock, large sectors of the community seem to be opposed to the school desegregation efforts and their costs. Rockford voters elected school boards that continue to have a 4-3 majority opposed to the remedial decree in both 1995 and 1997. Two organizations have been formed to challenge various aspects of the remedial decree. The first, Parents Against Controlled Choice, filed suit challenging the Controlled Choice student assignment plan as a violation of the 14th Amendment. The suit named as individual plaintiffs 107 students who were denied access to a school of their choice on the basis of race.[304] The suit was dismissed by the district court on the grounds that the plaintiffs should have sought to intervene in the underlying school desegregation lawsuit while the remedy was being litigated rather than collaterally attacking the remedial decree in a separate lawsuit.[305]

The other major community organization challenging the school desegregation efforts is called REACH (Rockford Educating All Children). REACH was started by Ted Biondo, a Rockford resident who in 1997 was elected Vice-President of the Rockford Board of Education.[306] REACH completely rejects the school desegregation efforts, portraying them as a form of "judicial tyranny" in which an un-elected federal judge and a group of experts who do

[304] *See* Plaintiffs' Complaint, Parents Against Controlled Choice v. Board of Education, Rockford School District No. 205, 1999 WL 7905 (N.D.Ill. Jan. 8, 1999) (No. 97 C 50326). Of the 107 named plaintiffs, 80 were identified as white, 21 as black, 3 as Hispanic, and 3 as "mixed". See id. at 7-10.

[305] *See* Parents Against Controlled Choice v. Board of Education, Rockford School District No. 205, 1999 WL 7905 (N.D.Ill. Jan. 8, 1999). The court alternatively held that the suit should be dismissed on the grounds that Parents Against Controlled Choice's suit was untimely and was collaterally estopped by the rulings of the court in the liability and remedial stages of the People Who Care lawsuit. *See id.* at 2-3.

[306] To avoid any potential conflicts of interest, Mr. Biondo withdrew his membership in REACH upon being elected to the Rockford Board of Education. Telephone Interview with Ted Biondo.

not live in Rockford[307] have taken control of the schools, forced millions of dollars in spending, deprived students of their neighborhood schools, and ruined educational quality.[308]

The major focus of REACH has been to challenge the funding of the remedial programs under the court decree. As mentioned above, the remedial order contained a provision that the school desegregation remedies would continue to be funded through taxes levied under the Illinois Local Government and Governmental Employees Tort Immunity Act (the Tort Immunity Act).[309] The Act enables a taxing entity, such as a school district, to levy property taxes to pay for tort judgments without submitting the levy to the voters. The defendant's lawyers, along with the plaintiffs' lawyer and the school superintendent, developed this method for funding the remedies in the second consent decree and the court stated in the remedial order that funding for the remedies would continue in the same way. Remedial spending is about $25 million per year under the remedial order and, since 1989, the District has spent over $150 million on school desegregation efforts.[310]

REACH has worked to organize opposition to the use of the Tort Immunity Act for raising funds for the desegregation remedies. Under Illinois law, an individual can pay her taxes under protest, meaning that while she has to pay her property taxes on time, the taxpayer can file

---

[307] The criticism that the litigation here involves a group of outsiders has some ring to it. For example, plaintiffs' lawyers are mainly located in Chicago (though the lead law firm, Futterman & Howard, did open a Rockford office in 1996), Special Master Eugene Eubanks is from Kansas City, Missouri; the creators of the Controlled Choice plan, Michael Alves and Chuck Willie, live in Massachusetts; and the educational expert on tracking issues, Jeannie Oakes, is from Cailfornia. In response to this criticism, the US Congressperson representing Rockford, Donald Manzullo, proposed legislation which would require court-appointed Special Masters to be from the state in which the litigation is occurring. *See* Congressman Donald Manzullo, *Press Releases - Manzullo Expands Efforts to Ban Judicial Taxation*, Feb. 11, 1998 (visited April 20, 1999) <http://www.house.gov/manzullo/pr021198.htm>.

[308] *See* REACH Webpage (visited April 20, 1999) <http://members.aol.com/tbiondo/index.html>.

