No. 01-30168

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLIFFORD EUGENE DAVIS, JR.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Plaintiffs-Appellees

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, Etc., ET AL.,
Defendants

EAST BATON ROUGE PARISH SCHOOL BOARD, A Corporation,
Defendant-Intervenor Defendant-Appellant

v.

UNITED STATES OF AMERICA,
Intervenor Plaintiff-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Appellants have requested oral argument. The United States does not object.

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STATEMENT OF JURISDICTION

The jurisdiction of the district court in this school desegregation case is based upon 28 U.S.C. 1331. The portion of the January 4, 2001, Notice to

Counsel that is the subject of this appeal is not appealable under 28 U.S.C. 1292(a)(1) because it is not a modification of the 1996 Consent Decree. Neither is it appealable under the collateral order doctrine.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court's statement clarifying that "all students who occupy a building shall be included in the enrollment limits" is an appealable order.

2. Assuming it is appealable, whether the district court abused its discretion by clarifying that "all students who occupy a building shall be included in the enrollment limits," *i.e.*, whether the court's statement is an improper modification of the 1996 Consent Decree.

STATEMENT OF THE CASE

1. This school desegregation case was filed in 1956 by plaintiffs Clifford Eugene Davis, et al. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, C.A. No. 1662 (M.D. La.). In 1974, plaintiffs-intervenors Dr. D'Orsay Bryant and Alphonso Potter filed a motion for supplemental relief alleging that the 1970 plan for desegregation had not effectively desegregated the former statutory dual school system. In the 1970 plan, "[s]tudent assignment was based primarily on the neighborhood school concept," supplemented by a majority-to-minority transfer provision. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 570 F.2d 1260, 1262 (5th

Cir. 1978), cert. denied, 439 U.S. 1114 (1979). The district court denied the motion for supplemental relief, found that the parish school system was being operated on a unitary basis, and dismissed the case with prejudice. This Court vacated the order of dismissal and remanded for the district court to "make findings regarding the feasibility and efficacy of implementing" alternatives to the neighborhood school concept in order to desegregate the numerous essentially one-race schools in the system. *Id.* at 1263.

The United States intervened in 1980, and filed a motion for partial summary judgment, joined by the plaintiffs-intervenors, on the issue of the school board's liability. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 498 F. Supp. 580, 583 (M.D. La. 1980), aff'd, 721 F.2d 1425 (5th Cir. 1983). The district court found that the "undisputed facts point[ed] inexorably to the conclusion that the East Baton Rouge Parish School Board ha[d] not successfully dismantled the former dual system." *Id.* at 586. The district court rejected the Board's justification for the continued existence of so many one-race schools because it found that "the undisputed facts establish that the school board has simply constructed white schools for white students and black schools for black students without consideration of location so as to further desegregation or to forestall resegregation of the school system." *Id.* at 584. The court also found that the Board used

temporary buildings to perpetuate all-white schools. *Ibid.* The court ordered the Board to submit a proposed plan for additional desegregation to become effective for the 1981 school year.

The plan submitted by the Board was rejected by the district court as failing to "dismantle the dual educational system 'root and branch' as required by the Constitution." *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 514 F. Supp. 869, 871 (M.D. La. 1981), aff'd, 721 F.2d 1425 (5th Cir. 1983). The court found that the Board's proposal would leave "nearly half of the elementary students in one-race schools with no serious indication that the ratio will improve in the future." *Id.* at 873. The court also rejected the government's plan and devised its own plan, borrowing from both the Board's plan and the government's plan. *Id.* at 874. In order to reverse the segregative effects of the Board's past practices, the court forbade the Board from placing any temporary buildings without its authorization. *Id.* at 875. In addition, as to racially identifiable schools that were left unchanged by the 1981 plan, the court ruled that "the capacity * * * as shown in the Revised Capacity Analysis submitted to the Court by the School Board shall, in no event, be exceeded. The School Board shall make every effort to keep attendance at those schools to a minimum, and shall, whenever possible, rezone attendance lines so as to include students from those schools into adjacent fully desegregated pairs

or clusters." *Id.* at 879. In 1982, the court ordered the Board to propose additional measures for reducing the percentage of black enrollment at eight former all-black schools. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 541 F. Supp. 1048, 1054 (M.D. La. 1982).[1]

In 1983, this Court affirmed the district court's liability determination. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425 (5th Cir. 1983). In affirming, this Court noted that, of the 76 new schools built since 1954, "fully 73 of [them] opened to serve student bodies over 90% one race. * * * Thus, the Board has apparently located its new schools to serve single-race attendance districts." 721 F.2d at 1435. This Court also noted that "despite an annual redistricting process, the Board has routinely reacted to overcrowding in certain of its schools, generally those serving white neighborhoods, by erecting temporary classrooms rather than by redrawing district lines to send children to underused school facilities in other neighborhoods. The racial isolation of many of the schools in the EBRP system, therefore, is in this important respect the result of the Board's conduct since 1954." 721 F.2d at 1435. In addition, this Court held that the district court had not abused its discretion in rejecting the Board's proposed plan and drawing

[1] The court also adopted, with modifications, the Board's alternative plan for desegregation of the middle schools.

one of its own.

As of the end of the 1995-1996 school year, the 1981 plan had failed to dismantle the dual school system (R. Vol. 3, 554-569). Extensive racial isolation remained: 56.4% of black elementary students attended racially identifiable black elementary schools, and 61.4% of white elementary students attended racially identifiable white schools. At the middle school level, 40.6% of black students and 65.4% of white students attended racially identifiable schools in which their race was in the majority; and at the high school level, the percentages attending racially identifiable schools was 40.5% of black students and 55.6% of white students (R. Vol. 3, 554-569, Exh. 6).[2] Out of 97 total schools that were in operation in 1995-1996, 58 were racially identifiable (R. Vol. 3, 560).

