



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 8, 2013

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Dear Ms. Chappell:

This refers to two submissions of changes affecting voting for the board of trustees for the Beaumont Independent School District (BISD) in Jefferson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. First, on March 1, 2013, we received your submission of the BISD's adoption of the February 21, 2013, redistricting plan and accompanying notices and orders necessary for the election of three of the seven members of the board of trustees. Second, on March 19, 2013, we received your submission of the changes effectuated as the result of the March 18, 2013, ruling in *In re Rodriguez*, ___ S.W. 3d ___, 2012 WL 1189005 (Tex. App. Beaumont), as well as those changes adopted by the BISD to implement the state court's orders. We have received additional information concerning both submissions through April 4, 2013, including the denial of the stay request in *Rodriguez*, No. 09-13-00115 (Tex. App. Beaumont Mar. 27, 2013), and the court's ruling on the same day in *In re Neil*, No. 9-13-00144 (Tex. App. Beaumont).

Collectively, these changes would shorten the terms of four incumbents from four years to two years, such that all seven trustee positions would be up for election this year. These changes also would treat the candidate qualification period as having closed before the date of the court order, with the effect that in three districts that provide black voters with the ability to elect candidates of choice, the black-preferred incumbent trustees would be removed from their offices and replaced with the candidates they defeated in the last election (and who received virtually no support from black voters), without the incumbent trustees in those three districts having had notice that an election would be held in their districts or the opportunity to qualify for re-election. In particular, the information contained in the two submissions indicates that the state court ordered (1) the school district election be conducted on May 11, 2013, (2) using the redistricting plan that the BISD adopted on February 21, 2013, (3) with all seven trustee positions to be contested, (4) resulting in the terms of four incumbents, three of whom are elected from districts which provide minority voters with the ability to elect candidates of choice, being shortened from four to two years. In addition, (5) the BISD must deem all persons who filed and qualified for any district on or before March 1, 2013, to be placed on the ballot with (6) no additional time allowed for persons to qualify for those districts not identified in the February 21,

2013, election order and notice. Finally, the BISD must (7) designate those persons who qualified for Districts 1, 2, 3 and 5 as unopposed candidates. The BISD has adopted provisions for (8) the county to conduct the election, (9) the use of separate ballots, (10) three polling place changes, and (11) the use of county early voting locations and hours. Because these changes are directly related, the Attorney General must review them simultaneously. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. §§ 51.22(b) and 51.35.

According to the 2010 Census, the BISD has a total population of 132,225 persons, of whom 46,691 (35.3%) are white, 60,581(45.8%) are black, and 19,459 (14.7%) are Hispanic. The BISD's voting age population is 39.2 percent white, 43.3 percent black, and 13.5 percent Hispanic. Although citizenship rates are not available for the BISD, they are available for the City of Beaumont, which is wholly contained within the BISD and shares similar demographics. The American Community Survey for 2007 to 2011 estimates that of the city's voting age population who are citizens, 43.5 percent are white, 47.9 percent are black, and 5.4 are Hispanic.

At the outset, it is imperative to note the historical context in which the present submissions arise and which informs our analysis. On April 22, 1985, the United States District Court for the Eastern District of Texas in *United States v. Texas Education Agency (Beaumont Independent School District)*, No. 6819-CA (E.D. Tex.), ordered the use of single-member districts for the election of the seven school district trustees for the BISD. The court, in addition to ordering the BISD's method of election, also required that the trustees' terms would be staggered, with a subset of trustees chosen at each election. The BISD has continued the practice of using single-member districts with staggered terms for the past 26 years, through two redistricting cycles. Most recently, on April 2, 2008, the Attorney General informed BISD officials that no objection would be interposed under Section 5 to the change in the staggering of terms for the board of trustees to account for the change from three-year to four-year terms.

In 2011, the BISD conducted a referendum election on the question of whether to change from the federal court-ordered method of election to one with five single-member districts and two at-large positions. Both the public activities prior to the referendum election as well as the election results showed extreme racial polarization. As required by the referendum results, the BISD submitted the 5-2 method of election and a five single-member district redistricting plan for administrative review under Section 5 of the Voting Rights Act. On December 21, 2012, the Attorney General informed BISD officials that implementing the proposed 5-2 method of election would not offer the same ability to African American voters to exercise the franchise as the benchmark method of election, and was therefore retrogressive in violation of Section 5. As a result of that determination, federal law required the continued use of the method of election ordered into effect by the federal court in 1985.

