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 IN SUPPORT OF ITS MOTION TO SHOW CAUSE

At the motions hearing on August 31, 2005, this Court offered the Chicago Public Schools ("CPS") an opportunity to respond to the *factual* allegations in the United States' motion. The Court indicated that it was prepared to move to the issue of a remedy if the factual allegations were not in dispute. In its response, CPS does not deny the factual assertions regarding its 2004-05 and 2005-06 school desegregation budgets, but instead argues unconvincingly that its budgets comply with the December 7, 2004 Order ("Order" or "Mem. Op.") and the Modified Consent Decree ("MCD"). In doing so, CPS argues for the first time that it may move the funds and programs under Section V.A of the MCD into the desegregation budget required by Section V.B. Had CPS always understood the MCD to allow such movement, then undoubtedly CPS would have made this argument last Fall when CPS opposed the United States' motion to enforce ¶ V.B.1.d. That it did not reveals that this interpretation is a recent invention.

The question before the Court is legal, not factual, and the answer to this question lies in the language of the Order and the MCD, not in inadmissible extrinsic documents regarding settlement negotiations. CPS' disclosures of such negotiations should be struck for the reasons given in the United States' motion to strike ("U.S.' Mot. to Strike"), but the United States nonetheless responds to them pursuant to this Court's directive on September 14, 2005. The United States also responds to this Court's request for suggestions on how to resolve this dispute. If CPS truly cannot remedy its 2004-05 and 2005-06 desegregation budget violations

this school year, then the United States proposes a compromise remedy for the 2006-07 school year that would resolve the violations from both of the prior years. See infra Section V below at 27-29.

I. The December 7, 2004 Order Precluded CPS from Moving Section V.A Funds into the 2004-05 and 2005-06 Desegregation Budgets to Achieve Parity of Allocation

CPS does not deny the United States' factual assertion that CPS moved at least $17.1 million in Pre-K, bilingual, and after-school programs that were *not* in last year's desegregation budget into this year's desegregation budget. See CPS' Response to U.S.' Mot. for an Order to Show Cause Re: CPS' Violations of this Court's December 7, 2004 Order & Para. V.B.1.c of the MCD & for a Full Remedy of CPS' 2004-05 Desegregation Funding Violations in the 2005-06 School Year at 7 (hereinafter "CPS' Opp'n" and "U.S.' Mot.").[1] CPS argues that "the inclusion of $17.1 million . . . does not violate the Order" because "the Order did not address whether compensatory programs offered at racially identifiable schools could be placed in the 2005-06 desegregation budget if they were not included in the 2004-05 desegregation budget." CPS' Opp'n at 7. This argument ignores the analysis and directives in the Order.

This Court squarely rejected CPS' argument that it should be allowed to count compensatory programs that were outside of the 2004-05 desegregation budget (i.e., programs required by Section V.A) toward its compensatory obligations under the 2004-05 desegregation budget (i.e., programs required by Section V.B.1.b). See Mem. Op. at 6 (finding CPS' argument "fundamentally at odds with the plain language of the decree"). For the 2005-06 school year, this Court directed CPS to "allocate the desegregation funds referenced within the MCD without respect to other monies that may be spent on the activities described in that section of the decree." Id. at 8. In opposing the United State's motion to enforce ¶ V.B.1.d, CPS never argued

[1]CPS also does not deny the admission in its August 19, 2005 letter that it also moved 29 full-day Kindergarten ("K") positions into the desegregation budget. See U.S.' Mot. at 9-10 & Ex. E at 3. According to data provided by CPS, $3.9 million of the 2005-06 desegregation budget supports K positions, and some portion thereof supports the 29 full-day K positions that were moved into the budget. See Chart of Kindergarten Positions in the 2005-06 Desegregation Budget (Ex. P), produced from data provided by the CPS by E-mail from S. Thornton to W. Rhee of Aug. 31, 2005. Thus, CPS' own information establishes that the amount CPS moved into the desegregation budget in contravention of the December 7, 2004 Order includes at least the $17.1 million plus the portion of the $3.9 million supporting the 29 full-day K positions.

that it could demonstrate compliance by moving sufficient Section V.A funds into the desegregation budget to reach the level of desegregation funds accorded to magnet clusters. See CPS Opp'n to U.S. Mot. to Enforce Provisions of MCD at 11-14 (filed Nov. 8, 2004)(hereinafter "CPS 2004 Opp'n") (omitting this argument). Why would CPS have asked this Court merely to *compare* the Section V.A compensatory funds against the desegregation budget's allocation for clusters if CPS *knew* it had the right to *move* these funds into the budget? CPS raises a new interpretation of Section V only because its first unreasonable interpretation of this Section failed last year and CPS has been unwilling to reallocate funds from ineligible schools.

Counting the compensatory programs outside of the desegregation budget, which are required by Section V.A, toward the compensatory programs funded by the desegregation budget, which are required by Section V.B, is no different than moving the funds into the desegregation budget because the result is the same: double counting the same funds and programs toward two separate obligations and no *reallocation* of desegregation funds from improper schools to proper schools. Although this Court directed CPS to *"reallocate"* desegregation funds from the non-racially identifiable clusters and the non-racially identifiable schools that improperly received compensatory programs, Mem. Op. at 7, none of the $6.6 million that CPS admitted went to ineligible schools was reallocated. See Tchaou Decl. ¶¶ 14-15 (CPS' Opp'n Ex. F). Instead of reallocating the cluster and compensatory positions at the ineligible schools to the eligible ones last year as the Order required, CPS merely relabeled the $6.6 million in improper desegregation budget funds as "general CPS budget" funds. See id. ¶ 15.

Because CPS remained unwilling to reallocate this locally controlled money from integrated schools to compensatory programs at racially-isolated schools *this school year*,[2] the remaining amount of actual desegregation funds for compensatory programs at racially-isolated schools, (which was only $3.3 million last year), see U.S.' Mot. at 15 n.17, again fell short of the

[2] CPS asserts that it could not reallocate the $6.6 million to racially identifiable schools for second semester of the 2004-05 school year "because the school year was well underway and the district had no alternative funding source to support these programs and positions." Tchaou Decl. ¶ 14. Even assuming these reasons excused CPS from the *mid-year* reallocation required by the December 7, 2004 Order, and the United States maintains that they do not, these reasons were not an issue for the 2005-06 desegregation budget and thus CPS could have reallocated these funds.

amount of desegregation funds that CPS wanted to spend on magnet clusters ($17.9 million). See id. at 11 & Ex. I. To make up this shortfall and achieve "apparent" compliance with ¶ V.B.1.d in the 2005-06 school year as the Order requires, see Mem. Op. at 8, CPS simply moved compensatory programs from outside of the desegregation budget into the desegregation budget so that the budget's amount for compensatory programs would appear larger than its amount for magnet clusters. See U.S.' Mot. Ex. I. This move, however, contravened the Order, which states that "[i]n considering whether [the Board's] allotment comports with ¶ V(B)(1)(d), the Board may not look at the entire universe of funds spent. The money specified as 'desegregation funds' is the sole amount that can be taken into account in calculating parity of allocation." Mem. Op. at 6.

The local funds specified as "desegregation funds" in Section V.B are plainly distinct from the "other local, state, and federal funds" in Section V.A that are "independent of [CPS'] desegregation budget." Thus, the Order barred CPS from using Section V.A funds to comply with ¶ V.B.1.d. Moving the Section V.A funds into the desegregation budget this school year provided *no* additional compensatory programs to racially-isolated schools, thereby rendering the Court's remedy hollow.[3]

II. The Language and Structure of Section V of the MCD Show that CPS May Not Supplant Desegregation Funds under Section V.B with Section V.A Funds

The question before this Court is whether CPS may move the funds and programs required by Section V.A into the desegregation budget required by Section V.B and simultaneously satisfy its separate program obligations under Sections V.A and V.B. The

[3] At least $6.6 million of the local desegregation funds that were supposed to be reallocated for new compensatory programs at these schools remain at the non-racially-isolated cluster and neighborhood schools this school year under the new label of "general CPS budget" funds. Tchaou Decl. ¶ 15. These local funds were part of CPS' desegregation budget in the 2003-04 and 2004-05 school years and are the very funds that ¶ V(B)(1)(b) obligates CPS to use for extra compensatory programs at racially-isolated schools. Instead of prioritizing the funds that had been in the desegregation budget for compensatory programs at racially-isolated schools, as the ¶ V(B)(1)(b) requires, CPS prioritized giving non-racially-isolated schools something extra: magnet cluster positions and other staff positions, which were improperly included under the compensatory funding category. See Tchaou Decl. ¶¶ 9, 11. If CPS has enough money to give both sets of schools something extra, it should do so. CPS, however, cannot evade its duty to provide extra programs to racially-isolated schools by tying up the needed funds at non-racially-isolated schools and then claiming it lacks the funds needed to meet its duty.

answer to this question is easily found in a common sense interpretation of the MCD's language and structure, not in the extrinsic and inappropriate attachments to CPS' Response. That answer is a resounding no. CPS relies largely on representations about the Original Decree and settlement negotiations between the United States and CPS to argue that the answer is yes. See CPS' Opp'n at 1-4 (discussing Original Decree) & 14-17 (discussing settlement negotiations). The former are not relevant to whether CPS complied with the MCD, and the latter are inadmissible for the reasons articulated in the United States' motion to strike. Those reasons are incorporated herein by reference.

CPS either misunderstands the question raised by the United States' motion to show cause or seeks to confuse this Court into accepting CPS' unreasonable interpretation of the MCD by focusing on questions that are not in dispute. To save this Court time, the United States begins by clarifying what is in dispute and what is not. First, the United States does not dispute that compensatory programs are broadly defined in Section V.A. See CPS' Opp'n at 10. Second, the United States does not dispute that it knew the programs identified in the second paragraph of Section V.A were also provided to non-racially identifiable schools. See id. at 15. Third, the United States does not dispute that Section V.A gives CPS credit toward the MCD's compensatory goal for the compensatory programs that CPS was funding outside of the desegregation budget when the parties agreed to the MCD in the fall of 2003. See id. at 16. Lastly, the United States does not seek to remove the compensatory programs identified in the second paragraph of Section V.A from stably desegregated schools. Id. at 13.

The United States disputes that the MCD allows CPS to move the programs and funds required by the second paragraph of Section V.A (i.e., "the other local, state, and federal funds" that were "independent of [CPS'] desegregation budget") to replace the funds that were in CPS' desegregation budget at the time the MCD was signed in order to satisfy CPS' funding and compensatory obligations under Section V.B. CPS' argument that it may replace the desegregation funds specified in Section V.B with the funds specified in Section V.A contradicts the plain meaning of Section V. As explained below, the structure and language of Section V clearly establish two distinct pools of funds that support compensatory programs and impose two separate obligations on CPS with respect to funding compensatory programs. If, as CPS contends, these pools are interchangeable and CPS may satisfy its obligations under Section V.B

by using Section V.A funds and programs, then much of the language in Section V would be superfluous. Interpretations, such as CPS', that eliminate consent decree language are unreasonable and should be rejected. See, e.g., Reynolds v. Ala. Dep't of Transp., 955 F. Supp. 1441, 1446-47 (M.D. Ala. 1997) (rejecting an interpretation of a consent decree that would render paragraph in decree superfluous); Cent. Ill. Pub. Serv. Co. v. Allianz Underwriters Ins. Co., 240 Ill. App. 3d 598, 603, 608 N.E. 2d 155, 158 (1st Dist. 1992).

A. Section V.A's Requirements

The first pool of funds is identified in the second paragraph of Section V.A as "other local, state, and federal funds" that were "independent of [CPS'] desegregation budget" and used to support certain compensatory programs at the time the MCD was signed. Id. ¶ V.A. The second paragraph of Section V.A gives CPS credit toward the compensatory goal of the MCD for the compensatory programs listed in that paragraph, which CPS funds outside of the desegregation budget. Id. (recognizing that these programs "address the compensatory and supplemental program goal"). These programs include those listed therein and those that CPS was funding outside of its desegregation budget at the time the MCD was signed (e.g., state bilingual positions). CPS knew what these programs were when it signed the MCD because it produced lists of such programs to the United States. See E-mail from S. Thornton to E. McCarthy of Oct. 3, 2003 & Attachs. 1 & 2 (Ex. Q). CPS also knew what these programs were in the 2003-04 school year because it identified them in documents on its website, see http://www.cps.k12.il.us/AboutCPS/deseg_reports/, reports under "Index" entitled "Elementary - Per Pupil Education Spending" and "High School - Per Pupil Education Spending,"[4] and represented to this Court that these programs totaled approximately $300 million. See CPS' 2004 Opp'n at 12, 13.

Section V.A imposes a substantive obligation on CPS: "CPS shall maintain, and increase, if practicable, these [compensatory] programs at African American and Hispanic racially-isolated schools" (i.e., the programs identified in the second paragraph of Section V.A that were

[4] Copies of the elementary and high schools reports appear at Exhibits R and S and were modified by the United States by adding shading to certain schools. The non-racially isolated schools have light gray shading and racially isolated schools receiving no programs have dark gray shading. See Exs. R and S.

funded independent of the desegregation budget at the time of the MCD's signing). MCD ¶ V.A (emphasis added). This obligation secures the compensatory programs that were being funded outside of the desegregation budget at the racially-isolated schools for the duration of the MCD. In order to meet this obligation, CPS has to continue allocating to "these programs" the "other local, state, and federal funds" that were "independent of its desegregation budget." Id. The third paragraph of Section V.A requires CPS to report these programs so that the United States can monitor CPS' compliance with this obligation. Id. That the report cards give CPS credit for compensatory programs funded within and outside of the desegregation budget does not mean that CPS can supplant one for the other. See CPS' 2004 Opp'n at 11 n.9.

B. Section V.B' Requirements

The second pool of funds supporting compensatory programs is set forth in the first paragraph of Section V.B. This pool is identified as "local funds," specifically "the 065, 163, and 011 funds," that "have supported magnet schools and programs, specialized schools, compensatory and supplemental programs, magnet clusters, transportation for desegregation, and other purposes." Id. ¶ V.B. CPS knew which funds were subject to Section V.B because it quantified them as totaling $98.3 million in the 2003-04 school year and inserted this figure into the second paragraph of Section V.B. CPS also had reported these funds for the 2001-02 and 2002-03 school year to the United States. See E-mail of S. Thornton to E. McCarthy of Aug. 21, 2003 & Attach. 1 only (Budgets.xls) (Ex. T). Exhibit T shows that the desegregation funds at each school came from the 065, 163, 011, and 986 funds and totaled approximately $96.4 million in the 2002-03 school year and $98.2 million in the 2001-02 school year. See Modified Attach. 1 to Ex. T Sorted by Project Number With Totals Calculated (Ex. U). That CPS knew which funds were required by Section V.B is also demonstrated by its maintenance of "traditional" desegregation funds in the 2004-05 school year at a level of $98 million. See CPS' 2004 Opp'n at 12.

The second paragraph of Section V.B requires CPS to "maintain its desegregation budget at its current level of $98.3 million, but [allows CPS to] decrease it by no more than 10% from the previous year's level upon a showing by CPS that the proposed decrease is not inconsistent with the [MCD's] goals." MCD ¶ V.B. In the 2004-05 school year, CPS reports maintaining its

desegregation budget at the $98 million level and the $300 million outside of its desegregation budget for the compensatory programs required by Section V.A. See CPS' 2004 Opp'n at 12. Although CPS fully understood that Sections V.A and V.B required two pools of funds that totaled roughly $400 million dollars in the 2003-04 and 2004-05 school years, CPS now claims for the first time that it may replace the Section V.B funds with the Section V.A funds and still satisfy its obligations under both sections.

C. CPS' Interpretation of Section V Requires this Court to Ignore Critical Language

CPS dismisses the language identifying two distinct pools of funds as "prefatory in nature and merely contain[ing] historical information without any mandate or prohibition set forth therein." CPS' Opp'n at 18. CPS urges the Court to disregard this language pursuant to the supposedly "clear" contractual principle that "courts should not give effect to 'mere surplusage' in a consent decree." Id. at 19 (citing White v. Roughton, 689 F.2d 118, 120 (7th Cir. 1982)). CPS misrepresents this principle because the words "mere surplusage" appear nowhere in White. The principle set forth in White is that courts should not give effect to "useless surplusage." 689 F.2d at 120. The language describing the funds required by Sections V.A and V.B is far from "useless." It is essential to understanding the nature of CPS' obligations under these sections. Section V.B's description of the desegregation funds is needed to understand and assess compliance with CPS' duty to maintain these funds at a level that is not less than 10% of the prior year level. Likewise, the description of the Section V.A funds is needed to understand what is meant by "these programs" in CPS' duty to "maintain, and increase, if practicable, these programs" and to assess compliance therewith.

CPS purports to have drafted Section V.A and therefore to know its "intended purpose." See Sneed Decl. ¶¶ 14-15; Moscovitch Decl. ¶¶ 12-13. Drafts of the MCD exchanged between the parties, however, show that the United States drafted Section V.A and that the relevant parts of this language remained largely the same as they appear in Section V.A of the MCD.[5] The

[5] On August 19, 2003, Ms. Sneed, CPS' counsel, forwarded a draft plan to the United States. E-mail from M. Sneed to E. McCarthy of Aug. 19, 2003 & Attach. at 11-12 (Ex. V). Ms. Sneed's draft contains provisions under Section VI.B entitled "Equity, Magnet Custer [sic] and Magnet Funds" that are unlike those in Section V.A. On September 18, 2003, Ms. Thornton,

United States' draft includes a Section V.A that closely resembles the one in the MCD and shows plainly that two pools of funds with separate obligations for each pool were intended. Compare Ex. X Attach. at 13-15 with MCD ¶ V.A.

If CPS disagreed with the United States' delineation of separate funding sources with distinct obligations, and desired the right to use the funds and programs identified in Sections V.A and V.B interchangeably, CPS should have secured this right in Section V. CPS claims that there is no prohibition in the MCD against moving "compensatory programs paid for by the Board outside of the 'desegregation budget' and allocated to racially identifiable schools . . . [into] the 'desegregation budget'." Sneed Decl. ¶ 18; Moscovitch Decl. ¶ 16. While there is no *explicit* prohibition against this in the MCD, there is also no language expressly stating permission to move these funds. CPS is asking this Court to read such permission into Section V, but doing so is contrary to the language and structure of Section V and renders much of that language meaningless, as explained in Part II.D below. See GNB Battery Technologies, Inc. v. Gould Inc., 65 F.3d 615, 622 (7th Cir. 1995) ("When interpreting a contract, we cannot read terms into the language that are not expressly stated, nor will we ignore terms that are explicitly written therein.")

CPS also argues that the MCD does not limit the desegregation budget to local funds. CPS asserts that "the desegregation budget previously has historically consisted of funding derived through a combination of local, state, and federal sources," but provides *no* support or time-frame for this assertion. CPS' Opp'n at 19 (citing Martinez Decl. ¶ 2). CPS cites

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CPS' counsel, forwarded another draft plan, which retained the same language for "Equity, Magnet Custer [sic] and Magnet Funds" that CPS had proposed on August 19, 2003. E-mail from S. Thornton to J. Glassman of Sept. 18, 2003, & Attach. at 17-18 (the paragraph is listed as VI.A), forwarded by J. Glassman to E. McCarthy on Sept. 22, 2003 (Ex. W). On September 22, 2003, Jeremiah Glassman, the United States' counsel, forwarded a revised draft that rewrote most of the section called "Equity, Magnet Custer [sic] and Magnet Funds." E-mail from J. Glassman to S. Thornton of Sept. 23, 2003, & Attach. at 13-15 ¶ V, forwarded by J. Glassman to E. McCarthy on Sept. 24, 2003 (Ex. X). To limit the disclosure of settlement negotiations, the United States has included only the pages of the attached drafts to Exhibits V, W, and X that pertain to the language in Section V of the MCD. The United States also notes its inability to introduce an affidavit from Jeremiah Glassman at this time because he has been out of the country on vacation in Africa since September 8, 2005, and will not return to the office until September 26, 2005.

paragraph two of the Martinez Declaration for this assertion, but neither this paragraph nor any other in the attachments to CPS' Response support this assertion.[6] Id. CPS has made no showing that the desegregation budget included federal and state funds at the time the MCD was signed, which is the relevant time-frame. See CPS' Opp'n at 18. Even assuming arguendo that the funds in the desegregation budget at the time the MCD was signed included federal or state funds, this does not mean that Section V allows CPS to use the Section V.A funds to meet its obligations under Section V.B. Whatever the source of the desegregation funds at the time the MCD was signed, CPS knew the desegregation funds were distinct from the federal, state, and local funds that were outside of its desegregation budget and supported the compensatory programs required by Section V.A. CPS also knew that the funds identified in Sections V.A (roughly $300 million) and V.B ($98.3 million) totaled roughly $400 million, as is evidenced by its 2004-05 funding which included roughly $300 million plus the $98 million desegregation budget. CPS' 2004 Opp'n at 12.

D. CPS' Interpretation of Section V Voids Its Language and Leads to Absurd Results

The language and structure of Section V plainly intended to secure the status quo of CPS' funding for compensatory and other desegregation-related programs except that Section V.B allows CPS to reduce the desegregation funds by 10% from the prior year level if CPS makes the requisite showing. See MCD ¶ V.B. Nevertheless, CPS now argues that it may supplant the desegregation funds required by Section V.B with the funds required by Section V.A in order to achieve compliance with its obligations under Section V.B, which include its duty not to allocate more desegregation funds to clusters than to compensatory programs under ¶ V.B.1.d and its duty to maintain its desegregation budget at a certain level. CPS' argument renders language in Section V superfluous and leads to absurd results.

If, as CPS contends, the MCD does not prohibit CPS from moving Section V.A funds and programs into the desegregation budget, then the MCD puts no limit on how much CPS can move into the desegregation budget as long as CPS maintains a budget level that is not less than

[6] Paragraph 4 of the Moscovitch Declaration neither makes this assertion nor supports it. See CPS' Opp'n Ex. D. Ms. Moscovitch did not begin working for CPS until May 2003, Ex. D ¶ 1, and thus has no personal knowledge of the funds within the desegregation budget prior to that time.

10% of the prior year level. This would mean that in the 2004-05 school year CPS could have replaced almost all of the funds for programs that were in the 2003-04 desegregation budget with funds that had been outside of the desegregation budget in the 2003-04 school year.[7] This would virtually eradicate the prior year desegregation budget instead of maintaining it as Section V.B requires. This also would reduce CPS' total funding under Section V from roughly $400 million in the 2003-04 school year to $300 million in the 2004-05 school year. Under the same logic, CPS could reduce its total funding under Section V to roughly $200 million in the 2005-06 school year. This cannot be what was intended because it would render the language delineating the two pools of funds, the distinct obligations regarding those funds, and the 10% limit on any decreases in the desegregation budget meaningless.[8]

Supplanting Section V.B funds with Section V.A funds also would severely undermine the compensatory goal of the MCD by reducing the overall amount of funding for compensatory and other desegregation programs by whatever amount CPS decided to supplant in a given year. A consent decree should not be construed to thwart its purpose so long as the purpose is supported by the words of the decree. See, e.g., United States v. Huebuer, 752 F.2d 1235, 1241 (7th Cir. 1985). Such supplanting also precludes CPS from being able to meet both its duty to "maintain, and increase, if practicable" the compensatory programs in paragraph two of Section V.A and its duty to maintain a separate desegregation budget for other compensatory programs, magnet schools, and transportation under Section V.B. CPS is effectively asking this Court to allow it to count the $17.1 million in Pre-K, bilingual, and after-school programs and the 29 full-day K positions that were outside of its desegregation budget last year toward its obligation under Section V.A to "maintain, and increase, if practicable these programs" as well as toward its obligation to maintain a desegregation budget at a certain level and to ensure that the desegregation funds for magnet clusters do not exceed those for compensatory programs. The

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[7] Presumably CPS would have to maintain a small portion of funds for magnet/specialized schools and transportation because ¶¶ V.B.1.a and V.B.1.c require some desegregation funds for these programs.

[8] See GNB Battery Technologies, 65 F.3d at 622 ("A contractual interpretation that gives reasonable meaning to all of the terms in an agreement is preferable to an interpretation which gives no effect to some terms."); Allianz, 608 N.E. 2d at 158 ("meaning and effect, if possible, [should] be given to every part of a contract so that one provision is not construed to annul another") (citation omitted).

United States is willing to count the $17.1 million in Pre-K, K, bilingual, and after-school programs toward CPS' compliance with Section V.A, but is unwilling to double count these exact same programs toward CPS' separate obligations under Section V.B.

E. CPS' Contention that the Desegregation Budget Does Not Provide Extra Programs is Belied By Its Prior Statement and the Language of the MCD

CPS denies that the desegregation budget was designed to provide racially-isolated schools with extra compensatory programs. CPS' Opp'n at 11-12. CPS, however, admitted less than a year ago that "[t]he purpose of desegregation funds for both magnet clusters and compensatory and supplemental programs is to provide *extra* funding for African American and Hispanic racially isolated schools so that these schools can provide quality educational programming." CPS' 2004 Opp'n at 14 (emphasis added); see also id. at 13 ("as magnet cluster schools this sub-set of racially-isolated minority schools receive *additional* funding through the traditional 'desegregation budget'"). CPS' statement is consistent with the United States' position and the language of Section V, especially Section V.B.1.b.

Section V.B.1.b requires CPS to "allocate desegregation funds for compensatory and supplemental programs to African American and Hispanic racially-isolated schools and that *priority* be given to racially-isolated schools that *do not* receive funding for compensatory, supplemental or magnet programs, including clusters." MCD ¶ V.B.1.b (emphasis added). Schools that received the state Pre-K, full-day K, state bilingual, after-school, gifted, IB, AP, and selective enrollment programs outside of the desegregation budget last year, see U.S.' Mot. Ex. E at 3-4, already were receiving compensatory and magnet programs and therefore are not the *priority* for desegregation-budget-funded compensatory programs in the 2005-06 school year. It would be an absurd result if CPS could limit or eliminate the pool of available desegregation funds for compensatory programs at the most needy schools by replacing most or all of that pool with funds from schools that already receive compensatory programs outside of the desegregation budget. See Beanstalk Group, Inc. v. AM Gen. Corp., 283 F.3d 856, 860 (7th Cir. 2002) ("[A] contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek.")

As CPS itself emphasizes, the local, state, and federal funds identified as outside of the

desegregation budget in Section V.A are allocated to both racially-isolated and non-racially-isolated schools for the compensatory programs identified in paragraph two of that Section. See Exs. R & S. The United States is certain that the state and federally funded programs listed in Exhibits R and S would flow to racially-isolated and non-racially-isolated schools even if this desegregation case did not exist.[9] In this sense, none of these programs is "extra."[10] By contrast, the desegregation budget totaling roughly $98.3 million at the MCD's inception exists only due to this case and is not guaranteed beyond this case. Because desegregation funds are extra funds that schools get only if they qualify under the desegregation funding guidelines, and such guidelines allow desegregation funds for compensatory programs only at racially-isolated schools, these compensatory programs are inherently "extra" programs that non-racially-isolated schools do not get. While racially-isolated and non-racially-isolated schools are eligible for Pre-K, K, bilingual, after-school, gifted, IB, AP, and selective enrollment programs, only racially-isolated schools are eligible for the "extra funding" that the desegregation funds provide for compensatory programs pursuant to Section V.B.1.b. Id.

CPS contends that the Pre-K, K, bilingual, after-school, gifted, IB, AP, and selective enrollment programs are "something extra" because they are "allocated to a school above and beyond the general curriculum programs to which the school is entitled under state law and in excess of the number of 'quota' teaching and staff positions to which a school is entitled by virtue of annual student enrollment numbers." CPS' Opp'n at 13 (citing Sneed Dec. ¶ 20 (Ex. C) & Martinez Dec. ¶ 4 (Ex. A)). CPS adds that compensatory programs allocated with desegregation budgeted funds "do not supplant a school's staff." Id. (citing Martinez Dec. ¶¶ 3,4). By extra, the United States does not mean simply above the general curriculum. Nor does the United States mean a unique program or position. By extra, the United States means a program that the racially-isolated school would not receive were it not for this case.[11] CPS never

[9] The amounts of state and federal funds for the Section V.A programs may vary, but state and federal support for these programs is not contingent upon this case.

[10] The United States suspects that the local funds identified for Section V.A programs in Exhibits R and S also would be available regardless of this case because they are district-wide initiatives.

[11] The United States is not insisting that the *type* of compensatory programs funded by the desegregation budget appear only at racially-isolated schools. See CPS' Opp'n at 16-17.

denies the United States' assertion that the racially-isolated schools receiving Pre-K, K, bilingual, after-school, gifted, IB, AP, and selective enrollment programs under the 2005-06 desegregation budget would receive these compensatory programs even if this budget did not exist. See U.S.' Mot. at 11;[12] CPS' Opp'n at 13 n.10 (stating only that "[e]ven if the DOJ were correct, it cites to no provision of the MCD that states that this would be improper").

Relabeling state Pre-K, state bilingual, and what appear to be federal K funds as "desegregation funds" does more than just violate the language of Section V. This relabeling deprives racially-isolated schools of the truly "extra funding" that is supplanted by the movement of such funds. In other words, if CPS could not move the $9.5 million in state Pre-K funds and the $6.5 million in state bilingual funds into the desegregation budget to meet its duty to maintain that budget at its requisite level, then CPS would have to provide $16 million in other funds for the four programs, including compensatory ones, required and permitted by Section V.B. Had CPS done this, the racially-isolated schools that received no compensatory or magnet programs would receive desegregation funds for compensatory programs that they would not have gotten but for CPS' duty to maintain desegregation funds and other racially-isolated schools would receive whatever Pre-K, bilingual, and K positions to which they were already entitled, with some subset possibly receiving extra or additional compensatory programs by virtue of the desegregation funds. This scenario, unlike the current 2005-06 desegregation budget, would have provided more of the most needy schools with the compensatory programs to which they are entitled under the MCD.

F. There is No Basis for Voiding the MCD

CPS attempts to avoid financial responsibility for its violations of Section V by threatening the United States and this Court with a doomsday scenario: if the Court rules in the United States' favor, "the entire MCD" is void. CPS' Opp'n at 20. CPS asserts that "CPS never understood the MCD to impose the limitations the DOJ now seeks in its Motion," id., but CPS' conduct last year belies this assertion. Last year's funding, while noncompliant with ¶ V.B.1.d

[12] CPS challenges our assertion that non-racially-identifiable and racially-identifiable schools receive state Pre-K, K, state bilingual, after-school, gifted, IB, AP and selective enrollment positions as unsupported, CPS' Opp'n at 12, but the chart at Exhibit K to the United States' motion demonstrates this as do Exhibits R and S.

(cluster funding) and ¶ V.B.1.c (transportation), appeared otherwise compliant with CPS' Section V.A and Section V.B duties because it provided $300 million in compensatory programs outside of the desegregation budget and maintained $98.3 million in desegregation funds. See CPS' 2004 Opp'n at 12. If, as CPS now contends for the first time, the MCD allows CPS to move compensatory programs outside of the desegregation budget into the desegregation budget, then surely CPS would have made this argument last year in opposing the United States' Motion to Enforce and would have moved enough programs into the budget to demonstrate compliance with ¶ V.B.1.d. That CPS did neither is telling.

CPS contends that voiding the MCD is "entirely consistent with" United States v. Bd. of Educ. of the City of Chicago, 799 F.2d 281 (7th Cir. 1986). See CPS' Opp'n at 20. Nothing could be further from the truth. The Seventh Circuit made clear that "the decision of one of the signatories to ignore its obligations cannot serve as the basis for finding the decree to be impractical." Bd. of Educ. of the City of Chicago, 799 F.2d at 297. CPS' production of a 2005-06 desegregation budget that ignored certain obligations under Sections V.A and V.B (as well as the December 7, 2004 Order) cannot now serve as a basis for voiding the entire MCD. The Seventh Circuit's resort to ordering the district court to "modify the decree so as to align costs with available funds while maintaining the goals of the initial decree" or "*consider* vacating the decree" if "there is no readily identifiable alternative to the Board's current plan" followed a lengthy battle up and down the courts about the meaning of a "vague[]" provision, id. at 289, and a concern that the "amount acceptable under [that provision] [might be] insufficient to allow the Board to fulfill the . . . goals of the decree, or that . . . the problems inherent in the decree are too intractable for judicially supervised resolution." Id. at 297.

The provisions before this Court are not vague, nor does the MCD contain problems incapable of judicial resolution. CPS has simply tried to read into Section V a right to transfer funds and programs that CPS never asserted last year and that contradicts the language and structure of Section V. CPS has not even made a sufficient showing to support modification of the MCD, let alone its elimination. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367,

384 (1992).[13] None of the cases cited by the Seventh Circuit supporting possible nullification of the Original Decree invoked this extreme judicial act. See, e.g., Bd. of Educ. of the City of Chicago, 799 F.2d at 297 (citing cases).[14]

If CPS lacks adequate funds to remedy its violations this year, this quandary is due to CPS' failure to allocate its funds in compliance with the MCD. CPS cannot evade its obligations under Section V simply because it has tied up the funds that should have supported compensatory programs under the desegregation budget for other purposes. The United States deserves the benefit of its bargain and the racially-isolated schools should not be cheated out of the compensatory programs to which they were entitled for another year. If this Court agrees with the United States' interpretation that CPS' 2005-06 desegregation budget violates the MCD and the CPS cannot satisfy its financial liability this school year, then this Court can simply order relief from CPS in the 2006-07 school year when CPS will have full control of its funds, as explained in more detail under Section V (Alternative Remedies) below.

III. CPS' Transportation Allocations and Personnel Allocations to Hitch Violate the Plain Language of the MCD

CPS' argument that Section V.B of the MCD permits the $1.4 million in 2005-06 desegregation funds allocated to the 78 racially identifiable schools that are neither magnet schools nor M-to-M receiving schools is contrary to the plain language of that Section. Similarly, CPS' argument that the desegregation funds for *personnel* at Hitch should be allowed under the MCD because these positions were created under the Original Decree has no support in the MCD.

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[13] A court may modify the decree when "there is a significant change either in factual conditions or in the law," "a decree proves to be unworkable because of unforeseen obstacles," or "enforcement of the decree without modification would be detrimental to the public interest." Rufo, 502 U.S. at 384.

[14] The Seventh Circuit cited: United States v. Swift & Co. 286 U.S. 106, 114-15 (1932) (declining to modify decree and stating that it should not be revoked or modified unless it "has been turned through changing circumstances into an instrument of wrong"); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1020 (7th Cir.1984)(en banc)(finding "an alternative interpretation" of the decree that did not conflict with FBI guidelines and reversing modification); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120-21 (3d Cir.1979)(modifying decree due to unforeseen and changed circumstances); Duran v. Elrod, 760 F.2d 756, 758 (7th Cir.1985) (modifying decree to protect public because inmates were being released from jail due to decree).

A. The MCD Does Not Authorize the $1.4 Million in Transportation-Related Desegregation Funds at the 78 Racially-Identifiable Schools

CPS asserts that the 78 racially-identifiable schools are receiving this year's desegregation funds for minority controlled enrollment students but provides no support for this assertion. CPS Opp'n at 23-24 (citing Martinez Dec. ¶ 9). There is no paragraph 9 in the Martinez Declaration, and neither his nor any other declaration says anything about the students being transported to these 78 schools. Even assuming arguendo that the entire $1.4 million funds transportation of minority students from controlled enrollment schools to these 78 schools, the MCD does not authorize desegregation funds for this purpose.[15] CPS argues that in light of its duty to "alleviate any racially and ethnically disproportionate overcrowding of school sites, to the extent practicable," MCD ¶ I.G.1, "money for that purpose *should* be available from the desegregation budget, given that money is needed to accomplish the busing required to alleviate overcrowding." CPS' Opp'n at 24 (emphasis added). There is no support for this argument.

As this Court observed on August 31, 2005, because there are only two express categories for transportation-related desegregation funds in the MCD, desegregation funds cannot be used for types of transportation other than these two categories. These two categories are "magnet and specialized schools" and "M-to-M transfers." MCD ¶ V.B.1.c. The mere existence of a requirement in the MCD does not mean CPS can spend the limited pool of desegregation funds on that requirement. There are also other areas in the MCD where CPS has obligations without corresponding funding allowances. One such example is contained in Section III, Facilities. Under CPS' current interpretation, the mere fact that the MCD states that "[w]here feasible, the CPS shall make decisions regarding facilities that maintain or promote stably desegregated enrollments in each of the affected schools and shall avoid the creation of one-race schools" gives CPS license to spend large amounts of the desegregation budget on facilities. MCD ¶ III.A. Because such an interpretation would be absurd, it should also be

[15] In discussing the limits on desegregation funds, the Court stated that it did not want to "imply that the [CPS] cannot or should not spend money other than the desegregation funds on any of the programs mentioned in the MCD." Mem. Op. at 6 n.3. Likewise, we do not intend for CPS to construe our argument as a basis for not allocating other funds for controlled enrollment.

rejected by this Court.[16]

CPS also cites this sentence to support its argument: "CPS may use [desegregation funds] for magnet specialized [sic] schools, compensatory and supplemental programs, transportation and magnet cluster programs." CPS' Opp'n at 24 (quoting MCD ¶ V.B and adding emphasis). The only reason Section V.B uses "may" instead of "shall" is because clusters are included in the list of four programs. The paragraphs about compensatory programs, magnet schools, and transportation all make clear that CPS "shall . . . allocate" desegregation funds for these three purposes, MCD ¶¶ V.B.1.a-c, while the paragraph regarding clusters states that CPS "may" use some portion of its desegregation funds for clusters. Id. ¶ V.B.1.d. Use of the word "shall" in the sentence quoted by CPS would have been inconsistent with ¶ V.B.1.d. Notably Section V.B does not authorize CPS to use desegregation funds under the MCD for any purpose other than the four listed in the sentence quoted above.[17]

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[16] CPS' extrinsic evidence that ¶ V.B.1.c of the MCD "is not intended to exclude the use of desegregation budgeted funds for transportation services related to fulfilling other obligations" under the MCD merits only a footnote. Sneed Decl. ¶ 21; Moscovich Decl. ¶ 18. Putting aside the argument raised in the United States' motion to strike that this extrinsic evidence refers to irrelevant confidential settlement neogtiations protected under Federal Rules of Evidence Rule 408 and considering, as explained above, the fact that the terms of ¶ V.B.1.c are not ambiguous, the only possible way CPS' extrinsic evidence could be relevant here is if CPS alleged "latent" or "extrinsic" ambiguity "when the terms are clear taken by themselves, but the surrounding circumstances create inconsistent interpretations." Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032, 1037 (7th Cir. 1998) (citation omitted). Nevertheless, the doctrine of "latent" or "extrinsic" ambiguity is still inapplicable here because that doctrine requires "objective evidence as to the circumstances which supposedly create ambiguity" of the sort "that can be supplied by disinterested third parties" and CPS' affidavits are clearly inadmissible "[s]ubjective evidence" of "unsupported recitations of the parties as to their own understandings." Id. (citations and internal quotations omitted).

[17] As the First Circuit has observed:

> We think that this case is a classic example of a situation in which the hoary maxim *expressio unius est exclusio alterius* is helpful. The maxim instructs that, when parties list specific items in a document, any item not so listed is typically thought to be excluded. . . . While this interpretative maxim is not always dispositive, it carries weight; and when, as now, there is absolutely nothing in the agreement's text that hints at some additional item lurking beyond the enumerated list, we see no reason why the maxim should not be controlling.

Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 179 (1st Cir. 1995) (citations omitted). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998); Delta Mining Corp. v. Big

The use of the word "shall" in ¶¶ V.B.1.a-c shows plainly that the desegregation funds must be used for magnet schools, compensatory programs, and transportation. Paragraph V.B.1.c explains that the transportation is for magnet schools and M-to-M transfers. Period. This Court should reject CPS' attempt to rewrite this paragraph so that CPS may use desegregation funds for any type of transportation it pleases. Under CPS' interpretation, the term "may use" means that these four programs are only examples of possible desegregation budget funding and any other purpose is acceptable provided it appears elsewhere in the MCD. If this were true, then there is nothing stopping CPS from using almost the entire budget for obligations outside of Section V, such as building new schools to alleviate racially disproportionate overcrowding, see MCD ¶ I.G.1. This interpretation is absurd because it would severely limit the funds intended for magnet schools, compensatory programs, and transportation to magnets and M-to-M receiving schools.

B. CPS Does Not Deny That It Used 2004-05 Desegregation Funds for Transportation Not Listed in Paragraph V.B.1.d

CPS never denies the United States' assertion that it provided desegregation funds for transportation of students other than those attending magnet schools and M-to-M receiving schools, see CPS' Opp'n at 21-28, nor could it when its own data shows that CPS used desegregation funds to transport homeless, safety, open enrollment, and controlled enrollment transfers last year. See U.S.' Mot. Ex. L. CPS also failed to explain why 1,623 homeless, 955 safety, and 247 open enrollment students received desegregation transportation funds.[18] See U.S.' Mot. Ex. L Attach. 2 at 16-17. Although CPS provided some explanation for the 5,897 controlled enrollment (column "IT" or "involuntary transfer") students, there remain thousands of unexplained students who received transportation, id., because CPS has yet to produce the desegregation transportation data broken down by race it promised by May 4, 2005. See U.S.' Mot. Ex. H at 2-3. For the reasons give above, we reject the explanation of the 5,897 controlled enrollment students and any other transfer in Exhibit L who was not transported to a magnet or

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Rivers Elec. Corp., 18 F.3d 1398, 1405 (7th Cir. 1994).

[18] CPS also has yet to explain why special education transfers are included if the transfers are not to magnet/specialized schools or to M-to-M receiving schools.

M-to-M receiving school.

Finally, CPS misrepresented the United States' position with regard to controlled enrollment transfers. The United States has never "acknowledged that, in principle, there is nothing offensive about using desegregation funds for such controlled enrollment transfers." CPS' Opp'n at 24. The United States merely stated that while the MCD does not authorize desegregation funds for transportation of controlled enrollment transfers, it would not object to minority controlled enrollment transfers to Hitch (40% white) if they furthered desegregation with the same effect as M-to-M transfers.[19] U.S.' Mot. at 14-15 n.16. In contrast to Hitch, the 78 minority schools are receiving $1.4 million to transport *alleged* minority controlled enrollment students (i.e., there is no evidence of this) whose transfers do not enhance the desegregation of the schools involved and therefore remain objectionable.

C. Desegregation Funds for Personnel at Hitch is Not Authorized by the MCD

CPS does not dispute the fact that Hitch, an over 40% white school, is receiving desegregation funds for four faculty positions. See CPS' Opp'n at 22-23. CPS tries to justify the faculty positions as having been somehow grandfathered from the Original Decree. As demonstrated by this Court's "initial inquiry into the continued vitality of the [Original Decree] and the wisdom of maintaining the status quo under the [O]riginal [D]ecree" and the agreement of all parties that the Original Decree was "no longer capable of achieving its primary objectives," Mar. 1, 2004 Opinion at 3, the MCD clearly superceded the Original Decree. Even assuming these positions were authorized by the Original Decree, this decree quite simply has no legal force at the present time apart from the MCD. See, e.g., Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc., 135 F. Supp.2d 1031, 1051-57 (N.D. Cal. 2001) (finding Consent Order superseded by a First Amended Consent Order). If this Court agrees with the United States' view that Hitch is not authorized to receive desegregation funds for *positions* under the MCD, then out of its duty of candor to the Court, CPS should identify any other non-racially identifiable, non-magnet/specialty schools that are receiving 2005-06 desegregation funds, or

[19] Considering CPS' duty of candor to this Court, if there are any other schools where desegregation transportation funds were expended without desegregative effect, CPS should affirmatively disclose those schools, their racial makeup, the amount of funds, and the purpose of the funds to this Court.

funds that were "desegregation funds" when the MCD was signed, for *positions*, including former voluntary transfer student ("VTS") positions.

C. CPS Violated the December 7, 2004 Order By Reallocating Insufficient Funds and its 2005-06 Desegregation Budget Fails to Remedy CPS' 2004-05 Violations

On October 12, 2004, the United States moved for *full* compliance with ¶ V.B.1.d of the MCD because CPS' *reported* desegregation funding allocations provided $40.1 million to clusters and $9.2 million to compensatory programs and $1.7 of the *reported* $9.2 million for compensatory programs went to ineligible schools. U.S. Mot. to Enforce Provisions of MCD at 4. Recognizing the difficulty of reallocating funds mid-year, the United States offered in its Reply a compromise that would provide only a partial remedy of CPS' violations. U.S. Reply at 12-13. That compromise was to count some of the funding at racially isolated magnet clusters toward the amount for compensatory programs the *2004-05 school year only* and to require CPS to reallocate $7.7 million by second semester in lieu of reallocating the $16.3 million needed to equalize the funding between clusters and compensatory programs. Id.

On December 7, 2004, this Court agreed with the United States' interpretation of Section V.B and ordered CPS to use the methodology expressed by the United Sates and to reallocate funds in accordance with the Court's interpretation of the MCD. Mem. Op. at 7-8. After learning that CPS was reallocating only $725,000 by virtue of its January 31, 2005 status report, the United States notified the Court on February 24, 2005 that CPS' reallocation did not comply with the Order and in no way remedied the violations. Due to CPS' repeated noncompliance, the United States returned to its original position of seeking a full remedy for the non-compliance totaling $14.5 million in the 2005-06 and 2006-07 school years. At that time, the United States did not yet know that $4.8 of the $9.2 million actually funded transportation. At the direction of the Court, the United States tried to resolve this issue with CPS through its 2005-06 desegregation budget.

CPS faults the United States for not moving until August but CPS' delays are to blame for the timing of the United States' motion to show cause. The United States could not know if CPS had allocated sufficient funds in its 2005-06 desegregation budget to remedy its 2004-05 violations until it received and was able to analyze that budget. Although the United States began requesting the 2005-06 budget data in March, and CPS promised to produce it in April,

CPS produced nothing until July 1, when it produced a one-page *draft* summary of the total category amounts. U.S.' Mot. Ex. G. Because these categories represented more funding for clusters than compensatory programs and a budget of $103 million, id. Ex. G, which was $14.5 million more than it was required to produce,[20] the United States could not tell without more information whether CPS had complied with its 2005-06 obligations and remedied its 2004-05 violations with the additional $14.5 million. CPS' July 1 letter and other communications made clear that additional data would not arrive until August 1. The United States was incapable of analyzing the August 1 data until CPS produced more information by letter dated August 19, id. Ex. E, which did not arrive until August 22. Four days later, the United States filed its motion to show cause.

This motion included the $4.8 million to explain the full amount needed to remedy the 2004-05 violations. By representing to this Court and the United States that $9.2 million was spent on compensatory programs, when $4.8 million was actually spent on transportation, CPS had inflated the amount for compensatory programs that was to be compared to the amount for magnet clusters under ¶ V.B.1.d. In its Opposition, CPS confirmed that $4.8 million of the $9.2 million it had reported as compensatory program funding actually went to transportation. See Tchaou Decl. ¶ 5.[21] The alleged uses for the $4.8 million - controlled enrollment transfers and continued minority voluntary transfers - in no way excuse counting these funds toward the compensatory category, id. ¶ 7, and the desegregation funds for controlled enrollment transfers were not allowed under the MCD as explained above. CPS also has confirmed that $689,697 of the $9.2 million went to eight integrated schools. Id. ¶ 9. While CPS may believe these positions further the goal of maintaining stably desegregated schools and were allowed under the Original Decree, id., Section V.B of the MCD does not authorize funds for this purpose.

To fully remedy CPS' 2004-05 violations, CPS must provide $18 million (not $17.8 million) because $689,697 is higher than the $0.5 million identified by the United States. This

[20] Section V.B permitted CPS to reduce its budget by 10% from the prior year level, which had been $98.3 million, such that CPS could have reduced it to $88.47 million this school year.

[21] CPS' representation that the $9.2 million was for "compensatory programs" was thus highly misleading and strongly suggests bad faith even though the United States has not alleged bad faith in its motion to show cause. See U.S.' Mot. at 15 n.17 & Ex. A.

remedy is hardly punitive. It is simply what CPS was obligated to do in the first place. If CPS truly lacks funds to provide this overdue remedy this school year, it should provide it next year.

V. Alternative Remedies

As an alternative to the $17.8 million requested in the United States' Motion to Enforce, CPS suggests giving it credit for $16.8 million that went to racially identifiable clusters in the 2004-05 school year so that it only has to remedy $1 million. CPS' calculations are mistaken. The United State's compromise of reallocating $7.7 million would have increased compensatory funding to $17.2 million, which still would have been $16.8 million short of the amount for magnet clusters at racially identifiable schools only. U.S. Reply at 12. Instead of requiring CPS to make up that shortfall with half of that amount to equalize the cluster and compensatory funds (*i.e.*, an additional $8.4 million to be reallocated on top of the $7.7 million), the United States stated that it was "willing to consider the use of the $16.8 million to fund racially identifiable clusters in lieu of other compensatory programs for this school year only." Id. at 12. Thus, the United States was willing to forego the $8.4 million, not $16.8 million, in additional compensatory programs that would have been needed to equalize funds between clusters and compensatory programs. This offer was made prior to the United States' knowledge of the $4.8 million used for transportation instead of compensatory programs. Thus, the United States would be willing to accept a reduction of $3.6 million (i.e., the $8.4 million should be reduced by the $4.8 million) from the amount needed to achieve a full remedy of the 2004-05 violations. Since CPS admitted that the violations actually total $18 million, see Tchaou Decl. ¶ 9, the relief we would accept would be $14.4 million.

In the event this Court rules for the United States and accepts CPS' argument that it does not have the surplus funding available this year to pay the United States' requested remedy, see CPS' Opp'n at 4-5 & Martinez Decl. ¶ 6, the United States respectfully recommends an alternative remedy for the Court's consideration. The proposed remedy for the 2004-05 violations would come in the form of $14.4 million in additional compensatory programs for the 2006-07 school year. As explained below, the proposed remedy for the 2005-06 violations would also come next school year and would include $7 million for additional compensatory programs and whatever additional amount would be need to have the 2005-06 desegregation

budget equal $88.5 million. The United States' interest is not in the funding in and of itself, but rather in the potential of funding to provide quality new or expanded compensatory programs for the most needy racially isolated schools.

The amount needed to remedy the 2005-06 violations would be calculated as follows. This Court would determine the total amount of Section V.A funds that must be removed from the desegregation budget, which we believe is roughly $19 million ($17.1 for Pre-K, bilingual, and after-school programs plus the unidentified amounts for the K, gifted, AP, selective enrollment positions). That amount should be subtracted from the $30 million reported for compensatory programs, U.S.' Mot. Ex. I, and the remaining compensatory funds should be compared to the $18 million reported for magnet clusters. Id. Assuming the improperly moved amount is $19 million, then $11 million would remain for compensatory programs, which is $7 million less than clusters, and the desegregation budget would drop from $103 million to $84 million. Id. This $84 million should be further reduced by the amounts that went to improper transportation.

To determine the amount needed to achieve compliance with ¶ V.B, the remaining amount in the budget should then be compared to $88.5 million, which is the level to which CPS could have reduced its 2005-06 desegregation budget given its ability to cut the prior year budget of $98.3 million by 10%. Assuming that removal of the improper transportation funds reduces the total budget from, for example, $84 million to $80 million, then CPS would have violated its duty to maintain an adequate budget by $8.5 million. Thus, to remedy its 2005-06 violations in the 2006-07 school year, CPS should provide $7 million in additional compensatory programs to racially isolated schools, (with priority going to those with few or none), to achieve compliance with ¶ V.B.1.d plus whatever additional amount is needed to raise the total budget to $88.5 million. This additional amount could come in the form of transportation for M-to-M transfers, as well as positions at magnet/specialized schools or additional compensatory programs.

Although the United States believes that CPS violated the Court's Order, the United States' main goal in these proceedings is to secure the compensatory programs to which racially-isolated schools are entitled under the MCD. The United States seeks compliance from CPS, not punishment. The United States moved for an order to show cause because although lacking complete information, the United States had sufficient information to identify violations of the

Court's Order and the MCD. The United States submits that it has now proven these violations "by clear and convincing evidence." Bartsh v. N.W. Airlines, Inc., 831 F.2d 1297, 1303 n.3 (7th Cir. 1987). Because this is a civil contempt proceeding, CPS' claim of good faith is not at issue. See, e.g., Nat'l Labor Relations Bd. v. Fairview Hosp., 443 F.2d 1217, 1220 (7th Cir 1971). The Court has already stated that there is no bad faith on the part of either party. At this stage, the United States seeks to determine the exact amount of CPS' violations for the 2005-06 school year and to achieve a full remedy for these violations and those of last year so that the promise of the MCD is fulfilled. If this promise cannot be fulfilled until next year, so be it.

Respectfully submitted,

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DATED: September 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2005, pursuant to N.D. Ill. L.R. 5.5, I electronically filed United States' Reply in Support of its Motion to Show Cause 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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