2. In 1996, the Board proposed a new plan, which it "asserted was designed to raise and equalize the level of quality of the educational experience provided to the students attending the East Baton Rouge Parish Public School System, reduce the number of racially identifiable schools, stabilize and increase the number of students in the system, increase the number of students enrolled in desegregated

[2] The exhibits to the United States' Response To East Baton Rouge Parish School Board's Motion For Approval Of Actions In Connection With Enrollment During The Fall Of 1999 (R. Vol. 3, 554-569) are not separately paginated. We therefore cite to the number of the exhibit from which these statistics were taken.

zschools, and increase interracial exposure among students" (R. Vol. 1, 225). Following negotiations, the parties agreed to implementation of that plan and presented a Consent Decree for the district court's approval (R. Vol. 1, 1-225). On August 2, 1996, following a hearing, the district court approved the Consent Decree (R. Vol. 1, 226-227).

The Consent Decree replaced the mandatory student assignment plan that was implemented in 1981, following the district court's finding that the Board had failed to dismantle the former dual school system. See *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 498 F. Supp. 580 (M.D. La. 1980), aff'd, 721 F.2d 1425 (5th Cir. 1983). The Decree provided for creation of "community sensitive attendance zones," a form of neighborhood schools. Desegregation was to be accomplished by two voluntary desegregation measures: (1) a comprehensive magnet school program to attract white students to predominantly black schools, and (2) intensified recruitment of majority-to-minority transfers of black students to predominantly white schools. To ensure that the return to a neighborhood school-based plan did not result in resegregation and to increase the likelihood of success of the voluntary desegregation measures in the plan, the parties agreed on certain safeguards that mirrored those placed in the 1981 plan by the district court. The Decree placed limitations on the Board's use of temporary buildings, requiring that

the Board certify that temporary buildings moved from one school to another will be used for implementing the plan and will further desegregation. In addition, the Board committed itself to eliminate one-third of the temporary buildings by the fifth year of the plan, and 75% of the temporary buildings by the eighth year of the plan. In addition, Exhibits 8, 9, and 10 to the Decree established proposed enrollment limits for each school and provided that "[i]f the proposed enrollments after transfers and returns to a school are exceeded, then Court approval will have to be obtained in connection with the same" (R. Vol. 1, 221a).[3] Under the terms of the Decree, the Board was required to obtain such approval "no later than 15 school days subsequent to the beginning of each semester" (R. Vol. 1, 221-221a).[4]

The Decree required the Board to provide pre-kindergarten classes during the 1996-1997 school year to children in 25 schools defined as being "at-risk" because of a number of demographic characteristics of their attendance zone population (R. Vol. 1, 193). In addition, pre-kindergarten classes were to be implemented at all but one of the elementary magnet schools (R. Vol. 1, 192). The

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[3] Certain of the pages of the Consent Decree were left out of the consecutive pagination of the record on appeal. For convenience, we cite page 6 of the Decree as R. Vol. 1, 221a.

[4] The proposed enrollments for certain schools were amended in August 1996 (R. 851).

Board did not have enrollment projections for pre-kindergarten classes at that time.

3. On September 27, 1996, shortly after the Decree was implemented, the Board sought permission to exceed the proposed enrollments in 17 schools (R. Vol. 2, 228-233). The district court granted that motion (R. Vol. 2, 234-236). Similar motions were filed on September 24, 1997 (R. Vol. 2, 237-242), and October 23, 1998 (R. Vol. 2, 244-250), seeking permission to exceed the proposed enrollments during those school years. Neither of those motions was filed within 15 days of the beginning of the school year, as required by the Decree. The court granted both of those motions (R. Vol. 2, 243, 251).

On May 10, 1999, the Board filed a motion to exceed the proposed enrollments for the remainder of the Spring semester of 1999 (R. Vol. 2, 252-265). The United States, noting that the Board had waited until the end of the 1998-1999 school year to seek the court's approval of over-enrollments that had been occurring at least since January 21, 1999, did not object to the court's granting approval (R. Vol. 2, 270; see R. Vol. 2, 264). The United States requested, however, that the court find the Board in non-compliance with the enrollment projections established in the 1996 Consent Decree and require the Board "to take all necessary steps to comply with the enrollment projections by the beginning of the 1999-2000 school year" (R. Vol. 2, 270). On July 20, 1999, the district court

held a hearing on the Board's motion. The Board argued at the hearing that the enrollment limitations applied only to the first three years of the Decree's implementation (7/20/99 Tr. 130-131).[5] The court stated, however, that the terms of the enrollment limitations provision of the Decree did not contain any time limit (7/20/99 Tr. 134-135). The court also stated that the purpose of the provision was to "make sure that [the Board did] not expand one race schools as they existed in 1996," and that requiring the Board to come to court within a short period of time after the opening of schools if it looks like it is going to exceed the enrollment limitations "is a very good method of doing that" (7/20/99 Tr. 131). On August 17, 1999, the court issued a ruling reiterating that it had denied the Board's May 10, 1999, motion to exceed the enrollment limits at the hearing, and again denying it (R. Vol. 2, 314-316; see also R. Vol. 2, 317-318).

On October 29, 1999, the Board moved for approval of actions in connection with enrollment during the fall of 1999 (R. Vol. 2, 319-542). Both the United States and the NAACP opposed the Board's motion (R. Vol. 3, 554-569, 570-576, 577-579), and the court ordered the Board to submit further support for its motion (R. Vol. 3, 580). Before a hearing could be held on that motion, the

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[5] The transcript of the July 20, 1999, hearing is contained in Volume 10 of the Record on Appeal. The transcript is cited in this Brief as "7/20/99 Tr. __."

