THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. WEST CARROLL PARISH SCHOOL BOARD, *et al.* Defendants.	)	Civil Action No. 14428 Judge James

UNITED STATES' REPLY IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION

I. Introduction

In its opposition to the United States' summary judgment motion, the District once again tries to distract this Court from the relevant facts and cases by focusing on extraneous arguments. First, it does not matter whether one refers to the 1969 Plan as "the District's Plan" or the "court-ordered Plan" or whether this Plan left Fiske and Goodwill all white because this Plan has not desegregated the District's one-race schools to the extent practicable. See Def.'s Opp'n to U.S. Summ. J. Mot. at 2 ("Def.'s Opp'n"). Second, the timing of the United States' proposed plans is irrelevant because the District's motion for unitary status raises the same issue: whether the District can meet its burden of proving that it has taken all practicable steps to eliminate vestiges. See id. at 3-4. Third, the District argues that it has complied with its orders, but even if this were true, the District still would have to replace its ineffective pre-Swann plan. See id. at 4-6. Fourth, the District's reliance on residential patterns and the San Francisco case do not refute the fact that its three de jure white schools are vestiges. See id. at 7-11, 14-15. Fifth, the District misinterprets Swann's discussion of racial balancing and mathematical ratios. See id. at 12-15.

II. The History of the 1969 Plan and the United States' Activity in this Case Are Irrelevant Because the District Has Yet to Fulfill Its Duty to Eradicate Vestiges

The District argues that it has no duty to desegregate Fiske and Goodwill because the pre-Swann Plan projected that their grade 1-8 student enrollments would be white.[1] Id. at 2. The District cites no cases to support this argument. Id. The binding cases make clear that a pre-Swann plan that leaves vestigial one-race schools must be replaced by a plan that uses the strategies outlined in Swann when such strategies could feasibly desegregate the schools. See U.S. Opp'n to Def.'s Summ. J. Mot. at 6-8 (citing cases) ("U.S. Opp'n"). This is true regardless of when further relief or unitary status is sought. Id. at 8-10 (citing cases). Indeed, the District's challenge to the timing of the United States' plans is curious for the District's own motion for unitary status requires this Court to answer the same question posed by the United States' plans.

The undisputed facts show that the 1969 Plan did not effectively desegregate the schools. By 1973, only three years into the Plan's implementation, Forest and Epps had become racially identifiable, and Fiske and Goodwill remained all white. U.S. Facts No. 8 (admitted by the District). In the Fifth Circuit, a district must maintain a unitary system for at least three years prior to dismissal. See Flax v. Potts, 915 F.2d 155, 158 (5th Cir. 1990). Today, three former de jure white schools remain virtually all white, and EHS and PES deviate from the district-wide average by approximately 30 percentage points. U.S. Facts No. 9 (admitted by the District). While it is true that a district with one-race schools can be unitary if the district took all reasonable steps to desegregate and geographic or other barriers preclude further desegregation,

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[1] The District asserts that the United States' 1969 plan left Epps High School racially imbalanced, Def.'s Opp'n at 2, but this plan projected that Epps would be a grade 1-8 school within 13% points of the district-wide average. U.S. Counter Facts No. 5; Def.'s Ex. B at 5.

Def.'s Opp'n at -3,[2] these circumstances are not present here because the superintendent admitted the feasibility of desegregating the District's one-race schools. U.S. Facts Nos. 25-26, 29-31 (admitted by the District); see also id. Nos. 27, 32 (admitted by the District); U.S. Opp'n at 5-6.

III. Even If the District Had Complied Fully with the 1969 Plan and All of Its Orders, It Nonetheless Would Have to Implement a New and Effective Desegregation Plan

This Court need not decide whether the District violated its orders because a school district must replace an ineffective pre-Swann plan when there are practicable ways to desegregate its racially identifiable schools even if the district has complied with its orders. See U.S. Opp'n at 7-8 (citing cases). In addition, the District's defense of its compliance with the 1969 Plan and its orders is weak. See Def.'s Opp'n at 4-6. The District disputes that it violated its transfer and residency verification obligations without offering evidence of its compliance. Id. at 4; Def.'s Resp. to U.S. Statement of Facts No. 48 ("Def.'s Counter Facts"). The District does not dispute that it added eight portables to two white schools or that EHS used race-based homecoming practices, but mistakenly contends that this conduct did not violate its orders. See Def.'s Opp'n at 4-5; Order of Aug. 4, 1970, ¶¶ IV, VI (Tab 40).[3] The District attempts to justify the portables, but this justification also lacks evidentiary support. Def.'s Counter Facts No. 49. The District also tries to blame the homecoming practices on two principals. Def.'s Opp'n at 5-6. This blame-game overlooks the District's duty to eradicate vestiges to the extent practicable.

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[2] The District cites Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) and Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1935 (5th Cir. 1983) as examples. The United States already has explained why these two large urban districts are distinguishable. See U.S. Opp'n at 15-16. The District also cites Horton v. Lawrence County Bd. of Educ. 578 F.2d 218 (5th Cir. 1978), but this citation does not exist.

[3] Tabs 1-39 are attached to the United States' summary judgment motion, Tabs 40-43 are attached to the United States' Opposition, and Tabs 44 and 45 are attached to this reply.

See Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249-50 (1991).

IV. Forest, Fiske, and Goodwill Are Vestiges of the Dual System

The United States need not prove that Fiske, Goodwill, and Forest are vestiges because the District bears "the burden" of proving that its "remaining one-race schools are not vestiges of past segregation." Davis, 721 F.2d at 1434 (citing Swann, 402 U.S. at 26). Nevertheless, the United States identified the undisputed facts and cases that establish the vestigial status of Fiske, Goodwill, and Forest. U.S. Facts Nos. 6-12; see U.S. Mem. Supp. Summ. J. at 5, 7-10 (citing cases). Though the District tries to deny or qualify certain facts without citing contrary evidence, Def.'s Counter Facts Nos. 10-12, these denials and qualifications do not preclude summary judgment because a dispute over a fact is only "genuine" if the non-moving party presented admissible, counter evidence that could justify a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Given the absence of conflicting evidence about these facts, compare U.S. Facts Nos. 6-12 with Def.'s Counter Facts Nos. 6-12, this Court need not hold a hearing to determine if Fiske, Goodwill, and Forest are vestiges. Contra Def.'s Opp'n at 17 (asserting that there is a factual dispute about vestiges without citing any evidence).

To meet its burden of proving that its one-race schools are not vestiges, the District would need to show that these schools were once desegregated and that subsequent changes outside of its control resegregated them. See, e.g., Freeman v. Pitts, 503 U.S. 467, 494-95 (1992); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976). The District cannot offer evidence that these schools were desegregated for at least three years. See U.S. Facts Nos. 6-12 (admitted by the District); Flax, 915 F.2d at 158. The District attempts to justify the enrollments at these three schools by discussing unsubstantiated residential patterns that preceded and followed the

1969 Plan. Def.'s Opp'n at 10-11, 14-15. As the United States has explained, districts that have failed to desegregate their schools cannot use residential patterns to excuse their failures. U.S. Opp'n at 12 (citing Davis, 721 F.2d at 1435; Lee v. Macon County Bd. of Educ., 616 F.2d 805, 810 (5th Cir. 1980); Tasby v. Estes, 572 F.2d 1010, 1013 (5th Cir. 1978)).

Ignoring the relevant cases regarding vestiges cited by the United States, see U.S. Mem. Supp. Summ. J. at 5, 7-10, the District tries to convince this Court that its three white schools fall outside of one district judge's two-part definition of a vestige. Opp'n at 7 (quoting San Francisco NAACP v. San Francisco Unified Sch. Dist., 413 F. Supp.2d 1051, 1066 (N.D. Cal. 2005)). The first part of the definition asks whether any school condition is likely to convey a message of racial inferiority. Id. The second part asks whether any such conditions stem from the past intentional segregation that gave rise to the original relief. Id. The district judge in San Francisco NAACP applied only the second part of the definition. Id. at 1067.

