IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

DIANE COWAN, et al. **PLAINTIFFS**

and

UNITED STATES OF AMERICA **PLAINTIFF-INTERVENOR**

v. **Civil Action No. 2:65-CV-00031-GHD**
(previously DC 6531-K)

BOLIVAR COUNTY BOARD OF EDUCATION, et al. **DEFENDANTS**

RESPONSE TO THE UNITED STATES' MOTION TO ALTER OR AMEND JUDGMENT

Defendant Cleveland School District (the "District") files this Response to Plaintiff-Intervenor United States of America's (the "United States") Motion to Alter or Amend Judgment and, in support thereof, would show this Court as follows:

Introduction

On March 28, 2012, this Court found that all of the Cleveland School District's elementary schools as well as Cleveland High School and Margaret Green Junior High School were fully integrated, but the District must improve integration at two of the District's schools, D.M. Smith Middle School, ("D.M. Smith") and East Side High School ("East Side").

On May 15, 2012, the District proposed a plan to implement new magnet programs and refine current magnet programs at East Side and D. M. Smith to attract more white students. The United States objected. However, during briefing, the United States never presented an alternative plan or any expert testimony to respond to the District's plan supported by the District's desegregation expert, Dr. Christine Rossell.

Following extensive briefing and an evidentiary hearing, on December 28, 2012, the Court toured the Cleveland School District, visiting the campuses of Cleveland High, East Side, D.M. Smith, and Margaret Green Junior High as well as the District's two magnet elementary schools, Hayes Cooper Elementary and Bell Elementary.

On January 24, 2013, this Court found that a constitutionally acceptable remedy is to abolish the attendance zones for the District's two high schools and two junior high schools thereby affording all students in grades 6-12 the opportunity to attend the school of their choice. The Court referred to its plan as "open enrollment" or "true freedom of choice."

The attendance zones for these schools were established in 1969 by Court Order. (See Doc. 33, 1969 Order at p. 2). When the 1969 Order was entered, there were more than 1,400 white residents in the East Side attendance zone. (See Jerome Norwood Report attached as "Exhibit "A"). In 1970, however, only 21 white students enrolled at East Side High. (See 1970 Report to the Court attached as Ex. "B"). By 1980, 2,091 or 19% of the population in the East Side zone was white. (See Slaughter Report at Figure 10 attached as Exhibit "C"). Yet, only five white students enrolled at East Side for the 1980-1981 school term. (See 1980 Report to the Court attached as Exhibit "D"). The number of white residents in the East Side zone steadily decreased from 1,303 in 1990 to 1,000 in 2010 and is about 11% of the zone's population. (See Figures 11, 12 and 13 of Slaughter Report attached as Ex. "C"). No white students living in the zone are enrolled full time in either East Side or D.M. Smith. (See Current Enrollment Data attached as Exhibit "E").

In contrast, the black population has steadily increased in the Cleveland High/Margaret Green Zone from 1,178 (in 1980) to 2,257 (in 2010). (See Figures 10-13 of Slaughter Report

attached as Exhibit "C"). As in the East Side zone, the white population in the Cleveland High/Margaret Green zone has also decreased, from 9,374 in 1980 to 7,769 in 2010. (See Figures 10 and 13 of Slaughter Report attached as Exhibit "C").

The Court's January 24, 2013 Order abolishes these zones, finding these zones "perpetuate the vestiges of *de jure* segregation." The United States objects to the Court's plan arguing open enrollment is an unconstitutional remedy, the plan will never work, and that the District is ill equipped to handle complications that may arise in implementing such a remedy.

The United States' motion fails for three reasons: (1) open enrollment is constitutional and the cases cited by the United States are distinguishable from the facts in the instant case; (2) there is no evidence that open enrollment will not improve integration at East Side and D.M. Smith, and the Constitution and this Court's orders do not require these schools reach any particular racial quota; and (3) there is no evidence that the District will not be able to implement the open enrollment plan.

I. "Open Enrollment" is Constitutional.

The Court's plan, to allow every middle and high school student the opportunity to opt for his/her school of choice, is constitutional. And, while the United States objects to utilizing open enrollment because "freedom of choice" in the District was utilized nearly fifty years ago, this Court is not prohibited from revisiting the concept to bring the District to unitary status. Indeed, in desegregation cases, a district court is allowed considerable flexibility in applying equitable remedies. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30-31 (1971).

The Court's plan cuts to the heart of the mandate of *Brown II* where the Supreme Court

found a school district's constitutional desegregation obligation is "to achieve a system of determining admission to public schools on a non-racial basis." *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 300-301 (1955). An open enrollment process is non-racial.

Contrary to the United States's argument, the Supreme Court in *Green v. County School Board of New Kent County, Virginia,* found "freedom of choice" an acceptable tool to achieve a unitary school system. 391 U.S. 430, 439 (1968). Importantly, in *Green* and its progeny (cited extensively by the United States in the subject motion), "freedom of choice" was found to be inadequate only when it had little to no effect on dismantling segregated systems. In all of these cases, "freedom of choice" was rejected when no black children or only a handful of black children attended "white schools" and no whites or very few whites attended "black schools."

Such racially polarized factual scenarios are simply not present in Cleveland. Here, formerly "white schools" - Pearman Elementary, Parks Elementary, Margaret Green Junior High and Cleveland High - all have African American enrollment which is the majority or near majority in each school. (See Current Enrollment Data attached as Exhibit "E" and 1970 Report attached as Exhibit "B"). Further, two of the historically "black schools" - Hayes Cooper Elementary and Bell Elementary - now have significant white enrollment. Hayes Cooper is near a 50/50 minority/white demographic split and Bell's population mirrors the overall make-up of the District. *Id.*

Further, as Dr. Christine Rossell found and as this Court noted, the District far surpasses all other Mississippi Delta schools in the percentage of white students attending the average black child's school. (See Exhibit "F" Dr. Rossell Report at Figure 9). The District has more than four times the interracial exposure of the second best school in the region. *Id.* The District also

compares favorably to schools outside the Delta. Dr. Rossell found the District has an overall racial balance greater than five southern school districts already declared unitary. *Id.* at Figure 14. Dr. Rossell points out that the District is one of the few schools in the country with increasing interracial exposure. *Id.* at p. 13. As Dr. Rossell found, "It cannot be emphasized enough how unique it is to have a school district with increasing interracial exposure, particularly in Mississippi, but also in the rest of the U.S." *Id.*

This type of interracial exposure was not the case in *Green.* There, only 15% of the school district's black children attended "white schools" and no white child attended a "black school." *Green v. County School Board of New Ken County, Virginia*, 391 U.S. 430, 441 (1968). The racial composition of the District's schools is markedly different from the district in *Green* and every other district examined in the cases cited by the United States where courts rejected "freedom of choice" plans.

For example, in *Marshall*, only 60 of the 1868 Holly Springs black students opted to attend a "white school" and 64 of the 3,606 black students in Marshall County chose to attend a "white school". *Anthony v. Marshall Co. Bd of Education*, 409 F.2d 1287, 1288-1289 (5th Cir. 1969). Likewise, in *Greenwood*, under "freedom of choice", six schools remained all one race and the remaining three schools only had 18 black students between them, resulting in only .6% of black children receiving a desegregated experience. *United States v. Greenwood Separate School District, et al.* 406 F.2d 1086, 1091-1092 (5th Cir.1969). In *Hinds County*, the twenty-five school districts examined had no white children in "black schools" and only a small number of black students in "white schools." *Id.* at 855. In all of these school districts, "freedom of choice" was rejected not because the plan is unconstitutional per se, but because, under the plan,

these districts were still operating dual systems with all one race or nearly one race schools. This District is nothing like the school districts in these old cases.

Likewise, the factual scenarios in other cases cited by the United States contrasts sharply with the Cleveland District. *Raney v. Board of Education of Gould School District,* 391 U.S. 443 (1968)(finding 15% of black children attending white schools); *Bivins v. Bibb County Board of Education*, 424 F.2d 1330 (5th Cir. 1970)(finding low percentage of black children in white schools and no whites enrolled in black schools); *Hall v. St. Helena Parish School Board*, 417 F.2d 801 (5th Cir. 1970)(finding only 2 white children in black schools and most schools had less than 10% of black children); *Hilson v. Ouzts*, 425 F.2d 219 (5th Cir. 1970)(finding only 44 of the district's 5270 black pupils attended "white schools" and only 85 white students in "black schools"); *United States v. Board of Education of Baldwin County*, 423 F.2d 1013 (5th Cir. 1970)(finding only 16% of black children in "white schools"); *United States v. Board of Education of Webster Co.*, 431 F.2d 59 (5th Cir. 1970).

This Court referred to its plan as "*true* freedom of choice." Perhaps this is because not only are the fact patterns of the above referenced cases at odds with the current Cleveland School District, it is also because the "freedom of choice" plans of 1969-1970 were mired in social realities that are as foreign to the District today as the terminology used to describe them.

Green outlined then-existing obstacles to freedom of choice plans. *Green*, 391 U.S. 430, 441 FN 5. Those arguments include the fear of retaliation by the white community which would deter "Negro families" from choosing all white schools, violence against "Negro families" attending white schools, improper influence by whites to keep "Negro children in Negro schools", embarrassment by "Negro families" because of their poverty, and improvement of

"Negro facilities" so that "Negro children" will not leave the "Negro school." *Id.*

The United States does not argue any of these factors are present in this case. Here, nearly 70% of the District's students are already enrolled full time in a school with students of other races and still more have diverse classroom experiences on a daily basis through the District's International Baccalaureate ("IB") and Advanced Placement ("AP") programs at East Side. When comparing opportunities for an integrated classroom experience, the Cleveland District stands virtually alone in the region.

There is also no evidence of violence or intimidation toward black children. As this Court has found, the progress the District has made in its integration efforts has been nothing short of remarkable. There is no evidence that facilities have been improved to prevent integration or that black children are hindered by poverty in making school choice. In sum, the arguments against "freedom of choice" in 1969 have no relation or relevancy to open enrollment in the Cleveland District.

The Court's elimination of attendance zone lines, making for true open enrollment, will also encourage the natural increased interracial exposure experienced by the District and lauded by Dr. Rossell in her reports to this Court. As Dr. Rossell found, if left alone, the District will accomplish its maximum integration within the next few years:

> The Cleveland School District is one the of the few school districts in the country with increasing interracial exposure. Although the percentage white in the Cleveland school system has declined since 1969, the percentage white in the average black child's school has continued to increase a little bit each year including the last year under the school reorganization plan. The difference between the percentage white in the school system and the percentage white in the average black child's classroom is only about 9 points. If there is no disruptive intervention and current trends continue, we should expect to see no difference between the two in only a few years. In other words, the Cleveland School District

will have accomplished all the integration it can.

See Dr. Rossell Report at p. 13.

II. Neither the Constitution nor the Orders of this Case Require any Racial Quota or any Additional Remedy.

A. Racial Balancing is not Required.

Citing no authority, the United States also argues that the Court's open enrollment plan is unconstitutional because there is no "empirical data" to suggest white students will enroll in "significant numbers" at East Side or D.M. Smith. (United States' Motion to Alter or Amend Judgment at p. 15, Doc. No. 80). The United States seems to contend a certain "racial quota" must be met at D.M. Smith and East Side. But, this is not what the Constitution requires.

Desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each school, grade or classroom. *Milliken v. Bradley*, 418 U.S. 717, 740-741 (1974). The Supreme Court has rejected any requirement of a particular degree of racial balance. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 12 (1971). *Swann* found that, while mathematical formulas can be a starting point, there is no "per se rule" which "can adequately embrace all of the difficulties in reconciling the competing interests involved." *Id.* at 25-26.

In 2007, citing *Swann* and *Milliken*, the Supreme Court affirmed its holding that even in the context of mandatory desegregation plans, racial proportionality is not required. *Parents Involved in Community Schools v. Seattle School District No. 1 et al*, 551 U.S. 701, 732 (2007). "[A desegregation] order contemplating the substantive constitutional right [to a] particular degree of racial balance or mixing...is infirm as a matter of law." *Id.* The Constitution does not

require every school in every community reflect the racial composition of the school system as a whole. *Id.*

B. The Abolished Zones were a Court Ordered Remedy.

The East Side/Cleveland High attendance zones established by this Court in 1969 put a 15-20% white population in the East Side zone (more than 1,400 residents), yet only twenty-one white students enrolled at East Side for the 1970 school year. (See 1970 Report to the Court attached as Exhibit "B"). In 1980, there were still more than 2,000 white residents enrolled in the East Side zone, yet white enrollment at the school was down to five. (See 1980 Report to the Court attached as Exhibit "D"). Even today, there are 1,000 whites living in the former East Side zone, yet none attend East Side or D.M. Smith.

In *Ross,* the Fifth Circuit considered whether it was permissible for a school district to maintain multiple one-race schools after re-zoning failed to cause white students to enroll in traditionally all black schools. *Ross v. Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983). Following re-zoning, the white students projected to enroll at the suspect one-race schools never enrolled. *Id.* at 226. The *Ross* court found it could distinguish between segregation caused by school policy and segregation caused by integrative policies. *Id.* In *Ross,* the court ultimately held the one race schools were permissible because they actually resulted from court sanctioned policies, not from the school district's past segregation practices. *Id.*

Here, like the subject zones in *Ross*, the East Side zone has always contained a white population, yet there has never been any significant white enrollment. Also, like the zone lines in *Ross*, the East Side zone was not a part of any *de jure* segregation policy. In fact, the zone was the remedy put in place by the Court itself. Also, like the zone at issue in *Ross*, the East Side

zone has seen not only a loss of white population, but a failure of the remaining whites to enroll. In 1980, the zone had a nineteen percent white population. The white population stands at 1,000 today, yet there is no white enrollment at East Side or D.M. Smith. Like *Ross*, demographic factors and private choices have impacted the racial make-up and enrollment of East Side and D.M. Smith. This decline in white population and failure of white students to enroll is not the responsibility of the District.

C. The District has Demonstrated its Commitment to Programs Increasing Interracial Exposure.

The District remains committed to provide continuing opportunities for more integration at all of its schools. The District's two highly successful magnet programs and robust majority-to- minority program (now superseded by open enrollment) show that students and families in the District embrace the idea of choice and a diverse environment. Dr. Rossell found that, to her knowledge, the District's majority to minority transfer program has been the second most successful in the nation. (See Dr. Rossell Report at p. 8 attached as Exhibit "F").

Moreover, the International Baccalaureate Program ("IB") at East Side High is steadily attracting more and more students (white and black) into its highly challenging curriculum. For the 2012-2013 school year, 49 white students attended classes at East Side taking either IB or Advance Placement courses. (See IB/AP Enrollment attached as Exhibit "G"). The United States argues that the District is under no mandate to continue any magnet programs at D.M. Smith and East Side. Although the Order does not mandate the continuation of these programs, the district has shown commitment to its magnet efforts, including the IB curriculum at East Side and D.M. Smith.

D. The United States' Consolidation Plan will Fail to Improve Integration.

The United States urges a more drastic remedy like consolidation. The problem with the United States' argument is that the evidence shows mandatory reassignment plans result in less integration, not more. If the United States' goal is to have more black and white students learning together, consolidation is not the answer.

As Dr. Rossell found, with school districts like Cleveland (greater than 35% minority), the evidence is clear. Voluntary plans (like open enrollment) produce greater increases in interracial exposure, while mandatory reassignment plans result in significant white enrollment loss. (See Dr. Rossell Report attached as Exhibit "F" at pp. 23-24 and Figures 19, 20 and 21). In one study, Dr. Rossell found that in districts with 35% or greater minority populations, mandatory re-assignment plans lead to a 65% loss of white enrollment. *Id.* The United States has not produced a single example of a school district, with a racial make-up like Cleveland, which has experienced more integration or anything close to stabilized integration under a mandatory assignment plan.

When choosing among constitutionally acceptable remedies in desegregation cases, this Court may take into consideration a plan's potential impact on retaining white students. *Flax v. Potts,* 864 F.2d 1157, 1162, FN 11 (5th Cir.1989). The *Flax* court held while white flight cannot be used as a justification for avoiding the affirmative duty to desegregate, a school district has a legitimate interest in retaining a sufficient number of white students to provide an integrated educational experience for students. *Id.* Here, this Court has wisely chosen to implement a plan which, the evidence has shown, has the best chance of providing the Cleveland District with stability in its overall racial composition.

III. The Plan is Workable for the District.

Finally, the United States argues that the Court's open enrollment plan will prove unworkable as the District will have to guess each year as to enrollment, thus being uncertain about the allocation of resources. The reality is that the District has successfully implemented a majority to minority transfer program for more than forty years and can also successfully implement an open enrollment program for its junior high and high schools.

For all of these reasons, Defendant requests this Court deny the United States' Motion to Alter of Amend Judgment.

Respectfully submitted,

Cleveland School District

By: */s/Jamie F. Jacks*

OF COUNSEL:

JAMIE F. JACKS
Mississippi Bar No. 101881
GERALD H. JACKS
Mississippi Bar No. 3232
Post Office Box 1209
Cleveland, Mississippi 38732
Telephone: 662-843-6171
jjacks@jacksadamsnorquist.com
gjacks@jacksadamsnorquist.com

Holmes S. Adams
Miss. Bar No. 1126
John S. Hooks
Miss. Bar No. 99175
Lindsey N. Oswalt
Miss. Bar No. 103329
ADAMS AND REESE
1018 Highland Colony Parkway, Suite 800
Ridgeland, MS 39157
Holmes.Adams@arlaw.com
john.hooks@arlaw.com
Lindsey.Oswalt@arlaw.com

CERTIFICATE OF SERVICE

I, Jamie F. Jacks, attorney for Defendant Cleveland School District, do hereby certify that I have this date served by electronically filing via the ECF system, a true and correct copy of the above and foregoing Response to:

Jonathan Fischbach
Joseph J. Wardenski
Anurima Bhargava
Renee Wohlenhaus
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW, PHB 4300
Washington, D.C. 20530
Jonathan.Fischbach@usdoj.gov
Joseph.Wardenski@usdoj.gov
Anurima.Bhargava@usdoj.gov

Ellis Turnage
Turnage Law Office
P. O. Box 216
Cleveland, MS 38732
eturnage@tecinfo.com

This, the 18th day of March, 2013.

s/Jamie F. Jacks
JAMIE F. JACKS