Educate! A newsletter on education in Charlotte-Mecklenburg, NC

Dec. 10, 2000

Editor's note: Editions of Educate! during year 2000 were distributed solely in e-mail format without pictures or graphics. For purposes of archiving and distribution, the text of these editions has been converted to PDF files. No other changes have been made.

Educate! the weekly newsletter of
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IN THIS ISSUE:

READERS COMMENT ON END OF FAMILY CHOICE PLAN

The Fellowship received a number of comments on last week's newsletter. Some people reflected on the school board's decision to shelve the Family Choice Plan. Some commented on the nature of the article. Other things were said that people didn't want published with their names, so we won't burden you with those!

Following are excerpts from those comments. At the end, Lucy Bush comments.

I serve on the Student Assignment Oversight Committee and am disgusted with the five votes on the school board. I certainly do blame the 5 because they are the ones who have put us without a school assignment plan in the first week of December. You can't just say we are maintaining the status quo because we have 5 new schools to populate next fall and there were schools that were going to be vacated while major renovations were going to be made. So students cannot just stay where they are. It was unreasonable to ask our school staff to come up with 2 completely different plans. They did not have the time to do that, especially, considering their primary job is to educate children not assign them. The choice plan was no "scheme" but a plan that was worked on for months by staff and the school board with input from SAOC and numerous public hearings. Dr. Smith has my utmost respect for the way he has handled this incredibly frustrating board. He has maintained his dignity and has earned my respect. It's quite easy after the fact to say what should have been done. Do you really think that the school board did not know until last week that there was no back-up plan? If that is so, they were not doing their job. Dr. Smith did say the plan could be modified without scrapping it altogether. You talk of the intransigence of the neighborhood school supporters and yet don't

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mention the intransigence of the side that want to continue busing. The board did indeed vote 8-1 two months ago to keep this plan. Rejecting it on Friday was the most irresponsible act I've seen in a long time. There is no way this community can trust or support this school board. This will not unify our community but split us 5-4 just like the vote. I hope the private schools and the surrounding counties are prepared for increased enrollment.
Jane Shutt

Thank you for sharing this information! Like many parents, I was a bit frustrated with regard to the cancellation of the Showcase of Schools and the end of the school choice program. This sheds a clearer light on the issue and the "behind-the-scenes" decisionmaking. I just wish that the media would report this issue objectively. Right now, it is very one-sided and puts the school board (not Eric Smith or the neighborhood school folks) in a negative light.
Melody Dixon-Brown

I think the school board should be embarrassed by their waste of taxpayers' money. I am the mother of a white child who failed under the public schools. With their knowledge the student was socially promoted to the ninth grade after attending a magnet school in a black neighborhood. You may ask, what does this have to do with your argument? It really doesn't matter if you are black or white: Charlotte-Mecklenburg schools are terrible. They need to focus on education, not the color of anyone's skin.
Fran Riggs

Please note that information sessions and tours are NOT over at the magnet schools throughout the county. We are in the process of still recruiting parents and students to consider our programs. We still offer parents a choice.
Also, is Discovery Place going to be presenting a Christian perspective of the true meaning and origin of the holiday? This seemed to be glaringly missing from their celebrations listed. As a member there, I certainly hope they are representing this tradition as well.
Cathy Smith

I was appalled at the way you characterized and mistreated Dr. Eric Smith. The way you question his intelligence is very unprofessional. Also in your article, you say you should not blame anyone. However, you go on to outline why we should blame Dr. Smith. How hypocritical of you! Before reading this article I did not have strong feelings for any of the parties in this arena. Now I definitely have less respect for yours.
Peggy Leo-Gallo

I am disturbed by your recent mailing which was not very supportive of Eric Smith. He is not only a smart man, but very obviously incredibly patient and devoted to have put up with the lack of support the School Board has shown him lately. As you know, I am in favor of diversity, but I feel that the current direction the Board is taking is only serving to drive away many of the families we need to attract in order to keep the system strong and thriving for everyone. I think that the Swann Fellowship has an important role here in encouraging compromise.
Lisa Warren

Lucy Bush comments:
I spend most of my "listening time" over issues of racial justice in the black community, and therefore I tend to have a somewhat different perspective than most white people. My philosophy is that you have to "dwell among" people in THEIR environment, not yours, to get a clear picture of THEIR perspective of a situation. It is very easy for me to get the white perspective because I live in it.

