

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

FILED

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

ANTHONY T. LEE, *et al.*,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenors

and

Amicus Curiae,

NATIONAL EDUCATION
ASSOCIATION,

Plaintiff-Intervenor,

v.

MACON COUNTY BOARD OF
EDUCATION,

Defendants.

Civil Action No. 70-251-S

FORT PAYNE CITY
BOARD OF EDUCATION

CONSENT ORDER

This Consent Order arises out of the good faith efforts of Plaintiff-Intervenor and Amicus Curiae United States of America ("United States") and Defendant Fort Payne City Board of Education ("the Board") to address and resolve the Board's school desegregation obligations. This agreement is jointly entered into by the United States and the Board. The Board agrees to comply with the terms of this Consent Order.

118-1-21

I. PROCEDURAL HISTORY

This action is part of the statewide school desegregation litigation, *Lee v. Macon County Board of Education*, which was initiated in 1963. On July 16, 1963, the United States was added as plaintiff-intervenor and amicus curiae "in order that the public interest in the administration of justice would be represented." *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 460 (M.D. Ala. 1967). On March 22, 1967, the Court ordered the State Superintendent of Education to notify several school systems, including the Board, that they were required to adopt a desegregation plan for all grades beginning with the 1967-68 school year. *Id.* at 482. On June 19, 1970, this case was transferred from the Middle District of Alabama to the Northern District of Alabama, where Macon County is located.

On July 25, 1974, the Court entered an order ("1974 Order") applicable to the Board and certain other defendant school districts, stating that those districts "ha[d] been operating a unitary school system for the past three years, and that all litigation pertaining to compliance with the orders of the Court ha[d] been satisfactorily resolved." 1974 Order at 1. The 1974 Order dissolved the regulatory injunction in place at the time, replacing it with a permanent injunction, which held that the Board, its superintendent, and its individual board members were "permanently enjoined from operating a dual system of racially identifiable schools" and were to "take no action which tends to segregate or otherwise

discriminate against students or faculty by or within school on the basis of race, color or national origin." *Id.* at 1-2. The Board was further ordered to take specific actions with respect to student assignment, faculty and staff, transportation, school facilities, and student transfers. *Id.* at 2-3. With respect to faculty and staff, the Court ordered that "[s]taff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin." *Id.* The Court placed this case on its inactive docket, subject to reactivation "on proper application by any party, or on the Court's motion, should it appear that further proceedings are necessary." *Id.* The 1974 Order was not a grant of unitary status for the purpose of ending federal court oversight. *See United States v. State of Georgia, Troup Cnty.*, 171 F.3d 1344, 1350 (11th Cir. 1999) (holding, in a similar context, that the term "unitary" indicated that the defendant school Board "no longer officially sanctioned a dual school structure," but did not constitute a finding of "unitary status" or signal the end of federal court supervision). Thus, the Board remains subject to the 1974 Order. This Consent Order sets forth in detail the remaining area to be addressed and the actions to be undertaken by the Board. In other words, this Consent Order represents "a roadmap to the end of judicial supervision" of the Board. *See*

N.A.A.C.P., Jacksonville Branch v. Duval Cnty. Sch., 273 F.3d 960, 963 (11th Cir. 2001).

II. BACKGROUND

On November 21, 2006, the United States initiated a review of the Board's compliance with its desegregation obligations. In the course of that review, on multiple occasions between 2006 and 2011, the United States requested information and the Board produced data on student assignment, extracurricular activities, faculty and staff, and transportation. The United States reviewed the data provided by the Board, as well as publicly available data, to assess the Board's compliance with its obligations under the 1974 Order. The parties agreed that the Board had satisfied its obligations in the areas of transportation, extracurricular activities, and facilities. On December 5, 2012, the Court entered a Consent Order ("2012 Order") that set forth additional obligations in the areas of student assignment and faculty and staff, and the Board subsequently provided pertinent data to the United States. The United States agrees that the Board has now satisfied its obligation in the area of student assignment, and that compliance with this second Consent Order will result in the Board fulfilling its remaining obligation in the area of faculty and staff.

