2002 WL 91895
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United States District Court, N.D. Mississippi, Greenville Division.

Jake AYERS, Jr., et al. Plaintiffs
UNITED STATES OF AMERICA
Plaintiff–Intervenor
v.
Ronnie MUSGROVE, Governor, State of Mississippi, Board of Trustees of State Institutions of Higher Learning, et al., Defendants

No. 4:75CV009–B–D.
|
Jan. 2, 2002.

ORDER

BIGGERS, Senior J.

***1** This cause comes before the court on the proposed settlement [Proposal] filed on April 23, 2001. The court conducted the required Fairness Hearing in accordance with Rule 23(e) of the Federal Rules of Civil Procedure on September 4–6, 2001, and heard testimony from proponents of and objectors to the Proposal. The court is now ready to rule on the issue in the following particulars.

I.

The plaintiffs in this case are a class of citizens comprised of

> all black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity ... in the universities operated by [the] Board of Trustees [of State Institutions of Higher Learning].[1]

See Order of September 17, 1975 (emphasis added).

The complaint of these plaintiffs that was filed in this case states in part:

> Plaintiffs bring this cause on their own behalf and on behalf of all others similarly situated, said class being more particularly described as all black persons who have been, are or will be subjected to racial discrimination ... in the provision of equal educational opportunity....

See Amended Complaint filed April 7, 1975 (emphasis added).

Following a lengthy trial in 1987, the court found that there were no longer any State policies which prevented African–American students from attending the university of their choice in this State and the case was dismissed. The Court of Appeals for the Fifth Circuit *en banc* affirmed this court's decision, but the Supreme Court held that while there may have been no State policies at the time of the ruling which had the intent of discriminating against the plaintiffs, a different standard of law should be used in determining whether desegregation had been fully implemented in the State's higher education system. The Supreme Court held that neutrality in the State's policies was not enough and the State must affirmatively take action to eradicate any policies traceable to the *de jure* system which may still be in force and have discriminatory effects "to the extent practicable and consistent with sound educational practices." *United States v. Fordice*, 505 U.S. 717, 729, 731, 743, 120 L.Ed.2d 575, 593–94, 595, 602 (1992) (emphasis added).

To address the new standards handed down by the Supreme Court, this court held a second trial in 1994 and concluded, among other things, that the admissions requirements for the eight universities were indeed a remnant of *de jure* segregation in that the historically white institutions [HWI's] had higher admissions

standards than the historically black institutions [HBI's], and since statistically the African–American students made lower scores on their admissions test scores, this State policy had the effect of channeling the African–American students to the HBI's.[2] As a result of the 1994 trial, this court issued a remedial decree [Court Plan], which changed the admissions standards so that admissions are now based on a combination of factors, including high school grades and ACT scores and a sliding scale of both, rather than only ACT scores, as in the past. In addition, the court established a unified admissions requirement for all eight universities so that if a student is qualified to go to one university in the State, he or she is qualified to go to each of the other universities in the State. Thus, there was no longer a "channeling effect" and no longer, in the court's opinion, a valid claim that opportunities to attend a university of one's choice would be denied because of race. Since the implementation of the new admissions standards, more African–American students are attending the HWI's than ever before.[3]

***2** The Court Plan also addressed the problem of attempting to desegregate the three HBI's. It was argued by the plaintiffs at the trial and their expert witnesses so testified that in order for the HBI's to attract white students, there must be new courses offered at the HBI's which are attractive to white students, and which are not duplicated at the white universities. The theory presented to the court by the plaintiffs was that, for example, if an engineering course were instituted at Jackson State University [JSU], located in a densely populated area of the State, white students interested in engineering, who live nearer JSU than other institutions offering engineering, may choose to attend JSU. Based on the theory presented by the plaintiffs and their witnesses, the court issued the Court Plan calling for the creation of certain new course offerings at JSU, including a new engineering school and new graduate courses in business and other fields.

The Supreme Court mandated and this court has restated that the additional enhancements at JSU as a result of court orders are not for the purpose of merely upgrading black colleges as publicly financed enclaves for African–Americans to attend, but are for the purpose of desegregation, that is, to attract white students to these institutions. Whether these course offerings will accomplish what the plaintiffs claim they will accomplish is yet to be seen. The court did state in its previous orders that once the new courses are in place, it is not necessary that they attract a substantial number of white students to be in compliance with the law. Neither the State nor a court can compel college students to attend any particular university. As long as the remnants of *de jure* segregation have been eradicated—and by the court's decree and the affirmance of the Court of Appeals, they have been at JSU—the constitutional requirements have been met. If, in the future, the new courses do not accomplish the goal advocated by the plaintiffs and are not self-supporting, as the court has previously stated, the courses' continuation can be reconsidered.

