

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
MIDDLE DIVISION

_____	)	
ANTHONY T. LEE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	Civil Action No. 70-251-S
	)	
Plaintiff-Intervenors and	)	
<i>Amicus Curiae</i> ,	)	FORT PAYNE CITY
	)	BOARD OF EDUCATION
NATIONAL EDUCATION ASSOCIATION,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	
	)	
MACON COUNTY BOARD OF	)	
EDUCATION,	)	
	)	
Defendants.	)	
_____	)	

**CONSENT ORDER**

This Consent Order arises out of the good faith efforts of Plaintiffs Lee, *et al.*, Plaintiff-Intervenor and *Amicus Curiae* United States of America (the “United States”) (collectively, the “Plaintiff Parties”), and Defendant Fort Payne City Board of Education (the “District”), to address and resolve the District’s school desegregation obligations. The United States has consulted counsel for the Lee Plaintiffs (“Private Plaintiffs”). This agreement is jointly entered into by the United States, the District, and the Private Plaintiffs (collectively, the “Parties”). The District agrees to comply with the terms of this Consent Order.

## 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 Cnty. Bd. of Educ.*, 267 F. Supp. 458, 460 (M.D. Ala. 1967) (three-judge panel). On March 22, 1967, the Court ordered the State Superintendent of Education to notify a number of school systems, including the District, that they were required to adopt a desegregation plan for all grades commencing with the 1967-1968 school year. *Id.* at 482. This case was transferred from the Middle District of Alabama to the Northern District of Alabama pursuant to a March 31, 1970 court order (“1970 Order”) so that “the convenience of the parties and witnesses and the interest of justice would be better served.” 1970 Order at 5-6.

On July 25, 1974, the Court entered an order (“1974 Order”) applicable to the District 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 District, 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 District 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.* Further, with respect to student transfers, the Court ordered that any inter-district transfers be granted “on a non-discriminatory basis, except that [the District] shall not consent to transfers where the cumulative effect will reduce desegregation in either district.” *Id.* at 3. 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 district “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 District remains subject to the 1974 Order.

This Consent Order sets forth in detail the areas to be addressed and the actions to be undertaken by the District. In other words, this Consent Order represents “a roadmap to the end of judicial supervision” of the District. *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 District’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 District produced data on student assignment, extracurricular activities, faculty and staff, and transportation.

The United States reviewed the data provided by the District, as well as publicly available data, to assess the District's compliance with its obligations under the 1974 Order. The United States informed the District that, in its opinion, the District has satisfied its obligations in the areas of transportation, extracurricular activities, and facilities. The Private Plaintiffs have since concurred in that assessment. The parties agree that compliance with this Consent Order will result in the District fulfilling its obligations in the areas of student assignment and faculty and staff.

### III. LEGAL STANDARDS

The ultimate inquiry in determining whether a school district is unitary is whether the district 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., Fla.*, 244 F.3d 927, 942 (11th Cir. 2001); *Lockett v. Bd. of Educ. of Muscogee Cnty. Sch. Dist., Ga.*, 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 district has fulfilled its duties and eliminated 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,” as the Supreme Court has approved consideration of other indicia, such as “quality of education,” in determining whether a district 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 District*, 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).<sup>1</sup> 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 district-wide faculty ratio. *See id.* at 1218. Once the faculty racial composition at the schools is substantially similar to the district-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, and otherwise treated without regard to race, color, or national origin.” *Id.*

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<sup>1</sup> 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).

Subsequently, in *Fort Bend Independent School District 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 district] is now unitary is two-fold: first, the district'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).<sup>2</sup> To this end, one factor examined is whether the school district 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:

#### **IV. STIPULATED FACTS**

At the request of the United States, the District has provided information related to the *Green* factors. Analysis of this data demonstrates that the District has met the required standards in the areas of transportation, extracurricular activities, and facilities. A review of District data raised concerns, however, in the areas of: (1) student assignment, and (2) faculty and staff.

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<sup>2</sup> This decision was entered on July 30, 1981.

## A. Student Assignment

In the 2011-2012 school year, 3,104 students are enrolled in the District, of whom 60.4 percent are white, 3.7 percent are black, 31.2 percent are Hispanic, and 4.7 percent are another race or ethnicity. The District operates one high school, one middle school, and two elementary schools. The schools are operated in a single-grade structure, such that each of the four schools serves a different range of grade levels. The demographics of and grade levels served by each school are set forth in Table 1.

