No. 00-12649 HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CATHERINE ANN MILLER, et al.,

Plaintiffs-Appellants

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant

v.

THE BOARD OF EDUCATION OF GADSDEN, ALABAMA, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLANT

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Miller and United States v. Board of Educ. of Gadsden
00-12649 HH

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISClOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this appeal:

Honorable William M. Acker, United States District Judge, Northern District of Alabama

The Board of Education of Gadsden, Alabama, Defendants

The Class of all African-American children eligible to attend public schools in Gadsden, Alabama

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument will be of assistance to the Court in this case.

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BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment granting the Board of Education's motion for a declaration of unitary status and dismissal of the case. The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 1345. The district court entered its order on March 21, 2000, and the United States filed a timely notice of appeal on May 18, 2000. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court failed to apply the correct legal standard when it concluded that the Gadsden school district was unitary and no longer in need of court supervision.

2. Whether the district court erred in declaring the Gadsden school system unitary, when the evidence establishes that defendants have neither complied in good faith with the terms of a 1995 consent decree nor eliminated the vestiges of past discrimination to the extent practicable.

3. Whether the school district's motion for a declaration of unitary status is inconsistent with the provisions of the 1995 consent decree.

STATEMENT OF THE CASE

A. Procedural History

In November 1963, a class of African-American school children filed the instant lawsuit alleging that the Board of Education of Gadsden, Alabama, violated their rights under the Equal Protection Clause of the Fourteenth Amendment by operating and maintaining a dual school system based on race. Later that same year, the district court entered a decree enjoining defendants from further discriminating and ordering them to submit a plan that would desegregate its dual school system (R. 6).[1] The following year, defendants submitted a plan (R. 9).

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[1] In conformity with Eleventh Circuit Rule 28-4, "R.__" refers to the entry number of a pleading on the district court docket sheet. Because the docket sheet does not delineate the volume numbers, we are unable to cite to the volume number.

In June 1964, following a trial, the district court accepted defendants' plan, with amendments from plaintiffs (R. 15).

In 1966, the United States intervened (R. 28). Twice, in October 1987 and April 1994, the district court issued an order to show cause directing plaintiffs to produce evidence demonstrating why the lawsuit should not be dismissed and the Gadsden school district should not be declared unitary (R. 207; R. 280). In each case, it subsequently issued an order refusing to find the school district unitary.

On May 24, 1995, in response to the 1994 order to show cause and in lieu of a trial, the parties entered into a consent decree, the purpose of which was to "further the orderly desegregation of the [school system] and * * * bring about the creation of a unitary school district and the termination of judicial supervision" (R. 311 at 1). The decree, which was approved by the district court, provides that "the Gadsden City School District has not achieved unitary status and shall implement the provisions set forth below to address vestiges and areas of non-compliance" (R. 311 at 2). It details defendants' specific obligations in several areas, including policies, student assignment, personnel assignment, school construction, curriculum, and quality of education, and requires that "all of [its provisions] * * * be implemented fully beginning with the 1995-1996 school year" (R. 311 at 9). The decree also provides that defendants may petition for unitary status "four (4) years

from the date [they] begin implementing all of the provisions set forth" (R. 311 at 2, 9).[2]

On May 20, 1999, nearly four years to the day after the parties executed the decree, defendants filed a Motion for Declaration of Unitary Status and Order of Dismissal (R. 335). They alleged that they were in full compliance with the 1995 consent decree; and had "complied in good faith with all desegregation orders for a reasonable period of time," "eliminated the vestiges of past segregation * * * to the extent practical [sic]," and shown that they "[would] not return to [their] discriminatory ways if released from Court oversight" (R. 335 at 5).

Private plaintiffs and the United States filed separate responses and argued that defendants' motion was unwarranted and premature (R. 336; R. 337). On July 30, 1999, the district court issued an order joining the Alabama State Board of Education as a defendant since Litchfield, a historically black high school in the Gadsden school district, was under the Board's supervision (R. 353).

On February 1, 2000, the district court held a hearing on defendants' motion for unitary status (R. 380). On March 21, 2000, it issued its order and memorandum opinion declaring the Gadsden School district unitary, dismissing the case, and terminating court supervision (R. 379; R. 378). Private

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[2] On July 21, 1995, the consent decree was amended to require defendants to implement a majority-to-minority student transfer program (R. 320).

plaintiffs filed a notice of appeal on April 25, 2000 (R. 381). See Miller v. Board of Educ., No. 0012224-H (11th Cir.). The United States filed a timely notice of appeal on May 18, 2000 (R. 382).

B. Facts

On February 1, 2000, the district court held a one-day hearing on defendants' motion (R. 380). The evidence presented at the hearing dealt primarily with the questions whether the defendants had complied in good faith with their obligations under various provisions of the 1995 consent decree, and had eliminated the vestiges of past discrimination to the extent practicable. Nine witnesses testified about various topics, including the Board's policies with regard to desegregation, discipline of students, the alternative school, the Board's failure to consider whether to rename a middle school, the quality of education, Litchfield High School, the recruitment of minorities for advanced-level courses, the Board's interaction with the Bi-Racial Committee created by the 1995 consent decree, adoption of a multi-cultural curriculum, and the hiring and retention of minority faculty. The state Board of Education appeared as a party but declined to support either of the parties (R. 380 at 16-17).

1. Dr. Fred Taylor, the Superintendent of the Gadsden Board of Education, testified about its policies with regard to desegregation (R. 380 at 22). He could not recall a single policy the Board had adopted for the purpose of "contribut[ing]

to a racially nondiscriminatory school system or to eliminate the vestiges of segregation" (R. 380 at 61). He explained that the Board never revised a single policy in its manual, because "[n]o policies were ever found to be discriminatory * * * [, and] we didn't see a need to do that" (R. 380 at 61). Dr. Roberta Watts, Dean Emeritus of the College of Nursing at Jacksonville State University and a former member of the Gadsden Board of Education from 1994 through 1999, confirmed Dr. Taylor's testimony about the Board's failure to review the policy manual (R. 380 at 230-231, 240). She also stated that she never received any reports or written materials about changes in procedures to carry out the terms of the 1995 consent decree (R. 380 at 240-241).