Following the December 2012 objection to the proposed change in the method of election, the BISD proceeded to adjust the existing districts to reflect the population changes reflected in the 2010 Census results, resulting in the adoption of a seven single-member district redistricting plan on February 21, 2013, along with the requisite notices and orders, providing for staggered terms according to the district's previously established schedule of staggered terms. Accordingly, the BISD's notice of election announced that elections would be held only in Districts 4, 6 and 7 in May 2013, and BISD only accepted candidate qualifying papers from

persons in those districts. The incumbents in Districts 1, 2 and 3, which provide minority voters with the ability to elect candidates of choice, did not seek to qualify for election, as the BISD had not announced that those seats would be up for election in May 2013. At the end of the last day for the candidate qualifying period, several of the referendum supporters, who had previously run and lost in the districts that provide minority voters with the ability to elect, appeared and sought to qualify in Districts 1, 2 and 3. The BISD did not accept their candidate filings, as it had not scheduled or announced an election in those districts in May 2013. Following the close of candidate qualification, litigation in both state court and federal court ensued.

As noted above, we continue to receive additional information on the BISD's submissions. At the same time, we are aware of the tight deadlines, both legal and practical, and have worked to expedite our review to the maximum extent possible. For that reason, rather than waiting until we have completed our review of all the changes currently before us, we believe that it would be helpful to both the BISD and the various courts in which litigation concerning the election is pending to inform you of those matters on which we have already made a determination.

The BISD has made two submissions. The first submission concerns the BISD's own February 21, 2013 adoption of a redistricting plan and related election procedures. The second submission includes two categories of changes: (1) those effectuated by the state court's order, and (2) those the BISD adopted to implement that order.

We first assess whether the procedures included in these submissions are changes within the meaning of Section 5 and therefore subject to our review. There is little question that all the changes adopted by the BISD itself, which include the changes contained in its initial March 1 submission and those submitted subsequently, such as the conduct of the election by the county, the resulting use of separate ballots, the three polling places changes, and the use of county early voting locations and hours, are subject to review under Section 5.

The remaining changes are those that were ordered by the state court. These changes are not insulated from review merely because they were ordered by the state court; rather, a "change in election procedures ordered by [state] courts is subject to preclearance under § 5." *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982). In language particularly applicable to the factual circumstances presented here, the Supreme Court has explained that a "state court decree directing compliance with a state election statute [may result in a covered change] within the meaning of §5," and noting that "if § 5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts." *Id.* at 266 n.16. The measure by which we identify those actions subject to scrutiny under Section 5 is whether the action results in a change to existing standards, practices, or procedures with respect to voting. 42 U.S.C. § 1973c. "It is immaterial that the change sought" by a covered jurisdiction "derives from a statute" that need not be precleared. *Hathorn*, 457 U.S. at 266 n.16. The state court order at issue here contains numerous directives, all based on the court's application of state law, designed to result in a single set of procedures for the conduct of an election. Accordingly, we examine the state court ruling to identify those instances where the application of state law did, in fact, produce changes requiring Section 5 review.

The state court noted that the February 21 redistricting plan based on the 2010 Census results met constitutional one-person, one-vote requirements, and ordered that plan into effect even though it was not timely adopted under state law. *In re Rodriguez*, __ S.W. 3d __, 2013 WL 1189005, at *3-4 (Tex. App. Beaumont). The state court administered a voting change by ordering that plan into effect. *Branch v. Smith*, 538 U.S. 254, 262 (2003). This change permitted the court to order that the election should go forward on May 11, 2013, the regularly-scheduled election date.

With regard to the number of positions to be contested at the election and the concomitant shortening of the terms of those individuals elected in 2011, the state court ordered that the election comply with Tex. Educ. Code § 11.052(h), which requires that “[a]t the first election at which some or all of the trustees are elected [from single-member districts] and after each redistricting, all positions on the board shall be filled. The trustees then elected shall draw lots for staggered terms as provided by Section 11.059.” Tex. Educ. Code § 11.052(h); *see In re Rodriguez*, 2013 WL 1189005, at *6. Pursuant to state law, however, a school district “may provide for the trustees in office when the plan is adopted or the school district is redistricted to serve for the remainder of their terms * * * .” Tex. Educ. Code § 11.053(a). The board must make this choice after the first election under single-member districts or after each redistricting. *Id.* at § 11.053(b). In this instance, the state court found the board’s adoption of a redistricting plan to be untimely and determined that the board policy on staggering of terms was not sufficient to meet the state law requirements. *In re Rodriguez*, 2013 WL 1189005, at *3-4, 6.

Thus, after determining that the February 21 plan would be used in the May election despite its untimely adoption under state law, the state court stood in the stead of the BISD and had the option either to continue the BISD’s longstanding existing staggered-term structure at the May election, the first election after a redistricting, or to eliminate the staggered terms. The state court decided not to continue the staggered terms, thus requiring an election in all seven districts in May 2013 and truncating the terms of office of those persons elected in 2011. In doing so, the court applied state law to administer an election procedure different from that in force or effect in the BISD prior to the court’s action, thus rendering the new procedures subject to Section 5 review.

We are aware that the state court concluded that its order was not a change affecting voting. The Supreme Court has held otherwise. *Hathorn*, 457 U.S. at 265; *see also NAACP v. Hampton County Election Comm’n*, 470 U.S. 166, 180 (1985) (rejecting the assertion by a covered jurisdiction that Section 5 review was not necessary “because [the changes] were undertaken in good faith, were merely an attempt to implement a statute that had already been approved by the Attorney General, and were therefore an improvement over prior voting procedures”). And the application of Section 5 to these changes is squarely within the definition of voting changes established by the Attorney General’s Procedures for the Administration of Section 5. *See* 28 C.F.R. § 51.13(i) (“[a]ny change in the term of an elective office or an elected official * * * (e.g., by shortening or extending the term of an office)” is subject to review); 28 C.F.R. § 51.13(g) (“[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices” is subject to review).

Having identified those actions that are subject to review, we assess whether the BISD has established that the submitted changes – whether those resulting from the state court order or those that the BISD itself adopted pursuant to the state court order or otherwise – comply with federal law. We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. Under Section 5 of the Voting Rights Act, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes “neither [have] the purpose nor will have the effect” of denying or abridging the right to vote on account of race.” *Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. § 51.52. The voting changes at issue must be measured against the benchmark practice to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976).

As noted above, the state court determined that all seven trustee positions would be contested concurrently in the upcoming May 11, 2013 election. In addition, the state court determined that the statutorily-mandated deadline to file for office had passed and would not be reopened. We start with the effect of these changes on the voters in Districts 4, 6 and 7. There is little, if any, effect of these changes on voters in these districts. BISD residents expected an election in each of these three districts in May 2013; residents were aware of the notice calling an election in these three districts, and the incumbent trustees filed for election in each of these three districts in a timely manner. The BISD’s actions – including its longstanding policy of staggering terms, its listing only these three districts in its February 21, 2013, election order, and its notice rejecting applicants for other districts – supports this conclusion. As such, there is no retrogressive effect as to Districts 4, 6 and 7.

We reach a contrary conclusion with respect to the effect of these changes in Districts 1, 2, 3 and 5. The change from the benchmark practice of staggered terms, in which the trustee positions to represent Districts 1, 2, 3 and 5 would not be up for election again until 2015, has the effect of shortening the terms of the incumbents in these districts from four years to two years. Three of these districts (1, 2 and 3) are currently represented by trustees who have won election with the cohesive support of black voters in their districts. In addition, unlike the factual circumstances in Districts 4, 6 and 7, there was no expectation that Districts 1, 2, 3 and 5 would be up for election this year. The board’s policy on the staggering of terms, the most recent version of which had been in effect since 2008, had yet to be ruled inapplicable to the post-2010 Census redistricting plan. Residents in these districts reasonably relied on the BISD’s policy on staggered terms, as well as the notice of election, to decide that it was unnecessary and probably inappropriate to file for an office for which there would be no election. Our investigation revealed that none of incumbent trustees in the three affected districts that provide minority voters with the ability to elect (Districts 1, 2 and 3), much less the voters in those districts, were aware that the terms had been shortened and an election for their districts would be held in May.

Although these circumstances alone would support a finding that the BISD could not establish that an election in the four additional districts (1, 2, 3 and 5) in May 2013 would not be retrogressive, there are two additional factors that buttress that conclusion. First, all the individuals who filed for the three ability-to-elect districts (1, 2 and 3), had previously been

candidates for the board of trustees. Some ran more than once. In no election did any of the candidates receive support from more than 10.9 percent of the black voters in their respective district when they ran as candidates in 2011. Indeed, our statistical analysis of the 2011 election determined that although one candidate did receive 37.4 percent of the total vote in District 1 (in which black voters are a bare majority of the voting age population), she received virtually no support from the district's black residents. Second, the state court's decision was issued after the close of the candidate filing period, thereby precluding anyone from filing who had relied on the BISD's policy and election notice as well as the common understanding that no election would be held in the four additional districts. The effect of the state court's order in these districts is that candidate qualifying was deemed closed, without any notice to either the voters in these districts or the incumbents, that qualifying had ever opened. Likewise, the effect of the state court's order is that candidates would run unopposed who are not the choice of the minority community – and indeed had previously been rejected by minority voters in contested elections – with no opportunity for them to be contested. Had the state court reopened the candidate qualifying period after the decision, even for a short period of time, the incumbent trustees or other residents of those districts would likely have qualified, thereby providing the voters in these districts with the opportunity to participate in the electoral process and the ability to elect their candidates of choice. This eventuality could have significantly mitigated, and potentially eliminated, the retrogressive effect of the changes.

In light of the considerations discussed above, I cannot conclude that the BISD has sustained its statutory burden that the use of the state court-adopted plan for elections in Districts 1, 2, 3 and 5, the truncating of the terms of the incumbents in those districts from four years to two years, and the changes to the candidate qualification procedures for those districts do not have a discriminatory effect. Therefore, on behalf of the Attorney General, I must object to the changes described in this paragraph. Because we conclude that the BISD has failed to meet its burden of demonstrating that these proposed changes will not have a retrogressive effect, we do not make any determination as to whether the BISD has established that these changes were adopted with no discriminatory purpose.

Under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. § 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. § 51.45. However, unless and until the objection is withdrawn or the United States District Court for the District of Columbia grants the BISD the relief it has requested in *Beaumont Independent School District v. United States*, 1:13-cv-00401 (D.D.C.), its pending declaratory judgment action, the changes identified above to which the Attorney General has interposed an objection continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

With regard to the February 2013 redistricting plan that the BISD adopted and the state court ordered into effect, at the present time, we are not in a position to complete our analysis of its compliance with Section 5. The information provided to date is insufficient to enable us to determine that the proposed redistricting plan neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language

minority group, as required under Section 5. The following information is necessary so that we may complete our review of the plan:

1. A list of registered voters, by name and by precinct, for the May 2007 election, the May 2011 election, and the list of registered voters as it currently exists.
2. The voter history files for each voter, by name and precinct, registered to vote in the BISD.
3. Copies of any available reports, studies, analyses, summaries, or other documents or publications, including county planning commission reports and school planning reports, that contain an assessment of the current and future demographic growth, broken down by race and ethnicity, in the BISD.
4. Election returns for all elections for offices in Jefferson County held from 2003 to the present in which a black candidate participated. For each election, indicate:
 - a. The office sought;
 - b. Each candidate's name and race;
 - c. The number of votes for each candidate, by precinct;
 - d. The number of registered voters, by race and by precinct at the time of each election;
 - e. The number of persons by race and by precinct, who participated in the election.

With regard to the information requested in Items 4(d) and (e), if the exact numbers are not available, please provide your best estimate and the basis for that estimate. Our review would be expedited if the information identified above could be provided in an electronic format (.dbf, .xls, or .txt files).

We note that concerns have been raised that the diminution in the black percentage of the voting age population in District 2 from 65.4 to 50.1 percent may diminish the ability of black voters to elect candidates of choice in that district. Any response that the BISD may wish to provide regarding this concern will be helpful to our analysis.

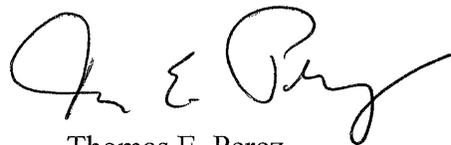
The Attorney General has 60 days to consider a completed submission pursuant to Section 5. This 60-day review period for the state court's adoption of the redistricting plan will begin when we receive the information specified above. 28 C.F.R. § 51.37. However, if no response is received within 60 days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. 28 C.F.R. §§ 51.40 and 51.52(a) and (c). Changes that affect voting are legally unenforceable unless and until the appropriate Section 5 determination has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

The BISD's procedures for the county to conduct the election, the temporary use of separate ballots, the three polling place changes, and the use of county early voting locations and hours are directly related to the redistricting plan. Accordingly, it would be inappropriate for the Attorney General to make a determination on those changes at this time. 28 C.F.R. §§ 51.22(b) and 51.35. Likewise, because the BISD's March 1 submission of its own adoption of the February 21 redistricting plan has been superseded by the state court's order adopting that same plan, no determination is required or appropriate concerning the BISD's adoption of that same plan. 28 C.F.R. § 51.35.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the BISD plans to take concerning this matter. If you have any questions concerning this letter, please call Robert S. Berman (202-514-8690), a deputy chief of the Voting Section.

Because the Section 5 status of the changes contained in this submission is currently before both the United States District Court for the District of Columbia in *Beaumont Independent School District v. United States*, No. 1:13-cv-00401 (D.D.C.) and the United States District Court for the Eastern District of Texas in *Jones v. Beaumont Independent School District*, No.1:13-cv-0177 (E.D. Tex), we are providing a copy of this letter to the Court and to counsel of record in those cases.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom E. Perez". The signature is fluid and cursive, with the first name "Tom" and last name "Perez" being the most prominent parts.

Thomas E. Perez
Assistant Attorney General