UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CLIFTON EUGENE DAVIS, JR., ET AL

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

CIVIL ACTION

NO. 56-1662-D

RULING ON MOTION TO ENFORCE TIME PROVISION AND ORDER

This matter is before the court on the motion of plaintiff-intervenor United States Department of Justice (the "DOJ") to enforce the time provision in the Consent Decree (doc. 1766). Plaintiffs, Clifford Eugene Davis, et al, have filed a statement in support of the motion. The East Baton Rouge Parish School Board (the "School Board") has filed an opposition. The United States Department of Justice has filed a reply.

On February 1, 2002, the School Board filed a motion for "a Declaration of Unitary Status." The DOJ contends that the School Board is precluded from unilaterally bringing its motion for unitary status in view of the following provision of the Consent Decree (the "Provision"), which was agreed to by all of the parties and approved by the court in 1996:

> The school district may unilaterally move for unitary status upon the conclusion of the eighth school year following the implementation of the plan. At any time after the conclusion of the fifth school year following the initial implementation of the plan, a joint motion for unitary status may be filed by all of the litigants with the Court.
> Doc. 843, p. 7.

Treating the 1996-97 school year as the plan's implementation year, the DOJ argues that the Provision precludes the School Board from unilaterally moving for unitary status until the end of the 2004-05 school year. The DOJ contends that the Provision is valid and enforceable as part of a judicially approved settlement between the parties. The DOJ argues that a consent decree in a desegregation case is like "any other type of case involving a violation of the Constitution or other federal law" and that the parties can agree to the time period for implementing a remedy. Once the parties have so agreed, the DOJ argues that, absent a showing of extraordinary circumstances, the parties should be held to their end of the bargain.

Additionally, the DOJ argues that the motion is premature because the School Board has not fully complied with the Consent Decree or the court's orders approving the 1998 tax plan. In particular, the DOJ points to the School Board's obligations to eliminate t-buildings and to renovate and rebuild racially identifiable, black schools.

In opposition to the motion, the School Board's major arguments are: (i) that the Provision is invalid because the constitutional violation giving rise to the Consent Decree has been fully remedied, i.e. the School District is "unitary"; and (ii) the Provision should be modified in light of a significant change in circumstances, i.e, "the continuous departure of white, middle class families from Baton Rouge's public schools threatens the education of the very children the Decree was intended to benefit." For much the same reasons, the School Board contends that the motion for unitary status is not premature.

I. Invalidity of the Provision

Citing **Dowell**,[1] **Freeman**,[2] and **Jenkins**,[3] the School Board contends that the Supreme Court has recognized that a federal district court's "supervisory role" over school desegregation must end as soon as the school system is in compliance with the Constitution. Consequently, the School Board contends that the Provision cannot be enforced because "the parties cannot [a] grant power to this Court that the Constitution has withheld." In other words, the School Board claims that the Provision is invalid because "it necessarily contemplates the continuation of judicial supervision even though the school district is unitary." Doc. 1771, Opposition brief, p. 6.

In response, the DOJ argues none of the cases cited by the School Board involves the nullification of a time provision in a consent decree. The DOJ contends that **Dowell** and **Freeman** simply call for the end of federal court supervision once a school district has remedied the effects of past discrimination and that this does not cause a negotiated, time provision to be invalid. Additionally, the DOJ contends that continued enforcement of the Provision is necessary to ensure that the School Board fully implements the Consent Decree and tax plan. Until the School Board has done so, the DOJ contends that the School Board cannot be found to have complied **in good faith**

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[1] **Board of Education of Oklahoma City Public Schools v. Dowell**, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991).

[2] **Freeman v. Pitts**, 503 U.S. 467, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992)

[3] **Missouri v. Jenkins**, 513 U.S. 1040, 115 S.Ct. 2038, 130 L.Ed.2d 539 (1995).

with the court's orders for a reasonable period of time.

The reply of the School Board is that the DOJ "takes out of context" the Supreme Court's statement in **Dowell**, 498 U.S. at 248, concerning "compliance... for a reasonable period of time" and the statement in **Freeman**, 503 U.S. at 490, concerning the court's "discretion to terminate supervision in an 'orderly and gradual' manner." The School Board reiterates its argument that a desegregation decree must end when the federal interest it serves has been fulfilled. The School Board argues that, while the parties may agree to do more than what the Constitution requires, they may not agree to violate the Constitution.

