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.	)	Judge Charles P. Kocoras

UNITED STATES' POST-TRIAL BRIEF

The United States submits this brief urging the Court to require the Defendant Board of Education of the City of Chicago (CPS) to file a proposal regarding how it intends to operate the magnet and specialized schools so that the Court can assess CPS' good faith, and to order appropriate relief to ensure that English Language Learner students (ELLs) receive the services required by the Second Amended Consent Decree (SACD).

I. Legal Standards

In determining whether a school board has made a sufficient showing of constitutional compliance to allow an injunction to be dissolved in whole or in part, "[t]he District Court should address itself to whether the Board has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable." Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 249-50 (1991); see also Missouri v. Jenkins, 515 U.S. 70, 89 (1995). Particular attention should be given to the board's record of compliance. Freeman v. Pitts, 503 U.S. 467, 491 (1992). Implicit in this inquiry is that the desegregation orders and plans be implemented fully and effectively.

See Swann v. Bd. of Educ., 402 U.S. 1, 25 (1971); Davis v. Bd. of Sch. Comm'rs of Mobile County, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness.").

Here, where it is clear that CPS has not complied with the ELL provisions of the SACD, the Court may consider whether to grant partial unitary status with respect to other provisions. "A federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control." Freeman, 503 U.S. at 489. In areas where the requisite degree of compliance has been attained, partial unitary status allows the Court to concentrate available resources on areas in which full compliance has not yet been achieved. Id. at 490. A key factor to consider in deciding whether to grant partial unitary status is "whether the school district has demonstrated, to the public and to the parents of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of law and the Constitution that were the predicate for judicial intervention in the first instance." Freeman, 503 U.S. at 491. Because "[m]ere protestations of an intention to comply with the Constitution in the future will not suffice[,]" the Court must examine "specific policies, decisions, and courses of action that extend into the future . . . to assess the school system's good faith." Dowell v. Bd. of Educ. of Oklahoma City, 8 F.3d 1501, 1513 (10th Cir. 1993).

II. CPS Has Not Yet Demonstrated Sufficient Good Faith Warranting a Declaration of Partial Unitary Status with respect to Magnet Schools and Specialized Schools

In response to the Court's invitation, several members of the community testified and/or provided written comments. No one urged the dissolution of the SACD, and most expressed concerns related to the magnet schools. (King, Kisler, Barrett, Johnson, and Cho). Those concerns included the difficulty of getting information and receiving misleading information.

(King, Barrett, and Cho). Ms. Barrett cited Drummond as an example where CPS reported that the school's white enrollment was 36.2%, Def. Ex. 86, which masked the fact that the Montessori magnet program being phased in at the school is 45% white, well outside the 15-35% white goal in the SACD. In addition, Ms. Barrett expressed concern that black students were under-represented at Drummond even though many sought to enroll.[1] Indeed, Ms. Kisler offered that the magnet school lottery is the only way for minority students to attend better schools.[2]

CPS has substantial control over enrollments at the magnets. It runs the lottery to ensure that the 15%-35% white and 65%-85% minority goals are met where practicable. As the SACD recognized, given the size of the city and its demographic trends, it is not practicable for all CPS schools to be desegregated in the traditional sense. Accordingly, magnet schools have always been an important part of the case and, as the comments reflect, are important to the community. Concern was expressed that many of the magnet and specialized schools fell outside of these goals (Cho, Kisler, Barrett) and that the goals (which were set in the 1980 Consent Decree) were inequitable given CPS' changing demographics.[3] (King).

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[1] The applicant chart cited by Ms. Barrett, Pl. Ex. 55, discloses that for the 2007-08 school year, 274 white students applied and 14 (5.1%) were selected, 210 black students applied and 4 were selected (1.9%), 43 Asian students applied and 2 (4.7%) were selected, and 165 Hispanic students applied and 15 were selected (9%). For the 2006-07 school year, 17.8% of the white applicants, 6% of the black applicants, 10% of the Asian applicants, and 12.6% of the Hispanic applicants were selected. Pl. Ex. 53.

[2] Tables 35, 36 37, and 38 of Defendant's Exhibit 51 disclose the ISAT and Prairie State test scores for magnet, gifted, and selective enrollment schools. It is evident from these tables that the scores of the schools that are highly sought by minority and non-minority students and approximate the court-ordered enrollment goals substantially exceed CPS' average scores. These top-scoring schools potentially will be most affected by the termination of the SACD.

[3] CPS' enrollment was 19% white in 1980, when the Original Consent Decree was entered, as compared to 8% white in the current school year. Def. Ex. 51a at 12. For the 2008-09 school year, 26 magnet schools exceed 85% minority enrollments; most of these exceed 98% and have few non-minority applicants; some have neighborhood attendance boundaries; another 12 are within the 15%-35% white

CPS did not respond to these community concerns and provided little information on the questions of the day, such as how CPS will operate the magnet and specialized schools in the future and whether schools will resegregate. It is clear that the current admissions practices will substantially change upon dismissal of this case, and while Dr. Barbara Eason-Watkins and Jim Dispensa stated that CPS will seek to have diverse schools, CPS did not identify specific policies or actions that extend into the future with respect to these schools. Richard Kahlenberg, CPS' expert on socioeconomic status (SES) diversity, testified that he is working with others on a plan for economic diversity that he believed would also further racial diversity; however, he had not drafted such a plan or even met one of his chief collaborators, Dr. Blanchflower. Neither expert has conducted any runs or simulations projecting what the schools' enrollments would look like under an SES-based plan. Given that 85% of CPS' students qualify for free and reduced price lunch (FRL), that such a plan might produce economically and racially diverse enrollments is certainly not self evident.[4] While Kahlenberg did offer that free transportation was needed for an effective plan, it is unclear whether CPS' current transportation system will be maintained.

CPS' failure to provide a plan with some specificity will only perpetuate and exacerbate the distrust expressed by community members, whereas the submission of a plan with transparent criteria may dispel at least some of this distrust by demonstrating CPS' good faith commitment to

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goal and have diverse applicant pools; and 5 have diverse applicant pools but exceed the 35% white goal: Drummond (36.2%), Hawthorne (43%), Sheridan (36.2%), Wildwood (52.7%), and Disney II (49.5%). For the selective enrollment schools, 3 are virtually all minority (Brooks, King, and Lindblom); 3 are within the 15%-35% white range (Jones, Lane Tech, and Whitney Young), and two exceed the 35% white goal (Northside (37.7%) and Payton (36%)). Similar patterns are present at the Regional Gifted and Classical Centers. See Def. Exs. 3, 10 for a listing of the magnet and specialized schools; Def. Ex. 86 for the 2008-09 enrollments; and Pl. Exs. 53, 55 for magnet applicant pools.

[4] None of the districts Kahlenberg identified as using SES approaches the 85% FRL level of CPS, nor do they apply SES at select enrollment schools that are not high poverty schools.

the whole of the SACD and to the federal laws that were the basis for the original court intervention.[5] See Freeman, 503 U.S. at 491. In its pre-hearing brief, the amici informed the Court of the opinion in the Tucson, Arizona school desegregation case, where the school district was required to submit a post-unitary plan so that the court could assess the school district's good faith. In a subsequent order, the court granted the school district's petition for unitary status pending the acceptance by the court of that plan. Fisher v. United States, Nos. 74-90 & 74-204, Order at 57-58 (D. Ariz. Apr. 23, 2008) (Attach. 1). Such an approach is appropriate here with respect to granting partial unitary status and does not require an advisory opinion by the Court.

III. CPS Has Not Fulfilled Its ELL Obligations for a Reasonable Period of Time

Paragraphs I.6 and III.2 of the 1980 Consent Decree, Appendix C of the Modified Consent Decree (MCD), and paragraph IV and Amended Appendix C (AAC) of the SACD have required CPS to provide its ELLs with adequate and appropriate services. All of the evidence individually and collectively established that CPS failed to fulfill its ELL obligations under paragraphs 1.d.1, 2.a-2.d, 3.a, 3.c, 6.a.1, 6.b, 7.a, and 8.a of the AAC.[6] Indeed, all of the people who have reviewed CPS' ELL program on site, the United States' two ELL experts Dr. Nancy Commins and Barbara Marler, CPS' compliance facilitators, and staff from the Illinois State

[5] This distrust must be viewed in light of CPS' assertion in 2004 that there were no seats available for minority students to take advantage of the Majority-to-Minority ("M-to-M") transfer program to attend over 40% white schools. See 11/10/04 U.S. Mot. to Enforce Provisions of MCD at 2; Op. of 12/7/04 at 2-5 (ordering CPS to comply with its M-to-M obligations in the 2005-06 school year).

[6] See testimony of U.S.' two ELL experts and five fact witnesses (Diane Zendejas, Raul Garcia, Minerva Garcia-Sanchez, Angela Beneyto-Badillo, and Danielle Omelczuk); Pl. Exs. 66, 69, 70 (U.S.' ELL Expert Reports); Pl. Exs. 3, 77, 79 (100 Principal Affs. & paralegal charts re: Affs.); Pl. Exs. 22, 23, 93 (CPS' Annual ELL Reports); Pl. Exs. 5, 76 (CPS' 49 Schs.' Resp. to U.S.' First Set of Interrogs. & paralegal chart re: Resp.); Pl. Exs. 7, 9A-9F, 10, 21, 24-29, 35-37, 40, 46, 57B-57C, 94 (sample CPS compliance reports); Pl. Exs. 31-33 (correspondence between ISBE & CPS about ISBE's 2007-08 audit).

Board of Education (ISBE) found inadequate services in the program. When ELLs lack these critical services for months or years, this denies them an equal educational opportunity.

A. CPS Failed to Place ELLs in a Timely and Appropriate Manner under ¶ 1.d.1

CPS must take "reasonable steps" to ensure that students are "identified and placed, in a timely and appropriate manner, in an English language acquisition program that is consistent with CPS' policies, including [*A Framework for Success*]." AAC ¶ 1.d.1. The evidence demonstrates that CPS failed to take reasonable steps because numerous students were not placed into the Transitional Bilingual Education (TBE) and the Transitional Program of Instruction (TPI) until late in the school year, and many were never placed. For example, the United States' ELL expert Barbara Marler[7] testified that in the 2006-07 school year, many ELLs were not placed in a timely fashion into TBE and TPI classes, and that many delays stretched into months. See Pl. Ex. 66 at 6-10, 12-13. Of the 25 elementary schools identified by CPS' compliance facilitators as having unserved ELLs, 11 had no follow-up and another 10 whose issues the compliance facilitators considered "resolved" were not fully resolved due to continued failures to provide native language or ESL instruction.[8] Compare id. at 8-10 with id. at 15-18, 22-24, 31-22. In addition, the United States' expert Dr. Nancy Commins[9] testified that during the 2007-08

[7] Ms. Marler has been the expert for the United States in this case since 2003. During the 2006-07 school year, she visited 32 schools: 23 elementary, 2 middle, and 7 high schools. Her opinions are based on her observations in the site visits and her analysis of CPS' compliance and technical assistance reports, CPS' 2006-07 annual ELL report, and other CPS documents. See Ex. 66 at App.

[8] Hammond, Jackson, Reilly, Tonti, Davis, Eberhardt, Falconer, Gary, Thorp, and Smyser.

[9] Dr. Commins visited 23 schools in the 2007-08 school year. Her opinions are based on her observations during the site visits, her analysis of the 100 principal affidavits, CPS' 49 schools' responses to the United States' interrogatories, CPS' compliance reports and related documentation, CPS' 2007-08 annual report, and other CPS memoranda and documents. See Ex. 69 at 2-4.

school year, in at least 69 of the 83 TBE schools and 30 of the 67 TPI schools with principal affidavits, over 4,500 ELLs received less than forty minutes of daily ESL or native language instruction. See Pl. Ex. 69 at 20-27. CPS offered no evidence to rebut these facts.

The only response CPS and its ELL expert Dr. Beatriz Arias could muster is that high mobility rates at schools with ELL enrollment may be the cause of the untimely placement of students. CPS, however, produced no mobility rate data at trial, and Dr. Arias's speculation relied upon rates for only 21 schools, none of whose rates were specific to ELLs. CPS also failed to prove that any of the thousands of unserved ELLs lacked services due to having arrived mid year or that any of the unserved ELLs received the requisite services later that school year.

