IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:67-CV-632-BO(3)

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE BERTIE COUNTY BOARD OF EDUCATION, et al.,
Defendants.

ORDER

This matter is before the Court on the Government's Motion for Further Relief. Thirty-four years ago, this Court issued an order requiring Defendant Bertie County Board of Education ("the District") to develop a school desegregation plan "providing for the complete elimination of the dual school system in the Bertie County schools with respect to pupil and faculty assignments, facilities, transportation, and other school activities." *United States v. Bertie County Bd. of Educ.*, 293 F. Supp. 1276, 1283 (E.D.N.C. 1968). Following the submission and approval of the District's desegregation plan in 1969, the Court removed this matter from its pending docket. The Court stated, however, that the case could be reopened "at such time as any pleadings or paper is filed therein, that would warrant the reopening of the case." Order dated Jan. 14, 1972. The United States now seeks further relief in this matter, alleging that the District has (1) continued to operate a racially identifiable white elementary school and (2) failed to develop and adhere to a student transfer policy consistent with its desegregation responsibilities. For the reasons stated below, the Government's motion will be GRANTED.

BACKGROUND

A. Litigation History

The original complaint in this case was filed by the United States on June 16, 1967. The complaint charged that the Bertie County Board of Education had failed to take adequate measures to eliminate its dual, segregated school system as required by *Brown v. Board of Education*, 347 U.S. 483 (1954) and subsequent Supreme Court decisions. On April 18, 1969, this Court found that "further delays are no longer tolerable" and ordered the District "to come forward with a [desegregation] plan that promises realistically to work, and promises realistically to work now." *Bertie County*, 293 F. Supp. at 1280-81 (quoting *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 439 (1968)). The Court stated that "[i]f the defendants elect to desegregate pursuant to geographical attendance zones, it is their obligation to draw those zones in such a manner as to eliminate the effects of past racial discrimination and to achieve desegregation." *Id.* at 1281. The Court further explained that faculty desegregation "cannot be left to the voluntariness of teacher applicants or transfers" and expressed disapproval of "free transfer" plans that would permit white students to transfer from schools in their attendance zones to predominately white schools within the district. *Id.* at 1280-82.

In response to this order, the District filed a proposed desegregation plan. This plan called for all students in grades eight and nine to attend Bertie Junior High School and for all students in grades ten through twelve to attend Bertie High School. With respect to the District's elementary schools, the plan proposed seven geographic attendance zones. The District's plan also provided that all teacher assignments would be made without regard to race. The Government expressed some concern about the boundary line between two of the proposed

attendance zones but did not otherwise object to the District's plan. The plan was approved by the Court in orders filed on June 2, 1969 and July 1, 1969.

The District's attendance zones have remained largely uncharged since 1969, with one exception. In 1990, the District decided to change from the elementary/high school model previously in place to a system with middle schools. In doing so, the District converted C.G. White, the only elementary school located in Attendance Zone 4, to a middle school. The District was therefore required to adjust attendance lines for elementary schools and to develop attendance zones for the middle schools. The District contacted the Government regarding this change in 1990. The Government responded on January 31, 1992 with a request for additional information about the rezoning proposal and its impact on desegregation. The District supplied additional information on February 19, 1992, and the Government took no further action with respect to this matter.

B. Current Status of the Bertie County School District

During the 2000-01 school year, the Bertie County School District served a total of 3,605 students in ten schools. The Government's Motion focuses in large part on Askewville Elementary School ("Askewville"). Askewville is a relatively small elementary school with an enrollment of approximately 150 students in kindergarten through fifth grade. During the 2001-02 year, white students comprised 81% of the student enrollment at Askewville, compared with only 14% of the District's total elementary school population. Since the adoption of the District's desegregation plan in 1969-70, white student enrollment at Askewville has ranged from a low of 77% in 2000-01 to a high of 98% in 1988-89.

The Government also alleges that the District has maintained an identifiably white faculty

and staff at Askewville. According to the Government, white personnel comprised 54% of all elementary school teachers within the district during the 2000-01 school year. During this same period, white personnel comprised 91% Askewville's faculty. The Government claims that the District has continued its practice of assigning white faculty to Askewville in recent years. Specifically, from 1999-2000 to 2001-02, white personnel comprised 100% of all teachers hired and assigned to Askewville. During this period, several black personnel were allegedly hired and assigned to fill similar teaching positions at other elementary schools within the District. With respect to staff assignments, the Government alleges that white personnel comprised 75% of the staff at Askewville in 2000-01 but only 26% of the total elementary school staff within the District. Between the years 1999-2000 and 2001-02, white personnel constituted 80% of all staff hired and assigned to Askewville, while black personnel were hired to fill similar positions at other elementary schools within the District. In response to these allegations, the District maintains that all faculty and staff assignments are made without regard to race.