III. LEGAL STANDARDS

The ultimate inquiry in determining whether a school Board is unitary is

whether the Board has: (1) fully and satisfactorily complied in good faith with the court's desegregation orders for a reasonable period of time; (2) eliminated the vestiges of prior *de jure* segregation to the extent practicable; and (3) demonstrated a good faith commitment to the whole of the court's order and to those provisions of the law and the Constitution which were the predicate for judicial intervention in the first instance. See *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995); *Freeman v. Pitts*, 503 U.S. 467, 491-92, 498 (1992); *Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237, 248-50 (1991); *Manning v. Sch. Bd. of Hillsborough Cnty.*, 244 F.3d 927, 942 (11th Cir. 2001); *Lockett v. Bd. of Educ. of Muscogee Cnty. Sch. Dist.*, 111 F.3d 839, 843 (11th Cir. 1997).

The Supreme Court has identified six areas, commonly referred to as the "Green factors," which must be addressed as part of the determination of whether a school Board has fulfilled its duties and eliminated the vestiges of the prior dual school system to the extent practicable. These factors are: (1) student assignment; (2) faculty; (3) staff; (4) transportation; (5) extracurricular activities; and (6) facilities. *Green v. Cnty. School Bd. of New Kent Cnty.*, 391 U.S. 430, 435-42 (1968); *Jenkins*, 515 U.S. at 88; *Dowell*, 498 U.S. at 250. The Green factors are not intended to be a "rigid framework"; indeed, the Supreme Court has approved consideration of other indicia, such as quality of education, in evaluating whether a Board has fulfilled its desegregation obligations. See *Freeman*, 503 U.S. at 492-93.

A court may allow partial or incremental dismissal of a school 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 was found. *Id.* at 490-91.

With respect to faculty and staff assignment, the seminal Fifth Circuit case, *Singleton v. Jackson Municipal Separate School Board*, decided prior to the circuit split, held that “the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students.” 419 F.2d 1211, 1217-18 (5th Cir. 1969)(en banc), *rev’d in part on other grounds sub nom. Carter v. West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970).¹ The Court instructed that immediately, and if need be through the use of faculty reassignment, the racial composition of the faculty at each school reflect that of the Board-wide faculty ratio. *See id.* at 1218. Once the faculty racial composition at the schools is substantially similar to the Board-wide faculty average, “[s]taff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed,

¹ This case was decided prior to October 1981 and therefore is precedent in the Eleventh Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452 (codified in scattered sections of 28 U.S.C.); *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

and otherwise treated without regard to race, color, or national origin.” *Id.*

Subsequently, in *Fort Bend Independent School Board v. City of Stafford*, the Fifth Circuit, prior to the division of the Fifth and Eleventh circuits, stated that:

The proper inquiry to be undertaken in an effort to determine whether the [school Board] is now unitary is two-fold: first, the Board’s current employment practices must be non-discriminatory and in compliance with constitutional standards; second, the adverse effects of any earlier, unlawful employment practices must have been adequately remedied.

651 F.2d 1133, 1140 (5th Cir. 1981).² To this end, one factor examined is whether the school Board has made a “sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices.” *Id.* (citing *United States v. Tex. Educ. Agency*, 467 F.2d 848 (5th Cir. 1972)); *see also N.A.A.C.P., Jacksonville Branch*, 273 F.3d at 967 (finding a school board unitary in faculty and staff assignment because the Board, *inter alia*, “aggressively recruited black faculty and staff”).

This Court has determined that this Consent Order is consistent with the objectives and requirements of the Fourteenth Amendment to the Constitution of the United States of America, applicable federal law, and the extant orders in this case.

The Court thus **ORDERS, ADJUDGES, and DECREES** the following:

² This decision was entered on July 30, 1981.

IV. STIPULATED FACTS

In compliance with the 2012 Order, the Board provided reports regarding its student assignments and faculty and staff. Analysis of this data demonstrates that the Board has met the required standards in the areas of student assignment; however, concerns remain with regard to faculty and staff.

The three annual reports submitted by the Board did not satisfactorily meet the faculty and staff recruitment requirements of the 2012 Order. For example, the reports did not sufficiently establish on-site recruiting and interviews at each of the historically black colleges and universities in the region, as discussed in the Order at ¶ B.1. Additionally, the Board did not fully demonstrate compliance with ¶ B.2 of the Order, which required that vacancies be posted at least two weeks before the application deadline. The annual reports indicate that the percentages of African-American faculty and staff did not increase over the past three years. For example, in 2011-2012, 97.7% of the teachers and certified staff were white, while 1.9% were African-American; in 2014-2015, the teachers and certified staff were 98.2% white and only 0.9% African-American.

