Nos. 83-2308, 83-2402, 83-2445

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (continued): Page

Page

Constitution, statutes and regulations:

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JURISDICTIONAL SUMMARY

The United States filed this school desegregation suit pursuant to 42 U.S.C. 2000c-6 and 2000d *et seq*. The district court had jurisdiction under 28 U.S.C. 1345, 42 U.S.C. 2000c-6 and 2000d-1.

The United States filed notices of appeal on July 13, July 26 and July 28, 1983 from a June 30, 1983 order of the district court (Br. App. 33-46)[1/] as modified by two orders of July 26 (Br. App. 51-53, 54-55).[2/] Part 1 of the June 30 order is a declaratory judgment (Br. App. 33-39) which serves as the

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1/ Citations to "Br. App." indicate the required short appendix which is bound with this brief. Citations to "App." indicate the separately bound Appellant's Appendix.

2/ It is our understanding that the latter order (Br. App. 54-55), though dated July 26, was not entered until July 27.

basis for a preliminary injunction embodied in Parts 2, 3 and 4 of the order (Br. App. 39-46). The July 26 modifications altered the terms of the preliminary injunction.[3/] This Court has jurisdiction of the appeals from the preliminary injunction and modification orders under 28 U.S.C. 1292(a)(1). This Court also has jurisdiction to review the declaratory judgment. Where an interlocutory appeal is taken from an injunction "the appellate court may consider 'other orders, although interlocutory and in themselves nonappealable, and such questions as are basic to and underlie the order supporting the appeal.'" Helene Curtis Industries v. Church & Dwight Co., 560 F.2d 1325, 1335 (7th Cir. 1977), cert. denied, 434 U.S. 1070 (1978), quoting from 9 Moore's Federal Practice ¶110.25[1], p. 270.

3/ It is questionable whether the district court had jurisdiction to amend the June 30 order on July 26 because a notice of appeal had been filed on July 13. See, e.g., Armstrong v. Board of School Directors, 616 F.2d 305, 327 (7th Cir. 1980); Overnite Transp. Co. v. Chicago Indus. Tire Co., 697 F.2d 789, 792 (7th Cir. 1983). The district court referred to one of the July 26 orders both as a modification and as a partial stay (Br. App. 52-53). The other order (Br. App. 54-55) extended the June 30 injunction against expenditure of certain federal funds from August 10 to September 30.

A third July 26 order (Br. App. 45-50) denied the United States' motion for a stay except insofar as it was granted in the first modification order (Br. App. 51-53).

STATEMENT OF THE CASE

1. Procedural History

The United States' complaint (App. 1-8) and a consent decree (App. 9-29) were filed simultaneously on September 24, 1980.[4/] The complaint alleged that the Board of Education of the City of Chicago had created, maintained and increased the racial and ethnic segregation of students in Chicago public schools in violation of the Fourteenth Amendment and Titles IV and VI of the 1964 Civil Rights Act (App. 4-6).

The consent decree resolved the litigation without an adjudication of the government's allegations (App. 10-11). The decree required the Board to develop and implement a plan to remedy the present effects of past segregation of black and Hispanic students (App. 12-27).[5/] The decree also provided that the cost of implementing the plan would not excuse a failure to develop the desegregation plan or justify postponing, cancelling or curtailing implementation of it (App. 21).

Recognizing that elimination of past barriers to federal funding would further the objectives of the decree, the parties agreed to ¶15.1, which states (App. 20):

> Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

4/ The Board did not file an answer, nor did it assert any claim against the United States.

5/ The court approved a plan on January 6, 1983 (554 F. Supp. 912).

The proper interpretation of ¶15.1 is the subject of this appeal. On May 31, 1983, the Chicago Board filed a "Petition * * * for an Order Directing Compliance with Provisions of the Consent Decree Concerning Financial Support" (App. 45-103). Hearings were held on June 1, 7, 8, 22 and 27. On June 30, the district court issued Findings of Fact and Conclusions of Law (Br. App. 1-32) and entered an Order (Br. App. 33-46).

Although the district court recognized that Chicago had received federal funding since the entry of the decree (Br. App. 3-4), the court declared that the United States had violated the "good faith effort" provision by failing to provide adequate desegregation funding and by "minimiz[ing] and eliminat[ing]" available sources of such funding (Br. App. 36).[6/]

6/ The court's principal criticisms (Br. App. 4-5) were (1) that the Department of Education, preferring block grants over categorical grants, had merged the Emergency School Aid Act with other federal programs into block grants (ECIA), 20 U.S.C. (Supp. V) 3801 *et seq.*, and (2) that the Department had also decided not to seek appropriations for Title IV of the Civil Rights Act and had subsequently decided to provide Title IV assistance through desegregation assistance centers (DACs) and state education agency projects rather than through direct grants to local school districts. The court also faulted (Br. App. 6) the Department's failure to direct Illinois to use its ECIA funds to provide greater assistance for the Chicago desegregation plan and the Department's designation of money in the Secretary's ECIA Discretionary Fund for purposes other than the Chicago desegregation plan. These federal funding statutes are discussed at nn. 13-16, *infra.*

The district court ruled (Br. App. 22-23) that the word "available" was not a limitation on the United States' obligation under ¶15.1 but rather "simply a term of emphasis" or a "tautological" term because "by definition 'unavailable' financial resources could not be provided." The court held (Br. App. 39) that ¶15.1 now obligated the government to provide "not less than $14.6 million" over and above the federal funds already flowing to Chicago for the 1983-84 school year. The United States was ordered (Br. App. 39-42) to develop an "affirmative program" to provide that sum from existing education programs or through legislative proposals. The court's June 30 order required the United States to "seek to implement" its program by August 8, 1983 (Br. App. 40).

The June 30 order, as modified on July 26, further restrained the United States and the Secretary of Education until September 30 (with some specific exceptions) from "expending, or taking any further action to obligate in any way," funds appropriated by Congress for the Department of Education's Special Programs and Populations (SPP) account -- the Secretary's Discretionary Fund, Title IV, Women's Educational Equity, Follow Through, Aid to the Virgin Islands and Territorial Teacher Training (Br. App. 42-44, 51-55).7/

7/ $10.7 million in the Discretionary Fund was exempted to pay for statutorily-mandated programs (Br. App. 42-43). An additional $9.06 million from the Discretionary Fund, which was obligated

(cont')

The court also determined that surplus Department of Education funds (specifically, the Guaranteed Student Loan Fund),[8/] could be reprogrammed through legislative action, and designated for use by Chicago for desegregation expenses (Br. App. 44-45).[9/] Accordingly, the court ordered the government to preserve the availability of such "excess funds" in the amount of $250 million (Br. App. 44-45). The government was ordered to withdraw any pending proposals made to Congress for rescission and to set aside the $250 million in an escrow fund, the specific terms of which are to be designated by the court at a later time (Br. App. 44-45).

On July 15, the United States submitted a report in response to the district court's order requiring the development of an "affirmative program" ("United States Report" (App. 153-191). That report demonstrated that some $91 million in federal funds is potentially available to the Chicago Board for desegregation expenses and that an additional $14.6 million is simply not available from current programs (App. 166-178).

7/ (cont'd)

by the Department before June 8, 1983, was also exempted (Br. App. 43). Additional funds in the other five programs (not to exceed $13.02 million) were exempted to the extent necessary to allow current grantees and programs to operate until September 30, 1983 (Br. App. 43-44, 51-53).

8/ The court identified no other surpluses, and we are aware of none.

9/ The process of reprogramming is discussed at App. 184-188.

On July 27, the United States moved this Court for a stay pending appeal. A temporary stay was granted on July 27, but the Court ordered the government not to expend any of the funds at issue until further order of the Court.[10/]

2. Factual Background

a. Events Leading to the Consent Decree

In 1979, the Chicago Board applied to the United States Department of Health, Education and Welfare (HEW) for a grant under the Emergency School Aid Act (ESAA) (App. 3, 9).[11/] On April 9, 1979, HEW notified the Board that it was ineligible for an ESAA grant because the Chicago school system was racially and ethnically segregated in violation of the law, and the Board had failed to initiate an adequate plan to desegregate (App. 3, 9). After the Board failed to rebut HEW's findings or to devise a satisfactory desegregation plan (App. 3-4, 9; Govt. Ex. 1, Doc. 33 pp. 1-3),[12/] HEW referred the matter to the Justice Department for appropriate enforcement action pursuant to Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d (App. 4; Govt. Ex. 1, Doc.

10/ On August 1, Congress passed H.J. Res. 338, "[t]o enable the Secretary of Education to comply with the [June 30] order" of the district court. The joint resolution "appropriated $20,000,000 to be derived by transfer from available balances in the current appropriation for 'Guaranteed student loans.'" The President has not yet acted on the bill. We will advise the Court of the President's action and address the effect of it on this appeal in our reply brief.

11/ ESAA is described at n. 14, *infra*.

12/ It is unclear whether Government Exhibits 1 and 2 were admitted in evidence. See discussion at pp. 25-26, *infra*.

33). Another ESAA application from Chicago in 1980 was rejected for the same reasons (App. 4).

On April 21, 1980, the Attorney General notified the Board that the United States was prepared to file suit unless the Board would agree to develop and implement a comprehensive desegregation plan (Govt. Ex. 1 Doc. 27). Representatives of the Board and the Justice Department negotiated over a period of several months. (Govt. Ex. 1, Docs. 16, 17, 18, 20, 21, 22, 23b). During these negotiations, the parties discussed the subject of the Board's eligibility for federal funding to assist in financing a desegregation plan (ibid.).

The Board expressed concern that it should not again be denied federal financial assistance for its schools, and this concern was a principal topic of discussion (Ibid.; see especially Docs. 18, 21, 22, 23a). The United States' position throughout these negotiations was, and indeed, the requirement of the Constitution is, that the Board bears the responsibility to ensure that its school system is operated free of discrimination (Govt. Ex. 1, Docs. 27, 37). However, the government was willing to assist the Board in finding funding for a desegregation plan to be developed in accord with mutually agreeable guidelines eventually set forth in the consent decree (id., Docs. 22, 27, 37). But, as the parties have stipulated, the United States refused to agree to any commitment of federal financial support "specific as to form and amount * * * in the context of the Consent Decree, because there was no way to anticipate the nature and costs of the Board's Plan, the amount and sources of Government Funding, or a variety of other matters" (Govt. Ex. 2 (App. 136-137)). It was thus agreed that the matter of financing would be handled by general provisions in the consent decree, including ¶15.1, the "good faith effort" provision. Other more specific provisions concerning timing of the Board's future applications for ESAA funds were also set out (App. 21, 25-27, 29).

b. Federal Assistance Provided to Chicago Subsequent to the Entry of the Consent Decree

The Department of Education's authority to extend federal financial assistance stems from various statutes. Congress has experimented with a variety of approaches for funding state and local government functions. As we detail below, the statutes not only authorized grants but defined the circumstances under which they could be made. The Secretary of Education has adopted regulations which also govern his implementation of the statutes.

Since the entry of the consent decree, the Chicago Board has received millions of dollars in federal aid to assist in its desegregation process. Some of the funds were specifically designated for desegregation. In fiscal year 1980, the Department of Education awarded Chicago the largest grant ($422,800) that year to local districts for race desegregation assistance under Title IV of the Civil Rights Act, 42 U.S.C. 2000c (Br. App. 3; App. 162).13/

In fiscal year 1981, the Department awarded Chicago $1.8 million in out-of-cycle assistance under ESAA (Br. App. 3).14/ The United States had previously joined with the Board in filing a

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13/ Title IV of the 1964 Civil Rights Act authorizes grants for technical assistance to school districts in the preparation, adoption, and implementation of desegregation plans including coping with special educational problems occasioned by desegregation, 42 U.S.C. 2000c-2. The Secretary has implemented this provision by establishing through regulations state education agency projects and desegregation assistance centers (DAC's). 34 C.F.R. 270, Subpart B, Subpart C. Title IV authorizes grants to local education agencies for inservice training for teachers and other school personnel and employment of specialists to assist in dealing with problems incident to desegregation, 42 U.S.C. 2000c-4. Title IV also authorizes grants to and contracts with higher education institutions for training institutes designed to improve the ability of teachers and other school personnel to deal with special educational problems connected with desegregation, 42 U.S.C. 2000c-3.

14/ When the decree was negotiated, the Emergency School Aid Act (ESAA), was the principal source of federal aid specifically designed for desegregation assistance to local school districts. Congress adopted ESAA in 1972, 20 U.S.C. 1601 *et seq.* (1976). After repeal and reenactment in 1978, the statute appeared at 20 U.S.C. (Supp. V) 3191-3207. The purpose of the grants, which were awarded on a competitive basis, was to meet the needs of desegregating school districts, to encourage school districts voluntarily to eliminate minority group isolation, and to aid school children in overcoming the educational disadvantages of such isolation. Applicants for assistance under ESAA were reviewed for the educational quality of the proposed program, 20 U.S.C. (Supp. V) 3200, as well as to determine whether the applicant school district met the specific civil rights eligibility requirements of ESAA, 20 U.S.C. (Supp. V) 3196(a)(1) and (c)(1). Assistance available under ESAA included basic grants, 20 U.S.C. (Supp. V) 3197; special programs and projects, 20 U.S.C. (Supp. V) 3198(a); and educational television, 20 U.S.C. (Supp. V) 3201. Out-of-cycle assistance was available to help local education agencies meet educational needs arising from the implementation of desegregation plans adopted too late to serve as the basis for a basic grant application. 34 C.F.R. 280.60(b).

joint motion to facilitate the Board's eligibility for ESAA funding. See discussion at p. 35, *infra*. In fiscal year 1981 another $298,639 grant was awarded to Chicago under Title IV (again the largest such grant awarded to a local district for race desegregation assistance that year) (Br. App. 3; App. 162). Northeastern Illinois University also received a $248,604 Title IV grant for the sole purpose of conducting a training institute for Chicago school personnel (June 24, 1983 Affidavit of Jack A. Simms). Chicago also received $674,432 in desegregation-related assistance under Title VII of ESEA in 1981 (Br. App. 4).[15/]

In fiscal year 1982, Chicago received $6.3 million under the Education Consolidation and Improvement Act (ECIA), or approximately $3 million more than it had received in 1980 under the categorical grant programs merged into ECIA (Br. App. 18). It used only $1.8 for direct desegregation costs (Br. App. 4).[16/] In 1982, Chicago also received another $528,267 under Title VII of

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15/ Under Title VII of the Elementary and Secondary Education Act (ESEA), 20 U.S.C. (Supp. V) 3221 *et seq.*, the Department of Education provides bilingual desegregation assistance to school districts. 20 U.S.C. (Supp. V) 3261.

16/ In 1981, the Department of Education proposed that several categorical grant programs -- including ESAA -- be replaced by a block grant which would provide school systems assistance with fewer strings attached. Congress enacted the Education Consolidation and Improvement Act of 1981 (ECIA), 20 U.S.C. (Supp. V) 3801 *et seq.* Chapter 2 of ECIA consolidates ESAA with more than thirty other programs.

The block grant legislation allocates funds to the states on a per capita basis. The state must distribute at least 80% of its block grant funds to local districts according to enrollment, adjusted according to the state's criteria for providing higher allocations to districts having a greater number or percentage of pupils whose education imposes a higher than average cost per child. 20 U.S.C. (Supp.V) 3815. Subject to meeting statutory requirements for equitable services to private school children,

(cont'd)

ESEA (Br. App. 4). In 1982, Title IV assistance was made available to Chicago through the Indiana University and University of Wisconsin-Milwaukee desegregation assistance centers and the Illinois state education agency (App. 175).

For 1983-84, a total of $91 million in federal funds is potentially available to the Chicago Board for many of the costs it categorizes as desegregation expenses, as the chart below demonstrates (App. 166-177). That sum is $10 million more than Chicago received in 1980, the year the consent decree was entered (App. 167).

16/ (cont'd)

all of these Chapter 2 funds allocated to the Board may be used by the Board at its discretion for educational activities under its desegregation program (App. 112). Some local educational agencies, including Detroit and Flint, Michigan, use all of their Chapter 2 funds that are available for services to public school children for desegregation purposes (App. 168).

Six percent of the monies under ECIA are reserved for the Secretary of Education's Discretionary Fund. 20 U.S.C. (Supp. V) 3813(a). The statute mandates funding for three programs: (1) the Inexpensive Book Distribution Program (as carried out through "Reading is Fundamental"), (2) programs of national significance in the "Arts in Education" Program, and (3) programs in alcohol and drug abuse education. These programs are to be funded in amounts necessary to sustain them at the level of funding for predecessor programs in fiscal year 1981. In addition, through the appropriations process, Congress directed the Secretary to provide support in fiscal year 1983 for law-related education, for the National Diffusion Network, and for evaluations and studies of Chapter 2 of the ECIA (App. 155-156). The remaining funds may be used by the Secretary to carry out directly, or through grants or contracts, programs and projects which (1) provide a national source for gathering and disseminating information on the effectiveness of programs designed to meet the special educational needs of educationally deprived children, and others served by the ECIA, and for assessing the needs of such individuals, (2) carry out research and demonstrations related to the purpose of the ECIA, (3) are designed to improve the training of teachers and other instructional personnel needed to carry out the purposes of the ECIA, and (4) are designed to assist state and local educational agencies in the implementation of programs under the ECIA, 20 U.S.C. (Supp. V) 3851.

FY 1980 and 1983 FUNDS FROM THE DEPARTMENT OF EDUCATION THAT ARE OR WERE AVAILABLE OR POTENTIALLY AVAILABLE TO THE BOARD FOR ITS DESEGREGATION PROGRAM (App. 166-167)17/

	FY 1980	FY 1983
ECIA Chapter 2..................	-	$6,358,256
Antecedent Programs to Chapter 2	$3,449,658	-
ECIA Chapter 1..................	-	73,247,000
Antecedent program to Chapter 1 of the ECIA (Title I of ESEA)..............	63,345,450	-
Impact Aid.....................	3,648,742	612,453
Education for all Handicapped Children Act 18/................	6,683,636	6,800,000
Follow Through Act.............	373,255	346,255
Bilingual Education Act (Desegregation Assistance Program) ...	- 0 -	506,140
Vocational Education Act 19/....	3,028,500	3,150,634
Title IV.......................	422,800	- 0 - 20/
	80,952,041	91,030,738

17/ Some of the amounts listed are estimates. Receipt is conditioned on the Board's compliance with statutory eligibility requirements. It is impossible to say whether all or some of the specific amounts listed could be used for the Board's plan in the absence of a detailed budget and program narrative from the Board (App. 166).

18/ These figures represent the minimum amount that must be distributed to the Chicago Board based on the statutory requirement that 75% of state funds under Part B of the Act be distributed to local education agencies (App. 166-167). The Chicago Board actually received an amount greater than this in FY 1980 and probably will again in FY 1983 (App. 167).

19/ These figures represent the amount the Board expended under the Illinois State Vocational Plan regardless of whether those funds were newly-appropriated or carried over from prior fiscal years (App. 166-167).

20/ While the Board will receive no direct Title IV assistance in FY 1983, it will receive approximately $300,000 worth of indirect services (App. 167).

The nature of these funds potentially available to the Board for financing desegregation costs in FY 1983 is described in detail in the United States' Report (App. 166-177).

QUESTIONS PRESENTED

1. Whether a consent decree provision requiring both parties to make a "good faith effort" to find and provide "available" funding for the Chicago desegregation plan obligated the plaintiff United States to make funding for the plan a priority over all other local school districts and all other educational programs even to the point of conforming its legislative program to that end.

2. Whether the United States failed to make a "good faith effort" to find and provide "available" funding for the Chicago desegregation plan.

3. Whether the district court abused its discretion in purporting to enforce the "good faith efforts" provision by ordering the United States to pay a specific sum of money to the Chicago Board out of current federal assistance programs or to seek legislation to provide such assistance.

SUMMARY OF ARGUMENT

Paragraph 15.1 of the consent decree obligated both parties to make "every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan." The district court has erred in reading into this provision an elastic five-year promise by the United States to fund those portions of Chicago's education costs, denominated by the Board as desegregation expenses, which Chicago is allegedly unable to bear, and to give Chicago priority over other school districts and educational priorities in dispersing federal education funds, and to shape the legislative program and policy determinations of the Executive Branch to maximize federal assistance to Chicago.

1. The plain language of the decree belies the court's reading, for the words of ¶15.1 promise a "good faith effort" to provide "available" funds, not an unlimited guarantee of millions for Chicago regardless of other programs or priorities. It is inconceivable that the Attorney General in a school desegregation suit brought by the United States would bargain away the fundamental powers of the Executive Branch to make legislative recommendations for changes in federal assistance programs and to exercise the discretion conferred by Congress.

The structure of the decree as a whole confirms that ¶15.1 was aimed at re-establishing Chicago's eligibility for federal financial assistance which had been denied because its schools were segregated.

The negotiating history establishes that the government declined to make a specific guarantee of funding. Furthermore, the conduct of the parties subsequent to the negotiations reflects that interpretation as well as the understanding that Chicago's grant applications were not, by virtue of the decree, to be automatically approved.

2. Because the district court's interpretation of ¶15.1 goes so far beyond any reasonable reading, the court has also erred in concluding that the United States violated the decree. In fact, the government has made and is making a "good faith effort" to find and provide "available" funding. Chicago has received millions of federal dollars which it could, but has declined, to use to finance its desegregation plan. Additional federal funds are simply not "available."

3. Even if the district court were correct that the United States has violated the decree, the order purporting to enforce it is an egregious abuse of discretion. The court exceeded the bounds of judicial authority in usurping the constitutional authority of the Executive Branch to recommend legislation and to exercise the discretion conferred upon it by Congress.

ARGUMENT

I

THE CONSENT DECREE PROVISION OBLIGATING BOTH PARTIES TO MAKE A GOOD FAITH EFFORT TO FIND AND PROVIDE AVAILABLE FUNDS DOES NOT REQUIRE THE EXECUTIVE BRANCH OF THE UNITED STATES TO PREFER CHICAGO OVER OTHER SCHOOL DISTRICTS OR EDUCATIONAL PRIORITIES IN DISPENSING FEDERAL FINANCIAL ASSISTANCE AND STRUCTURING FEDERAL ASSISTANCE PROGRAMS 21/

A. The plain language of ¶15.1 requires a "good faith effort" to find and provide "available" funds but does not impose a binding commitment to make funds available

A consent decree must be construed as it is written -- not as one of the parties might subsequently wish it had been.

21/ Interpretation of a consent decree is a matter of law, freely reviewable on appeal. *Vertex Distributing v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982).

United States v. Armour & Co., 402 U.S. 673, 682 (1971). Paragraph 15.1 of the consent decree committed both parties to make only "every good faith effort" to find and provide "available" funds. It did not impose an absolute obligation to "find and provide" funds or to make funds available. Paragraph 15.1 thus does not guarantee any federal funding for the Chicago desegregation plan. Rather it commits the United States to making a good faith effort to assist Chicago in locating and applying for funds which are earmarked for school districts undergoing desegregation. Nowhere does ¶15.1 suggest an open-ended commitment by the United States to provide federal assistance to which Chicago is not entitled, or to prefer Chicago over other desegregating school systems or other educational priorities. The district court, however, has read the central qualifying words of ¶15.1 -- "good faith effort" and "available" -- as a nullity.

1. Meaning of "Good Faith Effort"

Although the court acknowledged that the United States had provided assistance for the Chicago desegregation plan, it held that the government breached the "good faith effort" provision essentially by making policy judgments to alter the federal government's assistance programs. Accordingly, the court ruled that ¶15.1 now obligated the United States "to take all affirmative steps to seek to make available financial resources adequate for implementation of the Plan" (Br. App. 23) (emphasis in original). The district court's interpretation of the decree is in error.

The district court's construction of "good faith efforts" is contrary to other courts' interpretations of similar language. In Fox v. HUD, 680 F.2d 315 (3d Cir. 1982), the court interpreted a consent decree which required "best efforts" of a defendant, the alleged wrongdoer. The consent decree settled a suit alleging that HUD and the City of Philadelphia had undertaken urban renewal projects in violation of federal law. HUD agreed to use its best efforts to obtain necessary federal approvals for construction of a specific housing project to be built according to the terms of the decree. When HUD determined that the project developers would have to compete with other developers for the limited federal funds available for such projects, the district court ordered HUD to finance the project. The court of appeals reversed, finding that the "best efforts" clause was not an 'undertaking by HUD, express or implied, to provide * * * financing." 680 F.2d at 320. See also St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1300 (8th Cir. 1980) ("On its face," a promise to make "best efforts" to do an act is distinguishable from a binding commitment to do it.); Western Geophysical Co. v. Bolt Associates, 584 F.2d 1164, 1171 (2d Cir. 1978) ("The phrase best efforts * * * indicates a degree of discretion * * *; no absolute requirement * * * can be read into these words.").[22/]

22/ St. Louis Union Trust, Western Geophysical and other cases cited infra are contract cases. Because consent decrees have many of the features of contracts, the rules of construction of contracts are useful aids in construing consent decrees. United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975).

2. Meaning of "Available"

The district court held that the word "available" was simply tautological rather than being a limitation on the scope of the obligation imposed by ¶15.1. Although, as the district court observed, "by definition 'unavailable' funds could not be provided," (Br. App. 23), it does not follow that the word "available" is drained of all meaning. Courts should not presume that words used in a negotiated agreement are tautological rather than having a "distinct meaning and purpose." Whetstone v. Orion Insurance Co., 302 F.2d 15 (10th Cir. 1962).

Availability of federal funds is determined by congressional authorization and appropriation. Thus, "available" funds in ¶15.1 could only mean funds Chicago is eligible to receive and has applied for and funds appropriated for the purposes for which Chicago seeks to use them. The decree does not, contrary to the court's reading, mean that the government must make funds available. It does not mean that the government is required to restructure programs or seek legislation or refrain from doing so in derogation of the policy judgments of the Executive Branch. But that is precisely what the district court has interpreted ¶15.1 to require, for it found a violation in the government's proposal to merge ESAA into the block grant statute and its decision to extend Title IV assistance through state agencies and regional desegregation assistance centers.

3. <u>The district court's interpretation is not credible</u>

The power to recommend legislation to Congress is committed to the Executive Branch. Article II, Section 3 of the United States Constitution gives the President authority to recommend for congressional consideration "such Measures as he shall judge necessary and expedient." Furthermore, where Congress has conferred authority upon the Executive Branch to exercise discretion in implementing statutory programs, it is "not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers." <u>Newman</u> v. <u>United States</u>, 382 F.2d 479, 482 (D.C. Cir. 1967).

It is inconceivable that the Attorney General of the United States in a suit brought by the government would bargain away the constitutional prerogatives of the Executive Branch to recommend legislation to Congress, to seek changes in federal assistance programs, or to exercise the discretionary decision-making authority conferred by Congress. It is not possible to read such a sweeping abdication of discretion and power into the simple words of ¶15.1. Surely much more specific language must be required before a court can find that the government has agreed to such a course.

If parties contemplate that legislation must be sought or budget proposals must be made to comply with a consent decree, such obligations can be clearly set forth. Paragraph 15.1 did not require the Executive Branch, for example, to "take all steps necessary to ensure the full and timely financing of this judgment, including, if necessary, submission of appropriate budget requests to the legislature." New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980). The spare language of ¶15.1 also contrasts with the detailed "best efforts" clause construed in Brewster v. Dukakis, 675 F.2d 1, 4 n.3 (1st Cir. 1982), where defendants promised to

> use their best efforts to insure the full and timely financing of this Decree, including: submission of appropriate budget requests to the Massachusetts General Court; allocation of sufficient funds to insure that all existing and new programs meet the minimum standards therein; full allocation of funds appropriated for services during the fiscal year; allotments of appropriated funds as needed * * *.

Both of these cases, like Fox, supra, involved "best efforts" promises extracted by, rather than from, plaintiffs.

The United States is the plaintiff in this litigation, alleging that the Chicago Board operated its schools in violation of the Constitution. No claim was made against the United States. In a litigated decree, a court could not have entered any relief against the United States. Nor could a court have ordered the Executive Branch to seek or refrain from seeking legislative changes in federal assistance programs. "[I]t 'would thwart every constitutional canon for th[e] court to order an arm of the Executive Department to demand action by the Legislative Department," Smith v. United States, 333 F.2d 70, 72 (10th Cir. 1964) (citations omitted). The Board asserts, nevertheless, that ¶15.1 has entitled it to do what it concedes "[n]o other school board in the United States is in a position" to do -- "go to court and say, We object to the policy of this administration with respect to desegregation funding" (App. 143).[23/]

This Court should not conclude that the Attorney General -- who has a duty to protect the constitutional interests of the Executive Branch -- was "so inept a bargainer" (White v. Roughton, 689 F.2d 118, 121 (7th Cir. 1982), cert. denied, 51 U.S.L.W. 3720 (U.S. April 4, 1983)), as to give away the constitutional power and discretion of the Executive Branch, make the federal court the arbiter of the federal government's level of funding for Chicago schools and promise Chicago "substantive entitlements to which [it] had no possible claim" (ibid.). The courts should avoid a construction of a consent decree which enlarges judicial

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23/ The district court's findings are peppered with the court's disdain for the Administration's efforts to "dismantle" the Department of Education and reduce the levels of federal funding for education (See, e.g., Br. App. 4-8). We take exception to these findings. But they are irrelevant in any event, for as we have demonstrated, nothing in ¶15.1 created a judicially enforceable obligation to refrain from making executive policy choices in these areas. The findings do reveal the sweeping nature of the policy review the district court was willing to undertake.

power under Article III to extend to executive power under Article II.[24/]

B. The rest of the consent decree supports the plain language interpretation of ¶15.1

The focus of the consent decree was desegregation. But the parties agreed that desegregation would cost money (App. 21) and that educational enhancement should play a part in the desegregation plan (App. 17). Paragraph 15.1, the "good faith efforts" provision, is one of three subparagraphs under paragraph 15, "Financial Cost of the Plan." Paragraph 15.1 contrasts with the language of ¶15.2 which refers to potential "additional parties who may be legally obligated to contribute to the cost of the desegregation plan" (App. 21) (emphasis added). Paragraph 15.1 refers merely to an obligation "to make every good faith effort."

The reference in the "good faith" provision to "every available form of financial resources" encompasses the efforts of both parties. When the decree was entered, the primary available source of federal funds for desegregation was the Emergency School Aid Act (ESAA). The decree contains several provisions relating to ESAA. Paragraph 2 (App. 9) notes that HEW had denied Chicago funding under ESAA because its schools were segregated.

24/ The courts should not interpret a negotiated agreement to impose an obligation which a reasonable party in the circumstances would not undertake. Agreements should be construed to "result in a contract the parties probably and normally would enter into, rather than one which is improbable and unusual." Continental Bus System, Inc. v. NLRB, 325 F.2d 267, 273 (10th Cir. 1963). "[T]he courts will not construe a contract to mean that the parties have agreed to act contrary to what common sense and the circumstances obviously demand, unless the contract is explicit and clear in that meaning." Stool v. J.C. Penney Co., 404 F.2d 562, 566 (5th Cir. 1968).

This was one of the five considerations listed in the decree as reasons why "the parties * * * have determined to settle this action and resolve the United States' request for injunctive relief by entry of this consent decree" (App. 10). Similarly, Part III of the decree contains paragraphs relating to eligibility for ESAA funding (App. 25-26), and Attachment A (App. 29) -- the timetable for the plan -- provides a target date for the Board's submission of funding proposals under ESAA.

The Board's principal complaint is the disappointment of its expectation of large ESAA grants (App. 74-55, 105-106, 142). Although the Board concedes that ¶15.1 was not a guarantee of specific funds or a promise to continue the ESAA program (App. 141, 144, 147), it baldly asserts in virtually the same breath that the provision does much more than that by requiring the Executive Branch to take "all steps" within its power, including "all necessary legislative action" (App. 141). The Board argues, and the district court has agreed, that the merger of ESAA into block grants somehow deprived the Board of monies it was entitled to receive under the decree. The Board asserts, for example, that but for that merger, Chicago would have received an ESAA grant at a level the Board estimates variously at $33 to $101 million (App. 105-106, 142).[25/]

25/ Not only does the consent decree avoid commitment to any specific amount, but the record is devoid of any suggestion of such a commitment. The Board's expectations for ESAA funding were extremely unrealistic considering that the largest grant

(cont'd)

None of the provisions of the consent decree, including the "good faith effort" provision of ¶15.1, guaranteed Chicago a single dollar of federal aid even under ESAA much less from any other source. Rather the decree as a whole demonstrates that Chicago was concerned with re-establishing its eligibility for federal assistance. Entering into the decree accomplished that. But the decree did not state that Chicago would get every federal dollar it asked for or that Chicago's needs would be given priority over those of other school districts. Nor did the decree in any way suggest that the United States was to refrain from altering the ESAA funding scheme or to insure that alternate funding, at a level satisfactory to Chicago, would be established in the event ESAA were changed.