<b>School</b>	<i>White</i>	<i>Black</i>	<i>Hispanic</i>	<i>Other</i>	<i>Total</i>
Wills Valley ES (PK-2)	486 (54.4%)	15 (1.7%)	348 (39.0%)	44 (4.9%)	893
Williams Ave. ES (3-4)	250 (54.7%)	11 (2.4%)	166 (36.3%)	30 (6.6%)	457
Fort Payne MS (5-8)	553 (60.5%)	44 (4.9%)	271 (29.6%)	46 (5.0%)	914
Fort Payne HS (9-12)	585 (69.6%)	46 (5.5%)	182 (21.7%)	27 (3.2%)	840
<b><i>District-Wide</i></b>	<b>1874 (60.4%)</b>	<b>116 (3.7%)</b>	<b>967 (31.2%)</b>	<b>147 (4.7%)</b>	<b>3104</b>

The 1974 Order prohibits the District from taking any 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.” *See* 1974 Order at 2. A review of District data reveals no evidence that classroom assignment decisions improperly consider race.

The United States has reviewed the District’s student transfer policies and transfer records, however, and is unable to determine at this time whether the District has satisfied the terms of the 1974 Order with respect to school assignment decisions resulting from inter-district transfers.<sup>3</sup> The 1974 Order states that if the District grants inter-district transfers, “it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district.” *See* 1974 Order at 3. The District grants a significant number of inter-district transfers to and from nearby school districts. The vast

<sup>3</sup> Because the District operates a single-grade structure, there are no intra-district student transfers.

majority of incoming inter-district transfer students are white, and the percentage of white students in each school is greater as a result of those transfers.

Under the District's current policy, "[a]pplications for out-of-district enrollment shall be considered on a 'first-come, first-served' basis," with priority given to students with a sibling enrolled at the requested school or who was enrolled in the requested school in the previous year. District Policy Section 8.-11. An application may be denied for lack of space or other specified factors, including, *inter alia*, a student's disciplinary record, criminal record, and history of truancy. *Id.* The bases for denial articulated in the current policy do not include the potential resegregative effects of inter-district transfers.

#### **B. Transportation**

The United States has reviewed transportation data provided by the District. The District provides transportation to all eligible students on a non-discriminatory basis.

#### **C. Extracurricular Activities**

The United States has reviewed information provided by the District concerning extracurricular activities. The District provides all students an equal opportunity to participate in sports, student government, extra-curricular activities, and co-curricular activities.

#### **D. Facilities**

Because the District operates a single-grade structure under which each student in each grade attends the same school, there is no evidence of discrimination with respect to facilities.

#### **E. Faculty and Staff**

In the 2011-2012 school year, the District reports that it employs 199 teachers, 15 administrators, 17 certified staff, and 71 non-certified staff. The racial composition of the District's faculty, administration, and staff is set forth in Table 2 below.

The District's data reveals a near complete absence of black employees. The District currently employs no black administrators and, of the 216 teachers and certified staff members employed by the District in the 2011-2012 school year, only four (1.9 percent) are black. The District's two elementary schools have no black teachers, and the middle school and high school each have only two black teachers. The District employs only two black non-certified staff members. The District does not ask applicants for employment to identify their race voluntarily, and it does not maintain applicant pool data by race.

School	Teachers/Certified Staff				Administrators				Non-Certified Staff			
	White	Black	Other	Total	White	Black	Other	Total	White	Black	Other	Total
Wills Valley ES (PK-2)	67 (100%)	0 (0%)	0 (0%)	67	2 (100%)	0 (0%)	0 (0%)	2	19 (79.2%)	2 (8.3%)	3 (12.5%)	24
Williams Ave. ES (3-4)	33 (100%)	0 (0%)	0 (0%)	33	1 (100%)	0 (0%)	0 (0%)	1	8 (100%)	0 (0%)	0 (0%)	8
Fort Payne MS (5-8)	53 (96.4%)	2 (3.6%)	0 (0%)	55	2 (100%)	0 (0%)	0 (0%)	2	15 (93.8%)	0 (0%)	1 (6.3%)	16
Fort Payne HS (9-12)	56 (94.9%)	2 (3.4%)	1 (1.7%)	59	3 (100%)	0 (0%)	0 (0%)	3	17 (100%)	0 (0%)	0 (0%)	17
Central Office	2 (100%)	0 (0%)	0 (0%)	2	7 (100%)	0 (0%)	0 (0%)	7	6 (100%)	0 (0%)	0 (0%)	6
<i>District-wide</i>	<b>211</b> <b>(97.7%)</b>	<b>4</b> <b>(1.9%)</b>	<b>1</b> <b>(0.5%)</b>	<b>216</b>	<b>15</b> <b>(100%)</b>	<b>0</b> <b>(0%)</b>	<b>0</b> <b>(0%)</b>	<b>15</b>	<b>65</b> <b>(91.5%)</b>	<b>2</b> <b>(2.8%)</b>	<b>4</b> <b>(5.6%)</b>	<b>71</b>

The District has engaged in limited targeted minority faculty recruitment efforts, including: (1) contacting District alumni and other former residents of Fort Payne City who are minorities and hold degrees in education, and encouraging those individuals to apply for teaching jobs in the District (a strategy which has proven to be unsuccessful); (2) participating in a since-discontinued job fair at which two historically black colleges and universities were represented; and (3) recruiting at historically black Alabama A&M University.

