



simultaneously files, with the consent of the District, a Joint Motion stipulating to the desegregation obligations in the 2003 Order that may be dismissed based on the District having achieved partial unitary status, and the limited set of obligations that should remain open while the District takes additional steps to achieve full unitary status. As explained in the accompanying Joint Motion, the United States and the District agree that the Court's approval of the proposed Stipulation provides the most efficient path toward full unitary status in this case and the best use of the Parties' and this Court's resources. The United States understands that counsel for Private Plaintiffs has chosen to file a separate response.

## **I. Procedural History**

Plaintiffs initiated this desegregation action on December 8, 1965. The United States intervened on January 20, 1966. On August 17, 1967, this Court issued an order requiring the desegregation of the Franklin County School District, followed by additional orders in August 1968, July 1970, and August 1970.

On August 15, 1994, this Court approved the merger of the Franklin County School District with the Franklinton City School District. Following the merger, the Department of Justice conducted a site visit in the District and discovered noncompliance with existing Orders and vestiges of discrimination in several areas of District operations. The June 14, 1996 Consent Order was issued to bring the District into compliance with its desegregation obligations and provide a plan for the merged school systems.

On April 13, 2000, the District moved for a declaration of unitary status. On June 24, 2002, the Court granted in part, and denied in part, the District's motion. The Court held that "the District has achieved unitary status in the following areas: (1) school transportation; (2) extracurricular activities; (3) school construction and facilities; (4) student transfers; and (5)

faculty desegregation.” June 2002 Order at 2. The Court denied the District’s motion with regard to student assignment, staff desegregation, and quality of education. *See id.* at 2-3. Following the Court’s decision and as directed by the Court, the parties engaged in good faith negotiations to create a desegregation plan to address the Court’s remaining concerns.

The resulting 2003 Order outlined the District’s remaining obligations to eliminate the vestiges of discrimination, to the extent practicable, in student assignment, desegregation of staff, and quality of education. 2003 Order at ¶¶ I-III. The 2003 Order set forth specific District obligations within these broader categories, including: academic achievement; advanced course offerings and enrollment; discipline; gifted and talented program; special education program; and student dropouts. *Id.* The 2003 Order also included annual reporting requirements regarding these areas. *See id.* ¶ IV. With respect to the area of student assignment, the Court issued subsequent orders to implement the Alternate 21 Plan on May 6, 2005, and to approve Plan 11 and the opening of Long Mill Elementary on August 22, 2008.

Since 2008, the United States has primarily monitored this case through its review of the District’s annual reports and periodic written and oral communications with counsel for the District. In accordance with the terms of the 2003 Order, the Board has annually reported to the Court, the United States, and Private Plaintiffs. In addition, the Parties regularly communicate out of court regarding the District’s annual reports and its compliance with its desegregation obligations. These discussions and supplemental exchanges of documents and data have led to improved reporting and compliance in certain areas of this case.

Since the Court’s October 2017 Order, the United States has worked extensively and collaboratively with the District to ensure a complete and accurate understanding of the District’s compliance with the 2003 Order. To that end, the United States conducted a site visit to the

District where the United States met with community members, toured six schools, and interviewed school- and District-level employees from December 3-5, 2017. Prior to and subsequent to the visit, the United States issued requests for information needed to ascertain the District's compliance in various areas. Given the Court's directions to the Parties in its November 13, 2017 Order, the United States also engaged in discussions with the District and counsel for the Private Plaintiffs about a joint filing that would outline the Parties' agreement regarding areas of the District's compliance. The United States and the District submit today for the Court's consideration a Joint Motion for Declaration of Partial Unitary Status and for Approval of Stipulation Regarding Student Assignment. To further support this joint filing and to clarify the record before the Court, the District recently filed some of its responses to the United States' information requests with the Court. *See* ECF No. 19.

## **II. Legal Standards**

To obtain a declaration of unitary status, a school district must show that it has: (1) fully and satisfactorily complied with the Court's decrees for a reasonable period of time; (2) eliminated the vestiges of prior *de jure* discrimination to the extent practicable; and (3) demonstrated a good-faith commitment to the whole of the Court's decrees and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance. *See Missouri v. Jenkins*, 515 U.S. 70, 87-89 (1995); *Freeman v. Pitts*, 503 U.S. 467, 491-92, 498 (1992); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248-50 (1991).

