No. 00-12649 HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

CATHERINE ANN MILLER, et al.,

Plaintiffs-Appellants

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-
Appellant

v.

THE BOARD OF EDUCATION OF GADSDEN,
ALABAMA, et al.,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

_____

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

_____

ANITA S. HODGKISS
Deputy Assistant Attorney General

DENNIS J. DIMSEY
LISA J. STARK
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-4491

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument will be of assistance to the Court in this case.

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ARGUMENT

I

APPELLEES' STATEMENT OF FACTS INACCURATELY CHARACTERIZES THE EVIDENCE IN SEVERAL KEY RESPECTS

Appellees' Statement of Facts (Br. 4-18)[1] creates several significant misimpressions regarding aspects of the Gadsden school system. We identify these inaccuracies in the order that they appear in the fact section of appellees' brief.

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[1] "Br. __" refers to page references to defendants-appellees' brief. "U.S. Br. __" refers to page references to the Opening Brief of the United States.

1. Bi-Racial Committee. Appellees maintain (Br. 6-7) that the Board "provided significant cooperation in working with the bi-racial committee" by furnishing the committee with extensive documentation and materials. Citing to the testimony of Ms. Gertie Lowe, a member of the Bi-Racial Advisory Committee and its chairperson in 1997 (R. 380 at 206, 207),[2] appellees claim (Br. 6) that various members of the Board and the ad hoc committee of the Board "met with the bi-racial committee to respond to their questions."

Ms. Lowe's testimony does not support appellees' contentions. Ms. Lowe testified in detail about the difficulties the Bi-Racial Advisory Committee had in meeting with and obtaining information from the Board. For example, she stated (R. 380 at 191, 199, 198, 197):

> [I]f we requested information from the school board, sometimes * * * we would * * * have to call [our] meeting off because we had nothing * * * because we would receive our information sometimes two or three months late.
>
> * * * * *
>
> [W]e didn't get to meet often with [the Board], it felt [as if] we were being ignored.
>
> * * * * *
>
> [W]e very seldom saw Dr. Taylor * * *.
>
> * * * * *
>
> Some questions were answered. Some answers we received were very vague. They did not go into detail to answer the questions * * *.
>
> * * * * *
>
> If you asked a direct question, you were never given a direct answer.

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[2] In conformity with Eleventh Circuit Rule 28-4, "R._" refers to the entry number of a pleading on the district court docket sheet. Because the docket sheet does not delineate the volume numbers, we are unable to cite to the volume number.

Ms. Lowe also testified that these problems continued even after the creation of an ad hoc committee of the Board. She stated (R. 380 at 199, 200):

> [W]e * * * had but one meeting. I heard somebody say today several, and that is not true.
>
> * * * * *
>
> [W]e didn't get answers. You could make [requests], but you didn't receive the answers.
>
> * * * * *
>
> There has not been very much accomplished since the creation of this board because it seems like there was no willingness to do anything.

In fact, during the pendency of the decree, plaintiffs repeatedly expressed their concerns regarding the Board's lack of responsiveness to the Advisory Committee's requests and suggestions (R. 359 at 15).[3]

Furthermore, as to appellees' claim (Br. 6-7) that "[t]he Board attorney met with the [Bi-Racial] committee and showed them every piece of paper that was being kept pursuant to the consent decree," Ms. Lowe explained (R. 380 at 208):

> [I]t was just a lot of raw data. * * * [I]f you wanted a specific item such as the number of absentees, say, at Cory School, we didn't know where to find [it. Things were] not labeled [or kept] in a manner that we could just go in * * * a file cabinet or * * * [in] alphabetical order or something like that, where we could really find what we were looking for.

---

[3] The United States in its initial brief relied primarily on the sworn testimony presented at the unitary status hearing. Because appellees rely on statistics filed in papers submitted to the district court in support of their motion for unitary status and argue that such information was properly considered by the district court (Br. 3-4), we similarly rely on data contained in our response filed with the district court (R. 359) in this reply brief.

