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' REPLY IN SUPPORT OF ITS MOTION TO ENFORCE PROVISIONS OF THE MODIFIED CONSENT DECREE

The Chicago Public Schools ("CPS") opposes the United States' Motion to Enforce Provisions of the Modified Consent Decree by adopting an implausible interpretation of paragraphs I(E)(2)(a), I(E)(2)(b), and V(B)(1)(d) of the Modified Consent Decree. Unfortunately for the CPS, its position is squarely at odds with the plain language of the Modified Consent Decree. Paragraphs I(E)(2)(a) and I(E)(2)(b) required the CPS to deny open enrollment transfers that precluded majority to minority ("M to M") transfers and to offer some M to M transfers this school year.[1] The CPS has failed to comply with either requirement. Paragraph V(B)(1)(d), in equally clear terms, prohibited the CPS from allocating more desegregation funds to magnet clusters than to compensatory programs this school year. The CPS, however, has disregarded this prohibition.

[1] "An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan ... and is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 26-27 (1971).

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The United States has moved the Court to remedy these violations. The only factual dispute is whether certain schools with over 40% white enrollment have space for *some* M to M transfers this school year. The CPS' own capacity data indicate that the answer is "yes." Adequate space is not an issue for the next year because the CPS, consistent with the Modified Consent Decree, will have to deny the open enrollment transfers that are precluding M to M transfers. As for the desegregation funds, the CPS should reallocate them this school year in the manner outlined below and should allocate them in a fully compliant manner in future years.

I. The Remedy Sought by the United States for the Transfer Violations is Appropriate

The CPS opposes the remedy sought by the United States for the CPS' transfer violations. First, the CPS defends its determination that the over 40% white schools have no room for M to M transfers. Opp. at 4. Second, the CPS asserts that it will "monitor and prevent *new* White student transfers to any over 40% White schools to the exclusion of minority student transfers, without good cause" beginning in the 2005-06 school year. Id. (emphasis added). Third, the CPS argues that it is "educationally unsound to displace students who are currently enrolled in the more than 40% White schools to make room for M-M transfers, either now or in the future," and "to move any minority or White students in the middle of the school year." Id. These points are without merit. There currently is room for M to M transfers, and the United States is not asking the CPS to move any students during the middle of the school year. Monitoring *new* open enrollment transfers *next year* falls short of the CPS' obligation to monitor *all* such transfers and does not rectify its failure to monitor such transfers *this year* and in prior years.

A. The Schools with 40% or More White Enrollment Have Seats Available

The CPS' assertion that the over 40% white schools have no room for M to M transfers

this school year or next school year is belied by its own data. Worse yet, it rests on the mistaken view that white students should be allowed to transfer to these schools in a manner that denies minority students that right.

1. Sufficient Capacity Exists for Future Years: There are 801 white transfer students at the over 50% white schools. The CPS has admitted that 393 of these white transfer students are open enrollment transfers. Opp. at 9. This should be the end of the matter: paragraph I(E)(2)(a) of the Decree requires denying these 393 transfers next school year because they negatively impact desegregation by precluding M to M opportunities. See Section I(B) below. To assist the Court in determining whether some of the 47 transfers at Stock and the 73 transfers at Wildwood[2] should be denied next school year, the CPS should break down the number of transfers by type (e.g., open enrollment transfers) for both schools as the CPS did in Table 3 of Exhibit C. Likewise, the CPS should identify each Options Program and the year in which the student transferred for the 98 "Options Program Transfers" identified in Table 3 of Exhibit C so that the Court can determine if some of these transfers should be denied next school year.[3]

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[2] The CPS excluded the 47 transfers at Stock and the 73 at Wildwood on the grounds that Stock's percentage of white enrollment would decrease to 32.8% and Wildwood's would decrease to 36% if these white students were all replaced with minority M to M students. See Ex. C, Table 1. This calculation ignores the fact that Stock's and Wildwood's enrollments would be 44.1% white and 44.9% white respectively without the white transfer students, see Ex. A, Table 8, which means both schools should offer some M to M transfers. The CPS' contention that filling the 120 seats at Stock and Wildwood with M to M students would "push[] [the schools] appreciably toward racially identifiable status" is also not credible when enrollments of 32.8% white and 36% white fall within the CPS' definition of a "desegregated" school (i.e., 30% to 70% white), not that of a "racially identifiable" school, which is at or below 15% white.

