IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 80 CV 5124
BOARD OF EDUCATION OF THE CITY OF CHICAGO, Defendants.	)	Chief Judge Charles P. Kocoras

UNITED STATES' REPLY TO AMICI'S BRIEF IN RESPONSE TO PARTIES' JOINT MOTION FOR APPROVAL OF SECOND AMENDED CONSENT DECREE

The proposed Second Amended Consent Decree ("SACD") filed jointly by Plaintiff the United States and Defendant the Chicago Public Schools ("CPS") satisfactorily answers the Court's questions of whether any parts of the Modified Consent Decree ("MCD") should continue into the future, and if so, in what form. The SACD preserves the meaningful and practical desegregation and English Language Learner ("ELL") provisions of the MCD in a form that takes into account this Court's inquiries, the parties' experience under the MCD, and CPS' current demographic and financial realities. Amici's comments,[1] which focus on modification of the MCD in lieu of the Court's questions, provide no basis for delaying court approval of the SACD.

BACKGROUND

The United States' complaint against CPS and the Original Consent Decree ("OCD") between the two parties were filed simultaneously in 1980. Unlike most desegregation orders, the OCD was not premised on a finding or admission of liability. The OCD, like the MCD and the

[1] "Amici acknowledge that they are not in a position to either [sic] endorse or oppose the changes proposed by the Parties because they were not included in the settlement discussions." Amici Resp. at 3.

SACD, was a negotiated settlement reached by the parties after reviewing the issues and weighing their respective litigation risks. The desegregation plan, which was developed pursuant to the OCD and approved by the Court, included strategies for achieving the maximum number of stably desegregated schools, such as magnet schools and voluntary student transfers, and educational programs to compensate racially isolated schools. Comprehensive Student Assignment Plan of Jan. 22, 1982. The estimated cost for the compensatory educational programs was approximately $23 million, of which $16 million was to come from the reallocation of State Title I School Aid and $7 million was to come from other resources of the Chicago Board of Education. Id. at 320.

Beginning in 1995, fifteen years after the OCD's entry, this Court began questioning whether the case should continue. Noting "marked[]" changes in Chicago's demographics, the Court stated that "it is time everyone took a hard look at the necessity for continuing in this case and following guidelines and requirements simply because they are in place, without any underlying or substantive or remedial basis for them." Tr. of Nov. 2, 1995, at 4. In 2003, the Court asked the parties why it "should not terminate [the OCD] because it is so outdated." Tr. of Jan. 10, 2003, at 4. The Court's 2003 inquiry accelerated a review of CPS' record under the OCD that CPS and the United States had initiated.

After extensively examining CPS' record, the parties agreed that the case should continue under the revised terms of the MCD to ensure a just resolution of the litigation. The MCD primarily addressed eight areas where CPS had yet to achieve full compliance with the OCD. MCD at 3-4 (identifying eight areas). The MCD required CPS to study and report on these areas so that the parties and this Court could assess whether further desegregation was indeed practicable.

Although the Court approved the MCD on March 1, 2004, the Court reiterated its earlier doubts about continuing the case. Tr. of March 1, 2004, at 6 ("It can be fairly argued that twenty-three years is plenty of time to complete whatever can realistically be achieved, and all of the rest is needless trifling."). The Court also stated its "inten[t] to definitively consider the termination of the [MCD] as of the end of the 2005-06 school year," id. at 9, even though the agreement reached by the parties was to consider termination at the end of the 2006-07 school year unless CPS could prove two years of full and good faith compliance with the MCD and why dismissal after only two years was appropriate. MCD ¶ X.C. The Court explained that the schools and City of Chicago no longer look like they did in the 1970s and 1980s – the period surrounding the entry of the OCD. Tr. of March 1, 2004, at 5-6. Cognizant of how long the OCD had been in effect and the substantial resources needed to implement it, the Court reminded the parties that "[p]erfection in programs or results was neither sought nor obtainable." Id. at 6.

The United States vigorously enforced the MCD, filing four motions regarding CPS' noncompliance in a roughly two-year period.[2] The Court found CPS in breach on three of those occasions,[3] but expressed concern about devoting resources to solving compliance problems when

[2] U.S. Mot. to Show Cause of Aug. 26, 2005 (seeking relief for CPS' funding violations in the 2004-05 and 2005-06 school years); U.S. Resp. to CPS' Two Status Reports of Feb. 24, 2005 (seeking relief for CPS' failure to remedy its violations regarding majority-to-minority ("M-to-M") transfer and funding as well as the appointment of a monitor); U.S. Mot. to Enforce Provisions of MCD of Oct. 13, 2004 (seeking relief for CPS' 2004-05 M-to-M transfer and funding violations); U.S. Mot. to Enforce MCD of May 4, 2004 (seeking enforcement of CPS' obligations to submit policies, procedures, guidelines, and plans and to report transfer data).

[3] Tr. of Sept. 22, 2005, at 5 (declaring CPS' 2005-06 redesignation of certain funds for compensatory programs as desegregation funds as "contrary to both the Modified Consent Decree and contrary to common sense and reasonableness"); Order of Dec. 7, 2004 (ordering CPS to comply with its M-to-M and desegregation funding obligations); Tr. of May 13, 2004, at 9 (granting United States' motion regarding CPS' violations of its duty to produce policies by

a "fresh examination" of the OCD and the MCD would take place at the end of the 2005-06 school year. Tr. of Sept. 22, 2005, at 7. The Court wanted this examination to focus on whether the MCD continues to remedy a legal wrong given the passage of time and significant changes in CPS' demographics since entry of the OCD. Id. at 7-8. The Court asked the parties and Amici for position papers on what remedies, if any, should continue into the future and scheduled a hearing in February 2006 to address this question. Tr. of Oct. 20, 2005, at 13. The hearing was later continued to May 2006. Minute Entry of Nov. 30, 2005.

In light of the Court's focus as well as CPS' current demographics and fiscal restraints,[4] the United States prioritized continuing parts of the MCD that would address the Court's inquiries in a responsive and realistic way. In doing so, the United States sought make-whole relief for CPS' violations of the MCD to ensure that the benefits secured under the MCD would be in effect for at least the two-year period contemplated by the Court's approval of the MCD. The United States therefore suggested that: the M-to-M program be continued for another year; the 2004-05 funding shortfall for compensatory programs be made up in the 2006-07 school year; the five new magnet schools established since the MCD's entry meet its desegregation goals to the extent practicable in the 2006-07 school year; racially identifiable principal assignments be addressed; and CPS' ELL obligations be continued. U.S. Position Paper at 4-9. CPS sought complete dismissal on the grounds that the MCD no longer serves to remedy any legal wrong and imposes significant burdens on CPS. CPS Position Paper at 2. Amici's position paper set out concerns

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deadlines specified in the MCD).

[4] For the 2006-07 budget cycle, CPS faced a $328 million deficit and a pension crisis, which are requiring budget cuts this year and likely will require cuts in the next few years.

similar to those expressed in their response to the SACD and suggested a monitoring commission with Court oversight. Amici Position Paper at 10.

Subsequent to filing their position papers, the parties commenced discovery to prepare for the hearing scheduled in May 2006. The parties exchanged written discovery, and the United States deposed several CPS employees. With additional weeks of depositions, a two-week trial, and possible appeals looming, the parties began exploring settlement. While the Court held discovery in abeyance, the parties reached a settlement that is reflected in the terms of the SACD.

DISCUSSION

Amici suggest that this Court should not approve the SACD unless the parties satisfy the standard applied to *contested* modifications of a consent decree in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992). Amici Resp. at 2-3. Amici's suggestion is misplaced because the Rufo inquiry is irrelevant to the SACD.[5] The SACD is a *consensual* document that was drafted to respond to this Court's questions about the MCD's continuing viability. These questions are distinct from those in Rufo.

The Court's questions essentially ask whether any further desegregation can be achieved in a school district that has been under court order for twenty-five years and whose white student enrollment has declined to a level that makes meaningful desegregation difficult at best. The Court is certainly correct in its observation that the schools of Chicago no longer look like they did in the 1970s and 1980s. In 1975, CPS enrolled 526,716 students of whom 141,264 (27%)

[5] While recognizing that the Court applied Rufo when it approved the MCD, Mem. Op. of March 1, 2004, at 8-9, the United States respectfully maintains its position that Rufo is not the standard for approving a consensual modification to a consent decree for the reasons given in its brief filed with CPS. See Jt. Reply of U.S. & CPS to Amici's Resp. to Proposed MCD at 2-9. These arguments are incorporated herein by reference.

were white, 307,549 (58%) were African American, and 70,314 (13%) were Hispanic. Handout #1 by Expert Judith Poppell (Ex. 1). In 1980, the year the OCD was approved, CPS enrolled 458,496 students of whom 85,292 (19%) were white, 278,726 (61%) were African American and 84,226 (18%) were Hispanic. Id. By 2000, enrollment dropped to 435,470 students of whom 41,890 (10%) were white, 226,600 (52%) were African American, and 152,051 (35%) were Hispanic. Id. In the 2005-06 school year, CPS operated approximately 600 schools and enrolled 420,982 students of whom 33,945 (8.1%) are white, 204,664 (48.6%) are African American, and 158,270 (37.6%) are Hispanic. CPS0001795-CPS0001797 (Ex. 2). Only eighteen schools are majority white, and only a single high school, Taft High School, exceeds 40% white. Attach. to CPS Letter from Jack Hagerty to Emily McCarthy of Jan. 16, 2006 (CPS0001795-CPS0001833).

Given CPS' challenging demographics and finances, the SACD answers the Court's questions by extending what the parties agree to be the only practicable desegregation strategies. These strategies require CPS to offer magnet, selective enrollment, and cluster schools, to monitor open enrollment transfers, to continue M-to-M transfers, to take steps to diversify the principal applicant pool, and to provide compensatory programs at racially isolated schools. SACD ¶¶ I-III. The SACD retains these strategies for another year[6] to monitor enrollment at CPS' five new magnet schools and to remedy fully CPS' violations of its M-to-M transfer and compensatory

[6] The SACD actually continues these strategies for two school years because magnet and M-to-M applications for the 2007-08 school year will be approved in the 2006-07 school year. CPS informed the Court that it would use the time remaining under the SACD to continue its review of magnet school admissions policies and to determine how it will promote diversity in its magnet schools in the future. Status Conference of May 4, 2006.

obligations in the 2004-05 school year.[7] The SACD also continues court jurisdiction over CPS' ELL program, id. ¶ IV, a program that has become increasingly vital to Hispanic students whose enrollment jumped from 18% to 38% over the past twenty-five years. Compare Ex. 1 with Ex. 2.

The SACD does not retain the MCD's language requiring a study of magnet schools and their recruitment procedures because CPS conducted this study and implemented several strategies recommended therein. See Amici Resp. at 5 (questioning this omission); CPS Resp. to Interrog. 2 at 3-6 (identifying strategies) (Ex. 3). While CPS also could implement strategies recommended by the Blue Ribbon Commission as Amici point out, Amici Resp. at 8-9, this was not required by the MCD and therefore should not be a basis for rejecting the SACD. Amici also fault the SACD for not retaining the MCD's provisions regarding the No Child Left Behind Act ("NCLB") and attendance boundaries. Id. at 6-7. The experience under the MCD has shown that Amici's fear of having NCLB transfers negatively affect available space for M-to-M transfers has not materialized. See id. at 7. Similarly, although Amici correctly note that attendance zones can affect desegregation efforts, id, CPS studied this strategy under the MCD, and both parties agree that this strategy no longer offers meaningful desegregation opportunities given the demographics cited above.

Consistent with the OCD's original goal of compensating schools remaining racially isolated, the SACD includes compensatory program requirements. SACD ¶ III. Amici criticize the SACD for failing to specify a monetary amount for compensatory programs and the funding source for such programs. Amici Resp. at 7-8. The OCD did not require a particular funding

[7] The parties settled their disputes over the 2005-06 M-to-M transfers and compensatory programs with Court approval.

amount or source for compensatory programs, nor did it require a desegregation budget. OCD ¶ 2.2. The desegregation plan interpreted the compensatory provision of the OCD to require CPS to "develop consistent budgetary and programmatic guidelines for allocation of 'State Title I' monies that are supportive of desegregation efforts." Recommendations on Educational Components at 16. The plan consisted mostly of "Recommendations" for achieving the compensatory goal of the OCD, such as improving high school course offerings. Id. at 27-28. Another recommendation was to target a set of racially isolated schools for intervention strategies, and the plan suggested 35 possible schools. Id. at 19-20, App. A. Over the years, the number of racially identifiable schools and compensatory programs offered at such schools grew substantially. By the time the MCD was approved, several hundred schools were receiving a myriad of federal, state, and local programs totaling over $300 million, which included funds from within and outside of the desegregation budget. CPS Opp. to U.S. Mot. to Enforce of Nov. 8, 2004, at 12-13.

The MCD continued CPS' compensatory obligation and required a desegregation budget, but did not mandate specific funding amounts or sources for such programs. MCD ¶ V. The SACD does not specify an amount or source either because the United States' efforts to obtain specific amounts and more *local* funds did not prove to be an effective means of delivering compensatory programs to racially isolated schools as the United States' motions to enforce the MCD revealed. See Freeman v. Pitts, 503 U.S. 467, 491-92 (1992) ("And, with the passage of time, . . . the practicability and efficacy of various remedies can be evaluated with more precision."). It was only through the creative application of $11.4 million of primarily federal funds that *additional* tutoring and other compensatory programs were secured for racially isolated

schools in the court-approved settlement of CPS' 2005-06 funding violation of the MCD. See Stipulation of Nov. 9, 2005, at ¶¶ 1-3.

In a similar manner, the SACD completes the remedy of CPS' 2004-05 funding violation of the MCD with a $24.5 million federal grant for reading programs.[8] Information obtained in discovery confirmed that local funds were not available to redress this violation due to CPS' budget crisis. The SACD appropriately gives CPS credit for successfully applying for this highly competitive federal grant,[9] which secures specialized reading programs that plainly go beyond the compensatory programs that CPS has historically provided with federal, state, and local funds. The United States fully expects these state and federal compensatory programs, heretofore referred to as Section V.A programs, to continue under the SACD for they are in no way dependent on the status of this case. Verification of this will be made possible by CPS' obligation to report every compensatory program at each school. SACD ¶ V.2.

The compensatory program report coupled with the other reporting requirements in Section V of the SACD will provide the necessary record for assessing whether CPS fulfilled its student assignment, principal assignment, and compensatory program obligations under the SACD. Amici incorrectly argue that these requirements may not expire automatically after

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[8] The Court ordered CPS to redress this violation in the second semester of the 2004-05 school year, Mem. Op. of Dec. 7, 2004, at 7-8, but the United States has maintained that CPS' limited funding reallocation for teacher aide positions fell short of a complete remedy. U.S. Resp. to CPS' Two Status Reports at 3-5; U.S. Mot. for Order to Show Cause at 3-8.

[9] CPS also has secured a $21 million grant from the Gates Foundation to fund improved high school curricula and instruction, which clearly serves the compensatory goal of this case. Http://www.cps.k12.il.us/AboutCPS/PressReleases/April_2006/gate.htm. This infusion of outside funds for compensatory programs and the other outside funds for the five new magnet schools constitutes a new circumstance that was not present when the MCD was approved.

implementation as Section VI.A of the SACD permits. Amici Resp. at 11-12.[10] There is precedent for concluding a desegregation case without a hearing if no party requests one. In Knight v. State of Alabama, 900 F. Supp. 272, 374 (N.D.Ala. 1995), the desegregation case involving all of Alabama's public four-year institutions of higher education, the court directed that the case would terminate automatically unless a party moved to extend the decree. Furthermore, the court-approved desegregation plan in this case also expired by its own terms at the end of the 1985-86 school year. Comprehensive Student Assignment Plan, Jan. 22, 1982, at 325, ¶ IX.1.

Finally, Amici express an interest in giving parents and the community an opportunity to express their views prior to the dismissal of this case. This interest already has been addressed to a certain extent because the United States and CPS, at the Court's direction and without objection, provided notice and an opportunity to provide comments on the possible dismissal of this case after the hearing scheduled in May. The Court received written comments from the public and will have the benefit of those comments when it decides whether to approve the SACD.

Conclusion

For the foregoing reasons, the United States respectfully asks this Court to approve the jointly proposed SACD.

Respectfully submitted,

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[10] The ELL obligations under the SACD also will expire at the end of the 2006-07 school year unless the United States seeks an extension from the Court to remedy non-compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2006, pursuant to N.D. Ill. L.R. 5.5, I electronically filed **UNITED STATES' REPLY TO AMICI'S BRIEF IN RESPONSE TO PARTIES' JOINT MOTION FOR APPROVAL OF SECOND AMENDED CONSENT DECREE** with the Clerk of the Court using the ECF System and served a copy via regular mail and electronic mail upon the following counsel of record:

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