UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DIANE COWAN *et al.*, Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. BOLIVAR COUNTY BOARD OF EDUCATION *et al.*, Defendants.	Civil Action No. 2:65-cv-00031-DMB

PLAINTIFF-INTERVENOR UNITED STATES' RESPONSE TO DEFENDANT CLEVELAND SCHOOL DISTRICT'S OBJECTIONS TO THE UNITED STATES' PROPOSED PLAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

In Defendant Cleveland School District's Objections to the United States' Proposed Plan [Doc. 112] ("District Objections"), the District asks the Court to ignore the last four years of active litigation in this case, as well as the many decades of tried-and-failed attempts to desegregate East Side and D.M. Smith. In particular, the District asks this Court to disregard its unchallenged 2012 decision in this case, which found that the District had never desegregated East Side High School ("East Side") and D.M. Smith Middle School ("D.M. Smith") and ordered the District to adopt a remedial plan to desegregate those two schools. The District also asks the Court to overlook the Fifth Circuit's April 1, 2014 Opinion in this case, which cited this Court's liability finding and remanded the case for further consideration of the remedy.

Despite these decisions, the District rehashes arguments it first asserted in 2011 *before* this Court granted the United States' Motion for Further Relief with respect to East Side and D.M. Smith in its March 28, 2012 Opinion [Doc. 43].[1] As it did four years ago, the District contends that it has already satisfied its obligations in this case: (1) because *some* of its schools are desegregated, *compare* Dist. Objs. at 15-16 *with* Dist. Mem. in Support of Resp. to U.S. Mot. for Further Relief, Aug. 18, 2011 [Doc. 27] ("Dist. 2011 Opp. Br."), at 12-14; (2) because it has acted in "good faith" to implement prior orders in this case, *compare* Dist. Objs. at 10-11 *with* Dist. 2011 Opp. Br. at 8-9; and (3) because the District has too many black students to implement anything other than a "voluntary" (i.e., choice-based) approach to desegregation, *compare* Dist. Objs. at 7 *with* Rossell Report, Aug. 18, 2011, at 23-25 (submitted with both Dist. Obs. and Dist. 2011 Opp. Br.).

[1] The District even re-submitted its expert's August 18, 2011 report.

This Court, in 2012, rejected each of these arguments, acknowledging the District's success in desegregating some of its elementary schools, but finding that East Side and D.M. Smith had never been effectively desegregated. In addition, the Court found that the District needed to do more to desegregate those two schools and satisfy its continuing obligations to eradicate the vestiges of its former dual system of schools—specifically, the identifiability of East Side and D.M. Smith as one-race black schools.

In its latest Objections, the District demonstrates that it would prefer to re-litigate the settled question of *whether* it has an obligation to desegregate East Side and D.M. Smith. The answer, previously ordered by the Court and recognized by the Fifth Circuit, is an unqualified "yes." The only question presently before the Court is *how* the District will desegregate its middle and high schools.

The District has repeatedly offered up the status quo freedom of choice system, now in the form of Plan A, the first of two proposals in its January 23, 2015 Proposed Plans [Doc. 104-1] ("District Plans"). The District readily acknowledges, however, that it has no evidence that Plan A will work, as "no white student has enrolled at East Side or D.M. Smith since the plan was implemented in the 2013-2014 school year." Dist. Objs. at 15. In its Objections, the District spends a mere three paragraphs defending its alternative approach, Plan B, which, for the reasons set forth in the United States' Objections to the District' Proposed Plans [Doc. 113] ("United States' Objections"), is unacceptable because it may actually serve to worsen segregation between the two high schools.

The United States has offered the only plan that meets the constitutional requirement of promising realistically to work now. Therefore, this Court should order the District to implement that plan at the earliest practicable date.

II. ARGUMENT

A. The constitutional violation that must be remedied in this case is the former *de jure* segregation of the District's schools.

The District appears to misapprehend the fact that the task before the Court and the Parties is to devise and implement a remedy to finally cure the original constitutional violation at the heart of this case: the District's former practice of segregating its schools by race as a matter of law. The District asserts that this Court committed the constitutional violation that must be remedied. In doing so, the District effectively disclaiming responsibility for the continued segregation of its one-race black schools. Dist. Objs. at 9. According to the District, "the open enrollment plan [Plan A] is a proper remedy when the 'scope of the constitutional violation' involved *not any unconstitutional action taken by the District*, but an attendance zone line imposed by Order of this Court in 1969." *Id.* (emphasis added). The District goes on to declare that its freedom of choice plan would correct the Court's "violation" by "put[ting] all students in the position where school assignment is based on choice, not race." *Id.*

Of course, this Court did not create and maintain a dual system of racially segregated schools. The District did. Over the years, Court-ordered desegregation remedies have been unsuccessful in many instances for various reasons, including in this case; however, such failure does not, as the District implies, transfer liability from the defendant school district to the court itself. Rather, when remedies have proven unsuccessful in practice, the District remains obligated to take all available steps to correct the original constitutional violation. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458 (1979); *Davis v. East Baton Rouge Sch. Bd.*, 721 F.2d 1425, 1435 (5th Cir. 1983). In this case, in the wake of several failed remedies spanning several decades—first, freedom-of-choice from 1966 to 1969, then attendance zones from 1969 to 2013,

with the introduction of some magnet programs beginning in 1992—the role of the Court now is not to "put[] all students back" to where they were before 1969 (i.e., a segregated system of schools under the original freedom of choice plan). Instead, the Court's role is to order a plan that both meets constitutional requirements and "is most likely to achieve the desired effect: desegregation." *See Cowan v. Cleveland Sch. Dist.*, 748 F.3d 233, 240 (5th Cir. 2014).

Repeating an appeal made repeatedly over the last four years, the District also asks the Court to approve its plans because "the District has been working in good faith for decades." Dist. Objs. at 10; Dist. 2011 Opp. Br. at 8-9. Without conceding the assertion of good faith here, even assuming that a school district has complied in good faith with a court-ordered desegregation plan, such compliance alone does not satisfy the district's continuing obligations to take further action to effectuate meaningful desegregation. *See Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) ("A school system is not, of course, automatically desegregated when a constitutionally acceptable plan is adopted and implemented, for the remnants of discrimination are not readily eradicated. . . . We have several times refused to find unitary a school system whose operation continues to reflect official failure to eradicate, root and branch, the weeds of discrimination.").[2] The appropriate measure at this juncture is not whether the District has operated in good faith in the past, but whether its proposed plans are reasonably calculated to effectively desegregate East Side and D.M. Smith. For the reasons articulated in the United States' Objections, the District's two plans are not calculated to effectively desegregate East Side and D.M. Smith and both must be rejected.

[2] As the Supreme Court observed that "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." *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439 (1968).

B. Because the United States' Plan is a constitutionally sound, reasonably available remedy that offers the greatest promise of desegregating East Side and D.M. Smith, this Court should adopt that plan.

The District does not dispute that the United States' Plan is a constitutional remedy. However, the District asks the Court to reject the United States' Plan based, in large part, on a speculative fear that consolidation would result in "white flight" from the District. The fear of possible white flight cannot justify implementation of a plan that would fail to desegregate East Side and D.M. Smith when a more effective remedy, consolidation, is available. The District overlooks countless examples of school districts that have operated majority-black middle and high schools with significant white enrollment in the Delta, elsewhere in Mississippi, and in neighboring states, that undermine its claim that white families would not send their children to a majority-black consolidated middle or high school. Moreover, as discussed below, the United States' Plan includes a comprehensive set of affirmative measures calculated to generate support for the plan and mitigate any concerns about significant white flight from the newly consolidated schools.

1. The District cites an unsubstantiated fear of "white flight" as its primary objection to the United States' consolidation plan.

As it has numerous times since 2011, the District once again raises the fear of "white flight" as its primary objection to the United States' Plan—and, indeed, to any plan that would not depend exclusively on the individual choices of students and parents to desegregate Cleveland's schools. Conceding that the United States' Plan "desegregates Cleveland's middle and high schools on paper," Dist. Objs. at 8, the District reveals that its main objection to consolidation is a fear that white families in Cleveland would not send their children to a majority-black middle or high school. The District reiterates these fears even though *all* white

families in the District send their children to schools with significant black enrollments, including the majority-black Pearman Elementary School, Bell Academy, Nailor Elementary School, and Margaret Green Junior High School. *See* U.S. Plan at 4. The District continues to ignore the settled proposition that fear of white flight "cannot (be) . . . accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *See United States v. DeSoto Parish Sch. Bd.*, 574 F.2d 804, 816 (5th Cir. 1978) (quoting *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1972)). "From the inception of school desegregation litigation, accommodation of opposition to desegregation by failing to implement a constitutionally necessary plan has been impermissible." *DeSoto Parish*, 574 F.2d at 816 n.25 (citing *Morgan v. Kerrigan*, 530 F.2d 401, 420 (1st Cir. 1976)).

Since 2011, the United States has responded in detail to the District's repeated assertion that it cannot, and should not, be required to use viable, effective desegregation measures like consolidation, because some white students might withdraw from the system. *See* U.S. Mem. of Law in Support of Mot. for Further Relief, May 2, 2011 [Doc. 6], at 32-33; U.S. Reply Br., Oct. 6, 2011 [Doc. 31], at 8-10; U.S. Reply Br., Oct. 26, 2012 [Doc. 54], at 12-13. Each time, the United States has reiterated the uncontroverted principle that "fear that white students will flee the system is no justification for shrinking from the constitutional duty to desegregate the [district's] schools."). *See Davis.*, 721 F.2d at 1438.

In any event, the Court must first decide whether the District's plans meet constitutional requirements. If the Court concludes, as the United States has urged, that neither of the District's plans is constitutionally adequate, the inquiry can end there. Indeed, as the Fifth Circuit reiterated in its recent decision in this case, "white flight may be one legitimate concern 'when choosing among *constitutionally permissible* plans.'" *See Cowan*, 748 F.3d at 240 (quoting

United States v. Pittman, 808 F.2d 385, 391 (5th Cir. 1987)) (emphasis added). However, for the reasons set forth in the United States' Objections, both of the District's plans are constitutionally inadequate because they fail to offer the promise of desegregation of East Side and D.M. Smith. U.S. Objs. at 10. Therefore, the United States' Plan is the only constitutionally adequate plan before the Court. Consequently, the Court should not consider white flight since it is not choosing "among constitutionally permissible plans."

If the Court does find that one or both of the District's proposed plans is constitutionally adequate, then the Court must "grapple with the complexities of [the white flight] issue," *Cowan*, 748 F.3d at 240, when deciding between the United States' Plan and the District's plan or plans. The Court would then need to assess whether the alleged white flight that would result from the United States' Plan, the likelihood of which the United States disputes, weighs so heavily in favor of the District's plan that it justifies choosing that plan over the United States' Plan, which is calculated both to achieve desegregation and educationally benefit all students in the District.

2. Many school districts in Mississippi and surrounding states, including in the Delta, have majority-black middle and high schools with stable white enrollment.

The District need look no further than its own borders for evidence that majority-black schools resulting from mandatory assignment measures can retain significant white enrollment. Pearman Elementary School, a zoned elementary school in the District, has a current enrollment that is 66.7 percent black, 24.5 percent white, and 8.8 percent other. *See* U.S. Plan at 4. Pearman's demographics are similar to the projected student enrollment demographics at the proposed consolidated middle school and high school in the 2016-2017 school year. *See* U.S. Plan at 15, 21. As mentioned above, white students are also enrolled in majority-black Bell,

Nailor, and Margaret Green, and all white students in the District attend a school that is at least 42.1 percent black. *See id.* at 4.

In addition, other school districts in Mississippi and neighboring states operate majority-black middle and high schools with significant white enrollment, as illustrated by the examples listed in Table 1 below.

TABLE 1: COMPARISON SCHOOL DISTRICTS[3]

District	**District Enrollment (2011-12)**	**One District-wide Middle School?**	**One District-wide High School?**
Carroll County, MS	984 (62.5% B, 35% W)	Yes (6-8) / 231 students (61.5% B, 36.8% W)	Yes (9-12) / 276 students (66.7% B, 29.7% W)
East Tallahatchie, MS	1,296 (70.8% B, 28.2% W)	Yes (6-8) / 292 students (68.2% B, 31.2% W)	Yes (9-12) / 399 students (73.2% B, 25.8% W)
Philadelphia, MS	1,236 (70.9% B, 23.3% W)	Yes (7-8) / 155 students (70.3% B, 21.9% W)	Yes (9-12) / 329 students (68.7% B, 25.8% W)
Quitman County, MS	2,037 (61.3% B, 37.8% W)	Yes (6-8) / 472 students (64.4% B, 35.2% W)	Yes (9-12) / 553 students (64.2% B, 35.4% W)
Starkville, MS	4,708 (64.4% B, 30.7% W)	Yes (6-8) / 913 students (66.2% B, 29.7% W)	Yes (9-12) / 1087 students (63.3% B, 32.7% W)
Wayne County, MS	3,554 (55.1% B, 43.1% W)	No	Yes (9-12) / 991 students (55.5% B, 43.7% W)
Yazoo County, MS	1,509 (64.2% B, 34.5% W)	Yes (7-8) / 288 students (52.4% B, 46.2% W)	Yes (9-12) / 478 students (58.6% B, 39.8% W)
Troy City, AL	2,329 (62.6% B, 31.4% W)	Yes (6-8) / 514 students (59.1% B, 34.6% W)	Yes (9-12) / 637 students (59.0% B, 36.9% W)
Phenix City, AL	6,729 (59.2% B, 33.9% W)	Yes (6-7 & 8) *6-7:* 990 (64% B, 29.2% W) *8:* 481 (68.8% B, 24.5% W)	Yes (9 & 10-12) *9:* 436 (64.2% B, 30.5% W) *10-12:* 1324 (66% B, 30% W)
Valdosta City, GA	7,802 (74.5% B, 17.8% W)	No	Yes (9-12) / 1756 students (69.9% B, 23.5% W)
Haywood County, TN	3,333 (62.8% B, 30.2% W)	Yes (7-8) / 484 students (64% B, 29.3% W)	Yes (9-12) / 904 students (66.8% B, 27.6% W)

[3] All data in this table is from the U.S. Department of Education's Civil Rights Data Collection, available at http://ocrdata.ed.gov/, and reflects information from the 2011-2012 school year, the most recent year for which federal data is currently available.

In the Mississippi Delta region, several school districts operate middle and high schools with similar enrollment demographics to the estimated enrollment in a consolidated middle and high school in Cleveland. The Quitman County School District, a 2,037-student district that is 61.3 percent black and 37.8 percent white, one middle school and one high school, each of which is approximately 64 percent black and 35 percent white.[4] Similarly, the Yazoo County School District, a 1,509-student middle and high school district that is 64.2 percent black and 34.5 percent white, has one middle school and one high school (which are 52.4 percent black/46.2 percent white and 58.6 percent black/39.8 percent white, respectively). The South Panola School District, a 4,608-student district that is 55.7 percent black and 42.2 percent white, operates a single high school, which is 56.4 percent black and 41.6 percent white. The East Tallahatchie School District, a 1,296-student district that is 70.8 percent black and 28.2 percent white, operates a single middle school, which is 68.2 percent black and 31.2 percent white, and a single high school, which is 73.2 percent black and 23.2 percent white. In addition to these nearby Delta school districts, Table 1 above lists a sampling of school districts in Mississippi and nearby states that have similar demographics to Cleveland and operate one middle school and/or one high school, demonstrating that operating a district-wide, majority-black school is possible.

The District's assertion that it "is the only District in the Mississippi Delta with any real integration for its public school children," Dist. Objs. at 8, is simply untrue. In fact, racially diverse, majority-black middle schools and high schools are being operated by school districts throughout the region. The District worries that "the result of the [United States'] plan [could be] a significant decrease of an integrated experience for all students." However, just the

[4] All data referenced in this paragraph was obtained from the U.S. Department of Education's 2011-2012 Civil Rights Data Collection website at U.S. Dep't of Educ., 2011-2012 Civil Rights Data Collection, *available at* http://ocrdata.ed.gov/DistrictSchoolSearch (searching by "Find Schools" or "Find Districts" to obtain school-level and district-level enrollment data).

opposite is true: although 100 percent of white children in the District attend desegregated schools, 40.9 percent of the District's black students attend school with low or no white enrollment. At the middle school and high school level, 43.6 percent of black students attend a school with low or no white enrollment. Those black students are not currently receiving "an integrated experience," and the District's plans offer no promise of changing that. In contrast, these students would finally be guaranteed a desegregated middle and high school experience under the United States' Plan.

3. The United States' Plan incorporates provisions calculated to promote the success of the plan and to retain enrollment of all students in the District's schools.

The District is obligated to take action to mitigate that prospective white flight. As the Fifth Circuit has observed, "'[w]hite flight' must be met with creativity, not with a delay in desegregation." *Davis*, 721 F.2d at 1438; *see also Pittman*, 808 F.2d at 391-92 (quoting same) (rejecting magnet school proposal premised on deterrence of white flight, where two one-race black schools would continue to exist). "The exquisite difficulty is that a decree contemplating defeat by white flight is a self-fulfilling prophecy." *Pittman*, 808 F.2d at 393.

The United States' Plan both provides a quick path to desegregation and incorporates provisions intended to meet the Fifth Circuit's instruction that white flight be met with creativity, not inaction. Although consolidation is technically possible as early as the 2015-2016 school year, the United States' Plan incorporates a planning year to ensure thoughtful implementation of the consolidation plan, including appropriate engagement of students, parents, staff, and the community to ensure that all stakeholders are involved in the successful implementation of the consolidation plan and to generate support for the new schools in the entire school community. U.S. Plan at 14. The United States' Plan includes a process for marketing and rebranding the

consolidated middle school and high school, with input from the school community, to promote the schools as welcoming to all students and mitigate concerns that students and families might choose not to attend a school formerly considered a "white school" or a "black school." *Id.* Finally, the United States' Plan allows the District to offer a full range of popular academic and extracurricular offerings to *all* of its students, including the programs identified by the District as popular in the community that it would operate as separate "magnet" programs at the separate high schools under its plan. *Id.* at 14-17. In short, the United States' Plan requires the District do more than passively allowing white flight to become "a self-fulfilling prophecy" by ensuring that the diverse middle and high school enrollment promised by the United States' Plan is realized and maintained.

4. The District does not provide legal support or factual evidence demonstrating the effectiveness of its magnets proposals under either of its plans.

In its Objections, the District relies heavily on *Stell v. Savannah-Chatham County Board of Education*, 888 F.2d 82 (11th Cir. 1989), for the proposition that a plan based on magnet programs meets constitutional requirements, even if it some one-race schools remain. *See* Dist. Objs. at 12. *Stell* is a non-binding, out-of-Circuit case that significantly differs from the case presented to the Court here.

Stell involved the Savannah public schools, a school district serving almost eight times as many students as the District (30,641 students), which sought to establish multiple magnet programs in their school district to attract white students back into the district. *Stell*, 888 F.2d at 83. Unlike Cleveland, which has always been a majority-black district and has maintained consistent enrollment levels over the years, Savannah had lost approximately 10,000 white students over many years and was attempting to use magnets as part of a comprehensive

desegregation approach, including pairing, mandatory student assignments, majority-to-minority transfers, and busing, intended to attract white families back to the system. *Id.* Savannah's magnet programs were piloted and evaluated for effectiveness before more widespread implementation, and that district designed the programs to ensure meaningful daily interaction between white and black students in those programs and the school populations at large. *Id.* at 83-84. While magnet programs may have been appropriate as one remedy among many in Savannah, Cleveland offers an entirely different set of facts rendering *Stell* unpersuasive support for the District's magnet proposals here.

As the Fifth Circuit found in this case, "the situation in Cleveland is distinguishable from those where we have found that the retention of some one-race schools did not preclude a declaration of unitary status." *Cowan*, 748 F.3d at 239. Among other reasons, Cleveland differs from those cases because it "is relatively small, the schools at issue are a single junior high school and a single high school, which have never been meaningfully desegregated and which are located less than a mile and a half away from the only other junior high school and high school in the district, and . . . the original purpose of this configuration of schools was to segregate the races." *Id.* at 238-39 (distinguishing the present case from cases in which the court found the continued existence of one-race schools permissible, including *Flax v. Potts*, 915 F.2d 155 (5th Cir. 1990) and *Ross*, 699 F.2d at 218.

Under the District's Plan A, East Side and D.M. Smith would remain one-race black schools, an outcome that cannot be squared with the clear directive of the Fifth Circuit in this and other cases. Under Plan B, the middle schools would eventually be consolidated, but the uncertainties in the District's magnet proposal (explained fully in the United States' Objections) cast doubt on whether East Side would actually attract white enrollment sufficient to eradicate

the remaining vestiges of segregation (i.e., the school's continuing racial identifiability as a "black" school). The District's plan is silent on what measures, if any, it would take if East Side remained all- or predominantly black—raising the prospect that the Parties could return to this Court yet again if the District's plan fails to work. Since the United States' Plan is the only plan before the Court offering a promise of desegregation, both of the District's plans should be rejected.

C. The District's objections to the United States' Plan as a "practical impossibility" are unfounded.

The District characterizes the United States' Plan as "a practical impossibility" for three reasons: (1) that East Side lacks the capacity to hold the projected middle school enrollment; (2) that the District would lose International Baccalaureate ("IB") status if it operated one high school at the Cleveland High School/Margaret Green Junior High School campus; and (3) that the District cannot afford to build a new high school. None of these assertions are supported by the facts. *See* Dist. Objs. at 17.

1. East Side High School has adequate capacity and educational facilities to accommodate a consolidated middle school program.

The District contends that the United States' proposal to assign all middle school students to a consolidated middle school housed at East Side "should be rejected because it places middle school children in a building where they cannot effectively be educated." *Id*. The District estimates the maximum capacity for the East Side facility at 675 students, based on an analysis of Beverly Hardy, one of the District's magnet coordinators. *Id.* at 18 & Hardy Aff. at ¶ 11. However, the United States' facilities consultant, John Poros, has estimated that East Side's capacity is actually in the range of 769 to 870 students, assuming a utilization rate (i.e., ratio of unoccupied to occupied seats per teaching area per period) of 75 to 85 percent, which is

consistent with average utilization rates for middle schools.[5] *See* Declaration of John Poros, Feb. 27, 2015 (attached as Ex. A) at ¶ 15. Ms. Hardy's capacity estimate incorrectly assumes that the nine specialized classrooms at East Side would have no students throughout the school day. *Id.* at ¶¶ 11-12. Her estimate of a 675-student capacity would yield a utilization rate of approximately 66 percent, which is below average for a middle school facility. *Id.* at ¶¶ 11, 14.

The United States based its projection for total middle school enrollment for the 2016-2017 (the first year the United States' Plan would be fully implemented) on current District-wide enrollment figures for students in grades 4-6, who will be the students in grades 6-8 in the 2016-2017 school year (excluding those fourth graders at the two magnet elementary schools, who would be attending those schools as sixth graders in 2016-2017). The United States' projections did not include special education students in self-contained classrooms who are not currently assigned a grade level code by the District, or any students who might newly enroll in middle school who are not current students in the District. However, even assuming that an average number of self-contained special education students (i.e., the total number of elementary self-contained special education students divided by the number of grade levels at each school) moves from elementary school to middle school each year, the projected 2016-2017 middle school enrollment would be approximately 717 students.

Regardless, under any of the enrollment projections offered by the parties, the current East Side facility has adequate capacity to house all middle school students beginning in the 2016-2017 school year. Moreover, given its good overall condition and specialized facilities not

[5] Mr. Poros updated his previous estimates by applying Ms Hardy's assumption that all regular classrooms would serve 25 students, that all rooms would be used for the purpose indicated in Ms. Hardy's affidavit, and that specialized classrooms would be utilized for part of the school day. *See* Poros Decl. at ¶ 13.

present at Margaret Green (e.g., science labs), the building is suitable for use as a middle school without significant modifications.

2. The District would not lose IB status or SIG funds if it consolidated its middle schools and high schools.

The District is incorrect that it "will lose its IB status and will have to re-apply for authorization as an IB school" if the high schools are consolidated on a single site on the existing Cleveland High/Margaret Green campus. *See* Dist. Objs. at 18. The Diploma Programme ("DP") Manager of the International Baccalaureate program has advised the United States that, in the event a DP school (e.g., East Side) merges with a non-DP school (e.g., Cleveland High) and is relocated to the site of the non-DP school, the Programme would approve the merger and relocation if the District seeks approval and meets certain conditions (e.g., having the new site ready for teaching at a stipulated date, that the IB coordinator be either the current IB coordinator or another trained staff member, that the current principal move to the new school or that the new principal support the IB program, and that the current trained staff and IB students move to the new site). *See* Letter from Alica D'Urbano to U.S. Dep't of Justice, Feb. 26, 2015 (attached as Ex. B). Assuming these minimal conditions were met, the IB program could continue operating at the new consolidated high school without interruption.

Additionally, although the District has stated that it could lose School Improvement Grant ("SIG") funds if it consolidated its middle schools before the end of the 2016-2017 school year, the U.S. Department of Education has advised the United States that, under the circumstances presented in this case, the District would likely continue to receive funds if it consolidated D.M. Smith and Margaret Green at the beginning of the 2016-2017 school year, as proposed by the United States. *See* Declaration of Scott E. Sargrad (attached as Ex. C).

3. The United States' Plan does not require construction of a new high school.

The District objects to the United States' Plan because it "does not have enough money to build a new high school." Dist. Objs. at 19. The United States' Plan does not require construction of any new facilities—only the District's Plan B does. Yet, the District also concedes that it has adequate bonding capacity (approximately $27 million) to construct a high school facility based on the United States' consultants' estimates of $20-26 million. *Id.*

Unlike the United States' Plan, which requires no new construction, the District's Plan B is contingent on planning, financing, and constructing a wing of classrooms at Margaret Green to house the approximately 250 students currently attending D.M. Smith. Dist. Plans at 12. The current optimal capacity of Margaret Green is 568 students (*see* U.S. Plan at 14), so the District would need to add approximately ten to twelve classrooms to Margaret Green to accommodate the additional students at that site, which would include specialized science and art rooms to support the District's proposed magnet programs. Mr. Poros estimates that an addition of a new wing of classrooms meeting current standards (including restrooms, a teachers' resource room, and utilities closet), as well as other necessary upgrades to Margaret Green to accommodate the expanded student capacity (e.g., expanding or rebuilding the existing cafeteria, other site improvements), could cost the District up to $3.9 million. The United States' Plan requires no immediate facilities expansions and, unlike the District's Plan B, is not contingent on securing financing to be implemented fully by the 2016-2017 school year.

III. CONCLUSION

In its April 1, 2014 decision in this case, the Fifth Circuit instructed that "the district court should sort through the various proposed remedies, exclude those that are inadequate or infeasible and ultimately adopt the one that is most likely to achieve the desired effect: desegregation." *Cowan*, 748 F.3d at 240. By this metric, the United States' Plan, which consolidates the middle and high schools and incorporates multiple measures intended to generate support for these schools among students, parents, and the community, is the plan "most likely to achieve the desired effect: desegregation." Thus, the Court should order the District to implement the United States' Plan.

Respectfully submitted this 27th day of February, 2015,

FELICIA C. ADAMS
United States Attorney
Northern District of Mississippi
900 Jefferson Avenue
Oxford, MS 38655-3608
Telephone: (662) 234-3351
Facsimile: (662) 234-4818

VANITA GUPTA
Acting Assistant Attorney General

s/ Joseph J. Wardenski
ANURIMA BHARGAVA
RENEE WOHLENHAUS
JOSEPH J. WARDENSKI (NY #4595120)
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW, PHB 4300
Washington, D.C. 20530
Telephone: (202) 514-4092
Facsimile: (202) 514-8337
joseph.wardenski@usdoj.gov

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DIANE COWAN *et al.*, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. BOLIVAR COUNTY BOARD OF EDUCATION *et al.*, Defendants.	Civil Action No. 2:65-CV-00031-DMB

DECLARATION OF JOHN POROS

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that:

1. My name is John Poros. I am an Associate Professor in the School of Architecture at Mississippi State University, where I currently serve as the Director of the Carl Small Town Center, a nationally recognized community design center. I have been employed by Mississippi State University since 1997.
2. I have a Bachelor of Arts from Columbia College in New York City and a Masters of Architecture from the Graduate School of Design at Harvard University.
3. I have been a licensed architect since 1995.
4. From 2002 to 2004, I was the director of the Educational Design Institute (EDI), a partnership between the School of Architecture and College of Education at Mississippi State University, which was funded by the State of Mississippi.

EX. A

5. As director of EDI, I led the project to write the Mississippi School Design Guidelines, a complete guide of best practices for educational facility planning, design, maintenance, and related issues for the state of Mississippi. The Guidelines were written in conjunction with the Mississippi Department of Education and architects, superintendents, and teachers.
6. In October 2014, I was retained by the U.S. Department of Justice ("DOJ") as a litigative consultant.
7. This declaration is in support of the United States' response to the objections of the Cleveland School District (the "District") to the United States' proposed desegregation plan.
8. During visits to the District on October 29, 2014 and January 13, 2015, I toured every school facility in the District. I toured East Side High School on both dates.
9. In my professional judgment, the East Side High School ("East Side") facility would be an appropriate facility for a consolidated middle school serving all students in grades 6-8 in the District, except for those sixth graders who attend Hayes Cooper Elementary School and Bell Academy. In my professional judgment, the existing facility has the capacity to house all students in those grade levels.
10. In her January 23, 2015 Affidavit, Beverly Hardy, a magnet coordinator for the District, estimated that East Side has a capacity of 675 students.
11. In my professional judgment, Ms. Hardy's estimate assumes: (a) a 100 percent utilization rate (i.e., ratio of unoccupied to occupied seats per teaching area per period) of East Side's 26 instructional classrooms, with 25 students per classroom, and (b) a 0 percent utilization rate for the nine specialized classrooms (i.e., that those classrooms would be empty throughout the school day).

12. In my professional judgment, a more accurate way to compute the capacity of East Side would be to assume average middle school utilization rates for both the instructional and specialized classroom spaces. For middle schools, research indicates that the average overall school utilization rate is somewhere between 70 and 85 percent. An educational facility is underutilized with a utilization rate less than 65 percent.

13. I have calculated the maximum capacity of East Side to be between 1,023 students (using Ms. Hardy's assumption of 25 students per instructional classroom, reflecting the intended use of instructional spaces as specified in her affidavit, and applying standard methods of calculation, and 1,153 students (using the maximum number of students per classroom allowed by the Mississippi School Design Guidelines).

14. Ms. Hardy's estimated capacity of 675 students would yield a utilization rate of 66.0 percent (based on the 1,023 student maximum capacity).

15. In my professional judgment, East Side could accommodate approximately 870 students at a high average utilization rate of 85 percent or approximately 769 students at a low overall utilization rate of 75 percent. At these estimated capacities, East Side could readily accommodate all middle school students projected to be enrolled in the 2016-2017 school year, with capacity for future enrollment increases.

16. If the District wished to use a lower utilization rate because of a particular program offering, the District could use temporary portable classrooms or construct new classrooms on the East Side site to increase capacity. Since the District has represented that it may close the existing Cypress Park Elementary School facility, which is located in close proximity to the East Side campus, that facility could also be used as an annex to house some middle school students on a temporary or permanent basis.

17. Assuming that the District is correct that projected enrollment exceeds the maximum capacity of the East Side facility, the estimated cost of adding classrooms to East Side to expand capacity would be significantly less than the cost of adding a wing of classrooms to Margaret Green to house all middle school students at that campus because less space would be need to be added.

18. To accommodate 96 students (i.e., the difference between current middle school enrollment and the District's estimate that East Side can hold only 675 students), the District would need to build four classrooms at East Side. I estimate this project would cost between $860,324 and $1.2 million, depending on the location of the new wing of classrooms.

19. The District's "Plan B" would reassign all middle school students to Margaret Green, which would require the District to add a wing of classrooms to accommodate the approximately 250 students from D.M. Smith. To do that, the District would need to construct ten to twelve classrooms, including specialized science and art rooms to accommodate the proposed STEM/arts program, and make other renovations to the existing Margaret Green facility, including expanding or rebuilding the existing cafeteria, which is in poor condition. In my professional judgment, the cost of the Margaret Green expansion would be approximately $3.1 to $3.9 million, including necessary site work and improvements to the existing structure.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of February 2015.

JOHN POROS

26/02/2015

International Baccalaureate®
Baccalauréat International
Bachillerato Internacional

IB Americas: *Conditions for the approval of relocation*

To whom it may concern:

The conditions for approval of a merger are similar to those for the approval of relocation. If the non-DP school is relocating and merging with the DP school, it is not necessary for the DP school to submit the evidence outlined below. If the DP school is relocating to merge with the non-DP school, we ask that the IB school email a letter with the evidence below to the DP evaluation inbox at iba.dpevaluation@ibo.org. Receipt of this evidence will allow us to verify that the circumstances after the merger remain similar to those that were present when the school was authorized. Once the letter is received, the IB will review the situation and provide an official response to the school's request.

1. That the old site will either close down or stop teaching the IB programme.

2. That the new site is ready for teaching at a stipulated date.

3. That the new school facility will come under the same governing body of the old school. If the school comes under a different governing body or district, proof of support will need to be submitted together with budgetary requirements similar to those of the application process.

4. That the current Principal will move to the new facility. If the Principal does not move, submit letter of new Principal showing support to the programme.

5. That the current IB coordinator will move to the new facility. If the IB coordinator does not move, the school must submit proof of IB training for the IB coordinator designate.

6. That the current trained staff will move to the new facility. If not all trained staff moves, the school must submit the percentage of staff that will be relocating. If more than 2/3 of teachers move, the school must submit proof of professional IB training for new teachers. If less than 2/3 teachers move, IB Americas will assess whether a new authorization process will have to take place.

7. That the students will move to the new facility. If not all students move, the school must submit the percentage of students that will be relocating. If more than 2/3 of the students move, the school must submit proof of support of new parents and students to the IB programme. If less than 2/3 students move, IB Americas will assess whether a new authorization process will have to take place.

8. Name of the new school (if different from previous name).

At the discretion of the IB Americas office, a site visit to inspect the new facility might take place at the expense of the school. During the visit, an IB Americas representative will inspect the new facility and meet with the Principal, the IB coordinator and a member of the governing body to ensure that the programme is properly implemented. Following the visit and confirmation of the above items, IB Americas will recommend approval of the change to the Director General. Once approved, the IB curriculum and assessment office in Cardiff will be notified of the name and address change. The school will maintain the same IBIS school code.

We would fully support both schools as they work through the process and would visit the newly merged school at some point to verify that the conditions are in place.

Kind regards,

Alicia D'Urbano
Diploma Programme Manager
alicia.durbano@ibo.org

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DIANE COWAN *et al.*, Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. BOLIVAR COUNTY BOARD OF EDUCATION *et al.*, Defendants.	Civil Action No. 2:65-CV-00031-DMB

DECLARATION OF SCOTT E. SARGRAD

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that:

1. My name is Scott E. Sargrad. I am currently the Deputy Assistant Secretary for Policy and Strategic Initiatives in the Office of Elementary and Secondary Education, U.S. Department of Education (the "Department"). I have held this position for approximately one year and eight months, since June 16, 2013.
2. As the Deputy Assistant Secretary for Policy and Strategic Initiatives, I have significant responsibility for all matters arising under Title I, Part A, Section 1003(g) (School Improvement Grants (SIG)), of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. § 6303(g)).

3. I have been asked by the U.S. Department of Justice ("DOJ") to respond to the question of whether a court-ordered modification of local educational agency (LEA) student assignment policies resulting in consolidation of the LEA's schools would lead to a reduction or loss of the amount of SIG funds a recipient LEA receives.
4. The Department makes SIG grants to State educational agencies (SEAs) that use the SIG funds to make competitive subgrants to LEAs that demonstrate the greatest need for funds and the strongest commitment to ensuring that such funds are used to provide adequate resources to enable the lowest-achieving schools to raise academic achievement. 20 U.S.C. § 6303(g)(6).
5. In order to receive funds, States must submit a State plan. 20 U.S.C. § 6303(g)(4); 75 Fed. Reg. 66363, 66369 (Oct. 28, 2010); 80 Fed. Reg. 7224, 7246 (Feb. 9, 2015) (effective Mar. 15, 2015).
6. School districts that have schools identified as the lowest-achieving in the State (SIG schools) are eligible to apply to the SEA to obtain SIG funding. 75 Fed. Reg. 66363, 66369 (Oct. 28, 2010); 80 Fed. Reg. 7224, 7246 (Feb. 9, 2015) (effective Mar. 15, 2015).
7. I understand that both DOJ and the Cleveland School District (the "District") have submitted proposed plans to the Court; that the consolidation of two middle schools, D.M. Smith Middle School (a SIG school) and Margaret Green Junior High School (a non-SIG school) is a component of DOJ's proposed plan and the District's alternative plan referred to as "Plan B;" and that the Court may order consolidation of the middle schools in this case.

8. Due to the specific circumstances of the proposed consolidation of D.M. Smith Middle School and Margaret Green Junior High School, specifically that the SEA has identified both schools as "D" schools in the State's performance accountability index in 2013-2014 and that a potential court order could require consolidation, and based on all of the facts that we have available, I would expect that it would be appropriate for the LEA to continue to receive SIG funds to serve the consolidated school, subject to review by the SEA of the District's amended SIG application.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of February 2015.

SCOTT E. SARGRAD