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,	)	Judge Charles P. Kocoras
Defendants.	)	

UNITED STATES' RESPONSE TO CPS' MOTION TO FILE SUPPLEMENTAL BRIEF IN LIGHT OF THE U.S. SUPREME COURT DECISION IN HORNE V. FLORES

The United States submits this response to Defendant Board of Education of the City of Chicago's (CPS) Motion to File a Supplemental Post-Unitary Status Hearing Brief in light of the United States Supreme Court's decision in Horne v. Flores. While the United States does not oppose CPS' motion to file the supplemental brief, the United States does hereby object and respond to CPS' assertions therein. In short, CPS asserts that Horne "contains a number of statements that substantiate" its prior request that this Court vacate "the portion of the Second Amended Consent Decree (SACD) regarding English Language Learners [i.e., Amended Appendix C (AAC)]." (CPS Br. 1-2, Aug. 10, 2009.) This Court should reject this argument for the following reasons.

CPS tries to use Horne both to reargue its Rule 60(b) motion to vacate the AAC, which this Court rejected on May 1, 2008, and to persuade this Court to apply Horne's standards for enforcing a *court-ordered* decree in lieu of the well-established standards that govern dismissing desegregation decrees and enforcing *consent* decrees. CPS, however, fails to establish any basis

for relief under Horne's Rule 60(b)(5) analysis, and Horne does not change these well-established standards. In addition, Horne does not preclude this Court from applying these well-established standards to enforce CPS' English Language Learner (ELL) obligations, which CPS agreed to and this Court appropriately approved several times. These obligations derive from substantial claims of racial and national origin discrimination under Title VI of the 1964 Civil Rights Act and its implementing regulations and further the federal interest in ensuring that CPS complies with these federal laws.

I. Horne Does Not Affect the Legal Standards that Govern this Case

Reading Horne in its entirety, rather than just CPS' selective snippets, makes two points clear. First, Horne's Rule 60(b)(5) standards are not applicable here. Second, Horne did not alter the standards that govern dismissing and enforcing a desegregation consent decree.

A. Horne Addressed the Standards for Vacating a Court-Ordered Decree Under Rule 60(b)(5), and Those Standards Are Not Applicable Here

Horne addressed the analysis required when a party moves under Rule 60(b)(5) of the Federal Rules of Civil Procedure to vacate a judicial decree on the ground that its enforcement "is no longer equitable." Slip. Op. at 2, 10. This rule permits a party to seek relief from a judgment or order if "'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" Id. at 10 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)). In Horne, the Court held that the lower courts failed to engage in a proper Rule 60(b)(5) analysis because they "misperceived both the nature of the obligation imposed by the EEOA [Equal Educational Opportunities Act] and the breadth of the inquiry called for under Rule 60(b)(5)." Slip Op. at 23. Nothing in Horne, however, changes the fundamental principle that a party seeking relief from a consent decree under Rule 60(b)(5)

on the basis of changed circumstances must demonstrate the significant change in fact or law that justifies that request.

CPS has not and cannot meet this standard. As an initial matter, CPS has not even filed a motion under Rule 60(b)(5) at this stage of the litigation. In addition, this Court *rejected* CPS' prior Rule 60(b) motion without even seeking a response to the motion from the United States. See CPS Mot. to Vacate Section IV & AAC of SACD, Apr. 25, 2008; Order of May 1, 2008. CPS' efforts to relitigate the issue by taking quotes from Horne out of context simply do not establish the requisite changes in either fact or law. In fact, there are no changed circumstances since entry of the 2006 SACD or other bases for vacating the AAC under Rule 60(b)(5), and this Court should reject CPS' request.[1] See Rufo, 502 U.S. at 383 (Rule 60(b)(5) does not provide relief solely because "it is no longer convenient to live with the terms of a consent decree").

B. Horne Did Not Change the Standards for Dismissing a Desegregation Decree

Shortly after denying CPS' motion to vacate the AAC, this Court decided that a unitary status hearing was necessary to determine whether dismissal or continued enforcement of the SACD, including the AAC, was warranted. Having failed to demonstrate full and good faith compliance with the whole of its desegregation decree at the twelve-day unitary status hearing, CPS now seeks to vacate the AAC part of this decree on the basis of Horne. Horne, however, did not change the long-standing legal standards for dismissing a school desegregation decree embodied in Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991), and Freeman v.

