

**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)	Honorable Thad Heartfield
(Port Arthur Independent School District),)	
et al.,)	
)	
Defendants.)	
_____)	

**PLAINTIFF UNITED STATES’ OPPOSITION TO MOTION OF DEFENDANT
TO DECLARE UNITARY STATUS AND FOR ENTRY OF FINAL ORDER**

Defendant Port Arthur Independent School District (“PAISD”) has moved for a declaration of unitary status and for dismissal of this desegregation suit notwithstanding that (1) it has failed to fully comply with this Court’s desegregation orders and decrees, and to the extent that it has complied, it has not done so for a reasonable period of time; and (2) it has not, and cannot, show that it has eliminated all vestiges of its prior dual system, to the extent practicable.¹ For these reasons, PAISD’s Motion should be denied. See Freeman v. Pitts, 503 U.S. 467, 494, 498 (1992); Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 248-50 (1991).

¹See Motion of Defendant to Declare Unitary Status and for Entry of Final Order (“PAISD’s Motion”), dated February 18, 2003; Memorandum in support of same, dated February 28, 2003 (“PAISD’s Memorandum”).

INTRODUCTORY STATEMENT

PAISD's Motion comes just 14 months after this Court approved a consent decree, including a new desegregation plan, that "if properly implemented, will likely further the orderly desegregation of the PAISD." See Consent Decree, filed December 12, 2001 ("2001 Consent Decree"). Indeed, the 2001 Consent Decree was "advanced [by PAISD] as a means to comply with its desegregation obligations," obligations which PAISD admitted it had not theretofore complied with. Memorandum Opinion and Order Denying Intervention and Granting Motion for Entry of Consent Decree, filed December 12, 2002, at 4; 2001 Consent Decree at 4, 6 (admitting that "the District has failed to comply with [the terms of the 1982 order] and with desegregation standards in significant respects").

Even though it has not yet fully implemented the 2001 Consent Decree, and has not therefore fully satisfied its desegregation obligations, PAISD now asserts that it "has complied in all respects with both the letter and spirit of the Consent Decree." PAISD's Motion at 1 (emphasis added). PAISD's representation is obviously untrue; it is belied by the facts and is contradicted by PAISD's own recent court filings. See PAISD's Motion for Approval of Bond Construction Program, dated January 18, 2003 (acknowledging the need to develop and implement the elementary and middle school plan called for by the 2001 Consent Decree); PAISD's Memorandum at 8 (acknowledging that the elementary school plan is only in its planning stage and remaining silent with respect to the middle school plan). For example:

- PAISD has not yet developed a court-approved primary, elementary and intermediate school plan that "consider[s] the District's affirmative obligation to achieve desegregation to the extent practicable," a plan that is necessitated by its prior failures to properly implement the voluntary desegregation remedies contained in the 1982 desegregation order. 2001 Consent Decree at 5, 10.

- PAISD has not yet presented the United States with “written policies for determining whether hardship transfers will be granted,” policies that were required because PAISD historically “ha[d] not met its affirmative obligation to monitor intra-district transfers to ensure that such transfers are consistent with the District’s desegregation responsibilities.” Id. at 5, 11.
- PAISD has not yet provided the United States with data and analyses relating to the consolidation of the high schools, as required.² Id. at 8-9.

PAISD’s assertion that it has “eliminate[d] all vestiges of racial desegregation [sic]”³ is similarly without basis. See PAISD’s Motion at 1-2. PAISD has not eliminated a single one-race minority elementary or middle school since the entry of the 2001 Consent Decree. In fact, it is undisputed that PAISD has just as many one-race minority schools now as it had more than 14 years earlier. PAISD’s Memorandum at 5. If the 2001 Consent Decree were fully and properly implemented, these vestiges may very well have been eliminated to the extent practicable. That implementation, however, has not yet occurred. Neither has PAISD carried its burden of establishing that it has eliminated the vestiges in the area of faculty and staff assignments to the extent practicable. According to PAISD’s own Memorandum, almost half (6 of 13) schools are in non-compliance with the so-called Singleton ratio. PAISD’s Memorandum at 7.