C. The negotiating history of the decree supports the plain language construction of Paragraph 15.1

At the June 22, 1983 hearing, the United States offered into evidence a compilation of correspondence and internal memoranda covering a period beginning approximately one year before

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25/ (cont'd)

ever made under the statute was to the City of Los Angeles for $10,840,039 in Fiscal Year 1980. The Board's estimate of $101 million was based upon its calculation of the amounts which other school districts received per pupil. ESAA grants were, of course, not awarded on a per pupil basis but on the basis of the educational quality of a proposal submitted by the school district as limited by the total amount available in the school district's state. 20 U.S.C. (Supp. V) 3200.

entry of the consent decree and ending approximately one year after entry (Govt. Ex. 1).26/ We also offered a Joint Stipulation of the parties concerning the financial aspects of negotiation of the decree (Govt. Ex. 2) (App. 136-137)).

The district court concluded (Br. App. 21) that ¶15.1 of the Consent Decree is unambiguous in its terms and that resort to extrinsic evidence is not required to discern the mutual intent of the parties. In the alternative, the court concluded (Br. App. 21-22) that, even if the negotiating history is considered, that history supports the Board's construction of the decree. The court did not directly rule that the evidence tendered by the United States' Govt. Ex. 1 was inadmissible. However, it referred to Govt. Ex. 1 as "the United States' tendered documents" (Br. App. 22 n.6). and "the history it seeks to urge on this Court" (Br. App. 24 n.7). Thus, although the court also referred selectively to that evidence in support of its interpretation of the decree, we discuss the issue of its admissibility prior to addressing the merits of that evidence.

1. <u>Extrinsic evidence may be used as an aid to determining the intent of Paragraph 15.1 of the decree</u>

In <u>United States</u> v. <u>Armour & Co.</u>, <u>supra</u>, 402 U.S. at 682, the Supreme Court held that "the scope of a consent decree must be discerned within its four corners, and not by reference to

26/ Portions of Government Exhibit 1 are reproduced in the separately bound appendix (App. 113-135).

what might satisfy the purposes of one of the parties to it." Subsequently, the Court in United States v. ITT Continental Baking Co., supra, 420 U.S. at 238, held that "reliance upon certain aids to construction" such as "the circumstances surrounding the formation of the consent order * * * does not in any way depart from the 'four corners' rule of Armour."

In an opinion interpreting those decisions of the Supreme Court, this Court has held that resort to extrinsic aids in construing a consent decree is proper even where the language of the decree is itself unambiguous. White v. Roughton, supra. In White, the Court examined extrinsic evidence in an effort to determine the mutual intent of the parties in including certain language in the consent decree.

Although the district court discounted the United States' reliance on White as involving "a situation very different from the present one" (Br. App. 22 n.5), the situation there was, in some respects, quite similar to that of this case. Plaintiffs in White had brought a class action against officials of an Illinois township alleging a denial of due process in the procedure by which the township determined eligibility for a program of "General Assistance" to poor people, 689 F.2d at 118. The suit was settled by a consent decree in which the township agreed to adhere to standards "substantially in compliance with the standards adopted pursuant to this settlement and attached hereto as Exhibit 2," id. at 119. The document attached as Exhibit 2 included language mandating emergency assistance for basic maintenance under certain circumstances. More than four years after entry of the decree, the township repealed the ordinance under which such emergency assistance was provided, ibid.

The plaintiffs petitioned for an order holding the township and its officers in contempt of the decree for repealing the emergency assistance ordinance. Concluding that the township could not have intended, through the decree, to grant the plaintiffs a substantive entitlement to emergency assistance which plaintiffs had neither sought, nor, in any event, would have been legally entitled to, the court made reference to extrinsic evidence which tended to prove that the township had merely agreed to adhere to certain standards, of which those in Exhibit 2 were illustrative, 689 F.2d at 121. Similarly, in this case, we have argued that ¶15.1 was not intended to bargain away the Executive's authority to recommend changes in legislation and to implement education programs in accordance with national priorities. Reference to the documents embodying the negotiating history of this decree is proper in order to determine the intent of the parties.

The evidence offered by the United States to show the circumstances surrounding execution of the decree was offered not to alter the terms of the decree but rather to aid in its construction. Use of such evidence has been upheld by this and other courts in construing contracts, Kavanaugh v. Ford Motor Co., 353 F.2d 710, 716 (7th Cir. 1965); American Casualty Co. of Reading, Pa. v. Reidy, 386 F.2d 795, 797 (7th Cir. 1967); Hohenstein v. S. M. H. Trading Corp., 382 F.2d 530, 531-532 (5th Cir. 1967); Belcher v. Elliott, 312 F.2d 245, 247 (6th Cir. 1962).27/

2. Extrinsic evidence of the negotiating history of the decree supports the plain language construction

At the time negotiations began, the Board had been notified that it was ineligible to receive a grant under ESAA because of racial and ethnic segregation in its schools and, indeed, that its continued eligibility to receive any federal financial assistance was in jeopardy because of alleged violations of

27/ Once the courts have concluded that resort to extrinsic evidence is proper, they have considered evidence similar to that offered by the United States to prove the circumstances surrounding the formulation of a consent decree. See, e.g., Sportmart, Inc. v. Wolverine World Wide, Inc., 601 F.2d 313, 317-318 (7th Cir. 1979) (court examines complaint, previous consent orders, motions, and evidence concerning the context in which negotiations took place); Robinson v. Vollert, 602 F.2d 87, 93-94 (5th Cir. 1979) (court considers documents and testimony concerning what transpired during consent decree negotiations); In re Stratford of Texas, Inc., 635 F.2d 365, 369 (5th Cir. 1981) (court examines actions of the parties, solicitation materials, and other circumstances surrounding the formulation and adoption of the decree); United States v. Motor Vehicle Mfrs. Ass'n of U. S., 643 F.2d 644, 651 (9th Cir. 1981) (district court on remand should consider surrounding circumstances at formation of consent decree); Baum v. Great Western Cities, Inc., of New Mexico, 703 F.2d 1197, 1205 (10th Cir. 1983) (extrinsic evidence involving actions and conduct of parties is admissible for interpretation and ascertaining the parties' intent); Fox v. HUD, supra, 680 F.2d at 321-322 (evidence of conduct of parties before entry of consent decree, including a memorandum of understanding entered into by them, considered by court).

Title VI (App. 113-118, 119-128). From the beginning, the United States took the position that it was the responsibility of the Board to develop a desegregation plan which would comply with constitutional standards without regard to the amount of federal financial assistance available to assist in that endeavor. Thus, in one of the earliest documents in the negotiating history, Assistant Attorney General Drew S. Days III, who signed the consent decree on behalf of the United States, disavowed any intention to make the sort of financial commitment which the Board claims was made in ¶15.1. In a memorandum to the Attorney General seeking authorization to bring suit against the Board, Assistant Attorney General Days stated (App. 130):

> Despite the temptation to dangle the prospect of additional federal funds before a financially strapped school board to induce settlement, it remains our conviction that Chicago must agree to come into compliance with the law on the basis of the merits of the proposed suit and not in return for financial assistance.

Nevertheless, because the Board was anxious to establish its eligibility for an ESAA grant[28/] there were extensive discussions between federal officials and defendants concerning the reasons for its ineligibility and the actions the Board needed to take to establish eligibility (*e.g.*, Govt. Ex. 1, Documents 17, 18,

28/ The Board's eligibility for a grant from the Law Enforcement Assistance Administration (LEAA) was also a topic of concern (*e.g.*, Govt. Ex. 1, Documents 5, 19, 20).

21, 25, 28, 35). Internal memoranda of the Department of Justice and reports of negotiating sessions demonstrate a concern that the parties reach agreement in a manner, and on a schedule, that would increase the Board's chances of getting ESAA funding (e.g., Govt. Ex. 1, Documents 15, 16, 21, 22, 29). The parties also discussed the availability of Title IV grants for planning and other expenses connected with the desegregation process (e.g., Govt. Ex. 1, Documents 16, 18).

