

2000 WL 33680483

Only the Westlaw citation is currently available.
United States District Court, M.D. Alabama.

Anthony T. LEE, et al., Plaintiffs,
UNITED STATES of America, Plaintiff–Intervenor
and Amicus Curiae,
NATIONAL EDUCATION ASSOCIATION, INC.,
Plaintiff–Intervenor,
v.
BUTLER COUNTY BOARD OF EDUCATION, et
al. Defendants.

No. CIV.A.70–T–3099–N.

|
Aug. 30, 2000.

Attorneys and Law Firms

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Lewis Steiner Hamilton, Greenville, Anita L. Kelly, Department of Education, Office of General Counsel, Michael R. White, State Department of Education, Office of General Counsel, Edward A. Hosp, Office of the Governor, Alabama State Capitol, Montgomery, for Butler County Board of Education, the individual members thereof and the superintendent of Education, Superintendent of Education, State of Alabama Board of Education, Superintendent of State Board of Education, Don Seigleman, Governor as officio of State Board, defendants.

ORDER APPROVING CONSENT DECREE ON STATE–WIDE SPECIAL EDUCATION ISSUE

THOMPSON, District J.

*1 In an order entered on April 21, 1997, this court

reaffirmed that “the parties should now move toward ... the termination of the litigation.” *Lee v. Lee County Bd. of Educ.*, 963 F.Supp. 1122, 1124 (M.D.Ala.1997) (citation omitted). The reaffirmation was based on the premise that “local autonomy of school districts is a vital national tradition.” *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S.Ct. 1430, 1445, 118 L.Ed.2d 108 (1992) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766, 2770, 53 L.Ed.2d 851 (1977)). 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.” *Id.* at 489, 112 S.Ct. at 1445. The parties have submitted to the court a proposed consent decree that is “fair, adequate, and reasonable,” *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir.1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979), and is not illegal or against public policy. *See United States v. City of Montgomery, Ala.*, 948 F.Supp. 1553, 1568 (M.D.Ala.1996). The proposed consent decree on state-wide special education should move this litigation swiftly towards termination as to this issue. The court, therefore, hopes that the State Superintendent of Education and other state officials will vigorously and fully comply with the proposed consent decree so that, at the end of the period outlined in the decree, there will be no doubt whatsoever that the court should terminate this litigation as to special education and finally return to the Alabama State Board of Education the full responsibility of the operation of the state school system as to this issue.

Accordingly, it is ORDERED that the proposed consent decree on the special education issue is approved.

Furthermore, so that, should any glitches arise in implementing the consent decree, they can be resolved immediately and so that, as a result, this case can end without any complications or delays, it is ORDERED that yearly status conferences are set for the following dates at 8:15 a.m. in chambers at the federal courthouse in Montgomery, Alabama: January 19, 2001; January 11, 2002; January 17, 2003; January 16, 2004; and January 14, 2005.

The status conferences may be conducted by telephone, as long as the United States so notifies the court and other parties at least three days beforehand and the United States then makes appropriate arrangements for the conference to be by telephone.

CONSENT DECREE

I. INTRODUCTION

The *Lee v. Macon County Bd. of Educ.*, 267 F.Supp. 458 (M.D.Ala.1967) litigation was filed in 1963 to desegregate the public schools in Macon County, Alabama. On July 16, 1963, the United States was added as a party, Plaintiff–Intervenor and amicus curiae. On February 3, 1964, a supplemental complaint was filed adding the State Superintendent and the State Board of Education as party defendants and requesting the Court to enjoin the defendants from operating a racially dual school system throughout the State of Alabama.

*2 In *Lee v. Macon County Bd. of Educ.*, 963 F.Supp. 1122, 1124 (M.D.Ala.1997), the Court reminded the parties that the State defendants remained parties to the school desegregation litigation and had continuing obligations. The Court found that the predecessors in office to these state defendants had used their powers to maintain a dual school system primarily through the day-to-day performance of their duties in the general supervision and operation of the state system of education. *Lee*, 963 F.Supp. at 1125 (citing *Lee v. Macon County Bd. of Educ.*, 267 F.Supp. 458, 470 (M.D.Ala.1967)).

By Order dated February 3, 1998, the Court ordered the parties to report to the Court on the status of all statewide issues. On July 31, 1998, following a period of discovery and analysis, the parties submitted a joint statement to the Court, wherein the parties identified two statewide issues that were unresolved. The two areas identified were: (1) special education—the overrepresentation of African–American students in the mental retardation and emotional disturbance special education classifications and the underrepresentation of African–American students in the specific learning disabilities and gifted and talented special education classifications; and (2) facilities.

Since the submission of the July 31, 1998, Joint Statement of the Parties identifying the two statewide issues directly

involving defendant Alabama State Board of Education, the parties have devoted considerable time and resources working toward resolution of the special education and facilities issues.

This Consent Decree arises out of the good faith efforts of all parties to address and resolve the statewide issue of special education, including an agreement relating to gifted students. This agreement is jointly entered into with the United States, the private plaintiffs, and the Alabama State Board of Education, all parties to the litigation styled *Lee v. Macon*.

II. EMOTIONAL DISTURBANCE, MENTAL RETARDATION, AND SPECIFIC LEARNING DISABILITIES PROGRAMS

The Alabama State Department of Education (hereinafter sometimes referred to as “DOE”) agrees to implement the commitments outlined below to resolve the issue of racial disparities observed in certain special education exceptionalities (mental retardation, emotional disturbance, and specific learning disabilities) at the local district level. The commitments contained in this agreement will be implemented through a variety of strategies, as appropriate, given the nature of the needs being addressed. The DOE specifically agrees to amend, modify, and/or supplement the existing *Alabama Administrative Code* (hereinafter sometimes referred to as “Code”) provisions pertaining to special education, as necessary, to effect full implementation of this agreement. The terms “special education”, “mental retardation”, “specific learning disabilities”, and “emotional disturbance” as used herein are to be interpreted consistent with the definitions set forth in the *Code*.

A. AWARENESS

*3 With respect to the need for awareness of the problem, the Alabama Department of Education agrees to the following:

1. Design awareness training with the Southeastern Equity Center to address the overrepresentation of minorities in the areas of mental retardation and emotional disturbance and underrepresentation in the area of specific learning

disabilities. Focus points of awareness training:

a. Overview of reasons for overrepresentation/underrepresentation in the areas of mental retardation, emotional disturbance, and specific learning disabilities.

b. Characteristics of special education students with the aforementioned exceptionalities.

c. Purpose and significance of disability placement in special education.

2. Develop, pilot, and require awareness training, referenced in Section II.A., for all teachers, administrators, and evaluators (general and special education) in grades kindergarten through eighth and conduct training, through a trainer-of-trainers model to be used by local school systems, on overrepresentation and underrepresentation of minorities in special education.

3. Provide on-going statewide awareness training to teachers, administrators, and evaluators at least every two years through the 11 established Regional Inservice Centers and state conferences.

4. This awareness training will be mandatory for new teachers through the local education agency's new teacher orientation.

B. PREREFERRAL PROCESS

With respect to the prereferral process, the Alabama State Department of Education agrees to the following:

1. The DOE recognizes that students may be at risk of not experiencing school success and are in danger of school failure and/or noncompletion of school due to situations, circumstances, and/or conditions (e.g. environmental, family, health) over which the students may have limited control. As such, the DOE has established an at-risk program which provides focused attention and assistance in identified areas of need, giving students opportunities to experience school success. In FY 1998, the at-risk program was state funded at approximately \$25 million; in FY 1999, at approximately \$30 million; and in FY 2000, at \$32 million. The local school system's at-risk allocation must be used in accordance with the at-risk plan submitted by the local board to the State

Superintendent. Funds are restricted for use at schools within a system that were used to generate at-risk funds, unless provisions are included in the system at-risk plan and approved by the State Superintendent. Many of the at-risk students may be served at the local level through alternative education programs. A copy of the *Alabama State Department of Education Three-Year Local Education Agency (LEA) At-Risk Plan*, which includes an evaluation component, is attached. (See Attachment 1)

2. Follow current procedure as stated in the *Alabama Administrative Code*, 290-8-9-.1(1)-.58ER, page 490.

3. Expand existing training on the Building Based Student Support Teams (BBSST) model that will be phased in throughout the state no later than four years after entering this Consent Decree. Following this phase-in period, the BBSST will be mandatory. The BBSST is a model for best practice problem-solving teams implemented at the local school level. The structure provides for building-based professionals, and includes encouraging parent participation, to use their individual professional strengths in solving instructional and behavioral issues of students. The BBSST model will be annually evaluated by the local school to determine its effectiveness in demonstrating the identified positive results (i.e., decrease in special education referrals, decrease in discipline referrals, and decrease in dropout rates). A prereferral form that documents severity and duration of academic and behavior problems, interventions attempted with results achieved, and a functional assessment of the classroom environment has been included in the BBSST model. (See Attachment 2) Training on conducting a functional assessment will be included in the expanded training on the BBSST model. The DOE commits to employing additional staff (two educational specialists) to provide statewide BBSST training and requiring administrators and teachers to attend a training session. The BBSST teams that have demonstrated identified positive results will be utilized to assist the DOE trainers in implementing this statewide training. Three local school BBSST teams will be selected by the DOE from each of the three regions of the state to train staff in schools assigned by the DOE. (See Attachments 3 and 4)

*4 4. For local school districts that are not currently implementing the BBSST model, the DOE will ensure that the prereferral form and functional assessment will be completed consistent with the *Alabama Administrative Code*. The *Code* will be revised to require that a prereferral form and a functional assessment will be completed each and every time a student is suspected of

having a disability, except as delineated in the *Alabama Administrative Code* 290–8–9–.1(2), regardless of whether or not the local education agency (hereinafter sometimes referred to as “LEA”) uses the BBSST model. A copy of the school year 2000–2001 revised prereferral form, including functional assessment, is attached to this Consent Decree. (See Attachment 2)

5. Develop and pilot, through the five-year “Alabama State Improvement Grant,” a mentoring program for teachers and best instructional practices/behavioral intervention workshops. The teacher mentoring program is a beginning teacher support and coaching program that includes in-class coaching, feedback regarding instructional strategies, behavior management, and opportunities for observations of exemplary lessons, interventions and strategies, as presented by the mentor teacher. These initiatives are being developed with the assistance of Alabama’s teacher training institutions. The DOE agrees to implement the teacher mentor model and fund 200 teacher mentors per year. Some mentors in this program will participate in the BBSST model.

6. Provide initial training to general education teachers to assist them in providing appropriate instructional and behavioral intervention strategies and methods, as stated in Section II.B.5, to enhance student learning and academic progress in the general education curriculum. Specific training opportunities for general and special educators implemented in the 1999–2000 school year include: positive behavioral support training, online instruction on positive behavior supports and intervention strategies, and instructional intervention strategies to help general and special educators work effectively with at-risk students. The DOE will require LEAs to provide such training annually to new teachers during their new teacher orientation. These ongoing training opportunities provided by the DOE and LEAs will be available for teachers, administrators, and parents. (See Attachment 5)

7. Continue to monitor the prereferral process defined in the *Alabama Administrative Code*, 290–8–9–.1(2) and, in this Consent Decree, in each local education district, to determine if the prereferral interventions outlined in the revised student referral form packet have been implemented. If not implemented, the local education agency will be cited at monitoring and will be directed to correct citations. Failure to make the necessary corrections will result in enforcement action by the DOE against the LEA.

8. Change a sentence in the *Alabama Administrative*

Code, 290–8–9–.1(2), so that it will read: “Before a child is referred for special education services, prereferral intervention strategies must be implemented in the general education program and monitored by BBSST or other designated staff for at least six weeks or longer, depending on the problem, and be determined unsuccessful.”

*5 9. Continue on-going professional development activities identified in Section II.A.3 and 4 and Section II.B.3,4,5 and 6, that are designed to increase knowledge, sharing, collaboration, and mentoring among teachers through state conferences (e.g., Mega Conference, state meetings).

10. Achieve greater literacy for all students through the newly state funded “Alabama Reading Initiative: Literacy For All.” Currently, funding is \$6 million and for FY 2001, Governor Don Siegelman is proposing an additional \$4 million in state funding. This program targets the reading achievement of all Alabama students on three fronts: beginning reading, expanding reading power, and effective intervention. This research-based, extensive teacher training program will show teachers how to achieve high levels of literacy for all of their students. Piloted in 1998–99, this initiative is expected to be expanded statewide over a four-year period. Anticipated results of this program will be a decrease in the number of referrals to special education, a decrease in discipline referrals, and improvement of reading skills for students, which should positively impact student achievement throughout the curriculum.

11. Monitor the effects of the more structured prereferral process.

C. REFERRAL PROCESS

With respect to the referral process, the Alabama State Department of Education agrees to the following:

1. Follow current procedure as stated in the *Alabama Administrative Code*, 290–8–9–.1(3), pp. 490–491. DOE has revised current *Code* language to include parents as a member of the team that reviews the referral and determines if the student will be evaluated for special education services.

2. The *Alabama Administrative Code* will be revised to

require that a referral form will be completed each and every time a student is suspected of having a disability. A copy of the school year 2000–2001 referral form is attached to this Consent Decree. (See Attachment 6) The redesigned form reflects the following changes:

a. The severity/duration of the problem with subsequent prereferral interventions, including functional assessment of the classroom environment, must now be a part of the information collected and attached to the referral form.

b. Medical and school history information has been expanded to elicit a written response, instead of just attaching copies of records, which could become separated from the packet.

c. The IEP Team must answer specific questions to demonstrate their analysis of the information included in the student referral form packet.

d. Environmental, cultural, language and/or economic concerns are now a part of the special education student referral form for all students. These concerns must be considered for emotional disturbance, mental retardation, and specific learning disabilities for three purposes: (1) to determine factors affecting a student's learning and therefore excluding him/her from being identified as a student with specific learning disabilities; (2) to determine whether or not a student needs to be administered a non-traditional intelligence test, if there are environmental, language, cultural, and/or economic concerns checked; and/or (3) to determine a lack of academic instruction. (See Attachment 6) If said student is found in need of being administered a non-traditional intelligence test, such non-traditional intelligence test will be administered.

*6 3. Provide training to all teachers and evaluators on the revised special education student referral form, referral process, and on conducting a functional assessment of the classroom environment. The functional assessment includes a structured observation that examines teacher and student behaviors and how these behaviors influence academic performance.

4. Monitor the effects of the more structured referral process. (See Section IV.A.3 for monitoring procedure)

D. EVALUATION PROCEDURES AND ELIGIBILITY CRITERIA

With respect to the evaluation procedures and eligibility criteria, the Alabama State Department of Education agrees to the following:

1. Follow procedure as stated in the *Alabama Administrative Code*, 290–8–9–.2–.59ER through 290–8–9–.4–.61ER, pp. 491–510, as revised by the terms of this Consent Decree.

a. The DOE has revised the *Code* to include parents as part of the team that determines the appropriate evaluations for initial evaluation and subsequent reevaluations.

b. The DOE has revised the *Code* to include parents as a part of the team that determines student eligibility for special education services.

c. The DOE has revised the *Code* to reflect that the eligibility criteria for emotional disturbance includes: (1) parents as a possible rater for one of the three required behavior rating scales, and (2) the requirement of observations in two or more educational settings.

d. The DOE has revised the eligibility criteria for specific learning disabilities to use a predicted achievement model, based on regression to the mean, to determine whether or not there is a severe discrepancy between a student's ability and achievement. This provides a more statistically sound method of determining a severe discrepancy and, additionally, enlarges the population of students who may be considered for having a severe discrepancy. The predicted achievement model must be applied at initial evaluation for all students referred for an evaluation on or after July 1, 1998, and must be used at reevaluation for these students. All children referred prior to July 1, 1998, and who have been identified as specific learning disabled, using the simple standard score discrepancy criteria will continue to be reevaluated with the same criteria, until such time as the student is no longer eligible for services. However, if a qualified team, including the parent, deems it appropriate to use the regression to the mean criteria at reevaluation, they may do so.

2. The DOE will revise the *Code* 's eligibility criteria for mental retardation to quantify the criteria for adaptive behavior. The revised *Code* will state that: "Total score on an adaptive behavior scale or two subcomposite scores on an adaptive behavior scale must be at least two standard

deviations below the mean (usually 70 or below). A school version of an adaptive behavior assessment is required. When the parent participates in the meeting to discuss the referral, a home version of the adaptive behavior assessment will be completed by the parent/guardian at that time. The parent/guardian may complete the scale or it may be administered by conducting a parental interview. If the parent/guardian does not attend the meeting to discuss the referral, a home version of the adaptive behavior assessment will be sent home. The local education agency must make at least two attempts, and document such attempts, to have the parent or guardian complete the home version of the adaptive behavior assessment within the 90-day referral process. However, the absence of a home version of the adaptive behavior assessment may not delay the 90-day referral to placement process. The school version and the home version of the adaptive behavior assessment must be conducted using the same test instrument.”

*7 3. The DOE will revise the *Code’s* eligibility criteria for mental retardation to require that “Information must be gathered as part of the referral to determine if there are any environmental, cultural, language or economic differences that might mask a student’s true abilities and thereby affect the student’s performance in the areas evaluated. Tests and evaluative materials selected and administered should be sensitive to environmental, cultural, linguistic, and economic differences.”

4. The DOE will oversee a review of certain categories of minority students currently identified as mentally retarded or receiving services for students with mental retardation to determine if any such student has been inappropriately placed. The DOE has established the following criteria for identification of these minority students to be reviewed and reevaluated: First, any minority student with a current full-scale intelligence quotient (IQ) of 65 or higher must be reevaluated. Second, any minority student who was not assessed with an adaptive behavior instrument must be reevaluated. All students who satisfy either the first or second criterion for review and reevaluation must be reevaluated within eight school months of entry of this Consent Decree. Students will be reevaluated consistent with the Individuals with Disabilities Education Act of 1997 (20 U.S.C. 1400 *et seq.*), the revised *Alabama Administrative Code*, and the terms of this Consent Decree. The exception at *Alabama Administrative Code* 290-8-9-.15, as revised (*See discussion infra*) for mental retardation, does apply to the students identified under the Consent Decree. The DOE will revise the *Code* exception at 290-8-9-.15 so that it will read “Minority students in

the seventh grade and older who were identified as mentally retarded prior to July 1, 1999, will continue to be reevaluated under the criteria in this rule. Non-minority students in the fourth grade and older who were identified as mentally retarded prior to July 1, 1999, will continue to be reevaluated under the criteria in this rule. However, if a qualified team, including the parent, deems it appropriate to use the criteria in *Alabama Administrative Code* 290-8-9-.3(6), they may do so, but written justification for this action must be documented in the eligibility report.” The DOE will provide parents of minority students in the seventh grade or older who were identified as mentally retarded prior to July 1, 1999, with notice and sufficient information so that those parents may make a fully informed choice regarding whether their children should be reevaluated within eight school months under the revised criteria set forth in Section 290-8-9-.3(6) of the *Alabama Administrative Code*, or under the criteria set forth in Section 290-8-9-.15, and the ramifications of each option. A copy of this draft communique will be provided to the plaintiff parties for review and approval prior to its being disseminated. If the student no longer meets the new *Code* criteria for mental retardation, he/she will be evaluated for possible placement in another disability area. This decision based on the student’s educational and emotional needs should be made in the best interest of the student. Students who do not meet the eligibility criteria for any disability area will be exited from special education. However, these students exited from special education will be provided, by general education, appropriate supplemental services to facilitate successful transition in the general education program. All of this must be accomplished consistent with established *Code* requirements regarding evaluation.

*8 5. Provide statewide training for educational personnel (special education coordinators, school psychometrists, school psychologists, and other evaluators) on administration and interpretation of various assessment measures such as intellectual, nonverbal intellectual, adaptive behavior, behavior, achievement and functional assessment of the classroom environment. A schedule has been developed. (See Attachment 7)

6. Ensure that all approved assessment instruments are validated with respect to the population for whom they are being used; the instruments accurately assess the abilities/skills intended to be measured; and, to the extent that alternative intelligence tests are utilized, those individuals conducting the tests are provided with guidelines and training to ensure a proper evaluation.

7. Ensure that the local education agencies utilizing evaluation and placement practices and procedures which have a disparate and adverse impact on minority students (special education placement in areas of mental retardation, specific learning disabilities, and emotional disturbance) will be required to demonstrate to the DOE through their LEA plan that their practices and procedures are consistent and have fully complied with the *Alabama Administrative Code* and the terms and conditions of this Consent Decree. If the LEA fails to demonstrate to the DOE that its plan is consistent with, and that it has fully complied with the *Code*, as revised, and with the terms and conditions imposed on the LEA by the DOE pursuant to this Consent Decree, the DOE will take appropriate enforcement measures. Such measures may include requesting the Attorney General to bring civil injunctive actions to enforce the implementation of such plan. A data collection procedure (See Section IV.A.3 for monitoring procedures) will be developed and used to ensure retrieval of appropriate data.

III. GIFTED PROGRAM

The Title VI Resolution Agreement, entered into by the DOE and the U.S. Department of Education's Office for Civil Rights in February 1999, a copy of which is attached as Attachment 8, is hereby adopted by the parties to this litigation, incorporated by reference into this Consent Decree and made a part hereto. The parties agree to be bound by its terms and conditions in settlement of the issues concerning the underrepresentation of African American students in gifted programs throughout the state.

IV. OVERSIGHT/REPORTING/MONITORING

A. EMOTIONAL DISTURBANCE, MENTAL RETARDATION, AND SPECIFIC LEARNING DISABILITIES PROGRAMS

To ensure full implementation and continued compliance of the terms and conditions of this Consent Decree, the Alabama State Department of Education agrees to the following:

1. Require all LEAs to submit a plan for implementation of the *Alabama Administrative Code* and the terms and conditions imposed on the LEA by the DOE pursuant to this Consent Decree. The LEA plans will be required to address all components of the special education process (e.g., notice, referral, evaluation). In conjunction with the review and approval process, the DOE will evaluate all plans to ensure that they meet standards as set forth in this Consent Decree. The DOE will review for approval all such plans. If the plan is not approved, the DOE will follow the procedures set forth in the *Alabama Administrative Code*, Section 16-39-5.

*9 2. Develop and implement a comprehensive plan to evaluate annually the effectiveness of the training, proposals, procedures and commitments of the DOE set forth in this Consent Decree. The DOE will report annually to the State Board and the plaintiff parties, in August of each year, regarding the effectiveness of these measures and will include suggested modifications to the program, if appropriate.

3. Develop and implement a procedure for monitoring all LEAs' compliance with the revised *Alabama Administrative Code* and the terms and conditions imposed on the LEA by the DOE pursuant to this Consent Decree.

a. The DOE will collect and maintain, by LEA, statistical data regarding: 1) the number, disaggregated by race, of students referred for evaluation for eligibility for special education services; 2) the number, disaggregated by exceptionality and by race, of students determined eligible for services; 3) the number, disaggregated by exceptionality, by race, by type and by duration of prereferral interventions, of students determined eligible for services; 4) the number, disaggregated by exceptionality and by race, of students determined eligible for services who were administered an alternative intelligence test and 5) the number, disaggregated by exceptionality and by race, of students actually served during the school year.

b. The DOE will annually review data and, based on relative rankings derived from pertinent statistical and programmatic considerations, identify those LEAs which continue to evidence racial disparity in the referral, evaluation, and identification of minority students in the disability areas of mental retardation, emotional disturbance, and specific learning disability. An odds-ratio formula will be used to determine the degree to

which the initiatives are affecting placement patterns. The DOE will provide appropriate assistance to those LEAs, which continue to evidence racial disparity in the referral, evaluation, and identification of minority students in the disability areas of mental retardation, emotional disturbance, and specific learning disability and those LEAs will be required to submit an amendment to their LEA plan (as referenced above) to correct all concerns identified by the DOE related to this issue consistent with the *Alabama Administrative Code*, 290-8-9-.8(10) and this Consent Decree.

c. The DOE will require each LEA annually to report to the DOE all training initiatives, programs and sessions implemented or attended by the LEA, pursuant to the terms and conditions of this Consent Decree.

d. The DOE staff will review LEA practices as described in this agreement in conjunction with the existing five-year state monitoring cycle.

4. If a plan is not approved or if, as a result of monitoring, the DOE finds that the local education agency is not in compliance with its approved plan, the DOE will take appropriate enforcement measures. Such measures may include requesting the Attorney General to bring civil injunctive actions to enforce the implementation of such plan.

***10** 5. The DOE commits to employing an additional education specialist (Special Education Services) to assist with planning, directing, and monitoring activities in this Consent Decree.

6. With respect to the *Code* changes and other policies/procedures adopted relative to the implementation of this Consent Decree, provide training to appropriate local school district personnel including classroom teachers; routinely disseminate guidance and technical support to LEAs; and develop a process through which LEAs may request guidance and technical support from the DOE.

7. Request the Special Education Advisory Panel to annually prepare a report for the State Superintendent of Education on the status of the referral, evaluation, and identification of minority students in special education.

8. The DOE is currently developing a manual, *Mastering the Maze*, that in detail describes the state special education process from student prereferral to student placement in special education. This manual, which

provides instruction on completion of all the state-required forms, will also incorporate the best practices that are included in this Consent Decree. Training on this manual is being scheduled and will be provided to all special education teachers and administrators. (See Attachment 7)

9. The DOE shall submit to the Court and to the parties' counsel of record annual reports fully detailing its efforts with respect to items II through IV. These reports shall be submitted each year by September 1, with the first report due September 1, 2001. The Superintendent shall certify in writing that all of the information contained in each annual report is true and correct to the best of his/her information, knowledge and belief and that a copy of the report has been adopted by the Board. This certification shall be included with each annual report. The plaintiff parties will review the information submitted in each annual report and any comments, recommendations, and objections by the United States and private plaintiffs concerning the information contained in these annual reports shall be made in writing in a timely manner. Such timely review and response by the plaintiff parties is subject to the DOE providing complete and accurate information in a timely manner. These reports shall include the following information:

a. The statistical data collected annually from the LEAs by the DOE, referenced in Section IV.A.3 *supra*.

b. The names of those LEAs identified as continuing to evidence racial disparity in the referral, evaluation, and identification and placement of minority students in the disability areas of mental retardation, specific learning disability and emotional disturbance and a detailed discussion of the assistance provided by the DOE to those LEAs. (See Section IV.A.3.b)

c. Copies of each LEA's annual report to the DOE (see Section IV.A.3.c) regarding all training initiatives, programs and sessions implemented or attended by each LEA pursuant to the terms and conditions of this Consent Decree.

***11** d. A detailed discussion of any and all enforcement measures taken by the DOE, as referenced in Sections II.D.7 and IV.A.4, if an LEA's plan is not approved or if, as a result of monitoring, the DOE determines that the LEA is not in compliance either with prereferral interventions outlined in the revised student referral form packet or with its approved plan, and the outcome of those enforcement efforts.

e. The names of each district monitored by the DOE in that particular reporting year, and the results of such review.

f. A discussion and listing of all teacher training initiatives, programs and sessions implemented each year by the DOE, pursuant to the terms and conditions of this Consent Decree, detailing the type of training provided, the date that each such training initiative, program or session was provided and the participating LEAs.

g. A copy of the Special Education Advisory Panel's annual report to the State Superintendent on the status of the referral, evaluation, and identification of minority students in special education.

h. In the first annual report, a copy of the *Mastering the Maze* manual referenced in Section IV.8.

i. In the first annual report, a copy of the *Code*, as revised pursuant to the terms and conditions of this Consent Decree.

j. The results, by LEA, of the review and reevaluation of all minority students previously identified as mentally retarded who have been reevaluated pursuant to the terms and conditions of Section II.D.4. These results will include, set forth separately by LEA, the number of students reevaluated, the date upon which such reevaluation was completed, the number of students identified as no longer meeting the revised *Code*'s criteria for mental retardation and, for those students exited from special education, a description of the general education supplemental services provided to each particular child to facilitate a successful transition to the general education program.

B. GIFTED PROGRAM

The DOE shall submit to the Court and to the parties' counsel of record annual reports fully detailing its efforts to implement the Title VI Resolution Agreement, referenced in Section III. These reports shall be submitted each year by September 1, with the first report due September 1, 2001. The Superintendent shall certify in writing that all of the information contained in each annual report is true and correct to the best of his/her information, knowledge and belief and that a copy of the

report has been adopted by the Board. This certification shall be included with each annual report. The plaintiff parties will review the information submitted in each annual report and any comments, recommendations, and objections by the United States and private plaintiffs concerning the information contained in these annual reports shall be made in writing in a timely manner. Such timely review and response by the plaintiff parties is subject to the DOE providing complete and accurate information in a timely manner. These reports shall include the following information:

*12 1. A detailed description of all steps the DOE has taken to implement, and ensure that LEAs comply with, the terms and conditions of Section I (Identification/Referral Criteria and Procedures) of the Title VI Resolution Agreement (hereinafter referred to as the "Gifted Agreement").

2. A detailed description of all steps the DOE has taken to implement the terms and conditions of Section II (Evaluation Procedures and Eligibility Criteria) of the Gifted Agreement.

3. A detailed description of all steps the DOE has taken to implement the terms and conditions of Section III (Program Implementation) of the Gifted Agreement.

4. As required pursuant to Section IV.A. of the Gifted Agreement, a detailed listing both of those LEAs which have submitted DOE-approved plans and of those LEAs which have not submitted DOE-approved plans, including a discussion of the actions DOE has taken to ensure that such plans will be submitted.

5. The data collected by the DOE referenced in Section IV.B. of the Gifted Agreement.

6. A detailed statement certifying that the DOE has performed its obligations set forth in Section IV.B. of the Gifted Agreement.

7. A discussion and listing of all training provided, and a copy of the Best Practices guide/manual produced, pursuant to Section IV.D. of the Gifted Agreement.

8. A copy of the Special Education Advisory Panel's annual report to the State Superintendent of Education on the status of the State's gifted program.

9. Copies of the monitoring reports provided to the U.S. Department of Education's Office for Civil Rights by the

DOE regarding DOE's implementation of the Gifted Agreement.

V. TERM OF CONSENT DECREE

The Court shall retain jurisdiction over this matter to ensure full compliance with the terms and conditions of this Decree. The DOE may petition the Court for a determination that it has complied in all respects with the terms and conditions of this Decree after both: (i) a one-year period in which it designs, develops and implements the various program, policies and regulatory changes set forth in the Decree (see Consent Decree Activity Timeline attached as Attachment 9), and (ii) conducts two full two-year monitoring cycles, beginning with the 2001–2002 school year, during which each public school district in the state will be monitored twice by the DOE to determine compliance with the terms and conditions of this Decree. The plaintiff parties will have the right to submit a response to the DOE's petition within ninety days. Thereafter, the Court shall schedule appropriate proceedings, make appropriate findings and render appropriate orders with respect to the statewide defendants' unitary status on the issue of special education. Provided that the Court determines that the statewide defendants have demonstrated, consistent with the applicable constitutional standard, that the vestiges of discrimination no longer exist or have been eliminated to the extent practicable and further that the statewide defendants are entitled to a declaration of unitary status for special education, the Court may relinquish jurisdiction and dismiss with prejudice the special education claims against the statewide defendants.

***13** This Consent Decree has been approved by the Governor of the State of Alabama, the Attorney General for the State of Alabama, and the Alabama State Board of Education.

VI. ADDITIONAL PROVISIONS

1. The parties to this Consent Decree acknowledge that the obligations created herein are the obligations of the State defendants only, and that any motion alleging non-compliance with the terms and conditions of this decree, or any other proceedings to enforce this decree

will be brought against the State defendants only, and not against any Alabama LEA.

2. Nothing in this Consent Decree is to be construed as placing any Alabama LEA which has heretofore been declared unitary or which may be declared unitary during the term of this Consent Decree under the jurisdiction of this or any other federal court for an alleged violation of this Consent Decree.

3. Upon entry of this Consent Decree, any Alabama LEA which remains under the jurisdiction of this or any other federal court pursuant to a terminal desegregation order may be granted a declaration of unitary status in the area of special education notwithstanding any pending claim by the plaintiff parties or any present violation by the LEA, and the United States and private plaintiffs agree not to oppose such a declaration in light of the commitments undertaken in this Decree by the State defendants.

4. Nothing in this Consent Decree shall be construed to prohibit separate and independent action against any Alabama LEA under the United States Constitution or any state or federal law, statute, rule or regulation relating to special education or race discrimination.

5. Nothing in this Consent Decree shall be construed to preclude any Alabama LEA from being declared unitary prior to the expiration of this Decree.

VII. ATTORNEYS' FEES

Defendants shall pay to counsel for the private plaintiffs' class (excluding the United States) their reasonable attorneys' fees and costs incurred in connection with this action. The parties (excluding the United States) will attempt to agree upon the fees and costs, but if they cannot, they shall submit the matter to the Court for decision. Additionally, counsel for the private plaintiffs' class (excluding the United States) shall be provided reasonable attorneys' fees and costs incurred in monitoring compliance with this Consent Decree. Each year, on or about the anniversary of the entry of this decree, counsel for the private plaintiffs' class shall submit to the defendants their reasonable attorneys' fees and costs. The parties (excluding the United States) will attempt to agree upon the fees and costs, but if they cannot, they shall submit the matter to the Court for

decision.

All Citations

Not Reported in F.Supp.2d, 2000 WL 33680483

It is so ORDERED.