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I believed yesterday, I believe today, and I will probably believe tomorrow that going to a total choice plan at this point is wrong for the children who are at the greatest risk in this community. Creating so many schools of poverty will not be a choice for those children and their families. Yes, we will ultimately go to a choice system in education and I think there will come a time when that is the right thing to do.

I respect and admire Eric Smith and I hope he will stay in Charlotte to see us through this. However, I think he made the wrong decision to completely focus on one (choice) plan when the court processes left us with so many unknowns.

There is much work to be done in education in CMS. There are issues of academics and equity that deserve attention, and we can address those by leaving student assignment as it is until some of the court-related issues are resolved.

We are NOT unitary and going to choice now would not give us the opportunity to become unitary. The system is not in a shambles. There are good schools with good teachers and good students and we have much to celebrate in a country that offers to all the opportunity to learn in freedom. We take too much for granted as people of privilege and it is time we offered to share that privilege with those who lack the power to choose.

LONG RANGE PLANNING FOLLOW-UP: COULD YOU WORK ON THIS ISSUE?

The public meetings originally planned for Monday and last Saturday were canceled. The end of the Family Choice Plan prompted the decision, and decisions now being made about short-term adjustments will no doubt affect long-range planning.

Two things came out of a meeting last Tuesday between Swann folk and Ed Schweitzer, a member of the long-range planning committee. First, it was clear that the committee's charge had to do with reviewing the PROCESS of decision-making for long-range planning. The questions on Swann members' minds have more to do with the student population projections on which the decisions are made.

Are we planning around the possibility that thousands of children will be retained in grade this spring and in coming years? Will class sizes be small enough to boost all children to grade level? Are we assuming that kids will continue to drop out at the current rate?

If you are interested in leading or participating in a Swann effort to monitor those questions, please message us.

HOLIDAY PROGRAMS! OPEN HOUSES! AND MORE

Schools have cancelled most of the choice plan open houses, but many opportunities for visits remain. The magnets are continuing to market themselves. And as we mentioned last week, there are holiday-related events at many schools.

So please participate in some of these events -- for your entertainment, for your education, and to play your part in coming together to support the school staff, the children and the work they do together.

Given the flux in the schools' situation, it might be prudent to call ahead to the school to con-

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firm these events. The list is updated from CMS web site cancellation listings as of Friday morning.

Dec. 11 Monday
9 a.m. Lansdowne Elementary open house
9:30 a.m. Irwin Avenue Elementary open house and tour
9:30 a.m. Myers Park Traditional Elementary tours
10 a.m. Barringer Elementary open house
6 p.m. Alexander Middle open house, curriculum night
6:30 p.m. Ranson Middle open house
7 p.m. Carmel Middle choral concert
7 p.m. West Meck High Winter concert and PTSA meeting

Dec. 12 Tuesday
8 a.m. Harding University High tour, open house
8:30 a.m., 9:30 a.m. Pineville Elementary winter programs
9:15 a.m. East Meck High school tours
9:15 a.m. First Ward Elementary tours
1:15 p.m. East Meck High school tours
6:30 p.m. Allenbrook Elementary holiday program
6:30 p.m. West Charlotte High PTA Meeting
6:30 p.m. Nathaniel Alexander Elementary open house
6:30 p.m. Spaugh Middle holiday concert and PTA
7 p.m. Carmel Middle band concert
7 p.m. Coulwood Middle Music concert and PTSA meeting
7 p.m. Davidson IB Middle band and orchestra concert
7 p.m. Eastway Middle PTSA meeting