These documents demonstrate the type of federal financial assistance which the parties had in mind when Paragraph 15.1 was drafted and suggest that the phrase "every available form of financial resources" encompassed the forms of assistance discussed by the parties rather than assistance programs which were devoted to purposes other than local desegregation assistance. The fact that, throughout these discussions, there was extensive reference to statutory limitations upon the award of grants (e.g., Govt. Ex. 1, Doc. 18) and the need for the Board to meet eligibility requirements for funding (e.g., Govt. Ex. 1, Doc. 21), likewise supports the Government's reading of "available" in ¶15.1.

Several documents discussed obligations of the United States under the decree, particularly efforts to identify funds available from federal agencies to assist the Chicago area in "the creation and maintenance of stably integrated schools" (App. 22; Govt. Ex. 1, Documents 14, 15, 16, 21, 22, 39). None of those documents suggest that the United States contemplated making the kind of commitment encompassed by the district court's interpretation of the consent decree. If the United States had understood the Board's position to be that which is reflected in its May 31, 1983 Petition to enforce the consent decree, there surely would have been some discussion in these documents of the authority or wisdom of the government's taking on such an extraordinary obligation. Finally, the Board has stipulated that the United States made no funding commitment during negotiations. In a Joint Stipulation signed on June 22, 1983 (App. 136-137), the Board agreed as follows:

> At a relatively early stage in the negotiations leading to the Consent Decree, the parties discussed the question of financial support from the United States for the Board's desegregation activities. It was the Government's position that no funding commitment specific as to form and amount could be made in the context of the Consent Decree, because there was no way to anticipate the nature and costs of the Board's Plan, the amount and sources of Government funding, or a variety of other matters. * * * These discussions took place approximately two months before the completion and execution of the Consent Decree. It was concluded that the matter of federal financial support would be handled by including general provisions in the Consent Decree, and Section 15.1 was drafted and incorporated into the Decree. Section 15.1 was not designed to incorporate any specific discussions between the parties on this issue, but to establish a general obligation on the part of both parties which would be interpreted and applied as appropriate in whatever future circumstances might arise.

The district court acknowledged this stipulation (Br. App. 23-24 n.7) but concluded that the "future circumstances" alluded to there included the fact that, in its view, the government had violated an obligation not to take any steps which would make funds unavailable to the Board, and that having done so, the court was free to interpret the decree to impose a responsibility on the United States to provide the amount of money which the Board asserts that it needs. However, this language should be read to mean that the United States had declined to make any specific funding commitment precisely because it could not predict future circumstances nor would it divest itself of its authority to execute national educational policy for the sake of one school district's desegregation program. The stipulation must also be viewed in light of the negotiating history as a whole and should be used not to alter the meaning of the decree but to aid in its construction, Kavanaugh v. Ford Motor Co., supra.

D. The conduct of the parties subsequent to the negotiation of the consent decree confirms the plain language interpretation of paragraph 15.1 29/

If, indeed, the government had agreed to a totally open-ended financial commitment of the kind found by the district court, surely such a remarkable event would have been noted by at least one of the parties or the court at the time the decree was entered. But that did not happen. The parties presented

29/ The conduct of parties subsequent to the making of an agreement is a relevant guide to its construction. Kavanaugh v. Ford Motor Co., supra.

the proposed consent decree to the district court at a hearing on September 24, 1980. The only references to federal funding were two remarks by Assistant Attorney General Days. First, he observed that the Board had previously failed to comply with federal statutes but that the decree marked its new commitment to do so, and he indicated that "[t]hese issues that have a great deal to do with the question of federal funding for the Chicago School District, relate to questions of classroom segregation, bilingual programs, and faculty assignments" (App. 36). Second, he noted that the decree set timetables for the Board's submission of funding proposals to the Department of Education (App. 31). There was no indication in his remarks that the consent decree obligated the federal government to act favorably on such proposals.30/

Assistant Attorney General Days also referred to the United States' obligations under the decree -- first, to convene a group of high-level officials "to explore ways in which they can assist the Chicago School Board in making desegregation work" (App. 32), and second, to investigate whether the State of Illinois and/or the suburban school districts had played a role in maintaining the segregation in Chicago's schools (App. 32-35).

30/ The Joint Motion of the United States and the Board of Education For Entry of Consent Decree (at p. 9) also supports the view that restoration of eligibility for ESAA funding was the primary consideration leading to incorporation of ¶15.1.

No mention of ¶15.1 was made by Mr. Days, counsel for the Board or the court.

After entry of the consent decree, the Board took preliminary steps toward compliance. As contemplated by ¶15.1, on April 30, 1981, the United States joined with the Board in filing a joint motion for an order which would facilitate the Board's eligibility for ESAA funds. Contrary to the current position of the Board and the district court, both parties and the court stated their recognition that the Secretary of Education had full discretion to assess the merits of the application (App. 38-39).

The Desegregation Plan itself contains an extensive discussion of the financial aspects of the plan (pp. 266-274), but no statements which would support the Board's present construction, nor does the Board's memorandum in support of its Desegregation Plan (pp. 6-8) (May 26, 1981).

The first hint that either party or the court might construe ¶15.1 to impose on the United States the broad and open-ended obligation embodied in the June 30 order came from the Board's letters in the Spring of 1982 (App. 54, 84-103), over a year and a half after entry of the consent decree. One can only conclude that this construction is an afterthought, born of the financial difficulties common to so many school systems during a period of general cut-backs in government spending.

II

THE UNITED STATES HAS FULFILLED ITS OBLIGATION UNDER THE DECREE

A. <u>The United States Has Made a Good Faith Effort to Find and Provide Available Funds for the Chicago Desegregation Plan</u>

Paragraph 15.1 established an objective to find "financial resources adequate for the implementation of the plan." Such goals may not always be achievable despite good faith efforts. See <u>Nelson</u> v. <u>Collins</u>, 659 F.2d 420, 429 (4th Cir. 1981) (en banc). The United States' obligation under ¶15.1 was to identify available funds and to help pave the way for the Board to become eligible for certain of these funds; such steps have been taken. See, <u>e.g.</u>, Govt. Ex. 1, Doc. 1, 7.[31/] As we have demonstrated, ¶15.1 did not guarantee that the United States would provide a single dollar of federal aid to Chicago much less pay whatever costs of the Chicago desegregation plan the School Board now claims it is unable to bear.[32/]

31/ The district court misinterpreted the government's position to be that the change in legislative funding patterns relieved the government of its obligations under ¶15.1 (App. 139-140). The legislative changes did not alter the decree, but both before and after those changes, ¶15.1 required only "good faith efforts" to find "available" financial resources.

32/ It is unclear how the court arrived at $14.6 million as the United States' minimum obligation for the 1983-84 school year. Presumably, the court added $4.6 million, the expected cost of the special education assessments aspect of the plan to the Board's $10 million increased 1983-84 budget. (Br. App. 37 nn.4, 6; but see App. 110).

(cont'd)

Since the entry of the decree, the United States has made a "good faith effort" to find and provide funding for the plan. Chicago has received and is receiving millions of federal dollars which could be used to cover desegregation expenses, as we have indicated, supra, at 9-13.[33/]

32/ (cont'd)

The nature and scope of the Board's desegregation plan activities are so broad that they are virtually indistinguishable from all other educational activities conducted by the Board. Because the content of the Educational Components of the plan was considered unreviewable by the district court (554 F. Supp. 912, 926), the extent of activities, and thus the cost of this part of the plan, is open-ended.

It appears that the Board is attempting to supplement its budget by seeking to make the United States responsible for all increases in its 1983-84 budget (App. 77-79). For example, the record shows that for racially isolated schools, the Board underspent its 1981 budget by $3.6 million (App. at 65). In 1982, the Board budgeted $26.3 million for racially isolated schools -- $9.9 million in Board funds and $16.4 million in State Title I funds (App. 71). However, the Board spent only $17.1 million from State Title I funds (App. 110; Pet. Ex. 26 from June 22, 1983 hearing). In 1983-84, the Board plans to increase expenditures for racially isolated schools by $8.2 million (Compare Pet. Ex. 26 and Pet. Ex. 27 from June 22, 1983 hearing). The Board explains that spending for programs at racially identifiable schools "has fallen somewhat short" of projected levels during the first two years of implementation and must be "ma[de] up" during subsequent years (App. 77). This increase in expenditure for racially isolated schools is part of the $10 million in "additional incremental desegregation expenditures" (Br. App. 37 n.4) included in the $14.6 million for which the court has found the United States liable. Because of the indefinite nature of the plan the United States could thus become responsible indefinitely for costs which are attributable to the Board's choice to spend other funds on something else.

33/ Although the Board, as well as the United States, is obligated by ¶15.1 of the consent decree to use its best efforts to find and provide funds for the plan, it has chosen not to use the vast amount of federal assistance it has received for that purpose.

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B. Additional Federal Funds Are Not "Available" to Assist the Chicago Desegregation Plan

We demonstrate below that, to the extent that Chicago needs or desires more federal money, such funds are simply not presently "available" within the meaning of the decree. The district court erred in concluding otherwise. It would be inappropriate to provide exclusively to Chicago all or substantially all of the money appropriated by Congress for the purpose of providing nation-wide assistance under these programs.

1. Title IV

Congress reduced the appropriations for Title IV programs to $24 million in fiscal years 1982 and 1983. Given this reduction, the Secretary of Education exercised his statutorily conferred discretion in determining that the most effective way to provide assistance to as many local school districts as possible was to make grants to state education agencies and regional desegregation

33/ (cont'd)

The district court nevertheless determined that the Board had complied with ¶15.1 even though it had chosen not to use all of the funds "available." Whatever the merits of that finding, it is plain that the court has held the United States to a higher standard of performance. We will not address here the policy choices made by the Board in allocating resources among educational priorities. But surely the United States is entitled to enjoy similar discretion. Although ¶15.1 binds both parties equally, if anything, a higher standard should be required of the Board which ultimately bears the sole responsibility of operating the Chicago school system constitutionally.

assistance centers which would, in turn, be able to provide assistance to many local districts (June 16, 1983 Deposition of Monika Edwards Harrison at 37-38, 149; June 17, 1983 Deposition of Jack Simms at 15).

In order to permit the Board to receive any substantial award under Title IV this year, the current competition for State educational agency awards would have to be overturned, and the Department of Education would have to cancel its commitment to make continuation awards for desegregation assistance centers. Such action would contravene Congressional intent that state educational agencies and desegregation assistance centers receive Title IV awards this year. H.R. Rep. No. 97-894, 97th Cong. 2d Sess. 99 (1982); S. Rep. No. 97-680, 97th Cong. 2d. Sess. 107 (1982). Furthermore, as we have demonstrated, ¶15.1 of the consent decree does not constrain the Secretary of Education to exercise his discretion to insure that Chicago receive a direct Title IV grant every year.

There are at least two additional constraints on using Title IV funds to provide a grant to the Board. First, both the Title IV statute and regulations provide that grants to local educational agencies are to be made on a competitive basis. 42 U.S.C. 2000c-4(b); 34 C.F.R. 270.74(b). The Secretary is not free to ignore the needs for desegregation assistance of other local educational agencies that may apply. The statute and regulations do not permit the Secretary to set aside a specific sum under Title IV that would be available only to the Chicago Board.

In addition to the competition requirement and other statutory factors to be considered by the Secretary in evaluating grant applications, the Secretary may take into account "such other factors as he finds relevant." 42 U.S.C. 2000c-4(b). The Board argues[34/] that this provision allows the Secretary to consider the consent decree as a weighted factor in favor of Chicago. However, the Secretary has specified by regulation the "other factors * * * he finds relevant." 34 C.F.R. 74(b). But, in any event, this provision does not permit the Secretary to ignore the statutorily mandated competition requirement.[35/]

The district court erroneously viewed the Department of Education's regulations as mere "internal" constraints on the Secretary's power to disperse funds (App. 41-44). As this Court has recognized, however, "reasonable regulations promulgated pursuant to statutory authority have the force and effect of law * * * [and] an agency is bound by its own regulations." Pearce v. Director, Office of Wkrs. Compensation, 647 F.2d 716, 726 (7th Cir. 1981).

Second, the only activities that a grantee may carry out with Title IV funds are the provision to school personnel of inservice training in dealing with problems incident to desegregation and the hiring of specialists to advise on problems incident to desegregation. 42 U.S.C 2000c-4(a); 34 C.F.R. 270.72(a).

34/ Memorandum of Appellee Board of Education of the City of Chicago in Opposition to Motion of the United States for Stay Pending Appeal at 30-32.

35/ The Board's view of the competition requirement is that the Secretary should evaluate grant applicants in accord with a weighting system in which the consent decree is to be given "substantial, if not 100 percent weighting" in favor of Chicago (App. 150).

From the budget categories that the Board has projected for the 1983-84 school year, it is not clear that activities authorized under Title IV constitute any portion of the desegregation budget.

Historically, Title IV grants to local educational agencies have been quite small when compared to the magnitude of the additional funds which the Court has found to be required to implement fully the Board's plan. The Board's awards of $422,800 in fiscal year 1980 and $298,639 in fiscal year 1981 were the largest awards to local educational agencies for race desegregation assistance under Title IV in those years. There is no basis for believing that substantially more money could be made available for authorized activities this year. Moreover, training and advisory services have been provided to the Board under Title IV in each year since the consent decree was entered. Presumably, many of the Board's needs in these limited areas have already been met. To the extent they have not, services can be provided by the regional desegregation assistance centers (DAC's) and by the Illinois Office of Education's Title IV project.36/

2. ECIA - Chapter 2

Under Chapter 2, block grant funds are distributed to the states. The states in turn must redistribute at least 80% of the funds to localities according to student population as

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36/ Affording "available" Title IV financial assistance to the Board indirectly through DAC's and the Illinois state agency (see p. 11-12, *supra*) rather than directly, cannot possibly violate

(cont'd)

adjusted by the state's high cost criteria. Under Chapter 2, Chicago receives, with fewer strings attached, almost $3 million more than it received in 1980 under the antecedent programs (Br. App. 18). It is free to set the priorities for the use of those funds.[37/]

The Secretary of Education has no authority granted by statute or regulation to direct the states' allocation of Chapter 2 funds to local education agencies. However, in a letter of January 31, 1983 to each of the chief state school officers, the Secretary communicated his concerns about whether the states were distributing sufficient Chapter 2 funds to urban areas and taking adequate account of children involved in desegregation

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36/ (cont'd)

¶15.1 which did not guarantee any particular form of assistance. The district court also erred in faulting the government for failing to insure that the state and the DAC's provided assistance to Chicago (Br. App. 10). In fact, the record shows that such efforts were made (June 16, 1983 Deposition of Monika Edwards Harrison at 45, 154). In any event, surely it is incumbent on Chicago to take some affirmative steps to utilize these resources. Indeed, the Title IV regulations provide that assistance is available to the local education agencies "if assistance is requested." 34 C.F.R. 270.12(b), 270.32(b). See 42 U.S.C. 2000c-2. Paragraph 15.1 imposed a "good faith effort" obligation on both parties.

37/ The Board dismisses the millions it has received under Chapter 2 because "this is money everybody gets" (App. 149). To equate such "routine" acts with compliance, the Board asserts, would be "like saying that by letting us continue to breathe the air that God has provided, the United States has fulfilled its obligations under the decree" (ibid.).

programs and children from low-income families in those areas. The Secretary encouraged the chief state school officers to examine their criteria for adjusting Chapter 2 allocations and to evaluate the impact of their formulas on urban areas. (App. 181-183).

