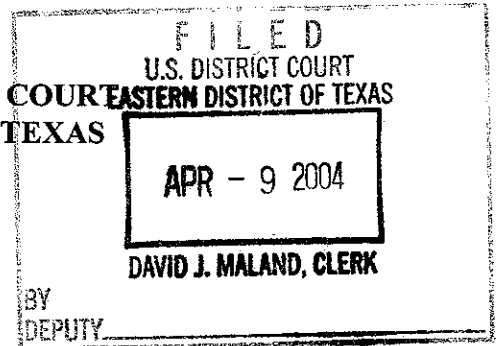


**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**



UNITED STATES OF AMERICA,

Plaintiffs,

**HEARNE INDEPENDENT SCHOOL
DISTRICT,**

Plaintiff-Intervenor,

v.

STATE OF TEXAS, ET AL.,

Defendants,

Civil Action No. 6:71-CV-5281

Before Judge JUSTICE

**PLAINTIFF UNITED STATES' MOTION TO ENFORCE ORDER
AGAINST DEFENDANT TEXAS EDUCATION AGENCY**

Plaintiff, the United States of America, hereby moves this Court to order Defendant Texas Education Agency ("TEA") to comply with the requirements of this Court's Modified Order of July 13, 1971, amended on August 9, 1973, regarding the provision of funding to school districts for transfer students. In support thereof, the United States would show the following.

1. TEA is violating this Court's Order of August 9, 1973, ("the Court Order") by providing the Mumford Independent School District ("MISD") with funding for students whose transfers to MISD are reducing or impeding desegregation at Hearne Independent School District ("Hearne ISD").

2. TEA also continues to provide MISD with funding for transfers that TEA determined MISD to have deliberately misrepresented as qualifying for exceptions to the Court Order.

The Court Order and Applicable Law

3. The desegregation order in this case provides that TEA “shall not permit, make arrangement for or give support of any kind to student transfers, between school districts, when the cumulative effect, in either the sending or receiving school or school district, will be to reduce or impede desegregation” Amendments to Modified Order of July 13, 1971, at 1, ¶ A(1) (Aug. 9, 1973) [hereinafter Court Order].
4. As a guideline for measuring the cumulative effect of transfers on desegregation, the Court Order provides that “the defendants shall not approve transfers where the effect of such transfers will change the majority or minority percentage of the school population, based on average daily attendance in such districts by more than one per cent (1%), in either the home or the receiving district or the home or the receiving school.” Court Order at 2, ¶A(3)(b).
5. Although a percentage or quantitative analysis can serve as an initial measure of the effect of inter-district transfers, the effect “ultimately must be measured qualitatively” to judge whether the transfers increase the racial identifiability of schools. Lee v. Eufala City Bd. of Educ., 573 F.2d 229, 233 (5th Cir. 1978); see United States v. Lowndes County Bd. of Educ., 878 F.2d 1301, 1304-05 (11th Cir. 1989) (applying Eufala, 573 F.2d at 232-233).
6. Whether inter-district transfers reduce or impede desegregation by increasing the racial identifiability of schools depends on whether the “increment of change in the racial

composition of a school seems [likely] to alter significantly general perceptions of a school's racial identity or the behavior of persons who rely on such factors in determining whether or not to send their children to a particular school." Lee v. Lee County Bd. of Educ., 639 F.2d 1243, 1261 (5th Cir. 1981); see Lowndes, 878 F.2d at 1305 (applying the factor identified in Lee as "an index of racial identifiability").

7. The Court Order in this case provides that if a school district accepts transfers after receiving notice from TEA that they reduce or impede desegregation, TEA

shall refuse to transfer the funds, based on the average daily attendance of the transfer students involved[,] to the account of the receiving district, and shall, thereby, terminate and refuse to grant or continue paying to the offending district a percentage of state funds equivalent to the district's entitlement based on the average daily attendance of the students transferring in violation of this order.

Id. at 4, ¶ A(6).

8. Additionally, in such circumstances TEA "shall also refuse to distribute to the offending district any transportation funds which might accrue on account of transfer students accepted in violation of this order." Id. at 4, ¶ A(7).
9. The Court Order allows for exceptions to the transfer requirements in "hardship situations," which the Order does not define. Id. at 2, ¶ A(2)(c).¹

TEA Is Violating the Court Order

10. TEA continues to provide MISD with funding for transfers that, as explained in paragraphs 14 through 20, below, reduce or impede desegregation at Hearne ISD.

