TUCSON UNIFIED SCHOOL DISTRICT NO. 1

Analysis of Compliance with Unitary Status Plan

Section I: Standards for Assessment of Compliance

An Annex to the Annual Report

for the

2016-2017 Academic Year

Fisher, Mendoza, et al. v. Tucson Unified School District, et al.

United States District Court, District of Arizona

74-CV-00090 TUC DCB and 74-CV-00204 TUC DCB

submitted to:

Honorable David C. Bury, United States District Court

prepared by:

Tucson Unified School District No. 1
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I. Introduction and Summary.

The primary purpose of a desegregation decree is to remedy any remaining vestiges of the constitutional violations which lead to the decree in the first instance. It is not, and cannot constitutionally be, merely an opportunity for an extended court-supervised exercise in district operation unrelated to those remaining vestiges.

This case has a procedural history unlike any other desegregation case. The trial in this case was conducted in 1977, many years after the particular conduct found to be a violation had ended in the 1950s and 1960s. Judge Frey's decision in 1978 already conducted the analysis mandated by the *Green* case, to determine what vestiges of that prohibited conduct remained in 1978.[1]

The only vestiges of the conduct in the 1950s and 1960s which remained in 1978 were in the racial and ethnic makeup of the student population in nine district schools, eight of which were elementary, and one junior high. Judge Frey expressly found that the District had never operated a dual school system with respect to Hispanic students. Judge Frey also found that the District had never operated a dual school system at the high school level with respect to any class.[2]

After Judge Frey's 1978 decision, the Court's principal task is thus to determine whether the remaining vestiges found by Judge Frey have been eliminated. The Court turned to those tasks in the 2000s, and in at least two decisions, held that the specific vestiges remaining in 1978 had been eliminated, at the latest, by 1986.[3]

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[1] Indeed, Judge Frey acknowledged that the District had properly and adequately ended its state-mandated segregation, and integrated itself in the early 1960s, under standards in effect until the Supreme Court decided the *Green* case in 1968. Thus his entire decision is based on his analysis of *Green* as applied to the District, determining what vestiges if any remained from the conduct he found to violate the Constitution.

[2] See discussion in Section II, below.

[3] See discussion in Section III, below.

Under *Green*, then, the only issue properly remaining in this case is a determination that the District will not revert back to a dual system and intentionally discriminate after the court terminates supervision. This is referred to as the "good faith" requirement. "[T]the purpose of the good-faith finding is to ensure that a school board has accepted racial equality and will abstain from intentional discrimination in the future." *Manning v. School Bd. of Hillsborough Cty.*, 244 F.3d 927 n.33 (11th Cir. 2001) (citing *Lockett v. Board of Educ. of Muscogee County Sch. Dist.*, 111 F.3d 839, 843 (11th Cir.1997) and *Freeman v. Pitts*, 503 U.S. 467, 498 (1992)).

One way to satisfy to satisfy that finding is of course following a desegregation decree over time.[4] "[I]n determining whether a school board has acted in good faith, a court should not dwell on isolated discrepancies, but rather should 'consider whether the school board's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.'" *Manning*, supra, at 946. "The focus is on the school board's pattern of conduct, and not isolated events[.] Focusing on isolated aberrations blurs a court's long-term vision." *Id*. at n. 33.

Requiring particular results or performance-related tests – especially where the (a) vestiges of the past segregation have already been eliminated and (b) external factors may influence results – is inappropriate. *Missouri v. Jenkins*, 515 U.S. 70, 101, 115 S. Ct. 2038, 2055 (1995).

> "Just as demographic changes independent of de jure segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of the [school district] and the State affect minority student achievement. **So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. Insistence upon academic goals**

[4] The District respectfully submits that there are others, not at issue in this analysis – the mere passage of time without reverting to a dual school system (here more than 50 years), the demographic size and importance of the group in question in the District, and other factors.

> **unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own**.

Id. (Emphasis added and citations omitted).

The purpose of federal supervision is not to maintain a desired racial mix at a school. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–37, 96 S.Ct. 2697, 2704–05, 49 L.Ed.2d 599 (1976); *see also Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 1447, 118 L.Ed.2d 108 (1992) (noting that "[r]acial balance is not to be achieved for its own sake"). Rather, a federal court may insist upon a racially balanced school only in those situations where a constitutional violation has caused the school to become racially imbalanced. *See id.* at 494, 112 S.Ct. at 1447. Put simply, a school board has no obligation to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control. *See Jenkins*, 515 U.S. at 102, 115 S.Ct. at 2055–56 (citing *Spangler*, 427 U.S. at 434, 96 S.Ct. at 2703–04; *Swann*, 402 U.S. at 22, 91 S.Ct. at 1279). Given that the only racial imbalance caused by the prohibited conduct in this case was eliminated more than 30 years ago, the achievement of particular racial and ethnic balances for students and faculty cannot be a precondition to termination of supervision, nor can continued (but improving) disparities in academic outcomes and discipline force continued supervision.