2. Three witnesses testified about the administration of punishment within the school system and problems at the alternative school, where students are sent once they are expelled from a regular high school for disciplinary reasons. Dr. Taylor admitted that there was a "'large disparity'" in corporal punishment and school suspensions between African-American and white students (R. 380 at 41). He nonetheless stated that the disparity may not be "legitimate" but may be related to socioeconomic status, since he "found absolutely no evidence that anyone was disciplining students and using race as a factor" (R. 380 at 41-44).

On cross-examination, Dr. Taylor conceded that no one had studied individual files to determine whether students of different races charged with the same infractions had been given

similar punishments (R. 380 at 46). He also admitted that the Board never actually analyzed whether there was a disparity in the severity or frequency of punishment imposed by individual teachers, because the principals of each school are in charge of teacher conduct (R. 380 at 47). In addition, Dr. Taylor stated that he was unaware of whether any of the specific, system-wide recommendations proposed by the Board's expert to reduce the racial disparities in punishment had been implemented (R. 380 at 49-50).

Dr. Watts and Gertie Lowe, a member of the Bi-Racial Advisory Committee created pursuant to the 1995 consent decree, also testified about problems at the alternative school (R. 380 at 189, 192-193, 244-245). Both witnesses explained that they had received numerous complaints from parents about the limited educational opportunities available at the alternative school, which Dr. Watts stated was 99% black (R. 380 at 192-193, 244-245, 254-255). Ms. Lowe testified that she visited the alternative school and observed only two white students in the entire school and classes that appeared to be nothing more than a "baby-sit[ting]" service (R. 380 at 192-193, 203). She stated that when she inquired of the Board about the racial imbalance and lack of instruction at the school, she did not receive adequate answers (R. 380 at 194-196).

3. Two witnesses, Dr. Watts and Dr. Harold Bishop, department head of the Department of Educational Leadership and Policy Studies at the University of Alabama, testified about the

Board's failure to consider whether to rename the Nathan Bedford Forrest Middle School. Dr. Watts testified that at one Board meeting she stated that she had received a letter from a member of the community suggesting that Nathan Bedford Forrest School be renamed because he was known to be one of the founders of the Ku Klux Klan and an officer in the Confederacy. She explained that she could not get a single Board member to second a motion to establish a committee to consider whether renaming the school was appropriate (R. 380 at 252-253). Dr. Bishop, who was subsequently hired by defendants to devise a program to increase the number of minority students in advanced level courses (R. 380 at 107, 122), testified that the fact that the school was named for someone associated with the Ku Klux Klan, yet the Board refused to consider renaming it, negatively affects the learning environment for minority children (R. 380 at 126-128).

4. Two witnesses testified about the Board's compliance with the decree's requirements to develop a multi-cultural curriculum. Dr. Taylor admitted that when the Advisory Committee initially wrote him to inquire about the Board's compliance with the decree's requirement to develop "lesson plans * * * that * * * are appropriately multi-cultural," he and defendants' lawyer responded that they did not know what the term "multi-cultural" meant (R. 311 at 5; R. 380 at 67-68).

Gesna Littlefield, Assistant Superintendent for Gadsden elementary schools, testified that a committee, of which she was a member, was created to examine text books and lesson plans and

had established a center with materials relevant to African-American culture (R. 380 at 159, 160-162). She noted that the committee, as required by the decree, also put together units of instruction on African-American studies for grades 5, 8, and 11 (R. 380 at 160). On cross-examination, she acknowledged that the committee had not yet developed the required curriculum for grades 4, 7, 9, 10, and 12 (R. 380 at 162). She agreed that the disparity in performance between African-American and white students in the school system was attributable, at least in part, to the prior history of discrimination within the school system and that there is "more that [the Board] ha[s] to do" with regard to desegregation (R. 380 at 164).

5. Four witnesses testified about the quality of education offered at Litchfield High School, a historically black high school, which the Board converted to a magnet school in order to provide a superior academic environment and to attract white students (R. 380 at 29). Dr. Taylor explained that because of its smaller size, Litchfield High School does not offer several advanced courses, electives, and extracurricular activities offered at Gadsden High School, which is significantly larger and has a student body that is nearly 50% white (R. 380 at 59-60). According to Dr. Taylor, Litchfield, which remains "90[-]something percent minority," nonetheless has "a very good program" and its "only disparity" is its smaller curriculum (R. 380 at 59). In addition, he explained the Board has "done everything [it] could to take care of those [Litchfield] students

who wanted * * * [advanced] courses" by "allow[ing] some of the[m]" to travel and take courses at other high schools (R. 380 at 59).

Richard Edwards, whose daughter transferred from Litchfield to Gadsden High School and graduated in 1999, testified about the inferior educational opportunities. He explained that his daughter eventually transferred from Litchfield, because several advanced-level courses, including math analysis, honors English, and genetics, were not offered at that location and traveling between high schools was too difficult (R. 380 at 170). He stated that once she became a student at Gadsden, it was obvious that she had not received adequate math instruction and preparation while at Litchfield (R. 380 at 171). He also reported that the advanced-level biology course at Litchfield and the regular biology course at Gadsden use the same text book, while the advanced-level biology course at Gadsden uses a more difficult text book (R. 380 at 171-172). In addition, Mr. Edwards noted that baseball, tennis, and golf are not offered as extracurricular activities at Litchfield, even though they are available at other schools (R. 380 at 176).

Dr. Watts also testified about the academic deficiencies at Litchfield (R. 380 at 233-234). She explained that students graduating from Litchfield were uniformly not adequately prepared for higher learning and consistently flunked out of the nursing school, even though minority and white students from Gadsden and Emma Sansom, schools with student bodies that are 54% and 35%

African-American, respectively, excelled academically (R. 380 at 233). She further explained that despite initiating a mentoring program to recruit minority students, only three Litchfield students made it through the nursing program, and two of them required remedial tutoring (R. 380 at 232).

Dr. Ed Richardson, the Superintendent of the Alabama State Board of Education, testified about Litchfield High School, which he characterized as having moved towards "racial isolat[ion]" (R. 380 at 78, 93). He explained that in July 1999, the State took over supervision of Litchfield, because it had been placed on "academic caution" in 1995 and its students' reading scores had not sufficiently improved over a three-year period (R. 380 at 87-88). According to Dr. Richardson, Litchfield was originally placed on "academic caution" because reading test scores were below what the State considered to be an acceptable level (R. 380 at 87, 91). He also explained that Litchfield was "a high performing Caution school" and, thus, anticipated that it would not be subject to state supervision the following year (R. 380 at 90).

6. Dr. Watts also testified about deficiencies in educational opportunities generally offered to minorities within the school system (R. 380 at 232-233). For example, she reported that 90% of the students in the school system designated retarded were black and 98% of the students in the gifted classes were white (R. 380 at 250).

Dr. Bishop testified that the Gadsden Board of Education hired him in the spring of 1998 to address the disparity in the percentages of white and minority students enrolled in advanced-level courses, which he believed had its "roots and relationship to prior discrimination" (R. 380 at 110-112, 122, 125, 131-132, 136). He stated that he developed a four-phase program to address the problem, which was based on identifying and providing support for gifted minority students at the elementary school level and was not presented to the Board until the spring of 1999 (R. 380 at 114, 131). He also explained that his open-heart surgery further delayed the process, and, thus, full implementation and noticeable results could not be anticipated until 2002 (R. 380 at 112, 130-132). In any event, he noted that follow-up and testing would still be necessary thereafter to ensure that the program's objectives had been achieved (R. 380 at 141).

7. Five witnesses testified about the relationship between the Board and the Bi-Racial Committee, which was established pursuant to the consent decree as a vehicle "to advise and make recommendations" regarding desegregation and the implementation of the decree (R. 311 at 4). Dr. Taylor and Jane Floyd, an attorney, former teacher and member of the Bi-Racial Advisory Committee for the past two years, testified that an ad hoc committee of the Board had to be created during the pendency of the decree, because the actual Board did not furnish the Bi-Racial Committee with the information to which it was entitled

(R. 380 at 64-65, 157). Floyd explained that prior to her tenure on the Committee, plaintiffs' lawyers and the Justice Department negotiated the creation of an ad hoc committee of the Board, because the actual Board had failed to provide information to the Committee as required (R. 380 at 157). She also stated that as long as she had been on the Advisory Committee, the Board had adequately responded to the Committee's recommendations and provided information (R. 380 at 152-156). Dr. Taylor explained that the Board adopted some, but not all, of the Advisory Committee's recommendations (R. 380 at 65-66). He noted that the Board accepted the Committee's recommendation regarding racial and ethnic sensitivity training and hired Dr. Bishop, who held a workshop for the Board and has been conducting on-going training for faculty and staff (R. 380 at 32).

Gertie Lowe, a member of the Bi-Racial Advisory Committee, Dr. Watts, and Betty Robinson, a member of the Bi-Racial Advisory Committee and its chairperson in 1997, all testified about the enormous difficulties that the Bi-Racial Committee had in obtaining information from the Board, which occurred even after the creation of an ad hoc committee of the Board to ameliorate the problem. All three explained that the Board consistently provided inadequate information to the Bi-Racial Committee (R. 380 at 195-197, 200, 210-211, 214-215, 219, 236-239, 245). They testified that when the Bi-Racial Committee requested information, it often received data in a form that could not be understood, "vague" or "[in]direct" responses, or no answers at

all (R. 380 at 195-197, 200). Lowe and Robinson each explained that on more than one occasion the Board responded to an inquiry by the Bi-Racial Committee stating that "there was nothing wrong with [the] school system" or that the Committee "didn't have any business asking that" (R. 380 at 200, 210-211, 214-215, 219). Lowe also noted that the Board refused her request to appear at a Board meeting and to be placed on the agenda, and, as a result of the Board's failure to provide information and address issues on a timely basis, the Bi-Racial Committee was forced to cancel meetings (R. 380 at 191, 200, 210-211).

8. Dr. Taylor testified about the Board's effort to hire and retain minority faculty members. He stated that he was aware of only three instances during the consent decree's four-year pendency in which defendants had not complied with its terms (R. 380 at 98). In one instance, Litchfield had one too many minority teachers, because a non-minority teacher transferred just as the school year began (R. 380 at 99). The situation was rectified at the end of the academic year and the Board created a $300.00 incentive to encourage teachers to give timely notice of retirement (R. 380 at 26, 99-100). A second instance of noncompliance, which was also corrected at the end of the school year, occurred when a minority teacher, who had been hired, decided at the last moment not to work in the school system (R. 380 at 99-100). The third instance was unavoidable, because, regardless of the races of those hired, the designated ratio could not be achieved (R. 380 at 100).

To increase minority hiring, Dr. Taylor noted that the Board did not "just go and give somebody an application" but instead tried to "arrange an appointment * * * for an interview" (R. 380 at 62). As to the retention of minority faculty, he acknowledged that the Board had not "done anything concrete other than to provide * * * a quality place to work" (R. 380 at 71).

Dr. Watts testified that there were only two black faculty members teaching core courses at Emma Sansom and Gadsden High Schools (R. 380 at 242-243). She also stated that, in her opinion, the problem of racism within the school system had been institutionalized, and was worse in 1999 when she left the Board than when she had joined the Board five years before (R. 380 at 256).

C. The District Court's Decision

On March 21, 2000, the district court issued its Order and Memorandum Opinion declaring the Gadsden school district unitary, dismissing the case, and terminating its supervision (R. 379; R. 380). It did so without discussing controlling precedent, specifying a legal standard, or citing any of the detailed provisions of the decree when assessing defendants' compliance. The court noted the difficulty of its decision, stating that it "finds it no easier to reach a decision on this evidence than the Gadsden Board has found it to satisfy the NAACP Legal Defense Fund and/or the Department of Justice" (R. 378 at 8). The court nonetheless reached its decision apparently because it believed that "the Gadsden Board ha[d] done a pretty good job of meeting

the standards it agreed to" in the consent decree and "a few more adjustments" would merely "invite another dispute" (R. 378 at 10, 14).

At the outset, the district court set forth a brief history of the lawsuit and listed its factual findings. Of its sixteen findings, none is dispositive and an equal number of them supports each of the parties (R. 378 at 4-7). The district court found, inter alia, disparities between the number of African-American and white students who are punished; sent to alternative schools, which "are different from and inferior to the other schools"; and enrolled in advanced-level courses (R. 378 at 7). It also found that racial imbalances existed within the schools and that the course offerings and activities at the schools with the highest percentage of African-American students are not as "varied or as advanced" as schools with a higher percentage of white students (R. 378 at 7).

The court "start[ed] its analysis with three truisms": supervision is not forever; nothing is perfect; and everything is relative (R. 378 at 8-9). Afterwards, it discussed the evidence that did not dictate the result (R. 378 at 9-10).

First, it noted that racial imbalances within Gadsden's school system "cannot be dispositive, or even strongly indicative * * * of 'unitariness' or of the level of the Gadsden Boards's commitment to desegregation" (R. 378 at 9). The court explained that "[t]he Gadsden Board cannot be held responsible for * * * residential racial separateness" and "so-called 'white flight'"

(R. 378 at 9-10). Consequently, it surmised that "[u]ntil the federal courts learn how to make the lion lie down with the lamb, * * * [and] plaintiffs and the United States actually know what they want the Gadsden Board to do[, t]here is no figurative way to put a ring in the Gadsden Board's nose" (R. 378 at 10).

Next, the court asserted that "[t]he bona fides of the intent of the Gadsden Board's decision makers is not dispositive * * * of whether [its] system has been satisfactorily desegregated" (R. 378 at 10). Recognizing that the "unitariness" inquiry nonetheless has a subjective component, it characterized defendants' efforts to comply with the 1995 consent decree as "pretty good" (R. 378 at 10). It found the Board's refusal to change the name of a school associated with a founding member of the Ku Klux Klan did "not prove a racist attitude" and the Board had done its "best to recruit more black teachers" (R. 378 at 11, 13).

Twice in its opinion, the court compared the circumstances in the Gadsden school system to events throughout the world. Initially, it emphasized that "the level of cooperation, open-mindedness and acceptance * * * in Gadsden * * * beats by a mile what this court hears and reads about the situations in Kosovo and Northern Ireland" (R. 378 at 9). Later, it stated that "the parallel" between the Board's refusal to rename the school and "the current well-publicized conflict in South Carolina over the flying of the Confederate flag is obvious" (R. 378 at 10).

Finally, the district court evaluated certain evidence in light of a newspaper article. It noted that it was initially "disturbed" that "black students in Gadsden are paddled or otherwise disciplined more often than white students" (R. 378 at 12). After reading a newspaper article reporting that the Assistant Secretary of Education for civil rights told the United States Commission on Civil Rights that racial disparities in school discipline "'do[] not necessarily mean racism is at work,'" however, the court did not believe that Gadsden's disparity in "administering discipline" or "mandated attendance at alternative schools" resulted from race (R. 378 at 12-13).

In concluding its opinion, the court acknowledged that it was "tempted to order a few more adjustments * * *, but such a course of fine tuning would only invite another dispute" (R. 378 at 14). Instead, it explained it "will place its bets on continued progress if not on ultimate perfection * * * [and] hope[] it is not disappointed" (R. 378 at 14).

SUMMARY OF ARGUMENT

1. The district court erred in issuing an order declaring the school system in Gadsden, Alabama, unitary, dismissing the case, and terminating court supervision. It ignored controlling precedent and did not apply any recognized legal standard in reaching its decision. Indeed, the district court failed to address whether defendants had eliminated the vestiges of discrimination to the extent practicable, focus on the explicit terms and goals of the 1995 consent decree, or adequately

consider whether defendants had acted in good faith. Given its complete failure to apply, or even to acknowledge the existence of, established precedent governing the termination of school desegregation litigation, the district court's decision must be set aside.

2. The district court also erred in dismissing the case, because the evidence affirmatively establishes that defendants failed to eliminate the vestiges of discrimination that still remain in various aspects of the school system; to comply with various requirements of the decree; or to make a good-faith commitment to its obligation to desegregate the school system. For the first two years following entry of the decree, defendants did little if anything to comply with its requirements. For example, defendants engaged in such dilatory tactics with regard to providing the Bi-Racial Advisory Committee with information to which it was entitled pursuant to the decree; consequently, it was necessary to create an ad hoc committee of the Board. With regard to defendants' obligation to provide "Quality Education" in accordance with the decree's terms, defendants did not even contact an expert until three years after the decree had been entered, and adopted his multi-year proposal to recruit minorities for advanced course work, which will not be fully implemented until 2002, only two weeks before filing for unitary status.

To date, defendants have failed to comply with their obligations pursuant to the decree in various areas. Despite

having an obligation to review and enact polices that further the purposes of the decree, defendants have refused to review their policy manual or adopt measures necessary to eliminate the vestiges of discrimination. For example, the record reflects that African-American high school students are disciplined, expelled, and required to attend an alternative school, which is inferior, at a significantly higher rate than white students. In addition, 90% of the students in the school system designated retarded are African-American, while 98% of the students in advanced placement courses are white.

Moreover, Litchfield High, a historically black high school, still exhibits the "injuries and stigma" inherent in a dual school system that must be eliminated prior to a court's issuing a declaration of unitariness. Freeman v. Pitts, 503 U.S. 467, 498 (1992). Defendants designated Litchfield as a magnet school, ostensibly to provide a superior academic environment and attract white students. Nonetheless, the school fails to provide upper-level advanced courses and electives that are offered at other high schools with substantially higher white student populations. In fact, the school remains over 90% black and currently is under state supervision due to its students' low reading scores. In other areas, including faculty hiring and a multi-cultural curriculum, defendants have also failed to fulfill their obligations pursuant to the decree or even make good faith efforts to eliminate the vestiges of discrimination to the extent practicable.

3. Finally, the district court, contrary to the express terms of the consent decree, erroneously assumed that defendants were entitled to petition for unitary status four years from the date that it was executed, without regard to whether they had begun to implement all of its terms. In accordance with the terms of the decree, however, defendants' motion for unitary status was premature and, thus, never should have been considered.

ARGUMENT

I

THE DISTRICT COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD WHEN IT CONCLUDED THAT THE GADSDEN SCHOOL DISTRICT WAS UNITARY AND NO LONGER IN NEED OF COURT SUPERVISION

The district court failed to apply any recognized legal standard in declaring the school system in Gadsden, Alabama, unitary, dismissing the case, and terminating court supervision. Rather, it issued its order because it believed defendants had done a "pretty good job" of complying with its 1995 consent decree and further "adjustments * * * would only invite another dispute" (R. 378 at 10, 14). Consequently, the district court's decision on its face is deficient.

The district court ignored controlling legal precedent that clearly sets forth the standard for determining whether a school system has achieved unitary status. As this Court has explained, "[t]he appropriate analysis for determining whether or not a school district that has practiced de jure segregation has achieved 'unitary status' is well established." United States v.

