UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

EVELYN R. ELLIS, et al.,

Plaintiffs,

-vs- **Case No. 6:62-cv-1215-Orl-22GJK**

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Defendant.

ORDER

The late Senator Robert F. Kennedy once said,

> Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.

Senator Robert F. Kennedy, Day of Affirmation Speech at University of Cape Town, South Africa (June 6, 1966), *available at* http://www.rfkcenter.org/lifeandvision/dayofaffirmation (last visited July 28, 2010). Although their efforts began as tiny ripples, after almost five decades of working with the community, breaking down barriers, and redefining societal expectations, the Orange County School Board has removed the vestiges of prior discrimination to the extent practicable.

For more than forty-five years, the Orange County public schools have been compelled to operate in accordance with a Court-approved desegregation plan. Now, after ten years of silence, the parties jointly approach the Court for approval of a settlement agreement that proposes to end this

litigation once and for all.[1] The parties' attempts to resolve this decades-old dispute on their own are admirable; however, the settlement agreement is problematic in a number of respects.

The Court's first concern is the parties' treatment of the Court's duty to assess whether the School Board has attained unitary status. In their joint motion to approve the agreement, the parties indicate that they "have different views on a number of matters" pertaining to unitary status, but, nonetheless, concur that the agreement enables the Court to make the requisite findings. The Court cannot, however, simply allow the parties to dispense with federal court supervision by mere agreement. In the Court's view, school desegregation cases are special, and require courts to look beyond the private interests of the parties (or, in this case, their attorneys) and consider whether a particular outcome serves the public interest. In other words, plaintiffs in school desegregation cases should not be permitted to waive the constitutional violation by virtue of a private contract. Furthermore, legal precedent indicates that even in the presence of a settlement agreement, the Court should independently assess whether the prior constitutional violation has been remedied. *See, e.g.*, *NAACP, Jacksonville Branch v. Duval Cnty. Sch.*, 273 F.3d 960, 966 (11th Cir. 2001) (explaining that a school board subject to contractual obligations to desegregate must also meet its constitutional duty to eliminate the vestiges of *de jure* segregation to the extent practicable to be freed from federal court supervision).

The Court is equally troubled by the failure of the parties' agreement to permanently restore control over school operations to the School Board. Though the parties request that the case be dismissed upon approval of the agreement, virtually every one of the agreement's provisions contains

[1] Because the parties believe this case to be a class action, they have sought court approval of their settlement agreement as required by Rule 23 of the Federal Rules of Civil Procedure.

a clause allowing the parties to return to the Court for relief in the event of a dispute. These provisions run counter to established school desegregation law, which requires the Court to promptly relinquish control over school operations to local authorities once the prior constitutional violation has been remedied. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (reiterating that "the court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991) ("[N]ecessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."(internal quotations omitted)). To retain jurisdiction, however limited, after the School Board is found to have remedied the effects of prior discrimination would be wholly improper and contrary to constitutional principles.

Therefore, inasmuch as the settlement agreement both short-circuits the Court's evaluation of the School Board's constitutional duty to desegregate and impermissibly requires court involvement beyond a finding of unitary status, the Court declines to approve it.[2] Even so, having independently evaluated whether the School Board has achieved unitary status in all aspects of school operations, as detailed in the ensuing pages, the Court unequivocally concludes that this case is due to be dismissed. The School Board has satisfactorily remedied the effects of the prior dual education system, and is, thus, entitled to conduct its affairs free of federal court supervision. To be sure, the Court's withdrawal of supervision in this regard does not give the School Board license to disregard

[2] The Court's action in this regard is in no way intended to preclude the parties from entering into a private agreement outside the confines of this case.

the racial impact of its decisions; rather, the School Board will continue to be held accountable to the political process, the citizens of Orange County, and the courts "in the ordinary course." *Freeman*, 503 U.S. at 490.

LEGAL AUTHORITY

There is no more appropriate place to start a discussion of the law of public school desegregation than the United States Supreme Court's 1954 decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) ("*Brown I*"), in which the Court struck down state laws aimed at providing "separate but equal" educational opportunities to grade and high school students as unconstitutional. In doing so, the Court observed that state-administered education, "is a right which must be made available to all on equal terms." *Brown*, 347 U.S. at 493. In the Court's view, simply equalizing separate schools with respect to buildings, curricula, teacher salaries and "other 'tangible' factors" did not fulfill this universal right. *Id.* at 492-93. Indeed, the Court opined, separating black students "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494. Thus, "[s]eparate educational facilities [were] inherently unequal," thereby depriving black students of their Fourteenth Amendment right to equal protection of the laws. *Id.* at 495.

Though it signaled a prompt end to state-sanctioned racial segregation in the public schools, *Brown I* was only the beginning of the Supreme Court's decades-long quest to remedy the effects of years of public school operations under the prior dual system. The Court's first attempt at crafting such a remedy came just one year later in the Court's follow-up opinion to *Brown I*. Recognizing that righting the prior constitutional violation would "require solution of varied local school problems," the Court declared that school authorities would bear "primary responsibility for elucidating,

assessing, and solving these problems." *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 299 (1955) ("*Brown II*"). The lower federal courts, on the other hand, were instructed to exercise their equity power to review the adequacy of local desegregation plans, assess good faith compliance with the directive of *Brown I*, and "enter such orders and decrees . . as are necessary and proper" to end racial discrimination in the public schools. *Id.* at 300-01. In carrying out their supervisory duties, courts were permitted to consider a wide range of public and private interests, including the physical condition of schools, transportation systems, personnel, administration, and school redistricting. *Id.* The ultimate goal, said the Court, was to desegregate the public schools "with all deliberate speed." *Id.* at 301.

Thirteen years following *Brown II*, however, the Court was called upon to assess the progress of a Virginia school system's desegregation efforts, and found, to its dismay, that little progress toward desegregation had been made. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968). *Green* concerned a challenge to the county school district's "freedom-of-choice" desegregation plan, which permitted students to annually choose which of the county's two schools (one historically attended only by white students and one historically attended only by black students) they wished to attend; students making no election were automatically assigned to the school they attended the previous year. *Id.* at 433-34. The challenge to the plan arose when, for the first effective school year, no student elected to attend the school historically attended by students of another race, thereby preserving the status quo. *Id.* at 433.

The High Court ultimately rejected the plan because it did not actually lead to the immediate dismantling of the prior dual system, a system in which racial identification "was complete, extending not just to the composition of the student bodies at the two schools but to every facet of school

operations—faculty, staff, transportation, extracurricular activities and facilities." *Id.* at 435. Thus, the school board had failed to uphold its constitutional duty "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. The Court reiterated the district courts' supervisory duties: to assess the effectiveness of desegregation plans on a case-by-case basis, "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Id.* at 439. In the Court's view, effective relief would be achieved when the district court found "the [school] board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system at the earliest practicable date." *Id.* (internal quotations omitted). Further, district courts were instructed to retain jurisdiction over school desegregation cases "until it is clear that state-imposed segregation has been completely removed." *Id.*

The Court's next major foray into the public school desegregation realm came only two years later in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Specifically noting the lower courts' struggle to implement the broad directives of *Brown I* and *II*, as well as the "fresh evidence of the dilatory tactics of many school authorities," the Court saw *Swann* as an opportunity to "try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts." *Swann*, 402 U.S. at 14.

Beginning with the role of the lower courts, the Court stressed that judicial intervention was triggered only upon a failure of school authorities to uphold their obligation to convert to a unitary school system. *Id.* at 15. That is, "judicial powers may be exercised only on the basis of a constitutional violation." *Id.* at 16. Specifically, the Court intimated that such a violation occurs "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial

composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities." *Id.* at 18. Once a constitutional violation had been found, the Court opined, district courts had "broad power to fashion a remedy that will assure a unitary school system." *Id.* at 16. This power was not to be used in perpetuity, however. The Court specifically noted that year-by-year adjustments to the racial composition of student bodies were not constitutionally mandated once desegregation had been accomplished. *Id.* at 31-2. Indeed, once school authorities had satisfactorily upheld their desegregation responsibilities and "racial discrimination through official action is eliminated from the system," further court intervention "should not be necessary" absent "a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." *Id.* at 32.

Turning to the responsibilities of local school authorities, the Court reiterated the six "important indicia of a segregated system" originally stated in *Green*: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *Id.* at 18 (citing *Green*, 391 U.S. at 435). With regard to staff, transportation, and extracurricular activities, the Court opined that school authorities may need only to "eliminate invidious racial distinctions." *Id.* In addition, faculty desegregation could legally be achieved by assigning faculty to schools in ratios consistent throughout the district. *Id.* at 19-20. Then, after noting that new school construction and old school closings were particularly likely to become "potent weapon[s] for creating and maintaining a state-segregated school system," the Court cautioned both local authorities and the courts to ensure that school construction and abandonment "are not used and do not serve to perpetuate, or re-establish the dual system." *Id.* at 21.