II. Determination of Vestiges Remaining in 1978.

The only findings of *de jure* violations in this case are set forth in Judge Frey's Findings of Fact and Conclusions of Law, after a full evidentiary trial on the merits forty years ago, in January 1977. [ECF 345.] The analysis of whether any vestiges of past discrimination remain, then, must be founded on a clear understanding of (a) exactly what conduct Judge Frey found to violate constitutional standards, and (b) what vestiges of that conduct Judge Frey found remaining at the time of the trial in 1977.

After carefully considering the evidence presented, Judge Frey's findings of *de jure* violations may be summarized as follows:

a. The District failed to properly assign African American students to other schools when dismantling the prior segregated system in 1951, because it assigned too many African American students to schools that were heavily Hispanic.

b. During the 1950s and 1960s, some elementary school construction and siting decisions were made with segregative intent, resulting in higher concentrations of Hispanic students in some schools.

c. During the 1960s, some decisions to relieve individual school overcrowding were made with segregative intent, resulting in Hispanic students being assigned and transported to schools with high Hispanic concentrations, and Anglo students being assigned and transported to schools with lower Hispanic concentrations, despite the availability of closer, more integrative alternatives. [ECF 345, Ex. 1, *passim*.]

Judge Frey was careful to limit his findings of violations. First, he found that the District had never operated a dual school system with respect to Hispanic and white students:

> In light of the principles discussed above and the evidence presented, the segregative acts by the District and the existence of racial imbalance in the schools are insufficient for a finding that a Mexican-American/Anglo dual school system has ever been operated by the defendants. [*Id.*, p. 221.]

He noted that the District had made substantial but not complete progress in eliminating the vestiges of the state-mandated segregation which ended in 1951:

> It appears that at the time Brown v. Board of Education, (Brown I) 347 U.S. 483, was decided in 1954, the District was in compliance with its mandate insofar as Blacks were concerned. . . . However, in light of the subsequent cases interpreting what the United States Supreme court meant in 1968 in Green v. Country School Board, 391 U.S. 430, when it stated, at page 438, that a dual system must be eradicated "root and branch", it now appears that all effects of the dual system which existed in 1950-51, were not effectively eradicated, notwithstanding considerable progress and attenuation. What effect remains is discussed elsewhere in these Findings. [*Id.*, pp. 119-120.]

> Although most parts of the dual Black/non-Black school system were dismantled in 1951-52, and although most later decisions were made using neutral policy considerations, the District was under an affirmative duty to go beyond just neutral policy considerations in order to erase all effects of the past statutory segregation. It failed to do so. [*Id.*, p. 222.]

Moreover, Judge Frey's findings were primarily limited to elementary schools:

> Except for Spring, no reasonable inference could be drawn that the imbalances present in the junior high schools at the time of trial resulted from segregative intent or acts on the part of the District. [*Id.*, p. 184.]

> Except as to Spring Junior High, a conclusion or inference that the District has operated or is operating a dual or segregated junior high school system with respect to either Black students, Mexican-American students, or both, is not warranted by the evidence. [*Id.*, p. 186.]

> There is no dual junior high school system within the District, even though Spring retains effects from former segregation as to Black students. [*Id.*, p. 189.]

> The District has never operated a de jure segregated or dual system with respect to high schools. [*Id.*, p. 193.]

> There has been no evidence presented from which it can rationally or reasonably be inferred that the District has operated a de jure segregated dual high school system or that there is a current condition of segregation in any high school in the District resulting from intentionally segregative State or District action. [*Id.*, p. 194.]

Finally, Judge Frey made it clear that most of the effects of the *de jure* violations had attenuated by the time of the trial forty years ago, and that the current racial balance in most schools in the District was not the result of those *de jure* violations:

> In summary of this section on segregation and desegregation within and/or by the District, a reasonable conclusion to be drawn is that the District is not operating a de jure segregated system, notwithstanding some segregative intent and actions. The District made a commendable and valiant effort to desegregate the dual or de jure system as to Blacks, at the time and under the circumstances, including the state of the law then existing. Viewed 25 years later under different circumstances, including a whole new array of legal decisions, it was inadequate. However, most of the effect

> from the earlier segregation of Black students, has attenuated during the past 25 years. As stated elsewhere in these findings, it appears that some effect may remain, as evidenced by the relatively large number of Black students remaining in the area of Spring, Roosevelt and University Heights. [*Id.*, p. 70.]

In the final analysis, the only vestige of the prior discrimination which Judge Frey found continued to exist as of the time of trial was in the racial and ethnic makeup of students at nine schools in the District, five of which no longer exist as active schools:

> Some effects of past intentional segregative acts by the District remain at these schools: Spring Junior High, Safford Junior High, University Heights, Roosevelt, Manzo, Jefferson Park, Cragin, Tully and Brichta. [*Id.*, p. 223.]

