IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

THE STATE OF MISSISSIPPI *et al.*,

Defendants,

and

McCOMB MUNICIPAL SEPARATE SCHOOL DISTRICT *et al.*,

Defendants-Intervenors.

Civ. Act. No. 70 CV 4706

UNITED STATES' RESPONSE TO THE DEFENDANT'S MOTION FOR DECLARATION OF UNITARY STATUS

On March 29, 2004, the United States received a copy of the McComb Municipal Separate School District's Motion for an Order Declaring Unitary Status, filed with this Court on March 26, 2004. The United States has worked diligently to review all records in our possession to determine what additional desegregation-related information must be obtained to complete the required desegregation compliance evaluation of this school district. This effort has been concurrent with working to conclude discovery on the McComb School District's (the "District") elementary classroom assignment practices.[1]

[1] The United States is currently conducting discovery regarding the classroom assignment practices for Otken and Kennedy Elementary Schools in the McComb School District. The Court granted the United States' Motion to Reinstate the Case to the Active Docket and for Discovery on November 17, 2003.

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As an initial matter, the United States opposes the District's request that the Motion for Declaration of Unitary Status be consolidated for hearing with any motion for further relief filed by the United States with respect to the District's student assignment practices. The November 17, 2003 Court Order granting discovery of the District's classroom assignment practices ends on May 17, 2004, with a status conference scheduled for June 17, 2004. That deadline provides insufficient time to develop the full record required to evaluate whether the District has met its burden of proving that it has achieved unitary status. Additionally, the United States has received complaints from McComb community members questioning the District's operations and compliance with the Consent Decree. Therefore, the United States requests a separate discovery schedule for the unitary status motion. This allows for a proper review of the Motion for Declaration of Unitary Status, without delaying a resolution to the classroom assignment issue currently before the Court.[2]

Accordingly, the United States sets forth below: (1) a discussion on why the two motions and discovery should not be consolidated (2) established legal standards for determining whether a school district has achieved unitary status; and (3) a proposed schedule for conducting a "unitary status" review of this school district. The proposed order includes a period for the

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[2] The United States requests that the classroom assignment issue proceed so that it is resolved before the beginning of the 2004-05 school year. The United States first made a detailed inquiry into the District's assignment practices on January 2, 2001 because of the high number of one race classrooms. See Letter from Mansukhani to Atkinson (1/2/01)(Attachment 1). After the District's explanation that in part the assignment practices were created out of concern for "white (minority) students", the United States alerted the District that it believed the classroom assignment practices for Otken and Kennedy Elementary schools violated the April 6, 1971 Consent Decree. See Letter from Mansukhani to Atkinson (2/12/01)(Attachment 2). The United States has corresponded with the District since that time attempting unsuccessfully to resolve any differences without court intervention. See Letter from Mansukhani to Adams (2/25/02)(Attachment 3) and Letter from Adams to Mansukhani (5/7/03)(Attachment 4).

parties to engage in good-faith negotiations so that this matter may be resolved amicably and without a lengthy evidentiary hearing. The United States has twice contacted counsel for the district as to whether they will agree to the proposed order, but at the time of filing had not received a response.

I. A HEARING ON ANY MOTION FOR FURTHER RELIEF SHOULD NOT BE DEFERRED

A. This Court should not consolidate the motions and discovery in this case.

The United States' objection to the District's student assignment practices should be heard by the Court before any other motions. The United States began seeking a resolution to the District's classroom assignment practices over three years ago. Consolidation of motions is unwarranted for several reasons. First, our discovery on the classroom assignment issue is further along, and scheduled to end on May 17. Second, if there is a violation, consolidating motions will result in delay of resolving the student assignment practice and students continuing to be harmed as a result of the practice. Third, the unitary status motion is not an urgent matter for the district. The school board voted on February 3, 2004 to seek unitary status. Yet the District waited two months to file the motion, when discovery on the classroom assignment issue was nearing completion. Finally, if there is a violation of the Decree by the assignment practices, that finding alone precludes a declaration of unitary status.

Discovery will be completed on the classroom assignment issue by May 17, 2004, and the United States expects to move for further relief within a month. Therefore, the Court should not consolidate any motion on the classroom assignment practices with the motion for unitary status.

II. APPLICABLE LAW ON UNITARY STATUS

A. This Court must apply the prescribed legal standard set forth by the Supreme Court by conducting a careful, factual inquiry.

The legal standard for achievement of unitary status set forth by the Supreme Court is well-established. First, school districts that unlawfully segregated their schools in the past have an affirmative, constitutional duty to remedy that segregation and its effects by taking "all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman v. Pitts, 503 U.S. 467, 485 (1992); accord Hull v. Quitman County Bd. Of Educ., 1 F.3d 1450, 1453 (5th Cir. 1993). Second, when determining whether remnants of a dual system have been eradicated, the court must examine every facet of the school district's operations, from the school and classroom assignment of student, faculty, and staff, to the transportation, extracurricular activities, and facilities and resource allocation policies and practices of the school district (the areas of school administration often referred to as the "Green factors"). Green v. County Sch. Bd. of New Kent County, Virginia, 391 U.S. 430, 435 (1968); Freeman, 503 U.S. at 485; Dowell, 498 U.S. at 250. These "Green factors" are "among the most important indicia of a segregated system." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 8, reh'g denied, 403 U.S. 912 (1971); they are often "intertwined or synergistic," so that a constitutional violation in one area cannot be eliminated without remedies in another. Freeman, 503 U.S. at 497-98. Finally, in addition to the Green factors, the court should identify other elements of school administration, such as quality of education, to "determine whether minority students [are] being disadvantaged in ways that require[ ] the formulation of new and further remedies to ensure full compliance with the court's decree." Freeman, 503 U.S. at 492.

The Supreme Court has stated that a proper resolution of any desegregation case turns on

the careful assessment of its facts. Freeman, 503 U.S. at 474 (citing Green, 391 U.S. at 439).[3] Therefore, to determine if school districts have achieved "unitary status," the Supreme Court has mandated a complete review, setting forth criteria by which the district court could determine whether the school district had manifested a good-faith commitment to maintaining a nondiscriminatory school environment. Freeman, 530 U.S. at 492. The district court must evaluate (1) whether the school districts have "complied in good faith with the desegregation decree [,]" Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249-50 (1991), and complied with the decree for a reasonable period of time, Freeman, 503 U.S. at 498; (2) whether "the vestiges of past discrimination [have been] eliminated to the extent practicable[,]" Dowell, 498 U.S. at 249-50; and (3) whether the parents, the students, and the public have assurances against further injuries and stigma. Freeman, 503 U.S. at 498; Lockett v. Board of Education, 111 F.3d 839, 842 (11th Cir. 1997); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1414 (11th Cir. 1985).

In Freeman, the Supreme Court instructed district courts to make a thorough analysis of whether a school board had complied with its obligation to desegregate in good faith. The Court stated that "[a] school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." 530 U.S. at 492. Additionally, a school board's future plans may assist the court when evaluating the school's promise to maintain an environment free of discrimination and that it is "unlikely that the school board [will] return to

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[3] "[A] school district that was once a dual system must be examined in all its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district court's remedial control ought to be modified, lessened, or withdrawn." Freeman, 503 U.S. at 486. See also Keyes v. School Dist. No.1, Denver, Colorado, 413 U.S. 189, 211 (1973).

its former ways[.]" Dowell, 498 U.S. at 248. The consideration of race to formulate classroom assignment policies calls into question the District's good faith in complying with the Consent Decree. Indeed, the United States' belief that the District is violating the Consent Decree increases the importance of a full, factual discovery period. The Court should follow Freeman to make certain that the District is acting in good faith with the rest of the Order and that violations in one area are not "intertwined" with other school district operations.

B. This Court must apply the proper allocation of burdens.

The school district bears the burden of proof of compliance with specific desegregation decrees and must demonstrate that all effects of state-imposed segregation have been remedied, because the defendant school district was previously found in violation of the Constitution and applicable federal laws. See Freeman, 503 U.S. at 494.

In Freeman, the Supreme Court made clear that school districts must shoulder the burden of demonstrating that they have eradicated all remnants of a de jure school system. See id. For example, in its discussion of student assignments, the Supreme Court stated that "the school district bears the burden of showing that any current imbalance is not traceable in a proximate way to the prior violation." Id.; See also Dowell, 498 U.S. at 249 (remanding case to district court to determine whether "Board made a sufficient showing of constitutional compliance"); United States v. Fordice, 505 U.S. 717, 739 (1992) (As set forth by "Brown and its progeny . . . the burden of proof falls on the defendant, and not the aggrieved plaintiffs, to establish that it has dismantled its prior de jure segregated system."); Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526, 537-38 (1979); Keyes, 413 U.S. 189, 211 at n.17 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

This case should be dismissed only upon a finding of "unitary status" as a result of a

careful, factual inquiry by this Court into whether the school district has met its obligations under the operative desegregation decrees and under the aforementioned legal standards set by the Supreme Court. A judicial inquiry into whether a district has achieved "unitary status" differs significantly from an initial finding that a school district has become "unitary." The Eleventh Circuit in Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985), clarified the distinction between operating as a "unitary" school system and achieving "unitary status:"

> [A] unitary school system is one which has not operated segregated schools as proscribed by cases such as Swann and Green for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures.

Id. at 1413. In Dowell, the Supreme Court also recognized that unitary school districts may still bear vestiges of discrimination, requiring continued judicial supervision. 498 U.S. at 245 (as cited in United States v. State of Georgia, 171 F.3d 1344, 1350 (11th Cir. 1999)). Thus, although a school district may no longer operate segregated schools under a dual system, this finding of a unitary school system alone is not sufficient to warrant a declaration of unitary status without a broader examination of all Green factors within the analytical framework established by the Supreme Court. By themselves, the District's Motion and accompanying documents do not provide sufficient information upon which to evaluate whether unitary status has been achieved.

III. PROPOSED SCHEDULE FOR DISCOVERY

A. The United States should be afforded the opportunity to conduct an appropriate discovery, separate from the discovery granted on November 17, 2003, before this Court hears evidence on whether the District has achieved Unitary Status.

To provide the Court with a complete record on which to assess whether the District has achieved Unitary Status, the United States should be allowed sufficient time for discovery. The data supplied in the District's Motion, while helpful in initiating the review process, is insufficient to enable the United States to assess whether the District has complied with its affirmative desegregation obligations. A thorough review of a unitary status motion includes talking with community members, visiting the school facilities, receiving information not provided in the District's motion like details of student transfers and each school's entire yearbook outlining all student honors and extracurricular activities. The United States will also need to investigate complaints recently received by McComb parents that include allegations of the District violating the Consent Decree. Until the United States is afforded an opportunity to take discovery concerning the District and "all of its facets," Freeman, 503 U.S. at 486, and until an evidentiary hearing can be held, the District's Unitary Status Motion cannot be properly evaluated. See Monteilh v. St. Landry Parish Sch. Bd., 848 F.2d 625, 628 (5th Cir. 1998) (district court must hold a hearing to determine whether school district can be declared to have achieved unitary status); United States v. Lawrence County Sch. Dist., 799 F.2d 1031, 1038 & n.6 (5th Cir. 1986), reh'g denied, 808 F.2d 1063 (5th Cir. 1987) (listing Fifth Circuit cases requiring a hearing before jurisdiction is relinquished in school desegregation case).

B. Proposed Order

As discussed above, the Supreme Court has mandated a thorough, factual inquiry into

this school district's operation, and into other areas such as quality of education. Since receiving this Motion, the United States has worked diligently to ascertain what records are in our possession and, based upon our review of these records, what additional desegregation-related information must be obtained in order to complete the required desegregation compliance evaluation of this school district. As a result of this assessment the United States requests 180 days from the date of the Order to complete discovery to enable an appropriate review of the district which includes: a review of the information collected from the school district, an adequate opportunity to speak with community leaders and parents, and a visit to the school district while school is in session. It is only at that point that the parties can meaningfully discuss any outstanding issues that may exist, including whether further remedial action is required. The parties should then be given a reasonable time of 60 days to meet, negotiate and come forward with recommendations to the Court.

CONCLUSION

For the reasons set forth above, the United States respectfully requests the Court to approve the schedule proposed below:

(1) The United States shall have 180 days from the date of entry of this Court's Scheduling Order to complete discovery and to inform the District and State of Mississippi in writing of any objections to a declaration of Unitary Status.

(2) The District and the State shall respond to requests for information from the United States within 30 days of receipt of such requests.

(3) The school district shall allow the United States an opportunity to tour and inspect school facilities upon at least seven days notice and shall provide

access to district officials, school staff, and students as well as school records.

(4) The parties shall then have 60 days from that date in which to confer and attempt to resolve any outstanding issues raised by the United States in the letter referenced in (1) above.

(5) If the parties are unable to resolve these outstanding issues, the United States shall have 30 days thereafter within which to file its objections to the District's Unitary Status Motion.

(6) Upon the United States' filing of any objections, the Court will convene a status conference and/or evidentiary hearing.

A proposed order to this effect accompanies this Response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent, by federal express mail, on this 5 th day of May, 2004, to the following attorneys of record:

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