Ms. Lowe's testimony is not unique. As outlined in our initial brief (U.S. Br. 13-14, 37), both Dr. Watts, a former member of the Board, and Ms. Betty Robinson, a member of the Bi-Racial Advisory Committee, detailed the numerous problems that the Advisory Committee had with the Board in meeting and obtaining necessary information (R. 380 at 236-240, 243-245, 251, 214-216, 218-222, 225-227).

2. Multi-Cultural Curriculum. Appellees cite to the testimony (R. 380 at 162) of Gesna Littlefield, a member of a committee to ensure the inclusion of African-American studies in the curriculum, and maintain that "African-American studies are taught in all grades through the multi-cultural aspects of the textbooks and the curriculum center where African-American books, tapes and other materials are present for teachers to utilize in the classroom" (Br. 8 (emphasis added)). They mischaracterize Ms. Littlefield's testimony.

Ms. Littlefield testified that the committee had established a specific African-American studies curriculum for grades 5, 8, and 11 but has not yet done so for grades 1 through 4, 7, 9, 10, and 12 (R. 380 at 162). She explained that teachers from all grades are nonetheless "encouraged" to use the resources in the multi-cultural curriculum center but "are not required to do so" (R. 380 at 163).

Ms. Littlefield's testimony does not support defendants' assertion that African-American studies are actually being taught in all grades. If anything, it implies the opposite and

establishes that a multi-culturalism program has not yet been developed, as required, for a majority of the grades.

Moreover, Ms. Robinson's testimony demonstrates that there is no mechanism to ensure that African-American studies is actually being taught. She explained that after hearing contrary rumors, she attempted to confirm whether the multi-culturalism curriculum requirement of the consent decree was being enforced. Dr. Taylor responded that there "wasn't any way that he could * * * make sure that this was being done" (R. 380 at 219).

3. Cultural Sensitivity. Appellees argue (Br. 10-11) that the school system as a whole has exhibited sensitivity towards diversity "from the very beginning of Dr. Bishop's involvement with the Board" and "that a culture of honesty and openness exists within the System regarding the plans that he has developed." There is ample evidence in the record to establish otherwise, and even appellees' own expert did not convincingly support their claim.

At the hearing, Dr. Bishop was asked whether "commitment ha[d] been exhibited by the Gadsden School Board" to cultural sensitivity and the programs he proposed (R. 380 at 145). He responded, based on his observations of the Board during a sensitivity training session in the summer of 1998 (R. 380 at 145):

> I believe the Board, as I saw them on that Friday night and Saturday when we conducted the [sensitivity] workshop, I believe they would say let's do it again and let's see where we are and where we need to go. So I think the commitment is there.

As to the receptivity of the faculty and staff within the school system as a whole to Dr. Bishop's programs and proposals, he testified (R. 380 at 117 (emphasis added)):

> There were several attitudes * * * expressed * * *. As with any group, there were some who said, you know, what's wrong with what we've been doing? There was a reaction from those who were participating who said there is a lot wrong with what we've been doing. And there were some who said we need to change things.
>
> We tried to develop a culture, if you will, through our discussion that would lead to openness, honesty, and a document that the people who have to implement the plan * * * would be committed to them. And I think we came to that particular culture.

Contrary to Dr. Bishop's tentative assessment, which was admittedly based only on approximately six visits to the entire school system (R. 380 at 117), Dr. Watts unequivocally stated that members of the Board were not genuinely concerned about their obligation to desegregate and comply with the requirements of the consent decree. She testified (R. 380 at 251, 256):

> There were so many instances [in] serving on the Board [in which] I had an opportunity to hear my colleagues discuss matters that showed clearly that they were insensitive and indifferent.
>
> * * * I felt that the Board basically was indifferent * * *. I was unable * * * to engender sensitivity on the part of my colleagues on the board to deal with some of those matters.
>
> * * * * *
>
> [R]acism and problems within the school system [have] become institutionalized. [It is] worse than * * * when I first came on the Board.

Dr. Watts also pointed out that it was she who recognized the need to hire an expert to conduct sensitivity training. She explained (R. 380 at 251-252):

> * * * I asked for Dr. Bishop. I didn't ask for him specifically. I asked for someone to come and talk to the Board because I felt unless the superintendent and the Board had some sensitivity training, * * * whatever the court ha[d] requested of us would never occur * * *.

The Board's lack of sensitivity is also evidenced by its reaction to Dr. Watt's suggestion to consider renaming the Nathan Bedford Forrest Middle School (see U.S. Br. 30).

4. Quality Of Education. Appellees maintain (Br. 12-15) that the conversion of Litchfield High School to a magnet program has "improved the racial population percentages" within the school and the quality of education (Br. 13). To support their claims, appellees rely in part on the testimony of Dr. Ed Richardson, Alabama Superintendent of Education, and Mr. Richard Edwards, a parent whose children attended Litchfield High in the 1970s, 1980s, and 1990s (R. 380 at 168). The testimony of both witnesses contradicts appellees' claims.

Dr. Richardson agreed that Litchfield High "has moved * * * in [the] direction" of "racial[] isolat[ion]" over the years (R. 380 at 93). Since entry of the consent decree, no significant desegregation has occurred and the school remains 90% African-American (R. 380 at 93; R. 359 at 8).

With regard to the necessity of the State's assumption of supervision over Litchfield, he explained (R. 380 at 92):

> [Y]ou are obviously saying the school has failed in some way. And no matter, you can sit here and say, well, I was [in the] 38th percentile [as to test scores] all along [or] whatever the percentile was, but the fact that you intervened spoke loud and clear.

Appellees cite (Br. 14) Mr. Edwards' testimony as evidence that all courses available within the school system are "offered" to Litchfield students, since they are permitted to travel to other schools to take courses not given at their school. Mr. Edwards, however, testified that such a solution is unworkable, and as a result, his daughter was forced to transfer from Litchfield (R. 380 at 169-170). He explained (R. 380 at 174, 181, 182):

> [A] policy * * * was in place so that kids [from Litchfield] could travel back and forth * * * to take courses. * * * [T]hat['s] * * * a very difficult situation for any kid, * * * the mechanics or the logistics of doing that is almost impossible.
>
> * * * * *
>
> It was not * * * a very easy [option that] the average high school student is going to be able to do * * *.
>
> * * * * *
>
> I understand that * * * offering a course [and forcing students to travel between schools is] * * * the easiest manner for the system, but * * * [are] there * * * not * * * other options.

Mr. Edwards also testified that the quality of education at Litchfield High has deteriorated over the 15 or 20 years that his children attended the school. Comparing Litchfield in earlier years to its current status, he testified (R. 380 at 168, 176):

> [B]ack in the '70s and '80s [it] was a different type of high school. * * * There seemed to be a sense of teacher involvement more so than there currently is. * * * There were programs that kids were able to get involved with across the board. And those things seemed to have deteriorated over the years * * *.
>
> * * * * *
>
> [T]he education[al] opportunities changed, and they went down.

Mr. Edwards also noted that there were substantial differences in attitudes towards the students at Litchfield and other high schools within the Gadsden school system, which have a significantly higher percentage of white students. He explained (R. 380 at 173):

> Now, I had * * * a discussion with some of the officials at Litchfield High School. And during that discussion it became apparent that there were some things that were different. * * * [T]here was an expression or feeling that the children at Litchfield High School, this came from the people that I was talking with, were not really ready to go into an honors English type course.

He stated that when his daughter transferred and took honors English at Gadsden High School (R. 380 at 174, 177):

> She performed quite well. Kelly made mostly A's all the time.
>
> * * * * *
>
> I noticed when she went to Gadsden High School, there actually was a change in her attitude about what she was being exposed to, what was being taught, and even in the presentation of some of the materials * * *. She was a changed person, and I think that that did her good.

Moreover, as outlined in our opening brief (U.S. Br. 9-11, 34-35), Mr. Edwards is not the only witness who testified about the inadequate educational opportunities at Litchfield as compared to other high schools with a significantly higher percentage of white students (R. 380 at 59-60, 232-234).

