UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 1:70cv-06820
v.	)	
	)	
TEXAS EDUCATION AGENCY	)	
(Port Arthur Independent School District),	)	
et al.	)	
	)	
Defendants.	)	
_____	)	

THE UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR FURTHER RELIEF AND IN OPPOSITION TO DEFENDANT'S MOTION TO DECLARE UNITARY STATUS

Plaintiff United States files this Memorandum in Support of Its Motion for Further Relief and in Opposition to Defendant's Motion to Declare Unitary Status. As fully set forth below, the United States objects to a declaration of unitary status in the areas of (1) student assignment and (2) faculty and staff assignment, and respectfully moves that the Court order Defendant to comply with its obligations in these areas.

INTRODUCTORY STATEMENT

In the Consent Order and Settlement Agreement entered by this Court on May 7, 2003 ("Consent Order"), Defendant Port Arthur Independent School District ("PAISD" or "the District") agreed to take a number of specific actions to further the orderly desegregation of the school system and bring this case toward an appropriate resolution. By its own admission, the District has disregarded several of these agreed-upon requirements, specifically those concerning student and faculty assignment. Because PAISD has failed to carry its burden of showing

compliance with the desegregation decree for a reasonable period of time, *see Freeman v. Pitts*, 503 U.S. 467, 498 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991), its motion for a declaration of unitary status should be denied.

In the area of student assignment, PAISD has wholly ignored provisions of the Consent Order requiring it to maintain its majority-to-minority ("m-to-m") transfer program and to facilitate and promote such transfers. As a result of PAISD's inaction, there have been no m-to-m transfers during the 2006-07 school year, despite the fact that students at several schools are eligible to participate in the program.

While ignoring its obligation to promote m-to-m transfers, PAISD has granted numerous other transfer requests for reasons not permitted under the Consent Order. In particular, the District is routinely granting transfer requests on grounds of "exceptional hardship," despite the Consent Order's requirement that such transfers be permitted only in "unique and urgent situations." (Consent Order at 3.) In further violation of the Consent Order, PAISD appears to be granting these transfers without regard to the possible negative impact they may have on desegregation in the District.

In the area of faculty assignment, the Consent Order requires PAISD to assign classroom teachers so that the percentages of black and white teachers at each school are within +/- 15% of the system-wide percentages at the grade levels served by that school. The District has never complied with this requirement. In the first year after the entry of the Consent Order, four of PAISD's eight elementary schools were out of compliance. Today, five of the eight elementary schools are not in compliance.

PAISD's lack of compliance in these areas is not new. The current Consent Order arose

out of the District's failure to comply with a 2001 Consent Decree that also addressed transfer policies and faculty assignment. (*See* Pl.'s Opp. to Mot. of Def. to Declare Unitary Status and for Entry of Final Order (Mar. 14, 2003) at 9-11, 17-18.) The 2001 Consent Decree in turn was the result of PAISD's admitted failure to comply with the Court's 1982 desegregation order and with applicable desegregation standards. (*See* Consent Decree (Dec. 12, 2001) ("2001 Consent Decree") at 4-6.)

Given PAISD's consistent and continuing disregard of this Court's orders, it has failed to meet the legal standard for unitary status, and therefore its motion should be denied. The United States respectfully moves that the Court declare the District in violation of the Consent Order and enter the attached proposed Order, which requires the District to demonstrate compliance with all terms of the Consent Order for two full school years before it may be declared unitary.

PROCEDURAL BACKGROUND

The United States filed this lawsuit on August 7, 1970, to desegregate the public schools of Port Arthur, Texas. On September 15, 1970, the Court entered an order requiring the District to "develop and maintain a unitary school system" and to implement a desegregation plan. In 1981, following additional litigation, the parties reached a settlement that was approved by the United States Court of Appeals for the Fifth Circuit, *see United States v. Texas Educ. Agency (Port Arthur Indep. Sch. Dist.)*, 679 F.2d 1104 (5th Cir. 1982), and entered as an order of this Court on March 2, 1982.

In January 2001, the United States advised PAISD that it had identified serious issues of noncompliance with the 1982 Order. The parties subsequently negotiated a Consent Decree in which PAISD admitted that it had "failed to comply with [the] terms [of the 1982 Order] and

with applicable desegregation standards in significant respects." (2001 Consent Decree at 4.) The 2001 Consent decree provided for the consolidation of the District's high schools; required PAISD to submit a plan to the United States for the consolidation of other schools; required PAISD to develop written policies governing hardship transfers and to determine the impact of such transfers on its desegregation obligations; required PAISD to take specific actions to publicize and facilitate m-to-m transfer opportunities; and required PAISD to implement new policies and procedures concerning faculty and staff assignments. The 2001 Consent Decree was entered as an order of the Court on December 12, 2001.

In February 2003, PAISD moved for a declaration of unitary status. The United States opposed the motion on the grounds that the District had failed to comply with the 2001 Consent Decree and with previous desegregation orders for a reasonable period of time. Moreover, PAISD had failed to eliminate vestiges of the prior dual system to the extent practicable in the areas of student assignment and faculty and staff assignment.

After the United States filed its opposition, the parties entered negotiations, and on May 7, 2003, the Court entered the current Consent Order and Settlement Agreement. This Consent Order specified several actions that PAISD was required to take in the areas of elementary and middle school assignment, transfer policies, and staff and faculty assignment, beginning in the 2003-2004 school year and continuing thereafter. Many of the requirements concerning student transfers were identical to those in the 2001 Consent Decree with which the District had failed to comply. The Consent Order also requires PAISD to file an annual report with the Court and the United States on or before October 31 of each year.

In the Consent Order, the parties agreed that the District had eliminated the vestiges of

the prior dual system to the extent practicable in the areas of transportation, facilities, and extracurricular activities. Judicial supervision was retained "to ensure that PAISD (1) take all actions identified in [the Consent Order]; and (2) refrain from taking any actions which have the effect of reversing the progress it has made in desegregating the school system." (Consent Order at 6.) The Consent Order provides that in or after July 2005, if PAISD has taken all required actions, the District may move to dismiss the case without objection from the United States. It further provides that the United States "shall have the right to seek judicial relief if PAISD does not comply with this Agreement." (*Id.*)

PAISD filed the instant motion for a declaration of unitary status on January 18, 2007. The United States served discovery in February 2007. Following a review of PAISD's responses, the United States opposes the District's motion and seeks further relief in the areas in which PAISD has failed to comply.

ARGUMENT

I. Legal Standard

"The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). In determining whether a school district has met its desegregation obligations such that the district court should withdraw its supervision and dismiss the case, the court must consider (1) whether the district has "complied in good faith with the desegregation decree[s]" for a reasonable period of time, *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248, 249-50 (1991); *Freeman*, 503 U.S. at 498; (2) "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable," *Dowell*, 498 U.S. at 250; and (3) whether the

district has demonstrated a "good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma," *Freeman*, 503 U.S. at 498.

The school district has the burden of demonstrating that it has complied with all three prongs of the test. *See United States v. Fordice*, 505 U.S. 717, 739 (1992) ("*Brown* and its progeny . . . established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system."); *Freeman*, 503 U.S. at 494; *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979).

The first prong requires that the defendant school district demonstrate "good-faith compliance . . . with the court order over a reasonable period of time." *Freeman*, 503 U.S. at 498 (citing *Dowell*, 498 U.S. at 249-50). "[A] system does not become unitary merely upon entry of a court order intended to transform it into a unitary system." *United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1037 (5th Cir. 1986).

The second prong requires the district to demonstrate that it has eliminated the vestiges of the prior dual system to the extent practicable. The district must demonstrate that it has eradicated the remnants of the dual system in every facet of the school district's operations, including student assignment; faculty and staff assignment; transportation; facilities; resource allocation; and extracurricular activities, *see Freeman*, 503 U.S. at 492; *Green v. County Sch. Bd.*, 391 U.S. 430, 435, 436-37 (1968), as well as "administration attitudes," *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 196 (1973), and quality of education, *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (citing *Milliken v. Bradley*, 433 U.S. 267, 287 (1977)). These "*Green* factors" are "among the most important indicia of a segregated system," *Swann v. Charlotte-Mecklenburg*

Bd. of Educ., 402 U.S. 1, 18 (1971), and they are often "intertwined or synergistic," so that a constitutional violation in one area cannot be eliminated without remedies in another, *Freeman*, 503 U.S. at 497.[1]

The third prong requires that the court look to a school district's past and current compliance, as well as its likely future actions. Not only is compliance with prior court orders required of the district, but the court also must inquire into whether it is "unlikely that the [school board will] return to its former ways." *Dowell*, 498 U.S. at 247. "[M]ere protestations of an intention to comply with the Constitution in the future will not suffice." *Dowell v. Bd. of Educ.*, 8 F.3d 1501, 1513 (10th Cir. 1993) (quoting *Brown v. Bd. of Educ.*, 978 F.2d 585, 592 (10th Cir. 1992)). Rather, "specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith." *Id.* "A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action

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[1] A court may declare a district partially unitary and relinquish control over one or more areas of a district's operations while retaining supervision over others. *Freeman*, 503 U.S. at 490. In deciding whether to order complete or partial withdrawal of the court's supervision, the district court must consider the following:

> [1] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [2] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and [3] 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 courts' decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Missouri v. Jenkins, 515 U.S. 70, 89 (1995) (alterations in original) (quoting *Freeman*, 503 U.S. at 491).

when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." *Freeman*, 503 U.S. at 491.

II. PAISD's Motion Should Be Denied Because It Has Never Complied With The Consent Order

As stated, PAISD is required to "compl[y] in good faith with the desegregation decree" for a reasonable period of time before it may be declared unitary. *Dowell*, 498 U.S. at 248, 249-50; *Freeman v. Pitts*, 503 U.S. at 498. To the contrary, the District has never fully complied with *any* of the Court's desegregation orders, including the 2003 Consent Order.[2] Based on the District's own admissions, it is ignoring its obligations in the areas of student assignment and faculty and staff assignment.

A. Student Assignment/Transfer Policies

1. Majority-to-Minority Transfer Program

The Consent Order requires the District to "continue to maintain the m-to-m transfer provisions of the existing orders, whereby any student can transfer from a school where his or her race (*e.g.*, Black, White, Hispanic, Asian, Native American) is in the majority (more than

[2] PAISD's unitary status motion completely ignores the 2003 Consent Order. The District asserts that it has complied with the 2001 Consent Decree (*see* Def. Mot. at 2), but makes no reference to the 2003 Consent Order -- the order most directly governing this case. Moreover, the District never fully complied with the 2001 Consent Decree. As discussed (*see infra* p. 4), many provisions of the 2001 Consent Decree not complied with were reaffirmed in the 2003 Consent Order. Instead, the District relies on the fact that this case was filed over thirty years ago and on the fact that the District's demographics have changed significantly since that time. While it is true that PAISD has experienced demographic change since the 1970s, that fact does not permit the District to ignore its obligations under the Consent Order, which was entered less than four years ago. Nor does the mere passage of time absolve the District of its duty to desegregate. *See Freeman*, 503 U.S. at 518 (Blackmun, J., concurring) ("[A]n integrated school system is no less desirable because it is difficult to achieve, and it is no less a constitutional imperative because that imperative has gone unmet for 38 years.").

50%) to a school where his or her race is in the minority (less than 50%)." (Consent Order at 3-4.) Further, the District is required to take specific actions to facilitate and promote such transfers:

> Free transportation will be provided by PAISD for all m-to-m transfer students. Such transportation must also be direct (no transfer points) for any transfers between (1) DeQueen Elementary and Tyrell [sic] Elementary; and (2) Washington Elementary and Dowling Elementary.
>
> The District shall determine what students are eligible for m-to-m transfers for each school in the District, and shall publish a list, by school, indicating the m-to-m opportunities available within the District. The District shall publicize the availability of free transportation for any PAISD student that is eligible for and desires an m-to-m transfer. At least once per school year, the District shall publicize the availability of m-to-m transfers in its weekly article written by the District's public affairs coordinator and published in the Port Arthur News newspaper. The District shall also consider other ways to publicize the availability of m-to-m transfers.

(*Id.* at 4.)

PAISD acknowledges that it has failed to comply with each of these requirements. In response to interrogatories asking it to describe its efforts in these areas, the District simply states that there are no m-to-m transfers. (*See* Def.'s Answers to Interrogs. nos. 10-15 (attached as Exhibit A)). In response to the United States' document requests, the District admits that it has not created lists of available m-to-m opportunities or publicized such opportunities in the *Port Arthur News*. (*See* Def.'s Resps. to Doc. Reqs. nos. 6-10 (attached as Exhibit B)). Again, PAISD's justification for its noncompliance is its assertion that "[t]here are no m-to-m transfers." (*Id.*)

The fact that there currently are no m-to-m transfers does not absolve PAISD of its

obligation to promote such opportunities. To the contrary, the lack of transfers would appear to be the result of the District's failure to promote and facilitate them, as it is required to do under the Consent Order. Far from providing a justification for the District's noncompliance, the lack of transfers simply demonstrates the consequences of PAISD's inaction.

2. Hardship Transfers

The Consent Order specifies a limited number of bases upon which the District is permitted to grant transfer requests. One of these bases is for cases of exceptional hardship. Under the Consent Order, "[t]he hardship exception is meant to provide for transfers in unique and urgent situations, such as incarceration of a parent/guardian, terminal illness of a parent/guardian, domestic abuse or neglect affecting the student or parent/guardian, or natural disaster." (Consent Order at 3.)

Information produced during discovery indicates that PAISD has not denied a single hardship transfer request in the past three school years. For the 2006-07 school year alone, the District granted 110 such requests. The transfer applications produced during discovery indicate that PAISD is routinely granting hardship transfers for reasons that do not rise to the level described in the Consent Order.[3] (*See* transfer applications collected in Exhibit C.)[4] In some

[3] PAISD also appears to be disregarding its obligation to consider the impact that hardship transfers may have on desegregation. (*See* Consent Order at 3 ("For each hardship transfer requested, the District shall determine whether the transfer, in the context of the aggregate impact of all transfers requested, will undermine the District's affirmative desegregation obligations.").) The record contains no evidence that PAISD considered how these transfers would affect desegregation at the affected schools.

[4] A form used by the District to advise principals that a transfer request has been granted lists only two possible grounds for approval: hardship and m-to-m selection. (*See* Exhibit C.) The District thus appears to be using "hardship" as a catch-all category to encompass any reason (continued...)

instances, the District has granted such requests even where no reason has been provided on the application form. (*See* Exhibit D.)

In addition, § II.B of the Consent Order requires that transfer requests "be accompanied by a signed, dated, sworn affidavit fully explaining the reason for the request and accompanied by supporting documentation, if available." (Consent Order at 3.) No transfer applications include such an affidavit (*see, e.g.*, applications collected in Exhibit C).[5] Accordingly, the District has failed to comply with the transfer provisions of the Consent Order.

B. Staff and Faculty Assignment

The Consent Order provides:

> Beginning with the 2003-2004 school year, the District shall assign faculty and staff in a manner that ensures that faculty and staff assignments do not perpetuate the historic racial identifiability of PAISD schools. In particular, beginning with the 2003-2004 school year, the District shall assign classroom teachers so that the percentage[s] of Black and White teachers in each school are within +/- 15% of the District-wide percentages at the grade levels served by that school.

(Consent Order at 4.)

PAISD has never complied with this requirement.[6] For example, in 2003-04 -- the year in which PAISD was first required to implement the +/- 15% standard -- four out of eight elementary schools were out of compliance. According to information provided by the District,

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[4](...continued)
other than participation in the m-to-m program.

[5] The transfer applications do include an Affidavit of Permanent Residence, but not the affidavit described in the Consent Order.

[6] Moreover, PAISD has failed to offer any evidence that compliance with this provision is impracticable or unduly burdensome, nor has it ever sought a modification of the Consent Order.

in 2003-04 the District-wide racial composition of elementary school teachers was 31% black and 59% white. Thus, the permissible range for each elementary school was 16%-46% black and 44%-74% white. As the following chart indicates, four schools had percentages that fell outside this range:

School	Black	White	Other	Total
DeQueen Elementary	**15 (47%)**	17 (53%)	0	32
Dowling Elementary	4 (20%)	**16 (80%)**	0	20
Franklin Elementary	20 (43%)	**10 (22%)**	16 (35%)	46
Houston Elementary	11 (24%)	**34 (76%)**	0	45
Lee Elementary	8 (18%)	26 (59%)	10 (23%)	44
Travis Elementary	12 (30%)	27 (67.5%)	1 (2.5%)	40
Tyrrell Elementary	10 (26%)	27 (71%)	1 (3%)	38
Washington Elementary	12 (44%)	15 (56%)	0	27

PAISD remains out of compliance with its obligations in this area. As of the current school year, the District-wide racial composition of elementary school teachers is 29% black and 57% white, and thus the permissible range for each school is 14%-44% black and 42%-72% white. Five schools are currently out of compliance:[7]

School	Black	White	Other	Total
DeQueen Elementary	**13 (46%)**	**10 (36%)**	5 (18%)	28
Dowling Elementary	4 (20%)	**16 (80%)**	0	20

[7] In its memorandum in support of its unitary status motion, the District notes its efforts to recruit African-American and Hispanic teachers and states that its percentage of African-American teachers exceeds the statewide percentage. (Def.'s Mem. at 5.) These facts do not address the District's obligations under the Consent Order, which does not relate to the system-wide percentage of minority teachers but instead involves a comparative analysis of individual schools.

Franklin Elementary (1-6)	**14 (50%)**	**11 (39%)**	3 (11%)	28
Houston Elementary	13 (25%)	31 (58%)	9 (17%)	53
Lee Elementary	9 (22.5%)	24 (60%)	7 (17.5%)	40
Travis Elementary	9 (21%)	21 (49%)	13 (30%)	43
Tyrrell Elementary	8 (20%)	**32 (78%)**	1 (2%)	41
Washington Elementary	**9 (53%)**	8 (47%)	0	17

Given PAISD's consistent lack of compliance in this area, as well as the other violations discussed above, it can hardly be said that the District has complied in good faith with the desegregation order for a reasonable period of time. Accordingly, PAISD's motion must be denied.[8]

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny PAISD's Motion to Dissolve Continuing Jurisdiction to Declare Unitary Status and for Entry of Final Order. The United States further requests that the Court grant its Motion for Further Relief and enter the attached proposed Order requiring PAISD to demonstrate compliance with all terms of the Consent Order for two full school years before it may be declared unitary.

[8] In support of its unitary status motion, PAISD relies on (but does not attach) a 1989 draft of an agreed record in which the United States purportedly stated that the District had complied with its legal obligations. The significance of this document already has been briefed in connection with PAISD's 2003 unitary status motion. (*See* Pl.'s Opp. to Mot. of Def. to Declare Unitary Status and for Entry of Final Order (Mar. 14, 2003) at 14-15.) Moreover, the 2001 Consent Decree and the 2003 Consent Order -- both of which have been entered as orders of the Court after 1989 -- reflect the District's own acknowledgment that it had not satisfied the requirements for a declaration of unitary status.

Respectfully submitted,

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Dated: May 10, 2007

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2007, a true and correct copy of the United States' Memorandum in Support of Its Motion for Further Relief and in Opposition to Defendant's Motion to Declare Unitary Status was served on the following counsel of record by electronic means through the Court's Electronic Court Filing (ECF) system:

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