**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **JOHN McFERREN, JR., et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff-Intervenor,** | ) | |
| | ) | |
| **v.** | ) | **No. 65-136-STA-egb** |
| | ) | |
| **COUNTY BOARD OF EDUCATION OF FAYETTE COUNTY, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**ORDER GRANTING DEFENDANT'S MOTION TO AMEND CONSENT ORDER**

Before the Court is Defendant County Board of Education of Fayette County, Tennessee ("the District")'s Motion to Amend Consent Order (D.E. # 133) filed on February 19, 2014. The United States has filed a response (D.E. # 135), and Private Plaintiffs John McFerren, Jr. et al. have filed a response in opposition (D.E. # 136).[1] The parties' briefing is now complete, and this matter

[1] On March 4, 2014, the District filed a reply (D.E. # 137) without first obtaining leave of court. Local Rule of Court 7.2(c) states, "reply memoranda may be filed only upon court order granting a motion for leave to reply." Private Plaintiffs have stated their intention to file a motion to strike the brief. By the time the District filed its reply, the Court had already reached its decision on the Motion to Amend. For the reasons stated in this Order, the Court finds that the final bridge plan with the reporting and remedial requirements suggested by the United States will accomplish the overall objective of desegregating the Fayette County School System, under the circumstances and consistent with the July 2013 consent order, in the most expeditious, reasonable and cost effective manner. While the information contained in the District's reply

is ripe for disposition. For the reasons set forth below, Defendant's Motion is **GRANTED**.

## BACKGROUND

The Court need not review the full procedural history of Plaintiffs' 1965 school desegregation suit to place Defendant's Motion in its proper context. Most relevant to the Court's determination of the Motion now pending before the Court are the parties' attempts dating to 2010 to negotiate the terms of a desegregation plan, which would comply with the requirements of the Fourteenth Amendment of the United States Constitution and further the desegregation of the District's elementary schools. Those efforts culminated in a mediated agreement in 2012 to construct a new elementary school in Somerville, Tennessee ("the New School"). Under the terms of their mediation agreement (D.E. # 88-1), the parties agreed that the New School, now named Buckley-Carpenter Elementary School, would replace Jefferson Elementary and Somerville Elementary as well as serve students who are currently attending other elementary schools in the District. The Court would highlight that the Court had first ordered that Somerville Elementary be closed in 1975. On July 27, 2012, the parties filed a joint motion for approval of a proposed consent order (D.E. # 81), setting forth the terms of a "consensus" plan with the stated intent of "eliminat[ing] the vestiges of segregation in the school District."[2] The parties stated their belief that their plan was "consistent with the objectives of the Fourteenth Amendment of the United States Constitution and [would] facilitate the orderly desegregation of the Fayette County School District."[3]

---

would appear to reinforce the Court's conclusion, the Court did not rely on this newly briefed information in deciding the District's Motion.

[2] Jt. Mot. for Approval of Proposed Consent Order 2, July 27, 2012 (D.E. # 81).

[3] *Id.*

On August 21, 2012, the Court granted the parties' joint motion for approval and entered the proposed consent order (D.E. # 88), adopting the parties' comprehensive desegregation plan. Among other mandates, the consent order required the District to construct and open the New School in time for the 2014-2015 school year. The District was further ordered to close the Jefferson and Somerville schools and implement new attendance zones for all elementary schools in the District beginning in the 2014-2015 school year.[4] The District was to implement a controlled choice program, by which students in grades K-5 living in the modified zones for Oakland and Southwest Elementary and the New School would be assigned to a school based on their ranked preference, subject to student racial diversity at the schools. In addition to controlled choice, the District would encourage students who were part of the racial majority at their current elementary school to consider transfer to a school where they would be in the racial minority ("the M-to-M transfer"). The consent order directed the District to implement a magnet school program at Northwest Elementary and detailed procedures for the administration of the program. The consent order also included certain reporting requirements for the District to keep the parties and the Court abreast of developments in the District. The August 2012 consent order was clear and unambiguous in directing the District to "implement the desegregation plan set forth in this Consent Order in its entirety beginning with the 2014-15 school year."[5]

Pursuant to its ongoing duties to provide reports and data to the other parties and the Court, the District filed an annual report (D.E. # 92) on October 15, 2012, and a supplemental report (D.E.

[4] Maps with the new attendance zones were attached to the August 21, 2012 consent order as exhibits 2 and 3.

[5] Consent Order 2, Aug. 21, 2012 (D.E. # 88).

# 93) on October 26, 2012. The parties also held meet-and-confer conferences on November 14, 2012, and December 10, 2012, in advance of an annual status conference with the Court in January 2013. In a joint status report (D.E. # 95) filed on December 21, 2012, the parties stated that due to an intervening change of circumstances, the District had proposed an alternative plan to the Court's August 2012 consent order. The District reported that it could not account for approximately $1 million missing from its general fund and that the state of Tennessee was conducting an audit of the District's finances. Due to the shortfall of funds and the possible effects of the shortfall on the implementation of the desegregation plan, the District began to investigate alternatives such as closing additional elementary schools. Plaintiffs and the United States indicated their concern over the proper implementation of the August 2012 consent order as well as the District's intent to pursue an alternative plan only four months after the approval of the consent order.

In a status report (D.E. # 105) filed on April 8, 2013, the District reported that the state of Tennessee's audit was published on March 27, 2013. According to the findings of the audit, the District's expenditures from 2010 through 2012 had exceeded appropriations by $1,252,647.[6] The District reported that it faced a budget shortfall for the 2012-2013 school year of $777,559.[7] The District proposed the construction of a new school larger than previously planned and the closure of two additional elementary schools in the District, Central and Northwest, as an alternative to the August 2012 consent order. The District's alternative plan also called for a smaller controlled choice zone and the elimination of the magnet school program. The District believed that these measures would reduce its overall expenditures and still allow it to further the goals of the desegregation plan.

[6] Status Rep. 2, Apr. 8, 2013 (D.E. # 105).

[7] *Id.*

In the mean time, the District reported that design for the New School was underway and that site preparation was scheduled to commence in May 2013.

On May 16, 2013, the Court held a status conference with counsel for the parties and discussed the District's alternative plan. The District had presented Plaintiffs and the United States with data and information about the District's financial state as well as the specifics of the District's alternative plan. In an effort to give Plaintiffs and the United States adequate time to analyze the new information, the Court set deadlines for the parties to complete their analysis of the alternative plan and then to meet and confer about the details of the plan. On June 24, 2013, the parties reported to the Court (D.E. # 112) that they had reached an agreement on the terms of an alternative plan, though the District still needed to obtain approval from the full Board. On July 3, 2013, the parties filed a joint motion for approval of a new consent order (D.E. # 115). On July 12, 2013, the Court convened a hearing on the parties' joint motion and at the conclusion of the hearing approved the new consent order, superseding and modifying the August 2012 consent order.

Under the terms of the July 2013 consent order (D.E. # 119), the District was ordered to construct the New School with a 900-student capacity and cease using Central, Jefferson, Northwest, and Somerville as elementary schools. The District would operate only four elementary schools, the New School, Moscow-LaGrange, Oakland, and Southwest, and modify the attendance zones in accordance with maps attached as exhibits 2 and 3 to the consent order. The consent order further required the creation of a controlled choice program to operate in the modified zones for Oakland and the New School. In lieu of the magnet school program operating at Northwest, the consent order gave the District the option to operate a magnet school at LaGrange-Moscow. The District was required to implement school transition programs for all students who would be attending a new

school for the 2014-2015 school year, including an open house at the newly constructed school prior to the start of the school year and after-school support programs. The July 2013 consent order directed the District to implement these and all other "components of the Desegregation Plan by no later than the beginning of the 2014-15 school year."[8]

On October 15, 2013, the District filed its annual report (D.E. # 120), updating the Court and the other parties with current data on student enrollments and faculty and staff assignments at all schools in the District. On November 6, 2013, the District filed a consent motion to modify the July 2013 consent order (D.E. # 121). The District requested the addition of language to the consent order, which would have the effect of requiring the Board "to obligate and commit a requisite sum of its funds in order to service that portion of the total construction debt for which it is responsible" under the terms of the parties' 2012 mediation agreement.[9] The Court granted the District's unopposed motion by order (D.E. # 123) dated November 7, 2013.

On January 7, 2014, the Court ordered the parties to file a status report with the Court "[i]n lieu of setting an annual status conference."[10] The parties were specifically instructed to address "the progress on the construction of the new elementary school and any other issues material to the success of the Desegregation Plan."[11] Thereafter, the parties requested a telephonic hearing with Court, which was convened on February 5, 2014. At the conference, the District reported that it had encountered delays in the construction of the New School, which made completion of the facility in

---

[8] Consent Order 13, July 13, 2013 (D.E. # 119).

[9] Consent Mot. to Modify Consent Order 2, Nov. 6, 2013 (D.E. # 121).

[10] Order on Status Rep. 2, Jan. 7, 2014 (D.E. # 124).

[11] *Id.*

time for the start of the 2014-2015 school year impossible. The District had proposed what it called a "bridge plan," which essentially would have the New School open in January 2015. Plaintiffs and the United States needed additional time to consider the "bridge plan" and perhaps negotiate a resolution of the issue with the District. The Court conducted subsequent status conferences with counsel on February 12 and February 18; however, the parties finally reported that their attempts to resolve the issue had failed and that they intended to submit the matter to the Court for determination.

In its Motion to Amend the Consent Order, the District has described the circumstances that caused the delays in construction and argued the merits of its final "bridge plan." During preparation of the construction site for the New School, asbestos was uncovered. The location of the new school was at one time the site of a high school, which was demolished in the 1980s. According to the Motion now before the Court, the District obtained a Phase I Environmental Site Assessment for the building location of the new school from RTE Environmental, LLC, and the August 25, 2010 report identified "no Recognized Environmental Conditions (RECs) associated with the subject property."[12] Site preparation commenced. On June 18, 2013, W.G. Yates & Sons Construction Company ("Yates"), the District's construction manager for the New School, encountered debris in the soil, which included asbestos. Over the ensuing months, the District undertook an asbestos abatement project at a cost of at least $925,965.50 (and perhaps exceeding $1.2 million). Following the asbestos clean-up, the District contracted with Fisher and Arnold Environmental to evaluate the site and ensure that it was a fit location for the New School. Based on post-abatement testing conducted by Fisher and Arnold, "asbestos and other contaminants within

[12] Def.'s Mem. in Support 3–4 (D.E. # 133-1).

the soil [were] either not detected or below EPA regional screening limits for residential properties, the most stringent criteria."[13] On February 6, 2014, the Tennessee Department of Environment and Conservation, Division of Air Pollution Control issued a letter in response to a request from the District and stated that "it appears that all known asbestos containing material has been properly removed from the site and disposed of at approved landfills."[14]

As a consequence of the discovery of asbestos at the construction site and the attending effort to abate the contaminants in the soil, the District now moves the Court to amend its July 2013 consent order. The District argues that construction of the New School will not be complete in time for the start of the 2014-2015 school year. The District has received a proposal from Yates for an expedited, six-day construction work week. The accelerated construction schedule would have the New School completed by October 1, 2014, at an additional cost of $700,000, a funding amount which is currently not available to the District. Yates has given the District a written guarantee that construction will be complete under a normal, five-day construction work week by no later than December 9, 2014. The late completion of the New School could mean the facility would remain vacant until the start of the 2015-2016 school year. In that event, the District will lose the value of its one-year warranty from Yates, which begins to run from the issuance of a certificate of occupancy. Faced with these delays, the District has investigated three possible options to allow for the opening of the New School in January 2015.

Under the first option available to the District, students would attend Jefferson, Northwest, Central, and Somerville for the first semester of the school year. The District considers this the

---

[13] *Id.* at 5 (quoting Fisher & Arnold Rep., ex. B).

[14] *Id.* at 6 (quoting Tenn. Dept. of Env't & Conservation Ltr. Feb. 6, 2014, ex. E).

"least viable approach" for several reasons. The District expected to realize savings from closing these schools after the 2013-2014 school year. The District's first payment on the service of its $4.8 million share of the total construction debt is due in January 2015 as well. Thus, the costs associated with operating four elementary schools for one semester will adversely affect the District's budget. What is more, the District believes that this option will be disruptive for the students who attend these schools. Once the students move to the new school in January 2015, they would be reassigned to new classrooms, and many would have new bus routes. For these reasons, the District does not find this first option very desirable.

Under its second option, the District would close only Northwest Elementary for the first semester. All but thirteen of the students currently assigned to Northwest would be assigned to Oakland under the modified attendance zones in the current consent order. The thirteen students who would be assigned to the New School under the modified attendance zones would attend Jefferson. The District argues that this second option would still require the reassignment of all students moving to the new school in January 2015 to new classrooms, though the District has not explained why this is the case. The second option would also yield lower than anticipated savings for the District and impact the budget for the 2014-2015 school year.

The District has requested that the Court adopt a third option, what the District refers to as the bridge plan. Under the District's bridge plan, the implementation of much of the desegregation plan would proceed for the 2014-15 school year and be in place by January 2015. The District would modify school attendance zones in time for the 2014-2015 school year, as required under the July 2013 consent order. Both Northwest Elementary and Somerville Elementary would close as planned. Students from all schools who were assigned to the New School would have classes at Jefferson or

Central for the first semester of the school year, then move to the New School in January 2015. While the mid-year transition to the New School would be disruptive, the bridge plan contemplates that classes would move intact, with students keeping their same class assignments and teachers once they move to the new campus for the second semester. With a guaranteed completion date of December 9, 2014 for the New School, the District believes that the New School will be available for orientation programs for new students in December. The District argues that its bridge plan would allow the school system to come into compliance with the Court's July 2013 consent order by January 1, 2015.

The District concedes that the delays in construction could "potentially compromise the implementation" of the controlled choice program.[15] The District proposes that the controlled choice program move forward for the 2014-2015 school year, with students assigned to the New School attending Jefferson or Central for the first semester. For example, students from the Oakland zone who are assigned to the New School would attend Central to start the school year. The District reports that it has retained Michael Alves, a nationally recognized expert on controlled choice, to implement the controlled choice program for the Fayette County Schools. Likewise, the bridge plan would offer M-to-M transfers to all students in kindergarten through fifth grade, who are in the majority race at their zoned schools, according to the modified school zones in the July 2013 consent order. The District will renew all current M-to-M transfers to the three existing elementary schools that will continue to operate beyond 2014, LaGrange/Moscow, Oakland, and Southwest. Any student attending one of the three schools to be closed and consolidated into the New School, namely, Central, Jefferson, and Somerville, on an M-to-M transfer will have their transfer converted

[15] Def.'s Mem. in Supp. 11.

to the New School. The District will communicate to parents of students with current M-to-M transfers that it will renew or convert all current transfers. Under the consent order, the District's deadline to notify families of the M-to-M transfer policy was February 21, 2014, a deadline the Court has tolled in light of the Motion to Amend.[16] The District has requested that the Court allow it a reasonable time after the Court's ruling to send notice to families with students eligible for the M-to-M transfers.

The District argues that relief from the current consent order and the modification of the order is warranted under several paragraphs of Federal Rule of Civil Procedure 60(b). The District contends that the unexpected discovery of asbestos constitutes a surprise for purposes of Rule 60(b)(1) or newly discovered evidence under Rule 60(b)(2). In the alternative, the District argues it is entitled to relief under Rule 60(b)(6) because the asbestos contamination at the site is an "other reason that justifies relief." Therefore, the Court should amend the consent order consistent with the terms of the District's bridge plan.

The United States as Intervenor-Plaintiff in this matter has filed a response to the District's Motion to Amend. The government states that in light of the unavoidable delays in the construction of the New School, the United States does not oppose the District's final bridge plan and states that the Court should grant the District's Motion.[17] According to the government, "[t]he Final Bridge

---

[16] Order, Feb. 12, 2014 (D.E. # 130).

[17] The District originally submitted to the other parties and filed on the docket (D.E. # 128) a proposed bridge plan, to which the other parties objected. The original plan contained many of the same features found in the final bridge plan but with notable exceptions. The original plan called for Somerville Elementary to remain open for the Fall 2014 semester as one of two "bridge" schools. Notice of Filing Bridge Plan, ex. A, 3 (providing that the District would "assign all Somerville students to Somerville for the fall semester"). Under the final version of the bridge plan, Somerville would close at the conclusion of the 2013-2014 school year. The

Plan will start delivering the desegregation relief required by the 2013 Consent Order by August 2014, fully implement the court-ordered assignment plan by January 2015, and does not disproportionately burden African-American students."[18] The government does express concern about the District's history of delay and failure to comply with the Court's orders in this matter. For example, the District has only recently taken steps to hire a third-party consultant for the controlled choice program and purchase the necessary computer software. According to the United States, the government and the Private Plaintiffs were given only a few days to offer input on the consultant or the request for proposals on the software. The government notes that the District has experienced much difficulty in complying with the Court's previous orders and believes that "any future delays in implementing [the Court's orders] will jeopardize the desegregation of the schools and the District's efforts to achieve unitary status."[19] As a result, the United States requests that the Court require the District to devise a timetable of actions that it must take on a bi-weekly basis between now and January 1, 2015, to ensure the full implementation of the bridge plan. The District should be ordered to file monthly reports with the Court to detail "all relevant construction benchmarks that have been reached and all of the steps the District has taken to inform parents about their students' prospective school assignments."[20] The monthly reports should further include a list of all contracts

---

United States has briefed several other objections it had to the District's initial proposal. Gov't's Resp. to Mot. to Amend 4 (D.E. # 135). Because the District has modified its proposal to remove elements the other parties deemed problematic, the Court need not consider those elements here.

[18] Gov't's Resp. to Mot. to Amend 5 (D.E. # 135).

[19] *Id.* at 9.

[20] *Id.* at 10.

or purchases the District approved in the preceding month to comply with the amended consent order. The United States has also requested that in the event additional delays are encountered, the District notify the Court, the Plaintiffs, and the government. Finally, the United States has proposed "additional remedial triggers" including possible show cause orders or other remedies to address future delays.

Private Plaintiffs have filed a separate response in opposition to the District's Motion to Amend and propose their own plan for amending the current consent order. Plaintiffs agree that due to the construction delays, the current desegregation plan cannot be implemented as ordered. As such, Plaintiffs do not oppose the modification of the July 2013 consent order. However, Plaintiffs begin by observing the number of recent instances when the parties engaged in good faith negotiations to arrive at a desegregation plan, only to have the District come back later with requests to modify the negotiated plan. In this most recent instance of delay, the District waited until December 2013 to advise that the deadlines of the current plan could not be met and to circulate its initial bridge plan. Counsel for Plaintiffs states that she inquired about the status of construction with counsel for the District on several occasions during the summer and fall of 2013. The District indicated in one communication during the summer of 2013 that there had been slight delays in the construction. The District did not inform opposing counsel that an alternative plan was under consideration until counsel circulated the plan by email in December 2013.

As for the merits of the District's bridge plan, Plaintiffs emphasize the aim of the desegregation plan to minimize impact on African-American and other students while achieving maximum desegregation in the Fayette County Schools as a whole. According to Plaintiffs, the District's bridge plan undermines these goals. Plaintiffs first argue that the interdependent steps of

the plan should be implemented simultaneously, and not in piecemeal fashion. Specifically, the controlled choice program, the conversion of Oakland Elementary and Southwest Elementary to grades K-5 campuses, and the closing of Northwest Elementary should occur at the same time. With respect to the changes to Oakland, Southwest, and Northwest, Plaintiffs argue that Oakland and Southwest were to be reconfigured as K-5 schools to accommodate new students being reassigned from Northwest and other schools in the District. Oakland and the New School are the two schools making up the controlled choice zone for the District. Essential to the success of the controlled choice program is the opening of the New School. Plaintiffs' assert that implementing controlled choice before the New School is open "would result in families that chose the New School getting, instead, a temporary assignment to an old school that is scheduled for closure," an outcome which threatens to "dampen enthusiasm for controlled choice and weaken the chance for its success."[21] Plaintiffs highlight the remaining uncertainty surrounding the construction of the New School. Plaintiffs further argue that the District's bridge plan would unduly burden African-American students, particularly students who currently attend Northwest Elementary. Under the terms of a previous consent order, Northwest was to be the home of the District's magnet school program. Then the July 2013 consent order contemplated the closure of Northwest so that students could enroll in the New School. Now under the District's bridge plan, Northwest students would be assigned to another school before they attend the New School. Plaintiffs argue then that the District's need for cost saving comes at the expense of these students.

Because of the delayed opening of the New School, Plaintiffs contend that the mutually-dependent elements of the plan should not be implemented until the beginning of the 2015-2016

[21] Pls.' Resp. in Opp'n 6–7 (D.E. # 136).

school year. As such, Plaintiffs propose the following changes to take effect in August 2014. First, the District should close Somerville and assign Somerville students to Central Elementary. The Court ordered the District to close Somerville in 1975, and yet the campus remains open. Second, rather than fully implementing the modifications to student attendance zones for the 2014-2015 school year, the District should only change the zones that would send Central students to LaGrange-Moscow. Third, the District should assign the entire Central pre-kindergarten class to Jefferson, meaning that all pre-K students who would have been assigned to Central, Somerville, and Jefferson would attend Jefferson. Plaintiffs propose that in January 2015 the New School open, Central and Jefferson close, and all Central and Jefferson students be assigned to the New School. In August 2015, the District would implement the controlled choice program and the remainder of the attendance zone changes. Plaintiffs argue that their plan does not strain the capacity of any of the schools, allows parents time to familiarize themselves with the desegregation plan, gives the District and the community a chance to develop the controlled choice program, and minimizes the burden on African-American and other students in the Fayette County Schools.

## STANDARD OF REVIEW

Rule 60(b) of the Federal Rules of Civil Procedure provides that parties may file a motion to alter or amend a judgment at any time after entry of that judgment.[22] Rule 60(b) permits a court to relieve a party from a final judgment, order, or proceeding under the following limited circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

[22] Fed. R. Civ. P. 60(b).

misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.[23] Generally, Rule 60(b) relief must be "circumscribed by public policy favoring finality of judgments and termination of litigation."[24]

**ANALYSIS**

The District has argued that amendment of the Court's July 2013 consent order is proper under more than one paragraph of Rule 60(b). Neither the United States nor the Private Plaintiffs have objected to the modification of the consent order, though Plaintiffs have submitted their own proposal for amending the desegregation plan. Therefore, the Court need not reach the issue of whether the District is entitled to relief specifically under Rule 60(b)(1), 60(b)(2), or 60(b)(6). The parties agree that a delay in construction has occurred and that current deadlines for opening the New School cannot be met. Therefore, relief from the Court's previous consent order is warranted. The question for the Court is what form that relief should take.

At the outset the parties continue to agree that the current desegregation plan "is consistent with the objectives of the Fourteenth Amendment of the United States Constitution and will facilitate the orderly desegregation of the Fayette County School District."[25] No party is requesting a wholesale modification of the plan adopted in the July 2013 consent order. The need to revise the

---

[23] *Id.*

[24] *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012).

[25] Jt. Mot. for Approval of Proposed Consent Order 2, July 27, 2012 (D.E. # 81).

plan arises only because of the unexpected delays associated with the construction of the New School. Instead of opening for the start of the 2014-2015 school year, the New School will be completed in time for the second semester and allow students to begin class there in January 2015. The parties' competing proposals for the modification of the order then concern matters of timing, which is to say, how and when the elements of the desegregation plan should go into effect.

Even at that the parties' plans have much on which they agree. All parties agree that the New School should open in January 2015, thereby giving the students the benefit of the brand new facility and the District the benefit of its warranty and economies derived from the closure of other schools. All parties agree that Somerville Elementary should finally be closed at the conclusion of the 2013-2014 school year, an act long required as part of the desegregation of the Fayette County Schools. All parties agree that Central Elementary and Jefferson Elementary should remain open only for the Fall 2014 semester and only for students who will inaugurate the New School in January 2015. The Court finds then that the parties share much common ground, even as they confront frustrating delays in the successful execution of their agreed plan for desegregation.

The differences between the plans proposed by the District and the Private Plaintiffs are few and largely relate to the sequence in which vital elements of the plan should occur. Generally speaking, the District favors the full implementation of the current desegregation plan for the 2014-2015 school year, the Private Plaintiffs a phased implementation of the plan with some elements introduced in the 2014-2015 school year and the remaining elements in 2015-2016. The parties specifically disagree over the roll-out for the controlled choice program and the full modification of school attendance zones. These measures along with the opening of the New School will necessarily result in changes at the elementary schools at Oakland and Southwest and the closure of Northwest

Elementary. The only question is when the changes will take place, in time for the 2014-2015 school year or the 2015-2016 school year.

The parties argue correctly that the plan the Court adopts should accomplish the greater goal of desegregation and minimize the burden on the students of the schools affected. The District must "make every effort to achieve the *greatest possible degree of actual desegregation* and to be concerned with the elimination of one-race schools."[26] Thus, the District is prohibited from pursuing plans or policies "that would impede the progress of disestablishing the dual system and its effects."[27] The District has the ongoing duty "not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system."[28] In short, the District must work to realize the "goal of a desegregated, non-racially operated school system [that] is rapidly and *finally* achieved."[29]

As such, the District has the burden "to come forward with a plan that promises realistically to work now until it is clear that state-imposed segregation has been completely removed."[30] "The

---

[26] *Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cnty., Okl. v. Dowell*, 498 U.S. 237, 259 (1991) (quotation and internal brackets omitted; emphasis in original).

[27] *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979).

[28] *Harris v. Crenshaw Cnty. Bd. of Educ.*, 968 F.2d 1090, 1095 (11th Cir. 1992).

[29] *Raney v. Bd. of Educ. of Gould Sch. Dist.*, 391 U.S. 443, 449 (1968) (quotation and internal quotation marks omitted); *see also Reed v. Rhodes*, 179 F.3d 453, 480 (6th Cir. 1999) ("[S]chool districts are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'").

[30] *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 13 (1971).

measure of any desegregation plan is its effectiveness."[31] The Supreme Court has described a district court's task in school desegregation cases as follows:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.[32]

The Court must be satisfied the District has proposed the plan in good faith and find that the proposed plan has "real prospects for dismantling the state-imposed dual system at the earliest practicable date."[33] By the same token, "the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method."[34] With these principles of law in mind, The Court finds good cause to adopt the District's bridge plan as an effective means of achieving "meaningful and immediate progress toward" the desegregation of the Fayette County

---

[31] *Davis v. Sch. Comm'rs of Mobile*, 402 U.S. 33, 37 (1971); *Kelley v. Metro. Cnty. Bd. of Educ. of Nashville & Davidson Cnty., Tenn.*, 687 F.2d 814, 831 (6th Cir. 1982); *see also Everett v. Pitt Cnty. Bd. of Educ.*, 678 F.3d 281, 290 (4th Cir. 2012) ("Given that there is no dispute that the school district has not attained unitary status, the evidentiary burden should have been on the School Board to prove that the 2011–12 Assignment Plan is consistent with the controlling desegregation orders and fulfills the School Board's affirmative duty to eliminate the vestiges of discrimination and move toward unitary status.").

[32] *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 439 (1968).

[33] *Id.*

[34] *Id.*

Schools. The Court now considers the specific merits of the parties' competing proposals for amending the desegregation plan.

**I. Modified Attendance Zones, School Closures, and Restructuring at Oakland and Southwest**

First and foremost, the District's bridge plan would put in place all of the elements of the parties' agreed desegregation plan by January 2015. The bridge plan would move ahead with the full desegregation plan for the 2014-2015 school year. The majority of the students in the District's elementary schools would be assigned to the schools where they will remain under the agreed plan for modified attendance zones, campus closings, and school reconfigurations. Based on projected enrollments after the consolidation of existing schools and the adoption of new attendance zones, students at Oakland (684), Southwest (317), and LaGrange-Moscow (328) will constitute 1,329, or 67.9%, of the 1,958 elementary school students in the District.[35] Thus, for most Fayette County elementary students, the full implementation of the plan for the 2014-2015 school year would advance the purpose of desegregation "at the earliest practicable date."[36]

As for the 629 students projected to attend the New School, the bridge plan deals with the realities of the delayed construction by placing these students in Central and Jefferson only for one semester. Students assigned to the New School will have classes at Central or Jefferson for Fall 2014 and then the New School in Spring 2015. The Court finds this to be the least attractive aspect of the bridge plan, in part because of the disruption assigning children to two different schools will likely cause. However, it is clear that assigning students to Central and Jefferson for Fall 2014 is a matter of necessity under the circumstances because both the District and Private Plaintiffs have

[35] *See* Def.'s Proposed Bridge Plan 9, ex. F to Mot. to Amend (D.E. # 133-7).

[36] *Green*, 391 U.S. at 439.

proposed it as part of their respective plans. Thus, under either proposal, students will inevitably attend either Central or Jefferson during a "bridge" semester before going on to the New School. To mitigate the burden on these students, the bridge plan would have students keep the same teacher and classmates (as well as school bus routes) when they move to the New School in January 2015. This aspect of the bridge plan cures in part the inconvenience for the 629 students who will be assigned on an interim basis to Central and Jefferson. The Court concludes then that the District's plan will minimize the amount of overall disruption to the District's students.

The Court further finds that the bridge plan will provide "meaningful and immediate progress toward disestablishing state-imposed segregation" in Fayette County.[37] Current enrollment statistics for the District's seven elementary schools show that five schools are racially identifiable, meaning their student body populations varied more than +/– 15% from the racial demographics of elementary school students for the District as a whole. "Racially identifiable schools are one of the primary vestiges or effects of state-sanctioned segregation."[38] The bridge plan, and in particular the immediate implementation of the modified attendance zones, would upend the status quo. As the United States noted in its brief in support of the District's Motion, four out of five elementary schools operating under the bridge plan for the Fall 2014 semester would have student body populations within +/– 15% of the district-wide racial demographics. Specifically, Jefferson would move from being a racially-identifiable African-American school to being within the +/– 15% range, and Central would remain within the range. Furthermore, Oakland should move within the acceptable range once controlled choice assignments are complete, leaving only LaGrange-Moscow

[37] *Green*, 391 U.S. at 439.

[38] *Reed*, 179 F.3d at 480.

as a racially identifiable student body. Thus, the District's bridge plan would immediately achieve a dramatic reversal in the area of racially identifiable elementary schools.

**II. Burden on African-American Students**

The Court also finds that the burdens of the bridge plan do not disproportionately fall on Fayette County's African-American students. The Supreme Court has commented in dicta that the remedies for segregation may be "inconvenient" and "may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."[39] Nevertheless, "the burden of desegregation should be shared as equally as possible between blacks and whites,"[40] and "the burdens and inconveniences of integration should not be placed discriminatorily on a particular group."[41] Here the bridge plan anticipates the assignment of 629 students to Central and Jefferson for the Fall 2014 semester and then to the New School for the Spring 2015.[42] The District projects that the 629 students assigned to the New School will be 60.3% African-American, 35.1% white, and 4.6% other ethnic groups.[43] Whatever burden the assignment to the "bridge" schools might constitute, the parties agree that the midyear reassignment of students from Central and Jefferson to the New School is unavoidable if students are to occupy the New School in January 2015. And as previously discussed, the bridge plan at least mitigates any disruption for the students by reassigning classes

---

[39] *Swann*, 402 U.S. at 28.

[40] *Davis v. Bd. of Ed. of N. Little Rock, Ark. Sch. Dist.*, 674 F.2d 684, 687 (8th Cir. 1982).

[41] *N.A.A.C.P. v. Lansing Bd. of Ed.*, 559 F.2d 1042, 1052 (6th Cir. 1977).

[42] *See* Def.'s Proposed Bridge Plan 9, ex. F to Mot. to Amend (D.E. # 133-7).

[43] *Id.*

with their teachers intact from the "bridge" schools to the New School. The fact remains that some students under the bridge plan will attend school at three different campuses between January 2014 and January 2015. Approximately 290 students assigned to the New School will attend one campus (Somerville, Oakland, or Northwest) during the Spring 2014 term, another campus (Central or Jefferson) for Fall 2014, and then the New School in Spring 2015. The District estimates that of the 290 students in this category, 47% are African-American and 49% are white.[44] The Court finds that based on these estimates, both African-American and white students will bear the burden of this unappealing feature of the bridge plan equally. Under these circumstances, the Court cannot say that the bridge plan disproportionately burdens African-American students.

Although the United States does not believe the bridge plan will burden African-American students, Private Plaintiffs argue that the bridge plan will adversely affect African-American students at Northwest "by once again denying Northwest students what they were promised in a court-ordered desegregation plan."[45] Initially, under the August 2012 consent order, Northwest Elementary was to become the District's magnet school. Then, under the July 2013 consent order, Northwest was to close at the end of the 2013-2014 school year with its students reassigned to Oakland or the New School. Northwest's African-American students now face the prospect of attending a school on an interim basis while construction of the New School is completed. Private Plaintiffs contend that the District's bridge plan sacrifices the interests of Northwest's African-American students for budgetary concerns. Private Plaintiffs have proposed that the District operate Northwest for the full 2014-2015 school year and then carry out the reassignment of Northwest students to Oakland and the New

[44] *Id.* at 13.

[45] Pls.' Resp. in Opp'n 8 (D.E. # 136).

School in 2015-2016.

Private Plaintiffs' arguments to the contrary notwithstanding, the Court finds that the bridge plan does not place any undue burden on Northwest's African-American students. The record shows Northwest Elementary has an enrollment of 134 students for the 2013-2014 school year.[46] Under the bridge plan, 121 of these students will attend Oakland for the 2014-2015 school year, just as they would have under the July 2013 consent order, which the Court entered on the joint motion of all parties including Private Plaintiffs.[47] The remaining 13 students, all of whom are African-American, will attend Jefferson for the Fall 2014 semester and then the New School.[48] The Court has already noted its concerns about the District assigning some students, including the 13 students from Northwest, to three different campuses in as many semesters. However, this specific hardship is being borne equally by students of all races and ethnic groups. Therefore, the Court disagrees with Private Plaintiffs' contention that the bridge plan disproportionately affects13 African-American students presently attending Northwest.

**III. Controlled Choice**

The Court finds that the District can effectively implement controlled choice for the 2014-2015 school year without compromising the integrity of the program. Under the July 2013 consent order, the District must implement a controlled choice program, which includes students in the modified attendance zones for Oakland and the New School.[49] Controlled choice utilizes a "random

---

[46] Def.'s Proposed Bridge Plan 9, ex. F to Mot. to Amend (D.E. # 133-7).

[47] *Id.* at 10.

[48] *Id.* at 11.

[49] Consent Order 4, July 12, 2013 (D.E. # 119).

computerized program" to "assign all grade K-5 students who reside" in the zones for Oakland and the New School to one of the two schools, taking into account the "ranked preferences" of the students and other factors.[50] Student assignments nevertheless remain subject to the achievement of "student racial diversity" at each school and the schools' capacity limitations.[51] Private Plaintiffs have raised concerns about the bridge plan's impact on the ultimate success of the controlled choice program. As Plaintiffs correctly argue, "the components of a school desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge upon the success or failure of another"[52] The District and the United States recognize that the full implementation of controlled choice before the opening of the New School poses certain risks.[53]

The Court finds that on balance the bridge plan's implementation of controlled choice for the 2014-2015 school year will not undermine the ultimate success of the program. There is an obvious concern that the temporary assignment of students to Jefferson and Central will dissuade some

---

[50] *Id.*

[51] *Id.* at 4–5. The Consent Order defined "student racial diversity" to mean a student body population within "+/–15 percentage points of the district-wide proportion of African-American and white elementary students based on the District's enrollment as reported to the Court October 15 of the preceding school year." *Id.* at 4.

[52] *Freeman v. Pitts*, 503 U.S. 467, 497–98 (1992) (quoting *Vaughns v. Bd. of Educ. of Prince George's Cnty.*, 742 F. Supp. 1275, 1291 (D. Md. 1990)).

[53] Def.'s Mem. in Supp. 11 ("The delay in the completion of the New School for the fall 2014 semester serves to potentially compromise the implementation of the Controlled Choice program."); Gov't's Resp. to Mot. to Amend 7–8 ("The United States recognizes that mid-year reassignments may impact the decisions of some parents as they rank their preferred schools under the controlled choice program, and that some parents may not elect the New School as their preferred school because their children will be assigned to one of the bridge schools before relocating to the New School.").

families from choosing the New School for 2014-2015. The District has hired Michael Alves of the Alves Educational Consultant Group as its controlled choice consultant.[54] It would appear that both parties recognize Alves as an authority on controlled choice.[55] The government argues that the bridge plan will not jeopardize the success of controlled choice because "the controlled choice program needs to move a total of only 16 students between Oakland and the New School in order to meet the expectations of the 2013 Consent Order."[56] This is not to minimize the significance of controlled choice as a tool to achieve the desegregation of the elementary schools in Fayette County but simply a recognition of the modest goals for the program at its inception. Aside from immediate concerns about the 2014-2015 school year, the consent order allows families to revisit their controlled choice assignment year-to-year, permitting students to "remain in the assigned school unless or until they choose to reapply in the controlled choice process."[57] And in any given year, the final student assignments in controlled choice are subject to student racial diversity at both Oakland and the New School. In the final analysis, the burden remains on the District to establish its program, educate its constituencies about controlled choice, and ensure that controlled choice has a chance to be successful in Fayette County as part of the comprehensive desegregation plan.

The Court shares the Private Plaintiffs' concerns about a rushed effort to develop and launch the controlled choice program before the 2014-2015 school year. The District has only recently

---

[54] *See* Def.'s Proposed Bridge Plan 21, ex. F to Mot. to Amend (D.E. # 133-7).

[55] Private Plaintiffs have cited Alves on controlled choice in their brief. Pls.' Resp. in Opp'n 8 (quoting Michael J. Alves, *What is Controlled Choice?* Participatory Action Research Ctr. for Educ. Org.).

[56] Gov't's Resp. to Mot. to Amend 8.

[57] Consent Order 5, July 12, 2013 (D.E. # 119).

retained its controlled choice consultant and has not yet purchased the computer software (and any additional hardware) needed to make student assignments. Under the current consent order, the District was required to make all student assignments by April 30, 2014. The time remaining for the District to implement the program effectively in time for the next school year is growing short. As discussed more fully below, a brief extension of the deadline for making student assignments will allow the District adequate time to work with Alves, get its controlled choice program in place, and then present the program to families with students in the controlled choice zone. The Court is satisfied that the District and its controlled choice consultant understand the challenges of "implement[ing] and sustain[ing] an effective and fair controlled choice student assignment plan."[58] The Court concludes then that the bridge plan does not pose a serious risk to the success of controlled choice as part of the overall desegregation plan for Fayette County.

**IV. Private Plaintiffs' Alternative Plan**

Finally, the Court finds that Private Plaintiffs' alternative to the bridge plan is feasible but no "more promising in [its] effectiveness" than the District's bridge plan.[59] The Court has already noted the many points of agreement between the District and Private Plaintiffs: the closure of Somerville Elementary, the opening of the New School in January 2015, and the use of Central and Jefferson as "bridge" schools in the interim. Furthermore, the Court has already noted Private Plaintiffs' specific objections to the bridge plan and addressed those concerns. The fundamental disagreement between the parties is the timing for key elements of the plan, especially controlled

---

[58] Pls.' Resp. in Opp'n 8 (quoting Michael J. Alves, *What is Controlled Choice?* Participatory Action Research Ctr. for Educ. Org.).

[59] *Green*, 391 U.S. at 439.

choice, the closure of Northwest, and the restructuring of Oakland and Southwest. Private Plaintiffs emphasize that these features of the larger desegregation plan should occur simultaneously, which is to say, no sooner than the beginning of the 2015-2016 school year. Private Plaintiffs' concerns are largely based on the unknown effects of the construction delays on the controlled choice program. While the Court notes those concerns, the Court has concluded that the District's plan to implement controlled choice in time for the 2014-2015 will not have an appreciable effect on the success of the program. Thus, there is no compelling reason to delay the full implementation of the desegregation plan in the 2014-2015 school year.

The Court finds that the District's bridge plan will further the goal of desegregation just as effectively as the plan proposed by Private Plaintiffs, only one year sooner. The bridge plan will result in the assignment of nearly 70 percent of Fayette County elementary school students to the school where they will remain while the other 30 percent will attend a "bridge" school for only one semester. By contrast, under the plan proposed by Private Plaintiffs, only students at LaGrange-Moscow will be finally settled at the school where they will remain once the plan is fully implemented. Moreover, under the bridge plan, by August 2014 Fayette County will have only one racially identifiable elementary school. Private Plaintiffs have not demonstrated what effect their proposal would have on the number of racially identifiable schools, though it appears their plan would reduce the number of racially identifiable schools no sooner than August 2015. And like the District's bridge plan, Private Plaintiffs' proposal entails the same disruptions and inconvenience of attending an interim school, and for a number of students, three schools in three semesters. As such, the Private Plaintiffs' plan is no more effective than the bridge plan in avoiding burdens on students during 2014-2015.

Taking the Court's findings about the bridge plan together with the United States' support for the bridge plan, the Court holds that the District's bridge plan is an effective means to advance the goal of desegregating the elementary schools of Fayette County "at the earliest practicable date."[60] The Court hereby adopts the District's bridge plan and modifies its July 2013 consent order accordingly, with all other aspects of the previous consent order not inconsistent withe bridge plan remaining in full force and effect. Therefore, the District's Motion to Amend is **GRANTED**.

**V. Reporting and Monitoring**

As is evident to all concerned, the completion of the New School by December 2014 is absolutely vital to the desegregation plan in this case. Private Plaintiffs question, with some justification, whether the New School will be ready to open as planned in January 2015. The District has encountered one setback after another since the Court entered its August 2012 consent order, caused most notably by construction delays and unexpected funding gaps. The District now assures the Court that it has written guarantees from Yates that the New School will be complete by early December 2014. The Court agrees with the United States that more frequent interim reporting from the District will keep the Court and the other parties better apprised of the District's progress in implementing the desegregation plan and will perhaps avoid the need to revise the Court's orders in the future. The District's interim reporting should also allay Private Plaintiffs' doubts about the timely completion of the New School.

Therefore, the Court adopts the following schedule and reporting requirements. The District is ordered to prepare and file a detailed action plan consisting of a timeline of bi-weekly steps it will take between now and January 2015 to implement the full desegregation plan. The July 2013

[60] *Green*, 391 U.S. at 439.

consent order already containes deadlines related to M-to-M transfers and school assignments for the upcoming academic year. However, the Court has tolled the deadline for the District to give eligible families notice about M-to-M transfers for 2014-2015, pending the Court's ruling on the District's Motion to Amend. The previous deadline for notifying families about the M-to-M transfer program was February 21, 2014. Due to the tolling of this key deadline, the Court finds good cause to extend other deadlines related to students assignments as well. The Court hereby extends those deadline as follows:

- March 14, 2014: the District must mail letters accompanying a transfer request form to the parents or guardians of all grade K-7 students who are in the majority race at their school (based on enrollment data at the school as of January 15, 2014);

- April 7, 2014: M-to-M transfer requests must be received by the District;

- May 7, 2014: the District must notify parents whether their M-to-M transfer requests were granted; and

- May 16, 2014: the District must make school assignments for the 2014-2015 school year.

In addition to these specific deadlines, the District's action plan should include (but is not limited to) deadlines for the development and implementation of the controlled choice program, the completion of the New School by December 9, 2014, and the opening of the New School in January 2015. The District's action plan is due within fourteen (14) days of the entry of this Order.

The District is further ordered to prepare and file monthly status reports with the Court between now and January 2015. The District's status reports should confirm that the District has met all of the deadlines in its action plan for the current reporting period. With respect to the construction of the New School, the monthly status reports should include at the very least a detailed description of all construction benchmarks reached to date. The District's monthly status reports

should also include a list of all contracts or purchases approved by the District since the last report to comply with the Court's consent order. If the District reports any missed deadline or delay, the District should detail what steps it took to avoid the delay and what actions it has taken in response to the delay. If the delays relate to the construction of the New School or affect the December 9, 2014 completion date of the New School in any material way, the Court will consider ordering the District to show cause as to why it cannot adopt an accelerated construction schedule and/or use any contractual penalties to which it might be entitled from Yates to remedy the delays. Failure to adhere to the Court's orders or these reporting requirements will result in appropriate sanctions. The District's monthly reports will be due on or before the 1st day of every month, with the District's first monthly report due April 1.

## CONCLUSION

The Court finds that the District's bridge plan is consistent with the Fourteenth Amendment to the United States Constitution and will effectively achieve the goal of desegregation in the Fayette County elementary schools as soon as practicable. The Court adopts the District's bridge plan and establishes the reporting and monitoring requirements set forth in this order. The District's Motion to Amend is **GRANTED**.

**IT IS SO ORDERED.**

**s/ S. Thomas Anderson**
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: March 5, 2014.