In **Dowell, Freeman** and **Jenkins**, the Supreme Court recognizes the importance of local control over public school systems. As a consequence, federal supervision of a local school system should "not extend beyond the time required to remedy the effects of past intentional discrimination." **Dowell**, 498 U.S. at 248. The court's "ultimate objective" is to restore control of the school system to the local authorities once it is in compliance with the Constitution. **Freeman**, 503 U.S. at 489. The undersigned judge whole-heartedly agrees with this proposition.

I have told all the parties on numerous occasions that I would like to see the system declared unitary and that I would do everything that was constitutionally permissible to help in achieving that goal. I will continue in this effort. I have also advised the parties on numerous occasions that, while it was my desire to see the system achieve unitary status, I am obligated to follow the Constitution and the

precedents of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit.

I am pleased with the efforts the parties and their counsel have made over the past months in resolving issues in this case. Through these efforts the Baker and Zachary portions of this lawsuit have been resolved. I hope that these good faith efforts towards resolving other issues will continue and the parties and their counsel will have my complete support of these efforts within the bounds of the Constitution and legal precedent.

In recognition of the importance of local control, **Freeman** further teaches that a federal district court has "the discretion to order an incremental or partial withdrawal of its supervision and control." 503 U.S. at 489. The court's remedial authority extends to partial relinquishment of judicial control when it is justified by the facts of the case. **Id.** As the Supreme Court notes, "[b]y withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated." **Freeman**, 503 U.S. at 493.[4]

But, whether the court is considering a partial or total relinquishment of judicial

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[4] In determining unitary status, the court must further consider whether the vestiges of *de jure* segregation have been eliminated to the extent practicable, taking into account not only student assignments but "every facet of school operations– faculty, staff, transportation, extra-curricular activities and facilities." **Dowell**, 498 U.S. at 250.

control, the "ultimate inquiry" is whether the school district has complied with the desegregation decree in good faith . **Missouri**, 513 U.S. at 89. Such compliance with the court's orders over a reasonable period of time is necessary to provide some assurance to the parents, students and the public that there will be no further injuries associated with the past wrongs sought to be remedied by the decree. **Freeman**, 503 U.S. at 498.

In the case at hand, the School Board argues that the time Provision in the Consent Decree cannot stand because the School Board has implemented every requirement of the Consent Decree for a reasonable period of time. The School Board argues that the fact that an obligation is an ongoing one does not preclude a finding that it has been "implemented." Indeed, the School Board claims that it has been in good faith compliance with all the court's orders for the last quarter of a century.

The DOJ presents a dramatically different view of the history of this case. According to the DOJ, the School Board has only recently begun compliance relative to t-buildings and enrollment limits and its compliance in these areas remains incomplete. In its reply brief, the DOJ submits numerous cites to specific court orders (discussed below) in support of its contentions.

Having carefully considered this matter, the court concludes that the Provision is not invalid. The School Board does not argue that the Provision is invalid on its face.[5]

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[5] Apparently, there is no support in the jurisprudence for such an argument. See, **N.A.A.C.P., Jackson Branch v. Duval County School**, 273 F.3d 960, 963, n. 9, 967

Rather, the School Board claims that it is the enforcement of the Provision which operates in an unconstitutional manner and renders it illegal. The application or enforcement of the Provision is said to be unconstitutional because the school district is unitary and the Supreme Court has mandated that judicial supervision end when unitary status has been achieved. Taking this argument to its logical conclusion, the court would have to decide the motion for unitary status in order to determine the validity of the Provision. That would not only be an extremely impractical exercise,[6] it is one that the court finds unwarranted under the case law. No authority has been cited to support such a proposition.[7]

If the School Board were able to present a prima facie case, or if it could perhaps demonstrate a substantial likelihood of success on the merits as to unitary status, the court might nevertheless be bound, as a matter of equity, to proceed full ahead with the unitary status hearing. However, the court finds that there is no indication, based upon what has been presented to the court thus far, that the School Board could make such

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(11th Cir. 2001).