Judge Frey made no findings that any vestiges of the prior discrimination remained in the areas of transportation, extra-curricular activities, family and community engagement, facilities, or in the then-current analogs of technology or data systems.[5] Indeed, Judge Frey found precisely the opposite with respect to transportation and extracurricular activities:

> The single high school, Tucson High, had segregated homerooms prior to 1946. In that year, Superintendent Morrow eliminated this practice, along with other similar practices in athletics, choir, band, orchestra and all other school activities. [*Id.*, p. 42.]
>
> Since 1969, all Black and Mexican-American students in the District could attend any school of their choice anywhere in the District, provided their attendance at such school improved the racial balance in that school; transportation to

[5] In the "Comment" section of his findings, Judge Frey did note that "[i]t may well be appropriate at any future hearings in this case to determine whether there are any existing effects from such past discriminatory acts of the District, as found by the Court, which may not have been apparent to the Court." [ECF 345, Ex. 1, p. 205] However, given the full and hotly contested trial, the extensive post-hearing briefing, the year that Judge Frey took to carefully assess the evidence, and his detailed findings and conclusions spanning 223 pages, it is extraordinarily unlikely that anything escaped Judge Frey's careful eye. Certainly no one since has suggested that Judge Frey missed any vestiges in his 1978 decision.

> any such school would be furnished by the District. [*Id.*, p. 200.]

III. Elimination of Vestiges Remaining in 1978.

Nearly ten years ago, this Court addressed whether the very limited vestiges of discrimination found by Judge Frey to exist in 1977 continued to exist. First, the Court noted:

> As noted in the Court's February 7, 2006, Order, Judge Frey made very limited, specific findings regarding student assignments and the existence of any vestiges of *de jure* segregation remaining in the district. [ECF 1239, p. 2.]

The Court then turned to the only vestiges found by Judge Frey – student assignment at the nine schools – and held that any vestiges existing in 1977 had been eliminated by 1986:

> The Court finds that as to student assignments at Brichta, Manzo, and Tully, any vestiges of *de jure* segregation were eliminated to the extent practicable as of 1983.
>
> . . .
>
> The Court finds that as to student assignments at Safford Middle School, any vestiges of *de jure* segregation were eliminated to the extent practicable as of 1986. [ECF 1239, pp. 16, 18.]

Spring Junior High, University Heights and Roosevelt had been closed many years earlier, and in a subsequent order the Court adopted findings that student body enrollment at Cragin and Jefferson Park by 1983 had met targets established in 1978. [ECF 1270, p. 6.][6]

Accordingly, since the only causally-linked vestiges found by Judge Frey to exist forty years ago in 1977 (student assignment at the nine listed schools) had been eliminated by 1986, there can be no vestiges of discrimination existing today which are causally linked to the *de jure* discrimination which is the foundation of this case. In

[6] The factual findings of the Court's 2007 and 2008 orders cited above were not set aside by the 9th Circuit in its subsequent decision remanding the matter for further supervision by the Court.

short, this is one of the "rare cases . . . where the racial imbalance had been temporarily corrected after the abandonment of *de jure* segregation" where it can it be asserted with "confidence that the past discrimination is no longer playing a proximate role." *Freeman*, *supra*, 503 U.S. at 503 (Justice Scalia, concurring).

Even in the absence of these findings, it is beyond genuine dispute that no aspect of the school district operations which are the subject of this motion retains any vestiges which are causally linked to any *de jure* discrimination found to have occurred from 45 to 70 years ago. The very nature of those operations is so fundamentally different now than it was then, the makeup of the district and the community so different, and the time period of the violations so very long ago, as to make it far "more unlikely than not" – indeed all but impossible – that there could be any causal link to the limited instances of discrimination found by Judge Frey to have occurred many years prior to the trial in 1977. As Justice Scalia noted twenty five years ago, "[a]t some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time."). *Id.* at 506.

IV. Conclusion

The current desegregation decree (the Unitary Status Plan) was entered long after the remaining vestiges of the discrimination found by Judge Frey had been eliminated. The scope of the USP goes far, far beyond those remaining vestiges found by Judge Frey, and even far beyond *Green* factors. But the massive scope of the USP, and the thousands of individual obligations and requirements in the USP and the many Action Plans, cannot obscure that good faith in the context of this case is simple: has the District demonstrated that it will not suddenly revert to segregation, after 50 years of court supervision? As a matter of law, good faith in the context of this case is **not** whether the District has done all it can to comply with the decree or even to promote integration**.** It is **not** even

whether it has done a particularly good job, or whether it has missed certain of the thousands of requirements. And it is most assuredly **not** whether it has achieved particular outcomes in racial balancing of student and faculty, or in parity of academic achievement or discipline, or in engaging families**.**

Again, the question of good faith is the question of whether or not the District is suddenly going to revert to intentional segregation after termination of supervision. In context of the *Green* decision in the South in the mid-60s, it was truly (and with good reason) feared that those school districts might immediately return to intentional segregation as soon as the case was terminated. Any concern that **this** District, with **this** Governing Board, in **this** town of Tucson, in **this** era, is suddenly going to revert to segregation is simply laughable. But more importantly, the huge effort by the District and its amazing teachers and staff over the last five years, as reflected in the hundreds of pages that follow, demonstrate beyond any reasonable doubt that the District is steadfastly and irrevocably committed to integration, diversity and equity. That is the essence of the good faith requirement.