Finally, the Court turned to the "central issue" of the case: student assignment. On this, the

Court cautioned that firm racial quotas were to be avoided, as "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. Schools that were all or predominantly one race, however, required "close scrutiny." *Id.* at 25. In these instances, school authorities had the burden of showing that the racial composition "is not the result of present or past discriminatory action on their part." *Id.* at 26. Lastly, remedial alteration of attendance zones and bus transportation routes were permissible tools of desegregation, but were to be given close examination by district courts. *Id.* at 27-31.

The Court continued to consider challenges to desegregation plans throughout the 1970's.[3] As many courts relinquished control over school operations to local authorities, however, the absence of specific requirements for dissolution of school desegregation decrees caused notable confusion. Thus, in 1991, the Supreme Court issued some much-needed guidance on the subject. In *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), the Court considered the propriety of a district court order finding that the Oklahoma City public school system was unitary and dissolving a prior injunction related to school desegregation. In formulating the standard for

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[3] *See, e.g.*, *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979) (affirming district court's imposition of desegregation plan where trial resulted in finding that school board operated an intentionally segregated school system); *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406 (1977) (rejecting court of appeals' system wide desegregation remedy as overly broad in light of discrete constitutional violations); *Milliken v. Bradley*, 433 U.S. 267 (1977) (approving of district court's imposition of remedial education programs as part of desegregation decree); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424 (1976) (finding district court had exceeded remedial authority by requiring annual readjustment of attendance zones); *Milliken v. Bradley*, 418 U.S. 717 (1974) (rejecting multi-system remedy where evidence of constitutional violation was limited to one school system); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) (setting forth test for detecting a constitutional violation in school systems that were never segregated by law).

dissolution of injunctions entered in school desegregation cases, the Court observed that, unlike injunctions entered in general civil cases, which were often intended to operate in perpetuity, "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Id.* at 247. Thus, federal court control over local schools should "not extend beyond the time required to remedy the effects of past intentional discrimination." *Id.* at 248. In deciding whether the time to return control to local authorities had arrived, the Court instructed district courts to consider the following: (1) whether local authorities have complied in good faith with the desegregation decree since it was entered; and (2) whether the "vestiges of past discrimination" have been eliminated "to the extent practicable." *Id.* at 249-50. The Court went on to instruct that, in considering the second of these factors, district courts "should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities'." *Id.* at 250 (quoting *Green*, 391 U.S. at 435).

The following term, the Supreme Court again addressed the requirements for dissolution of desegregation decrees, this time focusing on whether courts could properly find school systems to be unitary, and therefore withdraw supervision, on an incremental basis. In *Freeman v. Pitts*, 503 U.S. 467 (1992), the district court had relinquished supervisory control over certain aspects of school operation it had found to be unitary, while retaining jurisdiction to modify its decree as to the remaining aspects. The Supreme Court approved of the district court's actions in this regard, holding that when a school board is in compliance with a court-supervised desegregation plan "in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree." *Id.* at 491. The discretion to do so derived "both from

the constitutional authority which justified [court] intervention in the first instance and its ultimate objectives in formulating the decree." *Id.* at 489. The Court's primary rationale for adopting this view stemmed from its prior observation that a district court's "end purpose" must be "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Id.* The Court further reasoned that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Id.* at 490.

To guide district courts evaluating whether to incrementally withdraw supervision, the Court set forth a few factors to consider:

> [W]hether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Id. at 491. The Court further advised that district courts should "give particular attention to the school system's record of compliance." *Id.*

Turning to the specific facts of the case, the Court evaluated whether the district court had appropriately found that the school district had achieved unitary status in the area of student assignments. In holding that such a finding was entirely appropriate, the Court highlighted the importance of its earlier holding in *Swann* that "[r]acial balance is not to be achieved for its own sake." *Id.* at 494. Indeed, the Court continued, "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *Id.*

It was, of course, the school district's burden to demonstrate that any current imbalance was "not traceable, in a proximate way, to the prior violation." *Id.* That is, the vestiges of prior discrimination "must be so real that they have a causal link to the *de jure* violation being remedied." *Id.* at 495. Furthermore, the Court continued, this causal link becomes increasingly attenuated both with the passage of time and upon the school board's demonstrated good faith. *Id.* at 496. In the Court's view, a school board's established record of good-faith compliance "is evidence that any current racial imbalance is not the product of a new *de jure* violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future." *Id.* at 498.

Over the years since *Dowell* and *Freeman*, the Eleventh Circuit Court of Appeals has had ample opportunity to assess the propriety of district courts' withdrawal of supervision over public school desegregation efforts. As the following discussion demonstrates, the Circuit has remained steadfast to the standards set forth by the Supreme Court in *Brown I* and its progeny in this endeavor.

In accordance with Supreme Court precedent, the Eleventh Circuit guards against district courts being commandeered into serving as the perpetual hall monitors of local school districts. Accordingly, the district courts' remedial power in school desegregation cases is limited in scope—substantively and temporally. *See Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1337 (11th Cir. 2005) ("Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults" (quoting *Swann*, 402 U.S. at 16)); *Manning v. Sch. Bd. of Hillsborough Cnty., Fla.*, 244 F.3d 927, 941 (11th Cir. 2001) ("Federal judicial supervision of local officials, however, was intended to be a temporary measure." (citing *Dowell*, 498 U.S. at 247)). The purpose of judicial supervision

and the objective of school desegregation orders are to restore "state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Manning*, 244 F.3d at 941-42 (quoting *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (internal quotations omitted)). In this regard, the Eleventh Circuit notes the Supreme Court's "long observed view" that

> local autonomy of school districts is a vital national tradition. Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.

United States v. Georgia, 19 F.3d 1388, 1392 (11th Cir. 1994) (per curiam) (quoting *Freeman*, 503 U.S. at 490) (internal quotations and citations omitted). Thus, when it is shown that the school district has attained the requisite degree of compliance, the district court must "provide an orderly means for withdrawing from control." *Id.* at 1393 n.8 (quoting *Freeman*, 503 U.S. at 489-90).

A school district's attainment of the requisite degree of compliance with constitutional requirements is commonly known as "unitary status." Generally, after a period of time sufficient to achieve a desegregation plan's objectives,[4] a district court conducts a hearing to determine whether the school district has achieved unitary status and court supervision can effectively be withdrawn. *Lee v. Etowah Cnty. Bd. of Educ.*, 963 F.2d 1416, 1422 (11th Cir. 1992). At that time, the district court provides the plaintiff notice of the hearing and allows the plaintiff an opportunity to show why the district court should retain jurisdiction. *Id.* (citing *Freeman*, 755 F.2d at 1426).

Before terminating supervision over a public school desegregation case, a district court must, "[u]tilizing sound discretion after . . . careful factual assessment[,] . . . determine (1) whether the local

[4]The Eleventh Circuit holds this period is, at minimum, three years. *Lee*, 963 F.2d at 1422.

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." *Lockett v. Bd. of Educ. of Muscogee Cnty. Sch. Dist.*, 111 F.3d 839, 842 (11th Cir. 1997) (citations omitted). As to the first of these inquiries, the district court must examine the six *Green* factors: student assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, and facilities.[5] *Id.*; *see also United States v. State of Ga., Meriwether Cnty.*, 171 F.3d 1333, 1338 (explaining that the "*Green* factors are the guideposts in a court's determination as to whether a proposed plan would eliminate the 'vestiges of *de jure* segregation . . . as far as practicable'" (quoting *Dowell*, 498 U.S. at 250)). The starting point for this examination is determining whether racially identifiable schools exist. *Lockett*, 111 F.3d at 843; *see also Holton*, 425 F.3d at 1338 (stating when evaluating whether the vestiges have been removed, "a critical beginning point is the degree of racial imbalance in the school district . . .[,i.e.,] a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole." (quoting *Freeman*, 503 U.S. at 474)); *Meriwether Cnty.*, 171 F.3d at 1338 (declaring that the "hallmark of a dual system[] is schools that are markedly identifiable in terms of race" (citing *Freeman*, 503 U.S. at 487)). The Eleventh Circuit has not set forth any firm ground rules for determining whether a particular school is racially identifiable. Generally, the Circuit observes the *Swann* Court's description of the term, as follows:

> [i]n historically segregated school systems . . . "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers

[5] The district court may consider other facets at its discretion. *Lockett*, 111 F.3d at 842 (citing *Freeman*, 503 U.S. at 492); *see also Manning*, 244 F.3d at 934 (noting district court's use and other courts' use of quality of education as a seventh factor).

> and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

Holton, 425 F.3d at 1338 (quoting *Swann*, 402 U.S. at 18). Some district courts within the Eleventh Circuit and sister circuits have employed a more specific percentage figure to determine racial identifiability. For example, despite acknowledging "that there is no magic statistical number which can be utilized to determine whether schools are racially identifiable," the district court in *Meriwether County* used a +/- ratio of 20% deviation from the district-wide ratio to determine racially identifiable schools, though that was not the sole measure. 171 F.3d at 1338 (noting other courts that used 20% deviation figure); *see also Manning*, 244 F.3d at 935 n.15 (adopting magistrate judge's use of 20% deviation from 20/80 ratio to identify racially imbalanced schools but accepting definition only for that case).

If substantially disproportionate racial compositions within the schools do exist, the district court must presume these compositions to be constitutionally violative. *Lockett*, 111 F.3d at 843. Nonetheless, a federal court may insist on "a racially balanced school only in those situations where a constitutional violation has caused the school to become racially imbalanced." *Manning*, 244 F.3d at 941. Indeed, pursuant to Supreme Court precedent, a district court has no obligation to ensure racial balance if there is no evidence that "either school authorities or some other agency of the state" deliberately attempted "to fix or alter demographic patterns to affect the racial composition of the schools." *Id.* (quoting *Swann*, 402 U.S. at 32). Therefore, once a plaintiff has demonstrated the existence of racially identifiable schools, the school district assumes the burden of showing that the racial imbalance is "not traceable in a proximate way to prior *de jure* segregation." *Id.* at 942. The school district's burden in this regard may be eased by the mere passage of time. *See Lockett*, 111 F.3d

at 944 n.31 ("As a *de jure* violation becomes more remote in time and . . . demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of prior *de jure* system."). Should a school board successfully demonstrate that external factors are to blame, the plaintiff may still preserve the presumption of a constitutional violation if he or she shows that the external factors claimed by the school board are the result of prior *de jure* segregation or some other discriminatory conduct. *Id.* at 945.

The Constitution permits district courts to tolerate a certain degree of racial identifiability within a school district. Quoting the Fifth Circuit, the Eleventh Circuit stated that "[c]onstructing a unitary system . . . does not require a racial balance in all of the schools. What is required is that every reasonable effort be made to eradicate segregation and its insidious residue." *NAACP, Jacksonville Branch v. Duval Cnty. Sch.*, 273 F.3d 960, 973 (11th Cir. 2001) (original quotations omitted). Moreover, "[e]ven an *increase* in the number of racially identifiable schools during the period of federal court supervision does not preclude a finding of unitary status." *Id.*

The causal link between current racial imbalance and prior *de jure* discrimination weakens when the school district has complied in good faith with the desegregation plan. *Lockett*, 111 F.3d at 843. To determine whether a school district acted in good faith, "a court should not dwell on isolated discrepancies, but rather should 'consider whether the school [district's] policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.'" *Manning*, 244 F.3d at 946 (quoting *Lockett*, 111 F.3d at 843). The district court should focus on the pattern of conduct and not isolated events since the purpose of a good-faith finding is "to ensure that a school board has accepted racial equality and will abstain from intentional discrimination in the future. Focusing on isolated aberrations blurs a court's long-term vision." *Id.* at 946 n.33 (citations omitted).

PROCEDURAL HISTORY

The initial complaint in this case was filed on April 6, 1962 [6] on behalf of all African-American Orange County public school students and their legal representatives. The plaintiffs claimed that the county continued to operate a "compulsory biracial system of schools" in violation of the Fourteenth Amendment guarantees of equal protection and due process of law. Doc. 2 at 2. They therefore requested that the School Board be enjoined from operating a dual system of education or, in the alternative, that the School Board be required to submit a desegregation plan. Doc. 2 at 7-8. The School Board's answer denied the need for any court involvement given the School Board's adoption and implementation of rules and regulations pursuant to Florida's Pupil Assignment Law.[7] *See* Doc. 3.

Despite its disagreement with the relief requested by the plaintiffs, the School Board nonetheless submitted a desegregation plan for review. The plan (Doc. 106), submitted in May 1964, incorporated a "pupil preference" provision allowing students to attend the school closest to their residence regardless of their race, subject to considerations of capacity and the stated preference of their parent or guardian. The provision was to be phased in over the next four years. In addition, the plan stated that race was not to be considered by the School Board with regard to assignment of teachers and other personnel, the selection of sites for new schools, and the selection of older schools for necessary upgrades or expansion. The plaintiffs expressly agreed that the terms of the plan satisfied their request for relief, *see* Doc. 6 at 1, and, on June 9, 1964, the Court entered a Final

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[6] The complaint was twice amended, once on December 20, 1962 and again on March 4, 1963.

[7] Fla. Stat. §230.232 (1993) (repealed 1994).

Decree (Doc. 6) approving the plan.

Apparently prompted by the former Fifth Circuit Court of Appeals' decision in *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (1966), in which the appellate court adopted new minimum standards for school desegregation in light of the passage of the Civil Rights Act of 1964 and the issuance of the Guidelines of the United States Office of Education, Department of Health, Education and Welfare, the parties returned to the Court in April 1967 seeking approval of a jointly proposed amended desegregation plan. *See* Doc. 7. Most notably, the new plan set forth a revamped freedom-of-choice scheme for student assignment wherein every student was required to annually choose the school he or she wished to attend. Doc. 7, Ex. A at 1. Any student not properly exercising his or her choice was to be assigned to the school nearest his or her home, subject to space availability. *Id.* at 2. School transfers were allowed in certain circumstances, such as overcrowding, hardship, or necessary access to special programs. *Id.* at 5-6.

The plan also explicitly demanded that schools provide equal transportation, access to facilities, and extracurricular activity programs to all students, regardless of race. *Id.* at 6-7. Further, schools throughout the county were to be "equalized" in areas such as physical facilities, courses of instruction, quality of instructional materials, and overcrowding. *Id.* at 7-8. Likewise, any new school construction or expansion was to be located "with the objective of eradicating the vestiges of the dual system." *Id.* at 8. Finally, faculty were to be hired, assigned, reassigned, promoted, or dismissed without regard to race; however, to correct the effects of the former dual system, teachers, principals and staff could be assigned to certain schools based on race. *Id.* at 8-9. To monitor progress, the parties agreed to submit various yearly reports detailing the racial distribution of students and faculty throughout the district. *Id.* at 9-10. Deeming the new plan in compliance with

the *Jefferson County* case, the Court approved its full implementation on April 26, 1967. *See* Doc. 8.

Less than eighteen months later, the plaintiffs filed a motion for further relief (Doc. 9), insisting that the most recent freedom-of-choice plan was not effectively integrating the Orange County schools and suggesting that alternative means of pupil assignment should be implemented. After a hearing on the matter, and noting the past good faith efforts of the School Board to comply with prior desegregation plans, the Court ordered the School Board to submit a new detailed desegregation plan that would comply with the case law developed by the former Fifth Circuit Court of Appeals since the approval of the 1967 plan. *See* Doc. 107.

The plan submitted in March 1969 primarily required the School Board to do the following: (1) maintain the free-choice system established by the prior plan; (2) close or relocate certain designated schools; (3) upgrade facilities and offer both technical and academic courses at designated technical schools; (4) construct a new high school; and (5) strive to accomplish mixed faculties in all schools. Doc. 12. The plaintiffs vigorously opposed the new plan (Doc. 14), and an evidentiary hearing ensued. The Court ultimately decided, in May 1969, that the new plan did not violate established Supreme Court and Fifth Circuit law and was, thus, worthy of approval. Doc. 108. In approving and adopting the plan, the Court made a few important observations: (1) the transportation system and extracurricular activities in the district were completely desegregated (*Id.* at 19); (2) the district faculties were rapidly approaching the point of being racially unidentifiable (*Id.*); (3) with few exceptions, schools were integrated (*Id.*); and (4) the School Board had, throughout the litigation, demonstrated its good faith (*Id.* at 22).

For the first time in the history of the litigation, the plaintiffs appealed the Court's decision

to the former Fifth Circuit Court of Appeals. In its opinion issued that December, the Court of Appeals noted the School Board's substantial progress toward converting its former dual system to a unitary one. Doc. 18 at 1. Nonetheless, the court vacated this Court's approval of the most recent desegregation plan and remanded with instructions to re-evaluate the plan in light of intervening United States Supreme Court and Fifth Circuit precedent, i.e., *Alexander v. Holmes County Board of Education*, 396 U.S. 976 (1969) (mandating that every school district "terminate dual school systems at once and . . . operate now and hereafter only unitary schools"), and *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (setting forth specific requirements for carrying out the mandate of *Alexander*). *Id.* at 2.

Accordingly, upon remand the Court directed the School Board to submit a desegregation plan that fully complied with *Singleton*. Doc. 22. On January 15, 1970, the School Board simultaneously submitted a notice of compliance with *Singleton*'s requirements with respect to faculty assignment, majority-to-minority transfer, transportation, and school construction and site selection, and two alternative proposed desegregation plans. The first of these plans, dubbed "Plan I," aimed to preserve the freedom-of-choice pupil assignment system with a few modifications, including required transportation for black students choosing to attend predominantly white schools. *See* Doc. 109. The second plan, "Plan II," was presented by the School Board as an alternative to Plan I, and proposed changing the pupil assignment scheme to employ geographic attendance zones, whereby all students residing in a given zone must attend a school in that zone, regardless of proximity. *See* Doc. 110. By separate motion, the School Board officially endorsed only Plan I, attacking Plan II (which was based on recommendations of the United States Office of Education) as unreasonable in terms of cost, pupil and parent disruption, and probable resegregation. Doc. 113. The plaintiffs filed objections to

both plans. *See* Docs. 111, 112.

After an evidentiary hearing on the matter, the Court settled on Plan I, coupled with teacher and staff reassignment, as the plan most likely to achieve a unitary school system. *See* Doc. 23. Indeed, the Court observed that although Plan II met desegregation guidelines, it came with the "added price" of involuntary busing and disruption of schools in the middle of the school year. *Id.* at 12-13. Therefore, the Court ordered that Plan I be implemented no later than February 1, 1970. *Id.* at 13.

Continuing to believe that Plan I did not provide adequate relief, the plaintiffs returned to the former Fifth Circuit Court of Appeals seeking to overturn this Court's adoption of the plan. The Fifth Circuit promptly issued an opinion affirming in part, reversing in part, and remanding for further disposition. *Ellis v. Bd. of Pub. Instr. of Orange County*, 423 F.2d 203 (1970). In doing so, the appellate court made some notable observations. As an initial matter, the court found that the School Board had achieved a unitary school system in all respects except student body composition. *Id.* at 206. As to student body composition, the court approved of the School Board's use of a neighborhood school assignment system to achieve desegregation but criticized the desegregation plan's provisions allowing variances from the assignment system. *Id.* at 207-08. The appellate court indicated, however, that the Orange County schools would be unitary in all respects should the desegregation plan be revised to grant fewer variances and to assign students based on capacity considerations. *Id.* Finally, the court instructed that federal jurisdiction was to be maintained for a "reasonable time" to ensure that the school system continued to be operated in a "constitutional manner." *Id.*

In accordance with the Fifth Circuit's mandate, the School Board submitted a new

desegregation plan on March 10, 1970. *See* Doc. 27. In detail, the School Board explained its program to achieve and maintain desegregation as to each of the six *Green* factors: student body composition, faculty, staff, transportation, extracurricular activities, and facilities. The most notable changes to previous plans were in the area of pupil assignment, where the School Board rectified its past shortcomings with respect to the neighborhood school assignment system. *See id.* at 2-5. The plan further provided for the expansion and restructuring of the Bi-Racial Advisory Committee, a group tasked with advising the School Board on matters of racial discrimination, *id.* at 13-14, and student demographic reporting, *id.* at 15-16. The plaintiffs neither filed objections to the plan nor requested a hearing. Having concluded that, when implemented, the proposed plan would accomplish a unitary school system, the Court approved the plan on March 24, 1970. Doc. 29.

The case remained fairly quiet for the next year until, on May 10, 1971, the plaintiffs moved to compel the School Board to reformulate its desegregation plan in light of the United States Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *See* Doc. 114. The School Board vigorously opposed the plaintiffs' request, arguing that *Swann* did not allow the Court to reopen the case after it had previously found the School Board to be operating a unitary school system. Doc. 115. The Court disagreed. Noting that segregation by official action in Orange County was "dead and its corpse long-since buried," Doc. 116 at 7, the Court nonetheless ordered the School Board to demonstrate that eleven racially identifiable schools within the district did not constitute vestiges of the prior dual system, *id.* at 7-8. After an evidentiary hearing on the matter, the Court found that six of the eleven schools required further plans to desegregate and ordered the School Board to formulate such plans and submit them to the Court for review. *See* Doc. 31.

At first, the School Board balked, arguing that it had no authority to make further changes to the plan, and filed a proposed "plan" that was more properly viewed as a brief in opposition to the filing of a plan. *See* Doc. 117. Frustrated with the School Board's response, the Court again ordered the board to file a proposed desegregation plan for the six racially identifiable schools, noting that the appropriate avenue for protesting a court order was to file an appeal. Doc. 118. This time, the School Board complied, simultaneously filing a motion to dismiss the case. *See* Docs. 120, 121. The new plan proposed to extend the attendance zone of one school, close or re-purpose four schools and reassign those students to other surrounding schools, and preserve the attendance zone of the final school but increase its inter-school activities. *See* Doc. 123 at 4-5. The plaintiffs objected to the School Board's plan, and urged the Court to adopt an alternative plan they had formulated and submitted the day before. *See* Doc. 122. Unlike the School Board's plan, the plaintiffs' plan proposed to accomplish greater desegregation by pairing or clustering[8] schools with opposing racial compositions. *See* Doc. 119.

The Court ultimately opted to approve the School Board's proposed plan, but with some modification. *See* Doc. 123. Though the Court agreed with the School Board's plan with regard to four of the schools, it did not believe that repurposing the remaining two schools as a special education complex was a prudent option. *Id.* at 14-15. Therefore, the Court instituted an alternative pupil assignment plan to accomplish a greater degree of desegregation in those two schools. *Id.* at 15-17. With regard to the School Board's motion to dismiss, the Court noted that the motion was premature but stated its intent to dismiss the case as soon as the present issues were resolved and a

[8] This method entails using each of the paired or clustered schools for a designated portion of the total grade levels within the pair or cluster.

reasonable time had elapsed to ensure the School Board's compliance with the new plan. *Id.* at 27.

The School Board appealed this order and the Court's two prior orders relating to issues raised by the *Swann* case. While the Court of Appeals considered the appeal, it provided the School Board with an option to rezone attendance areas in relation to two junior high schools in lieu of implementing the portion of the desegregation plan that was formulated by this Court. *See* Doc. 32. If the School Board chose to exercise the option presented by the Court of Appeals, it was to present the rezoning scheme to this Court for approval as an amendment to the desegregation plan. *See* Doc. 33. The School Board promptly presented such an amendment for review, and, after an evidentiary hearing, the Court approved the amendment. *See* Doc. 34.

In August 1972, the Court of Appeals handed down its mandate with regard to the constitutionality of the changes made to the desegregation plan pursuant to *Swann*. *See* Doc. 35. Though the appellate court generally agreed with this Court's decision to grant the plaintiffs further relief in light of *Swann*, it did not agree with some of the details of the new desegregation plan. In this regard, the appellate court took issue with this Court's prior decision that five of the original eleven schools that were the subject of *Swann* inquiry did not require any further desegregation, ordering that three of those schools receive relief under the new desegregation plan. Doc. 35 at 4. The appellate court was also concerned with reassignment of faculty and staff from schools that were to be closed under the new plan, directing this Court to ensure that the School Board fully complied with *Singleton* in making such reassignments. *Id.* at 5. In accordance with this mandate, the School Board submitted a new desegregation plan which reconfigured student attendance zones to achieve a greater degree of racial balance within the District. *See* Doc. 39 (describing various aspects of the new plan). Despite the plaintiffs' objections (Doc. 38), and after an evidentiary hearing on the matter,

the Court approved the new plan on December 30, 1972. Doc. 40. That was the last time the Court was called upon to resolve contested issues in this case.

Over the next 37 years, the Court was intermittently asked to approve changes to the desegregation plan. Each of these requests was either mutually agreed upon beforehand or was uncontested by the plaintiffs after the fact. The Court approved an uncontested amendment to the student transfer provisions in March 1976 (Doc. 125), and a jointly-proposed overhaul of the student assignment and transfer provisions in September 1980 (Doc. 126). Changes to the Bi-Racial Advisory Committee were made in 1984 (Doc. 127), and various additional modifications to the student attendance zone and student transfer provisions were approved in 1986 (Doc. 42), 1987 (Doc. 44), 1990 (Doc. 48), 1991 (Doc. 51), 1992 (Doc. 54), 1994 (Doc. 58), 1996 (Doc. 63), and 2000 (Doc. 65). With the exception of a motion to withdraw as counsel in 2007 (Doc. 66), there was no docket activity in this case from September 2000 to January 2010. In other words, the case remained dormant for ten years.

In January 2010, the case was revived by a proposed intervenor, who sought Hispanic representation on the Bi-Racial Advisory Committee.[9] *See* Doc. 68. The parties jointly responded in opposition to the intervenor's motion, intimating that they intended to present a proposed settlement agreement to the Court for approval within the next few days. Doc. 74. As promised, a joint motion for preliminary approval of a settlement agreement was filed on February 12, 2010. Doc. 84. In their motion, the parties also requested a fairness hearing with ultimate dismissal of the case should the Court approve the settlement. *Id.*

[9] The motion was ultimately denied because the Court had long since handed control over the Committee's membership to the Committee itself. *See* Doc. 89.

The proposed settlement was fairly straight-forward, and focused on three major areas of school operations: facilities construction and use, faculty recruitment, and extra-curricular activity advertisement. With regard to facilities, the agreement set forth specific school replacement, renovation, and addition projects to be completed in the District, including prospective timelines, budgets, and building standards. Doc. 84, Ex. 1 at 2-8. The portion of the agreement related to faculty required the School Board to adopt a recruitment policy aimed at achieving greater geographic, gender, racial, and ethnic diversity among District employees. *Id.* at 9-10. The policy was to be implemented and overseen by various high-level administrators, who were to periodically collect data, attend meetings, and report their findings to the School Board. *Id.* at 10-13. Finally, extra-curricular activities were addressed by designating an administrative official to oversee the preparation and dissemination of information related to student participation in both athletic and non-athletic extra-curricular programs. *Id.* at 13-15.

As an added measure, the School Board's compliance with the terms of the agreement was to be jointly overseen by two designated Monitors, who, in dispensing of their supervisory duties, were to be given virtually unlimited access to school facilities and employees. *Id.* at 15-19. Ultimately, however, the agreement provides that should the Monitors be unable to resolve an issue, the parties can approach the Court for relief. *See, e.g.*, *id.* at 3 ("If agreement cannot be reached, plaintiffs may bring the matter before the Court for resolution.").

Having some questions about the Court's authority to approve the settlement, and wishing to hear from the parties regarding their positions on unitary status, the Court convened a hearing on the motion for preliminary approval on March 1, 2010. At that hearing, the Court began by explaining to the parties that it did not see the need to approve the settlement in order to make a finding that the

school system had achieved unitary status and to close the case. Then, the parties were asked to state their positions on whether the Orange County school system had achieved unitary status. Counsel for the School Board, Mr. Kruppenbacher, answered in the affirmative; however, Mr. Chachkin, counsel for the plaintiffs, indicated that he believed there were still some areas of school operation in which unitary status was questionable, though he admitted that none of these issues had been raised with the Court in the last 40 years. Mr. Chachkin further explained that the settlement agreement was a means to avoid the expense of litigating leftover issues before Court supervision is terminated.

On March 5, 2010, the Court entered an order declining to preliminarily approve the settlement, citing a lack of factual evidence to indicate that its approval was essential to a finding of unitary status. *See* Doc. 90. The Court did, however, agree to schedule a hearing, for which notice to the public was required,[10] to discuss whether the Orange County public schools should be freed from federal court supervision. Doc. 88. Anyone wishing to speak at the hearing was instructed to give notice of their intent by submitting a form to the Court. *Id.* In addition, the parties were instructed to file findings of fact and conclusions of law upon which the Court could base its unitary status decision. *Id.*

Having been informed both at the hearing on the motion for preliminary approval and in the Court's subsequent orders that the settlement agreement was unlikely to be approved and that the Court intended to independently evaluate whether the Orange County schools had achieved unitary

[10] Notice of the hearing was to be published on at least two separate occasions in the *Orlando Sentinel* and the *Orlando Times*, and was to be made available for review on the School Board's website, at the central offices of the School Board, and at the principal's office at each school operated by the School Board. *See* Doc. 88. The affidavit of John Palmerini, Associate General Counsel for the School Board, confirms that the required notice was provided as specified in the Court's order. *See* Doc. 102, Ex. 2.

status, the parties filed their proposed findings of fact and conclusions of law (Docs. 98, 99). The Court was dismayed to learn that these documents and the accompanying declarations of counsel (Docs. 100, 102) focused extensively on the parties' efforts to craft the settlement agreement and very little on the central issue at hand: whether the School Board had effectively eradicated the vestiges of the prior dual education system.

Apparently, the settlement agreement was the result of approximately eighteen months of vigorous negotiations between counsel regarding whether the District has indeed reached unitary status such that dismissal of the case was appropriate. Doc. 100 at 4-14. Over the course of these negotiations, Plaintiffs' counsel took the position that the School Board failed to comply with the desegregation plan in several areas of school operation. *Id.* at 10-12. Nonetheless, hoping to avoid the expense and time of litigating these issues in court, counsel for the parties resolved to remedy the School Board's alleged shortcomings in these areas by entering into the agreement that was ultimately submitted to the Court for approval. *Id.* at 12-14.

The Declaration of Mr. Chachkin (Doc. 100), filed in conjunction with the parties' proposed findings of fact and conclusions of law, more specifically articulates his concerns with respect to the School Board's consideration of race in the areas of school facilities, faculty and staff diversity, and extra-curricular activity participation. In particular, Mr. Chachkin seems most critical of the School Board's allocation of funding for school upgrades and renovations for the past ten years, as well as projected allocations for the coming decade. Citing documents received from the School Board through informal requests, Mr. Chachkin alleges that schools with a majority of African-American students have been, and continue to be, placed lower on the School Board's construction and renovation priority list than schools with a minority of African-American students having facilities

that are in the same or better condition. He also briefly points to alleged racial inequalities in the School Board's approach to the problem of overcrowding. With respect to faculty hiring, Mr. Chachkin observed that for the past four school years, efforts to recruit African-American faculty members had diminished. Finally, he touched on alleged racial inequalities in access to extra-curricular activities.

Counsel for the School Board, Mr. Kruppenbacher, also filed a declaration (Doc. 102, Ex. 1); however, it did not substantively respond to any of Mr. Chachkin's allegations. Instead, Mr. Kruppenbacher generally stated that he did not believe Mr. Chachkin's arguments would succeed if actually litigated before the Court. Doc. 102, Ex. 1 at 8.

The hearing on unitary status was held on May 10, 2010, as scheduled. Of nine members of the public who had filed notices of intent to speak at the hearing, only four actually attended the hearing.[11] Indeed, other than those four speakers, the public gallery was virtually deserted. Furthermore, when asked if they wanted to present additional evidence, counsel for both parties declined to do so. Thus, the hearing to determine whether to terminate federal court supervision over this near-fifty-year-old school desegregation case was opened and adjourned in only 15 minutes.

UNITARY STATUS

As previously noted, *Freeman* allows a district court to withdraw supervision over public school desegregation efforts incrementally, i.e., in some but not all areas of public school operations. The Court believes that Judge Young, who presided over this case for most of the first twenty years

[11] Three of the four speakers spoke in favor of approval of the settlement agreement, while one speaker denounced the settlement for lack of input from the African-American community. Counsel later confirmed that the agreement had been negotiated privately between the parties' attorneys.

of its existence,[12] exercised his discretion to do just that The Court must acknowledge, however, that interpreting decades-old court orders as indicative of unitary status must be done with care. In this regard, the Court recognizes the Eleventh Circuit's opinion in *United States v. State of Georgia, Troup County*, 171 F.3d 1344 (11th Cir. 1999), in which the court took issue with a district court's interpretation of a twenty-five-year-old order entered by prior presiding judges.[13] Nonetheless, the Court believes that the facts of the present case are distinguishable from *Troup County*, as the following discussion demonstrates.

In *Troup County*, the district judge found that a prior order entered in the case granted the Troup County public schools unitary status, thereby rendering continuing jurisdiction over the school system inappropriate. *Id.* at 1346. The prior order, entered in 1973, stated that Troup County, as well as seven other school districts, had complied with *Brown*, 347 U.S. 483, for three years and had, thus, become "unitary." *Id.* at 1349. In addition, the presiding judges dissolved the old preliminary injunction, issued a new permanent injunction, and placed the case on the inactive docket. *Id.* at 1348. On appeal, the Eleventh Circuit reversed the district court's finding that the 1973 order divested it of further jurisdiction over the case. In doing so, the court made several observations about the substance and context of the prior order. For example, in evaluating the plain language and context of the 1973 order, the court noted that the presiding judges' imposition of new obligations to desegregate was "wholly inconsistent with an end to federal jurisdiction over and supervision of the

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[12] After an almost ten year absence from the case, during which time Judge Sharp presided, Judge Young resumed supervision for a few years in the early 1990s before ultimately reassigning it to the undersigned for further proceedings.

