

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:65-CV-01796-FL

HAROLD DOUGLAS COPPEDGE, et al.,)	
Plaintiffs,)	
)	
UNITED STATES OF AMERICA,)	
Plaintiff-Intervenor,)	MEMORANDUM OF LAW IN SUPPORT
)	OF JOINT MOTION FOR
v.)	DECLARATION OF
)	PARTIAL UNITARY STATUS
THE FRANKLIN COUNTY BOARD OF)	
EDUCATION, et al.,)	
Defendants.)	

In accordance with the Court’s Orders of February 6, February 27, and October 29, 2018, along with Local Rules 7.1 and 7.2, the Plaintiff-Intervenor United States of America (“the United States”), and Defendant, Franklin County Board of Education (“the District”), submit this Memorandum of Law in Support of their Joint Motion for Declaration of Partial Unitary Status. As grounds for their Joint Motion, the United States and the District refer this Court to the reasons enumerated in their filings dated January 12, 2018 (*see* DE 21 & DE 22), and to the Joint Status Report filed on October 23, 2018 (*see* DE 30), and state the following:

I. Procedural History

On June 25, 2002, this 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.” 2002 Order at 2. At the same time, the Court left open the District’s desegregation obligations in the areas of student assignment, staff desegregation, and quality of education. *Id.* at 2-3.

On June 17, 2003, the Court entered a Consent Order (“2003 Order”) that required the

District to take additional steps to fulfill its desegregation obligations with respect to student assignment, staff, and quality of education. The 2003 Order required the District to file annual reports regarding its compliance. 2003 Order ¶ IV. After the District filed its annual report in October 2017, the Court directed the Plaintiff parties to identify any areas where the District was not in compliance with the 2003 Order. On January 12, 2018, Plaintiff-Intervenor United States filed its Response to the Court, in which it identified two areas of District noncompliance that pertain to the assignment of students within schools: (1) discipline that excludes students from schools and classrooms; and (2) the referral and assignment of students to the gifted and talented program. (DE 21.) With the consent of the District, the United States simultaneously filed a Joint Motion to declare the District partially unitary in staff desegregation and several areas of the 2003 Order pertaining to quality of education, and for approval of a Stipulation which would keep the area of student assignment open while the District phases out its majority-to-minority (“M-to-M”) program and fulfills its desegregation obligations in the 2003 Order regarding its assignment of students within schools with respect to discipline and its gifted and talented program. (DE 22.)

In a separate filing on January 12, 2018 (DE 23), counsel for Plaintiffs agreed with the United States’ identification of areas of District non-compliance with the 2003 Order discussed in the United States’ filed Response (DE 21), and concurred in the Joint Motion and proposed Stipulation (DE 22) to the extent they asked the Court to retain jurisdiction over those areas of the 2003 Order. However, counsel for Plaintiffs asked the Court to require the District to provide notice of the proposed Stipulation and invite public comment before dismissing any part of the 2003 Order. (DE 23 at 2.)

On February 6, 2018, the Court dismissed the Joint Motion without prejudice and

directed the Parties to develop a form of notice and opportunity for public comment regarding the proposed Stipulation. (DE 24 at 3.) On February 27, 2018, the Court approved the proposed schedule for notice and comment and the relevant forms. (DE 27.) Having provided the public appropriate notice and an opportunity to submit oral or written comments, the Parties filed with the Court a Joint Status Report summarizing the public comments, none of which opposed the proposed Stipulation. (DE 30 at 2-3.) The Parties also notified the Court that they have continued to work cooperatively to address the District's outstanding desegregation obligations under the 2003 Order. *Id.* at 3. The Parties also alerted the Court to their intention to renew the Joint Motion for Declaration of Partial Unitary Status and Approval of Stipulation. *Id.* In a text order dated October 29, 2018, this Court gave the Parties 60 days to file their Joint Motion. In accordance with the Court's Order and the Local Rules, the United States and the District have today filed a Joint Motion and Proposed Order along with this Memorandum of Law. The substance of the proposed Stipulation that was presented for public comment has been fully incorporated into the Proposed Order.

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 fulfilled 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. Argument

A. The United States And The District Agree That The District Has Complied With Certain Desegregation Obligations In The 2003 Order For A Reasonable Period Of Time And Eliminated Those Vestiges Of Discrimination To The Extent Practicable

Since the Court’s October 2017 Order, the United States has engaged in productive discussions with counsel for the District and Private Plaintiffs regarding the status of the District’s compliance with the 2003 Order. On multiple occasions the United States requested, and the District provided, supplemental information regarding its implementation of the 2003 Order. The United States has also conducted three site visits to the District, in December 2017, April 2018, and October 2018, in order to assess compliance at the District and school levels and interview District officials and school personnel. The United States also observed the public meeting hosted by the District on October 8, 2018, as part of the District’s compliance with the public notice requirements ordered by this Court. The District continues to work with the

Plaintiff parties to continue making progress toward meeting its outstanding desegregation obligations under the 2003 Order.

After a thorough review of the record in this case and supplemental information provided by the District, along with the ongoing discussions among all parties in this case, the United States and the District agree that the District has in good faith complied with the following desegregation obligations in the 2003 Order for a reasonable period of time and eliminated the vestiges of discrimination to the extent practicable:

1. Paragraphs I.A-F requiring a majority-to-minority transfer program and other relief regarding student assignment;
2. Paragraphs II.A-C requiring the desegregation of the District's staff;
3. Paragraphs III.A.1-4 requiring steps to develop all students' academic potential and achievement;
4. Paragraphs III.B.1-4 requiring steps to ensure advanced courses are offered and operated in a nondiscriminatory manner;
5. Paragraph III.C.2 requiring the District to operate at least one program as an alternative for students faced with suspension;
6. Paragraphs III.D.1, D.2, and D.6 requiring various steps to ensure the fair and nondiscriminatory administration of the gifted and talented program;
7. Paragraphs III.E.1-4 requiring various steps ensure the fair and nondiscriminatory administration of the special education program; and
8. Paragraphs III.F.1-4 requiring steps to address high student dropout rates among black students.

B. The United States And The District Agree That The *Green* Factor Of Student Assignment Should Remain Open Until Orderly Termination Of The District's Majority-To-Minority Transfer Program And District Fulfillment Of The Terms Of The 2003 Order With Regard To Discipline And The Gifted And Talented Program

Based on the Parties' ongoing dialogue and in-depth review of the record in this case, the United States and the District agree that the *Green* factor of student assignment should remain open until all current participants in the District's M-to-M transfer program complete the terminal grade at their receiving school (*e.g.*, 5th, 8th, or 12th grade) and the District fulfills its desegregation obligations under the 2003 Order regarding the administration of discipline and its gifted and talented program. To avoid seriously disrupting the education of the students who have participated in the M-to-M program, the United States and the District have agreed to allow current participants in the District's M-to-M program to complete the terminal grade at their receiving school (*e.g.*, 5th, 8th, or 12th grade). During this phase-out, the District has agreed to continue to provide transportation to all participants in the M-to-M program who currently receive transportation services and to report annually (by October 15) to the Plaintiff parties the number of currently enrolled students with an M-to-M or related hardship transfer by race, grade, and school. The District has also agreed to continue to file the enrollment data required by Paragraph IV.A of the 2003 Order until the District achieves full unitary status.

The United States and the District also agree that the District's desegregation obligations under the 2003 Order regarding discipline (Paragraphs III.C.1, III.C.3, and III.C.4) and the gifted and talented program (III.D.3, III.D.4, and III.D.5) should remain in effect until the District makes a showing to the Court that it has fulfilled these remaining desegregation obligations. The District continues to engage with the Plaintiff parties regarding its discipline data collection and analysis to ensure the District is meeting not only its reporting obligations but also making progress toward meeting its desegregation obligations with regard to discipline. As part of this

process, the District has agreed to include in future annual reports a copy of its Code of Conduct, a narrative description of changes made to its discipline policies over the past year, and the in-school suspension data for each school (mirroring the out-of-school suspension data already required in Part J of the annual report).

IV. Conclusion

For the foregoing reasons, the United States and the District respectfully request that the Court grant their Joint Motion for Declaration of Partial Unitary Status by entering the Proposed Order.

Respectfully submitted this 14th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 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.

/s/ Ceala E. Breen-Portnoy
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