

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOHN McFERREN, JR., et al.,
Plaintiffs,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

COUNTY BOARD OF EDUCATION OF
FAYETTE COUNTY, et al.,
Defendants.

CIVIL ACTION NO.: 2:65-cv-136

CONSENT ORDER

Before the Court is a Joint Motion to approve this Consent Order and issue a declaration of partial unitary status and dismissal, which arises out of the good faith efforts of Plaintiff class representatives, Vickie Shelton and Tracy Wade, (“Plaintiffs”), the Plaintiff-Intervenor United States (“United States”), and Defendant County Board of Education of Fayette County (“District”) to resolve this school desegregation case. Having reviewed the terms of this Consent Order, the Court finds that it is consistent with the District’s desegregation obligations, the Fourteenth Amendment to the United States Constitution, and all applicable federal law.

BACKGROUND

Because it operated a segregated school system, the District is required is “to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system.” *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). In considering whether the District has eliminated the vestiges of discrimination to the extent practicable, the court must evaluate the District’s policy and

practice with regard to: (1) student assignment (between and within schools);¹ (2) faculty assignment; (3) staff assignment; (4) transportation; (5) extracurricular activities; and (6) facilities. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248–50 (1991) (quoting *Green v. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 435 (1968)). These “*Green* factors” are “among the most important indicia of a segregated system.” *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).

“[T]he burden of proof falls on the [school district], and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.” *United States v. Fordice*, 505 U.S. 717, 739 (1992). To achieve unitary status (and dismissal of the case), the District must show that it has: (1) fully and satisfactorily complied with the Court’s desegregation order since it was entered; (2) eliminated the vestiges of its past *de jure* discrimination to the extent practicable; and (3) demonstrated a good faith commitment to the whole of the Court’s orders and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance. *See Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995); *Freeman*, 503 U.S. at 491–92, 498; *Dowell*, 498 U.S. at 248–50. If the District achieves partial compliance, however, the Court may grant partial unitary status and dismissal with respect to some *Green* factors and retain jurisdiction over the remaining factors. *See Freeman*, 503 U.S. at 490–91.

On July 12, 2013, this Court approved a Consent Order and directed the District to implement the desegregation plan contained therein. (ECF No. 119). That plan, as modified by this Court’s March 5, 2014 Order (ECF No. 138), required the District, *inter alia*, to close two

¹ Within student assignment, courts often review class assignment, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979) and discipline, *Bradley v. Milliken*, 540 F. 2d 229, 240, 250 (6th Cir. 1976), *aff’d* 433 U.S. 267 (1977).

elementary schools, construct a new elementary school, implement a controlled choice program, assign faculty and staff between schools in a nondiscriminatory manner, and provide professional development training on cultural competence. All other prior orders that did not conflict with that Consent Order remained in full force and effect, and the Court retained jurisdiction to oversee “every facet of school operations.” *Green* 391 U.S. at 435; *see also Swann*, 402 U.S. at 18.

Since 2013, the parties have worked cooperatively to move the District toward unitary status, regularly exchanging information and actively monitoring the District’s desegregation efforts. For example, Plaintiffs and the United States (“Plaintiff parties”) conducted site visits in November and December 2017 and reviewed the District’s desegregation efforts in the areas of student assignment, faculty assignment, discipline, and gifted programming. In November 2022, the Plaintiff parties conducted another site visit to each of the District’s eight schools, as well as the central office, and interviewed District staff, including various school administrators, the Superintendent, and her leadership team.

Following the November 2022 site visit and after reviewing additional data from the District, the Plaintiff parties identified some lingering concerns, including alleged vestiges of discrimination and racial disparities in various aspects of the District’s operations, and the parties began negotiating the terms of this Consent Order.