B. CPS Failed to Implement ELL Instruction Consistent with the Policies and Guidelines Set Forth in "A Framework For Success" under ¶¶ 2.a-2.c

CPS is required to "continue to implement its ELL instruction consistent with the policies and guidelines set forth in [*A Framework for Success*]." AAC ¶ 2.a. In addition, CPS must take reasonable steps to ensure that schools follow the guidelines in the *Framework* for allocating native language and ESL instruction based on English proficiency levels. AAC ¶¶ 2.b-2.c; Pl. Ex. 18 at 9-11. The evidence amply demonstrates that CPS failed to fulfill these obligations. Indeed, CPS' employees testified that the *Framework* is not distributed to principals and Bilingual Lead Teachers (BLTs). As explained below, many schools were not providing the instruction required by the *Framework*. Diane Zendejas, Chief of the Office of Language and Cultural Education (OLCE), testified that the *Framework* is outdated and needs to be revised, but CPS did not rescind the *Framework,* propose revisions to it for the United States' review under SACD ¶ IV.B, or seek modification of the SACD. Instead, CPS chose to ignore obligations that it deemed

difficult, even though its employees acknowledged that the *Framework*'s guidelines with regard to the TBE and TPI requirements remain valid, and Raul Garcia, High School Compliance Facilitator, testified that he still relies on the *Framework's* guidelines on pages 10-11. Pl. Ex. 18.

C. CPS Failed to Provide Native Language and/or English as a Second Language Instruction to Eligible ELLs under ¶¶ 2.b and 2.c

CPS is required to provide TBE and TPI services to eligible ELLs. AAC ¶¶ 2.b.-2.c. Schools with 20 or more ELLs from a single language background must receive instruction in their native language and daily ESL, and in schools, where there are 19 or fewer ELLs, ELLs must receive daily ESL. Pl. Ex. 18 at 4-12. For example, according to the *Framework*, ELLs with a beginning level of English proficiency should receive 170 minutes daily in the native language, intermediate level ELLs should receive 90 minutes, and advanced level ELLs should receive 50 minutes. Id. at 10. In addition, all ELLs in TBE and TPI programs should receive at least 40 minutes of daily ESL. Id. at 10-12. Testimony of CPS' employees confirmed that OLCE expects ELLs to receive a minimum of 40 minutes of daily ESL, but Danielle Omelczuk testified that she did not treat PY4 and above ELLs receiving less than this as noncompliance.

The evidence demonstrated that numerous ELLs did not and do not receive native language and/or ESL instruction. Ms. Marler testified that in the 2006-07 school year, 30 elementary schools failed to provide TBE and/or TPI services to all eligible ELLs. See Pl. Ex. 66 at 14-32. CPS provided no evidence that these 30 failures were resolved. See id. at 15. Because CPS did not conduct compliance reviews at over 150 of the 276 schools with TBE and TPI programs in the 2006-07 school year,[10] it is unknown how many other TBE and TPI schools

[10] CPS conducted compliance reviews at only 118 of the 276 schools with TBE and TPI programs in the 2006-07 school year. Pl. Ex. 42; Pl. Ex. 39 at 1.

lacked adequate native language and/or ESL. Ms. Zendejas testified that at the start of the 2007-08 school year, CPS agreed with Ms. Marler's 2006-07 findings and wanted to ensure that all ELLs receive TBE and TPI services. Pl. Ex. 54 at CPS0010727. Dr. Commins established that in the 2007-08 school year, 69 of the 83 TBE schools (83%) with principal affidavits stated that one or more ELLs received fewer than 40 minutes of daily native language instruction, totaling to over 4,300 ELLs. Pl. Ex. 69 at 30-41; Pl. Ex. 77; Pl. Ex. 3. Ms. Zendejas testified that ISBE's findings were consistent with the findings of the United States' experts. See Pl. Exs. 31-33.[11]

Although CPS did not explain the lack of native language instruction to elementary level ELLs, CPS attempted to explain away the lack of such instruction at the high school level. Mr. Garcia testified that it was difficult to create native language classes due to insufficient numbers of high school ELLs at each grade level and certified applicants.[12] He also suggested that only ELLs with the same English proficiency level could take a native language class together and that 25 ELLs were needed to form a native language class. Dr. Commins, however, testified that many of the noncompliant high schools had sufficient numbers of ELLs, particularly Spanish-speaking ELLs, to create a native language class. See, e.g., Pl. Ex. 93 at 17-18 (Schurz), 31 (Farragut), 37-38 (Foreman), 160 (Clemente), 157-58 (Amundsen), 177 (Kelly). Both of the United States' ELL experts explained that ELLs of different *English* proficiency levels can be taught together in a *native* language class, and CPS' employees confirmed that this is true of elementary native language classes. Ms. Marler's testimony and CPS' high school Interrogatory

[11] Dr. Commins visited 23 schools and ISBE visited 36 schools in the 2007-08 school year for a total of 55 schools because four schools were visited by both. Pl. Exs. 34, 69 at 3.