Because PAISD has not yet fully complied with this Court’s desegregation orders and decrees and because it can not establish that the vestiges of the prior dual system have been

²The United States specifically required that such data be provided given its “concern[] about the impact of the high school consolidation on the District’s non-white, minority students” resulting from “the District’s acknowledged non-compliance with its desegregation obligations.” Id. at 8.

³The United States assumes that PAISD intended to assert that it had eliminated the vestiges of segregation and not desegregation.

eliminated to the extent practicable, PAISD's Motion is premature and must be denied. See, e.g., United States v. Fordice, 505 U.S. 717, 739 (1992) (burden of proof falls on defendant school system in a desegregation case). The United States also respectfully suggests that a hearing is not necessary to dismiss PAISD's motion.⁴

LEGAL STANDARDS

PAISD, having previously segregated students by race, is under an "affirmative" and "continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system'." Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 437, 440 (1968) (citations omitted). "The Constitution requires substantially more than mere contemporaneous use of school facilities. It requires a unitary school system." Adams v. Rankin County Bd. of Educ., 485 F.2d 324, 327 (5th Cir. 1973). Only upon a finding of unitary status may the court restore control of the school system to state and local authorities.⁵

The "[p]roper resolution of any desegregation case turns on a careful assessment of its facts." Freeman, 503 U.S. at 474. To determine whether a school district has achieved the goals of its desegregation decree, and may thus be declared "unitary," the court must determine whether a school board has: (1) complied with its desegregation orders for a reasonable amount of time; (2) eliminated the vestiges of past segregation in the school system to the extent

⁴While an evidentiary hearing is necessary before granting a request for declaration of unitary status, no such hearing is necessary to deny the request where the undisputed facts demonstrate that the district cannot satisfy one of the elements necessary for unitary status.

⁵In this Circuit, a finding that one area of school operations is unitary does not immediately terminate jurisdiction over that area. The Fifth Circuit has determined that a district court should not dismiss a school desegregation case until at least three years after it has declared the system unitary. Flax v. Potts, 915 F.2d 155, 158 (5th Cir. 1990); Tasby v. Woolery, 869 F. Supp. 454, 459 (N.D. Tex. 1994).

practicable; and (3) demonstrated a good faith commitment to the whole of the decree and those provisions of the law and the Constitution that were the predicates for judicial intervention.

Missouri v. Jenkins, 515 U.S. 70, 89 (1995).⁶ The district bears the burden of establishing each and every element.

In the first prong of the unitary status analysis, the burden is upon the defendant school district to demonstrate that the school system has been operated in compliance with the Constitution and with the Court's interim orders or decrees for a reasonable period of time. Freeman, 503 U.S. at 494. The district does not discharge its duty to remedy its constitutional violation simply by implementing a court-ordered plan. United States and Bryant v. Lawrence County Sch. Dist., 799 F.2d 1031,1037 (5th Cir. 1986) (citations omitted) ("It should go without saying that a system does not become unitary merely upon entry of a court order intended to transform it into a unitary system."), reh'g and reh'g en banc denied, 808 F.2d 1063 (5th Cir. 1987) (per curiam). The inquiry is not simply whether the school district has attempted to redress its constitutional violation, but whether the school system has been successful in its efforts, since the measure of any desegregation plan is its effectiveness. Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971).

The second prong of the analysis requires that the district demonstrate that it has eliminated the vestiges of the prior dual system "to the extent practicable." The failure or refusal

⁶The good faith component has two parts; a school district must show not only past good faith compliance, but a good faith commitment to the future operation of the school system. See Brown v. Board of Educ., 978 F.2d 585, 592 (10th Cir. 1992), reh'g denied, 978 F.2d 585, cert. denied sub nom. Unified Sch. Dist. No. 501 v. Smith, 509 U.S. 903 (1993); United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367, 1384 (D. Kan. 1997).

of a district to fulfill its “affirmative duty” to eradicate the vestiges of its prior dual school system continues the constitutional violation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (citations omitted); Lawrence County, 799 F.2d at 1042-1044.