[309] *See* 745 ILL. COMP. STAT. 10/9-107 (1996).

[310] *See* Consolidated Brief of Plaintiffs-Appellees at 64, People Who Care v. Rockford Board of Education School District No. 205, -- F.3d --, 1999 WL 148036 (7th Cir. 1999) (No. 89 C 20168). As plaintiffs' note, this amount is only 10% of the total spent by the District over the same time period. See id.

a form with the payment preserving her challenge to the tax.[311] The number of Rockford taxpayers paying their taxes under protest has skyrocketed due to the school desegregation efforts. In the late 1980s, an average of five tax protests were filed per year, by 1992 that number was up to 2,600, and, by 1994, the number reached 16,000.[312] The number of tax protests filed every year since then has remained around 16,000.[313]

These tax protests were consolidated into lawsuit in state court challenging the use of the Tort Immunity Act for levying funds for remedial efforts. The early case involved only the use of the tax under the consent decrees, which meant that the school district was not using the tax pursuant to a direct court order. The defendant school district removed the case to federal court. The district court upheld the interpretation set forth by the Magistrate Judge that the Tort Immunity Act authorized levies to pay for remedies involved in this case.[314] The 7th Circuit, however, vacated the district court decision and remanded the case to state court, holding that there was no federal question here for the federal court to decide.[315] The 7th Circuit opinion did note that if the situation were to arise where constitutional violations were found and a remedy was crafted, the district court could order the school district, under *Missouri v. Jenkins*, to levy taxes despite state tax law limitations if necessary to carry out the remedies.[316]

The tax objectors fared better in state court. The state trial court ruled that the school district's use of the Tort Immunity Act was illegal.[317] Soon thereafter, the tax objectors presented

---

[311] *See* 35 ILL. COMP. STAT. 200/23-5 *et seq.*
[312] *See* CRO, *supra* note 261, at 90.
[313] *See* Rockford School Tax Protest Home Page, (visited April 20, 1999) <http://member.aol.com/mikobr/index.html>.
[314] *See* In re Application of County Collector of County of Winnebago, Ill., 918 F.Supp 235 (N.D.Ill 1996).
[315] *See* In re Application of County Collector of County of Winnebago, Ill., 96 F.3d 890 (7th Cir. 1996).
[316] *See id.* at 904.
[317] *See* In re Application of County Collector of County of Winnebago, Ill., Memorandum Opinion on Cross Motions for Summary Judgment, Circuit Judge John Rapp (No. 94 TX 115) (17th Judicial Cir. Nov. 4, 1997), *available at* <http://member.aol.com/mikobr/rapp.txt>.

new challenges to use of the Tort Immunity Act to fund remedies pursuant to the federal district court's remedial order (as opposed to the agreements in the Second Interim Order). The state trial court once again held the usage of the Tort Immunity Act invalid.[318] The state court, however, refused to enjoin usage of the Act or provide a refund for the illegally assessed taxes, allowing the decision to be appealed instead. The federal district court issued an order on December 18, 1997 that the District could continue to use the Tort Immunity Act until and unless the Illinois Supreme Court ruled otherwise.[319] A decision by the state supreme court is not expected until fall of 2000.[320] If the state courts do eventually prevent the District from using the Tort Immunity Act to fund the remedies, it is widely believed that the district court will simply issue a *Jenkins* order overcoming the state law limits on the District's ability to levy taxes.[321]

B. Rockford Board of Education Resistance

While REACH's legal challenges to the funding mechanism have had only mixed results, the organization has been instrumental in filling the Rockford Board of Education with a majority of members who are opposed to the desegregation efforts.[322] The Board has generally created an atmosphere in the District that is not supportive of desegregation efforts. The actions of the Board in two areas, levying funds for desegregation efforts and continuing legal challenges to desegregation activities, demonstrate the resistance of the Board.