The Supreme Court has identified six areas, commonly known as the “*Green* factors,” that must be addressed as part of the determination of whether a school district has fulfilled its duties and eliminated the vestiges of the prior dual system to the extent practicable: (1) student

assignment; (2) faculty; (3) staff; (4) transportation; (5) extracurricular activities; and (6) facilities. *See Dowell*, 498 U.S. at 250 (discussing *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 435 (1968)). The Supreme Court also has approved consideration of other indicia, such as “quality of education,” as important factors for determining whether the district has met its desegregation obligations. *Freeman*, 503 U.S. at 492-93. A district court may allow incremental dismissal of the desegregation case before full compliance has been achieved in every area of school operations, thereby retaining jurisdiction over those areas not yet in full compliance and terminating jurisdiction over those areas in which compliance is found. *Id.* at 490-91.

### **III. Analysis**

Based on the United States’ review of the District’s annual reports and its larger record of implementing the 2003 Order established by supplemental information it has provided, the United States has determined that the District has not yet fully complied with some of the 2003 Order’s obligations regarding student discipline and the gifted and talented program. *See* 2003 Order ¶¶ III.C.1, C.3, C.4, D.3-5.<sup>2</sup> These obligations pertain to the *Green* factor of student assignment because the District’s discipline practices exclude high numbers of black students from schools and classrooms, and its gifted and talented program assigns students within schools. Each area of noncompliance is addressed below and would be retained under the proposed Stipulation.

#### **A. Student Discipline**

Based on the record and supplemental information provided by the District through site visits, correspondence, and telephonic conferences, the District has not fully complied with its obligations under Paragraphs III.C.1, C.3, or C.4 of the 2003 Order to ensure that student

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<sup>2</sup> As set forth in the Joint Motion and Stipulation, the United States and the District agree that many obligations contained in the Court’s 2003 Order can be dismissed based on the District’s record of compliance.

discipline is administered in a non-discriminatory manner. Specifically, the District has not yet fulfilled its obligations to: “adhere to a uniform code of conduct” (C.1); “monitor discipline data each semester during each school year” to ensure non-discrimination and to identify discipline concerns at specific schools (C.3); or to “identify schools that have developed procedures and practices” to effectively administer fair and non-discriminatory discipline, and to share that information with other District schools (C.4). *Id.* ¶¶ III.C.1, C.3, C.4.

Paragraph C.1 requires the District to “adhere to a uniform code of conduct.” *Id.* ¶ III.C1. Based on the United States’ review of District- and school-level discipline policies and the recent site visit to six schools, the District has not complied with this requirement. Though the District-wide Student Handbook contains a code of conduct, discussions with school principals and reviews of school websites revealed that several schools are applying their own inconsistent codes of conduct. *See, e.g.*, ECF No. 19-2 at 2-9. For example, although the District’s code of conduct provides for In-School Suspension (“ISS”) and most elementary schools regularly assign ISS, Youngsville Elementary School reported never using ISS and Franklinton Elementary School only returned to using ISS this year after an almost decade-long gap. Consequently, a student who committed a particular infraction could receive an ISS at most schools, while a student at Youngsville or Franklinton Elementary could receive an Out-of-School Suspension (“OSS”) for the same offense (even though the District’s code specifically provides for ISS as a disciplinary consequence). Schools’ inconsistent use of ISS likely contributes to the high numbers of black elementary school students, including even Kindergartners, who are excluded from certain schools through OSS. *See, e.g.*, ECF No. 13-11 at 8-11 (showing that 52 K-5

students at Franklinton Elementary received OSS, 49 of whom committed one of the “Top 5 Offenses,” and 31 of these 49 students were black (63%).<sup>3</sup>

Paragraph III.C.3 requires the District to “monitor discipline data each semester during each school year to ensure that discipline is being administered fairly and without regard to race” and to “identif[y] data that indicates a high number of black students in specific schools ... are being disciplined by [ISS], [OSS], or some other forms of discipline.” 2003 Order ¶ III.C.3. Interviews with Central Office personnel revealed that the District looks at discipline data only on an annual basis to ensure the accuracy of data required for certain state reports, not for the purposes prescribed in Paragraph III.C.3. The District’s response to one of the United States’ information requests confirms this noncompliance: “We have not recently identified any schools pursuant to III.C.3.” ECF No. 19-2 at 27.

Had the District monitored its discipline data twice a year in accordance with Paragraph III.C.3, it would have identified high numbers of black students being excluded from several of its schools via OSS and from the classroom through ISS. Such monitoring also would have revealed the lack of uniformity in schools’ use of the District’s code of conduct, particularly with respect to ISS.<sup>4</sup> The District did not identify these school-specific issues under Paragraph III.C.3 even after the United States and Private Plaintiffs had notified the District of their concerns

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<sup>3</sup> The “Top 5 Offenses” is the term that Part J of the 2017 Annual Report uses for the five offenses that resulted in the highest number of OSS. *See, e.g., id.* at 5-10. Part J breaks down the 49 individual students at Franklinton Elementary School (“FES”) who received an OSS for a Top 5 Offense by race, *id.* at 8, 10, but did not break down the race and grade of the 52 students who received an OSS at FES. *See id.* at 11-12. The District provided supplemental data showing that 8 of the 52 were Kindergartners, of whom 7 were black.

<sup>4</sup> Though the District’s 2017 Annual Report represents that “[t]he [ISS] Process is reviewed annually to ensure that academic opportunity is not lost,” ECF No. 13-17 at 4, the review was inadequate because it missed these compliance problems.

regarding the high numbers of black students being suspended at several schools through correspondence and discussions in 2013, 2014, 2015, and 2017.<sup>5</sup>

The 2017 Annual Report reinforced these ongoing concerns. The discipline data for the elementary schools is particularly concerning and should have triggered closer District monitoring of these schools under Paragraph III.C.3. For example, in SY 2016-17, Franklinton Elementary had the same number of students receiving OSS (52) as the District's largest high school (Franklinton High), even though Franklinton Elementary enrolls less than half (437) the population of the high school (1,003). *See* ECF Nos. 13-2 at 2; 13-11 at 11. Franklinton Elementary also had more total incidents of black students receiving OSS than five of the District's seven traditional secondary schools. *See* ECF No. 13-11 at 4. Moreover, 70% (79) of the 113 incidents leading to OSS at Franklinton Elementary in SY 2016-17 involved suspensions of black students even though the school was only 41% black. ECF Nos. 13-2 at 2; 13-11 at 4.

High numbers of black students receiving OSS are not unique to Franklinton Elementary. For example, in each of the last three years (2015, 2016, and 2017), at least two District schools reported issuing more than 75 OSS to black students. *See* ECF Nos. 10-3 at 4; 13-11 at 4; 19-2 at 25. Moreover, in almost every one of the last five years, at least two elementary schools per year have issued 32 or more OSS to black students, while no elementary school issued that many OSS to white students during those years. *See* ECF Nos. 7 at 77; 10-3 at 4; 13-11 at 4; 19-2 at 25. For example, in SY 2016-17, Louisburg Elementary issued OSS to 34 students for the top five offenses, and 71% (24) of them were black even though the school was only 37.5% black. *See* ECF No. 13-2 at 2; ECF No. 13-11 at 8, 10.

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<sup>5</sup> The United States only recently became aware of the concerning use of ISS because it was not a required part of the District's annual report. The proposed Stipulation provides for ISS data to be included in future annual reports.



Despite these concerning data at several schools, the District did not do the required monitoring to identify these “high number[s] of black students in specific schools” or to “investigate the causes of the high discipline rate[s] among black students at each school in question.” *See* 2003 Order ¶ III.C.3. In addition, the District did not take adequate “steps to address the causes, including, but not limited to, training personnel on administering discipline in a fair and nondiscriminatory manner, reviewing and revising discipline procedures and practices, providing classroom management training, and creating corrective action plans for individual faculty and staff.” *See id.* ¶ III.C.3. The District’s 2017 Annual Report states that the student code of conduct was “recently reviewed, revised, and updated.” ECF No. 13-17 at 4. However, the United States’ review of the District codes of conduct from SY 2015-16 through SY 2017-18 identified no substantive changes in the last three school years. Moreover, the District’s revisions to its code between SY 2014-15 and SY 2015-16 exacerbated the schools’ inconsistent use of ISS, OSS, and other discipline by removing important guidance about “Disciplinary Action Levels” that explain differences among levels of punishments. *See* ECF No. 19-2 at 2-24.

In addition, the District has not adequately complied with Paragraph III.C.4. This Paragraph requires the District to identify schools “that have developed procedures and practices that have assisted the school in administering discipline in a fair and nondiscriminatory manner” and then to share that information with all schools in the District. *See id.* ¶ III.C.4. In the 2017 Annual Report, the District stated that “Positive Behavior Intervention Support (PBIS) has been successfully implemented in all elementary and middle schools.” ECF No. 13-17 at 5. The United States believes that PBIS could be an effective “step to address the causes” of high disciplinary rates among black students under Paragraph III.C.3 and that certain schools could learn to use PBIS well and become models for others under Paragraph III.C.4. However, the

United States observed that each visited school defined and applied PBIS differently, and only sometimes as a way to address high discipline rates.

As set forth in the accompanying Joint Motion and Stipulation, the United States and the District agree that the District can take further steps to fulfill the terms of Paragraphs III.C.1, C.3, and C.4. These steps will include: working collaboratively to revise the District's code of conduct to ensure its uniform application across schools under Paragraph III.C.1; investigating the causes of the high discipline rates among black students at several of the District's schools under Paragraph III.C.3; and addressing those causes under Paragraph III.C.4 through revisions to the code of conduct and improving schools' implementation of PBIS.

**B. Gifted and Talented Program**

Based on the record and supplemental information provided by the District through site visits, correspondence, and telephonic conferences, the District has not fully complied with its obligations under Paragraphs III.D.3-5 of the 2003 Order to ensure that its Academically and Intellectually Gifted ("AIG") program is administered in a non-discriminatory manner. Specifically, the District has not yet fulfilled its obligations to: encourage teacher referrals of potentially qualified students of all races into the program (D.3); "conduct outreach to minority students at each elementary and middle school" about the program (D.4); or monitor its AIG data each semester to identify, investigate, and address the causes of "low numbers of black students in specific schools" who are referred to or qualify for the program (D.5). *See* 2003 Order ¶¶ III.D.3-5.

The 2003 Order requires the District to "encourage teachers, through training, recognition, evaluation, and other initiatives, to identify, and refer for assessment, students of all races who may be able to qualify for the gifted/talented program." *Id.* ¶ III.D.3. In recent years,

however, the District has reported a net decline in teacher referrals, including a large drop in the number of teacher-referred black students. *Compare* ECF No. 7 at 84-87 (191 teacher referrals of whom 33 were black in SY 2012-13) *with* ECF No. 19-3 at 7 (44 teacher referrals of whom 9 were black in SY 2016-17). In addition, the District reported that some teachers had not referred minority students who had qualifying end-of-year grades in SY 2014-15 because they rated them “low” on a check list “due to misconceptions about gifted characteristics.” *See* ECF No. 19-3 at 4.<sup>6</sup> The District attributed the decline in AIG referrals to its implementation of a universal screening process.<sup>7</sup> While the District’s use of universal screening is a positive step, the District’s overall record of AIG referrals and its own observations about its teachers’ misunderstanding of gifted characteristics indicate that teachers need further support and training to properly identify and refer “students of all races who may be able to qualify for the gifted/talented program.” 2003 Order ¶ III.D.3.

The 2003 Order also requires the District to “conduct outreach to minority parents and students at each elementary and middle school” to inform them of the AIG program, including the referral and evaluation policies and procedures. *Id.* ¶ III.D.4. The District’s last five annual reports have not identified any outreach targeted to minority parents and students. *See* ECF Nos. 7, 8, 9, 10, and 13. While the District has held general meetings to inform parents about the AIG program in the past, attendance by black parents at both school-level and district-level meetings

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<sup>6</sup> Though the District asserts that “many” of these students were referred and qualified for AIG in SY 2016-17, *id.*, none of the black students referred by teachers in SY 2016-17 was identified as AIG. *See* ECF No. 19-3 at 7.

<sup>7</sup> Between SY 2012-13 and SY 2014-15, the District changed its gifted referral and identification process by introducing the Cognitive Abilities (“CogAT”) and Iowa Test of Basic Skills (“ITBS”) into the process as a universal screener. Every District third-grader is now administered the CogAT; all students scoring at or above 90% are automatically referred for evaluation for the AIG program. Students with scores of 80-90% on the CogAT are also administered the ITBS; students scoring 90% or above on the ITBS are also automatically referred for evaluation for the AIG program.

was low. *See, e.g.*, ECF No. 8-1 at 102. The District's 2017 Annual Report identified no such events or initiatives at all. *See* ECF No. 13-12 at 2-4.

Only through its requests for supplemental information did the United States learn that in SY 2016-17 the District began to send AIG brochures home with parents at the open house nights and created a District Advisory AIG Leadership Team, which engages in parent outreach strategy discussions. *See* ECF No. 19-3 at 4-5. While these general parent outreach initiatives are positive, they are so recent that more time is required to evaluate whether they are sufficiently targeted and effective to satisfy Paragraph III.D.4. Supplemental district reporting shows that parent referrals of black students to the AIG program remain quite low. *See* ECF No. 19-3 at 7. The proposed Stipulation would retain Paragraph III.D.4 for a limited period to permit the District to determine whether its outreach efforts are yielding the intended results.