In determining whether the vestiges of past discrimination have been eliminated to the extent practicable, the Court “should look not only at student assignments, but ‘to every facet of school operations - faculty, staff, transportation, extracurricular activities and facilities’.” Dowell, 498 U.S. at 250 (quoting Green, 391 U.S. at 435). These factors, the so-called Green factors, are amongst the most important indicia of a segregated system. Id. However, these factors should not be considered in a rigid framework. It is an appropriate exercise of discretion for the district court to identify and examine other elements such as quality of education. Freeman, 503 U.S. at 492-493.

Elimination of the vestiges "to the extent practicable," does not mean that the defendant must employ "awkward," "inconvenient," or "even bizarre measures," especially in the "late phases of carrying out a decree, when [any] imbalance is attributable neither to the prior de jure system nor to a later violation by the school district but rather to independent demographic forces." Id. at 493. Nonetheless, until unitary status is attained, the defendant school district has the burden of proving that any current racial imbalance within the school system is not related proximately to the prior violation. Id. at 494; Lee v. Etowah County Bd. of Educ., 963 F.2d 1416, 1425 (11th Cir. 1992).

The third prong of the unitary status analysis requires that the court look not only to a school district’s past and current compliance, but also to likely future actions. Not only is good faith compliance with prior court orders required of the district, the court must also 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. Board of Educ. of Oklahoma City, 8 F.3d 1501, 1513 (10th Cir. 1993) (citing Brown, 978 F.2d at 592). 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. In short, the district must demonstrate its "affirmative commitment to comply in good faith with the entirety of a desegregation plan," and not just that it "had [not] acted in bad faith or engaged in further acts of discrimination since the desegregation plan went into effect." Freeman, 503 U.S. at 499. "A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." Id. at 491.

ARGUMENT

I. PAISD's Motion Should Be Denied Because The Undisputed Facts Demonstrate That The Board Has Failed To Comply With The Desegregation Orders And Consent Decree For A Reasonable Period Of Time.

For PAISD to be declared unitary, it must demonstrate that it has complied with the desegregation orders and the 2001 Consent Decree for a reasonable period of time. See id. at 494. This prerequisite to a finding of unitary status is especially pertinent here given PAISD's past failures to comply with its desegregation obligations and its recent admissions that its practices, theretofore, constituted not only non-compliance but also a demonstrable impediment to desegregation. PAISD's failures included, inter alia, (1) the unauthorized construction and placement of portable classrooms resulting in the enlargement of minority schools and

underutilization of majority- and predominantly white facilities; (2) its decision to ignore its obligation to establish magnet schools designed to be desegregative in nature; (3) the assignment of faculty in a manner that perpetuated the historic racial identity of its schools; and (4) the allowance of numerous intra-district transfers without regard to desegregation concerns. See 2001 Consent Decree at 4-7. Moreover, the facilities that housed the magnet programs (as opposed to magnet schools) established by PAISD were not “maintained in a condition that could reasonably be expected to attract desegregative transfers and have not offered unique, high quality programs capable of attracting significant numbers of other-race students to these historically and predominantly black schools.” Id. at 5.

It was as a result of these failures that a new decree was negotiated that would serve as a means of remedying the past failures to desegregate the PAISD system. Absent implementation of that new decree, PAISD will have done nothing to eliminate the discriminatory effects of its acknowledged past practices. In short, until PAISD fulfills its obligations under that decree, PAISD will not have complied with its desegregation obligations and cannot, therefore, be declared unitary.