¹ TEA has defined several categories of hardships that qualify for this exception to the Court Order's transfer provisions. See Declaration of Edward G. Caspar in Support of Plaintiff United States' Motion to Enforce Order Against Defendant Texas Education Agency and Motion for Injunction Against Defendant Mumford Independent School District, C.A. 6:71-CV-5281 (Apr. 8, 2004) [hereinafter Caspar Declaration], Exh. 2, at TEA 336-39. The United States does not take issue with the hardship exceptions that TEA has defined.

11. As required by the Court Order, see Court Order at 4, ¶ A.5, TEA notified MISD as early as May 18, 2001, that the district was not in compliance with the Court Order's transfer requirements. See Declaration of Edward G. Caspar in Support of Plaintiff United States' Motion to Enforce Order Against Defendant Texas Education Agency and Motion for Injunction Against Defendant Mumford Independent School District, C.A. 6:71-CV-5281 (Apr. 8, 2004) [hereinafter Caspar Declaration], Exh. 1, Final Investigative Report, at 6. However, MISD continued to accept transfer students that reduced or impeded desegregation at Hearne ISD, see id., and TEA continued to fund them.
12. As of the 2002-03 school year, MISD enrolled at least 269 transfer students from Hearne ISD, of whom 246 do not qualify for any exception allowed by the Court Order. See Caspar Declaration, Exh. 3 (listing transfers); Exh. 4, Attachment C, at 1 (showing Hearne ISD as district 198905); Exh. 2, at TEA 340 (showing that code J indicates non-exempt transfers). Of these 246 Hearne transfer students, TEA withheld funding from MISD for only 40 students, see Caspar Declaration, Exh. 5; Exh. 6,² and continues to provide funding for at least 88 white students whose transfers reduce or impede desegregation at Hearne ISD. See Caspar Declaration, Exh. 2, at TEA 334 (showing ethnicity codes); compare Exh. 3 (listing all transfers to MISD by race and sending district) with Exh. 6 (listing transfer students for which TEA withheld funding).³

² TEA's list of the MISD transfer students it would not fund include 47 such students from Hearne ISD, but seven of these students are not included in TEA's list of all transfer students at MISD during the 2002-03 school year, which shows 269 transfer students from Hearne. Compare Caspar Declaration, Exh. 6 (listing transfer students for which TEA withheld funding) with Exh. 4 (listing all transfers at MISD).

³ Among these 88 transfer students are 64 students whose transfers TEA acknowledges violate the Court Order but who TEA permits to enroll at MISD nevertheless because they

13. The Court therefore should enjoin TEA from providing funding to MISD for these 88 students and any and all other transfer students that reduce or impede desegregation at Hearne ISD.

Inter-district Transfers Reduce or Impede Desegregation at Hearne ISD

14. Hearne ISD currently operates under a desegregation court order.
15. As of the 2002-03 school year, Hearne ISD served 1164 students, of whom 56% were black, 30% were Hispanic and 13% were white. See Caspar Declaration, Exh. 10 (2002-2003 Student Enrollment). Hearne operates two elementary schools, a junior high school and a high school. See id. (2002-03 Student Enrollment, Totals by Campus).
16. Since 1996, Hearne ISD's white student enrollment has declined from 23% to 13% in the 2002-03 school year. See Caspar Declaration, Exh. 10.
17. This decline coincides with an aggressive campaign by MISD begun in 1996 to encourage students to transfer from Hearne ISD to MISD. Between the 1996-97 school year and the 2002-03 school year, MISD added grades nine through twelve, expanded its enrollment from 156 students to 455 students, and increased its white enrollment from 28% to 45% of its total enrollment.⁴ See Caspar Declaration, Exh. 11 (showing enrollment); Exh. 12, at 7-8, ¶¶ 25-29 (Complaint alleging addition of grades 9 and 10); Exh. 13, at 4, ¶¶ 25-29

happened to be enrolled at MISD during the 2000-01 school year or because TEA "grandfathered" them for some other unexplained reason. See Caspar Declaration, Exh. 7 (listing 2000-01 "baseline" transfers); Exh.8, at TEA 121 (listing 2001-02 "grandfathered" transfers); Exh. 2, at TEA 340 (explaining "baseline" and "grandfathered" transfers). In activating a computer system in the Spring of 2002 to keep track of inter-district transfers, TEA decided to grandfather all transfer students who were enrolled in the receiving districts during that year. See Caspar Declaration, Exh. 9.