Georgia (Troup County), 171 F.3d 1344, 1347 (11th Cir. 1999). It requires a district court to determine: "(1) whether the local authorities have eliminated the vestiges of past discrimination to the extent practicable and (2) whether the local authorities have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan." Ibid. See also Freeman v. Pitts, 503 U.S. 467, 480-485 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 249-250 (1991); Lockett v. Board of Educ. (Muscogee County), 111 F.3d 839, 842-843 (11th Cir. 1997). In evaluating the evidence, a court should place the burden of proof on defendants and consider the "specific terms" of the decree in accordance with the specified "standard to govern termination of judicial supervision." Youngblood v. Dalzell, 925 F.2d 954, 959-960 (6th Cir. 1991). See also Allen v. Alabama State Bd. of Educ., 164 F.3d 1347, 1350 (11th Cir. 1999); Lee v. Etowah County Bd. of Educ., 963 F.2d 1416, 1425 (11th Cir. 1992).

In Dowell, the Supreme Court considered the question of when a court-ordered decree should be dissolved because the objectives of the decree have been achieved. In remanding the case to the district court for a determination as to whether there had been a sufficient showing of constitutional compliance, the Court stated that dissolution of a decree may be appropriate where "local authorities have operated in compliance with it for a reasonable period of time." 498 U.S. at 248 (emphasis added). In making that determination, a court should consider whether the school board's policies "form a consistent pattern of lawful

conduct directed to eliminating earlier violations." Freeman, 503 U.S. at 491. Its assessment of "good-faith * * * [is] a subject for * * * specific findings," and it "should give particular attention to the school system's record of compliance," which includes the extent to which local authorities have complied with the desegregation plan, the speed of compliance, and whether it has undertaken any actions above and beyond what was required by decrees. Id. at 498, 491.

Given this precedent, it is obvious that the district court's opinion is deficient. First, it found that the Gadsden system was "desegregated" but did not address whether defendants had "eliminated the vestiges of past discrimination to the extent practicable" (R. 379 at 1). In fact, it never made mention of the "vestiges of discrimination" in either its order or memorandum opinion. Instead, without focusing on specifics, it dismissed the decree based on its overall, generalized impression of defendants' conduct. Consequently, the district court's ruling, by definition, is defective. Troup County, 171 F.3d at 1348 ("a crucial finding required in any determination that a school system has achieved 'unitary status' is a finding that the vestiges of past discrimination have been eliminated to the extent practicable").

The district court's opinion nonetheless strongly suggests that defendants failed to meet their constitutional and contractual obligation to eliminate the vestiges of discrimination to the extent practicable. After all, the

district court recognized that defendants failed to reach their maximum potential. Indeed, at least twice in its opinion it noted that it expects defendants to make further "effort[s]" or "progress" (R. 378 at 9, 14).

Second, the district court's discussion of defendants' "good-faith efforts" is also deficient. At the outset, the district court failed to focus on the explicit terms and goals of the 1995 consent decree when assessing defendants' compliance. Rather, it seemingly dismissed the decree and terminated court supervision, because "the Gadsden Board has done a pretty good job" of meeting its obligations and further "adjustments * * * would only invite another dispute" (R. 378 at 10, 14 (emphasis added)).

The district court's offhand characterization of defendants' efforts is insufficient to justify a conclusion that defendants have either: (1) complied with the terms and purposes of the consent decree; or (2) acted in good faith. A finding that defendants did a "pretty good job" does not establish that they have fully complied with all aspects of the decree. In fact, it implies precisely the reverse. It also says little if anything as to whether defendants have acted in "good faith" other than to suggest that they clearly could have done better.[3]

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[3] The district court also seemed to minimize the significance of good faith when assessing whether supervision over the school system should be terminated. While acknowledging that "there certainly must be a subjective component to [its] inquiry," the district court minimized its importance, stating that "[t]he bona fides of the intent of the Gadsden Board's decision makers is not

(continued...)

Additionally, the court's opinion does not address defendants' history of noncompliance prior to entry of the decree.

Third, to the extent that the district court dismissed the decree to avoid further disputes between the parties, it clearly erred. At the conclusion of the opinion, it indicated that it was "tempted to order a few more adjustments and to hold out [on] * * * a declaration of unitary status * * *, but such a course * * * would only invite another dispute" (R. 378 at 14). Regardless of the level of controversy, defendants had a contractual and constitutional obligation to "take all steps necessary to eliminate the vestiges of the * * * de jure system." Freeman, 503 U.S. at 485; see also Allen, 164 F.3d at 1351-1352. Thus, the district court's stated reason does not justify its conclusion. Accordingly, the district court's order and opinion are legally unsound and inconsistent with controlling precedent from the Supreme Court and this Circuit.

II

THE DISTRICT COURT ERRED IN DECLARING THE GADSDEN SCHOOL SYSTEM UNITARY WHEN THE EVIDENCE ESTABLISHES THAT DEFENDANTS HAVE NEITHER COMPLIED IN GOOD FAITH WITH THE TERMS OR GOALS OF THE 1995 CONSENT DECREE NOR ELIMINATED THE VESTIGES OF PAST DISCRIMINATION TO THE EXTENT PRACTICABLE

The district court erroneously dismissed the case without considering whether defendants had complied with the purpose and specific terms of the consent decree. In fact, analysis of the

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[3](...continued)
dispositive in finding the answer to the question of whether this system has been satisfactorily desegregated" (R. 378 at 10).

evidence in light of the decree's detailed provisions demonstrates that the School Board failed to eliminate the vestiges of discrimination to the extent practicable, substantially comply with requirements of the decree, or attempt in good faith to desegregate its school system. Consequently, the district court's order should be reversed.

A. School Policies

The evidence establishes that defendants have done nothing to comply with their obligation to eliminate discriminatory policies and enact new procedures that further the purposes of the decree. Section II of the 1995 decree, entitled "Policies," provides:

> The defendants acknowledge the necessity of adopting and implementing policies that contribute to a racially nondiscriminatory school system and to the elimination of vestiges of past discrimination and segregation. Toward this end, the Board shall supplement and/or amend its policy manual, as necessary and appropriate, to achieve and insure compliance with this Consent Order.

(R. 311 at 2).

Section IX of the decree, entitled "Record-keeping," requires the Superintendent and his staff to "review and analyze * * * data" in certain areas, including discipline, participation in advanced curriculum, enrollment in special education and the magnet school program; and "where appropriate, develop, for implementation by defendants, responses designed to address racial disparities" (R. 311 at 7-8). Thus, Section II and Section IX together obligate the Board to change or eliminate existing discriminatory policies and enact new measures to

eradicate racial disparities and the vestiges of segregation.