---

[318] *See* O'Brien, et al. v. Aurand, 17th Judicial Circuit, Memorandum Opinion on Cross Motions for Summary Judgment, Circuit Judge John Rapp, (No. 97 TX 156) (17th Judicial Cir. Feb. 5, 1998), *available at* <http://member.aol.com/mikobr/rapp2.txt>.
[319] *See* Plaintiffs' Motion For an Order Directing Defendant RSD to Adopt FY 99 FRO Fund 12 and COPS Levies, Extending the State Law Deadline For Levy Adoption at 26, People Who Care v. Rockford Board of Education #205, (N.D. Ill., April 15, 1999) (No. 89 C 20168) , at 26 [hereinafter Plaintiffs' Funding Motion].
[320] Telephone Interview with Michael O'Brien, attorney for tax protesters.
[321] Telephone Interviews with Janet Pulliam, attorney for Special Master Eubanks; Robert Howard, lead plaintiffs' attorney.
[322] Telephone Interview with Charles Box, Mayor of Rockford; REACH Webpage (visited April 20, 1999) <http://members.aol.com/tbiondo/index.html>.

Inspired by the tax protesters, the Board has taken a "poison pill" approach to defeating the remedial order.[323] Every year, the Board has driven the District to the verge of bankruptcy by refusing to levy the approximately $25 million per year needed to fund the desegregation efforts.[324] Under state law, a fiscal year for a school district runs from July to June, so, for example, fiscal year 1998 starts in July 1997 and ends in June 1998. Tax levies must be adopted by the last Tuesday in December of the fiscal year.[325] The Board voted 4-3 against levying funds for remedial order implementation in 1996 (for fiscal year 1997). The district court then issued an order threatening to hold the Board members in contempt if they did not vote in favor of the levy. The Board then approved the levy unanimously. Virtually the same fight over the Tort Immunity Act levy occurred in 1997 (for fiscal year 1998).[326]

In 1998, the Board once again refused to levy the funds for the remedial programs. This time, the district court did not issue a contempt order. Part of the court's reluctance to issue the order was probably due to the state court decisions against the usage of the Tort Immunity Act.[327] The second reason for the court's failure to issue the order was that the Board presented a two part plan for funding the efforts. The first part of the plan was to present the voters with a referendum to increase the education fund property tax rate. The referendum, which was defeated on April 13, 1999 by a 2-1 margin,[328] would have raised approximately $12 million dollars for the desegregation efforts.[329]

---

[323] Interview with Robert Howard, lead plaintiffs' attorney.
[324] *See* Plaintiffs' Funding Motion, *supra* note 317, at 13-17; People Who Care, 179 F.R.D. 551, 553-558 (N.D.Ill. 1998).
[325] *See* 105 ILL. COMP. STAT. 5/17-11.
[326] *See* People Who Care, 179 F.R.D. 551, 553-558 (N.D.Ill. 1998).
[327] Interview with Robert Howard, lead plaintiffs' attorney.
[328] *See* Charlene Gunnels, *Mahoney Tells Board To Request Deseg Tax*, ROCKFORD REGISTER STAR, April 16, 1999, at 1A.
[329] Interview with Ted Biodo, Rockford Board of Education Vice-President.

The Board's plan to make up the rest of the funding gap was to eliminate the need for the spending by appealing various desegregation activities to the 7th Circuit. In 1997, the Board replaced its lawyer who had represented the Board since the beginning of the litigation. The new lawyer developed a strategy of challenging numerous aspects of the desegregation efforts. These appeals focused primarily on the role of the Special Master in the case, the procedures for developing budget orders, and spending on certain educational programs. Relying on the 7th Circuit's holding in the 1997 appeal of the remedial order that the District was not responsible for closing the achievement gap between minority and majority students, the Board hoped to get the 7th Circuit to eliminate the need to spend money on various programs aimed at educational improvements in the District.[330]

The 7th Circuit strongly rejected all of the Board's legal challenges.[331] The language used by Judge Posner (who generally is no fan of structural reform litigation) shows just how intransigent the Board has been. Stating that "a newly elected school board and its newly retained law firm are engaged in guerrilla warfare against the very provisions of a remedial decree to which their predecessors had consented" the court found that the appeals had no merit.[332] Judge Posner referred to some of the Board's claims as "picayune", "completely groundless", "absurd" and "misguided to the point of being preposterous."[333] The court noted that the Board had never proposed a plan of its own for achieving compliance with the remedial order and that the Magistrate Judge could "hardly be blamed" if he was exasperated with the Board.[334] Judge Posner, recommending that the Board set forth a plan for full compliance, concluded by