V. STIPULATED REMEDIES

As indicated above, the sole remaining issue identified by the United States in relation to the desegregation of the Board involves its efforts to recruit, hire, and retain African American faculty, administrators, and certified staff. Although the

Board denies any continuing liability for the disparities described above, the Board has agreed to take certain good faith, practicable steps to address these outstanding issues.³ The Court finds and the United States agrees that once these actions are fully implemented the Board will have remedied the remaining faculty/staff issues and will be entitled to a declaration of full unitary status after the conclusion of the monitoring/reporting period, as detailed below.

The Board will conduct hiring for all employment vacancies in the District on a non-discriminatory basis. Further, the Board shall:

1. Conduct on-campus recruitment and on-campus interviews at historically black colleges and universities in the region including, but not necessarily limited to, Alabama A&M University, Alabama State University, Concordia College Selma, Miles College, Oakwood University, Stillman College, Talladega College, and Tuskegee University.
2. Post notices of vacant personnel positions at least fourteen (14) calendar days before the application deadline, including on the Board and State Department of Education websites;
3. Send notices of all Board employment vacancies to the education placement officials at each public university in Alabama and all historically black

³ See *Jones v. Caddo Parish*, 704 F. 2d 206, 221 (5th Cir. 1983).

colleges and universities in Alabama (public and private) at least fourteen (14) calendar days before the application deadline;

4. Maintain records, with each such record to be maintained for a period of not less than three years, relating to the hiring or promotion of persons to all employment positions in the District.⁴ The Parties shall be permitted, without further order of the Court, to review and copy these materials, as well as any other materials related to the hiring and promotion of personnel, after giving at least two (2) weeks' notice to the Board.

5. Within fourteen (14) days of the entry of this Order, the Board shall contact the Intercultural Development Research Association ("Faculty Equity Consultant"), with a request for technical assistance and training on best practices related to the hiring and recruitment of diverse faculty and certified staff. The United States will also contact the Intercultural Development Research Association to request that it provide such assistance to the Board.

6. The Faculty Equity Consultant shall collaborate with the Board to complete a comprehensive review of the Board's hiring and recruitment policies

⁴ "Records" includes the following for each open position: (1) the name of each person who applied for and/or was considered for the position; (2) each person's application for the position (including, but not limited to, application forms, teaching certificates, references, and college transcripts); (3) the race of each applicant; (4) a description of each position filled; (5) the name and race of the person selected for the position; (6) copies of any interview questions used and/or interview notes taken for each applicant; (7) copies of any oral or written examination questions administered during the selection process; (8) the written responses of each applicant who was given a written examination; (9) the name and race of each person on the oral examination and/or interview panel; (10) the name and race of each person who scored the written examination; (11) a copy of any advertisements for the position, including the date(s) of publication in the media and/or posting or publication on an Internet website; and (12) a description of all recruitment efforts used to fill the vacancy.

and procedures. In conducting this review, particular attention shall be given to the manner in which the Board's hiring and assignment protocol affects:

- (a) the number of African American faculty and certified staff recruited, hired, and retained by the Board; and
- (b) the assignment of faculty and certified staff to schools on a non-discriminatory basis.

7. Drawing on the findings and conclusions the Faculty Equity Consultant makes as a result of the comprehensive review described in paragraph 6, the Board shall work with the Faculty Equity Consultant to propose revisions to its hiring and recruitment protocols and written procedures followed when filling vacancies.

Among other things, the proposed revisions shall:

- (a) clearly describe the Board's goal for achieving a diverse faculty and staff;
- (b) require that all Board personnel involved in recruitment and hiring follow a uniform set of guidelines/policies that identify and take account of the Board's affirmative desegregation obligations, including those related to the equitable assignment of faculty and certified staff among the Board's schools;
- (c) provide for the development and implementation of a targeted recruitment and hiring program designed to increase the number of African

American faculty and certified staff hired and retained by the Board, including specific provisions addressing the manner in which the Board announces and/or advertises vacancies, the Board's recruitment strategies, and the Board's interview and hiring process;

(d) include measures and protocols designed to ensure that African American faculty and certified staff are not disproportionately assigned to schools with disproportionately high numbers of African American students but instead are equitably distributed among schools with historically low numbers of African American students and schools with historically high numbers of African American students.

(e) require that all Board personnel involved in recruitment and hiring be trained annually on how to implement the new recruiting and hiring policies; and

(f) include any necessary improvements to procedures for documenting recruiting and hiring decisions, tracking the impact such decisions have on the racial composition of the Board's faculty and staff, and maintaining records appropriate for monitoring the Board's compliance with the revised recruitment and hiring policies and procedures.

8. The Board shall submit the proposed revisions to the United States and Plaintiffs ("Plaintiff Parties") for review no later than sixty (60) days after completion of the review and revision process undertaken by the Faculty Equity Consultant as set out above. The Plaintiff Parties shall advise the Board whether they approve or disapprove of the proposed revisions within thirty (30) days of receiving them. The Board shall implement all approved proposed revisions within thirty (30) days of receiving the Plaintiff Parties' approval. If the Plaintiff Parties object to certain of the proposed revisions, the parties will work together in good faith to develop mutually agreeable policies and procedures.

9. In consultation with the Faculty Equity Consultant, the Board shall develop and implement mandatory annual training for all faculty/staff involved in the recruitment, hiring, retention, or assignment of faculty/staff. The training shall cover the following, among other things:

- (a) the Board's affirmative desegregation obligations with respect to the recruitment, hiring, retention, and assignment of faculty, staff, and administrators; and
- (b) all targeted recruitment efforts and strategies designed to increase the number of qualified African American faculty/staff hired by the Board.

10. As soon as practicable but by no later than October 15, 2016, the Board shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under paragraphs 1 to 9 above.

C. Monitoring and Reporting

1. Beginning October 15, 2017, and continuing until the monitoring of this Consent Order has concluded, the Board shall provide the Plaintiff Parties with an annual status report describing all activity conducted pursuant to paragraphs 1 to 9 for the period since the entry of this Order or the last compliance report, whichever is later, containing the following information:

- (a) The number and percentage of principals, assistant principals, other administrators, guidance counselors, teachers, administrative assistants, and support staff (separately listing both certified and noncertified staff), by race, position, school, and grade level.
- (b) A list of the certified and non-certified staff of the District's central office, by position and race.
- (c) For each employment vacancy, listed separately by school and type of position (i.e., teachers, administrators, certified staff, and noncertified staff), the name and race (where voluntarily identified) of each individual who applied for the vacancy, each candidate who was interviewed for the vacancy, and the individual selected for the position.

(d) The specific efforts taken by the District to recruit black applicants for employment, including, for each recruitment trip (e.g., on campus interviews, job fairs), the college or university visited, the date and duration of each visit, and the names of the recruiters who visited the college or university, by race and position.

(e) For each advertisement or notice of an employment vacancy, a copy of the advertisement or notice, and a statement indicating when and where the advertisement or notice was published and/or posted.

(f) A statement of any changes the District has made or intends to make to its hiring forms, questions, and criteria, including copies of any such documents.

(g) All handouts, power points, agendas, and other materials used in connection with the Board's annual training on hiring and assignment protocol.

(h) Documentation reflecting the names and positions of all faculty/staff who received annual training on the Board's hiring and assignment protocol and the date(s) on which they received it.

VI. FINAL TERMINATION

Having found that the Board has satisfied its desegregation obligations in the area of student assignment, the Court hereby withdraws its jurisdiction over that


area of the case. Continued judicial supervision of this case will be limited to ensuring that the Board: (1) takes all actions identified in this Consent Order; and (2) refrains from taking any actions that reverse its progress in desegregating the school system. The parties commit to negotiate in good faith any disputes that may arise, but the Plaintiff Parties shall have the right to seek judicial resolution of any noncompliance.

The Board retains the burden of eliminating the vestiges of *de jure* segregation in the area still under this Court's supervision, and may move for a declaration of complete unitary status no sooner than forty-five (45) days after the Plaintiff Parties receive the October 2019 compliance report.

VII. EFFECT OF PRIOR ORDERS

The Court's 2012 Order is no longer in effect with regard to the sections addressing student assignment, and any other sections inconsistent with this Order. All other Orders not inconsistent herewith remain in full force and effect.

SO ORDERED, this 4th day of November, 2016.


ABDUL K. KALLON
United States District Judge


The following signatures of counsel indicate the parties' consent to the form and content of this Consent Order.


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