[6] Presumably, if the School Board fails to prevail at the unitary status hearing, the court would then hold that the time Provision is enforceable and the hearing would have been unnecessary.

[7] As the DOJ observes, none of the authorities cited by the School Board actually involves the nullification of a time provision in a consent decree. See, **Reed v. Rhodes**, 179 F.3d 453 (6th Cir. 1999) (involving a similar time provision that was superseded by joint stipulation). **Belk v. Charlotte-Mecklenberg Bd. of Educ.**, 269 F.3d 305 (4th Cir. 2001)(where the district court discounted school officials "assertions" and "self-recriminations" that they had not achieved unitary status).

a showing.

It must be kept in mind that the ultimate issue is good faith compliance with the court's orders over a reasonable period of time. The obligations cited by the DOJ regarding t-buildings and enrollment limits are directly linked to the School Board's past, discriminatory practices.[8] Contrary to what the School Board argues, these obligations are not independent of the Board's duties under the Constitution.[9] As discussed below, the record reflects that the School Board's compliance in these areas has been drawn out and incomplete.[10]

The terms of the Consent Decree require a one-third reduction of t-buildings by the fifth year and a seventy-five percent reduction by the eighth year . Doc. 843, p. 6.

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[8] The record reflects that the School Board used temporary buildings at schools which became overcrowded to avoid transferring students to other schools. **Davis v. East Baton Rouge Parish Sch. Bd.**, 498 F. Supp. 580, 584 (1980). Hence, the provisions in the Consent Decree requiring the elimination of t-buildings and the placing of limits on student enrollment are designed to remedy past discriminatory practices used to deliberately overcrowd one-race schools "to perpetuate all-white schools." **Davis v. East Baton Rouge Parish School Bd.**, 514 F.Supp. 869, 875 (1981).

[9] Even if they could be considered independent or ancillary to the School Board's constitutionally-required duties, compliance with all of the court's orders is relevant to the good faith determination.

[10] The court has reviewed dozens of rulings made by Judge Parker, who presided over this case until it was reassigned to the undersigned judge less than a year ago. Judge Parker's frustration with the School Board is very evident on the face of his rulings, culminating with his ruling of July 21, 2001, whereby he exercised his prerogative as Senior Judge to no longer preside over this case. Doc. 1598. In that ruling, Judge Parker observes that the "School Board's performance under the Consent Decree has been spotty at best" and if the Board members had cooperated with the court and "[done] what they agreed to do in [the] Consent Decree" this case would be over.

At the School Board's request in 1997, the court permitted the use of 27 additional t-buildings during the 1997-1998 school year. The School Board was ordered to submit **"prior to the end of September, 1997"** a plan to reduce the total number of t-buildings in compliance with the requirements of the Consent Decree pertaining to the fifth and eighth years of implementation. Doc. 894.

Almost three years later, Judge Parker issued a ruling relating to the use of the 27 t-buildings during the 1999-2000 school year, noting that the School Board had yet to present the t-building reduction plan ordered by the court. Doc. 1208, at 2, n. 1. This is not indicative of good faith compliance.

In 2000, the School Board sought permission to continue using the 27 t-buildings and to add more t-buildings. Again, Judge Parker's ruling dated August 15, 2000 (doc. 1296) does not paint a picture of good faith compliance. His ruling initiated an investigation into what appeared to be contempt of court on the part of school officials, i.e. intentional defiance of the court's prior ruling denying permission to use the 27 t-buildings during the 2000-2001 school year. Id. While the court later suspended the contempt proceedings, this was done after the president and superintendent apologized for failing to implement the court's earlier t-building orders. Doc. 1332.

By order dated September 19, 2000, the court reluctantly approved use of 20 of the 27 t-buildings finding that it was faced with a *fait accompli*. Doc. 1347. It is telling that in that order Judge Parker stated the following:

> The court's position on the use of temporary buildings in a school system that is undergoing desegregation is well known. The court has accepted the apologies of the superintendent and the president of the Board; the School Board has at last started a study of its temporary buildings; the provisions of the Consent Decree are clear; **the Consent Decree is an order of the court**. The School Board is aware that failure to comply with court orders has consequences..."
> Doc. 1347, p.2. (Emphasis added.)

The court then directed the court monitor, Dr. William Gordon, to assist the parties in identifying t-buildings to be eliminated. Dr. Gordon then submitted a report that served as a basis for the School District's t-building reduction plan. Doc. 1596. The School Board's "Temporary Building Reduction Plan" was finally filed on April 30, 2001. Doc. 1535. The plan became effective this last school year.

These orders, specifically cited by the DOJ in its reply brief, have not been addressed by the School Board. While the School Board might be able to argue that it has had financial and administrative difficulties eliminating the t-buildings and that t-buildings have sat in some instances unused for years, it is difficult to comprehend why the September, 1997, deadline could not have been met prior to April of 2001. In any event, it demonstrates how this has been a case of "foot-dragging and contentiousness" and constant judicial intervention. Good faith has not been found in such cases.

Similarly, it does not appear that there has been a good faith effort to maintain the enrollment limits set forth in the Consent Decree. Under the Consent Decree, the School Board is obligated to obtain court approval when the limits are exceeded "**no later than** 15 school days subsequent to the beginning of each semester." Doc. 843, at 6-7

(emphasis supplied). The record reflects this too has been "a recurring dispute," with the court repeatedly instructing the School Board to develop "practical alternatives, such as changes in attendance zones" to avoid the annual dispute concerning enrollment issues. Doc. 1095. See also, docs. 1075, 1098.

In his order dated June 28, 2000, Judge Parker expressly found that the limits have not achieved their intended purpose (to ensure against over-crowding of one-race schools) because the School Board has "essentially ignored them." Doc. 1264. In the same order, Judge Parker ordered the School Board to submit a plan "setting forth specifically how" it would comply with the limits for the 2001-02 school year. Doc. 1264. Judge Parker found that the first plan submitted by the School Board was inadequate "on its face." Doc. 1364. A second plan was rejected and the parties were ordered to prepare an acceptable plan under the direction of Dr. Gordon. Doc. 1467. The plan that was ultimately approved took effect this last school year. The foregoing is also not consistent with a history of good faith compliance.

While there is some evidence of good faith compliance in the very recent past, as noted above, it is far too early for a finding of good faith to be made in this case. Ironically, even the filing of the motion for unitary status itself can be found as indicative of a lack of good faith. The time Provision clearly barred such a motion. Rather than moving for a modification of the Provision, knowing that the DOJ would file an opposition on the basis of the time Provision, the School Board filed its motion for unitary status.

The court could also recount orders relating to the magnet schools and other

components of the Consent Decree. Nevertheless, it is important to note, that the court is not at this time ruling on the issue of good faith compliance. The court simply observes that a prima facie showing of good faith compliance over a reasonable period of time has yet to be made.

In short, under the circumstances outlined above, the court concludes that the time Provision cannot be found to operate in an unconstitutional manner. Therefore, it is legally enforceable– "a deal is a deal."

II. Change in Circumstances Warranting Modification of the Provision

Citing **Rufo v. Inmates of Suffolk County Jail**, 502 U.S. 367, 384, 112 S.Ct 748, 116 L.Ed.2d 867 (1992), the School Board argues that there has been "an unanticipated 'significant change... in factual conditions' that makes continued enforcement of the provision inequitable." In this regard, the School Board argues that the Consent Decree was predicated "upon the shared factual premise that its implementation would at least halt, and perhaps reverse, the outflow of white students from the school district." Everyone's expectation was that this would stabilize enrollment and increase interracial exposure among students. The School Board claims that the opposite has occurred– that there has been an "exodus of middle class families, both black and white" and that soon the system will consist "almost entirely of poor children", leaving the School Board with the "the daunting burden of attempting to convince parents who refuse to send their children to the public schools to vote for the taxes that are necessary to educate the poorest students."

In opposition, the United States argues that there has been no change of circumstances– that white flight existed when the Consent Decree was signed by the parties and that the fact that it has continued cannot constitute an unforseen change in circumstances.