Appellees also cite (Br. 15) the fact that 50% of all students receiving a diploma or certificate of credit during the 1998-1999 school year were African-American. However, the percentage of African-American students receiving less rigorous

academic diplomas is disproportionately high and the percentage awarded advanced diplomas is disproportionately low. For example, while African-American students were 54% of the district's graduating seniors in 1999, they comprised 73% of the students graduating with a certificate of credit and 80% of the students graduating with occupational diplomas (R. 359 at 26). At Gadsden High, 13% of the African-American graduates and 40% of the white graduates received advanced academic diplomas, despite the overall racial composition of 46% African-American and 52% white graduates (R. 359 at 25). In addition, 100% of the graduates receiving the less rigorous academic diplomas (certificates of credit and occupational diplomas) at Gadsden were African-American students (R. 359 at 26). The drop-out rates for African-American students at Emma Sansom and Gadsden High Schools are also disproportionate to their enrollment at those schools (R. 359 at 25).

5. Extra-Curricular Activities. Appellees acknowledge (Br. 15-16) that certain sports are not offered at Litchfield. They do not mention that there are also a number of other extra-curricular activities offered at Gadsden and Emma Sansom High Schools that are not offered at Litchfield, including Math Team, Health Occupations of America, a newspaper staff, Spanish National Honor Society, JROTC, a competitive academics team,

Drama Club, Psychology Club, Art Club, or a yearbook community (R. 359 at 31).[4]

Appellees also allege (Br. 16) that "if student interest is shown in an extracurricular activity not already established at LHS, the Board would make every effort to insure that it is provided." The Board apparently has no established procedures for Litchfield students to note their interest and does not solicit their views. According to the Board, no such procedures have been developed "'due to the voluntary status of such activities'" (R. 359 at 31 (quoting Board letter dated September 15, 1999, at 6)).[5]

6. Discipline. Citing to the hearing transcript (R. 380 at 40), appellees claim (Br. 16) that "the Board met with its principals to discuss alternative discipline methods" recommended by its expert Dr. Stephen Armstrong. Although the testimony reflects that Dr. Armstrong "made [a] presentation to the school board," the testimony does not indicate that the Board, or any of

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[4] At middle schools, many activities offered at predominantly white schools are not offered at majority black schools (R. 359 at 34-35). For example, at General Forrest Middle School, which is 64% white, 21 extracurricular activities are offered (R. 359 at 35-36). In contrast, at Cory Middle School, which is only 13% white and is the feeder school to Litchfield High, only eight extracurricular activities are offered (R. 359 at 34-36).

[5] The consent decree requires the Board to "develop and implement effective school-based plans for * * * affirmatively recruiting * * * black students to enroll in * * * elective courses and programs and in activities related to such courses and programs" (R. 311 at 6).

its members, met with principals to discuss discipline methods (R. 380 at 40).[6]

Appellees also mischaracterize (Br. 17) the testimony of Ms. Gertie Lowe when they maintain that "she took no issue with the fact that the students placed in the alternative school ought to have been removed from the regular classroom." Ms. Lowe stated that she did not "mean to imply" that students at the alternative school had not misbehaved (R. 380 at 202). Nonetheless, she unequivocally stated that she was concerned "whether black kids were the only kids that was [sic] getting expelled from school, because we didn't see anybody else there" (R. 380 at 193, 202). Ms. Lowe's apprehension about the racial composition of the alternative school was also expressed by Dr. Watts and confirmed by Dr. Taylor, as well as by statistics in the record showing a disproportionate percentage of African-American students at the alternative school (R. 380 at 41, 49-50, 244, 254-255; R. 359 at 22; see U.S. Br. 6-7, 28-29).

Moreover, appellees unfairly fault (Br. 17) Ms. Lowe for her lack of knowledge about the specifics of the curriculum at the alternative school. She explained that, in response to parents' complaints, she visited the alternative school and had serious

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[6] Several times during his testimony, Dr. Taylor stated that "we" spoke or met with principals (R. 380 at 43, 49, 50, 52). He never, however, suggested that "we" referred to members of the Board. He also stated that he had not looked at Dr. Armstrong's report "in two years," that he was "not familiar with it in detail at this point," could not "recall [its] specifics," and did not "recall what actually was recommended" (R. 380 at 41, 48).

questions about whether the instruction was "adequate" so that students would be able "to keep up with the[ir] class once they returned to the main school system" (R. 380 at 192-193, 195, 203-204). When she or the Bi-Racial Committee inquired about the deficiencies, she explained, "[s]ome questions were answered" but most often they received "vague" responses, replies that "did not go into detail to answer the questions that [she] had requested," "raw data that didn't make sense," or no answers at all (R. 380 at 197, 196, 200). Additionally, appellees offered no evidence regarding the alternative school's curriculum, or information that contradicted the district court's finding that the "alternative schools are different from and inferior to the other schools" (R. 378 at 7).