Board submitted a motion for approval of actions in connection with enrollment during the spring semester of 2000 (R. Vol. 4, 682-907). A hearing was held on February 11, 2000, and the motion was denied as moot on June 1, 2000, since the school year had ended (R. Vol. 5, 935-936). Following a status conference held on June 22, 2000, at which the Board indicated that it had made no plans to comply with the enrollment caps for the 2000-2001 school year despite several orders directing compliance, the court entered an order stating (R. Vol. 5, 932):

> The enrollment limits (caps) were not included in the Consent Decree by mistake or without purpose. Among other purposes, they are there to ensure that the School Board will not allow expansion of one-race schools by overcrowding and the use of temporary buildings. Because the Board has essentially ignored them the enrollment limits (caps) have not achieved their purpose.

The court ordered the Board to submit a plan by August 1, 2000, "setting forth specifically how [it] will fully comply with the consent decree enrollment limits (caps) and which furthers the desegregation of the [EBRP] School System with the opening of school for the 2001-2002 school year," including "arguments as to why is reasonable to grant another year's delay" (R. Vol. 5, 927-934).[6]

4. On August 1, 2000, the Board filed a plan (R. Vol. 5, 958-1206) projecting that 32 schools (17 of which were racially identifiable) would exceed

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[6] The deadline was subsequently postponed (R. 1332, 1392, 1413).

their enrollment limits for the 2001-2002 school year. Indeed, the Board proposed raising the enrollment limits at a number of racially identifiable schools (R. Vol. 5, 1160, 1185). The proposed plan accomplished only negligible desegregation. Moreover, the plan proposed restricting majority-to-minority transfers, a primary component of the Consent Decree's desegregation plan (see R. Vol. 9, 14), without providing an alternative to ensure that the desegregation process is not impeded or reversed.[7]

The Board also filed a motion on August 1, 2000, that, among other things, sought permission to add pre-kindergarten gifted programs and talented programs to several elementary schools (R. Vol. 5, 937-957). All of the plaintiffs objected to the addition of these programs because of their potential effect on the enrollment limits in the Decree (R. Vol. 6, 1209-1218). On August 10, 2000, the district court granted the Board's motion with the "proviso" that "[w]ithin ten (10) days after the date of this ruling, the School Board shall cause a declaration under oath to be filed by a staff member who shall certify as to each of these additional services at each school, that it does not result in the need for additional temporary buildings and that

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[7] Following a hearing, the district court rejected the proposed plan as inadequate and ordered the parties to confer and file a comprehensive plan for complying with the enrollment limits by December 15, 2000 (R. Vol. 6, 1246-1250). The deadline for filing that plan was subsequently postponed to January 16, 2001 (R. Vol. 6, 1381).

the enrollment limits set forth in the Consent Decree are not exceeded" (R. Vol. 6, 1221). The Board filed a motion for reconsideration of that order in which it contended that the court had erred in ruling that the addition of the pre-kindergarten programs would affect the enrollment limits (R. Vol. 6, 1239-1240). The Board asserted that pre-kindergarten students were not included within the enrollment limits set by the Decree (R. Vol. 6, 1240).

On January 3, 2001, the court held a status conference, and on January 4, 2001, the court issued a "Notice to Counsel" summarizing the proceedings at that conference. In Paragraph 2, the court noted the January 16, 2001, deadline for the Board to file its plan to comply with the enrollment limits in the Consent Decree, and then stated that, during the status conference, it had "clarified that all students who occupy a building shall be included in the enrollment limits" (R. Vol. 6, 1383). On January 26, 2001, the Board filed a notice of appeal from that portion of Paragraph 2 of the "Notice to Counsel" (R. Vol. 7, 1705-1708).

STANDARD OF REVIEW

This Court must satisfy itself that it has jurisdiction over this appeal before it may consider the merits. *Goldin* v. *Bartholow*, 166 F.3d 710, 714 (5th Cir. 1999). The district court's interpretation of the Consent Decree is reviewed *de novo*. *Walker* v. *United States Dep't of Housing & Urban Dev.*, 912 F.2d 819, 825 (5th

Cir. 1990). If this Court determines that it has jurisdiction because Paragraph 2 of the Notice to Counsel modifies the 1996 Consent Decree, the district court's action would be reviewed for abuse of discretion. *Police Ass'n of New Orleans Through Cannatella* v. *City of New Orleans*, 100 F.3d 1159, 1171 (5th Cir. 1996).

SUMMARY OF ARGUMENT

1. The East Baton Rouge Parish School Board has appealed, not from an order entered by the district court, but from a statement made by the court in a "Notice to Counsel" summarizing the previous day's status conference. The district court merely stated what was implicit in the enrollment limits provision of the 1996 Consent Decree, *i.e.*, that the limits include every student who occupies a school building. The enrollment limits were intended to prevent the Board from continuing segregative practices that increased the enrollments of one-race schools, rather than taking steps to desegregate them. The Board's contention below that pre-kindergarten students were excluded from the enrollment limits was based upon a misinterpretation of the Decree, and the district court's statement was intended to make clear to the Board that every student in the building counts for purposes of total enrollment. Since the district court's statement clarified the meaning of a decree provision, but did not modify the Decree, this Court does not have jurisdiction under 28 U.S.C. 1292(a)(1). *Martin's Herend Imports, Inc.* v.