---

[330] *Id.*
[331] *See* People Who Care, -- F.3d --, 1999 WL 148036 (7th Cir. Mar. 19, 1999).
[332] *Id.* at 1.
[333] *Id.* at 2-5.
[334] *Id.* at 4-5.

informing the Board that if it continued its current litigation strategy, "sanctions for prosecuting frivolous appeals" may be imposed.[335]

With both prongs of the Board's attempt to cover the costs of the desegregation remedies defeated, the Board has once again taken the District to the verge of bankruptcy. It is not clear whether this strategy will work. The plaintiffs' have filed a motion for the Magistrate Judge to order the Board to levy the Tort Immunity Act tax.[336] This motion also includes the first request in the case for a Jenkins order to overcome state tax law. Under state law, the District was to have levied taxes for fiscal year 1999 by December 28, 1999. The plaintiffs' have requested that the Magistrate Judge order the state law deadline extended so that the Board can levy the taxes and have them apply to the fiscal year 1999 funding.[337] At this point it is unclear how the Magistrate Judge is going to rule on the motion,[338] though it is important to remember that the 7th Circuit has twice stated that the district court has the power to issue a Jenkins order in at least some circumstances.

C. Remedial Results

Despite the community opposition and resistance by the Board, the remedial order has led to some significant changes in the Rockford schools. Most notably, the Controlled Choice plan has been implemented quite successfully.[339] In the 1995-1996 school year, the year before the student assignment plan was implemented, 15 of the District's 35 elementary schools were racially identifiable. After two years of implementation, there were only 10 racially identifiable

---

[335] *Id.* at 7.
[336] *See* Plaintiffs' Funding Motion, *supra* note 317.
[337] *See* id.
[338] Interview with Robert Howard, lead plaintiffs' attorney; Charlene Gunnells, *Mahoney Tells Board to Request Deseg Tax*, ROCKFORD REGISTER STAR, April 16, 1999, at 1A.
[339] Interviews with Dr. Bob Dentler, expert for the Special Master; Robert Howard, lead plaintiffs' attorney; Joyce Combest Price, Director of the Department of Desegregation; Dr. Eugene Eubanks, Special Master.

elementary schools in the district,[340] and in the current (1998-1999) school year, only 4 of the schools remain racially identifiable.[341] This desegregation has occurred despite continuing residential segregation in Rockford as is noted by the fact that if all students were sent to their neighborhood schools, 26 of the District's elementary schools would be segregated.[342] All of the middle schools and high schools were desegregated before the plan was initiated and remain so under the plan.[343]

The choices of most of the students assigned by the Controlled Choice plan were also honored, as 86% of the 5,048 students placed under the system received their first or second choice and 95% received their first, second, or third choice.[344] As the plan is phased in, the disproportionate busing burdens are being eliminated. While 70% of students in Rockford currently ride buses to school, this number is not much higher than the 65% that rode buses to school before the Controlled Choice plan and, since almost all children covered by the plan get to choose which schools they want to attend, the inequities of the previous system have been largely eliminated for those students.[345] Parents are satisfied with the plan: 80 to 90% of parents who participated in the Controlled Choice plan state that they are somewhat to very satisfied with the schools choice available and with the information and services provided to make those choices.[346] Finally, under the plan, the District has established a system for identifying which schools are and are not popular. The Citywide School Improvement Committee, whose members are picked

---

[340] *See* ROCKFORD SCHOOL DISTRICT, PROGRESS REPORT: STUDENT ASSIGNMENT COMPONENT OF THE COMPREHENSIVE REMEDIAL ORDER 4 (March 1998) [hereinafter PROGRESS REPORT].
[341] Telephone Interview with Joyce Combest Price, Director of the Department of Desegregation.
[342] *See* D. Garth Taylor and Michael Alves, *Controlled Choice: Rockford, Illinois, Desegregation*, 32(1) EQUITY & EXCELLENCE IN EDUCATION 18, 19 (April 1999).
[343] *See* PROGRESS REPORT, *supra* note 340, at 5.
[344] *See id.* at 20.
[345] Telephone Interview with Joyce Combest Price, Director of the Department of Desegregation
[346] *See* D. Garth Taylor and Michael Alves, *Controlled Choice: Rockford, Illinois, Desegregation*, 32(1) EQUITY & EXCELLENCE IN EDUCATION 18, 21-22 (April 1999).

