

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	80 C 5124
)	
BOARD OF EDUCATION OF THE)	
CITY OF CHICAGO,)	
)	
Defendant.)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

On September 24, 1980, the United States of America (“United States”) filed a lawsuit against the Board of Education of the City of Chicago (“Board”) in which it alleged that the Board operated a dual school system that segregated students on the basis of race and ethnic origin in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Titles IV and VI of the Civil Rights Act of 1964. The Attorney General of the United States certified that the institution of the lawsuit would materially further the orderly achievement of desegregation in the public schools operated by the Board.

The essence of the Board’s alleged unlawful conduct was to segregate students on the basis of race and Hispanic ethnic origin by engaging in specific practices which included the following:

- (a) the drawing and alteration of school attendance area boundaries in such a way as to create, maintain or increase racial or ethnic segregation of students;
- (b) the adjustment of grade structures among schools so as to create or maintain racial or ethnic segregation;
- (c) the maintenance of racially and ethnically segregated branches of schools;
- (d) the placement of permanent and temporary facilities to relieve student overcrowding and the failure to use alternative, educationally sound measures to relieve student overcrowding so that, by action and omission, racial and ethnic segregation of students was created and maintained;
- (e) The maintenance of a racially disproportionate number of severely overcrowded and thereby educationally inferior schools in such a way as to identify, in conjunction with the practices described in the next two subparagraphs, those schools as intended for black students and less crowded schools as intended for white students;
- (f) The assignment of teachers and staff to schools in such a way as to match the race of the faculties with the race of the students attending the schools;
- (g) The employment of a permissive transfer policy which allowed white students to avoid attending their schools of assignment when their race was in the minority in favor of attendance at other schools where their race constituted the majority of student enrollment; and
- (h) the association of segregated schools with segregated housing projects.

It was further alleged that the practices listed above occurred over a substantial period of time and in a substantial portion of the Chicago public schools and constituted a system-wide violation of the Constitution and the laws of the United States. In seeking relief from this Court, the United States claimed that unless restrained, the Board of Education would continue to maintain and operate the Chicago public schools in violation of the Constitution and laws of the United States,

resulting in immediate, severe and irreparable harm. The United States requested that this Court enjoin the Board, its agents, employees and all persons in active concert or participation with it from discriminating against pupils on the basis of race and ethnic origin and from failing to operate said school system lawfully, by implementing such plan of desegregation as this Court may order.

Prior to the filing of the lawsuit, the United States and the Board had engaged in substantive discussions for the purpose of terminating the proceedings without a trial and with the Board amending its practices so as to conform with the Constitution and federal law in the particulars cited in the complaint. As a result of the efforts of the parties, a Consent Decree was entered in the case resolving the Government's allegations and committing the Board to desegregate as many schools as possible considering all the circumstances in Chicago and to provide supplemental programs for any black or Hispanic schools remaining segregated.

For more than twenty years the Board was dutiful in its commitment. The Board filed annual reports with the Court detailing the Board's desegregation actions, the integration of school-based faculty, and the remediation of other practices necessary to satisfying its commitment. The United States never challenged or complained about the Board's efforts to bring about change, the efficacy of its actions, or the good faith with which it was operating.

In the year 2003, some twenty-three years into the decree, this Court summoned the parties and posed the question of whether the decree was outdated and had outlived its usefulness. The inquiry was based on the material changes in the City's demographics and the student population when viewed in racial and ethnic terms, in addition to the remediation efforts of the Board over the years. Validating the inquiry was the twenty plus years of the Board's commitment to the decree and the many changes it inspired, including school-based faculty integration. In 1980, the Board's student population was approximately 18% white, 60% African American, and 14% Hispanic. Today, those numbers are approximately 8% white, 47% African American, and 39% Hispanic.

In addition to the materially changed demographics, the Board underwent a statutorily mandated change in the manner in which it was structured and operated. Simply put, major reforms were enacted, resulting in the creation of Local School Councils which were to govern school-based decisions, including the selection of principals. Principals, in turn, were vested with the power and autonomy to hire teachers. The Board's centralized authority to impose changes consistent with the decree was made much more difficult and complicated. Nevertheless, no complaints were registered by the United States that the reform legislation compromised

compliance with the decree or that other failings on the part of the Board were taking place.

In late 2003, the parties agreed to enter into a modified version of the Consent Decree. The belief of the parties, shared by the Court, was that the Modified Consent Decree (“MCD”), would bring “an effective and orderly resolution” of the case. In early summer of 2006, a hearing was set to reconsider the termination of the MCD. Around the same time, however, the Supreme Court of the United States had before it school cases from Seattle, Washington, and Louisville, Kentucky, both involving race-based admission issues which would, almost certainly, impact the Board’s race-based Magnet and Selective Enrollment Schools and practices. It was agreed that prudence dictated that a hearing on termination of the MCD be postponed for a brief period in order to assess the impact of the forthcoming Supreme Court decisions in all pending school cases involving race and related topics. A Second Amended Consent Decree was agreed to by the parties reflecting a few changes but which, significantly, would expire of its own accord one year from the date of entry.

On August 10, 2006, the Court disagreed with the parties that the Decree would automatically expire of its own accord one year after the entry date. The basis for the Court’s rejection of this provision was that the parties could not assume for themselves the exclusive province of when and under what circumstances a non-

contested consent decree would terminate. Consent decrees approved and entered by federal judges are more than bilateral contract provisions affecting only the rights and obligations of the signatory parties. While important and helpful, the termination of a consent decree, particularly one that affects the rights and obligations of citizens at large, requires the independent evaluation and judgment of the court in which the decree has been entered after an opportunity to be heard has been afforded by those who may be affected by its termination.

In addition to rejecting the automatic sunset provision agreed to by the parties, this Court vacated the Modified Consent Decree and entered the Second Amended Consent Decree on terms which had been negotiated by the parties. Included within that decree were provisions regarding English Language Learner (“ELL”) program services. Notwithstanding the uncertainty in the legal landscape concerning school admission policies and the role of race therein, the question of whether even the Second Amended Consent Decree negotiated by the parties had continued vitality in light of the existing circumstances of the City of Chicago was still relevant. As a consequence, the Court decided to schedule a hearing for the purpose of taking evidence from the parties, Amici Curiae, and members of the public at large for the purpose of determining whether the Second Amended Consent Decree should be terminated.

The early constitutional jurisprudence dealing with public school practices and the role of race within those practices addressed questions of whether the school system operated in dual ways, that is to say, whether students who are in the majority (generally referencing white students) were the beneficiaries of practices and policies which resulted in greater resources and advantages as compared to those made available to minority students (generally referencing black students). In addition to the actual segregation of students, the decided cases portray a variety of ways in which minorities were subjected to inferior opportunities to succeed in school so as to violate the equal protection clause of the Fourteenth Amendment to the Constitution. Consequently, in order to achieve unitary status, it was necessary to show there was no duality in the treatment of students in a school system with one identifiable group favored and one or more disfavored.

In order to achieve unitary status, the Board must demonstrate that (1) it has complied in good faith with the consent decree or court orders over a reasonable period of time; (2) eliminated all vestiges of segregation “to the extent practicable;” and (3) demonstrated its good faith commitment to the constitutional rights that were the predicate for judicial intervention. *Freeman v. Pitts*, 503 U.S. 467, 491-92 (1992); *Dowell v. Board of Education of Oklahoma City Public Schools*, 489 U.S. 237, 248-50 (1991). “A history of good-faith compliance is evidence that any current racial

imbalance is not the product of a new *de jure* violation” *Freeman*, 503 U.S. at 498.

Notwithstanding the United States’ prior willingness to allow the Modified Consent Decree to terminate by agreement and its apparent acquiescence to the Board’s annual reports of compliance for over twenty years, it is the present position of the United States that unitary status has not been achieved and that the Second Amended Consent Decree should remain in effect. The evidentiary hearing which took place from January 22, 2009, through February 6, 2009, saw the United States urge that unitary status has not yet been achieved and focused most of its opposition to the Board’s ELL programs. Indeed, in its Post-Trial Brief, ten of the brief’s fifteen pages are devoted to the Board’s perceived deficiencies in various aspects of the ELL policies and programs.

This shift in the legal position of the United States is all the more unusual in the absence of any allegation in any federal complaint that the conduct of the ELL program implicates a federal constitutional interest or that federal law has been violated in the effectuation of the Board’s ELL policies. Additionally, a comparison of Amended Appendix C (“AAC”) to the Second Amended Consent Decree which contains the ELL provisions reflects substantial similarities with state law requirements. The evidence at the hearing buttressed that conclusion. In response

to questions as to the need for duplicate legal requirements covering the same subject matter, the United States asserts that state officials are less than vigorous in addressing the Board's noncompliance in this area while suggesting it is much more vigorous in its oversight and enforcement functions. This claim rings hollow in the face of its years of silence about ELL matters and its recent willingness to agree to the termination of the operative decree.

During the hearing, a few public witnesses offered their observations of some magnet schools and rendered their non-expert opinions with respect to one or two magnet schools in particular. The Board responded with an abundance of publicly available information and evidence about magnet and selective enrollment schools' admission processes in opposition to the isolated comments of the public witnesses. Despite difficulties in achieving then acceptable racial and ethnic balances in these highly desired schools, the United States and some Amici call for this Court to require the Board to file a proposal regarding how it intends to operate the magnet and selective enrollment schools as a pre-condition to the termination of the present decree.

As described in *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1076 (7th Cir. 2001), "the purpose of a school desegregation decree is to eliminate the consequences of segregation. When they have been eliminated the decree has

done its job and should be lifted.” The other fallacy of the Government’s position seeking a plan in order to assess future good faith on the part of the Board is its presumed necessity. There is ample evidence in this record of substantial and material changes in the Board’s structure and method of operation to permit confidence about future lawful compliance.

We start with the position of the United States already described: for over twenty years, it was accepting of the Board’s professed compliance with the objects to be achieved as set out in the original decree and the actions undertaken thereunder without lodging a single complaint to the annual reports submitted to this Court. Additionally, there exists evidence of the longstanding, diverse racial make-up of the Board itself—now comprised completely by minority members—and of the central office executive staff. The appointment of Dr. Barbara Eason-Watkins, an African-American woman, as Chief Education Officer in August 2001 endowed her with the responsibility for curriculum design and support supervision of all elementary schools in the system.

When the Court entered its August 10, 2006, Order vacating the Modified Consent Decree, the Board effectively achieved unitary status as to a significant number of the desegregation consent decree obligations, including faculty integration, extra-curricular activities, facilities, and overarching budget considerations. *See*

Freeman, 503 U.S. at 471 (recognizing that a school district may be held partially unitary by a court); *see also Dowell*, 498 U.S. at 250, *citing Green v. County School Board of New Kent County*, 391 U.S. 430, 435 (1968) (in determining unitary status a district court must consider what have become known as the *Green* factors: student assignment; faculty and staff; transportation; extracurricular activities; and facilities). Hence, the only factors presently before the Court for consideration of full and complete unitary status are the limited student assignment, transportation, and school-based administrator provisions of the SACD.

The United States did not present any affirmative evidence during the hearing to dispute that the Board has achieved unitary status. Indeed, during closing arguments, counsel for the United States effectively conceded the appropriateness of a complete unitary status finding, stating: “[F]rom our standpoint, basically, with respect to the desegregation aspect, we should be looking forward and we believe that the District should come in with a plan so that the court can assess good faith.” (Tr. at 2235, ll. 17-20). The Seventh Circuit has rejected the United States’ and Amici’s proposition that a good-faith determination consistent with *Freeman* and *Dowell* requires the presentation of a detailed plan for future district operations, notwithstanding a determination of good faith compliance with decree provisions and the elimination of vestiges of discrimination to the extent practicable. *See People*

Who Care, 246 F.3d at 1078. Rather, the remedy for Equal Protection violations after a district is returned to unitary status is a new legal challenge based on the new alleged violations. *See id.*¹

The United States' position that the Board's alleged deficiencies in the structure and implementation of ELL programs and practices are, standing alone, sufficient to defeat present termination of the Second Amended Consent Decree is a dubious proposition both legally and factually. Indeed, the Board claims that this Court has no federal jurisdiction upon which to continue the decree.

Notwithstanding the Board's prior willingness to agree to ELL provisions being included in the Second Amended Consent Decree, the Board now claims that any ELL provisions claimed to have been violated do not enjoy Constitutional or statutory protection. The extension of the Board's argument is that jurisdiction cannot be bestowed upon this Court by acquiescence or invitation.

The Supreme Court of the United States has yet to directly address Constitutional or federal statutory issues involving a school district's ELL programs. The legal landscape is not barren on the topic, however. The most recent decision by

¹The United States, like the ACLU during closing argument, relies on a district court case from Arizona, *Fisher v. Lohr*, 821 F. Supp. 1342 (D. Ariz. 1993), but does not address or even mention *People Who Care*, the controlling Seventh Circuit authority.

