UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

FRANCES SPURLOCK, et al, Plaintiffs, vs. DAVID FOX, et al, Defendants.	§ § § § § § § § § § § § §	Civil Action No.: 3:09-00756 JUDGE SHARP

PLAINTIFFS' MOTION FOR CLASS ACTION CERTIFICATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

I. STATUS OF THE CASE

This case was initiated under 42 U.S.C. 1983 on August 31, 2009, for the purpose of redressing the Defendants' adoption and implementation of a Rezoning Plan for the Pearl-Cohn, Hillwood, Hillsboro school cluster students of the Metropolitan Nashville public schools that removed black students from integrated schools and then assigned clusters and schools to said students on the basis of race with alleged choices that prevented the minority students from returning to the same school they previously attended. Thus, the Rezoning Plan marked an intentional return to racially isolated and racially segregated schools in violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment. A copy of the 97 page Community Task Force on Student Assignment Recommendations 2009-10 (herein referred to as the Rezoning Plan) is attached as Exhibit A to the Defendants' Motion to Dismiss dated January 24, 2011 (Document 242-1 Filed 01/24/12, Page 21 of 119, PageID #: 5918 through Document 242-1 Filed 01/24/12, Page 118 of 119, PageID #: 6015). The Rezoning Plan was adopted in July 2008 by Defendants and was implemented in August 2009 for the 2009-10 school year. Plaintiffs seek certification as a class action on the ground that this case challenging the constitutionality of the Defendants' plan meets all the applicable requirements under Rules 23 (a), (b)(1)(A), and (b)(2), F.R.Civ. P.

Plaintiffs filed this action for themselves and on behalf of all others similarly situated; that is a plaintiff class consisting of all students in the Metropolitan Nashville public school system who have been and are being directly affected by the Defendants' adoption and implementation of the Rezoning Plan that was adopted by a 5 to 4 vote by the Nashville School Board with every white member of the Board voting for the rezoning plan and four of the five black members of the Board voting against the rezoning plan. Fourth Amended Complaint, para. 12, p. 6-7. More particularly, plaintiffs seek to certify this action as a class action on behalf of a Plaintiff class of approximately 4,204# students (most or all African-American) in the Metropolitan Nashville public school system who have been and are being directly affected by the Defendants' adoption and implementation of the student assignment Rezoning Plan, plus all other black students who have been assigned to or attend a racially isolated (80% or more one- race) school pursuant to the Defendants' Rezoning Plan (more than 10,000, see Pl. Ex. 177 in evidence), or have been or are in jeopardy of same.

The Plaintiffs allege that the Defendant school district and Metro government officials and entities have intentionally decided to discriminate racially and to re-segregate Nashville public school students and public schools in order to make majority-black and majority-white schools even more identifiable as such, and have by official government policy marginalized black students in order to placate white parents and dissuade them from removing their students from the system.
Upon notice, after the filing of the original complaint, a contested hearing was held on Plaintiffs' request for a Temporary Restraining Order. After consideration and review of the affidavits of both parties and argument of counsel, this Court issued a TRO allowing the Spurlock child to attend her former middle school in the integrated Hillwood cluster.

An evidentiary hearing on Plaintiffs' motion for certain preliminary relief, including preliminary injunction, was held through the month of November, 2009. The Court has not yet issued a ruling on the preliminary injunction. Since the filing of the original complaint through the present, academic test scores in the Metro Nashville schools have consistently declined under the Defendants' Rezoning Plan except for the three academic magnet schools. Plaintiffs would show that the racial discrimination originally complained of has not abated, and so the nature and substance of their discrimination claims herein remain to be addressed.

II. RULE 23 REQUIREMENTS

Plaintiffs originally filed their class action motion on November 2, 2009 (Document 88). Pursuant to the Court's order (Document 235) of December 20, 2011 and pursuant to the Federal Rules of Civil Procedure, Plaintiffs hereby refile and move to certify this racial discrimination case seeking declaratory and injunctive relief as a class action.