The Government's motion also challenges the District's student transfer policy. As recently as June 2001, the District employed an "open door" policy with respect to student transfers. Pursuant to this policy, the District permitted inter-district and intra-district student transfers to any receiving school or school district, provided that space was available at the receiving school. According to the Government, between 1998-99 and 2000-01, a net of thirteen white students transferred from the schools in their attendance zones to Askewville.[1] During this period, the District also permitted a net of sixty white students to leave the Bertie County School

[1] Nineteen white students allegedly transferred into Askewville via intra-district transfers, while six white students transferred out of that school.

District and transfer to other school districts.[2] On September 5, 2001, the District advised the Government that it had suspended intra-district transfers. The District allegedly indicated at this time that it would also reconsider the appropriateness its inter-district transfer policy.[3] The Government alleges that the District has yet to adopt an alternative transfer policy. The District claims that it has denied recent student transfer requests unless the transfer would provide the student with access to an educational program unavailable within the student's attendance zone.

The United States filed its Motion for Further Relief on September 26, 2002. A hearing was held on February 25, 2003 in Raleigh, North Carolina, and this matter is now ripe for ruling.

ANALYSIS

Because the Bertie County school system was previously segregated by law and has not yet achieved unitary status, the District has an affirmative and continuing duty to eliminate all vestiges of past discrimination to the extent practicable. *See Board of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-59 (1979) (explaining that schools boards that previously operated dual systems are "clearly charged with an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."); *Vaughns v. Bd. of Educ. of Prince George's County*, 758 F.2d 983, 988 (4th Cir. 1985) ("Until a school system has discharged its duty to liquidate the dual system and replace it with a unitary one, the

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[2] Sixty-two white students transferred out of the District via inter-district transfer, and two white students transferred into the district.

[3] The Government claims that, despite the moratorium, the District permitted students who had previously transferred to Askewville or schools outside of the District under the open door policy to continue attending those schools.

school's duty remains in place."). The Supreme Court has stated that this affirmative duty includes "the obligation not to take any action that would impede the progress of disestablishing the dual system and its effects." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979). Furthermore, "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus*, 443 U.S. at 459.

The Fourth Circuit has explained that "once a court has found an unlawful dual school system, those alleging the existence of racial disparities are entitled to a presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." *Belk v. Charlotte-Mecklenberg Bd. of Educ.*, 269 F.3d 305, 327 (4th Cir. 2001) (en banc) (internal brackets and quotations omitted). *See also Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation."). Compliance with an existing desegregation plan or court order may not be sufficient to satisfy a school district's burden because "in some desegregation cases simple compliance with the court's orders is not enough for meaningful desegregation to take place." *Belk*, 269 F.3d at 334. In such cases, a school district must show, beyond mere compliance with the original decree, that the vestiges of the dual system have actually been eliminated to the extent practicable. *See id.*

The Government argues that further relief is necessary in this case because the District's desegregation efforts have not been effective in eliminating the vestiges of discrimination to the extent practicable. The Government's motion seeks further relief with respect to two issues: (1) the operation of Askewville as an identifiably white school, facilitated by the District's student, faculty, and staff assignment practices, and (2) the District's student transfer policy, which

previously enabled white students to transfer from the schools in their attendance zones to Askewville or schools outside of the District. The Court will address each issue in turn.

A. Askewville Elementary School

In 1968, this Court identified Askewville as an all-white school with an all-white faculty and student body. *See Bertie County*, 293 F. Supp. at 1278. In its order, the Court directed the District to develop a desegregation plan that would completely eliminate the vestiges of discrimination in the areas of student assignment, faculty assignment, and various other areas. *See id.* at 1283. The Government claims that, despite this directive, the District has continued to operate Askewville as an identifiably white school and has therefore failed to effectively desegregate the school system.