⁴ As of the 2002-03 school year, 45% of MISD's enrollment was white, 41% was Hispanic, and 13% was black. See Caspar Declaration, Exh. 11.

(Answer admitting allegations); Exh. 14 (showing grades 11 and 12 in 2002-03). During the 2002-03 school year, however, MISD's resident population remained only 83 students. See Caspar Declaration, Exh. 4, Attachment E, at 1 (showing 83 students before transfers).

18. Transfers from Hearne ISD made up the lion's share (78%) of the 343 transfer students that MISD enrolled during the 2002-03 year. At least 269 of MISD's 455 total students that year were transfer students from Hearne ISD. See Caspar Declaration, Exh. 3 (listing transfer students); Exh. 4, Attachment C, at 1 (identifying Hearne ISD as district 198905).
19. Without any inter-district transfers, Hearne ISD's enrollment would include 315 white students, comprising 21% of the total enrollment, but transfers have reduced the number by more than half to 155, or 13% of the enrollment. See Caspar Declaration, Exh. 10 (showing 2002-03 enrollment); Exh. 4, Attachment C, at 2 (showing numbers of transfers into and out of district).⁵ More white students transfer out of Hearne ISD than the entire white enrollment of the district today.
20. Consequently, and in view of the fact that almost one-half of the enrollment at

⁵ To arrive at the numbers of students who would have enrolled in Hearne ISD but for inter-district transfers, the analysis in paragraph 19 uses the final enrollment figures for the school year, see Caspar Declaration, Exh. 10, adds to them the numbers of transfers leaving the District, see Caspar Declaration, Exh. 4, Attachment C, at 2, and subtracts the numbers of transfers entering the District, see id. TEA uses this same method to calculate the effect of student transfers. See Caspar Declaration, Exh. 2, at TEA 334.

The Fifth Circuit has required courts to measure the cumulative effect of transfers on a school-by-school basis. See Eufala, 573 F.2d at 233. Such an analysis enables a court to tailor injunctive relief "so as to apply only to those attendance zones wherein desegregation has been reduced in the event that desegregation in all attendance zones within [the district] has not been adversely affected as a result of the transfer policy." Id. at 233 n.10. Hearne ISD has only one attendance zone, however, and no two of its schools serve the same grades, so measuring the effect of the transfers on the district as a whole accurately shows their cumulative effect on desegregation.

neighboring MISD is white, transfers from Hearne ISD are likely to alter significantly general perceptions of the District and its schools' racial identity and the behavior of persons who rely on such factors in determining whether to send their children to school in Hearne ISD. See Lowndes, 878 F.2d at 1308 (holding that a similar increment of change (9.3%) was likely to have such an effect); cf. Ross v. Houston Independent Sch. Dist., 583 F.2d 712, 714-15 (5th Cir. 1978) (holding that where the division of a school district would carve out 10.5% of that district's total white enrollment, and where the new neighboring district would have a majority white enrollment, the division would "impede the dismantling of the dual system" and therefore should be enjoined). This perception, in turn, could become self-reinforcing as white students, faced with dwindling numbers, continue to transfer from Hearne ISD. Accordingly, the cumulative effect of the transfers is to reduce or impede desegregation in Hearne ISD. See Lowndes, 878 F.2d at 1304-05.

Funding for Transfers that MISD Misrepresented

21. Additionally, as explained below, TEA has determined that MISD deliberately misrepresented that 151 transfers qualified for exceptions to the Court Order and therefore qualified for state funding notwithstanding their effect on desegregation. TEA, however, continues to fund these transfers, thereby signaling to MISD and other districts that they face no consequences for attempting to evade the Court Order's requirements. TEA's continued funding of these 151 transfers therefore undermines the effectiveness of the Court Order and should be enjoined.
22. To keep track of transfers' effect on desegregation, TEA requires districts to report information on each transfer student accepted, including whether each transfer qualifies

for an exception to the Court Order and, if so, what kind. See Caspar Declaration, Exh. 2, at TEA 329-30; 336-39.