A class action may be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk of:
(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
(B) adjudications with respect to individual class members that, as a practical matter, would be

dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to this case include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action, all as set forth herein. (Plaintiffs' Fourth Amended Complaint para.14). For purposes of class certification, the Court does not need to resolve all the facts, but rather should look at the basic facts and determine if they meet the requirements of Rule 23. In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

The Advisory Committee Notes to Rule 23 specifically identify civil rights cases for injunctive and declaratory relief as appropriate class actions under Rule 23(b)(2):

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. …
Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); Brunson v. Board of Trustees of School District No. 1, Clarendon City, S.C., 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Green v. School Bd. of Roanoke, Va., 304 F.2d 118 (4th Cir. 1962); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); Mannings v. Board of Public Inst. of Hillsborough County, Fla., 277 F.2d 370 (5th Cir. 1960); Northcross v. Board of Ed. of City of Memphis, 302 F.2d 818 (6th Cir. 1962), cert. denied 370 U.S. 944 (1962); Frasier v. Board of Trustees of Univ. of N.C., 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), aff'd, 350 U.S. 979 (1956).
F.R.C.P. 23, Committee Notes; http://www.law.cornell.edu/rules/frcp/rule_23

Plaintiffs possess the same interest and have suffered the same injury as the other members of the class. See generally, East Tex. Motor Freight System,Inc. v. Rodriguez , 431 U. S. 395, 403 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War , 418 U. S. 208, 216 (1974) ("a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."). As demonstrated herein, this case meets the class action requirements of numerosity, commonality, typicality, adequate representation and other provisions of Rule 23.

As noted above, Plaintiffs seek certification as a class action on the ground that this case and the Rezoning Plan of the Defendants meets all the applicable requirements under Rules 23 (a),

(b)(1)(A), and (b)(2). On the basis of evidence presented at the November 2009 hearing on preliminary injunction in this case, discovery to date and the expert witness reports, the class in this case includes at least 2,215 black students affected by elimination of the mandatory non-contiguous transfer zones involving the Hillwood, Hillsboro, and Pearl-Cohn cluster, and a total of at least 4,204 students affected by the Rezoning Plan's elimination of all such mandatory transfer zones. Fourth Amended Complaint, para. 15, p. 8-11; Stevens report, supra. Of the 4,204 students in the affected zones, supposedly 1,900 chose to go somewhere else--but that means at least 2,304 are stuck in the Pearl-Cohn cluster or in other neighborhood schools, many of which are segregated or racially isolated. See Stevens report, supra, at 8. In addition, some 10,275 black students (out of 36,360) are assigned to racially isolated schools (defined as 80% or higher black enrollment) as a result of the adoption and implementation of the Rezoning Plan and related actions by the Defendants (there is some overlap in these numbers). Pl. Ex. 177 in evidence. This number has remained the same or has increased slightly in subsequent years. The class is so numerous, therefore, that joinder of all members is impracticable. Rule 23 (a)(1); see, e.g., Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995); Stewart v. Abraham, 275 F.3d 220, 226-227 (3d Cir. 2001).

The Rezoning Plan removed at least 2,215 African American students from the predominantly white Hillwood and Hillsboro school clusters and placed hundreds of them in Pearl-Cohn cluster schools that were already intensely racially isolated. Fourth Amended Complaint, para. 54-55, p. 29-35. According to the Rezoning Plan, the African American students removed from Hillwood and Hillsboro were then offered an alleged "choice" of staying in the overwhelmingly African American Pearl-Cohn cluster in North Nashville to attend an assigned school there, which of course was not a choice the student or family had made or attending a school in the Hillwood cluster selected not by them but by the Defendants, all on the basis of race. Few students were able to return to the integrated school they previously attended, or even to the Hillwood cluster school they might have chosen.

The Rezoning Plan adopted by the Defendants states that it provides "the option for students to continue attending the school they presently attend…," but in truth, and as applied, the Rezoning Plan did not permit the removed black students to return to their previous school. Defendants' Rezoning Plan, Document 242-1 Filed 01/24/12, Page 32 of 119, PageID #: 5929, second paragraph. Thus the Rezoning Plan "choice" for Plaintiffs and the class, at least in the Pearl-Cohn cluster, is between an assigned school in their nearly all- black neighborhood and an assigned school in Hillwood that they likely have never attended nor wished to attend. See the Rezoning Plan (Document 242-1 Filed 01/24/12, Page 24 of 119, PageID #: 5921) :"Each child [in the Pearl-Cohn cluster noncontiguous zones] would have a choice between a school close to home and a school in the Hillwood cluster."

When the Defendants' Task Force on Rezoning and the Defendant School Board reviewed the Rezoning Plan and voted for it, these African American students in Pearl-Cohn cluster and in the non-contiguous zones were specifically counted, identified and assigned by race# and Defendants have measured and recorded the success or failure of the Rezoning Plan ever since by counting the race of the students in each school. See Defendants' Document 242-2 Filed 01/24/12, Page 7 of 10, Page ID #: 6023 for their student racial data under "Pearl-Cohn Cluster," as compared to the same student demographic data for Hillwood and Hillsboro Cluster schools at

Page 3 of 10, PageID #: 6019 of the same document, and the citations in footnote 2 .