While the United States does not concede that this two-part definition is applicable here, the District cannot satisfy either part. The facts supporting the judge's finding that the existing segregation in the San Francisco schools was not traceable to past intentional segregation do not exist in West Carroll's case. See id. at 1068. First, "[d]e jure segregation [was] never . . . proven" in the San Francisco case. Id. at 1072. The absence of a proven dual system to which vestiges could be traced therefore complicated the vestiges inquiry. Second, the 1983 consent decree "successfully desegregated the schools" so that by 1997 only one school in San Francisco enrolled over 50% of any one race. Id. at 1068. Third, the racial identifiability of certain schools was attributable to the district's use of a "diversity index" required by a later consent decree. Id. Fourth, all parties had agreed that compliance with the later consent decree would eliminate

vestiges in San Francisco's schools, and no party introduced evidence to the contrary. Id. at 1066. Because West Carroll never desegregated its de jure white schools, these schools are traceable to the dual system and cannot be excused by factors following a period of successful desegregation. See U.S. Opp'n at 4-5, 12.

The first part of the vestiges definition cited in the San Francisco case also fails to help the District. See San Francisco NAACP, 413 F. Supp.2d at 1066. The District contends that the persistence of three white schools does not convey a message of racial inferiority because white and black students have been performing above average in Louisiana and their fifteen-district regional area within Louisiana. Def.'s Opp'n at 8-9. To support this contention, the District relies on Dr. Miller's conclusion that the District is using its fiscal and human resources in a manner that generates student achievement data that compares favorably to the nation, the State of Louisiana, and its region. Id. (quoting Ex. 45 at 3, 39 (Tab 17)).[4] His conclusion is irrelevant because he never considered whether the District's one-race schools convey a message of racial inferiority. See Ex. 45 (Tab 17). His conclusion is also speculative because he did not visit the District or interview its employees. Miller Dep. at 52:20-53:8 (Tab 44). More importantly, he lacks desegregation experience and "think[s] it is wholly inappropriate" for him to offer opinions about whether the District has desegregated its schools. Id. at 33:10-34:12, 49:13-21, 51:2-4.

If anything, the undisputed facts support a finding that the persistence of the three white schools in the District "is likely to convey the message of racial inferiority." San Francisco NAACP, 413 F. Supp.2d at 1066. Each of these schools was a de jure white school, and none

[4] Even if this were true, student performance does not excuse a district from its duty to desegregate its one-race schools when feasible, and the District cites no cases to the contrary.

has been desegregated. U.S. Facts Nos. 6-12. When Pioneer High School closed in 1991, its grade 9-12 students, roughly half of whom were black, were sent to EHS, which is 8 miles away, instead of Forest, which is only 6.5 miles away. See U.S. Facts No. 3 (admitted by District); Ex. 21 (Tab 32); Ex. 57 (Tab 4). Moreover, while enrollment at PES fell to a level that is financially burdensome and EHS's enrollment fell well below its capacity, the District spent money to add seven portables to Forest even though it is close to capacity according to the District's figures. Ex. 10 (Tab 3); Ex. 59 at 2 (Tab 9) (PES has 139 students and capacity for 220, EHS has 276 students and capacity for 460, and Forest has 495 students and capacity for 540); Dosher Dep. at 57:19-23 (Tab 5) (stating that it is a financial burden to keep a school open for 147 students)

V. Swann Does Require the District to Implement a New Plan Because the District Failed to Prove that Reducing the Number of One-Race Schools Is Impracticable

The District argues that Swann bars the use of mathematical ratios to determine whether a district has eliminated vestiges and therefore does not require the District to implement a new plan. Def.'s Opp'n at 12-13. These arguments misinterpret the case. The language in Swann quoted by the District states only that there is no "constitutional right [to] any particular degree of racial balance or mixing." 402 U.S. at 24. The Fifth Circuit case cited by the District simply affirmed this statement and reiterated the principle that each school need not "mirror the racial balance of the . . . district." Def.'s Opp'n at 13 (quoting Price v. Dennison Indep. Sch. Dist., 694 F.2d 334, 356 (5th Cir. 1982)). The Supreme Court subsequently held that "a critical beginning point [for evaluating a school district's desegregation efforts] is the degree of racial imbalance in the school district." Freeman, 503 U.S. at 474. The United States' plans respect these principles.

Swann also explicitly endorsed using mathematical ratios as "a starting point" to devise

plans. Swann, 402 U.S. at 25. Thus, Dr. Gordon's use of a +/- 15% variance to devise his plans in no way bars this Court from ordering the District to implement one of them. See Davis, 721 F.2d at 1439; United States v. Desoto Parish Sch. Bd., 574 F.2d 804, 819 (5th Cir. 1978). The United States' plans use the desegregation techniques outlined in Swann and comply with its directive to take all reasonable steps to eliminate one-race schools. See Swann, 402 U.S. at 26-29 (authorizing rezoning, transportation, and the pairing and grouping of schools within zones). The United States explained how each plan substantially reduces the number of students in one-race schools, U.S. Opp'n at 19-20, and the District has not proven the infeasibility of these plans.

The District's denials, qualifications, and partial admissions of certain facts do not establish impracticability or preclude summary judgment because they lack evidentiary support. See Def.'s Counter Facts Nos. 5, 10, 11, 12, 18, 19, 24, 28, 35, 42, 43, 45-49; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). For example, without citing any evidence, the District denies that 14.5 miles is a reasonable distance to be bussed and asserts that the school board "feels" that the United States' travel times "are not accurate." Def.'s Counter Facts Nos. 42, 43. The District also implies that its board members may not have admitted that the distance between KHS and OGHS is reasonable for students to travel if this distance included frequent bus stops. Id. No. 35. This unsupported speculation does not create a genuine factual dispute.[5] Given the District's failure to submit evidence proving the impracticability of desegregating its schools, this Court should enter summary judgment against the District. See Anderson, 477 U.S. at 248-49; Davis, 721 F.2d at 1438 ("The Board has submitted no adequate

[5] The speculation is also inapt because the distance could be a transfer route, which does not have bus stops. See Simms. Dep. at 69:14-70:1 (Tab 45). The regular bus routes could bring K-12 students from Zone 5 to KHS, and the 9-12 students could ride a transfer route to OGHS.

time-and-distance studies to show that the student transfers . . . are unduly burdensome.").

Summary judgment is also appropriate because the District admitted key facts proving the feasibility of desegregating the schools. See Def.'s Counter Facts Nos. 25-27, 29-32, 34-45. When the District supplemented these admissions, it either mischaracterized deposition testimony or failed to cite evidence. See id. Nos. 25-26, 28, 30-31, 35, 42-43, 45. For example, the District asserts that "Superintendent Dosher . . . has not considered moving attendance zone lines or school closures simply because he has not been given or seen a plan that he could implement." Id. No. 25. This is not what he said. When asked if he would prefer to move zone lines or to close schools, he responded, "I haven't considered that in itself [i.e., which approach is preferable]." Dosher Dep. at 29:11-15 (Tab 5). He never said that he could not implement the plans; he said only that he had not seen a plan about which he could say "yes, I really like that, that - - that - - people can get a grip on this, and I won't lose students, and I'll be able to better educate my student bodies." Id. at 29:15-19. As previously explained, the fear of losing students does not justify delaying desegregation, see U.S. Mem. Supp. Summ. J. at 14 (citing cases), and a plan need not improve test scores or educational services. See U.S. Opp'n at 21.