7. Good-Faith Compliance. Appellees' misjudge (Br. 17-18) their alleged good-faith compliance with the consent decree. They assume Dr. Taylor's testimony is fact, mis-characterize what he said, and ignore significant testimony that does not comport with his conclusions.

For example, citing to his testimony (R. 380 at 38), appellees assert (Br. 17) that "[t]here is no provision of the consent decree that the Board has not complied with." Dr. Taylor, however, merely testified that he was not "aware" of any provision of the decree with which the Board had not complied (R. 380 at 37 (emphasis added)). Because it is undoubtedly possible for appellees to be out of compliance without Dr. Taylor's

knowing it, his testimony on its face does not establish compliance with the terms of the decree.

Contrary to appellees' assertion that they have complied with all of the provisions of the consent decree, there is ample evidence that both the Board and Bi-Racial Advisory Committee lacked sufficient information, which made it "impossible * * * to decide whether * * * [the Board was] making any progress toward achieving the goals of the consent decree" (R. 380 at 237). For example, Dr. Watts, a former member of the Board, testified about the lack of meaningful information and analysis to assess compliance (R. 380 at 236-238):

> [E]ach board member received boxes of data, but it was raw data. There [were] no aggregates. There was no descriptive material * * *. You could not see an analysis of whether or not there was any difference between when it [the consent decree] was initiated.
>
> [W]e had * * * data[, but it] was never broken down * * * so there was no way we could look at the variables to see whether we were better last year than we were the year before.
>
> * * * * *
>
> [I]n terms of whether or not there's a problem with certain groups in your population, certain school or age groups or certain discipline problems that were in the school system, whether or not there was any change in status of students from one point to the next point, we never did have that kind of data. Nor did we ever have those kinds of discussions even though it was requested.
>
> * * * * *
>
> [I]t's one thing for you to have discussions, but it's another thing for you to look at outcome data. And when you did not have that, it was just a matter of someone saying what they were projecting to do.

Dr. Watt's testimony regarding the lack of meaningful data to

assess compliance is consistent with the testimony of Ms. Robinson and Ms. Lowe (R. 380 at 208, 225-226, 240).

Moreover, while the Board apparently maintained raw data about a variety of significant issues like student discipline, it failed to analyze the information adequately to determine whether its policies were furthering the goals of the decree and desegregation (R. 359 at 15; R. 380 at 46). The Board also failed to aggregate much of the data by race and thus could not consider whether it was making adequate progress (R. 359 at 24-25).

Appellees also maintain (Br. 18) that the school system was in compliance with the decree, because Dr. Taylor "reviewed all Board policies." Contrary to Dr. Taylor's opinion, Ms. Lowe testified (R. 380 at 200):

> [i]f you don't see a problem, you can't correct [it]. [W]e were told there was nothing wrong with our school system more than one time.

When specifically asked about the Committee's efforts regarding the Board's "existing * * * and new * * * policies to advance desegregation," Ms. Betty Robinson, a member of the Bi-Racial Committee, replied (R. 380 at 227):

> I think we tried. But to me, the biracial committee was never, never did what the consent decree asked us to do because we always ran into closed doors.

As to the implementation of policies, Ms. Robinson testified (R. 380 at 217, 225-226):

> [I]n the beginning, we talked to everybody [who] was dealing with different aspects of the policy

> book, because we had some question about how it was implemented.
>
> [J]ust because [policies] are written down, * * * doesn't mean * * * that they are being followed or * * * implemented.
>
> * * * * *
>
> [The Board] gave us a whole lot of information * * * that wasn't really saying anything.
>
> * * * * *
>
> It * * * didn't prove whether the policies on the book were working.

Dr. Watts also testified that during her tenure, the Board "never reviewed the policy manual" (R. 380 at 240). Accordingly, the record contradicts Dr. Taylor's opinion and appellees' claim that the Board complied in good faith with the terms of the consent decree.