Finally, the District has not fully complied with its obligations to monitor the AIG program under Paragraph III.D.5, which would have alerted the District to the low numbers of parent and teacher referrals and the need for additional teacher training and minority parent outreach discussed above. Under Paragraph III.D.5, the District must monitor the AIG program data "each semester during each school year to ensure that the [AIG] program is being administered fairly and without regard to race." 2003 Order ¶ III.D.5. When the District identifies "low numbers of black students in specific schools" who are being referred to or enrolled in the AIG program, the District must "investigate to determine the cause(s) of the low referrals and/or qualification rates among black students at each school in question and, if appropriate, take steps to address the cause(s)." *Id.* According to the District's annual reports, the District reviews its AIG data at the end of the year, not each semester as required. *See* ECF No.

8-1 at 102-103.<sup>8</sup> Further, as explained below, the District's annual review overlooked schools with low referral and eligibility rates, did not prompt investigation into the causes of those rates, and did not adequately address those causes.

Had the District monitored its AIG data in accordance with Paragraph III.D.5, it would have identified several schools where the black AIG student population has significantly declined, as well as schools where the number of black AIG students is persistently low. For example, between 2009 and 2017 the number of black AIG students fell from 17 to 2 at Bunn Elementary, from 21 to 9 at Bunn Middle, and from 13 to 7 at Terrell Lane Middle. *Compare* ECF No. 19-3 at 9 *with* ECF No. 13-12 at 9-10. The 2017 Report also reveals schools that did not improve their low numbers of black AIG students over time. For example, in SY 2013-14, the Franklinton, Laurel Mill, and Louisburg elementary schools each reported only one black AIG student. *See* ECF No. 8-2 at 23-30. Three years later, Franklinton reported none and Laurel Mill and Louisburg reported only one. *See* ECF No. 13-12 at 9-10. In fact, Franklinton reported an all-white AIG program despite its enrollment being 64% minority. *Id.*; ECF No. 13-2 at 3.

Proper District monitoring each semester would have identified the declining and persistently low numbers discussed above and should have triggered an inquiry into the causes of these numbers and an appropriate response.<sup>9</sup> The last three annual reports failed to show that such an inquiry or response occurred. *See* ECF Nos. 13-12 at 1-4; 10-4 at 2-4; 9-2 at 2-4. The 2017 Report includes no discussion of the AIG program in Part P, *see* ECF No. 13-17,<sup>10</sup> and

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<sup>8</sup> The District has not since indicated in its more recent reports that it has changed its monitoring process in compliance with Paragraph III.D.5.

<sup>9</sup> For the past several years, the District's annual reports have stated that the elementary and middle schools "have seen an increase in underrepresented subgroups being represented in the AIG population, with increases each year over the last few years." ECF No. 13-12 at 4. Inadequate monitoring likely explains the inaccuracy in this statement.

<sup>10</sup> In 2014, the United States asked the District to identify the steps it had taken under Paragraph III.D.5 because the 2013 Annual Report did not address this, and the United States explained that Part P of future reports should do so. However, Parts P of the 2014, 2015, and 2016 Annual Reports do not include evidence of the District's compliance with Paragraph III.D.5. *See* ECF Nos. 8-2 at 83-91; 9-3 at 41-49; 10-6 at 38-44.

indicates that staff development on AIG identification and evaluation procedures are standardized across all schools, regardless of the AIG referral or qualification rates of black students. *See, e.g.*, ECF No. 13-12 at 2-4.

The United States and the District agree that the District can take further steps to fulfill its obligations under Paragraphs III.D.3-5, as set forth in the accompanying Joint Motion and Stipulation. For example, the District itself reported that it is considering using alternative scores, such as CogAT local percentiles, as a step to identify a more representative AIG population. *See* ECF No. 19-3 at 6. Leaving these paragraphs open per the Joint Motion and Stipulation will provide the District time to implement this step and other strategies.

### **Conclusion**

The United States respectfully requests that the District remain subject to the desegregation obligations in Paragraphs III.C.1, III.C.3, III.C.4, and III.D.3-5 of the 2003 Order, as well as the related reporting requirements, until the District has fulfilled those obligations. This could be accomplished by approving the Joint Motion and Stipulation.

This 12<sup>th</sup> day of January 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of filing to all registered counsel of record.

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