IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF MISSISSIPPI *et al.*, Defendants, and McCOMB MUNICIPAL SEPARATE SCHOOL DISTRICT *et al.,* Defendants-Intervenors.	)	Civ. Act. No. 70 CV 4706

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR FURTHER RELIEF AND REQUEST FOR PERMANENT INJUNCTION

The United States submits this memorandum of law in support of its Motion for Further Relief and Request for Permanent Injunction.

BACKGROUND

The McComb Municipal Separate School District ("District") has approximately 2922 students, a student body that is 78% black, and operates five schools: Otken Elementary (K-2); Kennedy Elementary (3-4); Higgins Middle School (5-6); Denman Junior High (7-8); and, McComb High School (9-12). The district is subject to an April 5, 1971 Consent Decree ("Decree"), a September 3, 1971 Order ("Order"), and other applicable federal law that governs the district's desegregation obligations. A copy of the Decree and Order are attached hereto at Tab 1. The Decree enjoins the district from failing or refusing to take such steps as are

necessary to terminate the operation of a racially dual school system, and to operate a non-racial, unitary system of public schools. See Decree at 1-2. The Decree also prohibits the district from maintaining any classroom on a segregated basis, so that no student is effectively excluded from attending any class on the basis of race, color, or national origin. Id. at App. II, Subsection F.

The Court placed this case on the inactive docket on February 12, 2001. See Tab Two. On October 30, 2003, the United States moved the Court to Reinstate the Case to the Active Docket and for Discovery to "ascertain whether the district is using race to assign students in violation of the Decree and federal desegregation law." See Tab Three Motion and Memorandum of Law in Support of the Motion at 9. The Court granted the motion on November 17, 2003 allowing for a six month discovery schedule. See Tab Four. Based on that discovery, the United States now moves to permanently enjoin the district from using race to assign students so as to create all-black classrooms.

1. The District's Use Of Race In Assigning Students To Segregated Classrooms.

In the United States' Motion to Reinstate the Case to the Active Docket, the United States set forth in detail the facts surrounding the student assignment issue. See Tab Three. To recap the pertinent points: the District's 1999-00 annual report identified numerous all-black classrooms at two elementary schools in particular, Otken and Kennedy. The United States requested information on the District's student assignment policies during the 2000-01 school year. The District responded that it tried to ensure that classes have at least 30% white students in classes in order to attract white students to the school system. See Letter from Cooper to Mansukhani (1/30/01)(Tab 5, without attachments). The United States then raised concerns that this method of assignment violated the consent decree and desegregation law in general. The

District then informed the United States that a random student assignment plan at the K-4 level for 2001-02 was implemented, but withdrawn a few days prior to the school year because of concern that white parents would remove their children from the school system. See Letter from Adams to Mansukhani Dec. 14, 2001 (Tab 6). The United States and the District subsequently discussed a resolution of the matter, which resulted in the District changing its student assignment practices for the 2002-03 school year. The District agreed to eliminate race-conscious student assignments that resulted in one-race classrooms. The United States sought to memorialize the new student assignment policy in a Resolution Agreement. The District, however, notified the United States that it was unwilling to adopt the Agreement, instead choosing to discontinue the new policy after only one year.

The District then informed the United States that for the 2003-04 school year, it would instead assign students based on the following policy:

> All elementary students at the District's two elementary schools will be randomly assigned to homeroom classes. The principal and/or teachers may make adjustment to the random assignments based upon their assessment of the best interest of the child, including social adjustment, behavior concerns, and parental requests. After such adjustments, final homeroom assignments will not vary more than +/- 20% from the racial makeup of the grade for a particular homeroom[.]

Letter from Adams to Mansukhani, 6/4/03 (Tab 7).[1] While this proposed policy is ostensibly race-neutral, it in fact has the same purpose and effect as the district's prior explicitly race-based student assignment policy. The 20% leeway permits the District to comply with the policy and

[1] In contradiction to the district's representation at that time that the +/- 20 % rule represented a new plan, Superintendent Dr. Patrick Cooper testified that the district has always followed a +/- 20 percent policy in assigning students to homerooms with the exception of the 2002-03 year. See Deposition of Patrick Cooper at 137:19-25, 138:1-3 & 181:11-19 (April 23, 2004)(Tab 8)(excerpt).

create one-race classrooms at Kennedy and Otken because both schools have enrollments that are at least 80% black. Moreover, the "social adjustment"provision, as the Superintendent has testified, is intended to account for race:

> Q: So in social adjustment, race was taken into account?
>
> A: Yes.

Cooper Dep. at 179: 7-9 (Tab 8)(excerpt).

Exactly what this means in practice is that the District accommodates the racial preferences of parents in assigning their children to classrooms:

> Q: What does "social adjustment" mean to you in this policy?
>
> A: "social adjustment meant [to parents] that we absolutely want our children to go to school with – in the case of a white parent – with black students. But we don't want them – and they didn't use these words – in fact, we don't want them pumped into a classroom that is totally foreign to their own – relative to what they've been used to growing up. And in essence what they were talking about there was, they just – socially – they wanted their children to be able to gradually adjust to other races, other cultures."

Cooper Dep. at 177:9-10, 19-25 & 178:1-5 (Tab 8)(excerpt).[2]

2. The Result of the District's Use Of Race In Classroom Assignments.

Given that the District still uses race to assign students, Kennedy and Otken's classrooms under the current policy, not surprisingly, look substantially identical to the classrooms created under the prior race-based policy. Twenty-six of the fifty-nine homerooms at these two schools are all-black. See Tab 9. Thirty-seven percent of the black students at Otken (213/563) and

[2] See also id. at 115:21-25 & 116:1-2 (Tab 8)(excerpt)(testifying that white parents requested their children be grouped to "give us and our children an opportunity to warm up, because our kids have never been around black students, that our kids don't go to church with black students, they don't play Little League with black students, that this is going to be different and we want to make sure that there's a soft entry into this[.]").

forty-seven percent of the black students at Kennedy (199/422) are in all black homerooms. Id. The number of white students in the non-black classrooms ranges from one[3] to nine.

When the United States began its classroom assignment inquiry in the 1999-00 school year, 30 of the 60 K-4 homerooms were all-black. See Tab 9. Several classes had only a few more black students than white students, even though the white student population was about 20 percent.[4] This pattern continued for the 2000-01 year.[5] During the United States' investigation, and possibly because of it, the number of white students grouped in a class has dropped some. And in the 2002-03 year, when the District eliminated race-conscious assignments, there were no racially identifiable homerooms.[6] But in 2003-04, when the district adopted the +/- 20 percent

---

[3] Otken had a classroom with 23 black students and one white. This is unusual for the school. Otken's principal testified that she "believe[s] that children should be able to have children of their own race in the classrooms with them." See Deposition of Rebecca Morgan ("Morgan Dep.") at 95:21-23 (April 21, 2004)(Tab 10)(excerpt). The principal explained that she would not want to place one white child in a class of all black children, unless they wanted to go for that specific purpose. Id. at 95:7-13.

[4] For example in 1999-00, Deere had a 50% white class, Smith had a 46% white class, Gardner had a 45% white class and several other homerooms had higher than 40% white enrollment at Otken, even though the school's white enrollment was 18%. At Kennedy that year, Waller had a 47% white class, Felder had a 46% white class and several other rooms were 40% white and above. Kennedy's white population that year was 20%. See Master Schedule Summary 1999-00 for Otken and Kennedy at Tab 9.

[5] In 2000-01, Smith's class was 52% white, Spinnato's 50% white, Drummond's 46% white, Richmond's 45% white, and other classes also had white populations over 40% at Otken. At Kennedy, Burris and Moore had 48% white classes. Other rooms also had classes above a 40% white enrollment. That year Otken's white student population was 18% and Kennedy's was 20%. These numbers far exceed the 30% grouping of white students that the District told the United States it used. See Master Schedule Summary 2000-01 for Otken and Kennedy at Tab 9.

[6] During the 2002-03 year there was no significant evidence of white flight. The white percentage at Otken actually increased from 17.13% to 19.14%. At Kennedy the white population decreased less than a tenth of a percentage point, from 17.27% to 17.18%. Compare McComb School District Reports 2001-02 & 2002-03 at Tab 9.

policy, the classroom composition at Kennedy and Otken reverted to the 2000-01 pattern. Even under this policy, classes existed where the number of white student exceeded the school-wide average by more than 20 percent.[7]

Black students' isolation under the district's student assignment policy is reinforced by the district's school day structure. At the K-4 level, a homeroom assignment functions as the student's main classroom for the day.[8] Kindergartners remain with a homeroom teacher for the entire school day. First through Fourth grade students change classrooms for a 90 minute reading program. See Letter from Adams to Mansukhani (9/9/2001)(Tab 11). Otken groups homerooms for lunch, recess, and, depending on the day, physical education, music, or health. These activities take a total of 90 minutes per day. Students in Kennedy's all-black homerooms have even less of an integrated school day. Kennedy teaches music by homeroom, so an all-black class remains all-black for music. See Deposition of Linda Young ("Young Dep.") at 165:1-12 (April 22, 2004)(Tab 12)(excerpt). Kennedy does group classes for lunch and physical education. However at lunch, the cafeteria is integrated at most for twenty minutes.[9] Id. at 172:9-15. During one 40 minute physical education class, four of five classes are all-black. Id.

---

[7] These classes include Drummond, Hamilton, and Herring. See Master Schedule Summary 2003-04 for Otken and Kennedy at Tab 9.

[8] The Superintendent explained the emphasis put on keeping an elementary student in one homeroom for the majority of the day, "[Y]oung kids like this need to have kind of a mother-hen teacher – somebody they stay with all day long – that they come to know and are comfortable with. . . . they need[] to be in one place with one teacher. See Cooper Dep. at 159:7-10 (Tab 8)(excerpt).

[9] Kennedy's principal testified there are three all black classes scheduled back to back where students might not have an integrated lunch. See Young Dep. at 171:11-25 (Tab 12)(excerpt). When asked if she considered in creating the lunch schedule an integrated lunch for all-black classes, the reply was, "I guess I have not." Id.

at 185:23, 173:23-25 & 174:1-12. Kennedy's principal also testified that the reading schedule indicates no effort to minimize the number of students in all-black homerooms, and then in all-black reading classes. Id. at 184:11-25. In sum, when Kennedy's principal was asked whether the school had taken any steps "with respect to music, library, reading, phys-ed or lunch that consciously tries to minimize the time that students in all black classes are spending in [other] all-black class[es.]" The answer was, "No, I guess not." Id. at 186:6-20. Thus, the majority of the day at both schools is spent in the homeroom, and the assignment policy is critical in determining an integrated classroom experience.

ARGUMENT

The United States is entitled to injunctive relief on either of two bases: (1) as a violation of the Decree and general desegregation law, and (2) as an impermissible use of race under the Fourteenth Amendment's Equal Protection Clause.

1. The District's Use of Race Violates the Consent Decree.

The District is violating the plain terms of the consent decree and Fifth Circuit desegregation law holding that the duty to desegregate extends to schools and classrooms. The April 5, 1971 Consent Decree prohibits the district from maintaining any classroom, non-classroom, or extra-curricular activity on a segregated basis, so that no student is effectively excluded from attending any class on the basis of race, color, or national origin. Id. at App. II, Subsection F.

The district has acknowledged that in the 2003-04 school year, it assigned students on the basis of their race so that some classes would have a higher percentage of white students. See Tab 8, supra. Superintendent Cooper testified that white parents informed him he would lose a

lot of white students if he did not return to the "grouping policy." See Cooper Dep. at 191: 4-24(Tab 8)(excerpt). This policy was carried out with the knowledge that this assignment method resulted in numerous all-black classrooms. Students in these classrooms were segregated from their white counterparts and thus were denied the opportunity to attend class and interact with white students for all or most of the school day in direct violation of the Decree.

Other applicable federal law also demonstrates that it is unlawful to use race in a manner that segregates students in classrooms. It is well settled that a school district that is subject to a desegregation decree has a duty and responsibility "to take all steps necessary to eliminate the vestiges of [its prior] unconstitutional de jure system," and to show that any current [racial] imbalance is not traceable, in a proximate way, to the prior dual system. Freeman v. Pitts, 503 U.S. 467, 485, 494 (1992). To remove the vestiges of the prior dual system, a district must eliminate "not only segregated schools, but also segregated classes within the schools." Johnson v. Jackson Parish Sch. Bd., 423 F.2d 1055, 1056 (5th Cir. 1970); Montgomery v. Starkville Mun. Separate Sch. Dist., 854 F.2d 127, 130 (5th Cir. 1988) (the Fifth Circuit has "made it clear . . . desegregation could not be circumvented through the device of transferring pupils from segregated schools into schools with segregated grades"). As the Fifth Circuit has succinctly stated, "It goes without citation that a school board may not direct or permit the segregation of students within the classrooms." Adams v. Rankin County Bd. of Educ., 485 F.2d 324, 327 (5th Cir. 1973). In this case, the district admits to using race when assigning students to classrooms at the K-4 level in a manner that resulted in all black classrooms. See Tab 5.

In 2000-01 and 2001-02, the district's primary stated justification for its race-based classroom assignment practices was its fear that white students would otherwise leave the school

system . See Tabs 5 & 6. The Superintendent has acknowledged that this continued to be a concern in classroom assignment for the 2003-04 student assignments. Concerns of white flight, however, do not provide the district with a legally acceptable justification for implementing policies and practices that perpetuate the vestiges of the dual school system. See United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972)(reasoning that splintering of district to prevent white flight was a concern but cannot justify "anything less than complete uprooting of the dual public school system").[10] In short, classrooms that are intentionally segregated by race are proscribed regardless of the degree of overall schoolwide desegregation achieved. McNeal v. Tate County Sch. Dist., 508 F.2d 1017, 1019 (5th Cir. 1975).

2. The District's Use Of Race Violates the Fourteenth Amendment.

The District's use of race in student assignment involves a suspect classification that must pass strict scrutiny review in order to comply with the Equal Protection Clause. Thus, the District's plan must (1) serve a compelling interest, and (2) be narrowly tailored to meet that end. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 493-496 (1989). The District's assignment policy meets neither requirement.

a. The District's Student Assignment Plan Does Not Serve a Compelling Interest.

The district's asserted interests for using race – to prevent white students from leaving the district and to reduce social or racial isolation in class, see Tab 6 & Cooper Dep. at 16:14-22

[10] See also Christian v. Board of Educ. of Strong Sch. Dist. No. 83 of Union County, 440 F.2d 608 (8th Cir. 1971). The school district in Christian attempted to do precisely what the McComb school district is doing here: intentionally increasing the percentage of white students in certain classrooms, thereby ensuring that the remaining classrooms were all black. See id. at 611. The Eighth Circuit found it "well settled that this kind of pupil assignment constitutes discrimination in the public schools in violation of the Constitution." Id.

(Tab 8)(excerpt) – are neither legally nor factually compelling for both interests subscribe to racially discriminatory attitudes. As Superintendent Cooper's testimony makes clear, the concern for retaining white students is based in race: the district believes parents "don't want [white students] pumped into a classroom that is totally foreign to their own – relative to what they've been used to growing up." Cooper Dep. at 177:23 - 178:1 (Tab 8)(excerpt). This aversion, in the district's view, stems from negative racial stereotypes: "there [is] a perception . . . especially the white parents, that the schools were dirty, they were unsafe, that, you know, they were becoming all black . . . that their children would not be with – with other children of like culture." Cooper Dep. at 79:10-16. To accommodate this concern, the district permits these parents to opt out their children from predominantly black classrooms.

Whether the district's beliefs are well-founded is questionable, for when the district adopted a truly race-neutral student assignment policy in the 2002-03 school year, the proportion of white students at Kennedy and Otken remained stable. See n.6, supra. Ultimately, however, whether white parents in the district in fact have such beliefs is legally irrelevant – private discriminatory attitudes are not actionable under the Constitution. But the district's attempt to accommodate such attitudes is. The Fourteenth Amendment prohibits state actors from adopting policies that accommodate or validate such attitudes. See Palmore v. Sidoti, 466 U.S. 429, 433 (1984)(reversing award of custody of daughter to father on grounds that mother had entered into interracial marriage and daughter would thereby be subject to "social stigmatization," because although "private biases may be outside the reach of the law, [] the law cannot, directly or indirectly, give them effect")(citation omitted).

The district's concern for racial isolation stems from the same racial considerations:

Otken's principal "believes children should be able to have children of their own race with them." Morgan Dep. at 95:21-23 (Tab 10)(excerpt). This concern, however, starts and stops with white students. The district's assignment policy results in racially isolated, all-black classrooms. The district takes no steps to mitigate this isolation. The homeroom system prevents any meaningful interaction between white students and black students assigned to all-black classrooms, and the district does not monitor student assignment patterns to ensure that black students in single-race classes are assigned to integrated classrooms in later elementary school years. See Morgan Dep. at 71:7-21 (Tab 10) & Young Dep. at 125:5-16 (Tab 12). At bottom, the concern for racial isolation is not about exposing students of different races to each other over the course of elementary school, but to insulate white students from most of their black peers. This the Fourteenth Amendment prohibits.

b. The District's Student Assignment Plan Is Not Narrowly Tailored.

Even if the district could show a compelling interest in using race to assign students, the district's student assignment plan is not narrowly tailored to meet that interest. The narrow tailoring requirement is meant to guarantee that there is little possibility that the "motive for the classification was illegitimate racial prejudice or stereotype." Grutter v. Bollinger, 121 S. Ct. 2325, 2341 (2003), quoting J.A. Croson Co., 488 U.S. at 493.

In general, the factors that bear on the narrow-tailoring inquiry include the necessity for consideration of race and whether race-neutral alternative remedies have been considered, the flexibility and duration of the use of race, and the impact on the rights of third parties. See United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality); id. at 187 (Powell, J., concurring); see also Fullilove v. Klutznik, 448 U.S. 448, 510 (1980) (Powell, J., concurring);

J.A. Croson Co., 488 U.S. at 507-10. Here, the district cannot meet its burden of showing that its student assignment plan is narrowly tailored. The District's student assignment plan falls at the first hurdle, for it has previously used racially-neutral assignment plan without negatively affecting racial isolation or driving out white students. See n.6, supra. In other words, the district can accomplish its goals through racially neutral means. See J.A. Croson Co., 488 U.S. at 507 (holding that one indicia of narrow tailoring is whether state "gave any consideration of the use of race-neutral means" to achieve objective). Notwithstanding this feasibility, the district has repeatedly shied away from race-neutral alternatives. In the 2001-02 school year, the District retracted its commitment to implement random assignments because white parents threatened to remove their children from school. See Tab 6. For the 2002-03 year, the District implemented an assignment plan that eliminated racially identifiable homerooms. However, the District abandoned this plan after only one year. The District asserts that it ended the assignment plan because teachers complained about the number of times students changed classes during the day. See Cooper Dep. at 164:4 -68:18 (Tab 8). Such administrative inconvenience, however, does not justify race-based practices. Moreover, the district could have maintained the assignment method to homerooms and eliminated the changing of classes. The District admits that it did not consider this alternative. Id. Nor did it consider calling the consultant from the Southeastern Equity Center for suggestions on how to make the plan work better for the following year. Id.

Additionally, to the extent that the District's plan can be considered a tool to reduce racial isolation, it is not narrowly tailored because it expressly permits black students to be isolated in one-race classrooms, and includes no steps for mitigating this effect. As explained

above, the plan prevents meaningful interaction between students and all-black classrooms and white student for all or most of the school day. And it may very well be that students in all-black classrooms will not share a classroom with white students in the elementary school years because the district does not monitor which students have been assigned to such classes during their time at Kennedy and Otken. Far from reducing racial isolation, the district's policy exacerbates it, and is therefore not narrowly tailored. See J.A. Croson Co., 488 U.S. at 493 (stating that narrowly tailored "means [must] 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype").

CONCLUSION

The district has reverted to its prior practice of using race to perpetuate racially segregated classes. The United States therefore requests that the Court fully enforce the terms of the 1971 Order with respect to class assignments. The United States also respectfully moves this Court for further relief enjoining McComb from assigning or grouping students by race, so as to create all black classrooms.

Respectfully submitted,

DUNN O. LAMPTON
United States Attorney
Southern District of Mississippi

R. ALEXANDER ACOSTA
Assistant Attorney General

JAVIER M. GUZMAN
TOBI E. LONGWITZ
Attorneys
U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section-PHB
950 Pennsylvania Ave., N.W.

Washington, DC 20530
Ph: (202) 514-4092
Fax: (202) 514-8337

DATED: August _____, 2004