[12] Ascension Juarez's testimony regarding 300 bilingual and ESL applicants for 150 vacancies last year established that staff is available. CPS also can extend its waiver of the residency requirement.

Responses also established numerous high school classes with less than 20 students. Pl. Ex. 5.

The evidence also shows that many ELLs are not receiving TPI services. Dr. Commins testified that 30 of the 67 schools with principal affidavits and TPI programs had one or more ELLs not receiving 40 minutes of ESL services per day. Pl. Ex. 69 at 41-45; Pl. Ex. 79; Pl. Ex. 3. Mr. Garcia's and Ms. Beneyto-Badillo's testimony and CPS' own documents confirm that CPS failed to add sufficient ESL and sheltered content classes to meet the needs of high school ELLs who could no longer be exited after five years once the MCD and SACD prohibited this. Pl. Exs. 21, 24, 27, 28, 35, 37, 38, 40, 66 at 26-31, 94 (tutoring in lieu of classes); MCD App. C ¶ 7.a; AAC ¶ 7.a. Although AAC ¶ 2.c requires TPI services at any school with less than 20 ELLs, CPS' employees testified that schools with less than 16 ELLs did not provide ESL, and 150 to 225 schools that enrolled ELLs lacked TPI programs in the 2006-07 and 2007-08 school years.[13]

D. CPS Failed to Take Reasonable Steps to Ensure That ELLs Received Appropriate Services at Their School or a Nearby School under ¶ 2.d

When CPS learns that an ELL is not receiving language acquisition services, it must take "reasonable steps to ensure that appropriate services become available at school, or if necessary, another school within a reasonable distance of the ELL's residence." AAC ¶ 2.d. The evidence shows that CPS' compliance process identified schools where services were absent or improperly provided, but that CPS failed to take reasonable steps to ensure that ELLs received services. See, e.g., Pl. Exs. 2-5, 7, 9A-9F, 10, 21, 24-29, 31-33, 35-38, 40, 46, 66 at 6-34, 69 at 45-48, 76-77, 79, 94; Def. Ex. 60 at CPS16939. The United States' experts testified that CPS failed to hold

[13] 276 of the approximately 425 schools with ELLs offered TBE and TPI programs in the 2006-07 school year, which leaves roughly 150 schools without a TPI program. See Pl. Ex. 23 item a(i); Pl. Ex. 39 at 2-3. 276 of the over 500 schools with ELLs offered TBE and TPI programs in the 2007-08 school year, which leaves roughly 224 without a TPI program. See Def. Ex. 53 Pt. I at 4; Pl. Ex. 39 at 1.

principals accountable for not providing services to ELLs. Pl. Ex. 69 at 45-48; Pl. Ex. 66 at 33-34. Mr. Garcia testified that 18 high schools were recommended for corrective action in the 2007-08 school year, Pl. Exs. 2, 21, 24, 27, 28, 35, but Ms. Zendejas testified that she did not recommend imposing discipline on select high school principals until December 2008, just a month before the hearing. Ms. Beneyto-Badillo and Ms. Omelczuk testified that OLCE does not monitor whether schools with unserved ELLs offer their parents the option to transfer to nearby schools with ELL services. Furthermore, Mr. Garcia testified that he approved only one transfer of an ELL in the 2007-08 school year and maybe one or two in the 2008-09 school year.

In her rebuttal testimony, Ms. Zendejas stated that the Interrogatory Responses of the 49 schools helped OLCE identify its priorities and that a few of these 49 are now in compliance. Ms. Zendejas also testified that another subset of these 49 schools were now subject to directives to comply or disciplinary referrals. This testimony, while positive, highlights the degree to which CPS' response to unserved and inadequately served ELLs has been both too little and too late to create a record of compliance needed for dismissal.

E. CPS Failed to Provide Appropriate Instructional Materials Under ¶¶ 3.a and 3.c

CPS must take "reasonable steps to ensure that" school and classroom libraries have "sufficient language-ability appropriate literary materials in English, [and] age-appropriate literary materials in the native language(s) of the ELLs at the schools" as well as "[s]ufficient funds . . . to provide ELLs with educationally sound textbooks and instructional materials." AAC ¶¶ 3.a, 3.c. The evidence demonstrates that CPS has failed to satisfy these obligations. The United States' experts testified that they observed classrooms and libraries that lacked adequate materials for ELLs. See Pl. Exs. 66 at 21-24, 31-32, 44-50; 69 at 52-62. CPS' own documents

revealed many other schools without adequate native language and ESL materials. See, e.g., Pl. Exs. 3-5; 7; 9E; 10; 21; 24-27; 35-37; 40; 46; 57B; 66 at 15-19, 43-44, 47-48; 69 at 54-56. Many of these schools lack Spanish language materials, which is inexcusable because they are readily accessible as confirmed by the ELL experts, Minerva Garcia-Sanchez, and Ms. Omelczuk.

In response, CPS presented testimony that the Local School Councils (LSCs) can be an obstacle to obtaining materials[14] and that textbooks aligned with the Illinois content standards are not available in certain grades and languages. CPS, however, offered no rebuttal evidence to explain its failure to take a more active role in identifying and disseminating a comprehensive list of recommended native language materials across content areas, particularly in Spanish and Polish. Ms. Marler explained that Illinois does not dictate which materials school districts can purchase. Despite this freedom, the materials lists in CPS' December 1, 2008 handbook lack recommendations for languages other than Spanish and do not include any grade K-8 Spanish social studies, 6-8 Spanish reading, or 9-12 Spanish science materials. Pl. Ex. 14 at 16, 30.

F. CPS Failed to Ensure That Special Education ELLs Received Appropriate Language Acquisition and Special Education Services Under ¶¶ 6.a.1 and 6.b

CPS must take "reasonable steps" to ensure that "[s]pecial education services at each school are sufficient to address the language acquisition and special education needs of ELLs" and that the six special education model numbers are assigned to special education ELLs who lack model numbers. AAC ¶¶ 6.a.1, 6.b. The evidence demonstrates that CPS has failed to fulfill both obligations. Pl. Exs. 22 item 9(f)(ii); 23 item 9(f)(ii); 66 at 60-62, 64-68; 69 at 74-87.

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[14] LSCs do not excuse CPS' federal obligations in this case under the Supremacy Clause and the terms of the law that created LSCs. See 105 ILCS 5/Art. 34-1.01(B). Implementation of this law "to the extent practicable, shall be consistent with and, in all cases, shall be subject to the desegregation obligations [in the] Consent Decree and Desegregation Plan" in this case. Id.

Although the six models are to be assigned in a hierarchical order based on ELLs' English proficiency levels and special education needs, Pl. Ex. 18 at 37-41, Dr. Commins testified that ELLs are disproportionately being assigned to Model Numbers 5 and 6, the models of "last resort." Pl. Ex. 69 at 74-80. This problem first identified by Dr. Arias in 2002, Pl. Ex. 70 at 3-4, got worse in the 2006-07 and 2007-08 school years. Pl. Exs. 22 item 9(f)(ii); 23 item 9(f)(ii). CPS provided no rebuttal evidence, and Ms. Beneyto-Badillo, OLCE's 2006-07 compliance manager, did not know why the number of ELLs without models increased that school year.

G. CPS' Is Failing to Ensure That ELLs Are Not Exited From ELL Programs Until They Reach the English Proficiency Score on ACCESS Under ¶ 7.a

The AAC prohibits CPS from exiting ELLs from the TBE or TPI program until their score is "proficient" on ACCESS. AAC ¶ 7.a.[15] The MCD also prohibited CPS from exiting ELLs until they achieved proficiency across all four language domains. MCD, App. C ¶ 7.a. Nevertheless, testimony from CPS' employees and CPS' documents revealed that a five-year cap on ELL services is being contemplated by the Board and is set forth in CPS' December 1, 2008 handbook. Pl. Exs. 14 at 23, 33; 41. Given that both the MCD and SACD prohibited CPS' former five-year cap, CPS' considered reinstatement of this cap shows a lack of good faith.