[3] The United States would not object to the 98 "Options Program Transfers" if they comply with the Original or Modified Consent Decree. See Ex. C, Table 3. For instance, if any of the 51 students at Byrne, Dirksen, Dore, Mt. Greenwood, Norwood Park, and Oriole Park were accepted as "voluntary transfers" when the enrollment at these schools was 40% or more

With respect to the schools with enrollments between 40% and 50% white, it is less clear how many open enrollment transfers should be denied next school year because the CPS did not submit an analysis for these schools to this Court or to the United States. But see Opp. 6 (claiming that such analysis was provided). Our analysis of the data provided by the CPS (in Tables 1 and 2 of Exhibit A and the August 17, 2004 Study of white enrollment (see Ex. 1)), however, permits us to conclude that at least 144 transfers are taking seats away from M to M transfers. Pursuant to the paragraph I(E)(2)(a) of the Modified Decree, these should be denied next school year. See Ex. 2 (37 at Beaubien, 22 at Hitch, 49 at Sutherland, and 36 at Twain).

Combining these 144 white transfers at the 40% to 50% white schools with the 393 white open enrollment transfers at the over 50% white schools yields *at least* 537 seats at the 40% or more white schools that should be made available for M to M transfers or desegregative No Child Left Behind ("NCLB") transfers next school year.[4] If all of these seats were filled with M to M transfers, the schools' enrollments would remain at or above 40% white, within the CPS' definition of a desegregated school. See Exs. 2 & 3. The United States is not alone in reaching the conclusion that the CPS could promote desegregation by denying certain open enrollment

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white, those transfers should not have been granted and should be denied next school year. While the United States would not object to transfers at magnet or specialized schools, only the 29 transfers at Lincoln fall into this category. The United States does not object to the exclusion of the 38 Pre-K and special education students and would not object to the exclusion of the 9 controlled enrollment students provided their home schools are still on controlled enrollment. See Opp. at 8-9.

[4] The actual number of available seats for next year is likely to be even more than 537 because the CPS' most recent study identified 1,129 white transfers from under 40% white schools to over 40% white schools. See Study of Oct. 19, 2004, at 2, Ex. 4. We also note that we still have not received the complete analysis of the impact of open enrollment transfers on sending and receiving schools required by paragraph ¶ I(E)(2)(a) of the Modified Consent Decree.

transfers. The CPS' own study concluded that "[t]he data suggest[s] that CPS may want to consider creating policies that would result in a significant decrease in the number of White students enrolling at receiving schools with an enrollment of 40% or more White students, from sending schools with an enrollment of White students of less than 40%." Study of Oct. 19, 2004, at 2, Ex. 4. Despite the data, the recommendation, and – most importantly – the legal obligation to deny open enrollment transfers that preclude M to M opportunities, see Decree ¶ I(E)(2)(a), the CPS refuses to consider such changes.

2. Sufficient Capacity Exists This Year: There is no question that if the CPS denies the 537 open enrollment transfers next year, there will be space at the 40% or more white schools for M to M transfers. The question is whether there is any space at these schools this school year if those 537 students remain enrolled. The response to this question depends on capacity.

The CPS asserts that none of the thirteen 40% to 50% white schools discussed in paragraphs 9 and 10 of Exhibit B has space available but provides no capacity analysis. See Opp. at 6.[5] It is difficult to maintain this assertion when these schools are not on controlled enrollment, see Ex. 5, and continue to accept open enrollment transfers. See Exs. 1 & 2. The United States' analysis of fifteen 40% to 50% white schools,[6] which uses the CPS' most recent enrollment data and "new capacity" data, identified 701 currently available seats. See Ex. 2 (3 at

[5] The 13 schools that allegedly have no space are Beard, Beaubien, Belding, Bell, Chicago Academy, Grissom, Hawthorne, Hitch, Ogden, Palmer, Solomon, Sutherland, and Twain.

[6] The 15 schools in Exhibit 2 include the 13 identified by CPS except for Beard, which is analyzed in Ex. 3, and Hawthorne because it is a magnet school. These 11 schools are analyzed along with Graham, Grimes, Kennedy, and Blaine, which are also 40% to 50% white schools.

Grissom, 278 at Graham, 13 at Hitch, 256 at Bell, 89 at Blaine, and 62 at Solomon).[7] In this analysis, enrollments were not adjusted for special education students because the CPS did not provide the necessary data. With such adjustments, fewer than 701 seats would be available, but it is doubtful that adjusting for special education students would eliminate all 701 seats. The CPS should explain how special education adjustments affected its calculation of available seats.

Even if adjusting for special education students eliminated all 701 seats, some seats should be available because the number of seats determined by "new capacity" figures is overly conservative as demonstrated by the 226 schools that operate above their "new capacity," see Ex. 7, only two of which are on controlled enrollment. See Ex. 5 (Kanoon and Steinmetz). The CPS previously used the more expansive definition of "design capacity" to increase M to M opportunities, but on July 21, 2003, the CPS replaced "design capacity" with "new capacity," which includes only 80% of a school's "design capacity."[8] Indeed, if the "design capacity" data, see Ex. 6, are used in lieu of the "new capacity" data, see id., there are 1,903 seats available at the 40% to 50% white schools. See Ex. 9. The actual number of seats available at the 40% to 50% white schools this year is likely somewhere between 701 and 1,903, and the enrollment at these schools would remain within the CPS' definition of a desegregated school even if all 701 seats or all 1,903 seats were filled with M to M transfers. See Exs. 2 and 9.

The CPS contends that none of the 20 over 50% white schools in Table 9 of Exhibit A

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[7] The United States used the June 9, 2004 enrollment data in Table 1 of Ex. A and the September 30, 2003 enrollment data in Appendix A of the CPS' Study of August 17, 2004. See Ex. 1. The "new capacity data" come from the CPS' Report of July 21, 2003. See Ex. 6.

[8] The new capacity figures eliminate 20% of the design capacity to "provide[] an allowance for ancillary classrooms such as art, music, computer, and science in proportion to the size of the school" and are adjusted downwards in other respects. See Capacity Memo at 2, Ex. 8.

has seats available for M to M transfers and identifies their capacity percentages as 96.4% to 171.9%. See Ex. A, Table 9. These figures are suspect or meaningless because the schools are managing to make room for open enrollment transfers, see Exs. 1 and 3, and none of the schools is on controlled enrollment. See Ex. 5.[9] The CPS should explain the basis for the capacity percentages in Table 9. According to the United States' analysis based on the CPS' new capacity data and enrollments that are not adjusted for special education students, there are 899 seats currently available at the over 50% white schools, see Ex. 3, in addition to the 701 seats available at the 40% to 50% white schools. See Ex. 2. Thus, the conservative new capacity data show a combined 1,600 seats currently available at the 40% or more white schools, and the more expansive design capacity data show 4,417 currently available seats (i.e., the 2,514 seats at the over 50% white schools, see Ex. 10, plus the 1,903 seats at the 40% to 50% white schools, see Ex. 9). The actual number of seats available this school year is likely between 1,600 and 4,417, and the enrollment at these schools would remain within the CPS' definition of a desegregated school even if all 1,600 seats or all 4,417 seats were filled with M to M transfers. Regardless of the actual number, the CPS' own capacity data make clear that seats are available this year.

B. The Modified Consent Decree and the CPS' Own Revised Policy Require Denying Open Enrollment Transfers that Negatively Impact Desegregation

Even if this Court were to accept the CPS' unsubstantiated claim that the 40% or more white schools do not have space for any M to M transfers this school year, the fault lies with the CPS. Any lack of space stems directly from the CPS' failure to monitor open enrollment

[9] Table 3 of Exhibit C identifies 2 controlled enrollment transfers at Lincoln, 4 at Norwood Park, and 1 at Smyser, but none of these schools is on CPS' list of controlled enrollment schools. See Ex. 5

transfers – despite its obligation to do so under the Original and Modified Consent Decrees. Notwithstanding the requirements of the Original Decree, the CPS admits that in 1997 it "eliminated the application and selection process for these [open enrollment] schools, as well as the monitoring and reporting" of open enrollment transfers. Ex. C at 3. The CPS' failure to monitor such transfers over the past eight years did limit the seats available for M to M transfers this year, but its violations of the Original Decree do not give it license to violate the Modified Consent Decree. The CPS is required to monitor *all* open enrollment transfers and must deny those that negatively impact desegregation. Its attempt to apply this requirement only to *prospective* open enrollment transfers in the 2005-06 school year, see Opp. at 10, simply cannot be squared with the language of the Modified Consent Decree.[10]

The CPS' final reason for refusing to deny open enrollment transfers that preclude M to M opportunities is that it would be "unfair," "impracticable," and "educationally unsound"[11] to

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[10] Indeed, the CPS' own revised *Open Enrollment and Transfer Policy* is not limited to new open enrollment transfers. See Ex. D. This policy requires any and all students seeking to enroll in a school other than their attendance area school to apply for an open enrollment transfer by the end of June of each year. See Ex. D ¶ I(J)(2)(a) ("Students seeking to enroll ....") and ¶ I.A.3 ("If a student wishes to enroll ...."). It also forbids a school from accepting an open enrollment application "if it would exclude enrollment opportunities for .... [s]tudents who may otherwise enroll pursuant to voluntary transfers that would enhance integration as described in Section II.C. of this policy." Id. ¶ I(J)(1). Section II.C defines such transfers as (1) "Minority student[s] ... transfer[ring] from schools 70% or over minority to schools less than 70% minority" and (2) "White students ... transfer[ring] from schools less than 70% minority to schools 70% or more minority." Although the CPS' own policy requires denying white open enrollment transfers at *over 30% white schools* starting in the 2005-06 school year, the CPS now argues that it has no duty to deny white open enrollment transfer students at *over 40% white schools* next school year.

[11] The research cited by the CPS is based on "mobile" students who move "frequently," "often," or "multiple" times, Opp. at 7 n. 6., not on students who transfer just one time as the case would be here, and any harm experienced by students who will be denied open enrollment transfers next school year will be no different than the harm routinely inflicted by the CPS on

deny these transfers. Opp. at 10. Requiring schools to deny transfers that negatively impact desegregation, however, is a routine and essential practice.[12] It is also unfair to deny minority students a right to transfer that has been guaranteed by the Original and Modified Consent Decrees. More to the point, the United States only asks for what the CPS has itself agreed to do.

We have no reason to quarrel with the CPS' contention that it is "educationally unsound to move any minority or White students in the middle of the school year," Opp. at 4, for the United States does not seek such intrusive relief. Rather, the United States has moved to have the CPS offer some M to M opportunities to the students who were wrongfully denied these opportunities by the CPS' violations of the Original and Modified Consent Decrees. If there are students who wish to take advantage of this opportunity mid-year, they should be allowed to do so. Respecting these families' choice to change school mid-year is consistent with the CPS' prior policy of allowing schools "to accept students from outside of their attendance area, during any time of the year and without process," Ex. C at 3, and its current policy that allows families to change elementary schools mid-year when they move. Ex. D ¶ II(A)(1).[13]

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tens of thousands of students who must change schools due to controlled enrollment or school closings.

[12] See, e.g., Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211, 1219 (5th Cir.1969) (en banc), rev'd in part sub nom. Carter v. West Feliciana Sch. Bd., 396 U.S. 290 (1970)(prohibiting interdistrict transfers that negatively impact desegregation); U.S. v. State of Ga., Meriwether County, 171 F.3d 1333, 1335-36 (11th Cir. 1999) (lower court "halted intra-district transfers (except majority-to-minority transfers)"); U.S. v. State of Ga., 19 F.3d 1388, 1391 (11th Cir. 1994) (lower court "halted all intra-district transfers as well as new inter-district transfers, but ordered the Board to make available a majority-to-minority transfer program").

[13] The CPS contends that mid-year transfers violate its policy, Opp. at 7, but the Modified Consent Decree trumps conflicting local policy and the CPS' policy actually requires high school students to transfer "at the end of the current semester" when their families move "[a]bsent students' extenuating circumstances." Ex. D ¶ II(A)(2).

II. The Desegregation Budget and Guidelines Violate the Modified Consent Decree

The CPS cannot demonstrate that its desegregation funding guidelines and allocations comply with paragraph V(B)(1)(d) of the Modified Consent Decree. It does not even try. Instead, the CPS effectively asks the Court to amend this obligation so that it conforms to the actions already taken by the CPS. The United States asks the Court to hold the CPS to its commitment.

The CPS' effort to recast desegregation funds for magnet clusters as desegregation funds for compensatory programs ignores the language and structure of the Modified Consent Decree. As the CPS itself highlights, the Modified Decree contemplated that funding for compensatory and supplemental programs would come from outside and within the desegregation budget. Opp. at 12. Paragraph V(B)(1) in turn limited allocations of the desegregation budget to four discrete purposes, each designated by a subparagraph: "a. Magnet and Specialized Schools," "b. Compensatory and Supplemental Programs," "c. Transportation," and "d. Magnet Clusters." Concerned that too much of the limited desegregation budget was being allocated to magnet cluster schools, (many of which were not racially identifiable and none of which offered any demonstrable desegregation benefit particularly in the absence of transportation), the United States ensured that the Modified Decree forbid the CPS from allocating more of the desegregation budget to magnet clusters under subparagraph (d) than it allocated to either "magnet schools and programs and specialized schools" under subparagraph (a), or "compensatory and supplemental programs" under subparagraph (b). Decree ¶ V(B)(1)(d).

The CPS' suggestion that desegregation funds for racially identifiable magnet clusters should be counted as part of the compensatory programs under subparagraph (b) instead of the

cluster programs under subparagraph (d) is simply contrary to the plain reading of paragraph V(B)(1) of the Modified Consent Decree. Opp. at 13. The CPS' suggestion that the funds it spends *outside of* the desegregation budget on compensatory programs should be counted as *part of* the desegregation budget for compensatory programs is likewise contrary to a common sense interpretation of paragraph V(B)(1). The CPS emphasizes that the amount of non-desegregation funding for compensatory programs exceeds the amount of desegregation funding for magnet clusters, but this does not negate the fact that the CPS allocated far less of its desegregation budget to compensatory programs than to magnet clusters in violation of the Decree. The CPS also stresses that roughly one third of the magnet cluster schools (78) are racially isolated minority schools, Opp. at 13, but this merely reveals an additional violation of the Decree, which limits the allocation of desegregation funds for magnet clusters to "African American or Hispanic racially isolated schools or to schools that enhance the desegregation of schools within that cluster." Decree ¶ V(B)(1). Unless the CPS can show that the non-racially isolated schools receiving such funds are enhancing the desegregation of the schools within their clusters by drawing minority students from the racially isolated schools to the non-racially isolated schools, such funds should be reallocated to racially isolated schools. Such a showing is doubtful, and the CPS should reallocate such funds anyway until the amount of cluster-related desegregation funds is reduced to a level that complies with the Modified Decree. See U.S. Mot. to Enforce ¶ 9.

To remedy the CPS' violations, the United States proposes the following reallocation for this school year, in accordance with the Modified Decree. According to the CPS' Opposition, integrated clusters receive $11,319,943 and racially identifiable clusters receive $28,695,992. The CPS' enrollment data, however, reveals that $5,284,992 of the $11,319,943 were allocated

to racially identifiable clusters such that the total amount for racially identifiable clusters is actually $33,980,984, and the total amount for integrated clusters is $6,034,951.53. See Ex. 11 at 1. Exhibit 11 also shows that about $1.7 million of the roughly $9.2 million desegregation funds for "compensatory programs" has been allocated to non-racially identifiable schools in violation of the Decree, which limits desegregation funding for compensatory programs to "African American and Hispanic racially isolated schools." Decree ¶ V(B)(1)(b). At a minimum, the CPS should be required to reallocate the $1.7 million to compensatory programs at racially identifiable schools and the $6 million from the "integrated" clusters to compensatory programs at racially identifiable schools. This would bring the total amount of desegregation funds for compensatory programs to $17,217,065 (i.e., $15.2 million plus the $1,997,332 apparently reallocated from the over 70% white clusters to compensatory programs),[14] see id. at 3, but this amount would still fall short of the $33,980,984 allocated to racially identifiable magnet clusters by roughly $16.8 million. Because $33,980,984 is approximately one third of the total desegregation budget (i.e., 34% of $99,516,626 or 35% of $97,519,294), the United States is willing to consider the use of the $16.8 million to fund racially identifiable magnet clusters in lieu of other compensatory programs for this school year only, if the Court is amenable. Next school year, CPS would have to comply fully with paragraph V(B)(1)(d) of the Decree by ensuring that the desegregation funding for magnet clusters does not exceed the desegregation funding for either compensatory programs or magnet and specialized schools.

[14] After the United States challenged the allocation of desegregation funds to over 70% white schools, the CPS stated that it reallocated the funds to racially identifiable schools. Ex. 12.

Conclusion

For the reasons provided, this Court should grant the United States' motion and remedy the CPS' violations of the Modified Consent Decree in the manner described herein. Because November 1, 2004, (the date sought in the motion), has passed, the United States respectfully asks this Court to order the CPS to publicize available M to M seats at the 40% or more white schools by December 10, 2004, so that students may begin filling these seats in the second semester. The CPS also should be ordered to reallocate the $7.7 million in desegregation funds from the non-racially identifiable schools to compensatory programs at racially identifiable schools by December 31, 2005, and to comply fully with paragraph V(B)(1)(d) of the Modified Consent Decree next year.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of November 2004, I served a copy of United States' Reply in Support of its Motion to Enforce Provisions of the Modified Consent Decree via regular mail and facsimile upon the following counsel of record:

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See Case File for Exhibits