Dec. 13 Wednesday
9 a.m. Piney Grove Elementary open house
10:30 a.m. Berryhill Elementary winter buffet/open house

Dec. 14 Thursday
9 a.m. Briarwood Elementary open house
9 a.m. Independence High open house
9 a.m. Olde Providence Elementary open house and tour
9:15 a.m. East Meck High school tours
9:15 a.m. Elizabeth Traditional Elementary school tour
9:15 a.m. First Ward Elementary tours
1 p.m. Barringer Elementary open house
1:15 p.m. East Meck High school tours
6 p.m. Northwest School of the Arts open house
6:30 p.m. Beverly Woods Elementary open house
7 p.m. Carmel Middle orchestra concert
7 p.m. Quail Hollow music concert
7 p.m. Randolph Middle PTSA meeting

NEXT WEEK (send corrections and additions to SwannFello@aol.com)

Dec. 19 Tuesday
9:15 a.m. East Meck High school tours
1:15 p.m. East Meck High school tours

Source: Charlotte-Mecklenburg Schools

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QUOTE UNQUOTE FROM THE PULPIT

Excerpts from sermon at Advent Luthern Dec. 3 by Rev. Richard Little:

What I think has happened to our culture is best explained for me by a long time friend of ours. Cherie and I for almost 20 years were a part of a group of 4 couples that formed after a Word and Witness Bible study in the church where we were members in Salisbury. We walked through a lot of "stuff" in those 20 years. The group was especially helpful when our children were going through their teenage years.

When we were walking through a tough time, one of the mothers said, "You have to stay on the road if you are going to help your child out of the ditch." She went on to explain that if in the chaos and emotions of the moment, we leave the road and go down into the ditch to try to save our child, we are not going to be of much help because we are down in the ditch with them. Only when we stay on the firm foundation of the road will we have the solid stance, the helpful perspective needed to help someone out of the ditch.

I don't know what your experience is, but I find it's very easy to fall into the ditch, to get embroiled in the fray, to dive into the discussion, and then find that I'm not a part of the solution but I've become a part of the problem. That's when I experience my highest frustration! If in those times I "lift my head and look up", to stop and listen to God, to spend time in prayer to re-center and to seek direction from God, I find myself out of the ditch and back on the road.

It doesn't mean that I'm not involved, that I escape the fray. Rather it means that I am able to re-enter the fray and bring to the discussion something more than my personal beliefs and feelings.

4th CIRCUIT SPEAKS, part one: HISTORY WE FORGET AT OUR PERIL

Over the years, the court filings in Swann vs. Mecklenburg have been splendid reading for newcomers and long time residents alike about how local history shaped school desegregation in Charlotte-Mecklenburg. As part of our educational mission, we begin today excerpting portions of the Nov. 30 Appeals Court ruling.

The following principles have guided our editing of the long document. All legal citations have been removed, as have most of the notes. Where notes were re-inserted in the text, they are in parentheses. The court's discussion and rulings on the injunction, nominal damages, attorney fees and discover disputes have been eliminated. That leaves four big chunks of material. Our tentative plans for publication, subject to changing events, are as follows:

Today: History of the case
Dec. 17: Questions of unitary status
Dec. 24: The magnets
Dec. 31: Judge Traxler's concurrence and dissent, covering the three same issues

For occasional readers of Educate!, we apologize for the length of this offering. But to make such information available to all is the purpose of this newsletter.

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UNTED STATES DISTRIC COURT OF APPEALS FOR THE FOURTH CIRCUIT

Since 1954, the school boards throughout this country, including the Charlotte-Mecklenburg Board of Education, have been operating under a standing Supreme Court mandate to integrate their school systems and eliminate all vestiges of de jure segregation. During the twenty years following the Supreme Court's mandate, the Charlotte-Mecklenburg Board of Education ("CMS" or the "Board") resisted all efforts to expedite desegregation, essentially arguing that, in light of the centuries over which the dual system of education had come to fruition, the Board would need a proportional period of time to develop remedies aimed at correcting past wrongs. Faced with this intransigence, the Supreme Court unanimously decided in 1971 that the Constitution required the Board to take affirmative measures, including the use of race-based ratios in student assignment, to eradicate vestiges of its invidious discrimination.