1. *Student Assignments*

The Government argues that the District has failed to satisfy its obligation to draw attendance lines "in such a manner as to eliminate the effects of past racial discrimination and to achieve desegregation." *Id.* at 1281. Under the attendance zones adopted by the District in 1969 and revised in 1991, Askewville has maintained a white student enrollment of 77% or greater. In contrast, district-wide white student enrollment has not exceeded 27% since the desegregation plan was implemented in 1969. In *Belk*, the Fourth Circuit found that a fifteen percent plus/minus variance from the district-wide ratio of black to white students could serve as a "reasonable starting point" in determining whether a school is racially balanced or imbalanced. *See Belk*, 269 F.3d at 319. Based on this measure, the Government has demonstrated a significant racial imbalance at Askewville, and the burden therefore shifts to the District to provide a reasonable and supportable explanation for this variance. *See id.*

The District has advanced several arguments in response to the Government's allegations regarding student assignment at Askewville. First, the District stresses that Askewville is located "in the middle of the only predominately white section of the county." Defs.' Resp. at 10. The Government concedes that Askewville is located in a predominately white community. *See* Pl.'s Mem. at 20 n.15. The Government nevertheless contends that further desegregation of this school is practicable and could be accomplished in several ways. For instance, the District could re-draw Askewville's attendance zone to include several black families who, according to the Government, live only a short distance from the current zone boundary. The District could also cluster Askewville with nearby elementary schools that have higher enrollments of black students or implement a "majority-to-minority" transfer program, allowing students to transfer from schools where their racial group exceeds the District's overall racial composition to schools where their racial group's representation is lower than the District-wide ratio. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26-27 (1971) (mentioning both clustering and "majority-to-minority" transfer policies as possible methods of achieving desegregation).

The District seems to argue that further desegregation is not practicable at Askewville because it estimates that re-drawing the Askewville attendance zone would increase the school's black student enrollment by only ten students. Thus, even if the proposed changes were made, Askewville would continue to have a majority white student enrollment. However, this argument does not address the other measures proposed by the Government and fails to demonstrate that these measures, used singly or in combination, would not be practicable in furthering desegregation in Askewville's student assignments.

The District also suggests that further relief is unnecessary in this case because it has

complied with the desegregation plan approved by this Court in 1969. The Supreme Court has stated that a school district's ultimate burden is to demonstrate (1) that it has "complied in good faith with the desegregation decree since it was entered" and (2) that "the vestiges of past discrimination have been eliminated to the extent practicable." *Board of Educ. of Oklahoma City Public Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991). As previously discussed, the Fourth Circuit has held that compliance with an existing plan may not be sufficient to satisfy a school district's affirmative duty to desegregate. *See Belk*, 269 F.3d at 334. *See also Davis v. Bd. of Sch. Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness."). Therefore, despite the existence of an earlier desegregation plan, a court may require a school district to develop a new and more effective plan. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459-60. Based on the evidence presented in this case, it appears that the plan previously adopted by this Court has not effectively eliminated the vestiges of prior discrimination at Askewville. The District's compliance with this plan is thus insufficient to satisfy the District's burden under *Dowell*.

Finally, the District stresses that four of the five members of the Bertie County Board of Education and the District's superintendent are African-American. However, compliance with a desegregation decree in one area of school operations, in this case school administration, does not eliminate the District's duty in other areas, such as student assignments. Moreover, partial compliance with a desegregation decree does not limit a court's ability to order further remedies in those areas where compliance has not yet been achieved. *See Freeman v. Pitts*, 503 U.S. 467, 490-91 (1992).

Because the racial composition of Askewville's student body varies significantly from

that of the District as a whole and because the District has failed present evidence demonstrating that it has effectively eradicated the vestiges of discrimination in the area of student assignments, the Court finds that the Government has satisfied its burden with respect to this issue.

2. *Faculty and Staff Assignments*

The Government alleges that the District has exacerbated Askewville's racial identifiability by failing to take adequate measures to desegregate the faculty and staff assigned to Askewville. The Supreme Court has stated that faculty and staff assignments are "among the most important indicia of a segregated system." *Swann*, 402 U.S. at 18. *See also Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 978 F.2d 585, 590 n.5 (10th Cir. 1992) ("[A] failure to achieve compliance with regard to faculty/staff assignment is particularly disturbing because it is the one facet within the exclusive control of the local school authorities."). In its 1968 order, the Court not only directed the District to desegregate its faculty assignments but also cautioned against leaving faculty desegregation to the "voluntariness of teacher applicants or transfers." *Bertie County*, 293 F. Supp. at 1282.

In its 1969 desegregation plan, the District adopted a race-neutral teacher assignment policy. The Government now contends that this race-neutral policy has not been effective in desegregating the faculty and staff at Askewville. The data provided by the Government indicates that, over the years, Askewville has employed a significantly higher percentage of white faculty and staff than the District as a whole. Furthermore, the Government claims that in recent years the District has continued to hire and assign white personnel to Askewville while assigning a number of black personnel to similar positions at others schools within the District.

The District has offered two arguments in response to the Government's allegations

regarding faculty and staff assignments. First, the District claims that, because the number faculty and staff employed at Askewville is small, the percentages offered by the Government are exaggerated. While it is certainly true that a change in one or two positions at Askewville can have a significant effect on these percentages, the Court must look at the percentages themselves and their consistency over the past thirty-four years. In 1972-73, 86% of Askewville's teachers were white, and in 2000-01, white personnel comprised 91% of Askewville's faculty. The District also argues that it has complied with the 1969 desegregation plan, which forbids school officials from hiring or assigning faculty on the basis of race. However, as discussed above, compliance with an existing desegregation decree is not always sufficient to satisfy a school district's affirmative duty. This is particularly true where the existing plan has proven to be ineffective in achieving desegregation.

Because of continuing disparities between the faculty and staff assignments at Askewville and assignments at other schools within the District, the Government has satisfied its burden with respect to this issue.

B. Student Transfer Policy

In addition to its concerns regarding Askewville Elementary, the Government alleges that the District's student transfer policies have violated this Court's 1968 order. In 1968, the Court expressly warned the District against the use of "free transfer" plans that would allow white students to transfer from the schools in their attendance zones to predominantly white schools. *See Bertie County*, 293 F. Supp at 1280. Despite this statement from the Court, the Government claims that the District operated a free transfer system as recently as June 2001. Pursuant to its "open door" policy, the District generally permitted students to transfer to any school within or

outside of the District, provided space was available at the receiving school and the student provided his or her own transportation. Between 1998-99 and 2000-01, a net of thirteen white students used this "open door" policy to transfer from the majority black schools in their attendance zones to Askewville, the only majority white school in the District. During this same period, a net of sixty white students transferred from the Bertie County school system to schools in neighboring districts.

On or about September 5, 2001, the District announced a moratorium on intra-district transfers and indicated that it planned to revise its policy regarding such transfers. According to the District, student transfer requests are now denied unless the transfer would provide access to an educational program currently unavailable within the student's attendance zone. Despite the moratorium, the Government contends that the District's transfer policies continue to violate this Court's 1968 desegregation order for several reasons. First, it appears that the District has permitted students who transferred to Askewville or other schools under the "open door" policy to continue attending those schools. Second, the Government claims that the District's current policy denies student transfers that would further desegregation within the school system.[4] Finally, according to the Government, the District has failed to adopt an official student transfer policy consistent with its desegregation responsibilities.

The Court finds, based on this evidence, that the cumulative effect of the District's "open door" transfer policy was to hinder desegregation within the District. This policy was therefore inconsistent with federal law and the prior orders of this Court. Despite the District's decision to

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[4] The Government appears to be suggesting that the District adopt the type of majority-to-minority transfer plan previously discussed in this Order.

impose a moratorium on intra-district transfers in September 2001, the District has not adopted a new student transfer policy consistent with the District's duty to eliminate the vestiges of past discrimination to the extent practicable. The Government has therefore met its burden with respect to the issue of student transfers by demonstrating disparities between the District's policies and the requirements of this Court's prior desegregation decree.

CONCLUSION

For the reasons discussed above, the Government's Motion for Further Relief is GRANTED. The District is hereby ORDERED to formulate and submit to this Court a plan designed to eliminate, to the extent practicable, the vestiges of past discrimination in the areas of (1) student, faculty, and staff assignments at Askewville Elementary and (2) student transfers. Following the submission of the District's proposed plan, the parties will be given an opportunity to review the plan and conduct any relevant discovery. Discovery will end thirty (30) days after the filing of the proposed plan. The Court will accept memoranda from the parties before rendering a decision with respect to the proposed plan. The Government's memorandum will be due within twenty (20) days after the close of discovery, and the District's response will be due within ten (10) days after the filing of the Government's submission.

SO ORDERED.

This 20TH day of April, 2003.

Terrence W. Boyle

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE