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United States District Court, N.D. California.

SAN FRANCISCO NAACP, et al., Plaintiffs,
v.
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, et al., Defendants.
Brian HO, by his parent and next friend, Carl Ho, et al., Plaintiffs,
v.
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, et al., Defendants.

Nos. C–78–1445 WHO, C–94–2418 WHO. | Oct. 24, 2001.

Opinion

MEMORANDUM DECISION AND ORDER

ORRICK, J.

***1** Currently before the Court is a proposed settlement in these two related class action lawsuits concerning the desegregation of the schools of the San Francisco Unified School District ("District" or "SFUSD"), *San Francisco NAACP v. San Francisco Unified School District,* No. C–78–1445 WHO ("the *NAACP* action"), and *Ho v. San Francisco Unified School District,* No. C–94–2418 WHO ("the *Ho* action"). For the reasons set forth below, the Court finds that the proposed settlement is a fair, reasonable and adequate resolution of the litigation.

I.

In 1978, the San Francisco National Association for the Advancement of Colored People ("NAACP") filed the *NAACP* action, seeking desegregation of the District's schools on behalf of a class of all children of school age who are or may in the future become eligible to attend the public schools of the District. The suit was brought against the District, its Board Members, and its Superintendent (collectively the "Local Defendants"), and the California State Board of Education, the State Superintendent of Public Instruction, and the State Department of Education (collectively the "State Defendants").

In 1983, the Court approved a Consent Decree to resolve the *NAACP* action. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.,* 576 F.Supp. 34 (N.D.Cal.1983). Paragraph 13 of the Consent Decree, as amended, set forth racial and ethnic guidelines for the assignment of San Francisco schoolchildren to the schools of the District.

In 1994, several schoolchildren of Chinese descent filed the *Ho* action against the State and Local Defendants, alleging that paragraph 13's student assignment plan constituted race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The NAACP was later added as a defendant. In March 1996, the Court certified the *Ho* action as a class action on behalf of all children of Chinese descent of school age who are current residents of San Francisco and who are eligible to attend the public school system.

On February 16, 1999, the day trial of the *Ho* action was to begin, the parties reached a settlement ("the 1999 settlement"). After holding a fairness hearing, the Court gave final approval to the settlement in an Opinion and Order filed July 2, 1999. One of the key parts of the settlement provided that the Consent Decree would terminate no later than December 31, 2002, subject to Court approval. The parties anticipated that the State and Local defendants would have taken all reasonably practical measures to remedy any vestiges of segregation by that date. The settlement also required the District and the State Superintendent of Public Instruction to develop a new student assignment plan, and imposed significant constraints on the use of race in assigning students to the schools of the District. On August 11, 1999, the Consent Decree was amended to include the terms of the settlement.

***2** As part of the approval of the settlement, the Court required the parties to respond to recent reports submitted to the Court by the Consent Decree Advisory Committee ("Committee") and State Consent Decree Monitor Stuart Biegel ("Biegel"). The parties filed a Joint Report on December 23, 1999 that did not dispute any of the problems identified in those reports. The parties informed the Court that by the end of the summer of 2000 they would develop comprehensive plans to address those problems.

The District had been without a permanent school superintendent since June 1999, when former superintendent William Rojas resigned. In May 2000, current Superintendent Arlene Ackerman ("Ackerman") was hired, although she did not begin work until August 2000. At about the same time, newspapers articles began to appear in early to mid–2000 about serious problems with the District's finances.

In the District's 1999–2000 Annual Report, which was filed on August 1, 2000, the District informed the Court that Ackerman was still in the process of developing a plan to achieve the various goals of the Consent Decree. The District expected to file a supplemental report in a few months.

On January 17, 2001, the Court ordered the parties to file a revised Joint Report containing detailed and substantive plans to address the problems identified by the Committee and Biegel by March 15, 2001. The Court adopted the findings of fact contained in the 1999 reports filed by the Committee and Biegel, and ordered the parties to respond to Biegel's 2000 report, which was filed on July 27, 2000. Shortly thereafter, on February 12, 2001, Biegel filed a supplemental report, and the Court ordered the parties to address that report as well in their revised Joint Report.

As a result of counterproposals submitted by the parties, the Court modified its order to require the District to file a Draft Comprehensive Plan on March 2, 2001. The parties were then provided with an opportunity to file written comments about the Draft Comprehensive Plan. The District was ordered to file a Final Comprehensive Plan by April 11, 2001.

After the District filed its Draft Comprehensive Plan, the parties engaged in significant discussions over the content of that Plan. A greatly revised Final Comprehensive Plan, entitled "Excellence For All: A Five–Year Comprehensive Plan to Achieve Educational Equity in the San Francisco Unified School District for School Years 2001–02 through 2005–06" ("the Plan") was filed on April 11, 2001.[1]

Shortly thereafter, the parties jointly requested that Thomas Klitgaard, Esq., be appointed as special master to assist the parties in negotiations designed to settle the parties' differences with respect to the Plan. The Court appointed the special master, and the parties engaged in lengthy settlement negotiations.

On July 11, 2001, the parties submitted a settlement agreement for the Court's preliminary approval. The settlement addressed only the few areas where the parties disagreed about the content of the Plan. In all other respects, the parties raised no dispute with the District's Plan, and it is the Court's understanding that the Plan is being implemented. All parties recognize that the Plan is not a final document that is set in stone, and that it will be modified and added to as part of an ongoing process. In addition, the Court will continue to require the District to respond to the ongoing problems identified in the yearly reports filed by the Consent Decree Monitor and to any future reports filed by the Consent Decree Advisory Committee.

***3** The entire settlement agreement is attached hereto as Exhibit 1.[*] The proposed settlement contains three major parts. First, the parties agreed to extend the Consent Decree by three years so that it would terminate on December 31, 2005, without the need for a further order of the Court. The State's Consent Decree funding would continue through June 30, 2006, the end of the District's 2005–06 school year. The District has agreed to take all practicable actions to eliminate any vestiges of past *de jure* racial or ethnic discrimination, to the extent practicable, by that time.

Second, the District agreed to adopt and comply with a system of monitoring and review of Consent Decree budgets and programs. The District has agreed to submit detailed budgets to the parties and to Consent Decree Monitor Biegel by June 30 of each year setting forth its plan for expenditure of Consent Decree funds. The District has agreed to give priority to expenditures that the District believes will directly enhance student achievement. Biegel has agreed to conduct an independent review of the budget, within 60 days after each budget is submitted, to evaluate the efficacy of each proposed budget in addressing Consent Decree objectives. The parties and Biegel may file objections to specific budget items, and any disputes over the budget that cannot be resolved among the parties may be submitted to the Court for a decision. The settlement also provides for independent audits twice a year to ensure that the District is complying with its Consent Decree budget.

Finally, the proposed settlement contains lengthy proposed modifications to paragraph 13 of the Consent Decree with respect to the District's student assignment plan. The parties propose to modify paragraph 13(j) of the Consent Decree to provide:

> The parties acknowledge that SFUSD officials have the duty and authority to determine lawful criteria for admission to all schools in the SFUSD. The parties further acknowledge that in setting those criteria, state and federal law provide that district officials may consider many factors, including the desire to promote residential, geographic, economic, racial and ethnic diversity in all SFUSD schools, and the student's language needs. Except as provided in paragraph 13(m), the SFUSD shall not use or include race or ethnicity as a criterion or factor to assign any student to any school, class, classroom, or program, and shall not use race or ethnicity as a

> primary or predominant consideration in setting any such criteria or factors.

Under the proposed settlement, paragraph 13(k) of the Consent Decree would also be modified. The District agrees to assign students to its schools, other than Lowell High School and the School of the Arts, in accordance with a student assignment plan that uses a multifactor diversity index that does not include race or ethnicity as one of the factors. The diversity index takes into account socioeconomic status, academic achievement, English Language Learner status, mother's educational background, academic performance at the student's prior school, home language, and geographic areas. The diversity index is set forth in Attachment B to the settlement, with the exception of the provisions relating to geographic areas. The student assignment plan set forth in the settlement is to take effect with the 2002–03 school year, and to remain in effect for future school years unless it is changed in accordance with paragraph 13(m). With respect to Lowell High School and the School of the Arts, the District agreed to devise an assignment plan that is consistent with paragraph 13(j).