Despite the terms of the decree, Dr. Taylor, the Board's Superintendent, testified that he could not recall a single policy that the Board has revised or implemented to "eliminate the vestiges of segregation" or "contribute to a racially nondiscriminatory school system" (R. 380 at 61). In addition, the Board has yet to revise its policy manual (R. 380 at 61). According to Dr. Taylor, "[w]e really didn't * * * see a need to do that," since "[n]o policies were ever found to be discriminatory" (R. 380 at 61).

Dr. Roberta Watts, a member of the Board of Education from 1994 until 1999, confirmed that defendants have ignored their obligations to amend old and implement new policies. She testified that during her tenure, the Board never reviewed the policy manual, and she never received any reports about changes in procedures to carry out the terms of the consent decree (R. 380 at 240-241). At the same time, Gertie Lowe, a member of the Bi-Racial Advisory Committee, testified that even though the Advisory Committee, in accordance with the decree, "would have meetings and * * * go through policies one by one and make suggestions," it made little progress with the Board in revising policy (R. 380 at 192, 199). Consistent with Dr. Taylor's testimony, she explained "if you don't see a problem, you can't correct [it]. * * * [W]e were told [by the Board] there was nothing wrong with our school system more than one time" (R. 380 at 200).

In fact, the district court's findings and the evidence demonstrate that defendants' policies are racially discriminatory in several areas. First, as to punishment, the district court found that African-American students are more often disciplined and sent to alternative schools, which "are different from and inferior to the other schools," than white students (R. 378 at 7, 12-13). Dr. Taylor testified that there is a "'large disparity (almost 20%) between corporal punishment administration rates for black[] and white[]'" students and "a similar disparity" with regard to school suspensions" (R. 380 at 41). In fact, Dr. Watts reported that 99% of the students who are expelled and ordered to attend the alternative school are African-American (R. 380 at 254). Additionally, Ms. Lowe testified that she got no answers when she inquired of the Board why the alternative school was entirely African-American, and certain students had been there over a year awaiting a recommendation from the school's principal to return to a regular high school (R. 380 at 193).

Data from the 1998-1999 academic year also reflect that African-American students are disciplined at a disproportionately high rate when compared to the overall enrollment at each school. Specifically, the rate of disciplinary incidents by race as compared to student enrollment reflects discrepancies at three elementary schools, one middle school, and the two high schools with the highest percentages of white students (R. 359 at 22).

The evidence also establishes that the statistical disparities in punishment, expulsion, and enrollment at the

alternative school between white and black students are the result of race.[4] See Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 25 (1971). First, Dr. Taylor acknowledged during cross-examination that the Board's expert issued a report making specific system-wide recommendations to reduce racial disparities in the administration of punishment (R. 380 at 49-50). In addition to the fact that Dr. Taylor was unable to recall whether the Board adopted any of the expert's recommendations, the existence of the report and recommendations demonstrates that the Board has not adequately addressed problems related to discipline.

In the instant case, defendants offered no affirmative evidence to demonstrate that the imbalances between the number of African-American and white students suspended, required to attend the alternative school, or otherwise punished resulted from anything other than present or past discrimination. Moreover, Dr. Taylor's testimony that he "found absolutely no evidence that anyone was disciplining students and using race as a factor" does not overcome the contradictory evidence and presumption, since he and the Board never focused on whether students of different races charged with the same infractions received disparate punishments (R. 380 at 43, 46).

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[4] The district court refused to believe that the disparity in punishment and enrollment at the alternative school between white and African-American students was the result of race, based on a newspaper article that addressed neither the circumstances in, nor any of the evidence relating to, the Gadsden school system (R. 378 at 12-13).

For the same reasons, the evidence establishes that defendants have a racially discriminatory policy with regard to the labeling of its students. After all, Dr. Watts reported that 90% of the students designated retarded are African-American (R. 380 at 250). Defendants offered no evidence to challenge or explain the racial disparity. Consequently, defendants' policies with regard to discipline, expulsion, enrollment at the alternative schools, and the classification of students are discriminatory and in violation of Sections II and IX of the decree.

The evidence relating to the Board's failure to consider renaming the Nathan Bedford Forrest Middle School also demonstrates its unwillingness or inability to appreciate its need to "adopt[] and implement[] policies that contribute to a racially nondiscriminatory school system" (R. 311 at 2). Defendants' expert, Dr. Bishop, testified that he believed that the school's being named after someone associated with the founding of the Ku Klux Klan had a negative effect on the learning environment (R. 380 at 128). Yet, when a proposal to consider whether to change the school's name was presented at a Board meeting, no Board member was willing to second the motion (R. 380 at 127-128). Thus, defendants clearly have not amended their policies to eliminate the vestiges of discrimination to the extent practicable.

The evidence also strongly suggests that the Board has not adopted adequate policies to ensure that Litchfield High's

conversion to a magnet school would eliminate the vestiges of past discrimination to the extent practicable or provide a superior educational environment for its predominantly African-American students. It is undisputed that Litchfield, a historically black school, remains over 90% black (R. 380 at 59). It currently is under state supervision, because its students' reading scores are at an unacceptable level.

Moreover, it seems apparent that the Board's policies have guaranteed the school's failure and the perpetuation of the "injuries and stigma" resulting from a dual system. Freeman v. Pitts, 503 U.S. 467, 485, 498 (1992). For example, although Litchfield is designated a magnet school, it fails to provide upper-level advanced courses and electives that are offered at other high schools with substantially higher white student populations (R. 380 at 57-61). In fact, there is no evidence that the Board has provided any incentive for academically advanced students of any race to attend Litchfield. Consequently, it is not surprising that the racial imbalance at the school has not improved in any significant respect during the pendency of the decree.

Furthermore, had defendants genuinely wanted to ensure Litchfield's desegregation, they could have offered several advanced-level courses only at that location. Such a policy would have helped to ensure that gifted students from high schools with significantly higher percentages of white students than Litchfield would travel to that location, rather than gifted

students from Litchfield -- who are presumably predominantly African American -- going to other schools. Thus, contrary to Sections II and IX of the decree, defendants have not implemented or effectuated polices with regard to Litchfield which "eliminat[e] * * * [the] vestiges of past discrimination and segregation" to the extent practicable, "contribute to a racially nondiscriminatory school system," or alleviate racial imbalances (R. 311 at 2).

B. Multi-Cultural Curriculum

The evidence establishes that defendants have failed to eliminate the vestiges of discrimination and to comply in good faith with the decree's requirements regarding a multi-cultural curriculum. Section VII of the consent decree, entitled "Curriculum," requires defendants, inter alia, to "insur[e] that the curriculum and instruction at the schools are appropriately multi-cultural, and in particular, have African American content, emphasis and treatment" (R. 311 at 5).

At the outset, the Board, at least initially, did not act in good faith with regard to this obligation. For example, when the Bi-Racial Advisory Committee wrote Dr. Taylor, the Superintendent, during its first year of operation to inquire as to the Board's efforts to implement a multi-cultural curriculum, he claimed that he did not know what the term "multi-cultural" meant (R. 380 at 66-67, 216-217). Later, when the Bi-Racial Advisory Committee sought to verify that the reported changes to the curriculum had been implemented, Dr. Taylor said that

verification was impossible, because issues relating to curriculum were left to the discretion of the principal of each school (R. 380 at 218-219).

The evidence is uncontradicted that the Board has not yet addressed the decree's requirement of a multi-cultural curriculum for a majority of the grades. Gesna Littlefield, an Assistant Superintendent, testified that although unit plans including African-American studies have been developed for three grades, required plans have yet to be developed for grades 4, 7, 9, 10, and 12 (R. 380 at 160-163). Consequently, as to Section VII of the decree, defendants have not eliminated the vestiges of discrimination to the extent practicable or complied in good faith with their obligations.

C. Quality Of Education

The district court's findings and the evidence demonstrate that defendants have not complied with their obligations pursuant to Section VIII of the decree. In fact, the evidence establishes that they have not even made a good-faith effort.

Section VIII of the decree, entitled "Quality of Education," requires defendants to provide "academic and enrichment classes and programs" on an equitable basis "at each school in the District" (R. 311 at 5-6 (emphasis added)). It also requires defendants to develop "effective school-based plans for * * * encouraging, informing, affirmatively recruiting, and academically preparing black students to enroll in advanced placement, honors, gifted and talented and elective courses and

programs and in activities related to such courses" (R. 311 at 6).

Despite the terms of the decree, the academic opportunities offered at schools with the highest percentages of African-American students are deficient and inferior to the academics provided at schools with significantly higher percentages of white students. See Freeman, 503 U.S. at 492 (noting that it is proper to compare the relative "quality of education" offered to black and white students in determining whether school system is unitary). The district court found that the "course offerings at the schools that have the highest percentage of black students are not as varied or as advanced as in the schools with a higher percentage of white students" (R. 378 at 7).

Moreover, as previously noted, the evidence demonstrates that the educational opportunities available at Litchfield High School, which is more than 90% African American, are inferior to the academics provided at high schools that have significantly higher percentages of white students. For example, it is undisputed that Litchfield does not offer certain advanced courses, electives, and extracurricular activities that are given at Gadsden and Emma Sansom, high schools in the district which are approximately 54% black and 35% black, respectively (R. 380 at 57-58). Anecdotal evidence from a parent and administrator, both of whom are familiar with the curriculum available at various high schools in the district, described the limited and inferior academic opportunities offered at Litchfield. Indeed,

the reading test scores of its students are so deficient that the school, after having been on "academic caution" since 1995, is now under the supervision of the Alabama State Board of Education.

Similar to Litchfield, it can hardly be disputed that the instruction at the alternative school, which is 99% African-American, is deficient (R. 380 at 254). Gertie Lowe testified that when she visited the school, she observed classroom settings without instruction that were equivalent to "baby-sit[ting]" (R. 380 at 203). Consistent with her uncontradicted testimony, the district court found that the academics at the alternative school were "different from and inferior to the other schools" (R. 378 at 7). Consequently, given the multitude of problems at Litchfield and the alternative school, there was no basis for the court to conclude that defendants have effectively implemented the decree or eliminated the vestiges of discrimination to the extent practicable.

Moreover, within the school system as a whole, significant inequities exist in the quality of education based on race. Dr. Roberta Watts reported that students within the system are unfairly labeled and denied opportunities: 90% of the students categorized as retarded are African-American and 98% of the students in the gifted classes are white (R. 380 at 250, 254). The court also acknowledged that a disparity exists between the numbers of black and white students who take advanced-placement courses (R. 378 at 7). Not surprisingly, defendants' expert, Dr.

Bishop, and Gesna Littlefield, Assistant Superintendent for Gadsden's elementary schools, testified that the disparity in academic performance between African-American and white students was due at least in part to the prior discrimination in the school system (R. 380 at 136, 164).

The evidence also demonstrates that defendants have not acted in good faith with regard to providing quality education as required by the decree. After all, the Board did not contact its expert, Dr. Bishop, until the spring of 1998, which was three years after the decree had been entered (R. 380 at 121-122). Additionally, Dr. Bishop's proposal to recruit minorities for advanced course work was not presented to or approved by the Board until the spring of 1999, two weeks before defendants filed their motion requesting unitary status (R. 380 at 114, 131-132).

Moreover, at the hearing, Dr. Bishop acknowledged that only the first phase of his four-phase program had been fully implemented, and, thus, results would not begin to be visible until 2002 (R. 380 at 111, 131-132). Since it is undisputed that at that point there still will be a need for follow-up, documentation, and testing to determine whether the program has achieved the desired result, the district court correctly found that "the * * * success of this plan is a matter of legitimate debate" (R. 378 at 4). Consequently, defendants have not complied in good faith with the terms of the consent decree requiring them to provide quality education.

D. Bi-Racial Advisory Committee

The evidence demonstrates that defendants failed to comply in good faith with the decree's requirements regarding the Bi-Racial Advisory Committee. Section VI of the decree provides for the creation of an independent Bi-Racial Advisory Committee to advise, recommend, and oversee changes in policies and programs "to advance desegregation and improve education in the system" (R. 311 at 4). It requires the Board to provide the Committee with the information that it needs to carry out its function (R. 311 at 5).

There is ample evidence to demonstrate that the Advisory Committee has encountered substantial roadblocks in obtaining information from Gadsden's Board of Education during its first two years of existence. Indeed, it is undisputed that plaintiffs' lawyer, the Justice Department, and the Board needed to undertake negotiations to address the problems and create an ad hoc committee of the Board (R. 380 at 64-65, 157-159). In addition, one board member and one member of the Advisory Committee testified that even after the creation of the ad hoc Board, the Bi-Racial Committee received inadequate information and data (R. 380 at 200, 236, 244-245). In fact, the district court acknowledged there was "arguable support" for the proposition that "[t]he Bi-Racial Committee has not met as often, or been as involved in the decision making, as would be optimal for obtaining the appropriate amount of input from black parents" (R. 378 at 6-7).

E. Faculty Positions

The district court erred in concluding that the School Board "has done [its] best to recruit more black teachers * * * [and that its] lack of marked success * * * results from a combination of the strenuousness of the competition among Alabama's school systems for black educators and the Gadsden Board's insistence that its teachers be qualified to teach without regard to their race" (R. 378 at 13). Both premises of the district court's conclusion are erroneous.[5]

First, the record establishes that defendants have not done their best to recruit African-American teachers. Defendants presented no evidence that they have ever undertaken any recruitment efforts to encourage minorities to apply for positions within the school system. There also is no evidence suggesting that defendants did anything -- such as advertising in media markets most heavily patronized by minorities, holding job fairs designed to ensure that all those who are qualified apply for positions, or interviewing at universities where there is a particularly high concentration of minorities -- to ensure that minorities were even made aware of vacancies. Thus, the district court's conclusion that defendants have done their "best to recruit more black teachers" is clearly erroneous (R. 378 at 13).

[5] Section IV of the consent decree, entitled "Personnel Assignment," obligates defendants to "take all steps necessary and appropriate * * * to establish and maintain a percentage of black certificated personnel" (R. 311 at 3).

In fact, the record reveals that defendants have done little, if anything, to recruit African-American faculty members. For example, Dr. Taylor testified that to recruit minority faculty members, the School Board created a $300 incentive so that teachers would give timely notice of when they were retiring (R. 380 at 26). Such a measure can hardly be characterized as an effort directed to ensure the increased hiring of minority teachers. After all, while early notice of retirement may facilitate the smooth hiring of replacements, it does nothing to encourage or ensure that minorities know of or will apply for the position. Thus, the financial incentive provided by the Board for prompt notice of retirement does not constitute a recruitment measure to hire minorities.

For the same reason, Dr. Taylor's testimony that the Board did not merely "go and give somebody an application" but tried to "arrange for an interview," does not suggest that defendants have attempted to recruit African-American teachers (R. 380 at 62). If minorities do not know about a vacancy and thus do not apply, the Board's efforts to schedule an interview will have no bearing on whether minorities are hired. Consequently, contrary to the district court's finding, the record is devoid of evidence establishing that defendants have taken all necessary and appropriate steps to recruit minorities.

Second, there also is no evidence to support the district court's conclusion that defendants' "lack of marked success [in hiring African Americans] * * * results from * * * the

strenuousness of the competition among Alabama's school systems for black educators and the Gadsden Board's insistence that its teachers be qualified to teach without regard to their race" (R. 378 at 13). In addition to defendants' failure to actively recruit minorities, defendants offered no applicant flow data or other statistics to establish the unavailability of qualified African Americans to fill vacancies within the district or the State. Consequently, there was no basis for the district court to conclude that defendants' lack of success in hiring qualified African-American teachers is caused by their unavailability.

Further, defendants clearly have not complied with their obligation to take the necessary steps to retain minority teachers they have already hired. Dr. Taylor conceded that the Board has done nothing "with respect to retention of black certified staff" (R. 380 at 71). He stated that "[w]e haven't done anything concrete other than just try to provide them a quality place to work and encourage them to stay in Gadsden" (R. 380 at 71). Accordingly, the record demonstrates that defendants have not sufficiently complied with the terms of the decree with regard to hiring and retention of minority personnel.

III

THE SCHOOL DISTRICT'S MOTION FOR A DECLARATION OF UNITARY STATUS IS INCONSISTENT WITH THE PROVISIONS OF THE 1995 CONSENT DECREE

The district court erroneously assumed that defendants were entitled to petition for unitary status four years from the date

that the 1995 consent decree was executed. The consent decree provides otherwise.

Section I of the decree, entitled "Unitary Status," provides in pertinent part that "[t]he parties agree that four (4) years from the date the defendants begin implementing all of the provisions set forth herein * * * defendants may petition the Court to be declared unitary" (R. 311 at 2) (emphasis added). Thus, in accordance with the decree, defendants are not eligible to petition for unitary status until four years from the date when they have begun to implement all aspects of the decree.

Defendants, however, have not yet begun to comply with their obligations related to discriminatory school policies set forth in Section II of the decree. For example, that provision requires the Board to review, amend, and supplement its policy manual to ensure compliance with the decree (R. 311 at 2). Dr. Taylor testified that the Board did not revise its policy manual, because "we really didn't * * * see a need to do that" (R. 380 at 61). He also stated that he could not recall a single policy that the Board had revised or implemented to "eliminate the vestiges of segregation" or "contribute to a racially nondiscriminatory school system" (R. 380 at 61). Additionally, defendants filed their petition for unitary status only two weeks after accepting their expert's proposal for recruiting minorities for advanced course work and before they had begun implementing it. Accordingly, they are not even eligible to petition for unitary status under the terms of the decree.

The district court nonetheless erroneously assumed that defendants were eligible to petition for unitary status four years from the date that the consent decree was executed, without regard to whether the Board had begun implementation of all the various requirements of the decree. The district court explained that "a consent order was entered on May 24, 1995, * * * [a]nd without going through all the language of it, * * * [the decree provides that] after four years [the Gadsden Board of Education] would be permitted to apply for a declaration of unitary status" (R. 380 at 7; see R. 378 at 3 ("[t]he 1995 decree prevents the Gadsden Board from petitioning for unitary status for a period of four years while it undertook to implement the decree")). Consequently, the district court erred in granting defendants' motion for declaration of unitary status, because the filing of that motion was premature under the explicit terms of the 1995 consent decree.

CONCLUSION

For the reasons set forth, the order of the district court declaring the Gadsden school system unitary, dismissing the case, and terminating court supervision should be reversed and the case remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(B), the attached Brief For The United States As Appellant was prepared using Wordperfect 7.0 and contains 9,996 words.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2000, two copies of the foregoing Brief For The United States As Appellant were served by first-class mail to the following counsel of record:

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