## V. STIPULATED RELIEF

To ensure that the District satisfies its desegregation obligations in the area of student assignment and faculty and staff, the District shall undertake the following actions:

### A. Student Assignment

The District shall amend its transfer policy to conform to the 1974 Order by including provisions requiring that: (1) all inter-district transfers be conducted in a non-discriminatory manner; and (2) an application to transfer into or out of a District school will be denied where the cumulative effect of transfers will reduce desegregation in the District. *See* 1974 Order at 3.<sup>4</sup>

### B. Faculty and Staff

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

1. Conduct on-campus recruitment and on-campus interviews at historically black colleges and universities in the region including, but not 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;
3. Send notices of all District employment vacancies to the education placement officials at each public university in Alabama and all historically black colleges and universities

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<sup>4</sup> The 1974 Order requires Fort Payne to grant transfers "on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district." July 25, 1974 Court Order at 3. Currently, incoming transfer students reside in the school districts of Cherokee County, DeKalb County, Etowah County, and Jackson County. Of these districts, only Jackson County is currently under a court desegregation order, but that district is partially unitary with respect to all factors except faculty. Therefore, the District need not consider the cumulative effect of transfers in its sending districts.

in Alabama (public and private), and post notices of the vacancies on the District and State Department of Education websites;

4. Modify the District's employment application(s) to include a field requesting identification of the applicant's race;

5. Track the race/ethnicity (where voluntarily identified) of all applicants for employment and of all newly hired teachers, administrators, certified staff, and non-certified staff;

6. Develop and maintain written procedures that will be followed when filling vacancies, including, but not limited to, procedures relating to application forms, interview questions, and hiring criteria; and

7. 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, including teaching, administration, certified staff, non-certified staff, and other paid positions (*e.g.*, coaching and advising).<sup>5</sup> 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 District.

### **C. Monitoring and Reporting**

The District shall submit to the Court and to counsel of record for all parties annual reports pursuant to this Consent Order until such time as the District is declared unitary. The

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<sup>5</sup> "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.

District shall submit these reports each year by July 1, with the first report due on July 1, 2012. The annual reports shall include the following information for the period since the entry of this Order or the last compliance report, whichever is later:

1. Inter-District Transfers

a. Copies of all current student transfer policies and procedures used by the District, including documentation of the policy or procedure for requesting, granting, and denying transfer requests, highlighting any changes in the applicable policies and/or procedures since the last report;

b. The total number of students who have requested inter-district transfers, indicating for each such request: the student's grade level, race, sending school (school which student is zoned to attend), receiving school (school to which transfer was sought), reason for the transfer request, whether the transfer was granted or denied by the District, and the reason for granting or denying the transfer.

2. Faculty Recruitment and Hiring

a. The number and percentage of principals, assistant principals, other administrators, guidance counselors, teachers, administrative assistants, and support staff (separately listing both certified and non-certified 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 non-certified 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. For the first annual report, a description of all forms, questions, and criteria, including copies of application forms and written procedures related to interviews and/or the hiring process; and for each subsequent annual report, a statement of any changes the District has made or intends to make to the above-mentioned forms, questions, and criteria, including copies of any such documents.

## **VI. FINAL TERMINATION**

Having found that the District has satisfied its desegregation obligations in the areas of transportation, extracurricular activities, and facilities, the Court hereby withdraws its jurisdiction over those areas of the case.

Continued judicial supervision of this case will be limited to ensuring that the District: (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 District retains the burden of eliminating the vestiges of *de jure* segregation in the areas 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 United States and Private Plaintiffs receive the July 1, 2014 compliance report.

#### **VII. EFFECT OF PRIOR ORDERS**

All Orders not inconsistent herewith remain in full force and effect.

**SO ORDERED**, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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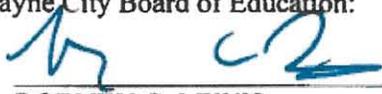
The Honorable Abdul Kallon  
United States District Judge

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

For Plaintiffs,  
Lee, et al.:

  
\_\_\_\_\_  
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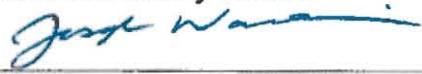
For Defendant,  
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