3. ECIA - Discretionary Fund

This fund is arguably misnamed since the Secretary's discretion to award grants under it is subject to several congressional constraints. The statute mandates the funding of three specific programs from the Discretionary Fund, (20 U.S.C. (Supp. V) 3851(b); see n. 16, supra), accounting for $10.725 million of the $28.8 million appropriated (Br. App. 42-43). An additional $11.692 million is earmarked to carry out Congressional directives.[38/]

The Secretary has exercised his authority to determine that the remaining funds will be used for other research, demonstration, improvement of training, dissemination, and technical

38/ In the Conference Report (H.R. Rep. No. 97-980, 97th Cong., 2d Sess. 180 (1982)) accompanying Public Law No. 97-377, Congress indicated that the Secretary should use $1 million for law-related education projects. To comply with directives in both House and Senate reports (H.R. Rep. No. 97-894, 97th Cong., 2d Sess. 98 (1982); (S. Rep. No. 97-680, 97th Cong., 2d Sess. 106-107 (1982)), accompanying the continuing appropriations for the Department (H.R. 7205), the Secretary is using $10 million from the appropriation for the Secretary's Discretionary Program to fund the National Diffusion Network, a program designed to identify, disseminate information about, and replicate programs which have been particularly successful in meeting the educational needs of educationally deprived children. (See 20 U.S.C. (Supp. V) 3851; see Affidavit of Lee E. Wickline attached to United States' Motion for a Stay Pending Appeal). The Senate committee report also directs the Secretary to conduct an evaluative study of the block grant programs which will cost $692,475 (App. 156).

assistance activities, which address some national education priority. A competition for such funds was announced on March 30, 1983. 48 Fed. Reg. 13220 (March 30, 1983).[39/] No more than $1 million will be available for unsolicited applications for programs within the statutory purposes.[40/]

The Department of Education has received an application from the Board and is now reviewing it. But any grant made to the Board would have to fund costs other than general operating costs incurred in implementing the desegregation plan. In view of the small amount of funds currently available, competing national priorities and the nature of the activities authorized, the Secretary would not be prepared to make awards that exceeded the dollar ranges of $75,000 to $175,000 specified in the March 30 application notice (App. 155).

39/ For example, $1.6 million will be used for grants to school districts to support technology demonstration projects (App. 156). Approximately $800,000 will be used to fund grants that explore options for expanding parental choice in education, improving teacher quality through incentives, or strengthening local school boards. Many of these projects will be designed to follow up on the report of the National Commission on Excellence in Education (App. 156-157).

40/ Section 583 does not authorize the Secretary to make a grant to a local educational agency for general operating support. Such support is authorized only by sections 561-582 of Chapter 2 (20 U.S.C. (Supp. V) 3811-3842) governing funds allocated by formula to local educational agencies or reserved for state use. In authorizing the Secretary to reserve funds for section 583, Congress did not mean to duplicate these authorities. It would have made no sense for Congress to have established an authority for very limited direct funding by the Secretary at the national

(cont'd)

4. Other SPP Programs

Theoretically, funds appropriated for other programs within the Special Programs and Populations account, not specifically earmarked by appropriations language, could be reprogrammed into Title IV or the Secretary's Discretionary Fund. Funds appropriated for Women's Educational Equity, Follow Through, Aid to the Virgin Islands, and Territorial Teacher Training fall into this category. However, reprogramming is not a viable means of providing assistance to the Board.

First, funds could not be reprogrammed into the Discretionary Fund because of the authorization ceiling established in the statute (6% of the amount appropriated for Chapter 2), 20 U.S.C (Supp. V) 3813(a), and the amount specified in the appropriation act itself (Pub. L. 97-377). Second, funds reprogrammed into Title IV would be subject to all of the statutory restrictions on the use of Title IV funds which we have discussed. The money could thus not be used by Chicago for the general operating expenses of its desegregation plan.

40/ (cont'd)

level ($28.764 million in fiscal 1983) if that authority were to be used for direct grants to meet the general operating needs of particular school districts, and Congress did not do so. That conclusion is supported by the nature of the activities specifically authorized by Section 583, including the mandated programs in section 583(b), the level of funds authorized, the overall structure of Chapter 2 of the ECIA, the consistent practice under section 583 and its antecedent authority, section 303(a) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. V) 2943; and the legislative history of section 583. S. Rep. No. 97-139, 97th Cong., 1st Sess. 897 (1981).

Finally, as a matter of comity, the Secretary of Education must notify and obtain the consent of the Chairmen of the House and Senate Appropriations Committees before any funds can be reprogrammed (App. 163). While it may be true, as the Board argues,[41/] that the strictures of comity do not circumscribe the strictly legal power of the Secretary to reprogram funds, neither may they be ignored. As we have demonstrated, paragraph 15.1 does not require the United States to make funds available that are otherwise intended to be spent for other purposes. Congress has already rejected the rescissions proposed by the administration for these programs for fiscal year 1983 (App. 163). Moreover, all of these programs are line-item activities, for which specific funding levels were identified in committee reports (App. 163). Presently, the Department is in the process of reviewing applications and preparing to make awards in these programs, many of which involve the continuation of ongoing activities (App. 163). The Department has not identified any "excess" funds in these programs that will not be used for the purposes for which they were appropriated (App. 163). These funds are thus not "available" within the meaning of the decree.

41/ Memorandum of Appellee Board of Education of the City of Chicago in Opposition to Motion of the United States for Stay Pending Appeal at 40-45.

II

THE DISTRICT COURT'S ORDER IS AN ABUSE OF DISCRETION

The district court's error in interpreting the decree is magnified by its order denying essential funding to grantees selected by Congress or the Executive and simultaneously seeking a reversal of Congressional and Executive discretionary decisions. Where a party has violated a consent decree, the court in remedying that violation may not impose obligations beyond what is necessary to obtain compliance with the original decree.[42/] Thus, even assuming that the United States violated ¶15.1 of the consent decree, that premise would not support an order substituting the court for the Executive Branch as the governmental body responsible for proposing and executing legislation. Yet the district court has declared that it will set the level of federal assistance to the Chicago school desegregation process each year for the next five years and that the Executive Branch will be required to seek congressional approval of those levels.

The district court determined the magnitude of the United States' liability not by determining what good faith efforts the government had failed to take but rather by eliciting testimony,

42/ For example in Brewster v. Dukakis, supra, the court of appeals concurred in the district court's finding that defendants had violated a "good faith efforts" promise, but reversed, as an abuse of discretion, the order imposing new obligations beyond what the decree already required -- "good faith efforts", 675 F.2d at 4-5. This proposition applies with particular force to a plaintiff who has voluntarily agreed to make "every good faith effort" to achieve a certain end.

over the government's objection, of what money Chicago allegedly needed to fully fund its desegregation plan (App. 108). The June 30 order is only the first installment as far as the Board is concerned (App. 152). In response, the district court is prepared to write a blank check from the United States Treasury (Br. App. 39).

The district court's actions are unprecedented and unwarranted. The courts lack the power to interfere with the Secretary's authority to administer educational programs and to make decisions which by law are committed to his discretion. Courts are not the "monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action." Laird v. Tatum, 408 U.S. 1, 15 (1972). The courts should defer to the policy choices made by executive officials in carrying out their statutory directives "[a]bsent constitutional constraints or extremely compelling circumstances," Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978).

The district court has ignored the legal limitations on federal funds "available" for the Chicago desegregation plan. But "[g]overnment agencies may only enter into obligations to pay money if they have been granted such authority by Congress."

National Ass'n of Regional Councils v. Costle, 564 F.2d 583, 586 (D.C. Cir. 1977). The Supreme Court has admonished that it is "'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" Schweiker v. Hansen, 450 U.S. 785, 788 (1981), quoting from Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). "[U]nless a court can rely on a statutory authorization, it simply lacks the power to order the obligation of public funds, regardless of how appropriate a remedy that order would be." National Ass'n of Regional Councils, supra, 564 F.2d at 590.

The district court's order goes so far as to hold hostage funds appropriated by Congress for very specific purposes - (Aid to the Virgin Islands, Women's Educational Equity, etc.) having no relationship to desegregation assistance. This action effectively extinguishes the rights and expectations of hundreds of grantees and beneficiaries under these programs, none of whom were a party to these proceedings. The court has enjoined the expenditure of funds under these programs until such time as the Executive Branch can assure the court that it will provide from some source or seek from Congress the $14.6 million the court has determined is now owed to Chicago. This action is an "unwarranted interference and intrusion upon the discretion vested" in the officials of the Executive Branch. Giancana v. Hoover, 322 F.2d 789, 790 (7th Cir. 1963). The courts lack the power to usurp the Executive's authority to choose whether or when to propose new legislation, or to seek reallocation, rescission, or reprogramming of appropriated funds from Congress. Article II, Section 3 invests in the Executive Branch the power to recommend legislation to Congress. See Smith v. United States, supra.

Paragraph 4 of the June 30 order requiring the creation of a $250 million escrow account is remarkable for its excess. It is simply inconceivable that the Board or the district court could ever establish that the United States is now liable to pay some $250 million to Chicago because it agreed to make a "good faith effort" to find and provide "available" funds in order to assist the desegregation process.

CONCLUSION

This court should reverse the orders of the district court.

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CERTIFICATE OF SERVICE

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