The District further misrepresented the superintendent's testimony by asserting that he "state[d] that the implementation of any Government plans would be a financial burden." Def.'s Counter Facts No. 30. Superintendent Dosher identified only one plan (Plan 3 for the northern portion of the District) as a financial burden because this plan leaves Fiske with 147 students. Dosher Dep. at 57:19-23 (Tab 5). The District, however, has been able to afford having only 139 students at PES, Ex. 59 at 2 (Tab 9), and cost concerns do not justify postponing desegregation. See Macon, 616 F.2d at 811. The District also incorrectly asserts that the superintendent said the

United States' plans "are not very realistic." Def.'s Counter Facts No. 31. The superintendent actually said, "None of [the United States'] plans are [sic] very idealistic." Dosher Dep. at 91:18-19 (Tab 5). This opinion is immaterial because a plan must be practicable, not idealistic.

The District's argument that geographic factors can preclude desegregating one-race schools is unavailing because the District offers no evidence of such factors in West Carroll Parish. Def.'s Opp'n at 14. Clearly, geography cannot justify keeping 495 students in Forest when only 6.5 miles of highway separate Forest from the black communities in Pioneer and Oak Grove. See Ex. 21 (Tab 32); Ex. 57 (Tab 4).[6] Nor can geography justify keeping grades 6-8 or 7-8 at the one-race school of Fiske when buses already transport the grade 9-12 students living in the Fiske Zone to OGHS. See U.S. Facts Nos. 4, 33 (admitted by the District); Dosher Dep. at 38:10-39:4 (Tab 5). In short, there are no geographic or other barriers to reducing the number of students in one-race schools, and the District has not produced any evidence to dispute this fact.

VI. Conclusion

For the above reasons, the United States' summary judgment motion should be granted.

Respectfully submitted,

DONALD W. WASHINGTON
United States Attorney
Western District of Louisiana

Katherine W. Vincent
Assistant United States Attorney

WAN J. KIM
Assistant Attorney General
Civil Rights Division

JEREMIAH GLASSMAN
EMILY H. MCCARTHY (D.C. Bar No. 463447)

[6] The District admits that Exhibit 57 (Tab 4) represents where students live according to the United States and asserts that it has not reviewed the map enough to be sure of its accuracy. Def.'s Counter Facts No. 5. By failing to produce evidence of any inaccuracies, the District has admitted the map's accuracy. It is hard to conceive how the District could challenge the map when the District produced all of the enrollment, race, and address data represented therein.

Attorneys for the Plaintiff
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., NW
Educational Opportunities Section
Patrick Henry Building, Suite 4300
Washington, D.C. 20530
Phone: (202) 514-4092
Fax: (202) 514-8337

This the 25th day of January 2007.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2007, I served a copy of the foregoing *United States' Reply in Support of its Motion for Summary Judgment* by Federal Express to counsel of record at this address:

Robert L. Hammonds, Esq.
Hammonds & Sills
Quad One, Suite C
1111 South Foster Drive
Baton Rouge, LA 70806

Emily H. McCarthy
Counsel for the United States

U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section

U.S. Mail: 950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Overnight: 601 D Street, N.W., Suite 4300
Washington, D.C. 20004
Telephone: (202) 514-4092
Facsimile: (202) 514-8337

JG:EM
DJ 169-33-46

January 25, 2007

By Federal Express
Clerk of the Court
United States District Court
for the Western District of Louisiana
201 Jackson Street, Suite 215
Monroe, Louisiana 71201

Re: United States v. West Carroll Parish School Board, C.A. No. 14428 (W.D. La.)

Dear Clerk of the Court:

Enclosed please find the original and two copies of the United States' Reply in Support of its Summary Judgment Motion in the above-captioned case. Please file stamp one of the enclosed copies and return it to us in the enclosed self-addressed envelope. The second copy is a courtesy copy for the Honorable Judge James. Please forward this courtesy copy to him. Please call me if you have any questions at (202) 305-3690. Thank you for your cooperation.

Sincerely,

Emily McCarthy
Special Litigation Counsel

Enclosures

cc: Robert L. Hammonds, Esq. (w/encl.)