H. CPS Failed to Monitor Implementation of the AAC at Each School with ELLs and to Document the Steps Taken to Achieve Compliance Under ¶ 8.a

At least once each school year, CPS must "monitor the implementation of its language acquisition programs and the ELL-related requirements set forth in [the AAC] at each school"

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[15] CPS argued that ¶ 7.a pertains only to the 2005-06 and 2006-07 school years, but this was due to the sunset provision that would have terminated the desegregation obligations and allowed the United States to move for continuation of the ELL obligations at the end of the 2006-07 school year. Given this Court's deletion of the sunset provision, the only reasonable contractual interpretation of the 8/10/06 Order is that all sunset dates therein, including the one in AAC ¶ 7.a, likewise do not apply.

with ELLs to assess the school's compliance with the *Framework* and the SACD. AAC ¶ 8.a. CPS also must "keep a record of record of each finding of noncompliance" and "document the steps taken to achieve compliance." Id. CPS, however, did not monitor compliance with the AAC at hundreds of its 500 schools with ELLs that did not receive a compliance or technical assistance visit in the 2006-07 and 2007-08 school years. Def. Ex. 60 at CPS16939-16957; Pl. Exs. 23 item a(i); 39; 42-44; 66 at 71-74; 69 at 20, 91, 93; 81. CPS' employees testified that schools with less than 16 ELLs are not subject to compliance reviews and that these schools' failures to offer ESL are not considered noncompliance. Moreover, only 5 of the 102 high schools that enrolled ELLs had a compliance review in the 2006-07 school year and only 17 had one in the 2007-08 school year. Pl. Ex. 66 at 71; Def. Ex. 53 Pt. 1 at 4; Def. Ex. 60 at CPS16955-16957. Although compliance facilitators documented noncompliance on their reports, their notations of an issue being "resolved" often did not fully resolve the issue, or CPS failed to document steps taken to achieve compliance at the schools. See, e.g., Pl. Exs. 2-5; 7; 9A-9F; 10; 21; 24-29; 34-38; 40; 46; 66 at 71-74; 69 at 45-48, 91-92, 94; 94 (tutoring only).

IV. Appropriate Relief is Needed to Remedy CPS' Violations of the AAC

Remedying CPS' repeated failures to provide adequate TPI and TBE services requires strengthening the obligations in the AAC in at least five respects. First, CPS should identify all unserved and under-served ELLs earlier in the school year (e.g., mid October) through, for example, an IMPACT- or BLT/principal-generated report to OLCE. This is critical because CPS does not conduct compliance reviews at hundreds of schools each year and CPS' use of an initial visit prior to the compliance review delayed identifying unserved ELLs for months. See Def. Ex. 60 at CPS16940-16957. Another report in mid-January should identify unserved ELLs early in

the second semester and address CPS' concerns about student mobility. Because the compliance forms provide an incomplete and unclear count of the unserved and under-served ELLs, these reports should identify separately the numbers of ELLs by proficiency level[16] who: (a) receive no ESL; (b) are TBE ELLs and receive no native language instruction; (c) receive some ESL but not a daily period of it; and (d) are TBE and receive some native language but not a daily period of it.

Second, CPS should use these mid-October and mid-January reports to prioritize schools for targeted assistance and compliance reviews. Within 30 days of learning of unserved ELLs, CPS should secure ELL services at the noncompliant school or, if not practicable, offer a transfer to a nearby school with services. Third, CPS should create a list of native language materials relevant to the content standards in all languages of TBE programs, distribute this list to TBE schools, require TBE schools to report native language classes lacking such materials, and ensure that TBE schools order the missing materials within 60 days. Fourth, CPS must ensure that ESL or bilingual certified teachers help assign special education models and that such assignments best accommodate the special education and language needs of the ELLs with the schools' available staff. CPS also must require documentation of the ongoing collaboration required by model 6 and must monitor that SPED ELLs actually receive their models. Lastly, the schools' reports of unserved ELLs and missing materials should be sworn given how effective the 100 Principal Affidavits and 49 Interrogatory Responses proved to be. If it will assist the Court, the United States will file a proposed order that outlines this recommended relief in more detail.

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[16] The amount of ESL and native language instruction must reflect the ELL's English proficiency level. AAC ¶¶ 2.b, 2.c. Reports therefore should include this in lieu of the ELL's program year. The ELL experts, Ms. Garcia-Sanchez, and ISBE agree that an ELL's English proficiency level, not his/her program year, should determine services allocation. See Pl. Ex. 31 at 6.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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