DECLARATION OF PARTIAL UNITARY STATUS AND DISMISSAL

Having reviewed the Joint Motion and the full record, it is the opinion of this Court that the Joint Motion should be **GRANTED** because, with respect to the following facets of its operation, the District has: (1) fully and satisfactorily complied with the Court’s desegregation orders for a reasonable period of time; (2) eliminated the vestiges of its past *de jure*

discrimination to the extent practicable; and (3) demonstrated a good faith commitment to the whole of the Court's orders and to those provisions of the law and the Constitution which were the predicate for judicial intervention in the first instance:

1. Staff Assignment;
2. Facilities;
3. Transportation; and
4. Extracurricular Activities.

It is therefore **ORDERED** that the District is declared partially unitary with respect to the above-referenced *Green* factors, and, except to the limited extent these factors "may be intertwined or synergistic in their relation" to the remaining *Green* factors of student assignment and faculty assignment, *Freeman*, 503 U.S. at 497, all claims related to these four factors are hereby **DISMISSED**.

REMEDIAL TERMS

The Court also has determined the following remedial terms are reasonable, fair, and consistent with the District's continuing legal obligations regarding student assignment and faculty assignment. It is therefore **ORDERED** that the parties shall comply with the following:

I. Student Assignment

A. Between School Assignment

By March 1, 2024, the Plaintiffs and the District, with input from the United States, will develop a controlled choice student assignment program that does not rely on the race of individual students and is consistent with applicable law. *Swann*, 402 U.S. at 21; *Monroe v. Bd. of Comm'rs of Jackson, Tenn.*, 391 U.S. 450, 459 (1968). The District will pilot the new controlled choice program to assign students to schools for the 2024-2025 school year. On or

before October 15, 2024, the District will provide the Plaintiff parties with the results of the piloted controlled choice assignment program. The parties will evaluate the results of the pilot program and determine whether any final changes are necessary to comply with applicable law before the start of 2025-2026 school year.

B. Within School Assignment

The District will ensure that all students, regardless of race, have equal access to all grade-appropriate course offerings and academic programs in a racially nondiscriminatory manner. In no event will such program and course assignments be made in a manner that has the effect of furthering segregation.

1. Gifted Program

The District will develop, execute, and comply with a plan (the “Gifted Plan”) to ensure that all students, including Black students, are properly identified for enrollment in its gifted program and the District delivers gifted services to properly designated students in a nondiscriminatory manner. The Gifted Plan will describe how the District intends to:

- i. Identify the central office administrator(s) who will oversee the assignment of students to the gifted program. This person will ensure the District manages and reviews all relevant records; monitors and analyzes gifted referrals and designations by race and school; and reviews all relevant data to assess and refine the District’s identification and assessment procedures;
- ii. Use a uniform process to identify students who are eligible for gifted services and ensure such students receive services on an equitable basis. The District will screen all students in kindergarten through third grade to identify eligible students, using multiple reliable and valid instruments and measures, such as

- portfolios, interviews, recommendations, curiosity assessments, and performance assessments;
- iii. Provide professional development for all faculty and staff involved in the gifted identification process on the District's identification and assessment policies, signs of racial and cultural biases and the priority of nondiscrimination in the identification of gifted children, and steps they can take to cultivate and promote the proper and equitable identification of gifted students;
 - iv. Implement a targeted communication plan to ensure that all parents/guardians, including Black parents/guardians, are informed of the District's gifted program and the District's gifted identification process;
 - v. Support teachers, including Black teachers, in obtaining gifted credentials; and
 - vi. Provide enrichment instruction in regular classrooms to students who are not eligible for gifted services based on the identification and assessment criteria but may be gifted based on certain measures and should receive further talent development and future reassessments.

Within sixty (60) calendar days of entry of this order, the District will produce its draft Gifted Plan to Plaintiff parties, who will have at least sixty (60) calendar days to review and comment on the Plan. The Superintendent will consider the comments from the Plaintiff parties and take reasonable steps to address any concerns before submitting the Plan to the Board for approval.

2. Course and Curricular Offerings

Beginning with the 2023-2024 school year and each school year thereafter, the District will: (i) review its enrollment in advanced and dual enrollment courses in secondary schools to identify any racial disparities; (ii) implement practicable responses designed to reduce barriers that limit the participation of Black students; and (iii) implement a variety of methods to communicate information about courses and curricular supports to parents/guardians and students.

3. Discipline

The District will administer student discipline in a fair and non-discriminatory manner, and ensure students remain in their regular classroom environment to the greatest extent possible. The District will implement the following provisions related to student discipline in an effort to show “continuous progress” across two consecutive school years. If the District fully satisfies the requirements of this Consent Decree and applicable law, however, the failure to eliminate all racial disparities related to discipline, may not be the sole basis for denying unitary status in discipline to the District. “Continuous progress” means measurable reductions in Black/white racial disparities across two school years with respect to the number of days of lost instruction, percentage of students issued one or more in-school suspensions, percentage of students issued one or more out-of-school suspensions, and number of office referrals as compared to the 2022-2023 baseline school year data.

- i. By October 1, 2023 the District will partner or otherwise retain the services of a mutually agreeable third-party (“Equity Consultant”) (e.g. a representative(s) of the University of Memphis or the Equity Assistance Center-South (EAC)) to provide the District with appropriate technical assistance and help it build its internal capacity to identify and address racial

disparities in discipline. The District, with assistance from its Equity Consultant, will conduct a comprehensive review of the District's discipline policies and procedures, identify trends or racial disparities in the District's administration of student discipline, consider underlying causes of such trends or disparities, and recommend practicable steps the District can take in response. The Equity Consultant will provide the District and Plaintiff parties with a written summary of their findings and recommendations based on their comprehensive review. By December 31, 2023, the District will, in consultation with the Equity Consultant, revise its discipline policies and procedures and produce them to Plaintiff parties. Plaintiff parties will have at least sixty (60) calendar days to review and comment on the District's revised discipline policies. The Superintendent will consider the comments from the Plaintiff parties and take reasonable steps to address any concerns before submitting the revised discipline policies to the Board for approval. The District will make every effort to implement the revised policies during the first nine-week period of Spring semester of the 2023-2024 school year.

- ii. The District's revised discipline policies will:
 - a. Provide clear guidance to students, parents/guardians, faculty, and staff regarding disciplinary expectations, by using concrete definitions of prohibited conduct and identifying specific, developmentally appropriate criteria for assessing and responding to infractions;
 - b. Except where the safety of students or staff is threatened, incorporate a continuum of alternative consequences to suspension and expulsion

that only escalates discipline after less-intensive strategies have been tried, documented, and demonstrated to be ineffective at modifying student behavior;

- c. Ensure that disciplinary consequences minimize students' loss of instructional time and that students who do lose instructional time due to exclusionary discipline are provided opportunities to make up missed work;
- d. Facilitate the establishment of a positive school culture by promoting constructive teaching of school rules and social-emotional skills and positive reinforcement of appropriate student behavior, including by incorporating a continuum of alternatives to exclusionary discipline (such as positive behavioral intervention and supports, restorative justice, reflective writing assignments, conflict resolution, and restorative justice practices);
- e. Emphasize early intervention for misbehavior before resorting to exclusionary discipline, except in instances where the safety of students and/or staff is threatened;
- f. Provide appropriate and non-exclusionary consequences or interventions for infractions related to tardiness; and
- g. Use the same progressive disciplinary process and provide the same protections for students before excluding them from buses as the District does when suspending or expelling students from classrooms, including, for example, opportunities to make up missed work.

- iii. The District will identify the administrator(s) who will oversee the administration of discipline and ensure the District is: (1) conducting ongoing evaluation of the discipline data collected by the District; (2) identifying any racial disparities in disciplinary referrals, in-school or out-of-school suspensions, expulsions, alternative school referrals, and/or other outcomes of referrals (by school and districtwide); and (3) proposing practicable steps to address any such disparities.
- iv. The District will provide at least one informational session each year with students and parents/guardians to discuss the District's positive core values (such as family, collaboration, perseverance, and service), behavior expectations, and disciplinary rules (including due process rights and complaint procedures), and to provide an opportunity for such persons to raise any questions or concerns about the disciplinary process.
- v. As part of the District's commitment to Positive Behavior Interventions and Supports ("PBIS") and restorative justice, the District will eliminate the use of corporal punishment for students attending any school in the FCPS system beginning with the 2023-2024 school year.
- vi. The District will also develop a mandatory annual training program for all faculty, instructional staff, bus drivers, and administrators that will promote understanding and effective implementation of the revised discipline policies and procedures. The District's training will include instruction on recognizing and reducing racial biases, including subconscious and implicit biases, increasing cross-cultural understanding, and eliminating racial discrimination.