[13] On that occasion, the case was heard by a three-judge panel.

school district." *Id.* at 1348. The court further emphasized that the 1973 order lacked "any mention at all of vestiges of discrimination," concluding that the "matter simply was not addressed, and therefore the 1973 Order could not have been intended as a finding of 'unitary status'." *Id.* at 1348 ("[A] crucial finding 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." (citation omitted)). As well, the court pointed out that the district court declined to adopt the Government's recommendation that the case be automatically dismissed after seven years of substantial compliance with any new injunction, instead choosing to place the case on the inactive docket, subject to reactivation at the request of either party, for an indefinite period of time. *Id.* at 1348-9. In the court's view, this demonstrated that the district court "left the matter of dismissing the case until a later time." *Id.* at 1349.

After evaluating the 1973 order itself, the court turned to a broader assessment of the historical significance of the term "unitary." In this regard, the court reasoned that at the time the 1973 order was entered, a school system was deemed "unitary" when it was found to have operated in compliance with *Brown* for a given number of years. *Id.* at 1349. The court further reasoned that a court's declaration that a school system was unitary did not necessarily mean that the school district had achieved "unitary status," i.e., that the school district had implemented a desegregation plan in good faith and eliminated the vestiges of prior *de jure* segregation. *Id.* at 1349-50. Given this context, the Eleventh Circuit concluded that the district judges presiding over the case in 1973 intended only to convey their finding that the district had complied with *Brown* for three years; they made no judgment regarding the district's achievement of unitary status. *Id.* at 1350. This fact, when

viewed together with the plain language of the 1973 order and the record in the case,[14] clearly indicated to the court that the prior order could not fairly be interpreted to bestow unitary status upon the Troup County schools. *Id.* at 1351.

Turning to the facts of the present case, the Court finds it useful to discuss a few of Judge Young's Orders in this case in more detail. As early as 1969, Judge Young noted that a great deal of integration had been accomplished in Orange County. In his Order of May 13 of that year, he found that the school system's "transportation system and extracurricular activities, including sports programs, have been completely desegregated; its faculties are moving rapidly to the point of being racially unidentifiable and its students will attend integrated schools except for [some] areas . . . resulting from concentrations of Negroes in certain residential areas." Order of May 13, 1969 at 19. He further noted that the School Board had demonstrated good faith during the pendency of the litigation, observing that there were, as yet, "no previous 'service stripes' acquired from contested litigation over the desegregation issue." Order of May 13, 1969 at 22.

The following year, in approving the adoption of a new desegregation plan, which, notably, only prompted further desegregation efforts in the areas of student and faculty assignment, Judge Young declared that the new student assignment procedure "eliminates any segregation based upon past state imposed action" and, once implemented, would "provide Orange County a unitary school

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[14] The court also found its prior decision in *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985), to be binding precedent. In that case, the appellate court concluded that the 1973 Order declaring Troup County and seven other school districts "unitary," did not grant the Coweta County School District unitary status. Because there was "no indication that the facts relevant to this Court's discussion in *Georgia State Conference* were notably different than the operative facts" in the *Troup County* case, *Georgia State Conference* was controlling. *Troup County*, 171 F.3d at 1351. There is no such binding precedent in this case.

system." Order of January 26, 1970 at 12. On appeal of that Order, the former Fifth Circuit Court of Appeals confirmed Judge Young's prior observations with regard to the progress of desegregation efforts in Orange County, concluding that "five of the six elements which go to make up a unitary system have been accomplished in the Orange County system: faculty, staff, transportation, extracurricular activities, and facilities." *Ellis*, 423 F.2d at 208. The court further concluded that the system would be in full compliance upon implementation of a prescribed neighborhood student assignment system. *Id.* On remand, Judge Young likewise concluded that implementation of a new student assignment system would complete Orange County's transition to a unitary school system, specifically stating that "when implemented the Plan will accomplish a unitary school system." Order of March 24, 1970 at 2.

Admittedly, there are a few parallels between Judge Young's 1969 and 1970 orders in this case and the 1973 Order that was the subject of *Troup County*. As in *Troup County*, Judge Young did not dismiss the case upon his finding that the schools were unitary, choosing instead to allow the litigation to become reactivated by the parties from time to time. And, like *Troup County*, Judge Young and the former Fifth Circuit likely used the word "unitary" to convey only that the District had operated in compliance with the desegregation plan, particularly given the fact that these opinions were issued prior to the United States Supreme Court's decision in *Swann*. Despite these similarities, the Court has little trouble concluding that *Troup County* does not control this case.

First, unlike in *Troup County*, Judge Young did not impose sweeping new desegregation obligations on the School Board once he found it to be unitary in five of the six major areas of school operations. In fact, neither he, nor any of his successors, materially altered the desegregation plan in any area other than student assignment and transfer after the 1970 plan was approved. Perhaps

more importantly, however, the orders entered by Judge Young in the year following approval of the 1970 desegregation plan reveal that he specifically and extensively considered whether any vestiges of past discrimination required him to re-intervene. For example, in an order setting an evidentiary hearing on whether further remedial action was required in light of *Swann*, Judge Young reiterated his belief that *Swann* required him to evaluate whether the School Board had achieved two results: "first, the abolition of any board-imposed segregation in the school system- students, staff, facilities, transportation, faculties and extracurricular activities; and second, the elimination of all the vestiges of past segregation." Order of July 22, 1971 at 6. Thus, the question remained "whether certain schools have all-black or nearly all-black student bodies because of past state-imposed school segregation." *Id.* at 7. In an ensuing order, Judge Young reiterated these principles, adding that "if a present racial imbalance is a result of past de jure segregation, then steps are required under [*Swann*] to correct such imbalance." Order of August 16, 1971 at 11. Indeed, based upon the evidence presented at a three-day hearing, Judge Young concluded that six schools represented vestiges of the prior dual education system. *See id.* at 13-22. And, the former Fifth Circuit confirmed one year later that Judge Young properly interpreted *Swann* to require him to reevaluate the desegregation plan. Doc. 35 at 2 ("[T]he confines of what is necessary to desegregate a school system were never settled until the Swann decision, if then, and thus formerly segregated school districts must comply with that as a supervening decision of the Supreme Court on the subject."). Therefore, the record in this case makes clear that Judge Young extensively evaluated the causal link between present racial imbalance and past state-sanctioned segregation.

Critically, during the course of his "vestiges" inquiry, Judge Young did not re-examine any of the *Green* factors under which the school district had been found to be unitary the year before. In

fact, he opened the three-day evidentiary hearing by noting that the hearing was set to consider the only remaining question in the case: "whether certain schools have all-Black or nearly all-Black student bodies because of past State-imposed school segregation." Hr'g Tr. 6, Aug. 3, 1971. Thereafter, Judge Young made no mention in any of his orders of racial imbalance in transportation, extracurricular activities, or faculty and staff. And, while he touched on facilities with respect to their locations, capacities, and dates of construction, he did not pause to consider whether the conditions of the schools or equipment rendered them racially identifiable. Based only on the record before the Court, it is impossible to know precisely why Judge Young did not broaden his *Swann* inquiry beyond the racial composition of the student body; however, the absence of a discussion related to the other *Green* factors suggests that Judge Young believed these issues to be settled by the former Fifth Circuit's prior determination that the Orange County school system was unitary in all areas except student assignment. This view is supported by examining the post-*Swann* orders entered in this case; racial imbalance in the student body composition of particular schools in the district continued to be the sole focus of Judge Young and his successors up through 2000, the last time this Court was asked to approve amendments to the desegregation plan. As further evidence supporting this view, the Court notes that both at the hearing on the proposed *Swann*-compliant desegregation plan, and in his order approving the plan, Judge Young clearly indicated that he intended to dismiss the case once the student assignment issues presently before him were finally resolved. *See* Order of September 17, 1971 at 27 ("[T]his Court restates as it has several times in recent orders, that it contemplates that when the issues now involved are finally determined and a reasonable time thereafter has elapsed . . . then this Court intends to finally dismiss this case."); Hr'g Tr. 185, Sept. 14, 1971 ("As I have said several times, I anticipate that when this stage of this proceeding is finally concluded, not only at this

level but whatever appellate levels are taken, finishing whatever is required to be done, once it is done . . . then the case is going to be dismissed at that point, whether there is a motion to that effect or not.").

Judge Young's early orders in this case also demonstrate the School Board's history of good faith compliance with the desegregation plans approved and adopted by this Court. Of particular note is his order of May 13, 1969, in which he explicitly praised the School Board for its good faith observance of the desegregation plan over the last seven years. Furthermore, over the ensuing three years, with the exception of one instance in 1971,[15] the record demonstrates that the School Board promptly and dutifully responded to this Court's repeated requests for new or amended desegregation plans in light of both the plaintiffs' requests for further relief and the demands of the ever-evolving legal landscape during the late 1960s and early 1970s.

In sum, though Judge Young never dismissed the case nor explicitly declared that the Orange County schools had attained unitary status, the Court believes that his orders can fairly be interpreted to have withdrawn supervision as to all of the *Green* factors except student assignment, thus negating the Court's jurisdiction to re-evaluate those factors now. Even so, the Court acknowledges that reasonable minds may differ, and, thus, now proceeds to consider all six *Green* factors in light of the only contested evidence in this case: the April 15, 2010 Declaration of Plaintiffs' counsel, Mr.

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[15] As previously mentioned, the School Board initially balked at the Court's August 1971 request for a new *Swann*-compliant desegregation plan. This isolated incident, however, does not destroy the School Board's otherwise exemplary record of good-faith compliance. *See Manning*, 244 F.3d at 946 ("[A] court should not dwell on isolated discrepancies, but rather should consider whether the school [district's] policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.")(internal quotations omitted)).

Chachkin.

THE *GREEN* FACTORS

Before the Court begins its examination of the *Green* factors, some general observations are in order. First, as the record in this case reflects, these proceedings have been largely uncontested. Indeed, the four-year period between 1968 and 1972 was the only time the parties engaged in active litigation over the course of the almost fifty years since this case was filed. This is certainly not surprising given the rapidly changing legal climate during those four years. Still, the Court would be remiss not to recognize the School Board's demonstrated commitment to developing mutually agreeable solutions to problems raised by the plaintiffs and the Court from time to time. No trial was ever necessary in this case, and most of the disputes were resolved by the School Board's proposed modifications of the desegregation plan. Now, after nearly 40 years of virtually uncontested school operations under the most recent desegregation plan, Mr. Chachkin attacks the School Board's virtually untarnished record of compliance. As will be explained in more detail in the Court's discussion of the specific *Green* factors, his attempts are too little, too late.

Second, this case is unlike any other unitary status case the Court has encountered in its research on the subject. Bound and determined to persuade the Court to approve their settlement agreement, the parties' attorneys have refused to engage in any meaningful adversary proceedings with regard to the School Board's progress toward unitary status. When the Court asked for proposed findings of fact and conclusions of law on the unitary status issue, the parties submitted findings of fact and conclusions of law in relation to the settlement agreement. When the Court convened a hearing to consider objections to unitary status, the parties' attorneys said they had no evidence to present. As a result, the Court is left with a meager record from which to make its own findings of

fact. In sum, the parties' unwillingness to let go of the settlement agreement has frustrated, though not completely forestalled, the Court's ability to make the required unitary status findings.

Finally, the Court was surprised by the lack of community interest in the unitary status proceedings. As previously mentioned, despite widespread dissemination of the notice in the newspaper, only a handful of citizens expressed a desire to speak at the hearing, and even fewer actually attended the hearing. One could interpret the lack of interest in the Court's unitary status inquiry as a sign that the vestiges of the prior dual education system have been eliminated and the community is ready to put this litigation to rest. Nevertheless, the Court is bound to follow the law, and the law demands that the Court evaluate at least six aspects of school operations to ensure that the constitutional violation upon which this lawsuit is based has been remedied. It is this task to which the Court now turns.

(1) Student Assignment

In a typical school desegregation case, student assignment commands a fair amount of attention from both the parties and the court when it comes time to assess unitary status. Usually, the parties engage in adversary proceedings, presenting the district court with extensive evidence, e.g., student enrollment statistics, residential demographic information, and school board policy documents, from which to assess the status of student assignments within the school district. This case is different; despite numerous requests, the parties have opted not to provide the Court with any such evidence.[16] The Court surmises that this evidentiary void is a result of the parties' persistent

[16] Although Mr. Chachkin does cite some student enrollment statistics in a footnote in his declaration, *see* Doc. 100 at 17 n.8, this reference merely identifies the source from which he drew figures to support his arguments regarding racial inequality in capital expenditures.

efforts to persuade the Court to approve the settlement in lieu of taking a hard look at the *Green* factors. Unfortunately, the parties' reluctance to confront the real issues in this case has made the Court's task of discerning whether it can withdraw supervision as to student assignment manifestly more difficult. Nonetheless, the Court forges ahead, as it must.

Though there is no substantive evidence bearing on student assignment in the record, the contents of Mr. Chachkin's declaration and the proposed settlement agreement suggest that Mr. Chachkin either does not believe there to be any ongoing constitutional violation with respect to the racial distribution of students within the District, or he cannot substantiate any such claim. His discussion of student assignment in his declaration is confined to a footnote, in which he explains that the plaintiffs chose not to invest the expense and time required to assess the racial distribution of the District's student body in light of the substantial demographic changes that have taken place in Orange County in the last 40 or so years. *See* Doc. 100 at 14 n.5. The plaintiffs' choice not to pursue this issue is further reflected by the terms of the settlement agreement which, except with regard to school overcrowding, contain no provision requiring the School Board to reassign students to various schools in order to achieve greater racial balance. Given the importance of student assignments as an indicator of a constitutional violation, the Court must assume that Mr. Chachkin would not have allowed this issue to simply wither away during the course of settlement negotiations, nor would he have failed to raise it with the Court, if he truly believed it to be a barrier to unitary status.

Whatever Mr. Chachkin's reasons for failing to seriously contest this issue, the fact remains that he has failed to uphold the plaintiffs' relatively undemanding burden of demonstrating a present racial imbalance in the student body composition of the school district. Without racial imbalance, there is no constitutional violation. And absent a constitutional violation, there can be no remedy.

Accordingly, the Court is compelled to declare that the School District has attained unitary status with regard to student assignments in the Orange County public schools.

(2) Faculty & Staff

Mr. Chachkin contests the School Board's compliance with the hiring provision of the desegregation plan, which states as follows:

> B. HIRING
> All applicants for positions of employment shall be required to accept the operation of the Orange County School System as a unitary system and shall accept assignment on this basis. The Board shall aggressively recruit black teachers and other staff members and shall cause special emphasis to be placed upon recruiting additional black guidance counsellors [sic].

Doc. 27 at 9. More specifically, Mr. Chachkin argues that, over the past four school years, the District's commitment to aggressive recruitment of African-American administrators, teachers, and staff has noticeably waned. Specifically, Mr. Chachkin points to a decrease in the number of recruiting events at historically black colleges and universities and the District's recent elimination of its recruitment department due to budgetary constraints.

It is apparent from both Mr. Chachkin's declaration and from the exhibits he attaches, that *overall* recruitment activities, not just those at historically black colleges and universities, have noticeably diminished since 2005, presumably in response to the budgetary constraints Mr. Chachkin briefly alludes to. What is not apparent from Mr. Chachkin's declaration and exhibits is the effect these decreased recruitment activities have had on the racial distribution of faculty and staff within the District. To be sure, the 1970 faculty and staff hiring provision was enacted to remedy lingering imbalance in the racial distribution and makeup of District faculty and staff. Notably, however, Mr. Chachkin neither demonstrates nor even alleges that aggressive recruitment of African-American

faculty and staff is still needed to correct any *present* racial imbalance. Furthermore, even if the Court assumes that the School Board has indeed failed to "aggressively recruit black teachers and other staff members" over the last four school years, and that such failure demonstrates a lack of good faith compliance over the last four years, such failure pales in comparison to the School Board's previous forty-year history of uncontested faculty and staff recruitment activities.

Having no evidence of any racial imbalance in the makeup of faculty and staff in the Orange County public schools, and in light of the School District's lengthy track record of good faith compliance with the desegregation plan's faculty and staff provisions, the Court is compelled to find that the Orange County public schools have long ago achieved unitary status with respect to faculty and staff.

(3) Transportation

Racial imbalance in student transportation has not been a topic of conversation in this case since the Court approved the most recent desegregation plan in 1970. Now, the parties have stipulated that the vestiges of past discrimination have been eliminated in this area. Doc. 99 at 4. Having no evidence to the contrary, the Court is bound to agree. Furthermore, Mr. Chachkin does not now contest the School Board's good faith compliance with the provisions of the desegregation plan related to transportation. Thus, the Court is compelled to find that the Orange County schools have long since achieved unitary status in this area of school operations.

(4) Extracurricular Activities

Similarly, extra-curricular activities have not arisen as a point of contention in the last forty years. The desegregation plan now in effect generally requires that all extra-curricular activities and associated facilities be open to all students without regard to race. *See* Doc. 27 at 11. Mr. Chachkin's

only contention with regard to the School Board's compliance with the plan's extracurricular activities provision centers on the School Board's alleged failure to implement 2004 Work Session recommendations regarding monitoring and reporting student participation in extracurricular activities. The desegregation plan, however, contains no such specific monitoring and reporting requirements, nor does the Constitution require it. *See NAACP*, 273 F.3d at 967 n.19 ("Since participation in extra-curricular activities is voluntary, the law does not require . . . racial balance goals for this *Green* factor. Eliminating racial distinction is required."). Indeed, the sole focus of the desegregation plan is to equalize student access to activities, and Mr. Chachkin does not argue that the failure of the School Board to implement the 2004 Work Session recommendations denies any student access to activities and related facilities based on their race. Thus, there is no evidence now before the Court tending to tarnish the School Board's decades-long record of good faith compliance with the extracurricular activities provision of the desegregation plan.

Mr. Chachkin likewise fails to demonstrate, let alone allege, any racial imbalance with regard to the availability of various extracurricular activities. Though he vaguely asserts that information regarding the availability of such activities is not disseminated evenly among schools in the District, he does not tie this alleged imbalance to the racial makeup of particular schools. Thus, the Court has no evidence before it to indicate that any schools within the District are racially identifiable with respect to the offering or advertisement of extra-curricular activities. This fact, coupled with the School Board's uncontested record of good faith compliance with the extra-curricular activities provisions of the desegregation plan over the course of the litigation, leads the Court to conclude that the Orange County schools have achieved unitary status as to extracurricular activities.

(5) Facilities

Perhaps Mr. Chachkin's most fervent objection to unitary status is in the area of school facilities. The relevant provisions of the 1970 desegregation plan are as follows:

> V. FACILITIES, SCHOOL CONSTRUCTION AND SITE SELECTION
>
> A. FACILITIES
>
> The physical facilities, equipment, courses of instruction and instructional materials for all schools shall be substantially equal except for variances due to the ages of certain school plants. Conditions of overcrowding as determined by pupil-teacher ratios and pupil-classroom ratios shall be distributed evenly among all schools to the extent feasible.[17]
>
> B. SCHOOL CONSTRUCTION AND SITE SELECTION
>
> The Board shall locate, construct, consolidate or improve schools in a manner which will seek to prevent the recurrence of segregation of any type and shall take into consideration residential housing patterns. The Board shall be guided further by the recommendations of the Florida Department of Education surveys of school plants in order to qualify for construction funds.

Doc. 27 at 13. Alleging that the School Board has failed to maintain substantial equality in the physical facilities within the District, Mr. Chachkin charges that the School Board's current priority ranking system for school construction and renovation does not appropriately factor in the proportion of black student enrollment, thus placing schools with a large proportion of black student enrollment farther down on the facilities priority list than similarly-situated schools with a lower proportion of black student enrollment. He also variously alleges that total expenditures to upgrade or replace facilities that house a high proportion of black students fall far short of those spent on facilities housing a large proportion of white students.

Similarly, Mr. Chachkin points to the School Board's alleged failure to uphold its promises, embodied in the 1970 desegregation order, and amended by joint stipulation in 1980, regarding equal

[17] In 1980, a specific mechanism for achievement of the provision related to overcrowding was jointly proposed by the parties and approved by the Court.

distribution of school overcrowding. Specifically, Mr. Chachkin charges that the School Board's failure to follow up on a 1991 modification of school attendance zones resulted in an uneven distribution of overcrowding, such that some predominantly black schools continue to operate under capacity, rendering them more susceptible to fiscal inefficiency and eventual closure, while other predominantly white schools operate over capacity and are under no such threat. In all, it is apparent from Mr. Chachkin's declaration that he believes that the School Board has neither eliminated the vestiges of past discrimination nor complied with the desegregation plan in good faith with regard to facilities construction and use. However, he has failed to substantiate these beliefs with concrete evidence.

Critically, Mr. Chachkin offers no evidence that the present condition of any of the Orange County schools renders them racially identifiable. His cherry-picked references[18] to the types of renovations received by select schools, as well as the amount of money spent on these renovations, are virtually meaningless absent evidence as to whether the schools that did not receive certain renovations were actually in need of attention. While it is true that the age of a school is one indication of the condition of the facility, the Court declines to merely assume, without any evidentiary foundation, that all schools of a certain age require the same types of upgrades within the same periods of time.

The absence of any data regarding the current conditions of the school facilities also hinders Mr. Chachkin's arguments about the ranking system used by the District to prioritize capital expenditures. Mr. Chachkin appears to argue that the present ranking system does not adequately

[18] Even Mr. Chachkin admits that the data he presents are neither "dispositive, [n]or the only such comparison that might be made." Doc. 100 at 20.

consider the proportion of black student enrollment. This assumes, however, that such considerations are still needed to equalize the school facilities in Orange County. But, Mr. Chachkin has given the Court no reason to make this assumption; there is no evidence that the present condition of any of the school facilities renders them racially identifiable, let alone vestiges of the prior dual system.

Mr. Chachkin's arguments with respect to the unequal distribution of overcrowding are likewise unavailing. Other than simply stating that certain predominantly black schools are underpopulated, and that underpopulated schools are at a higher risk for closure, Mr. Chachkin has not demonstrated that, in fact, underpopulated schools with a high proportion of black student enrollment have been chosen by the School Board for closure in substantial numbers. And, as even Mr. Chachkin recognizes, it is nearly impossible, without more, to determine whether the distribution of overcrowding among schools can be attributed to the School Board's alleged failure to comply with the desegregation plan or to simple demographic changes over the last thirty years. *See* Doc. 100 at 30-1 ("But Plaintiffs also recognize that the passage of time complicates the task of fashioning an appropriate remedy, because of the difficulty of disentangling the effects of that failure from more general demographic patterns that have accompanied the substantial growth in the size of the Orange County school system since entry of the Court's orders in 1970 and 1980.").

To add to the shortcomings in Mr. Chachkin's declaration, the Court notes that the School Board has built new schools, closed old schools, and authorized periodic renovations and upgrades for the last forty years without objection by the plaintiffs. This is significant in a number of ways. First, the passage of a considerable amount of time lessens the likelihood that any current racial imbalance, should it even exist, represents a vestige of the prior dual system. *See Lockett*, 111 F.3d at 944 n.31 ("As a *de jure* violation becomes more remote in time and . . . demographic changes

intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of prior *de jure* system."). Second, the School Board's lengthy history of good-faith compliance with the facilities provisions of the desegregation plan further widens the gap between any present racial imbalance and the prior constitutional violation. *See Freeman*, 503 U.S. at 496 (observing that "[t]he causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith."). Finally, even if the Court assumes that the School Board has recently failed to follow the letter of the desegregation plan with regard to the particular schools identified by Mr. Chachkin in his declaration, the School Board's demonstrated history of good faith compliance with the desegregation plans over the lifetime of this case is not negated by isolated instances of noncompliance. *See Manning*, 244 F.3d at 946 ("[A] court should not dwell on isolated discrepancies, but rather should consider whether the school [district's] policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.") (internal quotations omitted)).

To reiterate, Mr. Chachkin's objections to the School Board's facilities operations are too little, too late. There is simply not enough evidence upon which to presume that any public school facilities in Orange County are vestiges of the prior dual education system. And, any alleged failures of the School Board to fully execute the facilities provisions of the desegregation plan, even if true, pale in comparison to the School Board's overall record of good faith compliance. Therefore, the Court does not hesitate to find that the Orange County public schools have attained unitary status with respect to facilities.

CONCLUSION

In sum, notwithstanding the parties' proposed settlement agreement, it is time to put this decades-old public school desegregation case completely to rest. The School Board has shown

remarkable good faith com pliance with the desegregation plan over the years, resulting in the elimination of any vestiges of the prior dual educa tion system. Having achieved unitary status in all areas of public school operation, t he School Board is now entitled to reclaim full control over its affairs. The duty now falls upon the political system to ensure that the discrimination which triggered this action does not once again percolate. The Court expects that the School Board will continue to operate in com pliance with the Constitution, and with the utm ost respect for the interests of the students and communities it serves.

Based on the foregoing, it is **ORDERED** as follows:

1. The Final Decree and all subsequent amendments thereto are hereby **DISSOLVED**.

2. This case is **DISMISSED**.

DONE and **ORDERED** in Chambers, in Orlando, Florida on August 2, 2010.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record