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Consent Decrees: Reversal of Consent Decree Which Had Required Permanent Relocation of Middle School is Permitted "Modification"--Not "Termination"

A.D. Smith v. Board of Education, No. 13-1816 (8th Cir. Oct. 2, 2014).

A district court's decision allowing an Arkansas school district to reverse a 1990 consent decree which had required a predominantly white middle school to relocate permanently to a predominantly African-American school has been upheld at the Eighth Circuit, which found that the *Rufo* standard of review for modification of a decree (rather than the *Freeman* standard for termination of a decree) was the appropriate guideline.

In 1987 the majority white Palestine school district and the majority African American Wheatley school district voluntarily consolidated. In 1989 the Wheatley parents, children, and other interested parties sued the consolidated district ("District"), alleging violations of the Voting Rights Act (school board elections) and of the Fourteenth Amendment. In 1990 a settlement was confirmed and a consent decree was approved by the district court. The decree specifically required that the District move the middle school, grades five through eight, to the Wheatley campus.

The District petitioned to modify the consent decree in both 1994 and 2005 to change the grades attending the Wheatley middle school, neither of which the Wheatley plaintiffs objected to. However, in 2006 the District petitioned to modify the consent decree by relocating all grades from the Wheatley to the Palestine campus. The Wheatley plaintiffs opposed this action, but the District Court upheld it. The Wheatley plaintiffs appealed.

HELD: The Eighth Circuit affirmed the District Court's order granting the modification.

DISCUSSION: The Wheatley plaintiffs argued the District Court erred by approving the consent decree modification under the *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384-85 (1992) standard, rather than the *Freeman v. Pitts*, 503 U.S. 467, 490-91 (1992) standard. In *Rufo* the Supreme Court held that FRCP 60(b) permits district courts to modify consent decrees and that a party may obtain such a modification if it shows a significant change in circumstances warranting it and that such relief is available when it is "no longer equitable" to leave the judgment in place--but modification is not allowed merely because the decree is "no longer convenient."

On the other hand, *Freeman* controls the dismissal of a consent decree and it requires the court consider a range of factors, including whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practical to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance."

The Wheatley plaintiffs argued that the District Court inappropriately applied *Rufo* when it should have applied *Freeman*, because *Rufo* does not apply in school desegregation, and that the District had failed to meet *Freeman's* test because it failed comply with the decree's requirement that the middle school always be located at Wheatley.

The Eight Circuit rejected the argument that *Rufo* did not apply to school desegregation cases. It noted it had itself applied *Rufo* to a desegregation decree modification nearly twenty years earlier. It further noted that *Rufo* applies to an application to modify the terms of a decree, while *Freeman* addresses requests to terminate the decree altogether.

The issue thus became whether the District Court abused its discretion in modifying the consent decree, and the Eight Circuit held it did not. *Rufo* comprises two elements: "whether a significant change in circumstances warrants revision of the decree," and if so, "whether the proposed modification is suitably tailored to the changed circumstances." The Wheatley plaintiffs failed to address the "significant change" issue, but the Circuit Court noted the factors cited by the lower court as reasons for granting the District's request – "dramatic demographic changes, significant cost savings, a projected decrease in enrollment, a risk of fiscal distress noted by the Arkansas Department of Education's Fiscal Distress Accountability and Reporting Unit, "academic shortcomings" cited by the Department, and evidence that placing all grade levels on the same campus would likely improve the academic performance of middle school students" – were a sufficient basis to believe a change in circumstances existed.

The second element--suitable tailoring--gave the Court "greater pause" because the lower court failed to clarify what it was doing. It simply granted the "motion to modify or terminate" the decree. The Wheatley plaintiffs argued the decree was being terminated because permitting the middle school to be moved from Wheatley affected other terms of the decree, rendering those other aspects nugatory. The Circuit Court disagreed, concluding that the District Court did not intend its order to terminate the entire consent decree, but only to modify the condition controlling the location of the middle school.

http://media.ca8.uscourts.gov/opndir/14/10/131816P.pdf (last accessed Oct. 9, 2014).