A. PAISD has not yet implemented key terms of the 2001 Consent Decree.

1. Elementary and middle school plan

To desegregate the PAISD schools, PAISD agreed to the consolidation of its high schools and to the development of a new elementary and middle school plan. While PAISD has implemented the provision of the 2001 Consent Decree designed to desegregate the PAISD high schools, it is undisputed that PAISD has yet to implement the provision designed to desegregate the elementary and middle schools. See PAISD’s Motion for Approval of Bond Construction

Program, dated January 18, 2003 (acknowledging the need to develop and implement the elementary and middle school plan called for by the 2001 Consent Decree); PAISD's Memorandum at 8 (acknowledging that its elementary school assignment plan is in its planning stage and without mention of its middle school assignment plan).

PAISD's obligation to develop such a plan is significant, especially given its past failures to properly implement the desegregation tools required by the 1982 Order and intended to desegregate the elementary and middle schools. 2001 Consent Decree at 4-5. While PAISD correctly points out that only two of its 15 schools⁷ have white enrollments that are substantially higher (by 23.6% and 35.5%) than the district wide-average, it ignores that at least three schools have black enrollments that are more than 25% higher than the district-wide average.⁸ See PAISD's Annual Report, filed October 31, 2002. In other words, a third of its schools continue to have black or white racial compositions that substantially deviate from the district-wide average.

2. Intra-district transfers

PAISD has also historically failed to “[meet] its affirmative obligation to monitor intra-district transfers to ensure that such transfers are consistent with the District’s desegregation obligation.” Id. at 5-6; also January 2, 2001 DOJ letter to Ms. Thomas at 3-4 (Attachment 1). Instead, it had allowed large numbers of hardship transfers without regard to their segregative

⁷PAISD's motion states that Dequeen has a white enrollment of 31.8%. According to PAISD's October 31 Report, however, Dequeen has a black enrollment of 91.5%. Hughen Special School has a white enrollment of 31.8%.

⁸These five schools are Austin Elementary/Middle, Tyrell Elementary, Dequeen Elementary, Washington Elementary and Wilson Middle.

impact while failing to properly implement the majority-to-minority transfer program (“m-to-m program”) required by the 1982 Order. Id.

As a result, as part of the 2001 Consent Decree, PAISD agreed to develop written guidelines governing hardship transfers and to better promote its m-to-m program. Id. at 11-12. PAISD has not provided the United States with new hardship transfer guidelines nor with evidence that it has fulfilled its responsibilities regarding the m-to-m program. In fact, the number of hardship transfers have actually increased from 195 in 1999-2000⁹ to 215 in 2002-2003.¹⁰ Many of the 2002-2003 hardship transfers have a negative impact on desegregation. For example, there were transfers of black students from schools with low black enrollments (*e.g.*, Lee Elementary (28.1% black)) to schools with high black enrollments (*e.g.*, Dequeen Elementary (91.5% black)); and transfers of white students from schools with low white enrollments (*e.g.*, Edison Middle (7.7% white)) to schools with high white enrollments (*e.g.*, Austin Elementary/Middle (43.7% white)).

The number of m-to-m transfers, on the other hand, has increased from only 18 students in 1999-2000 to 19 students in 2002-2003. Id. at 5-6; see also January 2, 2001 DOJ letter to Ms. Thomas at 3-4. However, of the 19 m-to-m transfers reported in 2002-2003, only three were appropriate; the other 16 involved transfers from schools in which the student’s race was not in the majority.¹¹ See PAISD’s Annual Report, dated October 31, 2002. For example, one of the

⁹See January 2, 2001 DOJ letter to Ms. Thomas.

¹⁰See PAISD’s Annual Report, dated October 31, 2002.

¹¹The 1982 Order defines m-to-m transfers as follows: “Under this transfer provision, any student who attends a school in which his or her race constitutes a majority shall be permitted to choose to transfer to any school offering the appropriate grades where his or her race constitutes a

m-to-m transfers approved involved a white student transferring from Edison Middle (7.7% white) to Austin Middle (43.7% white). This is hardly the desegregative transfer opportunity that PAISD claims it to be. See PAISD’s Motion at 2; PAISD’s Memorandum at 5.

3. Data relating to the High School consolidation

PAISD chose, as its means to desegregate the secondary schools, to consolidate its three high schools into a single school. While the United States did not object to PAISD’s chosen means, it expressed its “concern[] about the impact of the high school consolidation on the District’s non-white, minority students.” 2001 Consent Decree at 8. The United States’ concern was based upon PAISD’s history of non-compliance with its desegregation obligations. Id.

Consequently, the 2001 Consent Decree required that PAISD compile certain data relating to student assignments and participation at the high school level and analyze the data to determine whether there existed racially-identifiable programs or activities.¹² Id. at 9. The 2001 Consent Decree also makes clear that PAISD was required to “compile these data and supply them to the United States in its annual report.” PAISD has not supplied these data.¹³ As a result, the United States has been unable to assess the adequacy of PAISD’s implementation of the high school consolidation.

minority.” According to PAISD’s Memorandum, it has adopted a policy of allowing transfers by white students from schools that exceed 30% in white enrollment. PAISD has not sought court approval to implement such a modification to the court-ordered m-to-m program.

¹²These data compilations included data relating to class assignments (including advanced courses), special education designations, extra-curricular activities, disciplinary referrals and responses, and assignment to the alternative school. Id. at 9.

¹³The United States informed PAISD of its failure to provide the required data at a meeting between the parties on December 17, 2002.

B. PAISD has not fully complied with the desegregation orders and consent decree “for a reasonable period of time.”

PAISD’s Motion must be denied for a second reason – in several of the areas in which it has complied with the decree, it had completed or begun such actions only in the past months, which is insufficient to constitute “a reasonable period of time” under Dowell and Freeman. For example, PAISD’s high schools have been consolidated, as required by the 2001 Consent Decree, but only as of Fall 2002. “No court has held that compliance for such a short period constitutes compliance for a reasonable period.” Alexander v. Britt, 89 F.3d 194, 201 (4th Cir. 1996) (involving compliance with orders for “little more than a year”). Instead, “[o]nly compliance for substantially longer periods has been regarded as significant evidence of good faith compliance.” Id. (citing cases); see Dowell v. Bd. of Educ. of Okla. City Public Schs., 8 F.3d 1501, 1512 (10th Cir. 1993) (holding that good faith compliance from 1977 to 1985 satisfied reasonable period requirement).

This prerequisite to a finding of unitary status is not meaningless. “Good faith compliance with a desegregation decree ‘over a reasonable period of time’ is relevant because it is ‘evidence that any current racial imbalance is not the product of a new de jure violation, and enables the district court to accept the school board’s representation that it has accepted the principle of racial equality and will not suffer *intentional* discrimination in the future’.” Brown, 978 F.2d at 596 n.4 (quoting Freeman, 503 U.S. at 498).

Given the short time since PAISD began implementation of the 2001 Consent Decree, it cannot be found to have complied with it for a reasonable period of time, especially in view of its past record of non-compliance.

II. PAISD's Motion Should Be Denied Because The Undisputed Facts Demonstrate That The Board Has Failed To Eliminate All Vestiges Of The Prior Dual System To The Extent Practicable.

PAISD provides scant evidence of what affirmative steps it has taken to eliminate the vestiges of the prior dual system to the extent practicable. Instead, it points to the demographic changes that have occurred in the district and to the fact that this case was first filed 33 years ago. PAISD correctly notes that desegregation lawsuits such as this one were never intended to last forever. However, the mere passage of time does not absolve the District of its affirmative constitutional obligation to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green, 391 U.S. at 437-438. The "lingering effects" of segregation do not "magically dissolve" without affirmative efforts by the school district, and the Constitution "does not permit the courts to ignore today's reality because it is temporally distant from the initial finding that the school system was operated in violation of the constitutional rights of its students." Brown, 978 F.2d at 590; see also 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.").

That said, the goal of the United States in this lawsuit is no different than its goal in any of its other desegregation lawsuits – to ensure that defendant school districts fully comply with their desegregation obligations so that the lawsuits can be dismissed once they have satisfied the constitutional standards for achieving unitary status. Indeed, the United States has repeatedly offered its assistance to PAISD to ensure that PAISD's actions move the district toward, rather than away from, achievement of unitary status.