In past proceedings in this case, there has been dispute about exactly how many thousands of African America students were removed from predominantly white Hillwood and Hillsboro or were otherwise affected by the Rezoning Plan. The major disputes about the information/evidence concerning the size and composition of the class have arisen in the past because the Defendants have presented a moving target. In a series of depositions of the Defendants in the month leading up to the preliminary injunction hearing in November 2009, they could not answer the question of how many Nashville public school students were directly affected by the Rezoning Plan. That claimed lack of knowledge raised a serious competency issue and raised a serious issue of willful ignorance. For purposes of this class certification motion, the Plaintiffs will accept the number of students provided to and used by the Defendants' expert witness Leonard Stevens in his report dated November 14, 2011, at 6-12; his number for all students directly affected by the plan is 4,204.

There are questions of law or fact common to the class, and the claims of the representative plaintiffs are typical of those of the class, primarily whether the adoption and implementation of the challenged Rezoning Plan by the Defendants amounts to intentional, de jure racial segregation and discrimination and unconstitutional assignment or reassignment of black students on the basis of race without any compelling justification, in violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment. The wrongs suffered and remedies sought by the representative plaintiffs apply generally to the class, so that final injunctive and corresponding declaratory relief would be appropriate respecting the class as a whole. Rule 23 (b)(2). By the same token, prosecution of separate actions by the hundreds of individual class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class. Rule 23 (b)(1)(A). (Even where there are minor factual differences among the Plaintiffs, "[g]enerally the class representatives need not have claims identical in all respects with those of other members of the class." Baicker- McKee et al., Federal Civil Rules Handbook 2012at 653 and n. 32. "The Rule does not require that every question of law or fact be common to every member of the class." Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997). As one appellate court has held, "[f]actual variations in the individual claims will not normally preclude class certification if [as in the instant case] the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." Alpern v. Utilicorp United Inc., 84 F.3d 1525, 1540 (8th Cir. 1996).

The constitutionality of the Defendants' racially discriminatory Rezoning Plan under the Fourteenth Amendment, and of their official acts and decisions of the flowing from the adoption and implementation of that plan constitutes the question of law that is common to the named plaintiffs and the class. The allegations by Plaintiffs that the Defendants acted with race-based discriminatory intent and engaged in pretext as to the reasons for adopting their rezoning policy are questions of fact and law common to the class. See Fourth Amended Complaint, para. 13, p. 7 and para. 90-94, p. 59-61; see also Plaintiffs' Proposed Findings of Facts and Conclusions of Law Concerning Issuance of the Preliminary Injunction, para. 60-67, p. 34-38.

As parents of and as MNPS students, the named Plaintiffs possess exactly the same interest and

injury as the other black students who were rezoned by the Defendants' policy. Plaintiffs' issues apply generally to the entire class, see Plaintiffs' Fourth Amended Complaint, para. 20, p. 11-12, and the Metro and school district defenses are uniform and applicable to the entire class as seen in the three defenses in the Defendants' Theory of the Case: no discriminatory intent (Document 185-1 Filed 05/25/11, Page 5 of 12, PageID #: 4748); alleged "choice" barring any causation (Document 185-1 Filed 05/25/11, Page 6 of 12, Page ID #: 4749); no discriminatory effect (Document 185-1 Filed 05/25/11, Page 7 of 12, Page ID #: 4750).

The overriding common question of law and fact in this class action is whether Defendants violated the Fourteenth Amendment, i.e., whether under Brown v. Board of Education, 347 U.S. 483 (1954) and Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), among other precedents, the Defendants' Rezoning Plan constitutes the intentional discriminatory removal and assignment of students on the basis of race without any compelling justification for purposes of intentional governmental (de jure) segregation, and as such should be prohibited and remediated in all its ramifications. As the Wal-Mart class action opinion stated it: commonality is the crux of the Rule 23(a) decision in terms of the identification of such common issues (like segregative effect and discriminatory intent here) as "will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart v. Dukes, 131 S. Ct. 2541, 180 L.Ed.3d 374, 2011 U.S. LEXIS 4567; see also Fourth Amended Complaint, para. 21, p. 12. Here, the Court in one stroke can decide the Fourteenth Amendment issue for the entire class by finding that the Defendants created the Rezoning Plan to racially re-segregate Nashville students. By ultimately declaring and rectifying the purpose and effect of the Rezoning Plan the Court has the "capacity …[in this] classwide proceeding to generate common answers apt to drive the resolution of the litigation" which the Wal-Mart decision, supra, held to be the critical requirement. As the Wal-Mart case states (citing General Telephone Co. of Southwest v. Falcon , 457 U. S. 147) "proof that an employer operated under a general policy of discrimination" is one way to justify class certification. No such policy could be identified in Wal-Mart, but here the general policy of discrimination is the Rezoning Plan.

Plaintiffs presented expert testimony that the Rezoning Plan had a clear segregative effect in the Pearl-Cohn, Hillwood, and Hillsboro clusters, and found no educational justification for isolating hundreds more minority students in their nearly all-black "neighborhood" schools. Vanderbilt University-based research conducted in Nashville schools, found that even with the benefit of additional resources, students cannot succeed when concentrated in these high minority/high-poverty school environments. The Defendants were aware of the Vanderbilt research when they acted to consign the minority students to those schools and simply chose to ignore it. Plaintiffs' Fourth Amended Complaint, para.24, p. 13. Since the Defendants have acted on grounds that apply generally to the class and its representatives, "so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," certification of the class is appropriate under Rules 23 (a)(2)-(3) and Rule 23 (b)(2) in particular.

The representative parties will fairly and adequately protect the interests of the class. Rule 23 (a)(4). The named individual class members ardently desire a safe and high-quality educational experience for their students. They were adversely affected in this regard by the adoption and implementation of the challenged Rezoning Plan and the actions taken by Defendants thereunder, and they sought and have continued to seek placement in integrated, diverse school

settings where true growth and learning can be achieved. These parents and their students have shown great courage and commitment to the aims of this action by coming forward as class representatives. (Plaintiffs' Fourth Amended Complaint para.3-11,17)

Plaintiffs' counsel are well versed in the law and procedures applicable to this case. Rules 23 (g)(1)(A)(b)-(c). Counsel are committed to and can and will provide for any additional legal, expert, or financial support that is necessary in this case. In general, the provisions of Rule 23 (g), F. R. Civ. P., seem primarily designed to assist a court in selecting class counsel when there is more than one applicant for the position, see Rule 23(g)(2), a problem that, for better or worse, is unlikely to arise herein due to the unpopular nature for most in handling civil rights cases. An inspection of counsel's work to date, in any event, will demonstrate that they can fairly and adequately represent and have so represented the interests of the members of the class. (Plaintiffs' Fourth Amended Complaint para.19)

Plaintiffs believe the class should be certified as all the white, Hispanic, black and other students directly affected by the Rezoning Plan—in effect, all or nearly all the students in the district. Many white students, Hispanic and Latina students, Asian students, and Pacific Island students are also adversely affected by these deliberate and intentional actions by the Defendants to re-segregate by race the black students in the Nashville school system. As the scientific literature over the years has shown, children of every race are negatively affected by government policies and actions based on racial or ethnic identity. Fourth Amended Complaint, para. 28, p. 15. Among other things, such discriminatory conduct deprives even those not targeted for discrimination of the right to enjoy and learn from other cultures and other members of society.

Even if the class certification is limited to the black students, then on the basis of the evidence presented in this case, discovery material, and expert witness reports, Plaintiffs believe the class should include at least 2,215 black students affected by elimination of mandatory non-contiguous transfer zones involving the Hillwood, Hillsboro, and Pearl-Cohn clusters; a total of at least 4,204 black students affected by the Rezoning Plan's elimination of all such mandatory transfer zones; and 10,275 black students (out of 36,360) assigned to racially isolated schools (defined as 80% or higher black enrollment) because of acts and practices taken, incorporated in, or related to the Rezoning Plan. In short, plaintiffs seek a class composed of all students in the Metro Nashville school system affected by the adoption or implementation of the Defendants' 2008 Rezoning Plan; all students assigned to, attending, or at risk of being assigned to or attending a racially isolated school (defined as 80% or higher black student enrollment) in the Metro Nashville system; and the parents, guardians, or other representatives of such children.

Accordingly, based on the entire record in this case and the pleadings as summarized above, Plaintiffs move for the Court to certify this proceeding as a class action.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was sent electronically by the Middle District Court electronic filing system to James L. Charles, Kevin C. Klein, Keli J. Oliver, James W.J. Farrar, Allison Bussell, John Borkowski and Elizabeth A. Sanders, PO Box 196300, Nashville, Tennessee 37219, on this the 26th day of January 2012.

/s/ Larry Woods_____