***4** Finally, paragraph 13(m) is amended to set forth a procedure by which the parties can address any identifiable racial or ethnic concentration at a particular school or schools that they believe adversely affects the District's educational goals. Any adjustments to student assignments on the basis of race are required to be narrowly tailored to further a compelling government interest, in order to comply with the United States Supreme Court's strict requirements for the use of race in government decisionmaking.

The Court gave preliminary approval to the proposed settlement on July 11, 2001, and set a fairness hearing for September 21, 2001 at 10:00 a.m.

II.

A.

"A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e). The purpose of Rule 23(e) is to protect " 'unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." ' *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997) (quoting 7B Wright, Miller & Kane, Federal Practice and Procedure § 1797 at 340–41 (2d ed.1986)). Accordingly, the standard by which a proposed settlement is to be evaluated is " 'whether the settlement is fundamentally fair, adequate and reasonable." ' *Class Plaintiffs v.. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir.1992) (quoting *Officers For Justice v. Civil Serv. Comm'n of the City & County Of San Francisco,* 688 F.2d 615, 625 (9th Cir.1982)).

B.

The Ninth Circuit has summarized the Court's procedural obligations as follows:

> [T]he class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice; the notice must indicate that a dissident can object to the settlement and to the definition of the class; each objection must be made a part of the record; those members raising substantial objections must be afforded an opportunity to be heard with the assistance of privately retained counsel if so desired, and a reasoned response by the court on the record; and objections without substance and which are frivolous require only a statement on the record of the reasons for so considering the objection.

Officers for Justice, 688 F.2d at 624 (citing *Mandujano v. Basic Vegetable Prods., Inc.,* 541 F.2d 832, 835–36 (9th Cir.1976)) (footnote omitted).

The Court and the parties have satisfied these procedural requirements. On July 11, 2001, the Court ordered the parties to provide notice of the proposed settlement, and of the September 21, 2001 fairness hearing, to the class members of the *Ho* and *NAACP* actions. The Court ordered the District to publish a notice three times weekly for two consecutive weeks in the following papers, beginning no later than August 20, 2001:(a) the *San Francisco Chronicle,* the *San Francisco Examiner,* the *Sun Reporter,* the *Bayview,* and the *San Francisco Independent,* in English; (b) *Sing Tao,* translated into Chinese; and (c) *El Mensajero,* translated into Spanish. The Court also ordered the District to cause copies of the notice to be posted (in English, Chinese, and Spanish) at the main office of the District, at the main office of each

school operated by the District, at the parent centers operated by the District, and on the District's website. The Court found that this form of notice was reasonably calculated to reach the class members in both actions, was the best notice practicable under the circumstances, and satisfied the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure. The District has filed a declaration from Lovina Martinez, an executive secretary in the District's Legal Office, attesting that each of these things was done.

***5** The notice also expressly provided for the filing of comments about the proposed settlement, and set forth a procedure by which interested parties could make comments at the fairness hearing. The Court has received comments, both written and oral, and requests to appear at the fairness hearing, all of which have been made part of the record.

C.

In determining whether the settlement is fair, reasonable, and adequate, the Court is required to balance some or all of the following factors:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir.1998) (citing *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir.1993) (quoting *Officers For Justice,* 688 F.2d at 625)). The Ninth Circuit has stressed that this is not an exhaustive list of relevant considerations, nor even necessarily the most significant factors. *Officers For Justice,* 688 F.2d at 625. Moreover, "[t]he relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Id.*

The issue is not whether the settlement could be better, but whether it is fair, reasonable, and adequate and free from collusion. *Hanlon,* 150 F.3d at 1027. There is a strong judicial policy in favor of settlements in complex class actions. *Class Plaintiffs,* 955 F.2d at 1276.

The Court may not delete, modify or substitute certain provisions. *Hanlon,* 150 F.3d at 1026 (quoting *Officers For Justice,* 688 F.2d 615 at 628). The settlement must stand or fall in its entirety. *Id.*

1.

The first factor is the strength of plaintiffs' case. *Hanlon,* 150 F.3d at 1026. Here, as the State Superintendent suggests, the proper inquiry is actually with respect to the strength of the *District'* s case. In light of the 1999 settlement, there was no remaining dispute among the parties about the progress and implementation of the Consent Decree until the District filed its Draft Comprehensive Plan and then the Final Comprehensive Plan. Two issues raised by the District were a source of contention among the parties: (1) a new proposal for limited use of race in the student assignment plan; and (2) a proposal to extend the Consent Decree until the 2006–07 school year.

The Court had already struck down a student assignment plan that used race as a factor in student assignments, on the ground that it was unconstitutional. The District unquestionably faced an uphill battle, although not an impossible one, in attempting to show that the use of race it now proposed was within the boundaries of the United States Constitution.

***6** In all likelihood, the District faced a much less difficult time seeking an extension of the Consent Decree due to the changed circumstances in the District since the parties entered into the 1999 settlement. *See Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 383 (1992) (the party seeking to modify a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree). At the time the parties entered into the 1999 settlement, there was no indication that Superintendent Rojas would suddenly resign, throwing the leadership of the District into uncertainty for an entire year. In addition, issues surrounding the disarray of the District's finances had not yet been made public. The Court has no doubt that the lack of a permanent superintendent during the year immediately after the adoption of the 1999 settlement, combined with the significant attention District management had to turn to financial matters during that time, hampered the District's ability to move forward with its plans to bring itself into full compliance with the Consent Decree.

In addition, a dispute arose among the parties almost

immediately after the Court approved the 1999 settlement over interpretation of the terms of that settlement with respect to the use of race in student assignments. The parties, thus, had to spend several months litigating the legality of the District's proposed 2000–01 student assignment plan. The Court struck down that plan as both a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and a violation of the terms of the 1999 settlement agreement. In the aftermath of that decision, the District changed its lead counsel, and abandoned any attempt at modifying its student assignment plan to obtain a diverse student body at each school. This dispute and the District's change of counsel negatively affected the District's ability to move forward.

Thus, the strength of the District's proposals put the parties in an ideal situation for settlement. Its proposals with respect to using race in its student assignment plan were considerably less likely to prevail than its proposal to extend the Consent Decree beyond the December 31, 2002 termination date set forth in the 1999 settlement.

2.

The second factor to be considered is the risk, expense, complexity, and likely duration of further litigation. *Hanlon,* 150 F.3d at 1026. There is no question that a trial on extending the Consent Decree and using race as a factor in student assignments would have been lengthy and complex. Even after the trial had been completed, there was a strong likelihood of further litigation on appeal. This extensive litigation would have been very expensive, and a large portion of that expense would have been borne by the taxpayers.

In addition, a trial and any subsequent litigation likely would have been extremely divisive in the community. In the weeks leading up to the February 1999 trial date in the *Ho* action, the case had attracted considerable attention from the press. On the day trial was to begin, the courtroom was filled with press and concerned citizens. The Court has no reason to believe that a new trial now would attract less interest from the public. Thus a settlement of the parties' disputes over the Plan, if possible, unquestionably would be preferable to a lengthy, racially divisive trial. This factor also favors a settlement.

3.

***7** The third factor is the risk of maintaining class action status throughout the trial. *Hanlon,* 150 F.3d at 1026. The analysis the Court set forth in its Opinion of July 2, 1999 remains applicable here. Before the *Ho* action settled, the *Ho* plaintiffs had already filed a motion to redefine the class in the *NAACP* action, in which they asked the Court to create a subclass of the Chinese students who comprise the *Ho* class. Given the conflicting remedies sought by the two classes, the motion raised serious questions about the proper definition of the class in the *NAACP* action. Issues also were starting to arise about the propriety of the *Ho* class itself in light of the different needs of limited English proficiency Chinese students when compared to those Chinese students who are proficient in English.

If the Court had been required to redefine the classes in the *Ho* and *NAACP* actions, new counsel would have been brought in to represent the subclasses, which would have lengthened the proceedings and added significant extra expense. This factor also favors a settlement of the action.

4.

The fourth factor is the amount offered in settlement. *Hanlon,* 150 F.3d at 1026. As a result of the settlement, the District will receive three more years of Consent Decree funds, which will unquestionably benefit the school children of San Francisco if spent appropriately. The settlement includes a procedure for monitoring and reviewing Consent Decree expenditures to ensure that the money is spent wisely. This factor also favors a settlement.

5.

The fifth factor is the extent of discovery completed and the stage of the proceedings. *Hanlon,* 150 F.3d at 1026. The *Ho* action settled in 1999 on the day of trial, when discovery was complete. Each side was well aware of the strengths and weaknesses of the case at the time it settled in 1999.

During the settlement negotiations that took place in the spring of 2001, the District provided a great deal of informal discovery to the parties, in addition to the voluminous documentation the District submitted to the Court with the Plan. Superintendent Arlene Ackerman met with the parties and answered their questions, as did her Special Assistant Myong Leigh; Dr. Anthony Anderson, head of the District's Department of Integration; and Cathy Vogel, the District's acting Chief Financial Officer. Dr. Donald Barfield spent a full day with the parties explaining the intricacies of the District's current assignment plan and its proposed diversity index.

The District provided the parties with charts, budgets, and statistics. The parties also toured six schools with Consent Decree Monitor Biegel, spending approximately half a day at each school meeting with school principals, and talking with teachers and students in the classroom.

As the parties were highly informed about the relevant evidence at the time they entered into the proposed settlement, this factor also favors approving the settlement.

6.

***8** The sixth and seventh factors are the experience and views of counsel, and the presence of governmental participants. *Hanlon,* 150 F.3d at 1026. As the Court explained in its Opinion of July 2, 1999, all counsel have a great deal of experience in class action litigation and/or school desegregation, and include both state and local government participants. The Court will not repeat that discussion again here. It notes, however, that the District's new counsel, Louise H. Renne and David F. Campos of the Office of the San Francisco City Attorney, and Marie Sneed of the law firm of Hogan & Hartson LLP in Washington, D.C., also bring with them a great deal of relevant experience. This factor also favors a settlement.

7.

The preceding factors all strongly favor a settlement of this action. The last remaining factor in determining whether the terms of this particular settlement are fair, reasonable, and adequate focuses on the reactions of the class members to the proposed settlement.

The Court has received twenty-two written comments about the proposed settlement, including written comments in support of the settlement from Consent Decree Monitor Biegel, and written comments objecting to the settlement from Dr. Gary Orfield, the Chair of the Court's Consent Decree Advisory Committee. Many of those who submitted written comments also appeared at the fairness hearing to comment orally on the proposed settlement.

Of those comments, several are from people who have not established that they have standing to comment on the fairness of the proposed settlement. The notice of the fairness hearing required each written comment to state whether the writer is a person presently enrolled in the District, or eligible to enroll in the District in the future, or the parent, legal guardian, or attorney of such a person. The reason for this requirement is that persons who are not members of the class have no standing to object to the settlement of a class action. *See, e.g., Gould v. Alleco, Inc.,* 883 F.2d 281, 284 (4th Cir.1989) (citations omitted) ("The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals.").

Louis Calabro does not state that he is a class member, but submits comments only as president of the European/American Issues Forum. The statements filed by Peter J. Loder and Philip Melnick similarly fail to state their connection, if any, with the class. The statements submitted by "Starchild" and Diallo Dphrepaulezz are submitted as citizens and *future* parents, which also fails to establish that they are class members. As these statements were not filed by members of the *Ho* and *NAACP* classes, the Court will not consider them.

Of the seventeen remaining comments, five comments approve of the settlement, including the comments filed by Consent Decree Monitor Biegel. The notice of the fairness hearing provided that class members need not take any action if they approved of the settlement; accordingly, the fact that only four letters were received in favor of the settlement does not indicate a lack of enthusiasm for the settlement.

***9** The remaining twelve comments, including those filed by Dr. Orfield, all contain criticisms of one or more aspects of the settlement. In light of the more than 65,000 class members in the *NAACP* and *Ho* actions, the twelve letters the Court received opposing some part of the settlement do not suggest a groundswell of opposition to the settlement.

Because many of the comments in opposition to the settlement address similar issues, the Court will address those comments issue by issue, rather than by individually addressing each letter received by the Court. Most of the objections reflect either a misunderstanding of the terms of the settlement or of the law that applies to court desegregation orders.

a.

The Court notes that no one has objected to the portion of the settlement requiring greater oversight of the District's expenditure of Consent Decree funds, or to the part of the settlement providing for termination of the Consent Decree on December 31, 2005 without need for any further court action. The provisions of the settlement requiring oversight of the District's expenditures of Consent Decree funds will enhance the likelihood that

those funds will be spent on the areas with the greatest need.

The settlement's imposition of a new deadline for the District to have taken all practicable actions to achieve the goals of the Consent Decree is realistic in light of the unexpected turmoil in the District since the 1999 settlement was adopted. The settlement also properly recognizes that desegregation consent decrees cannot remain in effect in perpetuity. As the Court noted in 1999,

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 248 (1991) (quoting *Spangler v. Pasadena City Board of Education,* 611 F.2d 1239, 1245 n. 5 (9th Cir.1979) (Kennedy, J., concurring)). The Court notes, however, that the settlement does not *require* the Consent Decree to terminate in 2005. In fact, the settlement expressly permits any person to seek relief for acts of *de jure* racial or ethnic discrimination by the District after the date of the settlement, and also permits motions to modify the Consent Decree if, for example, there is evidence that the District has not yet eliminated all vestiges of past segregation to the extent practicable.

b.

The Court has received some objections to the student assignment plan that is set forth in the proposed settlement.

1.

First, the Court has received some complaints that the assignment plan assigns students to schools on the basis of race. In fact, the settlement expressly precludes the District from assigning students on the basis of race until at least the 2004–05 school year, and then permits it only if the District can meet a very difficult standard. This complies with the relevant Supreme Court case law, which does not forbid the use of race, but permits it only in special circumstances. *See, e.g., Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.")

2.

***10** Second, some object that although the student assignment plan uses a race-neutral diversity index, it actually is nothing more than a proxy for using race. The Supreme Court has held that a party challenging a facially race neutral plan must show not merely that race was a motivation in choosing the race neutral factors but that it was the predominant factor motivating the decision. *Hunt v. Cromartie,* 121 S.Ct. 1452, 1458 (2001). The challenging party must show that the race neutral plan is unexplainable on grounds other than race. *Id.* There is no evidence here that the factors chosen by the District for its diversity index correlate so strongly with race that they cannot be explained as anything but a proxy for race. Each of the factors chosen by the District for use in its diversity index can apply to students of any race or ethnicity. Even if there were evidence of a strong correlation between the diversity index factors and the race of the students, however, that still would not be enough to invalidate the plan without evidence that race also was the District's predominant motivation for choosing those factors. *Id.* at 1459. There is no evidence before the Court from which the Court can conclude that the District's race neutral diversity index is an unconstitutional proxy for race.

3.

Third, the Court has received objections that the diversity index eliminates parent choice. In fact, the assignment plan allows parents to submit an enrollment application designing their preference for up to five schools, including three alternative schools. The diversity index comes into play only when there are more applicants for a school than the school has room to accommodate.

4.

Fourth, there are complaints that the diversity index discriminates against students who do not have any of the characteristics that are given preference under the index. These complaints reflect a misunderstanding of how the diversity index works. Under the assignment plan, brothers and sisters are placed in the same school when requested by a parent, while a sibling remains enrolled at the school, and to the extent that space is available.

Siblings are thus placed first, without application of the diversity index. Then, children qualifying for special programs (such as limited English proficiency, special education, and gifted programs) are admitted without application of the diversity index. The diversity index then applies to the remaining applicants only if there are more applicants than the school can accept.

The diversity index grants a preference to those students who are most different from the students who are already admitted. The diversity index is applied on a rolling basis during the admissions process, so that as each student is admitted, the diversity of the student body in each grade is recalculated. Thus, the characteristics of the students who are most different from the students who are already admitted necessarily changes throughout the admission process. The operation of the diversity index is not anticipated to favor or disfavor any particular group.

***11** In addition, the settlement requires the District to provide the parties with information about the extent to which members of various racial and ethnic groups receive assignment to their schools of choice *prior* to parent notification of those assignments. The settlement also provides that if any party believes that data shows that the diversity index imposes a disproportionate burden on any racial or ethnic group, the parties will meet within two weeks to discuss those concerns and explore potential solutions.

c.

One person complains that the Consent Decree should not be extended because of the poor performance of the District in providing quality education. That statement contends, in particular, that the District has not met the needs of African–American students. Another person complains that the continued expenditure of Consent Decree funds will not benefit the students of the District.

The District concedes in its brief in support of the settlement that it has not yet satisfied the requirements of the Consent Decree or fully met the needs of African–American and Latino students and English language learners. The problems that have been identified by the District, the Consent Decree Advisory Committee, and the Consent Decree Monitor provide more support for extending the Consent Decree than for terminating it. Moreover, the settlement provides for an entirely new level of financial oversight for expenditure of Consent Decree funds that should ensure that funds are spent on the areas with the greatest needs and, thus, will benefit the students of the District.

d.

Consent Decree Monitor Biegel filed a statement supporting the settlement, but suggests that the Court continue its practice of requiring the District to file written responses to any new reports he files or that are filed by the Consent Decree Advisory Committee. The Court has required the District to respond to each such report for the past several years, and had planned to continue that practice for the duration of the Consent Decree even before receiving the Consent Decree Monitor's comments.

e.

Gary Orfield, the Chair of the Court's Consent Decree Advisory Committee, has submitted comments opposing the settlement, but does not actually oppose any portion of the settlement agreement. Dr. Orfield does not oppose extending the Consent Decree. He does not oppose the financial oversight imposed on the District by the settlement. He does not oppose the District's proposed assignment plan. Instead, he argues that the District has not gone far enough in addressing the problems identified in the reports of the Consent Decree Advisory Committee and the Consent Decree Monitor.

In essence, then, Dr. Orfield objects to the adequacy of the District's Plan. That document is clearly a work in progress, however, and does not purport to set forth the entirety of the District's plans for the remainder of the life of the Consent Decree. It is merely a starting point. None of the parties dispute the problems that Dr. Orfield has identified in his written statement. All parties have joined together in assisting the District in resolving those problems before the Consent Decree is terminated. The financial oversight imposed by the settlement will help greatly to ensure that the money the District receives will go to the areas with the greatest need. In addition, by requiring the District to respond in detail to each problem identified in the reports filed by the Consent Decree Monitor and the Consent Decree Advisory Committee, the Court will ensure that the District remains focused on solving the problems that remain to be addressed.

III.

***12** Accordingly,

IT IS HEREBY ORDERED that:

1. The proposed settlement is approved as fundamentally

fair, reasonable and adequate.

2. No later than November 14, 2001, the parties will submit to the Court a stipulated, modified Consent Decree that incorporates the changes set forth in the settlement agreement.

3. No later than November 14, 2001, the parties will file a copy of the provisions of the diversity index relating to geographic areas. By the same date, the District will also file a copy of its proposed new assignment plan for Lowell High School and the School of the Arts. The District will file these documents so that they are made part of the public record of these cases.

4. For the remainder of the life of the Consent Decree, the District will file a written response to each report filed by the Consent Decree Monitor or the Consent Decree Advisory Committee no later than sixty days after each such report is submitted to the Court. The District will also amend its Plan to include specific plans and a timetable for addressing each of the problems in the District's implementation of the Consent Decree that are identified in each such report. The Consent Decree Monitor and Consent Decree Advisory Committee will assist the District by including a separate section in each of their future reports that briefly lists each problem they believe requires a response from the District.

If the District believes that its current Plan will adequately address the problems identified in a report, it will explain the basis for that belief in its written response to the report. If the District disputes the existence of a particular problem identified in a report, it will submit an evidentiary basis for its conclusion that the problem does not exist, or does not need to be remedied.

If any party to this action objects to any portion of the District's response, or believes that the response is inadequate, the parties shall meet and confer promptly to attempt to resolve their differences without Court intervention. If the parties are unable to resolve their differences, any party may file a motion with the Court, which will be heard on the normal thirty-five-day calendar.

5. Within ninety days after the filing date of this decision, the District will file its response to the Consent Decree Monitor's Report # 18, which was filed with the Court on July 30, 2001. The District will address separately each problem identified at pages 27 and 28 of that Report. In that document, the District will also address each of the problem areas identified in Dr. Orfield's September 17, 2001 statement to the Court. On the same date, the District also will file its amended Plan, including specific plans and a timetable for addressing each of the problems in the District's implementation of the Consent Decree that are identified in the Consent Decree Monitor's Report # 18 and Dr. Orfield's September 17, 2001 statement to the Court. If the District believes that the current Plan will adequately address the problems identified in those documents, it will explain the basis for its belief in its written response.

Footnotes

1 The District issued a slightly revised version of the Plan on July 30, 2001.

* [Editor's Note: Exhibit 1 omitted for publication purposes.]