Finally, in 1975, the Board began seeking to fulfill the Supreme Court's mandate that public schools be desegregated with "all deliberate speed." Today, with the Board having had less than twenty-six years to implement appropriate remedies, we must decide whether the task of desegregating the Charlotte-Mecklenburg schools has reached its end.

We hold that it has not. Over the Board's own admission to the contrary, the district court concluded that the school system had achieved unitary status across the board. While the district court made findings sufficient to hold that CMS had achieved unitary status in some respects, the court failed to adequately explore the return of predominantly one-race schools as a vestige of segregation, rendering its findings insufficient to conclude that CMS has achieved unitary status in every respect.

In an equally unprecedented ruling, the district court held that the school system, although operating under court orders to desegregate its schools, violated the Constitution by employing a magnet school program that considered race in student assignment. On the contrary, because the Board's expanded magnet schools program -- and the race-sensitive method of student selection it employed -- was undertaken both to remedy the effects of past segregation and to comply with governing court orders, they did not and could not violate the Constitution.

In this appeal, we consider the above rulings along with a number of related issues.

In order to better understand the issues presented in this case, we must briefly review our country's history of school desegregation litigation, in which CMS has played a prominent role.

Even after slavery had been abolished for almost a full century, African-American children were, for the most part, either excluded from the public schools or educated separately from white children.... Indeed, throughout the early part of the 1900s, CMS operated a segregated school system within the safe harbor created by the Supreme Court's doctrine of "separate but equal" articulated in Plessy v. Ferguson.

In the middle of the 1900s, the Supreme Court began dismantling the great wall of segregation constructed under the imprimatur of Plessy. The Court initially sought to determine whether various "separate" African-American schools were genuinely "equal" to white schools by evaluating the quality of physical facilities, curricula, faculty, and certain "intangible" considerations. In each instance, the Court concluded that they were not. In 1954, the Supreme Court at last overruled Plessy, declaring that "in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal." Just one year later, the Court mandated that federal courts and school authorities take affirmative steps to achieve desegregation. Specifically, federal courts were to retain jurisdiction over desegregation cases during the period of transition, wielding their equitable powers to super-

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vise school boards' efforts to effectuate integration. One of the most important obligations of the federal courts was to ensure that school boards were proceeding in good faith to desegregate the public schools "with all deliberate speed." With these seminal decisions the Supreme Court promised the citizens of this country, and particularly African-American children, school systems "in which all vestiges of enforced racial segregation have been eliminated." Notwithstanding the Court's repeated admonition that segregation and its vestiges be eliminated "root and branch," many school boards -- CMS included -- adopted "an all too familiar" response to the mandate of Brown II, interpreting "all deliberate speed" "as giving latitude to delay steps to desegregate." And so, lower federal courts, with the guidance and oversight of the Supreme Court, began fashioning equitable remedies to contend with school board recalcitrance. For example, in Green, the Supreme Court held that a "freedom of choice" plan, which permitted students -- regardless of race -- to choose the school they would attend, was by itself insufficient to meet the mandate of Brown. In so holding, the Court recognized that more intensive efforts would be necessary in order to make "meaningful and immediate progress toward disestablishing state-imposed segregation." Subsequently, in this very case, the Court approved significant federal court intervention into a school system in order to eliminate segregation "root and branch," including the busing of students from schools close to their homes to schools farther away, the use of race-based "mathematical ratios," and the alteration of student attendance zones.

The Supreme Court has made clear, however, that a federal court's "end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." Hence, as a school system eliminates the vestiges of past official segregation from certain facets of its operations, courts possess the authority to relinquish supervision in a commensurate fashion.

In this context, we examine the steps taken by CMS to eliminate the vestiges of segregation.

North Carolina's most significant initial response to the mandate of Brown II was the "Pupil Assignment Act of 1955-56, under which [the Board had] the sole power to assign pupils to schools, and children [were] required to attend the schools to which they [were] assigned." This was an ineffectual measure -- perhaps intentionally so -- and by 1964, no more than a few dozen (out of more than 20,000) African-American children in CMS were attending schools with white children.

In 1965, the parents of African-American children attending CMS (hereinafter the "Swann plaintiffs") filed a class action seeking injunctive relief, claiming that the Board's policies and practices were perpetuating a segregated school system.

On July 14, 1965, the district court approved a Board-proposed plan that closed certain black schools, built new schools, and established school attendance zones based on neighborhoods. But the linchpin of this plan was its grant of permission to each student -- regardless of race -- freely transfer to a different school (often described as a "freedom of choice" plan). In approving this plan, the district court held that CMS had no affirmative duty to "increase the mixing of the races"; instead, the Board's obligation under Brown II, according to the court, was to act without the intent to perpetuate segregation. The following year, this Court affirmed the district court's interpretation of Brown II.

However, in the wake of the Supreme Court's 1968 decision in Green, which struck down a desegregation plan founded predominantly on "freedom of choice," it became clear that school boards did possess an affirmative obligation to desegregate, not merely an obligation to implement race-neutral policies. Invigorated by the developing law, the Swann plaintiffs promptly filed a motion for further relief with the district court, seeking to expedite the desegregation process.

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In 1969, Judge James B. McMillan, newly assigned to the Swann case, reexamined the Board's actions in light of Green and determined that its "freedom of choice" plan, when coupled with geographic zoning, were "not furthering desegregation." On the fundamental matters of assigning students and faculty, and the siting of new schools, the court made the following findings:

Student assignment: The court noted that a ratio of seventy percent white students to thirty percent black students, which approximated the ratio of white to black students in the county, tended to aid "better students [in holding] their pace, with substantial improvement for the poorer students."

Faculty assignment: Although faculty members were not being assigned with a discriminatory purpose, there was also "no sustained effort to desegregate faculties." The court ordered CMS to work actively to integrate the faculties, so that "a child attending any school in the system will face about the same chances of having a black or a white teacher as he would in any other school."

School siting: The court underscored that the desirability of implementing a "neighborhood school" policy, under which efforts were made to locate schools in neighborhoods and within walking distance for children, could not override the constitutional duty to desegregate. At the same time, CMS was not to avoid locating new facilities in black neighborhoods.

In light of Green, Judge McMillan also ordered CMS to submit a new, amended desegregation plan, and he outlined certain possible remedies, including busing and re-zoning.

Once again, however, CMS was slow to respond, prompting Judge McMillan to impose a deadline of August 4, 1969, by which the Board was to submit a detailed desegregation plan to the court. CMS complied, and its proposed desegregation plan appeared to accept, for the first time, the constitutional duty to desegregate students, teachers, principals, and staffs "'at the earliest possible date.'" The Board's proposed desegregation plan, approved by the district court on an interim basis ("interim desegregation plan"), included programs for faculty desegregation, the closing of seven all-black schools, and the reassignment of pupils from the closed schools to outlying, predominantly white schools. In approving the plan on an interim basis, the district court noted that black children were bearing a disproportionate burden of the desegregation efforts, but the court nonetheless concluded that some action -- even if interim -- was preferable to none at all. Judge McMillan also ordered the Board to submit another desegregation plan within three months.

In November and December 1969, the district court determined that the school system's compliance with the interim desegregation plan was unsatisfactory, finding that the Board was continuing to perpetuate segregation:

"The School Board is sharply divided in the expressed views of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools. By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they intend not to do it effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance."

At that time, the district court also reviewed and rejected the Board's newly submitted amended desegregation plan. Then, the court appointed Dr. John A. Finger, Jr. as an expert consultant to prepare a more acceptable plan. This appointment came nearly two years after

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the Supreme Court's Green decision and more than fifteen years after Brown I.

The district court ultimately adopted Dr. Finger's proposed plan for elementary schools and the Board's plan, as modified by Dr. Finger, for secondary schools (collectively the "Finger Plan"). In doing so, the court again observed the Board's failure to make an effective beginning to desegregation: "The School Board, after four opportunities and nearly ten months of time, have failed to submit a lawful plan (one which desegregates all the schools). This default on their part leaves the court in the position of being forced to prepare or choose a lawful plan."

The Finger Plan included several components. First, students were to be assigned "in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." Second, "no school [could] be operated with an all-black or predominantly black student body." Third, in redrawing the school system's attendance zones, the Board was authorized to use bus transportation and noncontiguous "satellite zones" to accomplish its goals. Fourth, the district court restricted the student transfer policy in order to safeguard against resegregation. Fifth, the race of faculty members at each school had to approximate the ratio of black and white faculty members throughout the system. Sixth, the overall competence of teachers at formerly black schools could not be inferior to those at formerly white schools. Finally, the district court mandated that the Board monitor and report on its progress in implementing the plan.

(CMS used "satellite zones" in connection with elementary schools. Under this method, students from a small geographic area located outside an elementary school's primary attendance area were assigned to that school. The use of satellite zones was implemented by "pairing" elementary schools -- students from a predominantly black neighborhood were bused to a school in a predominantly white neighborhood for grades K-3, and students from a predominantly white neighborhood were bused to a school in a predominantly black neighborhood for grades 4-6.)

The Finger Plan was challenged on several occasions and, in 1971, the Supreme Court upheld it as a valid exercise of the district court's equitable powers. Indeed, the Court specifically found that the district court's adoption of a student assignment plan that used race-based "mathematical ratios" as a starting point was well within the court's "equitable remedial discretion."

Even after the Supreme Court's decision in Swann, the district court found that the Board's desegregation efforts failed to meet constitutional requirements. For example, Judge McMillan ordered student assignment proposals revised in June 1971, finding that the proposals "were discriminatory in detail and in overall result; they placed increasing burdens upon black patrons while partially relieving white patrons of similar burdens." During the 1971-72 and 1972-73 school years, the district court attempted a "hands-off" approach, leaving the Board to remedy problems as they arose, but the court twice found that the Board still had not adopted sufficient measures to guard against resegregation and ensure that whites were bearing an appropriate share of the desegregation burden. The 1974 order expressed somewhat more optimism about the Board's desegregation efforts. In that order, Judge McMillan approved a student assignment proposal that, if implemented properly, would result in "a fair and stable school operation" and would permit the court to close the case as an active matter. The proposal made provisions for several "optional schools" -- schools that would offer some specialized program or curriculum and thereby attract students of all races from across Charlotte and Mecklenburg County. Although Judge McMillan approved the incorporation of these schools into the plan, he cautioned that the optional schools would be inconsistent with the school board's constitutional obligations if they merely served to re-institute "freedom of choice." ("`Freedom of choice' was a synonym for segregation for many years, and . . . it should not be resurrected at this late date sub nom. `optional schools' without adequate safeguards against discriminatory results."). To ensure that the optional schools served their stated purpose of fur-

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thering the process of desegregation, Judge McMillan decreed that "optional school enrollments will be controlled starting with 1974 so that they . . . have about or above 20% black students."

Finally, in July 1975, over twenty years after the mandate of Brown II, Judge McMillan for the first time observed, albeit with reservations, that the Board was actually working toward desegregation: "The new Board has taken a more positive attitude toward desegregation and has at last openly supported affirmative action to cope with recurrent racial problems in pupil assignment."

Although the district court cautioned that problems remained, the new vigor with which the Board was pursuing desegregation persuaded Judge McMillan to close Swann as an active matter of litigation and to remove it from the court's docket. In so acting, the court reaffirmed that its orders still stood: "[t]his case contains many orders of continuing effect, and could be reopened upon proper showing that those orders are not being observed." Between 1975 and 1992, two significant actions were taken in connection with the CMS desegregation litigation.

First, in 1978, a group of white parents and children brought suit against CMS, seeking an order prohibiting the Board from assigning children pursuant to the Board's latest student-assignment plan. The(se) Martin plaintiffs claimed that the Supreme Court's then-recent decisions prohibited any consideration of race in student assignment. The Swann plaintiffs intervened in Martin, joining the Board's opposition to the contentions of the Martin plaintiffs.

A brief review [of those 1978 Spangler and Bakke decisions] is necessary to an understanding of Martin. In Spangler, the Supreme Court held that because the Pasadena Unified School District ("PUSD") had achieved racial neutrality in its school attendance pattern, "the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity." All parties in Spangler agreed that the plan initially achieved racial neutrality in student attendance; nonetheless, the district court had believed it was empowered to annually readjust school boundaries to ensure in perpetuity that there would be no majority of any minority race at any Pasadena school. In Bakke, the Supreme Court determined that a public university with no history of discrimination could not constitutionally reserve sixteen out of one hundred admission slots for racial minorities. In striking down this admissions plan, the Court had made clear that "[w]hen a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, [it must] be regarded as [constitutionally] suspect."

Judge McMillan, who retained jurisdiction over Swann and presided over Martin, first held that because CMS had not achieved racial neutrality in student attendance, consideration of race in student assignment policies was appropriate under Swann. He explained that because the student assignment policy in the CMS school system had been independently adopted by the Board, it was not established, as the Spangler policy had been, via judicial coercion or order. Second, Judge McMillan ruled that Bakke was inapposite to the claims of the Martin plaintiffs. Specifically, the court reasoned that no child was being denied access to equal educational opportunity because of race, and the actions of the Board were therefore not constitutionally suspect under Bakke.

In upholding the independent actions of the Board, Judge McMillan made several important findings. For example, he found that discrimination had not ended; indeed, it was this very finding that led the court to uphold the 1978 race-conscious student assignment policy. Also, although for the first time the district court praised the efforts of the Board without reservation, it underscored yet again the need for patience and continued efforts:

"It took three centuries to develop a slave culture, to fight a bloody civil war, and to live

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through the century of racial turmoil after that war. The culture and attitudes and results of three centuries of segregation cannot be eliminated nor corrected in ten years. Human nature and practices don't change that fast, even in the hands of people of good will like the members of the present School Board. They need time to work their own experiments, and to find their own ways of producing the sustained operation of a system of schools in which racial discrimination will play no part. I vote to uphold their efforts to date, and to give them that time." In 1980, we affirmed the district court's decision in Martin.

The second significant phase of litigation between 1975 and 1992 was initiated in 1980. At that time, CMS and the Swann plaintiffs notified the district court that the black student population in CMS elementary schools had grown from twenty-nine percent to forty percent, making it increasingly difficult to comply with the desegregation order's mandate to avoid majority-black elementary schools. In response to this change, Judge McMillan approved a modification to the desegregation plan. Instead of prohibiting a "predominantly black student body," the court permitted CMS to operate elementary schools with a black student population of "plus 15 percent" above the district-wide average. Thus, if the school district averaged forty percent black students, any individual school could have fifty-five percent black students.

From 1981 to 1992, the Board continued to operate its desegregation plan as approved by the district court, focusing, inter alia, on satellite attendance zones, a feeder plan (assigning middle-school students from a certain neighborhood to identified high schools), school closings, and construction of new schools. Then, in 1992, CMS substantially increased its reliance on "optional" or magnet schools (the "expanded magnet schools program"). The Board placed new emphasis on magnet schools in order to phase out "pairing" and heavy reliance on busing, and to give parents more choice in school selection. It was the expanded magnet schools program that ultimately led to the present phase of this litigation.