II

THE DISTRICT COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD WHEN IT CONCLUDED THAT THE GADSDEN SCHOOL DISTRICT WAS UNITARY AND NO LONGER IN NEED OF COURT SUPERVISION

Appellees argue (Br. 21, 22) that because "it [was] clear that the only issue before the court was whether the System had achieved 'unitary status'" and the court "[d]eclared the System to have [a]chieved '[u]nitary status,'" the court necessarily applied the correct standard in reaching its decision. Appellees' claim is illogical and inaccurate.

The fact that the subject of the pleadings, hearing, opinion, and order is whether the Gadsden school system has achieved unitary status is no guarantee that the court applied the correct legal standard in making its determination. Contrary to appellees' claim (Br. 21-23), there is nothing in the court's

opinion or order demonstrating that the court actually assessed -- consistent with controlling case law -- whether appellees have eliminated the vestiges of the discrimination to the extent practicable, complied with the provisions of the decree, and demonstrated a consistent pattern of good-faith commitment to desegregate.

To the extent that appellees rely (Br. 24-32) on the district court's findings to argue that the court employed the correct legal standard, they are mistaken. The mere fact that the district court made findings about certain aspects of the school system does not establish that it applied the requisite legal standard.

Nor is it obvious, as appellees suggest (Br. 22-23), that the court understood what findings were required for it to conclude that the school system had achieved unitary status. To the contrary, the court acknowledged (R. 378 at 3) that "there is some dispute about what exactly the Gadsden Board is required to prove in order to obtain the relief it seeks" and that it was "hard to get a handle on" "the essentials of what would entitle the Gadsden Board to be relieved of" court supervision. Indeed, it noted that "unitary status" is an "illusive[]," "murky" "concept" (R. 379 at 3-4). Consequently, even though the court was aware that it had to decide whether the school system was unitary, its opinion reflects that it was uncertain about the correct way to make that determination.

Appellees also erroneously argue (Br. 27) that "it is implicit and self-evident that [the court] specifically found that the Board eliminated vestiges of discrimination to the extent possible because [it] specifically held that the Board complied with the consent decree." Compliance with the decree and elimination of the vestiges of past discrimination to the extent possible are not one and the same. Rather, each is a separate element of the determination of whether a school system has achieved unitary status. A district court must find both that defendants have "eliminated the vestiges of past discrimination to the extent practicable and * * * in good faith fully and satisfactorily complied with * * * the desegregation plan." United States v. Georgia (Troup County), 171 F.3d 1344, 1347 (11th Cir. 1999) (emphasis added). In short, the district court's opinion is devoid of any indication that it applied the correct legal standard in dismissing this case.

III

THE DISTRICT COURT'S FINDINGS DEMONSTRATE THAT THE SCHOOL SYSTEM IS NOT ENTITLED TO A DECLARATION OF UNITARY STATUS

Nor, contrary to appellees' contention (Br. 24-32), do the district court's findings establish that appellees have met their burden of establishing that they have eliminated the vestiges of discrimination to the extent practicable, complied with provisions of the consent decree, and demonstrated a good-faith commitment to the desegregation process.

Appellees ignore the fact that half of the court's findings demonstrate that the Board's conduct and practices in at least

five significant areas have been inadequate. The court found:

> (1) the Board's efforts with regard to "increas[ing] black enrollment in advanced classes" is a "matter of legitimate debate;"
>
> (2) the Board's relationship with the Bi-Racial Committee had been less than "optimal for obtaining the appropriate amount of input from black parents;"
>
> (3) the status of the alternative school was deficient since "[t]he percentage of black students * * * sent to [the] so-called 'alternative schools' is higher than the percentage of white students * * * [and i]n material respects, [the] alternative schools are different from and inferior to the other schools;"
>
> (4) the Board's efforts to "attract more black teachers have been less than successful;" and
>
> (5) "course offerings at the schools that have the highest percentage of black students" are insufficient, since they "are not as varied or as advanced as in the schools with a higher percentage of white students."

(R. 378 at 4, 6-7). Consequently, the district court's findings demonstrate that under the requisite standard, its supervision should not have been terminated.