The lone “evidence” that PAISD attaches in support of its motion is a January 3, 1989 letter and an incomplete draft document that was a first attempt at drafting an agreed record regarding PAISD’s progress toward establishment of a unitary system.¹⁴ These documents have little, if any, relevance today. First, as the letter and incomplete draft document indicate, more work had to be done before final conclusions could be drawn and before a final agreement could be reached; at a minimum, a site visit had to be conducted and additional statistical information was needed.¹⁵

That process was never completed. It does not appear that any detailed analysis was undertaken to determine whether PAISD had, in fact, eliminated the vestiges of its prior segregated system. Nor does it appear that PAISD provided the United States with any of the statistical evidence requested. The draft document and letter are simply insufficient to allow a determination, or even an inference, that PAISD was unitary in 1989.

Second, the law governing dismissal of desegregation lawsuits has changed substantially since 1989. In 1991, for example, the Supreme Court held that full implementation of the decree and compliance with the Court’s orders for a reasonable period are prerequisites to achieving unitary status. Dowell, 498 U.S. at 249-50. The United States has since concluded, and PAISD has since admitted, that it failed to comply with the terms of the operative 1982 desegregation

¹⁴ Case files from the 1989 time period are archived at the Federal Records Center. The United States has requested that these archived documents be retrieved but they have not yet been obtained.

¹⁵The language of the draft document upon which PAISD relies is nothing other than a bracketed “Draft Conclusion” in an incomplete draft document. If it suggests anything at all, it suggests that this was a conclusion that the United States had hoped to reach upon completion of the process it had undertaken, and provided that the site visit and additional statistical information supported such a conclusion.

order and with applicable desegregation standards “in significant respects.” See 2001 Consent Decree at 4.

Third, and perhaps most importantly, the relevant issue before this Court is whether PAISD is, in fact, unitary today – not whether the United States in 1989 may have made preliminary and contingent opinions based upon incomplete data.¹⁶

In short, the burden remains with PAISD to demonstrate that it has eliminated all vestiges of the prior dual system to the extent practicable. It has not satisfied its burden in 2003; an incomplete draft proposal from 1989, which was never submitted to this Court for approval, is not a substitute for such a determination. Indeed, the undisputed facts demonstrate that PAISD has not eliminated all such vestiges.¹⁷

A. Student assignment

Citing the current racial composition of its student enrollment, PAISD hails its system as “a model of systemic diversity.” PAISD’s Memorandum at 2. PAISD further avers that “any attempt to bring legal action against PAISD based on current racial ratios would be dismissed as frivolous.” Id. PAISD misconstrues the law and its obligations. PAISD’s system-wide diversity

¹⁶Regardless of the United States’ intent with respect to the 1989 letter, the parties decision to negotiate and enter into the subsequent 2001 Consent Decree reflects an intention by both parties to resolve outstanding legal issues regarding PAISD’s desegregation obligations. Public policy favors such settlements. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 881 (1994).

¹⁷The United States addresses herein only those Green factors for which the undisputed facts demonstrate that the vestiges have not been eliminated. The facts are likely to be in dispute or have not yet been established with respect to other Green factors, such as facilities, extra-curricular activities and transportation.

is not at issue. Rather, the inquiry is properly focused on a comparative analysis of individual schools.

By its own admission, as of 2001, PAISD had not yet fully dismantled the prior dual system and had “a continuing duty to take action necessary to create and maintain a unitary, non-racial system.” See Defendant Port Arthur Independent School District’s Proposed Findings of Fact and Conclusions of Law on Motion to Intervene, dated November 12, 2001, at II.8. (emphasis added). It was PAISD’s intention that the 2001 Consent Decree would further, if not complete, the process of dismantling the prior dual system. Id. at I.7 (“The Consent Decree seeks to implement a remedy that promises to be more effective at disestablishing a dual system than the remedies contained in the existing 1982 Order.”). To date, however, PAISD has done little, if anything, to eliminate the vestiges of the prior dual system to the extent practicable at the elementary and middle school levels; it is undisputed that the same number of predominantly black schools exist now as existed at least 14 years earlier. See PAISD’s Memorandum at 5.

PAISD’s sole argument in support of its conclusion that vestiges in the area of student assignment have nonetheless been eliminated is that the District has experienced great demographic change. To be sure, the demographics of the school system are factors to be considered. PAISD’s argument puts the cart before the horse, however. “Not until all vestiges of the dual system are eradicated can demographic changes constitute legal cause for racial imbalance in the schools.” Lee v. Macon County Bd. of Educ., 616 F.2d 805, 810 (5th Cir. 1980) (holding that the school district was still under an affirmative duty to dismantle the dual system “regardless of current housing patterns”); see also Freeman, 503 U.S. at 494 (“Once the racial imbalance due to the de jure violation has been remedied, the school district is under no

duty to remedy imbalance that is caused by demographic factors.”).

Until PAISD implements an elementary and middle school plan that furthers desegregation, it will have done nothing to eliminate the remaining vestiges of the prior dual system.

B. Faculty and staff assignment

PAISD cannot carry its burden of proving that it has eliminated all vestiges of the prior dual system to the extent practicable in the area of faculty and staff assignments. As conceded by PAISD as recently as the 2001 Consent Decree, it “has assigned faculty in a way that perpetuates the historic racial identity of its schools.” 2001 Consent Decree at 5. As PAISD also concedes, almost half of its schools remain out of compliance with its Singleton obligations. This, alone, is evidence that it has not yet eliminated all vestiges of the prior dual system. See United States v. Texas Education Agency, 564 F.2d 162, 173 (5th Cir. 1977) (“faculty segregation is especially probative of a school board’s intent to discriminate because of the high degree of control school boards exercise over such matters as faculty placement”).

Further evidence lies in PAISD’s annual court filings. In the 2001 Consent Decree, PAISD committed to implement procedures that would ensure that the racial identifiability of its faculty and staff would not be perpetuated. Yet between 2000-2001 and 2002-2003, the racial identifiability of the faculty and staff at the schools with the largest white and black enrollments has increased. At Austin Elementary/Middle (43.7% white), the racial composition of the faculty and staff has increased from 8.2% above the district-wide average of 40.5% white to 19.3% above the district-wide average of 40.1% white. Compare PAISD’s 2001 Annual Report with PAISD’s 2002 Annual Report. At Dequeen Elementary (91.5% black), the racial composition of

the faculty and staff has increased from 14.8% above the district-wide average of 51.9% black to 19.7% above the district-wide average of 51.7% black. Id.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny PAISD's Motion. Contrary to PAISD's assertions, it has neither complied fully with its desegregation orders and decrees nor eliminated all vestiges of its prior dual system.¹⁸

Respectfully submitted,

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¹⁸In the event that the Court does not summarily deny PAISD's motion, the United States will request an opportunity to take appropriate discovery to prepare for the evidentiary hearing that would need to be held before PAISD can be declared to have achieved unitary status. See Freeman, 503 U.S. at 474 ("Proper resolution of any desegregation case turns on a careful assessment of its facts."); Monteilh v. St. Landry Parish Sch. Bd., 848 F.2d 625, 628 (5th Cir. 1998)(district court must hold a hearing to determine whether school district can be declared to have achieved unitary status); United States v. Lawrence County Sch. Dist., 799 F.2d 1031, 1038 & n.6 (5th Cir. 1986), reh'g denied, 808 F.2d 1063 (5th Cir. 1987) (listing Fifth Circuit cases requiring a hearing before jurisdiction is relinquished in school desegregation case).

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2003, I served copies of the foregoing to counsel of record by facsimile and by first class U.S. mail, postage prepaid, addressed to:

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ATTACHMENT 1