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' POSITION PAPER ON THE FUTURE OF THE MODIFIED CONSENT DECREE

The Court has asked the parties and the amici to state their respective positions on: (1) the continued existence or termination of the Modified Consent Decree ("MCD"); (2) recommended changes to the MCD were it to continue; and (3) the bases for any recommended changes. When the MCD was negotiated in 2003, the parties agreed that it should continue through the 2006-07 school year unless full and good faith compliance by the Chicago Public Schools ("CPS") warranted an early dismissal at the end of the 2005-06 school year. See MCD ¶ X.C.[1] The burden is squarely on CPS to demonstrate its full and good-faith compliance with the terms of the MCD and that there are circumstances justifying early dismissal.

As set forth below, CPS cannot meet its burden. Accordingly, the United States recommends continuing key provisions of the MCD so that CPS has adequate time to achieve the Court's goal of "ensur[ing] that CPS has taken all practicable measures in its desegregation efforts." Op. of 3/1/04 at 15.

[1]In approving the MCD, the Court stated that it would hold proceedings to address termination of the MCD at the end of the 2005-06 school year. See Op. of 3/1/04 at 15. The United States believes the Court made this statement anticipating full and good faith compliance.

I. The Legal and Factual Underpinnings of the MCD and the Standards for Dismissing It

The original Consent Decree ("Original Decree") and Desegregation Plan had two primary goals: (1) to establish "the greatest practicable number of stably desegregated schools, considering all of the circumstances in Chicago," and (2) to "provide educational and related programs for Black or Hispanic schools remaining segregated." MCD at 1-2. These goals are consistent with the legal standards for dismissing a desegregation case: whether the school district has complied in good faith with the desegregation decree since it was entered and eliminated the vestiges of past discrimination to the extent practicable.[2] "[S]pecific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith." Dowell v. Bd. of Educ. of Oklahoma City, 8 F.3d 1501, 1513 (10th Cir. 1993) (internal quotations and citation omitted). If a school district establishes good faith compliance in some areas but not others, the court may dismiss the areas of compliance and retain jurisdiction over the others. See Freeman v. Pitts, 503 U.S. 467, 471 (1992). These legal standards are set forth in greater detail in the briefs filed in 2003, and those in the United States' brief are incorporated by reference. See U.S. Mem. of 2/14/03 at 3-7.

Just two years ago, CPS and the United States agreed that compliance had yet to be achieved in several areas. By failing to comply with the Original Decree, CPS had continued the legal wrong that gave rise to this case. See Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-59 (1979) ("Each instance of a failure or refusal to fulfill th[e] [desegregation] duty continues the violation of the Fourteenth Amendment.") (citations omitted). The parties

[2] See U.S. Mem. of 2/14/03 at 3 (citing Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 249-50 (1990) and other cases); see also CPS Mem. of 2/14/03 at 2-5.

therefore entered into the provisions of the MCD as necessary to ensure that CPS take all practicable steps to achieve stably desegregated schools and to redress those that suffer from a system of past discrimination. See Tr. of 9/22/05 at 8 (the Court's question as to whether the MCD continues to remedy a legal wrong). The parties were well aware of CPS' changed circumstances, including its current demographics that limit practical student desegregation, and drafted the MCD accordingly. Requiring full and good faith implementation of the MCD for two to three years serves to establish the type of record needed to dismiss this case. See Dowell, 498 U.S. at 248 (requiring good faith compliance "for a reasonable period of time").

The MCD's terms were achievable – indeed, CPS agreed to them. Yet CPS has repeatedly failed to meet them. Many of the MCD's provisions require CPS to collect and analyze its own data to determine whether additional steps can be taken and to establish its own policies and procedures that "appropriately protect the civil rights and interests of all CPS students and staff." CPS Mem. of 2/14/03 at 13. If CPS' good faith inquiry concluded that nothing more could be done in a given area, the Court would have a valid basis for dismissing this area. If more could be done in an area, the MCD required only that CPS make a good faith effort to do so for two to three years. This did not happen.

Emphasizing the demographic changes in CPS, this Court has questioned the MCD's viability. The MCD, however, fully takes into account the demographic changes that have occurred since 1980 and requires only the practicable steps left to take in this case. While the MCD offers an appropriate path toward a just dismissal of this case, the MCD has not received adequate implementation or time to achieve this purpose. Only two years have passed since CPS conceded its non-compliance in eight areas, see MCD at 3-4, and promised to implement the

MCD fully through at least the 2005-06 school year and the 2006-07 school year if needed. Id. ¶ X.C. Since that time, CPS has failed to honor its court-ordered agreement in many respects. For example, the United States notified the Court of CPS' violations of its policy, funding, and M-to-M obligations because prompt relief was imperative. The Court found CPS in breach.[3] This backdrop demonstrates why the MCD is not only viable but also necessary. The provisions of the MCD that require continuation in their original or a revised form are set forth below with justifications for their continuation and revision.

II. The Magnet and Transfer Provisions of the MCD Should be Continued

The Court has called the magnet schools "one of the crown jewels" of CPS. Tr. of 9/22/05 at 23. Because magnet schools offer an effective way to achieve desegregated schools in Chicago and substantial unmet demand exists for such schools, the MCD required CPS to study whether additional magnets could be established. See MCD ¶ I.C.4. In the 2004-05 school year, CPS received federal funding to open up five new magnets, three of which opened this school year and two of which will open next school year. Paragraph I.C of the MCD, especially the obligations regarding magnet recruitment guidelines, selection procedures, and curriculum, should be continued through next school year to see how these new magnets fare and to ensure that recruitment strategies are effective.

M-to-M transfers offer another feasible way to further desegregation by giving students in racially isolated schools a chance to attend schools with 40% white or higher enrollment. See

[3] See Tr. of 9/22/05 at 4 (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"); Op. of 12/7/04 at 4-5, 7-8 (ordering CPS to comply with its M-to-M and desegregation funding obligations); Tr. of 5/13/04 at 9 (granting U.S.'s motion regarding CPS' violations of its duty to produce policies by deadlines specified in the MCD).

MCD ¶ I.E.2. Although there were 37 such schools in the 2004-05 school year, CPS refused to offer a single M-to-M seat at these schools. See U.S. Mot. of 10/13/04 at 2. CPS' documents showed that it had violated its duty to monitor open enrollment transfers since 1997 and that several hundred white students had taken spots to which minority students were entitled. See CPS Opp. of 11/8/04 at 8, Exs. A, B, & Ex. C at 3. When the Court ordered CPS to offer M-to-M seats for the second semester of the 2004-05 school year, see Op. of 12/7/04 at 4-5, CPS identified 308 seats – a remarkable turn of events given its earlier representations that no space existed. See CPS Status Rep. of 12/22/04 at 2.

The benefits of the M-to-M program were severely diluted in the 2004-05 school year because mid-year transfers are less attractive to families and CPS did not offer the transportation required by the MCD. See U.S. Mot. of 2/24/05 at 3. CPS appears to have provided adequate seats and transportation for the 2005-06 school year,[4] but this one year of compliance does not satisfy the MCD's requirement to provide an M-to-M program for at least two, if not three, full school years, nor does it rectify CPS' admitted violations of its transfer obligations between 1997 and 2004. To ensure that minority students receive the seats that CPS wrongfully denied them, paragraph I.E.2.b should be continued through the 2006-07 school year. For the M-to-M program to be effective, it must include the type of transportation provided this school year and must be accompanied by the continuation of paragraphs I.E.2.a and I.E.2.c. Only by ensuring that NCLB transfers have a desegregative impact where feasible, id. ¶ I.E.2.c, and monitoring open enrollment transfers, id. ¶ I.E.2.a, which have historically taken away M-to-M seats and

[4] The United States has requested but has yet to receive data showing the number of M-to-M students this school year and the numbers of such students using the available transportation.

continue to impede desegregation today,[5] will CPS be able to secure the number of M-to-M seats practicable.

III. The Desegregation Funding Obligations Should be Continued in Revised Form

Prior to entry of the MCD: (1) over 160 racially isolated schools were not receiving any desegregation funds while eleven over 70% white schools were receiving approximately $2 million; (2) the only compensatory program available to racially isolated schools applying for desegregation funds was the magnet cluster, and (3) a third of the magnet clusters funded by the desegregation budget were not even racially isolated. While the United States recognized that clusters had some compensatory value at racially identifiable schools, the non-racially identifiable cluster schools were neither compensating nor desegregating their clusters, particularly in the absence of transportation. Paragraphs V.B.1.c and V.B.1.d were therefore drafted to prioritize compensatory programs at racially isolated schools receiving no desegregation funds, to ensure compensatory programs other than clusters at schools unable or unwilling to form a cluster so that these schools were not denied compensatory desegregation funds, and to increase desegregation funds for compensatory programs by prohibiting CPS from spending more on clusters than it spends on compensatory programs.

Paragraphs V.B.1.c and V.B.1.d would have achieved the intended goal of increasing compensatory programs at racially isolated schools without any additional funding had CPS reallocated desegregation funds from the over 70% white schools and the non-racially identifiable clusters to the racially isolated schools receiving few to no desegregation funds.

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[5] For example, CPS' 2004-05 open enrollment analysis reveals 166 white transfers to Lincoln (66% white) and 68 to Norwood Park (72% white). Many of these transfers are from schools with lower white percentages, and some of these sending schools have almost no white students.

Instead, in the first year of implementation in 2004, CPS maintained its cluster funding level entirely with desegregation funds without increasing its compensatory desegregation funds to the cluster funding level. Because CPS' desegregation funding violations from the 2004-05 school year have not been remedied,[6] the MCD's desegregation funding and compensatory program obligations should be continued through the 2006-07 school year, but should be revised to ensure a reasonable remedy of the violations through quality compensatory programs at regular racially isolated African American and Hispanic schools receiving no desegregation funds.

The United States believes that paragraph V.A should be retained as is, reporting on paragraph V.A programs should be required by July 1, 2006, and paragraph V.B should be revised in the manner set forth in Attachment A. The revised text clarifies CPS' compensatory obligations, removes cluster programs from the desegregation budget, and eliminates the required monetary ratio among programs. Because monitoring budget amounts has proven difficult, the revised text will better ensure that priority racially isolated schools will receive meaningful compensatory programs by specifying the requisite schools and programs rather than the funding ratios.[7] The revised text maintains existing levels of funding for magnet and specialized schools, transportation to such schools, and M-to-M transportation to ensure the effectiveness of these programs. Magnet cluster funds at racially isolated schools can receive

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[6] As explained in the portion of the United States' motion to show cause that was denied without prejudice, an additional $17.8 million in compensatory programs would be needed to fully remedy the 2004-05 breach, which resulted in $40.1 million for clusters and only $3.9 million for compensatory programs at racially isolated schools. See U.S. Mot. of 8/26/05 at 15 n.17 & 16.

[7] The requested change is appropriate to achieve the Original Decree's goal. See Freeman, 503 U.S. at 492 ("It was an appropriate exercise of its discretion for the District Court to . . . determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the court's decree.")

credit under Section V.A of the MCD but are removed from the desegregation budget because they do not meet the definition shared by the United States and this Court: "a program that the racially-isolated school would not receive were it not for this case."[8] Tr. of 9/22/05 at 5 (reading from U.S. Reply of 9/16/05 at 13).

IV. Obligations Regarding Faculty and Administrators Should be Continued

In the MCD, CPS committed to make a good faith effort to continue the requirement of the Original Decree, id. ¶ III.3, to work towards equalizing the certification, experience, and educational backgrounds of faculty and administrators (collectively, "faculties") and assigning faculties in a non-racially identifiable manner. See MCD ¶ II.A ("a school is not racially identifiable by student enrollment and by the teachers and school-based administrators assigned to the school"). CPS never achieved the goals of the Original Decree in this area; nor has it made continuous progress. For example, in the 2002-03 school year, 30 of the 31 principals at majority white schools were white.[9] Moreover, CPS must show that it has made every good faith effort to assign teachers to schools so that their certification, experience, and educational backgrounds approximate those of teachers districtwide as required by paragraph II.A.2. To ensure that CPS makes whatever progress is practicable in desegregating its faculties and administrators, this Court should continue paragraph II of the MCD.

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[8] This year, non-racially isolated schools receive cluster programs outside the desegregation budget while racially isolated schools receive them through this budget. Because non-racially isolated and racially isolated schools are eligible for cluster funding independent of this case, the United States is willing to accord credit for racially isolated clusters under Section V.A of the MCD, but does not believe clusters should be counted in the desegregation budget required by Section V.B.

[9] According to CPS' data, not only was there no improvement in 2003-04 and 2004-05, but also it now appears that all 31 principals are white.

V. The ELL Provisions Should be Continued

The MCD recognized that CPS had failed to provide the services needed to assure ELLs' effective participation in CPS' educational programs, as required by Paragraph III.2 of the Original Decree. CPS' own consultant, Dr. Beatriz Arias, identified several areas where CPS had failed to implement its program adequately: (1) services to ELL students in their fourth and fifth year of ELL services ("PY4 and PY5 students"), (2) monitoring students exited from ELL services, and (3) access for ELL students to special education, magnet, and gifted programs. See generally Report of Dr. Beatriz Arias, Review of the Bilingual Programs for the Chicago Public Schools of 10/02.

To address these three concerns, the MCD requires adequate services for PY4 and PY5 students, systemic monitoring of exited students, and adequate access to CPS' special education and gifted programs. See MCD, App. C, ¶¶ 2.e, 2.f, 5, 6, and 7. To address concerns about CPS' exiting practices, the MCD required CPS to evaluate ELLs each year in all four language domains and to ensure that ELLs meet transition criteria in these domains prior to exiting ELLs. See id. ¶¶ 2.g & 7.a. CPS has failed to remedy violations in these four areas and to implement several other aspects of Appendix C of the MCD. Appendix C should be continued in its current form through the 2006-07 school year to ensure that CPS finally meets its obligation to provide ELLs with the services needed for their effective academic participation.

VII. Continuation of the Advanced Courses and Discipline Provisions

Prior to entry of the MCD, many racially isolated high schools had few to no Advanced Placement ("AP") and honors courses. The MCD requires CPS to contact schools reporting few or no AP or honors classes, to determine the reason for the lack of courses, and to assist the

schools in establishing such classes. See MCD ¶ V.D. If CPS cannot demonstrate full and good faith implementation of this provision, the Court should continue this provision through the next school year to ensure full compliance. With respect to discipline, the MCD requires CPS to "review the implementation of its discipline policy and practices to ensure that a student's race or ethnicity is not a factor in any disciplinary action" and shall submit the results of its review to the United States. Id. ¶ V.C. Thus far, CPS has provided the United States with the audit of only one school and two reports based on aggregate data that recommend further inquiry. If CPS cannot demonstrate at the February hearing that it has audited additional schools and conducted further inquiry regarding the racial disparities identified in its reports, the Court should continue paragraph V.C through the next school year.

VIII. Discovery and Pretrial Procedures

The Court has stated that both parties will need to submit witness lists, exhibit lists, and expert reports prior to the February hearing. See Tr. of 10/20/05 at 16-17, 28-29. The parties and amici will have the right to depose expert witnesses and to request reasonable numbers of depositions of lay witnesses. Id. at 28-29, 33. The United States respectfully seeks permission to depose lay witnesses: Pedro Martinez and Jennifer Tchaou regarding the CPS' funding obligations under the MCD; Jack Harnedy regarding the magnet school, cluster, and compensatory programs funded through the desegregation budget; Raj Balu and Manuel Medina regarding the ELL programs; and whoever oversees the M-to-M program and transportation associated with it. Because CPS' witness list may reveal other persons that the United States may need to depose, the United States asks that witness lists be provided by December 19, 2005, to ensure adequate time for depositions. The United States' expert in bilingual and English as a

second language education is reviewing the adequacy of CPS' ELL services and is scheduled to visit additional CPS schools at the end of this month and in December. The United States respectfully asks that the hearing be set for late February, as requested by CPS on October 20, 2005, and that expert reports be due no early than January 17, 2006, because the United States' ELL expert will be unable to complete her site visits until December 14, 2005 and unable to write most of her report until January.

Conclusion

For the foregoing reasons, the United States respectfully asks this Court to continue the identified provisions of the MCD in the manner articulated above through the 2006-07 school year.

Respectfully submitted,

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DATED: November 21, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2005, pursuant to N.D. Ill. L.R. 5.5, I electronically filed United States' Position Paper on the Future of the Modified 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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