II. Faculty

The parties acknowledge that the District has taken preliminary steps designed to increase recruitment, hiring, promotion, and retention of Black faculty. The District will increase its efforts to recruit, hire, promote, and retain Black faculty to fill vacancies, and the District commits to maintaining positive working conditions and access to career advancement opportunities for its faculty.

Within one-hundred twenty (120) calendar days of entry of this order, the District, in collaboration with its Equity Consultant or another mutually agreeable consultant will draft and provide to Plaintiff parties a proposed Minority Recruiting, Hiring and Retention Plan. Plaintiff parties will have at least sixty (60) calendar days to review and comment on the District's draft Plan. The Superintendent will consider the comments from the Plaintiff parties and take reasonable steps to address any concerns before submitting the Plan to the Board for approval. Thereafter, the District will work closely with its Equity Consultant to implement and comply with the Plan and ensure that it:

- A. Promotes equitable employment opportunities for Black teachers. To ensure that equitable employment opportunities are available and accessible for Black teachers, the District will collaborate with its Equity Consultant and conduct a comprehensive review of the District's hiring policies and procedures to identify trends or racial disparities in the recruitment, hiring, promotion, and retention of Black faculty, consider underlying causes of such trends or disparities, and recommend practicable steps the District can take in response.
- B. Analyzes and interprets data to identify trends and disparities and implements a plan to strategically coordinate with student placement offices at major universities in Tennessee

and at all Historically Black Colleges and Universities (“HBCUs”) within a 100-mile radius. The District’s Minority Recruiting, Hiring and Retention Plan should describe the District’s plans to visit HBCU campuses and advertise job vacancies in sources and publications that reach Black populations.

- C. Continuously refines and improves its “Grow Your Own” teacher preparation support program. To develop qualified Black faculty, the “Grow Your Own” program should offer targeted education and training opportunities for community members, public high school students, public high school graduates, non-certified staff (including teacher’s assistants and cafeteria workers), and paraprofessionals to become licensed teachers in District schools. The District will consult with its Equity Consultant on best practices regarding implementing strategies to reduce turnover rates of licensed teachers who participate in the program.

The District also will, for teachers leaving the school district, schedule exit surveys that, *inter alia*, will inquire about the teacher’s reason for leaving.

III. Implementation

Each school in the District will hold parent information and listening sessions no less than twice in school year 2023-24 and no less than three times per year in subsequent school years, to be attended by the school principal, at least one board member, Superintendent or other central office staff, designated notetaker provided by District, parents/guardians, and students. The District will hold these sessions at dates and times convenient for parents/guardians and students, and it will take reasonable steps to make these sessions accessible to attendees with disabilities and limited English proficiency. The District may present updates on progress under this Consent Order and other relevant information about school-based or district-wide

opportunities and resources. The District will listen and respond to questions, comments, and concerns. No later than two weeks after each session, the District will post a summary of the parent information and listening session online.

IV. Meet and Confer

The parties will meet and confer and make a good-faith effort to resolve any concerns regarding the controlled choice program, Gifted Plan, discipline policies, and Minority Recruiting, Hiring and Retention Plan. If the parties are unable to reach an agreement, then any party may move the Court to resolve the dispute so long as the motion is made within forty-five (45) calendar days of the meet and confer.

V. Monitoring and Reporting

The District will implement all components of this Consent Order by no later than the beginning of the 2024-2025 school year. The District may move for unitary status and dismissal of this case in the areas of student assignment and faculty assignment no earlier than one-hundred twenty (120) calendar days after the filing of the October 15, 2025 status report. Prior to the District filing a motion for unitary status, the parties will confer to determine whether they can agree that the District can demonstrate that it has implemented in good faith a section or sections of this Consent Order for a reasonable period of time. In the event the parties cannot agree and the District intends to file a motion for declaration of full unitary status and dismissal of this case, the parties will ask the Court to adopt a scheduling order with a discovery period and other appropriate deadlines ahead of an evidentiary hearing.