23. The Court Order allows for exceptions to the transfer requirements in “hardship situations,” Court Order at 2, ¶ A(2)(c), which TEA has defined to include certain situations relating to childcare needs and a student’s health or safety, for example. See Caspar Declaration, Exh. 2, at TEA 337.
24. TEA notified MISD of the requirements for qualifying for each of these exceptions in March 2001, including those claimed for “child care,” “health” and “safety” reasons. See Caspar Declaration, Exh. 1, Final Investigative Report, at 2, 4.
25. TEA also informed MISD Superintendent Pete Bienski in August 2001 that MISD had reported a disproportionate number of transfers as qualifying for hardship exceptions based on “health” and “safety” reasons. See Caspar Declaration, Exh. 15, at TEA 66.
26. TEA again explained to Bienski the requirements for qualifying for such exceptions and described the documentation needed to support them, cautioning Bienski that MISD should document “health” and “safety” transfers appropriately. See id. at TEA 66-67.
27. Nevertheless, when TEA investigated MISD’s acceptance of transfer students in 2002, it found that “[t]he number of discrepancies was unprecedented,” and that “[t]he district failed to provide justification and valid documentation when questioned about specific student transfers.” Caspar Declaration, Exh. 9.
28. In fact, TEA’s investigation disclosed that MISD had misrepresented 151 interdistrict transfers as qualifying for an exception to the requirements of the Court Order. See Caspar Declaration, Exh. 1, Final Investigative Report, at 2-6.

29. For example, although TEA previously had informed MISD that the “child care” exception only applied when the sending district had no child care facilities, MISD reported to TEA that 31 transfer students from Hearne ISD qualified for this exception although Hearne had four child care providers and MISD had none. See id. at 2-3.
30. TEA further determined that MISD “did not provide any acceptable medical documentation” for the 31 students that MISD had reported as “health” transfers. MISD’s “documentation [did] not support the transfer of any child to Mumford” under this exception. Id. at 3 (emphasis added).
31. Additionally, although TEA informed MISD in August 2001 that “safety” transfers required documentation from the superintendents of both the sending and receiving school districts verifying the need for the transfers, see Caspar Declaration, Exh. 15, TEA determined in 2002 that for the 89 “safety” transfers it had reported, MISD “did not provide acceptable documentation to support the transfer of a child to the district based upon safety reasons, nor has there been agreement or discussion between the Mumford ISD and Hearne ISD superintendents to justify the coding of a student for safety reasons.” Caspar Declaration, Exh. 1, Final Investigative Report, at 4.
32. In fact, rather than communicating with the Superintendent of Hearne ISD to ensure the validity of a claimed “safety” reason, it appears that the Superintendent of MISD himself had invited parents claiming a hardship to consider the “safety” reason. See Caspar Declaration, Exh. 16, at TEA 617.
33. As TEA concluded in its Investigative Report:

The [MISD] Superintendent continued to accept transfer students into Mumford ISD by misrepresenting the reason for the student transfer through miscoding of

these students. The miscoding of students is clearly a violation of the intent of 5281 and a clear refusal to comply with directives contained in documentation previously sent to the school district and to the superintendent.

Caspar Declaration, Exh. 1, Final Investigative Report, at 6.

Funding for Transportation

34. Finally, MISD admits that it is sending buses to pick up students living in Hearne and take them to school at MISD. See Caspar Declaration, Exh. 12, at 10, ¶ 36 (Complaint making allegation); Exh. 13, at 5, ¶36 (Answer admitting fact).
35. Where a district is accepting transfers that reduce or impede desegregation in another district, the order in this case prohibits TEA from “distribut[ing] to the offending district any transportation funds which might accrue on account of transfer students accepted in violation of this order.” Court Order, at 4, ¶ A(7).
36. This court therefore should enjoin TEA from providing any transportation funding to MISD until MISD ceases to transport transfer students that reduce or impede desegregation in Hearne ISD.

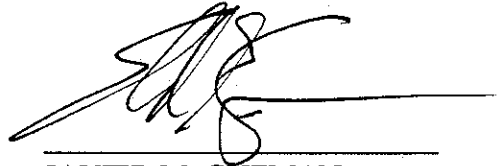
WHEREFORE, the United States respectfully requests that the Court (1) enjoin TEA from providing funding to MISD for the 88 students identified in paragraph 12, above, and any and all other transfer students whose transfers reduce or impede desegregation at Hearne ISD; (2) enjoin TEA from providing funding to MISD for each of the 151 transfer students that TEA found MISD to have misrepresented as qualifying for an exception to the Court Order in TEA’s August 23, 2002 Final Investigative Report (see Exhibit 1); and (3) enjoin TEA from providing any transportation funding to MISD until MISD can show that it has ceased providing

transportation to transfer students that reduce or impede desegregation in Hearne ISD. A proposed order is attached with this motion.

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Respectfully submitted,

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