IV

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT DEFENDANTS HAVE COMPLIED WITH THE CONSENT DECREE IN GOOD FAITH AND HAVE ELIMINATED THE VESTIGES OF DISCRIMINATION TO THE EXTENT PRACTICABLE

In Section I of this brief, we demonstrated that appellees' statement of the facts does not accurately reflect the record in this case. In this Section of our reply brief, we address a number of arguments advanced by appellees in support of their assertion that the evidence demonstrates that they are entitled to a declaration of unitary status.

1. School Policies. Appellees argue (Br. 37-39) that they have no discriminatory policies and they enforce all rules in an unbiased manner. The record refutes their claim.

For example, appellees refuse to recognize that there is a racial problem with regard to the administration of discipline within the school system. It is undisputed that African-American students are expelled and required to attend the alternative school at a much higher rate than white students (R. 380 at 41, 192-194, 244, 254-255; R. 378 at 7; R. 359 at 22). Moreover, Dr. Richardson, the Alabama Superintendent of Education, testified that Litchfield's students "are probably the most well behaved high school students in one place at one time I've ever seen" (R. 380 at 82). The statistics, along with Dr. Richardson's testimony, are strong evidence that in the two high schools that have significant white student populations, Gadsden High (51% African-American) and Emma Sansom (38% African-American), African-American students are expelled and otherwise disciplined at much higher rates than white students (R. 365 at 7, 43; R. 359 at 8). In addition, according to Dr. Taylor, defendants never bothered to review individual files to determine whether white and minority students who commit the same infraction receive the same penalty (R. 380 at 46).

Appellees also fail to recognize that certain policies of theirs are contrary to the terms and overall purpose of the consent decree. For example, a policy that requires only students from Litchfield High, which is more than 90% African-

American, to travel to another high school to take certain advanced courses is plainly burdensome and has a disproportionate impact on African-American students.[7]

That policy is also contrary to the explicit terms of the decree. The consent decree requires "equitable * * * academic and enrichment classes and programs * * * at each school * * *" (R. 311 at 5-6 (emphasis added)). Thus, a policy requiring only Litchfield students to travel to another school to take advanced-level courses unavailable at their school is not in compliance with the decree and is overly burdensome to African-American students.

To the extent that appellees fault (Br. 37) plaintiffs for the Board's failure to modify its policies, they misplace the blame. The hearing testimony is replete with examples of the Board's rejecting or ignoring suggestions and specific requests made by both the Bi-Racial Advisory Committee and Dr. Watts, a member of the Board (see also R. 359 at 15, 17 (noting the Board's "outright" rejection of many of the recommendations made by the Advisory Committee as "being too difficult or cost prohibitive")). Thus, there is no basis to believe that the Board would have responded favorably to plaintiffs' suggestions to change certain policies. In any event, plaintiffs did previously request the Board to review its policies to determine what modifications, if any, were necessary (R. 359 at 4 & n.5

[7] According to defendants' own statistics, only 20 white students attend Litchfield High School (R. 365 at 8).

(citing Reply to Second Annual Report Concerning the Implementation and Status of, as Well as Compliance With Each and Every Provision of the Consent Order of This Court, filed with the district court on October 20, 1997)).

2. Discipline. Appellees maintain (Br. 41) that they "disagree[] with the assertions by Dr. Watts and Ms. Lowe that [99%] of [the] students who are expelled [and] sent to [the] alternative school are African American." They do not, however, offer any statistics to contradict Dr. Watt's or Ms. Lowe's statements or reveal the percentage of African-American and minority students who attend the alternative school. They also do not offer evidence to contradict the district court's finding that the alternative school is "different from and inferior to the other schools" (R. 378 at 7).

3. Special Education. Appellees maintain (Br. 42) that Dr. Watt's testimony (R. 380 at 250) that 90% of the students designated mentally retarded are African-American is inaccurate. They fail to report what they consider to be the accurate statistics to this Court and thus fail to refute the data presented to the court establishing that disproportionate percentages of African-American students are in the special education program and labeled mentally retarded.

The United States presented statistics in the court below that demonstrate that while the district-wide racial composition of the student body for the 1998-1999 school year was 54% African American, 43% white, and 3% other races, 61% of the students in

special education program were African-American and 38% were white (R. 359 at 6, 27-28). Additionally, 74% of those designated mentally retarded were African-American students while only 26% of white students were so labeled (R. 359 at 28).[8]

4. Quality Of Education/Litchfield High School. Appellees assert (Br. 43), without citation to the record, that "[t]he evidence is uncontradicted that any discrepancies in course offerings between [Litchfield and high schools with substantially higher percentages of white students] are due to the size of the respective schools and not because of race." Their claim is inaccurate.

It is beyond dispute that Litchfield, whose students are 90% African-American, offers fewer electives, advanced courses, and extracurricular activities than other high schools with significantly higher percentages of white students (R. 359 at 31-36). As a magnet school, Litchfield should offer superior and greater academic and extracurricular opportunities, and yet appellees have failed to identify a single course, program, or activity that is offered exclusively at Litchfield.

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[8] The disparities at certain schools are even greater. For example, at Gadsden High School, which has a student body that is 51% African-American, black students comprise 73% of the referrals to special education (R. 359 at 27-28). Moreover, 85% of those students are designated mentally retarded (R. 359 at 28). Similarly, at Jesse Dean Smith Elementary School, where 28% of the students are African Americans, they constitute 45% of those referred to special education. Moreover, 46% of the African-American students in special education are designated mentally retarded, while only 21% of white students are so labeled (R. 359 at 28-29).

In arguing that all inequities at Litchfield are due exclusively to its small size (Br. 13-14, 15, 43, 45-46), appellees ignore the possibility that Litchfield's limited educational offerings and inferior academic status undoubtedly affect the number of students who desire to attend the school. For, why would an academically gifted student of any race choose to attend Litchfield, which provides fewer course selections and activities, is on academic probation, and might require him or her to travel between schools to take certain advanced courses, when there are superior alternatives. Consequently, even though Litchfield is designated to be a magnet school, it is not equal and certainly not academically superior to other high schools with substantially higher percentages of white students. Accordingly, it remains a vestige of discrimination.

5. Good-Faith Commitment To And Compliance With The Consent Decree. Finally, defendants' attitude in failing to recognize the necessity of change and good-faith compliance is clearly reflected in the papers they filed with the district court when seeking unitary status. The consent decree provides "that the Gadsden City School District has not achieved unitary status and shall implement the provisions set forth below to address vestiges and areas of non-compliance" (R. 311 at 2). Nonetheless, when seeking termination of court supervision, defendants maintained that the consent decree never declared that the system was not unitary and imposed only a single affirmative obligation -- related to student transfers -- upon the Board.

They claimed (R. 365 at 2):

> [T]his Court's 1995 Consent Order does not state that the System is not unitary in any specific area, nor does the 1995 Order mandate any specific actions be taken by the Board, except for the Minority to Majority (hereinafter "M-to-M") policy which was implemented by the Board. Rather, the 1995 Order requires the Board to assemble, maintain and produce documentation regarding certain areas therein set forth [and a]fter the Board complies with these documentation provisions, the Order provides that the Board may petition for unitary status.

Accordingly, as recently as nine months ago, appellees refused to recognize their obligation to desegregate and comply with the specific requirements of the consent decree.

CONCLUSION

The order of the district court declaring the Gadsden school system unitary, dismissing the case, and terminating court supervision should be reversed and the case remanded.

Respectfully submitted,

ANITA S. HODGKISS
Deputy Assistant
Attorney General

_____
DENNIS J. DIMSEY
LISA J. STARK
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-4491

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(B), the attached Reply Brief For The United States As Appellant was prepared using Wordperfect 7.0 and contains 6,127 words.

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LISA J. STARK
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2000, two copies of the foregoing Reply Brief For The United States As Appellant were served by first-class mail to the following counsel of record:

Christie D. Knowles, Esq.
Henslee, Robertson & Strawn, L.L.C.
754 Chestnut Street
Gadsden, Alabama 35901

Dennis D. Parker, Esq.
NAACP Legal Defense & Educational
Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013

_____
LISA J. STARK
Attorney
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078