IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-M-2313

CONGRESS OF HISPANIC EDUCATORS, et al.,
Plaintiff-Intervenor,

and

UNITED STATES OF AMERICA,
Proposed Plaintiff-Intervenor

v.

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.,
Defendants.

UNITED STATES' MOTION TO INTERVENE

The United States hereby moves this Court for the entry of an order permitting it to intervene as a matter of right as a plaintiff party in the above-styled action pursuant to Fed. R. Civ. P. 24(a)(1) and 24(a)(2), and directing the Clerk to file the attached Complaint-in-Intervention. In the alternative, the United States, pursuant to Fed. R. Civ. P. 24(b)(2) hereby requests that the Court enter an order granting permissive intervention and directing the Clerk to file the attached Complaint-in-Intervention. As grounds for this motion, the United States asserts as follows.

I. Introduction and Summary

1. On December 30, 1983, the Court found the defendant school district (D.P.S.) in violation of the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703, with respect to its

provision of services to limited English proficient students. Thereafter, the private plaintiffs and D.P.S. negotiated a remedial Decree which was approved by the Court on August 17, 1984.

2. More recently, in October 1994, the plaintiffs filed a motion for contempt alleging that D.P.S. was not in compliance with various aspects of the Decree. Subsequently, on March 3, 1995, D.P.S. filed a motion to modify the Decree.

3. On July 31, 1997, the United States Department of Education found D.P.S. to be out of compliance with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act, as well as applicable regulations, due to a failure to provide equal educational opportunities to limited English proficient students. The Department of Education was unable to obtain voluntary compliance and on October 6, 1997, referred the matter to the Department of Justice with a recommendation to intervene in this lawsuit. Referrals are authorized by applicable regulations.

4. Subsequent to the referral, the United States, D.P.S. and the CHE plaintiffs entered into lengthy and complex negotiations to resolve the outstanding issues raised by the referral by the Department of Education to the Department of Justice, and the filings referred to in paragraph 2, above, without the expense of litigation. The Department informed the plaintiffs and D.P.S. that the goal of the negotiations was to

resolve these outstanding issues and that it would seek to intervene at the conclusion of the negotiation process. This is our common practice. See United States v. Bd. of Educ. of City of Chicago, 554 F. Supp. 912, 913 n.1 (N.D. Ill. 1983).

5. The United States, D.P.S. and plaintiffs have resolved the outstanding issues and have agreed to submit two documents to the court for approval. This motion is being filed contemporaneously with the submission. The first document, "English Language Acquisition Program," sets forth the substantive obligations of D.P.S. toward limited English proficient students and includes certain reporting provisions. The second document, entitled "Monitoring" creates a position of a monitor which will oversee the implementation of the decree for a period of three school years, beginning in the 1999-2000. The parties have agreed that Dr. Ernest House will serve, with court approval, in that position.

6. The United States seeks to intervene to join with D.P.S. and the CHE plaintiffs in urging the Court to approve the agreement, and to be able to enforce the agreement and the applicable laws upon which the agreement is based.

II. Intervention of Right

A. Rule 24(a)(1)

7. Rule 24(a)(1) of the Federal Rules of Civil Procedure, with respect to intervention of right, provides that "[u]pon timely application anyone shall be permitted to intervene in an

action: (1) when a statute of the United States confers an unconditional right to intervene."

8. A statute of the United States grants the Attorney General the unconditional right to intervene on behalf of the United States. The Equal Educational Opportunities Act of 1974 at 20 U.S.C. § 1709 permits the Attorney General to intervene in an action instituted under 20 U.S.C. § 1706. This lawsuit was instituted, in part, under this provision. See Keyes v. School Dist. No. 1, 576 F. Supp. 1503, 1520 (D. Colo. 1983) (finding EEOA violation).

9. The United States' intervention is timely. The timeliness analysis is contextual, and considers the length of time the would be intervenor should have known of its interests in the case before it petitioned to intervene, the prejudice to existing parties because of the delay, the prejudice the would be intervenor may suffer if intervention is denied, and unusual circumstances. See Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994). Here, the United States has acted diligently since it was asked by the Department of Education to intervene in this action. It has participated in comprehensive negotiations with the parties in this case to bring about a fair, reasonable and adequate resolution of the issues raised by not only the referral but also the filings referred to in paragraph 2, above. Accordingly, the original parties to this lawsuit are not in any way prejudiced by the United States' intervention. The United States would be prejudiced if intervention were denied. The

United States would have to file a separate lawsuit regarding the same subject matter and not obtain the immediate benefits of its substantial efforts in the negotiations process.

B. Rule 24(a)(2)

10. Fed. R. Civ. P. 24(a)(2) permits intervention of right, upon timely application, "when the applicant claims an interest relating to ... the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." See generally, Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Dept. of the Interior, 100 F.3d 837 (10th Cir. 1996) (discussing standard for intervention under Rule 24(a)(2)).

11. For the reasons stated in paragraph 9, above, our application is timely.

12. The United States has a substantial interest in the subject matter of this lawsuit, which is the provision of services, as required by federal law, to limited English proficient students in D.P.S. to enable such students to meaningfully participate in the district's educational program. This is particularly true when the defendant is a recipient of federal funds, and also when the government is charged with enforcement responsibility under the statutes in question. See Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981); Gulf States Utilities v. Alabama Power Co., 824 F.2d 1465, 1476,

modified on other grounds, 831 F.2d 557 (5th Cir. 1987).

13. As set out in the attached Complaint-in-Intervention, the Department of Education found D.P.S. out of compliance with several statutes pertaining to the provision of services to limited English proficient students. Pursuant to applicable statutes and regulations, see 42 U.S.C. § 2000d, 34 C.F.R. § 100.8(a), incorporated into the Section 504 regulations at 34 C.F.R § 104.61, and authorized by the ADA regualations at 28 C.F.R. § 35.174, the matter was referred to the Department of Justice for enforcement, with a recommendation that the United States intervene in this lawsuit. Thus, our interest is more than sufficient to warrant intervention.

13. Should intervention be denied, the United States would have to file a separate lawsuit regarding the same subject matter to protect its interests identified above. However, the disposition of this action may impede our ability to protect our interest, even assuming the same remedial plan that was negotiated by the United States, D.P.S. and the CHE plaintiffs, were incorporated into the separate action. Indeed, with the unlikely scenario of two separate lawsuits regarding the same subject matter, which would put a strain on D.P.S. limited resources, any subsequent action in one lawsuit would necessarily affect the other and also raise the possibility of inconsistent obligations for D.P.S. Moreover, a decision in one lawsuit would impact the parallel suit. "In appropriate circumstances ... stare decisis may supply the requisite practical impairment

warranting intervention of right." Pangilinan, 651 F.3d at 1325. See Coalition of Arizona/New Mexico Counties, 100 F.3d at 844; United States v. Oregon, 839 F.2d 635, 638 (9th Cir. 1988).

14. Finally, the requirement of the Rule is met if the applicant shows that the representation of its interest "may be" inadequate; the burden of making that showing is minimal. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). The private plaintiffs do not represent the government's interests, they represent the interests of the Congress of Hispanic Educators and the class. Moreover, the government has a unique interest here insofar as several of the statutes its seeks to enforce through intervention, Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, are conditioned on the receipt of federal funds and the contractual relationship between the government and the D.P.S.

III. Permissive Intervention

Rule 24(b)(2)

15. Granting permissive intervention is within the sound discretion of the district court. City of Stilwell v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038, 1043 (10th Cir. 1996). The requirements for permissive intervention under Rule 24(b) are met when there is a common question of law or fact between applicant's claim and the main action. In exercising its discretion the court should consider whether the intervention will unduly prejudice the adjudication of the rights of the

original parties.

16. Here the requirements are met. The questions of fact and law in the referral and the questions of fact and law in this lawsuit are the same or substantially overlap as they relate to the provision of services to limited English proficient students. Moreover, for reasons set out herein, our intervention is timely and will not prejudice the adjudication of the rights of the original parties. Indeed, our participation will help ensure the guaranty of those rights.

Conclusion

For the foregoing reasons, we urge the Court to grant our motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(1) and 24(a)(2), or alternatively to grant our motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2); and to direct the Clerk to file the attached Complaint-in-Intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing, United States's Motion to Intervene with the attached Complaint-in-Intervention and Proposed Order, by first-class mail upon the following counsel of record:

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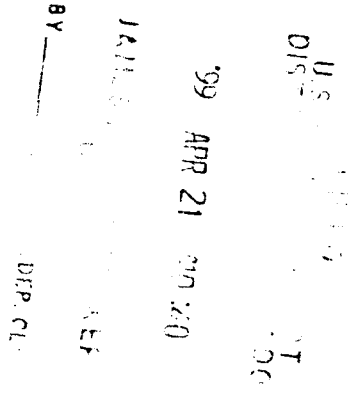

This 21 day of April, 1999.

Donna Gorell
U.S. Dept. of Justice