[1] Rule 60(b)(5) also allows relief from a judgment if it "has been satisfied, released, or discharged; [or] it is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5). While this Court may grant relief on its own motion if one of the grounds of Rule 60(b)(5) is met, O'Sullivan v. City of Chicago, 396 F.3d 843, 866 n.6 (7th Cir. 2005), these additional grounds are not present here, were not raised by CPS, and are not addressed by Horne.

Pitts, 503 U.S. 467 (1992). See Dowell, 498 U.S. at 249-50 (holding that district court must address whether "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"); Pitts, 503 U.S. at 492 (same); (U.S.' Post-Trial Br. 1-2). The majority opinion in Horne does not mention Dowell or Freeman, let alone overturn or modify these decisions.

In fact, Horne is consistent with Dowell, given the Horne majority's recognition that implementation of a "durable remedy" is relevant to whether a judgment's goals have been attained. Slip Op. at 13. This recognition comports with Dowell's requirements that a school board establish both compliance with its decrees "for a reasonable period of time" and the "unlikel[ihood] that [it] would return to its former ways" before a court should vacate a desegregation order. 498 U.S. at 247-48. As Dowell explains, only then would the "purposes of the desegregation litigation ha[ve] been fully achieved." Id.

The evidence at the unitary status hearing demonstrated that this Court should deny CPS' request to dissolve the AAC. That evidence shows that CPS has failed to comply with the AAC for a reasonable period of time, see U.S.' Post-Trial Br. at 5-14, and that CPS was planning to reinstate its *former* five-year cap on ELL services, which both the MCD and the SACD prohibited. See id. at 13. Because this evidence fails to satisfy Dowell's and Pitts' standards, which Horne did not alter, the AAC should be enforced, not vacated.

C. Horne Did Not Change the Standards for Enforcement of a Consent Decree

Even though CPS sought court approval of the ELL obligations in the 1980 Consent Order, the 1983 desegregation plan, the 2004 Modified Consent Decree (MCD), and the 2006 SACD, CPS now tries to use language in Horne to argue *implicitly* that the ELL obligations in

the SACD should not have been approved because they did not remedy an alleged violation of federal law in the 1980 Complaint and *explicitly* that these obligations should not be enforced now absent evidence of an ongoing violation of federal law. See CPS Br. at 2-3. The language CPS quotes from Horne fails to support either argument.

First, CPS invokes this language in Horne: "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation.'" (CPS Br. 2 (quoting Horne, Slip Op. at 13).) This language clearly applies to *court-ordered* decrees, not consent decrees, because Horne was quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977), and both Milliken and Horne were focused on the importance of a court staying within "appropriate limits" when remedying violations of federal law. See Horne, Slip Op. at 4 (district court issued a declaratory judgment and a series of orders thereafter regarding the State's violation of the EEOA); Milliken, 433 U.S. at 277 (district court entered desegregation order noting it was "careful to order only what is essential for a school district undergoing desegregation"). Horne in no way changed the well-established principle that a federal court may approve a consent decree that "provides broader relief than the court could have awarded at trial." Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). See also Frew v. Hawkins, 540 U.S. 431, 439 (2004) (consent decrees requiring steps that the federal statute does not require may be approved and enforced); Rufo, 502 U.S. at 392 ("[S]tate and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation."); O'Sullivan, 396 F.3d at 862 (same).

Second, CPS invokes this quote from Horne, (CPS Br. 2): a federal consent decree "*may*

'improperly deprive future officials of their designated legislative and executive powers'" if it is "not limited to reasonable and necessary implementations of federal law." Slip Op. at 13 (quoting Frew, 540 U.S. at 441) (emphasis added). CPS, however, omits Frew's subsequent explanation that this risk should be addressed through a Rule 60(b)(5) motion if changed circumstances render enforcement of the decree inequitable. 540 U.S. at 441-42. Absent a defendant establishing reasons to modify or vacate the decree under Rule 60(b)(5), Frew reaffirms that "the [consent] decree should be enforced according to its terms." Id. at 442. Given that CPS has failed to identify any changed circumstances or other reasons justifying Rule 60(b)(5) relief, see supra Section I.A, this Court should enforce the AAC, consistent with Frew.

Third, although Horne required an ongoing violation of federal law to continue enforcement of a *judicial* decree against the State of Arizona, Slip. Op. at 18, Horne did not reverse the Court's explicit position in Frew that such a showing is not necessary in the context of a consent decree. See Frew, 540 U.S. at 438-40 (rejecting defendant's argument that a court may not enforce a consent decree against a state unless the court first finds an ongoing violation of federal law). In Frew, the Court held that a district court could enforce a consent decree even though the violation of the decree did not constitute a violation of the federal law upon which the decree was based because it "vindicate[d] an agreement that the state officials reached to comply with federal law." Id. at 439. In so holding, the Court reaffirmed that consent decrees that go beyond what federal law requires are enforceable provided they "spring[] from a federal dispute and further[] the objectives of federal law." Id. at 438 (citing Firefighters, 478 U.S. at 525). Because Horne did not alter, let alone overturn, these well-established principles in Frew and Firefighters, this Court should enforce the AAC because it springs from a dispute within this

Court's subject matter jurisdiction and continues to further the objectives of federal law.

II. Nothing in Horne Precludes this Court from Enforcing the AAC Because It and the Preceding Consent Decrees Derive from Substantial Federal Claims and Further Federal Interests

As the discussion below establishes, the 1980 Complaint included substantial claims under Title VI and its regulations. Moreover, the ELL obligations in the 1980 Consent Decree, the 1983 court-approved desegregation plan, the 2004 MCD, and the 2006 SACD all furthered the federal interest in ensuring that CPS' ELL program complied with Title VI and its regulations. CPS nonetheless tries to use Horne to deny these realities in three ways. First, CPS contends that Horne affirms language from a Seventh Circuit case that CPS has used to argue that "there is no federal interest [or claim] articulated in the Complaint . . . as to the Board's bilingual education program." CPS Br. 3 (discussing O'Sullivan, 396 F.3d at 863). Second, CPS asserts that Horne's discussion of the EEOA negates any federal interest in enforcing the AAC. Third, CPS distorts Horne's discussion of *No Child Left Behind* (NCLB) to argue that any federal interest in its ELL program is already represented by the United States Department of Education and the Illinois State Board of Education under Title III of NCLB. None of these arguments has merit.

A. Horne Does Not Affirm O'Sullivan, and Even if the Court Concludes Otherwise, the AAC Satisfies the Standards for Enforcing a Consent Decree

CPS' contention that Horne "clear[ly] affirm[s]" the Seventh Circuit's requirement that entry and continued enforcement of a consent decree against a government entity requires a "substantial claim under federal law" is at best an overstatement. (See CPS Br. 3 (quoting O'Sullivan, 396 F.3d at 863).) The language quoted by CPS from O'Sullivan actually comes from the plurality opinion in Evans v. Chicago, 10 F.3d 474, 480 (7th Cir. 1993), and Horne did

not discuss either case.[2] Even if this Court interprets Horne to endorse this language from the Seventh Circuit, this would provide no basis for vacating the AAC because the AAC of the SACD and the ELL requirements in the prior consent decrees all derive from substantial federal claims in the 1980 Complaint and further the federal interest in ensuring that CPS' ELL program complies with Title VI and its regulations. As a result, the AAC meets the O'Sullivan standard.

Despite CPS' assertions to the contrary, (CPS Br. 3), the 1980 Complaint shows that the United States' substantial claims of racial and national origin discrimination were based in part on Title VI and its implementing regulations and that the United States had a federal interest in ensuring CPS' compliance with these federal laws. See Compl. ¶¶ 1, 3, 6-8, 11-12 (discussing Title VI, its regulations, and its required Assurances of Compliance). At the time the Complaint was filed, Title VI and its regulations not only prohibited the segregative conduct alleged in the Complaint, but also required CPS to take affirmative steps to ensure ELLs' meaningful participation in its educational programs.[3] Furthermore, the Complaint's references to HEW

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[2] In O'Sullivan, the defendants challenged the plaintiffs' standing to enforce a consent decree, and the Seventh Circuit held that the court had the power to enforce the decree and that the defendants had a duty to seek its modification under Rule 60(b)(5) if they believed factual or legal changes since the decree's entry rendered its continued enforcement inequitable. 396 F.3d at 868. While Evans involved a Rule 60(b)(5) motion, it was based on the reversal of the judgment finding a violation of federal law that had given rise to the remedial consent order, not on changed circumstances like the motion in Horne. To the extent neither of the Rule 60(b)(5) circumstances in O'Sullivan and Evans exists here, these cases, like Horne, are inapposite.

[3] See Lau v. Nichols, 414 U.S. 563, 568 (1974) (holding that Title VI, its implementing regulations, and 1970 clarifying guidelines from the Department of Health, Education, and Welfare (HEW) bar federally funded recipients from "deny[ing] [ELLs] a meaningful opportunity to participate in the educational program"); May 25, 1970 HEW Mem. Regarding Language Minority Children, http://www.ed.gov/about/offices/list/ocr/docs/lau1970.html (last visited Sept. 3, 2009); 35 Fed. Reg. 11595 (July 18, 1970); 34 C.F.R. § 100.3(b)(2); 45 C.F.R. §§ 80.3(b)(1), 80.3(b)(2) (Dep't of Health & Human Servs., former HEW, Title VI regulations).

finding CPS ineligible for Emergency School Aid Act (ESAA) funds in 1979 and 1980, Compl. ¶¶ 6-13, were based in part on CPS' failures to implement requirements of a Title VI Compliance Plan designed to address an administrative finding that CPS' ELL program violated Title VI.[4] Until these failures were resolved, CPS could not obtain ESAA funds, whose purposes included eliminating segregation and discrimination in public schools. See 20 U.S.C. § 1601(b)(1) (since repealed). These references in the Complaint show that the parties were aware of this recent history regarding deficiencies in CPS' ELL Program under Title VI and ESAA when the parties filed the Complaint and the Consent Decree.[5]

Thus, although the Complaint does not claim that CPS' ELL program violated Title VI, (see CPS Br. 3), CPS made a legitimate "choice" to settle the Complaint's claims based on Title VI and its regulations in a manner that would achieve compliance with both CPS' desegregation and its ELL-related obligations under these federal laws. Frew, 540 U.S. at 439 (noting that a consent decree reflects a "choice among various ways" a government entity could comply with federal law); see Firefighters, 478 U.S. at 525 ("[I]n addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree."); O'Sullivan, 396

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[4] See Excerpts of Letter from HEW to Dr. Hannon (Apr. 9, 1979) at 1-2, 6-8, 15, 17 (referencing Administrative Law Judge's Feb. 15, 1977 decision and CPS' Oct. 12, 1977 Title VI Compliance Plan and finding that CPS' failures to implement certain ELL requirements of this Plan supported denial of ESAA funds) (Ex. 1); Excerpts of Letter from HEW to Dr. Caruso (June 12, 1980) at 1-2, 24-29 (denying ESAA funds in part because "ethnic discrimination" in "bilingual education" addressed in 1977 Title VI Plan had not ceased to exist) (Ex. 2); see also Compl. ¶¶ 7, 13 (discussing April 9, 1979 and June 12, 1980 Letters); In re CPS, Docket No. S-120, 1977 Ed. Civ. R. Rev. Auth. LEXIS 50, (Feb. 15, 1977) at 1-8, 16-17, 20-26 (A.L.J. Hammarstrom) (Ex. 3).

[5] These references further satisfy the requirement that a consent decree "must come within the general scope of the case made by the pleadings." See Frew, 540 U.S. at 437 (citing Firefighters, 478 U.S. at 525).

F.3d at 860 (same).[6] When CPS moved for entry of the Consent Decree the same day the Complaint was filed, CPS "acknowledged that subject matter jurisdiction exists over this action under . . . Title[] . . . VI," 1980 Consent Decree at 2-3 ¶ 6, and the Court correctly found "the terms of the Decree [were] within the scope of the complaint." Id. at 3. Thus, the Consent Decree's ELL provisions, id. at 8 ¶ I.6, 17 ¶ III.2, both "spr[a]ng[] from a federal dispute and further[ed] the objectives of federal law," Frew, 540 U.S. at 438, and nothing in Horne undermines this fact.

In addition, the ELL provisions of the desegregation plan required by the Consent Decree also advanced the federal interest in ensuring CPS' compliance with Title VI and its regulations. See Student Desegregation Plan for [CPS]: Recommendations on Educational Components at 51-58 (Ex. 4). These provisions were correctly approved by this Court "as being within the broad range of constitutionally acceptable system-wide school desegregation plans." Judgment of Feb. 11, 1983, at 1-2. Likewise, in 2004 when this Court approved the MCD and in 2006 when this Court approved the SACD, this Court again implicitly determined that their respective ELL obligations satisfied the consent decree requirements in Firefighters, which were reaffirmed in Frew, 540 U.S. at 437-38, and O'Sullivan, 396 F.3d at 859-60, and left intact by Horne. See

[6] CPS agreed to implement a plan that would "provide[] [ELLs] with the instructional services necessary to assure their effective participation in the educational programs of [CPS]," and "be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and [was] acceptable to the Department of Education," which replaced HEW. 1980 Consent Decree at 17 ¶ III.2. This provision is instructive because CPS' FY79 commitments regarding its ELL program that HEW found acceptable pertained to parts of the 1977 Title VI Compliance Plan that CPS had failed to implement. See Letter from HEW to Dr. Caruso (June 12, 1980) at 25 (Ex. 2) (explaining that the commitments CPS made in its application for a waiver of ineligibility to implement certain areas of the 1977 Plan were deemed adequate by HEW but that CPS failed to implement some).

MCD of Mar. 1, 2004, at 1-5 (explaining the bases for entering the MCD and the parties' acknowledgment that the remaining areas of noncompliance with the 1980 Consent Decree necessitate the remedies in the MCD). Moreover, this Court's approval of CPS' modified ELL obligations in 2004 comports with Horne's Rule 60(b)(5) analysis because those obligations were consistent with the original goals of the 1980 Decree and were then tailored to address changed factual and legal circumstances pertaining to ELLs as well as deficiencies in CPS' implementation of its ELL program under the 1980 Decree. (See Mem. Supp. Jt. Mot. for Ct. Approval of MCD 2, 7-8, 18-19, Dec. 10, 2003.) In sum, all of the relevant standards for entering and enforcing the AAC have been met.

B. Horne's Discussion of the EEOA's "Appropriate Action" Requirement Does Not Negate the Federal Interest Furthered by the AAC

As CPS points out, the 1980 Complaint is not based on the EEOA, the statute at issue in Horne. (CPS Br. 3.) Rather the Complaint is based, inter alia, on Title VI and its regulations. Compl. ¶¶ 1, 3, 6-8, 11-12. That said, because the United States Department of Education applies Castaneda's EEOA framework[7] to assess compliance with Title VI[8] and the Seventh Circuit applies Castaneda's framework to EEOA claims,[9] the United States hereby responds to

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[7] The Castaneda framework considers three factors to assess compliance with the EEOA: (1) whether the school district's program is based upon sound educational theory or principles; (2) whether the school district's program is reasonably calculated to implement effectively the educational theory; and (3) whether, after a period of time sufficient to give the program a legitimate trial, the results of the program show that language barriers are actually being overcome. Castaneda v. Pickard, 648 F.2d 989, 1009-1010 (5th Cir. 1981).

[8] See OCR Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited English Proficiency, Sept. 27, 1991, at App. (1991 OCR Policy), http://www.ed.gov/about/offices/list/ocr/docs/lau1991.html (last visited Sept. 3, 2009).

[9] See Gomez v. Ill. State Bd. of Ed., 811 F.2d 1030, 1041 (7th Cir. 1987).

CPS' argument that Horne's discussion of the EEOA negates any federal interest in CPS' implementation of the AAC's bilingual education requirements. (See CPS Br. 3-4.)

As Horne notes, the EEOA's "appropriate action" language does not require a particular ELL program, such as bilingual education. Slip. Op. at 3. Title VI does not require bilingual education either, but both laws recognize it as an educationally sound ELL program.[10] In fact, since at least 1980, Illinois law has *required* bilingual education for certain ELLs. 105 Ill. Comp. Stat. 5/14C-3; formerly cited as IL. ST. Ch. 122 ¶ 14C-3. Thus, although CPS need not have provided bilingual education to comply with Title VI when CPS agreed to the original and modified consent decrees in this case, CPS' repeated "choice" to do so reflected an acceptable way to comply with Title VI and state law. Frew, 540 U.S. at 439; see O'Sullivan, 396 F.3d at 862 (state and local officials may consent to more than the minimum required by federal law to settle a case).

More importantly, each time CPS made this choice, the terms of the consent decrees reflecting this choice became enforceable obligations even if they went beyond what Title VI required or what a court could have ordered to remedy a violation of Title VI because these terms satisfied the other requirements for federal consent decrees in Firefighters. See Frew, 540 U.S. at 438-40; Rufo, 502 U.S. at 392; Firefighters, 478 U.S. at 525; O'Sullivan, 396 F.3d at 859-60, 863-64. To the extent the bilingual provisions of each consent decree sought to avoid conflicts with state law, CPS may not now use the overlap between the AAC and state law as a basis for vacating the AAC, (see CPS Br. 3, 5), because "[t]he mere congruence of the selected

[10] See 1991 OCR Policy at ¶¶ 1-2 (recognizing bilingual model as educationally sound); Gomez, 811 F.2d at 1042 (not challenging plaintiffs' position that a bilingual model satisfies the first part of the three-part EEOA framework); Castaneda, 648 F.2d 989 at 1010 (same).

terms with a provision of state law does not, standing alone, render the consent decree beyond the authority of the federal court" provided those terms meet the requirements in Firefighters. O'Sullivan, 396 F.3d at 864. As explained above, all of CPS' ELL obligations "spr[a]ng[] from a federal dispute and further[ed] the objectives of federal law." Id. at 438 (citing Firefighters, 478 U.S. at 525).

Horne's reference to research supporting the view that Sheltered English Immersion (SEI) is more effective than bilingual education does not negate the federal interest in ensuring CPS' Title VI compliance that underlies the AAC. (See CPS Br. 4 (quoting Horne, Slip. Op. at 24).) In Horne, the defendants chose to use an SEI model, and the majority opinion questioned whether the EEOA violation, which the lower court previously found based on a bilingual model, was ongoing in light of this changed circumstance. Slip. Op. at 18, 23. By contrast, CPS has consistently chosen bilingual education as its means of complying with Title VI since 1980, and CPS' failures to provide adequate and appropriate native language instruction, materials, and special education services demonstrate that CPS has not satisfied the AAC's bilingual requirements. (See U.S.' Post-Trial Br. 5-13.) Frew makes clear that a violation of a consent order need not constitute a violation of federal law to support court enforcement. See supra Section I.C at 6.[11] Because Horne neither alters Frew's holdings to this effect nor undermines the federal interest furthered by the AAC, CPS' failures to fulfill its obligations under the AAC

[11] Though not required, these failures also could demonstrate violations of Title VI and its implementing regulations (as well as the EEOA) because CPS has failed to implement the bilingual model appropriately and adequately under Castaneda's second prong. See 1991 OCR Policy at ¶¶ 1-2 (discussing Title VI requirements for properly implementing bilingual education programs); Castaneda, 648 F.2d 989 at 1010 (holding that EEOA requires a school district to "follow through with practices, resources and personnel necessary to transform the theory [underlying the chosen ELL program model] into reality").

demonstrated at trial require continued enforcement of the AAC.

C. Horne's Discussion of NCLB Does Not Negate the Federal Interest in the AAC

CPS asserts that because it is already subject to federal and state oversight through Title III of NCLB and this case has not raised any issues under Title III, CPS should not be subject to additional oversight by the Department of Justice. (CPS Br. 5.) This argument lacks merit and finds no support in Horne, which states nothing about dual oversight of ELL programs by federal and state agencies. Every school district in this country that has an ELL program and receives NCLB funding is subject to oversight by the state education agency and the United States Departments of Education and Justice to monitor compliance with state requirements, the EEOA, Title VI, and NCLB.

Although Horne did discuss NCLB as a "potentially significant 'changed circumstance'" under Rule 60(b)(5), Slip Op. at 25, CPS has not argued that NCLB is a changed circumstance since the 2006 entry of the AAC. Presumably, CPS did not do so here because its own prior arguments precluded such an assertion; CPS cited to NCLB as a legal change since the 1980 Consent Decree that justified *court approval* of the 2004 MCD. See MCD at 3; (Jt. Mot. of U.S. & CPS for Ct. Approval of Proposed MCD 8-9, Dec. 10, 2003). Horne also held that compliance with Title III of NCLB is relevant to, but not dispositive of, compliance with the EEOA, Slip. Op. at 26, noting that Title III's annual measurable accountability objectives (AMAOs) constitute "evidence of the progress and achievement of . . . ELL students" that "could provide persuasive evidence of the current effectiveness of . . . ELL programming." Id. at 27, n.15. This part of Horne also fails to support vacating the AAC because the evidence at trial showed that CPS failed to meet the AMAOs in four out of the last five years. (See Gov't Ex. 48

at 4 (Ill. AMAO District Status 2004-2008).)

III. Conclusion

For all of the above reasons, this Court should deny CPS' request to vacate the ELL provisions of the SACD and grant the relief requested in the United States' Post-Trial Brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2009, I served a true and correct copy of the foregoing United States' Response to CPS' Motion to File Supplemental Brief in Light of the U.S. Supreme Court Decision in Horne v. Flores upon the following counsel of record:

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