The court has not finished a plan for Alcorn State University [ASU] and Mississippi Valley State University [MVSU] at this time. The IHL Board was ordered by this court and by the Court of Appeals in 1997 to present a plan to the court for consideration but, as yet, the court has not received a plan to attract white students to ASU and MVSU. The court may have been overly lenient in not setting earlier deadlines for the Board, but with JSU's plan already completed and JSU having more students than ASU and MVSU combined, and the uniform admissions standards already in place at all universities, it would appear that the majority of the work necessary to meet constitutional requirements for the overall plan has been accomplished.

II.

In the process of the court implementing the court-ordered plan to end this case as far as court-ordered remedies are concerned, the Governor of the State of Mississippi, the Attorney General and United States Congressman Bennie Thompson announced that they were beginning negotiations to "settle the *Ayers* case." The end result of those negotiations among the above-named officials, the attorneys for the United States Department of Justice and the IHL Board was that the further implementation by the court of the Court Plan then in progress was suspended and the Proposal herein under consideration was submitted to the court for approval or rejection.

III.

***3** As stated heretofore, the court has had several hearings and conferences concerning the Proposal. There were numerous witnesses and written objections opposing it, and advocates in favor of the Proposal have presented numerous arguments in its favor. If the court rejects the Proposal, it will mean the Court Plan will continue to be

implemented. If the court accepts the Proposal, it will mean the plan negotiated by the parties will be substituted for the Court Plan, and the State of Mississippi will be legally obligated to fund the Proposal over the next seventeen years of its life. That obligation would be legally enforceable as a contract, meaning that if at any time the State failed to appropriate the yearly dollar amounts called for in the Proposal, the State may be taken to court and the Proposal enforced as any other contract.[4]

IV.

The court has received numerous arguments *pro* and *con* on the issue of whether the Proposal is reasonable. Intelligent, thoughtful and sincere people have presented reasons on both sides of the issue. University professors and administrators have testified in favor of the Proposal. University professors and administrators have testified against the Proposal. Members of the Mississippi Legislature have testified in favor of the Proposal. Members of the Mississippi Legislature have testified in opposition to the Proposal. Education experts from outside the State, with no vested interest in any of the universities in this State, have testified in favor of and in opposition to the Proposal. Ordinary citizens of the State who hold no elected or appointed offices and who are not in the field of education, but who are interested as citizens and taxpayers, have expressed strong views on the issue.

The court summarizes the rationales presented to the court in favor of and in opposition to the Proposal which carry weight with the court as follows:

In Favor:

1. The State Legislature will know exactly what its financial obligations are to settle the case and how many dollars it must appropriate each year to fund the Proposal and the costs could be spread over seventeen years.

2. The State will improve its public image by no longer being in court litigating a desegregation case.

3. The administrators of JSU, ASU and MVSU could plan years in advance how to use the funds designated for their institutions, over and above their regular budgets.

4. The IHL Board would no longer have to spend time working with the court on the Court Plan and in presenting a desegregation plan for ASU and MVSU. The Court Plan for JSU, as stated, has been implemented and is finished. *See* Order of January 10, 2001.

5. If the elected representatives of the State and the private plaintiffs have reached an agreement and want to settle the case, the court should allow them to do so, notwithstanding reservations of the court.

In Opposition:

1. The Proposal is unreasonably expensive. The Court Plan has been completed at JSU, yet the Proposal calls for many millions of additional dollars for *Ayers* funding to be spent at JSU.[5] The Court Plan for ASU and MVSU, although not completed, will likely be cumulatively less than that already expended on JSU, and more populous states than Mississippi have settled their IHL desegregation disputes for much less than the Proposal calls for.[6]

***4** 2. The Proposal hamstrings future policy-makers of the State from making any organizational changes in the State's higher education system for at least the next seventeen years, whereas the Court Plan has never ruled out the consideration of mergers, consolidations, additions or reorganization if the future leadership of the State decides to consider those choices in light of future developments in higher education.

3. The Proposal is more about politics and money than equal educational opportunity and desegregation, and is merely an attempt to use the federal court as a tool to gain State tax dollars for political purposes when the Legislature could not otherwise justify these dollar amounts for these purposes.[7]

4. Since the admissions standards to the universities now allow a student-applicant to attend any of the HWI's, if that student is qualified to attend any of the HBI's, the claim of denial of equal educational opportunity has largely been handled. The addition of monies to the HBI budgets called for by the Proposal to create courses which duplicate those now offered at nearby universities does nothing for desegregation and smacks of separate but equal. In addition, the IHL Board has already disregarded prior rulings of the court that the funding formulas for the HBI's are adequate, and has allocated for fiscal years 1997–2000 more tax dollars per student headcount for ASU and MVSU than for Mississippi State University, the University of Mississippi and the University of

Southern Mississippi, thus turning the funding formula on its head.[8]

5. Some proponents say the Proposal, if accepted, will *end* the case but, as a practical matter, it will continue for seventeen years, cost more, take longer to complete and do less for desegregation than the Court Plan.

6. The Proposal fails to take into consideration the present or future ability of the State to fund it.

V.

This court prefers that all cases end in agreement by the parties, if that agreement is in accordance with established law and reasonable to all involved. At this juncture, only a few persons have formulated this Proposal and spoken to the court as parties on behalf of the State, albeit those persons are high-ranking officials of the State—the Governor, the Attorney General and members of the IHL Board. All those proponents of the Proposal have an interest in obtaining more dollars from the Legislature to fund this Proposal, as do Congressman Bennie Thompson, the attorneys for the Justice Department and the private plaintiffs, the other creators of this Proposal. Although these persons have the power to bind the State to fund this Proposal for the next seventeen years, if the Proposal is accepted by the court, none of them has the power or responsibility to raise or appropriate the money necessary to fund the Proposal. Members of the Mississippi State Legislature, the body which does have the responsibility to raise and appropriate tax revenues, have presented well-articulated and reasoned opinions to the court on both sides of the issue. Testimony was presented that the members of the Legislative Black Caucus are generally in support of the Proposal, but the other testimony and writings received from Legislators were sharply divided.

***5** Before the court rules on a settlement proposal of this magnitude which calls for the expenditure of over $400 million tax dollars, the court wishes to receive a concurrent resolution or similar statement on the record from the Mississippi State Legislature, indicating whether the Legislature endorses this Proposal and agrees to fund it on the terms called for[9] or, alternatively, prefers the continuation of the Court Plan. If the Legislature advises the court that it agrees with the parties on their Proposal, then the court will not stand in the way, and the Proposal will be accepted by this court.

The court has an interest in preventing the appearance or substance of being used for political purposes as a tool to obtain money from the State to fund a Proposal which would not otherwise be appropriated. In the past there have been monies requested and appropriated under the guise of *Ayers* funding which the court has never ordered or contemplated ordering. *See* Orders of March 24, 2000 and July 6, 2000.

If the Legislature advises the court on the record that it wants the Proposal accepted, then if, in future years, in order to fund the Proposal, taxes have to be raised and/or tuitions increased and/or money taken from other universities and/or indebtedness increased to be paid by future generations, it cannot be said—or at least it cannot be said truthfully[10]—that the amounts of money to fund the Proposal were unknown or that they were mandated by the court.

The acceptance or rejection of the proposed settlement submitted by the parties, therefore, will be ruled on forthwith upon receiving the above-described communication from the Mississippi Legislature.

All Citations

Not Reported in F.Supp.2d, 2002 WL 91895

Footnotes

1 Hereinafter referred to as IHL Board.

2 It was pointed out by this court's previous decisions that those lower admissions requirements at the HBI's were instituted by the IHL Board at the specific request of the HBI presidents.

3 IHL Board enrollment data for 1996–2000 furnished to the court.

4 *See* Order of May 8, 2001, in which the details of the Proposal and the yearly funding obligations are included.

5 JSU will share in a proposed $100 million endowment, $70 million of which would be State tax dollars and $30 million raised by State employees from other sources. There has been no evidence presented to the court nor is the court aware that any other state has created state-funded endowments for state-financed institutions.

6 Larger states have settled their higher education disputes for much less amounts—e.g., Tennessee—$75 million over seven years; Virginia—$69.9 million over six years.

7 > If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request.
>
> *United States v. Fordice,* 505 U.S. 717, 743, 120 L.Ed.2d 575, 602 (1992) (emphasis in original).

8 Data regarding general operations appropriations, exclusive of capital appropriations, furnished to the court by IHL Board, as reflected in the Monitor's report dated June 2, 2000.

9 A few aspects of the Proposal were restated at the Fairness Hearing but are not related to the amounts of funding—i.e., the trigger percentages and the attorney fees.

10 It has already been pointed out *supra* that some monies have been requested and appropriated for *Ayers* that were not so ordered.