The School Board's reliance on the text of the Consent Decree is misplaced. The language used in that document indicates that the "design" or intent of the parties in providing for Community Sensitive Attendance Zones was that this would halt, if not reverse white flight. See, Doc. 843 at 1. This, however, is not the same thing as saying that it was unforeseeable that the plan would not work. In view of the prolonged history of this case, it constituted more of an optimistic expectation or a hope and the best plan that the parties could devise at the time.

As a secondary argument, the School Board argues that modification of a consent decree is appropriate when "a decree proves to be unworkable because of unforseen obstacles, or when enforcement... without modification would be detrimental to the public interest." **Rufo**, 502 U.S. at 385. As a statement of law, the court agrees. However, there is no indication that "white flight"[11] is causing the decree as a whole to be unworkable or that white flight has any bearing upon many of the obligations contained in the Consent Decree.

If declining enrollment is causing continued implementation of certain obligations

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[11] The court uses the term loosely as it appears that blacks and whites have been leaving the school system.

of the School Board under the Consent Decree to be "unworkable" or "inequitable", the remedy is to move for modification of those obligations. As stated above, this court would gladly work with the parties to achieve an acceptable legal modification if warranted. However, there is no dispute that the requested modification must be "suitably tailored to the changed circumstance." **Rufo** 502 U.S. at 391. A consent decree is a final judgment; it may be reopened "only to the extent that equity requires." **Rufo**, 502 U.S. at 391-92. The motion for unitary status is obviously a non-tailored response to the "unanticipated" continuation of white flight.

The School Board makes the argument that "the very continuance of judicial supervision" threatens the viability of the school system. The simple fact of the matter is that there is no guarantee, or significant degree of probability even, that a declaration of unitary status will be a cure-all for the student enrollment, teacher assignment, and financial woes of the School Board. The School Board's argument is grounded in speculation. Such speculation is not grounds for overriding the time Provision.

The court holds that the continuation of white flight from the public school system is not a change in circumstance warranting modification of the time Provision.[12]

III. Conclusion

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[12] The court has not overlooked the argument of the School Board that certain provisions of the Consent Decree "now actually operate to the distinct detriment of minority children– most prominently, the racial limitation on magnet school enrollment." Where there are provisions of the Consent Decree that impede desegregation, the School Board may move to modify those provisions. It is not the time Provision that needs modification, but there may be other provisions that do.

While the court holds that the time Provision is valid and not subject to unilateral modification, the School Board has made some serious arguments relative to unitary status and the continued viability of certain provisions of the Consent Decree. These arguments are worthy of further consideration. Although the time has not yet come for a total relinquishment of judicial supervision, the time has come for the court to step up and make sua sponte inquiries into the possibility that the system is partially unitary.

In this regard, the court has concluded that the best thing for everyone involved–the parties, the parents, the teachers, the students and the citizens of this Parish–would be for the parties to engage in further mediation in a good faith attempt to resolve as many of the **Green** factors[13] as can amicably be agreed upon. If the parties participate in good faith, the court has every expectation that the parties will be able to considerably narrow the **Green** factors remaining before the court.

Furthermore, this court is certain that there are areas (**Green** factors) where the system is in compliance and that these areas should not be litigated any further. These areas should be resolved by the parties and they should no longer be under the court's consideration. Therefore, depending upon the outcome of the mediation, the court intends to sua sponte consider the question of unitary status on a piecemeal basis, beginning with the least contentious, with the goal of accelerating the withdrawal of federal judicial supervision. By withdrawing control over areas where judicial supervision

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[13] **Green v. County School Bd. of New Kent County, Va.**, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

is no longer needed, the court will be able to "concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated." Accordingly;

IT IS HEREBY ORDERED that the motion by the United States to enforce the time provision in the consent decree (doc. 1766) is hereby GRANTED.

IT IS ORDERED that the date for the unitary status hearing set for November 12, 2002, be held open as a tentative date for consideration of partial unitary status.

IT IS ORDERED that this matter be referred to the magistrate judge for consideration of pending discovery matters in view of the court's ruling herein.

IT IS FURTHER ORDERED that the mediation previously conducted by Judge Melançon be reconvened commencing Monday, June 24, 2002, at 8:00 a.m., subject to further orders of this court.

The clerk's office shall notify counsel by fax (or telephone where fax is unavailable).

Baton Rouge, Louisiana, June 17th, 2002.

JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA