IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CLIFFORD EUGENE DAVIS, JR., *et al.*, Plaintiffs	)	
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor	)	C.A. NO. 56-1662-D
	)	Hon. James J. Brady
v.	)	
	)	Hon. Magistrate Docia L. Dalby
EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*, Defendants.	)	

UNITED STATES' REPLY IN SUPPORT OF MOTION TO ENFORCE CONSENT DECREE TIME PROVISION

The consent decree time provision's validity is grounded in two simple principles. First, parties to a desegregation case – like parties in any other type of case involving a violation of the Constitution or other federal law – can agree to a remedy's form and time period for implementing it. Second, upon reaching an agreement, the parties, barring extraordinary circumstances, will be held to their bargain. These principles apply with particular force here, where significant obligations remain outstanding under the 1996 consent decree and the 1998 tax plan.

EBR fails to cite a single case in which a court has nullified a consent decree time provision and declared a school district unitary over a party's objection. Instead, in arguing that it should not be bound by its agreement, EBR misstates the law, the facts and the record in this case. EBR argues that Freeman and Dowell prohibit parties from agreeing to a fixed time

period when courts continue to approve such agreements. It argues that the outstanding obligations under the decree and the 1998 tax plan are "ancillary" to EBR's duty to desegregate when their very purpose is to eliminate the vestiges of the former dual system. It argues that it has complied with every order in this case when the Court has repeatedly addressed EBR's non-compliance with orders. It argues that the decree requires race-based practices that are unconstitutional "absent a need to remedy a violation" when that is precisely their role here. Finally, it argues that a continuing decline in white student enrollment requires the premature termination of the decree without any evidentiary support that the decline is related to the decree, rather than to the Board's own failures in implementing it.

Each of these misstatements is addressed below.

I. The Time Provision Does Not Conflict with Dowell or Freeman.

Neither Dowell nor Freeman prohibits parties in a school desegregation case from defining a consent decree time period. See U.S. Supp. Mem. at 10-12. And, contrary to EBR's assertion, EBR Opp. at 5, a negotiated time provision does not impermissibly conflict with the Supreme Court's mandate that federal court supervision is to end once the school district has remedied the effects of past discrimination. Rather, a decree's duration, like any other decree provision, is negotiable, and the parties in compromising their claims may "give up certain rights or benefits in return for others." Berry v. Benton Harbor Sch.

Dist., 184 F.R.D. 93, 103 (W.D. Mich. 1998) (approving desegregation settlement where parties agreed that court would "continue jurisdiction over the case for a transition period of three years").

The circuit court cases cited by EBR do not hold otherwise. EBR cites Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001), cert. denied, 2002 WL 171970 (Apr. 15, 2002), as an instance in which a court nullified an agreement between plaintiffs and a school district that unitary status had not yet been achieved. EBR Opp. at 6-7. Belk, however, is readily distinguishable.

First, like Freeman and Dowell, Belk involved compliance with a long-standing desegregation order that did not contain a fixed time provision. Belk, 269 F.3d at 315. The Fourth Circuit found that the school district had complied with that order in good faith, given that "no further relief has been sought since the district court removed the case from the active docket in 1975." Id. at 316, 332.

Second, unlike this case, in Belk, the parties' "agreement" was not the product of a judicially-approved consent decree to resolve a disputed claim, but rather was a "litigation strategy" to perpetuate judicial supervision. Id. at 333-34. Thus, the court's action in Belk is most analogously viewed as rejection of an agreement that did not result from a true arm's-length negotiation. Cf. 8/1/96 Hearing Tr. at 78-79 [docket no. 882] (in approving consent decree, Court found that "there is no

collusion or anything of that nature among the parties to this litigation").

EBR is likewise wrong in asserting that the court in Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999), nullified a consent decree time provision and permitted defendant to prematurely move for unitary status. EBR Opp. at 20. At issue in Reed was a consent decree negotiated in 1994 which provided that the parties would not request a hearing to assess compliance with the decree and other court orders until July 1997. 179 F.3d at 460. In January 1995, the school district moved to modify the decree and for partial unitary status. Rather than attempt to enforce the time provision, the plaintiffs opposed the modification on the grounds that there had been no significant change in circumstances since the decree's entry. Id. The parties then negotiated a superseding decree that permitted the school district to move for unitary status by January 1996, which it did. Id. at 461-62. Thus, Reed affirms the parties' ability to define a consent decree's period of duration.

Since Dowell and Freeman were decided, numerous courts have approved desegregation decrees containing time provisions, just as this Court has.[1] See U.S. Supp. Mem. at 8-9. EBR's response to these cases is that none involve "a Consent Decree provision

[1]That the Court fully understood Dowell and Freeman, and the limit of its jurisdiction is demonstrated by its statement at the fairness hearing that "the only interest a federal district court has is to see to it that its local school system is desegregated." 8/1/96 Hearing Tr. at 77.

purporting to require the continuation of federal judicial supervision in a school desegregation case even though the school district is unitary." EBR Opp. at 16-17. But neither does this case. Rather, the decree here - like the decrees in those cases – prescribe the steps to be taken toward unitary status and when. See, e.g., NAACP v. Duval County Sch., 273 F.3d 960, 963 n.9, 967 (11th Cir. 2001) (finding district unitary where it had timely implemented decree and maintained "three years of racial equality in all areas of school operation" as required by decree); Berry v. Benton Harbor Sch. Dist., ___ F. Supp. 2d ___, 2002 WL 538988, *2 (W.D. Mich. Apr. 4, 2002) (dismissing two districts pursuant to settlement agreement after decree's three-year period had elapsed); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1363, 1368 (M.D. Ala. 2002) (finding district unitary under decree with three-year time provision where district had timely performed all actions required by the decree within prescribed time period).

In sum, far from seeking continued federal supervision "even though the school district is unitary," EBR Opp. at 16-17, the United States seeks enforcement of the time provision so that EBR fully implements the consent decree and tax plan. Until these outstanding obligations are performed, EBR cannot claim to have complied with all of the Court's orders for a reasonable period of time.[2]

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[2]Quite apart from its unfinished business under the decree (continued...)

II. The Decree and Tax Plan Obligations Are Directly Linked to EBR's Illegal Actions.

EBR does not dispute that unperformed obligations remain under the decree and tax plan, but instead argues that these obligations are merely "ancillary" to EBR's duty to desegregate, and that the decree time provision must therefore be ignored. See EBR Opp. at 24-27. EBR is wrong.

The requirement to eliminate t-buildings stems directly from EBR's deliberate overcrowding of one-race schools "to perpetuate all-white schools." Davis v. E. Baton Rouge Parish Sch. Bd., 514 F. Supp. 869, 875 (M.D. La. 1981); Davis v. E. Baton Rouge Parish Sch. Bd., 498 F. Supp. 580, 584 (1980) ("It is undisputed that the board has followed the practice of constructing temporary classrooms at schools which become overcrowded rather than transferring excess students to under-utilized schools."). The decree's elimination of t-buildings, together with the use of enrollment limits, is intended to halt this practice.[3]

The facility repairs and construction set forth in the tax plan were expressly contemplated in the decree and are intended to remedy EBR's historical neglect of the system's black schools:

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[2](...continued)
and tax plan, EBR has repeatedly disregarded many of the Court's orders and has only begun complying with other orders during the current school year. See U.S. Reply at 8-12, infra. This non-compliance alone defeats EBR's motion for unitary status and counsels against the Court exercising its discretion to take up the issue of unitary status sua sponte.

[3]EBR, however, only began eliminating t-buildings and complying with the decree enrollment limits in the 2001-02 school year.

> A 1993 facilities study established that a minimum of . . . $23,403,700 is required, to bring the physical facilities of the racially identifiable black schools into compliance with all codes and current needs. . . . The EBRPSS acknowledges its legal obligation under this Consent Decree to take necessary and reasonable steps to make the repairs and/or replacements to racially identifiable black schools. The parties agree and acknowledge that "necessary and reasonable steps" for purposes of this paragraph shall include but are not limited to seeking sources of revenue which are not presently recurring in nature.

Decree at 2, § 2A (emphasis added).

In seeking judicial approval of the tax plan, EBR stated that it developed the plan "in recognition of its obligations pursuant to the Consent Decree." 11/10/99 EBR Motion Regarding the Remaining Portions of the Tax Plan, at 2, ¶ 8 [docket no. 1146]; Roger Moser Affidavit, ¶ 11 (Exhibit 1 to EBR Tax Plan Motion) [docket no. 1148]. The tax plan improvements not only are critical to equalizing facilities but also to making the schools with magnet programs "more attractive" to prospective students. William Robbins Affidavit, ¶ 23 (Exhibit 2 to EBR Tax Plan Motion) [docket no. 1148].

The fatal flaw in EBR's argument is that it treats implementation of the consent decree as irrelevant to whether EBR has complied in good faith with the Court's orders. See EBR Opp. at 24 (if good faith compliance is shown, "it does not matter that there may be some provisions of the remedial decree . . . requiring future compliance"). But good faith compliance requires compliance for a reasonable period with all orders, not some orders or portion of orders. Until EBR has fully implemented the decree and tax plan – whose obligations are

directly linked to EBR's past illegal actions – it has not complied in good faith, and there is no basis for nullifying the decree's time provision.

III. EBR Has Repeatedly Disregarded Court Orders.

EBR argues that the United States fails to identify "a "single provision of the Consent Decree the Board has failed to implement." EBR Opp. at 25. Whether or not EBR has complied with past obligations is a different question from whether EBR should be relieved of complying with its remaining obligations under the decree and tax plan. But even if past compliance could serve as a basis for nullifying a time provision negotiated by the parties, EBR has repeatedly disregarded the Court's orders.

A. T-buildings

The decree obligates EBR to eliminate t-buildings over a 5-to-8 year period. Decree at 6. Until the 2001-02 school year, however, EBR, rather than reduce t-buildings, had increased the number in use throughout the school system.

In 1997, EBR requested permission from the Court to add 27 t-buildings for use during the 1997-98 school year. The Court approved these t-buildings – and the United States did not oppose the motion – on the condition that EBR submit a t-building reduction plan by September 1997. 4/7/97 Order [docket no. 894]. EBR, however, did not submit a plan in either of the following two school years. See 2/18/00 Order at 2 n.1 [docket no. 1208] (finding that EBR, as of February 2000, still had not submitted the required plan).

In 2000, EBR again requested permission to continue using the 27 t-buildings and to add even more t-buildings, which the Court denied. 6/1/00 Order [docket no. 1261]. Rather than comply with this order, EBR simply re-filed its motion two weeks before the start of the school year. The Court again denied the request and issued a supplemental ruling, stating that it had "indications that someone connected with the School Board may have instructed school board employees to ignore the June 1, 2000 ruling . . . to deliberately create chaos and confusion on the opening day of school." 8/15/00 Order at 2 [docket no. 1296]. The Court asked the United States Attorney to investigate EBR's conduct to determine whether contempt of court proceedings were warranted. Id. at 3. The Court suspended its request only after the school board president and the superintendent offered "apologies . . . for failing to implement" the t-building orders. 9/1/00 Order at 3 [docket no. 1332].[4]

Due to EBR's repeated failure to submit a good faith t-building reduction plan, the Court directed Dr. William Gordon to work with EBR personnel and the parties to identify t-buildings to be eliminated. Subsequently, Dr. Gordon prepared a report

[4]EBR finally obtained approval to continue using several of the 27 t-buildings in question not because it had made the required showing under the decree but because students had already been placed in the t-buildings. See 9/19/00 Order [docket no. 1347] ("the court is once again confronted with a *fait accompli*. School has started; the students are already physically present at those schools; the overcrowding at each school is such that student learning will be most difficult; other problems to the students will occur by denial of use for the current school year.").

that served as the basis for EBR's t-building elimination plan, which was submitted nearly four years after the original September 1997 deadline. 7/25/01 Order [docket no. 1596]. The plan did not take effect until the 2001-02 school year, and will not be completed until the 2004-05 school year.

B. Enrollment Limits

Under the decree, each school's enrollment is limited to a prescribed number of students. Decree, Exhs. 8, 9 & 10. The limits' purpose is "to ensure that the School Board will not allow expansion of one-race schools by overcrowding and the use of temporary buildings." 6/28/00 Order at 3 [docket no. 1264]. But "[b]ecause the Board has essentially ignored them, the enrollment limits (caps) have not achieved their purpose." Id.

The Court has ruled numerous times that the decree limits are binding. See, e.g., 7/29/99 Order [docket no. 1075]; 8/17/99 Order [docket no. 1095]; 8/20/99 Order at 2 [docket no. 1098]. Notwithstanding these prior rulings, EBR repeatedly sought Court approval to exceed enrollment limits at racially identifiable schools without offering any plan to reduce excess enrollments or to prevent their recurrence.[5]

[5]While the decree permits EBR to exceed the enrollment limits at particular schools upon Court approval, such approval must be obtained within 15 days of the semester's beginning. Decree at 6-7. In several instances, EBR failed to even file a motion within this 15-day period. See 2/8/99 EBR motion [docket no. 998]. Indeed, for the Spring 1999 semester, EBR did not file a motion to exceed enrollment limits until the school year was almost complete. See 5/10/99 EBR Motion [docket no. 1040].

EBR again exceeded enrollment limits for the 1999-00 school year, this time without ever obtaining court approval. 6/1/00 Order [docket no. 1261]. In June 2000, "[a]fter being informed by counsel for the School Board that [EBR had] made no plans" to comply with the limits, the Court ordered EBR to submit a plan "setting forth specifically how [it] will fully comply with the Consent Decree enrollment limits (caps) and which furthers the desegregation of the [EBR] School System with the opening of school for the 2001-02 school year." 6/28/00 Order at 2, 4 [docket no. 1264].

On August 1, 2000, EBR filed a plan in which it projected that nearly one-third of the system's schools would exceed their enrollment limits, with most of these schools having racially identifiable enrollments. EBR's "plan" proposed to raise the decree limits at a number of these schools and to restrict M-to-M transfers, a primary component of the decree's desegregation plan. The Court rejected the plan as inadequate. 10/26/00 Order at 2-3 [docket no. 1364] (EBR's plan "on its face fails to comply with the court's order"). EBR submitted a second plan, which, rather than further desegregation, would increase the number of students who would attend racially identifiable schools. The Court again rejected EBR's plan, and ordered the parties, under the direction of Dr. Gordon, to prepare an acceptable plan. 2/7/01 Order at 3 [docket no. 1467]. As with t-buildings, the plan ultimately approved by the Court did not take effect until the 2001-02 school year, and only after EBR unsuccessfully

appealed the Court's orders requiring EBR to continue to make room for M-to-M transfers.

EBR's record of non-compliance extends to other decree obligations and court orders preceding the decree. See, e.g., 12/13/99 Order at 6 [docket no. 1161] ("At the beginning of one school year, the Plan called for eight magnet schools to open. Seven of the eight failed to open. The reasons for that failure have never been satisfactorily explained to the court."); 7/25/01 Order at 2-3 [docket no. 1598] (discussing EBR's failure to comply with court directives in 1982 and 1988). In short, EBR's contention that there has not been a "single instance" in which it has failed to comply with the Court's orders is meritless.

IV. The Decree's Race-based Provisions Are Solely for Remedial Purposes.

EBR argues, citing a string of cases involving school districts and universities not under an order to desegregate, that the decree must be terminated prematurely because it "employs race-based restrictions that would unquestionably be unconstitutional absent a need to remedy a past violation of the Constitution." EBR Opp. at 9. The short answer is that the decree's race-based provisions are intended solely to remediate EBR's past discrimination against black students. Absent from EBR's discussion is any mention of Belk, which held that a school

district ordered to desegregate may, consistent with the duty to desegregate, take race into account in assigning students. Belk, 269 F.3d at 353-55, 397-416.[6]

The decree requires race-based action by EBR in two instances: (1) to control the racial make-up of the magnet programs, and (2) to increase black student participation in the the system-wide gifted and talented program. Decree, App. A at 2-24. Both requirements stem from EBR's practice of excluding black students from magnet programs, particularly Baton Rouge Magnet High School, and admitting inflated numbers of white students into the gifted and talented program in order to segregate them from black students.

Thus, the decree obligates EBR not only to eventually increase black student admissions to Baton Rouge Magnet High to 50% of the school's total enrollment (compared to an approximately 70% black system-wide enrollment) but also to take affirmative steps to create a "respectful and inclusive" environment at the school. Id. at 21. Likewise, the decree acknowledges the "continuing disparity between black/white enrollment" in the gifted program, and requires EBR to expand the criteria it uses to identify gifted and talented students to

[6]In addition to the issue of whether the Charlotte-Mecklenburg school district had attained unitary status, Belk involved the question of whether the district acted unconstitutionally in controlling the racial composition of its magnet program enrollments. The court, by a 6-5 vote, held that it did not. 269 F.3d at 353-55 (opinion of Wilkinson, C.J., joined by Niemeyer, J.,), 397-416 (opinion of Motz & King, J.J., joined by Michael & Gregory, JJ.).

include "non-traditional" ones developed by the state department of education. Id. at 22-23.

More fundamentally, the magnet programs created by the decree "are the primary tool for desegregating the predominantly black schools in the inner city." Id. at 2. Indeed, other than M-to-M transfers, they are the primary means of desegregating the entire school system. Thus, to increase the magnet programs' desegregative ability, the decree limits the number of students of either race who may enroll in the magnet programs.[7] Whatever the ongoing ability of school districts to use race for reasons other than remediating past discrimination, school districts under court order to desegregate "must of course take race into account when assigning students." Belk, 269 F.3d at 340 n.9.

V. EBR Has Not Justified Modifying the Decree.

EBR argues, without any evidentiary support, that "absent relief from the Consent Decree in the very near future," white and middle class student enrollment will continue to decline until only "poor children" remain in the school system. EBR Opp.

[7]EBR claims that the enrollment limits for the magnet program harms black students who, but for the limits, would be able to enroll in the programs. EBR Opp. at 12-13 & n.2. Until now, however, EBR has neither raised this issue with the parties or the Court nor sought to modify the decree to increase the limits at the magnet programs. Likewise, until now, EBR has asserted that non-magnet students attending a school with a magnet program benefit from the magnet program's instructional offerings. See EBR Unitary Status Mem. at 22 (stating that "magnet programs benefit not only their participants, but also non-magnet students in magnet host schools.").

at 17.[8] But justifying a modification to a consent decree requires more than unsupported assertions; it requires evidence. See Heath v. DeCourcy, 992 F.2d 630, 635 (6th Cir. 1993) (finding that district court abused its discretion in granting modification on basis of unverified statements, unauthenticated materials, and argument of counsel).

EBR does not dispute that the district's white enrollment has been declining since before entry of the consent decree. Indeed, it cannot be disputed that the system has lost enrollment in the years before it was ordered to desegregate, before the decree's entry, and in the first four years of the decree, notwithstanding that EBR permitted all students to enroll at their zone schools without regard to the schools' enrollment limits. The long-term decline certainly made it foreseeable that the decline might continue. That the parties hoped that a new plan would reverse the decline did not make its continuation unforeseeable. This is why the parties agreed that the Court could order a new desegregation plan if enrollment "stabilization" was not accomplished. Decree at 7.

Given this anticipated change in circumstance, EBR must show that it has made a reasonable effort to comply with the decree, that it should be relieved of its obligations, and that the proposed modification is suitably tailored to the changed

[8]EBR apparently no longer contends that it expected a large number of returning private school students to help desegregate the system given that the decree projected only 611 such students. See U.S. Supp. Mem. at 17.

circumstances. Heath, 992 F.2d at 635 (citing Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992)). This EBR has failed to do.

CONCLUSION

The decree's time provision does not conflict with the Supreme Court's desegregation decisions. Furthermore, EBR fails to carry its heavy burden of showing why the decree should be modified in the face of anticipated changes in circumstance. In short, EBR's self-declaration of unitary status is simply not a legal basis to set aside the time provision negotiated by the parties and approved by this Court. The Court should therefore enforce the decree as negotiated by the parties.

Respectfully submitted,

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