by the Special Master and the Director of the Department of Desegregation, is in the process of analyzing the parental choice data and making suggestions for how to improve schools which were under-chosen.[347]

While Controlled Choice is the heart of the remedial order, other changes have occurred thanks to the desegregation efforts. Minority enrollment in the gifted programs that were preserved under the remedial order has increased to around 20-30%.[348] Numerous supplemental educational programs have been enacted over the past few years and, now that the 7th Circuit has specifically rejected the Board's attempts to eliminate funding for these programs, they should remain in place at least until the District manages to obtain a finding of unitary status.[349] The educational programs and desegregation efforts are already having a positive effect on academic achievement as test scores have increased for all students, with the most notable increases among minority students.[350] The District has developed a uniform discipline code and at least some schools have established alternative discipline procedures.[351] Finally, under the remedial order, three new schools have been constructed so far, another school is to open next year, and three new magnet programs have been established (bringing the total number of magnet schools in the District to 10).[352]

Progress under the remedial order has not been perfect. While on an inter-district basis desegregation is almost complete, problems still remain within the schools. Most notably,

---

[347] Telephone Interview with Joyce Combest Price, Director of the Department of Desegregation
[348] *See* Vernita Hervey, People Who Care Case Summary - Segregation Within Schools, Nov. 2, 1998.
[349] *See* Vernita Hervey, People Who Care Case Summary - Educational Discrimination Within Classrooms and Schools, Nov. 2, 1998.
[350] Interviews with Jack Packard, Chair of the Citizens' Advisory Panel; Robert Howard, lead plaintiffs' attorney; Dr. Eugene Eubanks, Special Master.
[351] *See* Vernita Hervey, People Who Care Case Summary - Discipline & Hostile School Climate, Oct. 1998.
[352] Interviews with Dr. Bob Dentler, expert consultant for the Special Master; Joyce Combest Price, Director of Department of Desegregation; Ted Biondo, Vice-President of the Rockford Board of Education.

tracking problems still remain.[353] While the District has officially eliminated its tracking systems, many schools continue to have two sets of "regular" core courses and the number of students enrolled in gifted classes has escalated. Meanwhile, the percentage of high school classes that are within the +/- 12% racial composition guidelines set forth by the Magistrate Judge has fallen from a high of 90.5% in 1995 to around 63% in 1998.[354]

The supplemental educational programs have not been as successful as those implemented in other school districts, largely because the District was not allowed to abrogate the seniority provisions of the collective bargaining agreements with the teachers' union and because the Board continually threatened to eliminate funding for these programs.[355] The programs may be more secure in the future as the district is going to begin renegotiating the collective bargaining agreement this summer and the Board's attempts to end the educational programs have been rejected.

Other problems for minority students remain within the Rockford public schools. For example, minority students still account for a disproportionate percentage of the disciplinary suspensions.[356] There are still a number of reports of racial prejudice on the part of District teachers and counselors including biased counseling in course selection, misidentification of minority students as gang-members on the basis of clothing style, and identification of minority fathers as "boyfriends" despite their having the same surnames and addresses in their child's

[353] Telephone Interview with Andrew Campos, member of the Citizens' Advisory Committee and original People Who Care member.
[354] *See* Vernita Hervey, People Who Care Case Summary - Tracking and Ability Grouping, Oct. 10, 1998.
[355] *See* Vernita Hervey, People Who Care Case Summary - Educational Discrimination Within Classrooms and Schools, Nov. 2, 1998.
[356] *See* Vernita Hervey, People Who Care Case Summary - Discipline & Hostile School Climate, Oct. 1998.

student records.[357] Most disturbing is the fact that the minority dropout rate in the Rockford high schools remains high.[358]

A final result of the desegregation efforts that must be considered is white flight. As mentioned earlier, white flight is not only a good gauge of how well the desegregation efforts are being accepted in the community, but it is also a prime determinant of how successful the desegregation efforts will be in the long run because, obviously, if too many whites leave the district, racial integration will be difficult. Here are the enrollment numbers for most of the past 10 years:

Changing Racial Composition of the Rockford School District 1988/89-1998/99[359]

Year	White Students	%	Annual % Change	Minority Students*	%	Annual % Change	Total Students
1988-89	18,212	71.7	N/A	6,434	25.4	N/A	25,407
1989-90	18,866	70.5	+3.5	7,084	26.5	+10.1	26,757
1991-92	18,533	69.2	-0.8	7,536	28.1	+3.2	26,767
1994-95	17,166	65.1	-2.4	9,203[360]	34.9	+7.4	26,370
1995-96	16,650	63.2	-3.0	8,935	33.9	-2.9	26,360
1996-97	16,248	60.8	-2.4	9,623	36.1	+7.7	26,688
1997-98	15,380	58.0	-5.3	10,306	38.8	+7.1	26,531
1998-99	14,480	55.6	-5.8	10,675	41.0	+3.6	26,038

[357] *See* Vernita Hervey, People Who Care Case Summary - Staff Racial Attitude and the Stigmatization of Minorities, May 8, 1998.

[358] Telephone Interviews with Jack Packard, Chair of the Citizens' Advisory Panel; Michael Alves, expert consultant for the Special Master.

[359] The source for these numbers are annual student enrollment reports published by the Rockford School District's Office of Attendance and Planning.

[360] Minority students here refers to only African-American and Hispanic students, except for the year 1994-1995, where the number includes all students of color.

As the numbers above show, white enrollment has declined over the past ten years, and that decline has accelerated since implementation of the remedial order began. A couple of important points should be made about this decline, however. First, white flight tends to peak in the few years after implementation and, therefore, if Rockford follows the trend, the white flight numbers should begin declining soon.[361] Second, the white enrollment losses under the Controlled Choice plan have been fairly low when compared with other districts under desegregation orders.[362] Finally, as a number of people involved in the litigation have pointed out, the decline may actually be linked more to the tactics of the Board of Education and the fact that the District is driven to the verge of bankruptcy every year than to the actual desegregation.[363] This explanation is supported by the fact that the white enrollment loss of the first year under Controlled Choice was no greater than the average loss between 1991 and 1996. The major losses of over 5% per year did not begin until 1997, after the Board had to be ordered to levy funds for the desegregation orders and hired a new lawyer to file frivolous appeals of the remedial order.

D. Explanation of the Remedial Results

The reasons for the problems with remedial implementation seem pretty obvious. First, the Board has refused to faithfully implement the order. Through frivolous litigation, refusal to

[361] *See* Christine Rossell, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING 65 (1990).
[362] *See, e.g., id.* at 66. Rossell analyzed white enrollment losses under 18 school desegregation plans in terms of whether the plans were mandatory or voluntary and whether the school districts had more or less than 30% minority enrollment. The peak white enrollment losses in districts with over 30% minority enrollment were 12.7% for mandatory plans and 7.7% for voluntary plans. In districts with under 30% minority enrollment the numbers were 6.9% for mandatory plans and 5% for voluntary plans. *See id.* The 5.8% loss last year, therefore, was towards the low end of these losses.
[363] Telephone interviews with Joyce Combest Price, Director of the Department of Desegregation; Dr. Bob Dentler, expert witness for the Special Master; Michael Alves, expert witness for the Special Master.

fund the remedies, and only partial implementation of some orders (such as de-tracking), the Board has managed to impede the progress of the remedies. The Board and community protest have also created an atmosphere that makes it difficult for administrators who are supportive of the efforts to work actively for change.[364] A final problem with implementation grows out of the fact that the 7th Circuit struck down the provisions of the remedial order calling for an increase in minority faculty and allowing the District to reassign teachers so the more experienced teachers could be assigned to the supplemental education programs where they are most needed.

Despite these problems, significant progress, as described above, has been made. There seems to be three main reasons for this success. First, with the liability finding and the issuance of a remedial order has come full judicial involvement of the case. Not only has the judge been active in overseeing the remedies, their implementation, and their financial impacts,[365] but he has also appointed a Special Master who is widely praised for all the work that he has done to ensure that the remedies are carried out. The Special Master, and various members of his group of desegregation experts known as the "Equity Team," have visited Rockford at least once a week to ensure that aspects of the plan are being carried out. These efforts are widely credited for the success that has been achieved so far.[366]

A second factor in the success here is that the court has been able to overcome or bypass much of the opposition to the desegregation efforts. The threats of contempt sanctions issued by the Magistrate Judge when the Board of Education refused to levy funds for the remedial

---

[364] Telephone Interviews with Harriet Doss Willis, expert witness for plaintiffs (stating that many of the people in the administration who are supportive have left the District); Robert Howard, lead plaintiffs' attorney.
[365] Interviews with Robert Howard, lead plaintiffs' attorney; Janet Pulliam, attorney for Special Master Eubanks; Michael Alves, expert witness for the Special Master.
[366] Telephone Interview with Robert Dentler, expert witness for the Special Master (stating that the Controlled Choice plan worked through the enormous effort of the Special Master); Robert Howard, lead plaintiffs' attorney; Janet Pulliam, attorney for Special Master (crediting success of Controlled Choice to Special Master, the Equity Team and the Department of Desegregation); Andrew Campos, member of the Citizens' Advisory Panel (stating that

programs were successful in getting the Board to change its votes, at least in 1996 and 1997. It will be interesting to see if Judge Posner's similar threat of sanctions will move the Board away from its current litigation strategy. Beyond trying to obtain compliance from resistant actors, the remedial efforts have largely been successful because the Magistrate Judge established a parallel administration to carry out major parts of the desegregation plan, such as the student assignment components.[367] The staff of the Department of Desegregation, while officially employees of the District, answer to the Master and the Court, and, therefore, are shielded from the Board and others who may be opposed to desegregation. In these ways, the court has largely managed to overcome the remedial problems that the critics of structural reform litigation argue make such litigation ineffective.

A final key to the success that has been achieved is the use of the Controlled Choice plan. As mentioned before, Controlled Choice is different from traditional approaches to school desegregation because, while relying on a mandatory back-up, it allows parents to choose which schools they want their children to attend. As we have seen, the plan has led to less white flight than mandatory plans and most of the parents who take part in the plan are satisfied with it. In light of the fact that many other sectors of the Rockford community strongly oppose the desegregation efforts, it is of utmost importance that one of the provisions of the remedial order has managed to garner significant support from those who are most directly involved in the schools, the parents. This seems to lend credence to the hypothesis of Gerald Rosenberg that

---

the Special Master is holding everything together); Harriet Doss-Willis, expert witness for plaintiffs.

[367] Telephone Interviews with Charles Box, Mayor of Rockford; Janet Pulliam, attorney for the Special Master; Robert Howard, lead plaintiffs' attorney; Joyce Combest Price, Director of Department of Desegregation (stating that she "would not be able to do her job without" being isolated from the political pressures in the District).

using market based mechanisms increase the likelihood of success of structural reform litigation.[368]

VI. Conclusion

In the end it seems that the Rockford school desegregation story has shown both the necessity, and the limits, of court involvement in ensuring that minority children receive an equal and desegregated education. Thirty years ago, the Rockford public schools, like many of the schools in the United States, were segregated on the basis of race. Furthermore the schools which were primarily minority received much less funding and had much worse facilities and equipment than the schools that white students attended.

Many approaches to changing this situation were taken. Attempts to achieve desegregation through community protest, political organizing, and limited litigation leading to settlements, however, were largely unsuccessful. It was only when an active set of plaintiffs took the case to a full trial and obtained a finding of liability and a comprehensive remedial order that any significant progress in truly changing the Rockford public schools occurred.

The arguments of those who question whether courts can effectively undertake structural reform litigation seem to be undermined by this case study, especially when one compares the progress under the remedial order to that which resulted from earlier desegregation attempts. Other approaches taken by desegregation advocates in this case led to little positive change. State government pressure and limited court involvement created a situation that was in many ways worse, as it led the Board of Education to shuffle students around to create an appearance of

---

[368] *See* Rosenberg, THE HOLLOW HOPE, *supra* note 36, at 36.

desegregation while doing little to ensure that the schools were actually integrated or that minority students were receiving equal educational opportunities.

Protests, attempts to bring their concerns to the elected officials who ran the district, and efforts to achieve greater representation on the Board of Education also led to little improvement. The arguments of the desegregation advocates were rarely listened to by the Board and, while the advocates did manage to increase the number of friendly Board members, they have still been unable to achieve a majority.[369]

The settlement strategy of the early 1990s managed to preserve what little desegregation had been achieved so far and to obtain some funding for predominantly minority schools. Little new progress was made under the consent decrees, however, and the plaintiffs soon found they could not get the District to abide by its agreements.

Proving the capacity critics wrong, it was not until the court became fully involved in the case that significant progress was made. For the first time ever, almost all of the schools in Rockford are desegregated and such desegregation has been achieved much more equitably than the past desegregation efforts did. By using its full remedial powers, ordering creative student assignment plans that neither force students to go to particular schools nor rely on the good will of student to desegregate the schools, and appointing numerous educational experts to assist in implementing a remedy, the court has managed to achieve significant change in the Rockford public schools.

---

[369] On April 13, 1999 another school board election occurred. Four of the seven seats were up for election. One of the pro-desegregation members ended up getting replaced by a candidate running on an anti-remedial order platform, while one of the anti-desegregation members was replaced by a candidate backed by the People Who Care. One of the other anti-desegregation members of the Board won re-election by 39 votes. His victory was most likely due to the fact that his opponent' s name was not on the ballot as she had failed to number her ballot petitions correctly and, therefore, was not allowed to appear on the ballot. The losing candidate, who was backed by the People Who Care, is considering challenging her exclusion and the results. If she wins, the Board would then have a 4-3 majority in favor of the desegregation efforts. As of now, however, there remains a 4 person majority opposed to the remedial

The litigation has not been a complete success. Disturbing problems of within-school segregation and not yet fully equal educational opportunities for minority student remain. Furthermore, the tactics of the Board have created yet another financial crisis in the district and led at least some parents to simply leave the district. If the past is any indicator, however, the court should continue with its active involvement in the case. To pull out now would most likely lead the District back to its previous segregated state. If the court, however, ensures that the Board funds and implements the remedies, changes will most likely continue to occur in Rockford.

---

order.

Interviews

Michael O'Brien	2/18/99	Attorney for the tax protestors
Tom Lester	3/4/99	Rockford Board of Education lawyer since January, 1997
Christine Rossell	3/18/99	Expert witness for Rockford Education Association
Jack Packard	3/12/99	Chair of Citizens' Advisory Panel
Joyce Combest Price	4/5/99	Director of the Department of Desegregation
Vernita Hervey	3/15/99	Plaintiff's attorney at Rockford office of Futterman & Howard
Stephen Katz	3/16/99	Lawyer for Rockford Education Association
Harriet Doss Willis	3/17/99	Expert witness of plaintiff
Gary Orfield	3/18/99	Head of Harvard Project on School Desegregation
Jeannie Oakes	3/23/99	Expert witness for plaintiff; specializes in tracking issues
Eugene Eubanks	4/2/99	Special Master
Andrew Campos	3/18/99	Original member of the People Who Care, member of Citizens' Advisory Committee
Lewis Jordan	3/17/99	Member of Citizens' Advisory Committee, chair of the Rockford chapter of the NAACP
Charles Box	3/18/99	Mayor of Rockford
Johnathan Rothstein	4/5/99	Plaintiffs' lawyer; focused on employment discrimination claim
Ted Biondo	3/21/99	Current Vice-President of Rockford Board of Education; past founder of REACH
Janet Pulliam	3/30/99	Attorney for Special Master Eubanks
Dr. Bob Dentler	4/6/99	Expert consultant and witness for the Special Master
Michael Alves	4/8/99	Expert consultant; developer of Controlled Choice plan
Robert Howard	4/16/99	Lead plaintiffs' attorney