The District will retain all documents used to prepare the reports described below, and Plaintiff parties will have the right to inspect all records related to the District's efforts to comply with this Consent Order and the parties will cooperate to exchange such information. With

reasonable notice, Plaintiff parties also may conduct site visits of the schools and observe trainings. Finally, Plaintiff parties may interview, *ex parte*, or otherwise communicate individually or collectively with the Equity Consultant, parents, students with their parent's consent, teachers and other District employees who are not administrators because their acts or omissions would not be imputed to the District for purposes of this case.

The District will file with the Court an annual report no later than October 15 of each school year until the Court enters an Order granting full unitary status to the District containing the following information related to that school year, except where otherwise indicated:

1. Student Assignment

a. Between School Assignment

- i. The total number and percentage of students, by race/ethnicity and grade level, assigned to each school operated by the District.
- ii. The total number of students who have requested intra-district transfers, indicating for each such request the student's race/ethnicity, grade, zoned school, receiving school, reason for transfer request, and the reason for granting or denying the transfer. The District will provide the same information for inter-district transfers.
- iii. Whether the school satisfies the +/-15 desegregation standard.

b. Within School Assignment

- i. For each classroom in each school, the total enrollment in the class, by race/ethnicity; grade served; and the subject or program of the class, specifically indicating any groupings or assignments by ability, achievement, or other basis such as advanced placement or honors classes,

programs for students with intellectual or specific learning disabilities, gifted programs, or limited English proficient classes.

ii. Gifted Program

1. The number of students identified as gifted, disaggregated by school, grade, race/ethnicity, method of identification, and whether the student is receiving services.
2. A description of efforts to educate parents/guardians about the gifted program pursuant to Section I(B)(1)(iv).

iii. Course and Curricular Offerings

1. A description of responses designed to reduce barriers to enrollment in advanced and dual enrollment courses pursuant to Section I(B)(2)(i); and a list of outreach efforts conducted pursuant to Section I(B)(2)(ii).

iv. Discipline

1. For each infraction of the Code of Conduct that results in the referral of a student to an administrator for discipline that occurred in the preceding semester, provide the student's home school, a unique student identifier, race of the student, grade level of the student, sex of the student, infraction, description of the infraction, date the infraction occurred, action taken in response to infraction, date student returned to full instruction at home school (if relevant), number of days consequence continued, school year, disability status of the student, any restorative justice practice

employed at any point in response to the infraction, referring teacher, and race of referring teacher.

2. Number of school-based team meetings to review discipline data and description of steps taken to address any identified racial disparities in the preceding semester.
3. Number and nature of positive behavioral interventions by school in the preceding semester as well as number and nature of restorative practices by school in the preceding semester.

2. Faculty

- a. The total number and percentage of faculty, by race/ethnicity and position, assigned to each school operated by the District, specifically indicating all full-time teachers, part-time teachers, and other long-term substitutes.
- b. Whether each school operated by the District satisfies the +/-20 desegregation standard.
- c. The number of faculty with gifted credentials, disaggregated by race, position, school, and grade level;
- d. A detailed summary of the District's efforts to improve the recruitment and retention of Black faculty in the District in the previous academic year, including the steps the District plans to take to continue to improve the recruitment and retention of certified Black faculty in the District and other metrics outlined in the Minority Recruiting, Hiring and Retention Plan;
- e. A list of all faculty who were demoted, suspended, non-renewed or dismissed/terminated in the reporting year, organized by each person's name,

race, position/title, school assignment, grade level or subject area taught, if applicable, and date of demotion, suspension, or dismissal/termination;

- f. All documentation pertaining to any oral or written complaints alleging discrimination on the basis of race or color in the reporting year.

3. Implementation

- a. A list of parent information sessions conducted pursuant to Section III including the date, duration, approximate number of individuals in attendance (if applicable), and estimated participation level by race (if applicable).

The District also will file with the Court an additional report providing the information listed above at Section V(1)(b)(iv) Discipline and Section V(3)(a) Implementation on April 15 of each school year until the Court enters an Order granting full unitary status to the District.

By no later than October 15 of each school year until the Court enters an Order granting full unitary status to the District, the District will send to the Plaintiff parties, but not file with the Court:

- a. All exit interview questionnaires and survey responses, including responses to questions that call for a narrative answer, provided by departing Black faculty in the District.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: October 10, 2023.