Diamond & Gem Trading United States of Am. Co., 195 F.3d 765, 769 (5th Cir. 1999). Moreover, since the appeal involves an interlocutory determination by the district court, the Board must show that the ruling "might have serious, perhaps irreparable, consequence[s]." *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981) (quoting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981)). Because the Board can either establish centrally-located pre-kindergarten centers or take other measures to bring a school building within the established enrollment limits, it has failed to demonstrate that the district court's interpretation will limit its ability to provide beneficial pre-kindergarten classes. The Board's insistence on the primacy of the "community sensitive attendance zones" and its concomitant reluctance to reassign students in order to meet those limits proves not that the district court's interpretation of the Consent Decree will cause irreparable consequences, but rather that the Board refuses to recognize that the "community sensitive attendance zones" are subordinate to the Decree's goal of desegregating the school system.

2. Even assuming that the district court's interpretation modifies the Decree, the court did not abuse its discretion in requiring the Board to count every student in a building within its enrollment limits. Such a modification would be justified by the Board's continuing noncompliance with the enrollment limits that has

undermined the voluntary desegregation methods that were an integral part of the Decree and necessary to its success. A district court may modify an injunction in favor of a plaintiff where it is necessary in order to achieve the original purposes of an injunction that have not been fully achieved. *Sierra Club, Lone Star Chapter* v. *Cedar Point Oil Co.*, 73 F.3d 546, 579 (5th Cir.), cert. denied, 519 U.S. 811 (1996). And where, as here, the district judge has overseen this litigation for many years and has great familiarity with the record, it was within the court's discretion not to hold an evidentiary hearing before ruling, especially where the Board has not stated what evidence it would produce at a hearing. *Gary W.* v. *Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979).

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THIS APPEAL

The Board has appealed from a statement in Paragraph 2 of the district court's January 4, 2001, "Notice to Counsel." The "Notice" summarized the discussion at the previous day's status conference. In particular, Paragraph 2 summarized the discussion at the status conference concerning the Board's plan to comply with the enrollment limits in the Consent Decree. It noted that the Board's plan was due to be filed on or before January 16, 2001, and stated that, during the

status conference, the court had "clarified that all students who occupy a building shall be included in the enrollment limits" (R. Vol. 6, 1383). The Board contends (Br. 17-22) that this statement modified the Consent Decree by requiring the Board to include in the enrollment limits any pre-kindergarten students who attend a particular school, and that the statement is therefore an interlocutory order that is appealable under 28 U.S.C. 1292(a)(1). Alternatively, the Board argues that the statement is appealable under the collateral order doctrine recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Neither of these grounds provides a basis for appeal.

A. *Paragraph 2 Of The Notice To Counsel Did Not Modify The Consent Decree And Therefore Is Not Appealable Under 28 U.S.C. 1292(a)(1)*

1. The Board asserts that jurisdiction is proper under 28 U.S.C. 1292(a)(1), which permits interlocutory appeals when a court "grants, continues, modifies, refuses or dissolves an injunction, or when it refuses to modify or dissolve an injunction." *In re Complaint of Ingram Towing Co.*, 59 F.3d 513, 516 (5th Cir. 1995) (*Ingram)*. The Board contends that the district court's statement that "all students who occupy a building shall be included in the enrollment limits," is an interlocutory order that modifies an injunction, specifically that it modifies the 1996

Consent Decree. [8]

Since "[i]nterlocutory appellate jurisdiction is the exception rather than the rule," this Court has held that "interlocutory appeals are not favored and the statutes allowing them must be strictly construed." *Ingram*, 59 F.3d at 515. In order for appellate jurisdiction to exist, "the district court's order must 'modify' the earlier order, not merely 'interpret' it." *Martin's Herend Imports, Inc.* v. *Diamond & Gem Trading United States of Am. Co.*, 195 F.3d 765, 769 (5th Cir. 1999). The "line between modification and interpretation is a functional one, and the dispositive issue is whether 'the ruling appealed from can fairly be said to have changed the underlying decree in a jurisdictionally significant way.'" *Ibid.* (quoting *Sierra Club* v. *Marsh*, 907 F.2d 210, 212 (1st Cir. 1990)). One way of deciding whether an order modifies or merely interprets a prior order is by focusing on "whether provisions of the district court's subsequent order are implicit in the terms of the original injunction." *In re Seabulk Offshore, Ltd.*, 158 F.3d 897, 899 (5th Cir. 1998). We submit that it was implicit in the 1996 Consent Decree that all students who occupy a building are to be counted toward the enrollment limit. Thus, the explicit clarification made by the district court at the January 3, 2001, status

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[8] A consent decree may constitute an injunction for purposes of 28 U.S.C. 1292(a)(1). *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981).

conference, as memorialized in the "Notice to Counsel," is not a modification of the Decree provision concerning enrollment limits.

To some extent, the issue whether the court's clarification was in fact a modification of the Decree requires this Court to "look through the door" to the merits. *Fern* v. *Thorp Pub. Sch.*, 532 F.2d 1120, 1129 n.6 (7th Cir. 1976). See also *Motorola, Inc.* v. *Computer Displays Int'l, Inc.*, 739 F.2d 1149, 1155-1156 n.9 (7th Cir. 1984). This is so because if the district court "correctly construed the Decree, [it] did not modify it, but if [it] erred in [its] construction, [it] did modify [the Decree]." *Wilder* v. *Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995). In this case, the "look through the door" involves an examination of why the Decree is properly construed to require that all students who occupy a building be counted toward the enrollment limits.[9] A review of the history of the decree and the purpose for inclusion of the enrollment limits demonstrates that this is a clarification, not a modification.