In September 1997, William Capacchione, individually and on behalf of his daughter Christina, sued CMS claiming that Christina was unconstitutionally denied admission to a magnet school. Christina is Hispanic and Caucasian, and her suit under 42 U.S.C. S 1983 sought declaratory, injunctive, and compensatory relief. In response, CMS moved to dismiss Capacchione's suit and, almost simultaneously, the Swann plaintiffs moved to reactivate Swann, claiming that CMS was not yet in compliance with past desegregation orders and had not yet achieved unitary status. Because Judge McMillan had died, the cases were assigned to Senior Judge Robert D. Potter, who restored Swann to the district court's docket, consolidated the cases, denied CMS's motion to dismiss, and granted Capacchione's motion to intervene.

The Capacchione plaintiffs claimed that CMS had long since eliminated the vestiges of segregation in its schools, and that its formerly dual system of white and black schools had, for some time, been unitary. They also contended that CMS, while still operating under the court's desegregation orders, had violated those orders and the constitutional rights of white students in its efforts to desegregate the school system by employing a race-conscious assignment lottery in its expanded magnet schools program. The Swann plaintiffs countered that the school system had not yet achieved unitary status. CMS acknowledged that it was not yet in compliance with past desegregation orders and agreed that it should not be declared to have achieved unitary status. CMS also contended that, in any event, the expanded magnet schools program constituted an entirely constitutional, appropriate integration tool authorized under the desegregation orders in this case. The Swann plaintiffs, while endorsing the concept of magnet schools, argued that the expanded magnet schools program, as implemented, was contributing to the resegregation of the school system.

Following a bench trial conducted from April 19 to June 22, 1999, the court, on September 9, 1999, filed its Memorandum of Decision and Order, from which this appeal is taken. Although the Board claimed that unitary status had not been achieved, the district court found that it

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had. In its ruling, the district court then found that the Board's expanded magnet schools program, even though instituted to effect court-ordered desegregation, was unconstitutional. Furthermore, the court enjoined the Board from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." Finally, the court awarded the Capacchione plaintiffs nominal monetary damages and substantial attorney's fees.

Following the filing of timely notices of appeal, the Swann plaintiffs and CMS sought a stay of Judge Potter's September 9, 1999 injunction. On December 30, 1999, we granted the requested stay pending further order of this court. Thereafter, the Capacchione plaintiffs petitioned for an initial hearing en banc, which was denied by an eight-to-three vote of the Court. The panel heard argument in these appeals on June 7, 2000.

END OF EXCERPTS
Dec. 17: Questions of unitary status
Dec. 24: The magnets
Dec. 31: Judge Traxler's concurrence and dissent, covering the three same issues

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We welcome your comments and observations on this newsletter. Send us e-mail addresses for people who would like to receive it. To write about your school's activities, just do it -- then send the material to us.

THE SWANN FELLOWSHIP
Lucy Bush, president
B.B. DeLaine, vice president

The name:
The Swann Fellowship was named for Darius and Vera Swann, who on behalf of their son James became the lead plaintiffs in Swann vs. Mecklenburg in the 1960s. Darius Swann was the first African American Presbyterian missionary ever assigned outside of Africa. His experiences in India led him to appreciate the value of an integrated society for human development.

The vision:
As people of faith, our vision is that all children in the Charlotte-Mecklenburg School System will have excellent educational opportunities which are both equitable and integrated.

The background:
Formed in 1997 out of several Charlotte religious congregations, the Fellowship focuses on being a witness to the value of diversity as an integral part of children's education, and educating the public on public school issues as they relate to this and allied subjects. The Swann Fellowship is a nonprofit organization exempt under Section 501(c)(3) of the Internal Revenue Code. A copy of the license to solicit charitable contributions may be obtained from the N.C. Department of Human Resources, Solicitation Licensing Branch. Registration does not imply endorsement, approval or recommendation by the state.