Because the Board historically has reacted to overcrowding by placing temporary buildings at the racially identifiable schools rather than redrawing

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[9] It is not the same, however, as the issue whether it would be an abuse of discretion for the district court to modify the Decree to include pre-kindergarten students who occupy space in an elementary school in the enrollment limits for that school. That issue is discussed in Argument II, *infra*.

attendance zones, see *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d at 1435, the Decree established enrollment limits for each school and directed the Board to eliminate most temporary buildings over a five- to eight-year period. The enrollment limits for the one-race schools were deliberately set below the buildings' actual capacity.[10] The district court has made clear that the enrollment limits were included in the Decree to "make sure that [the Board did] not expand one race schools as they existed in 1996" (7/20/99 Tr. 131; see also R. Vol. 5, 932). Without enrollment limits and court control over the placement of temporary buildings, the Board could continue to expand the size of the one-race schools in a manner that would undermine the voluntary desegregation measures that the Consent Decree envisioned.[11] Specifically, if white students knew that the consequence of their home school's being overenrolled would be mandatory reassignment to another school, they might prefer to opt for attendance at one of the magnet schools designed to desegregate predominantly black schools. In addition, to the extent that white schools are permitted to become more overcrowded, the ability of the

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[10] In some schools, where the capacities were set at the brick-and-mortar capacity of the building, a related purpose of the enrollment limits was to prevent educationally unsound overcrowding. 498 F. Supp. at 584.

[11] In fact, the Board repeatedly sought permission to exceed the enrollment limits (R. Vol. 2, 228-233, 237-242, 244-250, 252-265).

schools to accommodate majority-to-minority transfers of black students would be constrained.

The Board's post-Decree behavior has been characterized by an emphasis on the "community sensitive attendance zones" at the expense of the voluntary desegregation measures in the Decree. Although the success of the voluntary desegregation measures depends upon the Board's compliance with the enrollment limits established thereby, the Board has repeatedly sought the court's approval of the very segregative practice condemned by the district court in 1981. It has continued to seek the court's permission to increase the size of racially identifiable schools and to allow the segregative overenrollment that results to undermine the anticipated desegregative effect of majority-to-minority transfers and magnet schools. Indeed, the Board has repeatedly proposed an amendment to the majority-to-minority transfer program that would permit it to deny majority-to-minority transfers into any school if the enrollment of such student would result in the school's exceeding its enrollment limit under the Consent Decree (R. Vol. 7, 1605-1606; R. Vol. 8, 1652-1653). Arguing that pre-kindergarten classes contained in the elementary schools are exempt from the enrollment limits is another manifestation of that pattern.

Despite the fact that Paragraph 2 of the "Notice to Counsel" does not even

mention pre-kindergarten classes specifically, the Board argues here that the court's clarification in fact modified the Decree to include pre-kindergarten students in the enrollment limits. It supports that argument by pointing to the Decree provision stating that "pre-kindergarten classes are an adjunct to the plan and are not a constituent part of any desegregation plan approved or adopted by the court" (R. Vol. 1, 192) (Br. 21). The fact that pre-kindergarten programs are not a constituent part of the desegregation plan means that pre-K students are not included in the computation of the racial ratio of the school (R. Vol. 1, 209; see also 201-210). But that does not mean that pre-kindergarten children were not intended to be counted as occupants of the building for purposes of the enrollment limits. Indeed, since nothing in the Decree requires the Board to seek permission to add pre-kindergarten classes to schools that were not specified in 1996, the fact that the Board thought it necessary to file a motion to add such classes at four schools on August 1, 2000, suggests that it understood that permission was needed because the addition of those classes would affect the enrollment limits.

The Board's interpretation is symptomatic of its refusal to recognize that the Consent Decree is designed to desegregate the parish schools. Although the Decree permits the Board to frame its desegregation plan around "community sensitive attendance zones," its main objective is to accomplish the desegregation left undone

by the 1981 plan. That objective is underlined by the provision of the Decree providing that if substantial improvement in the goals of "equality of educational opportunities, reduction of racial isolation, and stabilization for the purposes of future desegregation in the school system" are not accomplished by the end of the third year of implementation, "the Court may order the implementation of a desegregation plan utilizing traditional desegregation methodologies" (R. Vol. 1, 221). The third year of implementation ended with the 1998-1999 school year. At about the time when the district court lost patience with the Board's attempts to maintain the status quo of permitting overenrollment at one-race schools to undermine desegregation, it began issuing a series of orders requiring the Board either to justify why overenrollment at particular schools was necessary and would further desegregation, or to propose a plan to prevent the continued overenrollment from occurring (R. Vol. 5, 931-933).[12] The matter came to a head when the Board acknowledged at a status conference in June 2000 that it had made no plans to comply with the enrollment caps for the 2000-2001 school year (R. Vol. 5, 933). At

[12] In its June 28, 2000, order, the court referred specifically to orders entered on July 20, 1999 (R. Vol. 2, 312-313); August 17, 1999 (R. Vol. 2, 314-316); and June 1, 2000 (R. Vol. 5, 935-936), each of which "direct[ed] the Board to comply with the enrollment caps," as well as "at least three status conferences at which the court ha[d] made it abundantly clear that the defendants are to operate consistently with the enrollment caps" (R. Vol. 5, 933).

that point, the court stated that, "[b]ecause the Board has essentially ignored them, the enrollment limits (caps) have not achieved their purpose" (R. Vol. 5, 932).

The Board recites numerous pleadings containing enrollment figures in which it stated that pre-kindergarten students were not included in those figures (Br. 5-9). If, in doing so, the Board is suggesting that the United States waived any argument that pre-kindergarten students are included in the enrollment limits, that suggestion is incorrect.[13] In response to the Board's August 1, 2000, motion to add pre-kindergarten gifted programs to certain schools, for example, the United States stated that it was concerned that "the[] pre-k programs not consume classroom space which would otherwise assist in furthering the desegregation of students in grades K through 5, and result in new t-buildings being added or in schools exceeding their enrollment limits" (R. Vol. 6, 1214). The United States noted that one of the schools to which the Board proposed to add a pre-kindergarten gifted class was already projected to exceed its enrollment limit for the 2000-2001 school year, and that it "would further exceed its enrollment limit to the extent that

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[13] Nor does the fact that the district court has not previously provided its interpretation of the enrollment limits provision of the Decree foreclose it from doing so now in response to the Board's continuing refusal to deal with the overenrollment situation that has existed since the Decree became effective. In the absence of a motion requiring its attention, the court is not expected to issue orders to correct every misinterpretation of a Decree that a party might advance in its pleadings.

additional students are enrolled through the new pre-K programs" (R. Vol. 6, 1214). The United States stated that it did not object to adding the proposed pre-K programs to the designated schools, so long as the Board took precautions to ensure compliance with the Consent Decree enrollment limits and the requirement for reduction of the number of temporary buildings (R. Vol. 6, 1214-1213a).[14] The Decree presents the Board with a choice. If it elects to place a pre-kindergarten class at a particular school, it must make provision for adjustment of enrollment in the K-5 programs. Thus, in granting the Board's motion to add the proposed pre-K gifted classes, the district court did so with the "proviso" that the Board "certify as to each of these additional services at each school, that it does not result in the need for additional temporary buildings and that the enrollment limits set forth in the Consent Decree are not exceeded" (R. Vol. 6, 1221). In addition, the court recommended that the Board enter into a dialogue with counsel for the NAACP concerning the creation of "centrally located pre-kindergarten centers," which would lessen the continuing problem of overenrollment in the predominantly one-race

[14] The second page of the United States' response in opposition to the Board's motion to add pre-K classes, as well as two pages of the letter that is attached to the response as Exhibit A, are missing from the record on appeal. We have filed a motion to supplement the record, along with Supplemental Record Excerpts containing a complete copy of the response. Page 2 of the response is cited in this Brief as R. Vol. 6, 1213a.

schools and also further desegregation. (R. Vol. 6, 1221; see R. Vol. 6, 1217).

The court's reiteration of the basic principle that all students who occupy a building are to be included in the enrollment limit does not modify the Decree. It is both implicit in the Decree and necessary for proper implementation of the Decree's desegregative purpose.[15]

2. Even assuming that the Board has demonstrated that Paragraph 2 of the "Notice to Counsel" modifies the Decree, however, it is not appealable under 28 U.S.C. 1292(a)(1) unless the Board can also show that this interlocutory ruling of the district court "might have serious, perhaps irreparable, consequences." *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981) (quoting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981)). The Board raises two arguments in an effort to meet that burden. First, it argues that including all students who occupy a building in the enrollment limits will limit the ability of the Board to provide beneficial pre-K programs (Br. 13, 15-16). That argument is specious. As the

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[15] Although the substance and not the form of the court's statement controls for purposes of deciding whether it is a modification or an interpretation, it is significant that the court did not issue an order, but rather mentioned the clarification in a "Notice to Counsel." When the court intends to issue an order, it ordinarily does so in the specific language of an order or ruling. If, in the context of a "Notice to Counsel," the court intends to issue a mandatory ruling such as setting a deadline, it makes its intent clear. That it did not do so here strongly suggests that it did not believe that its statement about enrollment limits broke any new ground.

district court recognized (R. Vol. 6, 1221), the establishment of centrally-located pre-K centers is an option. In addition, as demonstrated by the court's order of August 10, 2000, granting the Board's motion to add pre-kindergarten classes to certain schools, the Board may also add pre-K programs to an individual school, so long as it takes other measures to keep the school within the enrollment limits set by the Decree. It was the Board that decided not to implement those programs, if it could not do so on its own terms.

The Board's second argument, *i.e.*, that such measures will "unnecessarily require the movement of students from one school to another (which negatively impacts the 'community sensitive attendance zone' concept approved by the district court in the Consent Decree)" again reveals the extent to which the Board has emphasized the "community sensitive attendance zone" concept at the expense of its obligations to desegregate its schools. The Decree must be read as a whole, so that each and every provision is given effect. *Texas E. Transmission Corp.* v. *Amerada Hess Corp.*, 145 F.3d 737, 742 (5th Cir. 1998) (applying Louisiana law). Since the Decree was entered in 1996, the Board has attempted to avoid taking any measures that would require it to reassign students from one school to another, relying on "the policy of the school district that no student who wishes to attend their home attendance zone school will be denied admission" (R. Vol. 1, 219).

Although guaranteed attendance at the community attendance zone school is the Board's "policy," it is subordinate to the goal of desegregating the school system. The Decree provides that if the plan embodied in the Decree did not result in "substantial improvement" towards the goals of "equality of educational opportunities, reduction of racial isolation, and stabilization for the purposes of future desegregation in the school system," the district court may order the Board to implement "a desegregation plan utilizing traditional desegregation methodologies" (R. Vol .1, 221). The district court permitted the Board to exceed the enrollment limits for the first three years of the Decree, but in 2000, when it became clear that the Board was not working on a plan to avoid exceeding the enrollment limits, the court ordered the Board to submit a plan "setting forth specifically how the Board will fully comply with the Consent Decree enrollment limits (caps) and which furthers the desegregation of the [EBRP] School System with the opening of school for the 2001-2002 school year," including "arguments as to why it is reasonable to grant another year's delay" (R. Vol. 5, 927-934).

Further, the Board has not shown that this interlocutory order can be "effectually challenged" only by an immediate appeal. *Roberts* v. *St. Regis Paper Co.*, 653 F.2d at 170 (quoting *American Brands*, 450 U.S. at 84). Ordinarily, an order modifying or refusing to modify a prior injunction is entered after one of the

parties moves for modification. The decision of the court of appeals in *Massachusetts Association for Retarded Citizens* v. *King*, 643 F.2d 899, 904 (1st Cir. 1981), is instructive. That case involved one of several consent decrees entered in settlement of a class action on behalf of residents of five state schools for persons with mental retardation. In the relevant decree, the defendants agreed to add 2,047 staff positions at the five schools. During a hearing to assess the defendants' compliance with their decree obligations, the defendants argued that the decree permitted a five percent vacancy rate in staff positions, relying on a provision that required defendants to make "special efforts" whenever vacancies exceeded five percent. The district court agreed with a court monitor that this provision did not make an explicit allowance for a five percent vacancy rate, and stated that "[c]ompliance is 100 percent," and that defendants were to "comply literally with the terms of the decree." 643 F.2d at 902-903. When defendants moved for reconsideration of those statements as to the terms of compliance, the district court indicated that it had merely stated its position with respect to what the decree required. On appeal, the defendants asserted that the statements were appealable under Section 1292(a)(1). The court of appeals found that the district court's statements, though "forcefully expressed," could not be characterized as orders because they did not compel the parties to change their behavior or prevent them

from doing so. 643 F.2d at 904. It noted that the district court had not denied a motion or declared that it would not consider a motion. Rather defendants were "ask[ing], in effect, that [the court of appeals] assume that the district court would deny a motion that they have yet to make and that [the appellate court] then review this hypothetical denial." *Ibid*.

In appealing the district court's statement in Paragraph 2 of the "Notice to Counsel," the Board is likewise seeking to appeal a hypothetical denial of a motion to exempt pre-kindergarten students from the enrollment limits in the Decree. The Board is free to file such a motion. If the district court denies that motion, the Board can appeal that order as one refusing to modify an injunction under Section 1292(a)(1). See also *United States* v. *Western Elec. Co.*, 777 F.2d 23, 30-31 (D.C. Cir. 1985). But the district court's statement clarifying that all students who occupy a building are to be included in the enrollment limits is not an appealable interlocutory order under 28 U.S.C. 1292(a)(1).

This case is readily distinguishable from *United States* v. *Board of School Commissioners of the City of Indianapolis*, 128 F.3d 507 (7th Cir. 1997), cited by the Board (Br. 24-25). In *Indianapolis*, the school district asked the district court to lift an injunction entered in 1979, which required it to transport public schoolchildren living in certain parts of the City of Indianapolis that were

predominantly black to public schools located in primarily white suburban areas of Marion County, Indiana. 128 F.3d at 508. The district court declined to lift the injunction, stating that it did not have sufficient evidence as to whether the City had achieved unitary status. At the same time, the district court ordered that kindergarten students from those areas of the City be added to the busing order. This latter order rescinded an earlier order that had permitted parents to opt for busing of kindergarten students, but had not required it. *Ibid.* The court of appeals held that there was "no question that in adding compulsory busing of kindergarten students to the original injunction, the district [court] modified that injunction," and that that portion of the district court's order was appealable under Section 1292(a)(1). *Id.* at 509. In contrast, here the district court's clarification of the enrollment limits provision of the Consent Decree did not change the Decree.

B. *Paragraph 2 Of The Notice To Counsel Is Not Appealable As A Collateral Order*

The Board argues alternatively that Paragraph 2 of the "Notice To Counsel" is appealable under the collateral order doctrine established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* permits appeal of "a narrow class of decisions that do not terminate the litigation, but must * * * nonetheless be treated as 'final.'" *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867

(1994). The Supreme Court has "stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule * * * that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Id.* at 868.

The standard applied by this Court to determine whether an order qualifies as a collateral, appealable order contains the following elements:

> 1) the order must finally dispose of a matter so that the district court's decision may not be characterizable as tentative, informal or incomplete; 2) the question presented must be serious and unsettled; 3) the order must be separable from, and collateral to, rights asserted in the principal suit; and 4) there should generally be a risk of important and probably irreparable loss if an immediate appeal is not heard.

Thompson v. *Drewry*, 138 F.3d 984, 986 (5th Cir. 1998). Although the Board cites the collateral order doctrine as a basis for this Court's jurisdiction (Br. 20), it does not attempt to demonstrate that it meets these "stringent" conditions for collateral order appeal. *Digital Equip. Corp.*, 511 U.S. at 868.

A review of the four elements identified in *Thompson* confirms that this is not the type of situation for which the collateral order doctrine was created. First, the court's clarification that the enrollment limits include all students occupying a building is not in any way "separable from, and collateral to," the rights asserted in

the case.[16] Because it is intended to enforce one of the safeguards included in the plan, it goes to the very heart of the desegregation remedy. Moreover, this appeal does not present any "serious and unsettled" question. It involves solely a disagreement by the Board with the interpretation of a provision of the 1996 Consent Decree, a question that has no relevance to any other litigation. In addition, as we have argued above, there is no "risk of important and probably irreparable loss if an immediate appeal is not heard."

II

ASSUMING THIS COURT FINDS THAT IT HAS JURISDICTION BECAUSE THE DISTRICT COURT MODIFIED THE DECREE, SUCH MODIFICATION IS NOT AN ABUSE OF DISCRETION

If this Court disagrees with our analysis and finds that it has jurisdiction over this appeal because the district court has modified the 1996 Consent Decree, it should affirm the district court's modification. Modifications of an injunction are ordinarily reviewed for abuse of discretion. *Police Ass'n of New Orleans Through*

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[16] Examples of cases that come within this element are *Shanks* v. *Allied Signal, Inc.*, 169 F.3d 988 (5th Cir. 1999) (order denying a claim of immunity from suit); *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920 (5th Cir. 1996) (validity of "gag orders" entered against newspaper concerning Board's formulation of a proposed desegregation plan); *Markwell* v. *County of Bexar*, 878 F.2d 899, 901 (5th Cir. 1989) (review of Rule 11 sanctions against an attorney who had withdrawn from representing a party to the case and was no longer connected with the merits).

Cannatella v. *City of New Orleans*, 100 F.3d 1159, 1171 (5th Cir. 1996). An abuse of discretion occurs when a district court relies on clearly erroneous factual findings, relies on erroneous conclusions of law, or misapplies the factual or legal conclusions when fashioning or modifying injunctive relief. *Peaches Entm't Corp.* v. *Entertainment Repertoire Assocs.*, 62 F.3d 690, 693 (5th Cir.1995); *Alcatel USA, Inc.* v. *DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999). Assuming that the Decree did not originally contemplate that all students who occupy a building are to be included in the enrollment limits, the district court did not abuse its discretion in modifying the Decree to so provide.

The Board asserts that this alleged modification of the Decree is an abuse of discretion because the district court did not hold a hearing or explain its reasons for the modification (Br. 22-25). There was no hearing here because there was no outstanding motion on which to hold a hearing. There was, however, a status conference at which the parties discussed the proper interpretation of the enrollment limits of the Decree. Even if a motion had been pending, "a district court has discretion not to hear oral testimony on motions." *Gary W.* v. *Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979). [17] Where, as here, a district judge has presided over a case

[17] See also Fed. R. Civ. P. 78 ("[t]o expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and

(continued...)

for a considerable length of time and is intimately familiar with the evidence, an evidentiary hearing on the interpretation of a consent decree is unnecessary. Nor has the Board "suggested what evidence [it] would produce at an evidentiary hearing." *Ibid.* Here, if the district court modified the Decree, it did so because the Board has persisted in refusing to comply with the enrollment limits established by the Decree. Unlike the unsupported and unsought order in *Indianapolis*, *supra*, that made busing of kindergarten students a mandate rather than an option, the ruling in this case is traceable directly to the Board's continuing pattern of disregard for the enrollment limits. The latest development in this pattern involved the Board's motion to add pre-kindergarten classes to certain elementary schools, including one (Brownfields) that was already projected to exceed its permissible enrollment for the 2000-2001 school year. As discussed *supra*, pp. 24-25, the United States expressed concern that the addition of pre-K programs would consume classroom space that would otherwise be used to further the desegregation of students in grades K through 5 and would result in either the placement of additional temporary buildings, or in the schools' exceeding their enrollment limit. The district court granted the Board's motion to add the pre-K classes only on condition that a responsible official certify that the addition would not have either of those results.

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[17](...continued)
opposition").

This order was met by a motion for reconsideration by the Board in which it indicated that, in its view, pre-kindergarten students did not have to be counted in the building enrollment limits (R. Vol. 6, 1239-1240). At this point, the district court made clear that all students who occupy a building must be counted for purposes of total enrollment. To the extent that this clarification actually modified the Decree (because it differed from the Board's interpretation of the Decree), the modification was justified by the Board's continuing failure to abide by the enrollment limits.

A district court may modify an injunction in favor of a plaintiff where necessary to achieve the original purposes of an injunction that have not been fully achieved. *Sierra Club, Lone Star Chapter* v. *Cedar Point Oil Co.*, 73 F.3d 546, 579 (5th Cir.), cert. denied, 519 U.S. 811 (1996). When plaintiffs seek a modification of injunctive relief, the standard for granting modification is derived from *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).[18] *United Shoe* involved a government request to modify an injunction ten years after

[18] In this case, of course, neither party actually sought modification of the Decree. In fact, the United States maintains that Paragraph 2 of the "Notice to Counsel" is not a modification, but rather an interpretation of the Decree. See Argument I, *supra*. For purposes of this argument, however, since any modification of the Decree that occurred here was designed to enforce its intent, the propriety of such modification should be judged under the standard in *United Shoe*.

the initial injunction had been entered, because the initial injunction had not been wholly effective. The district court denied the motion, holding that it was powerless to modify the injunction because there had been no showing of a "grievous wrong * * * evoked by new and unforeseen conditions." *Id.* at 247. The Supreme Court reversed, holding that the district court had the power "to prescribe other, and if necessary more definitive, means to achieve the result" the decree was "specifically designed to achieve." *Id.* at 252, 249. If the relief originally ordered has not produced the intended results, the district court "should modify the decree so as to achieve the required result with all appropriate expedition." *Id.* at 252. See *Exxon Corp.* v. *Texas Motor Exch. of Houston, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980).

Counting all students who occupy a building in the enrollment limits, including pre-kindergarten students, is necessary in order to fulfill the purpose of the Decree to desegregate the one-race schools that still remained at the time the Decree was entered. As discussed *supra*, pp. 20-21, permitting the Board to continue to enlarge the size of these one-race schools with students from within their attendance zone undermines the voluntary desegregation methods. It consumes space in predominantly white schools that should be available for black majority-to-minority transfer students, and it removes the incentive for white students to choose attendance at the magnet programs created in the predominantly black schools.

Having found in June 2000, that "[b]ecause the Board has essentially ignored them, the enrollment limits (caps) have not achieved their purpose" (R. Vol. 5, 932), the district court did not abuse its discretion to the extent that its January 2, 2001, statement modified the Decree to include pre-kindergarten students within a building's enrollment limits.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. Alternatively, if the Court finds that it has jurisdiction, the district court's action should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 9073 words in proportionally spaced typeface. The brief has been prepared in proportionally spaced typeface using Wordperfect 9.0, with Times Roman 14-point font. The undersigned understands that, pursuant to 5th Cir. R. 32.3, a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7)(B), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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