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

DIANE COWAN ET AL., **PLAINTIFFS**

and

UNITED STATES OF AMERICA, **PLAINTIFF-INTERVENOR**

v. **CIVIL ACTION NO.: 2:65-CV-00031-GHD**

BOLIVAR COUNTY BOARD OF EDUCATION ET AL., **DEFENDANTS**

THE CLEVELAND SCHOOL DISTRICT'S MEMORANDUM IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION FOR FURTHER RELIEF

Holmes S. Adams (MS Bar No. 1126)
John S. Hooks (MS Bar No. 99175)
Lindsey N. Oswalt (MS Bar No. 103329)
1018 Highland Colony Parkway, Suite 800
Ridgeland, MS 39157
T: 601.353.3234
F. 601.355 9708
holmes.adams@arlaw.com
john.hooks@arlaw.com
lindsey.oswalt@arlaw.com

Gerald H. Jacks (MS Bar No. 3232)
Jamie F. Jacks (MS Bar No. 101881)
Jacks, Adams & Norquist, P.A.
150 N. Sharpe Avenue
P.O. Box 1209
Cleveland, MS 38732
T: 662.843.6171
F: 662.843.6176
gjacks@jacksadamsnorquist.com
jjacks@jacksadamsnorquist.com

INTRODUCTION

The Cleveland School District ("the District") has satisfied both this Court's orders and federal law requiring elimination of the vestiges of *de jure* segregation to the extent practicable with respect to student and faculty assignment. The Department of Justice ("the Government") cannot show a constitutional violation requiring desegregation measures beyond those currently in place. Achieving racial balance or a particular racial quota is not constitutionally required. Nor does the existence of one-race schools prove a constitutional violation. In view of the District's continuing gains in interracial exposure and equitable distribution of students and faculty, the Government's Motion for Further Relief is without basis.

FACTS

I. The Cleveland School District Today

The District is located in Bolivar County, Mississippi, where it is one of six school districts. (*See* Slaughter Report, Figures 1, 2, and 3; Ex. 1).[1] The District encompasses 109 square miles and serves the cities of Cleveland, Boyle, Renova, and Merigold. *Id*. Since 1980, the District's overall population has steadily declined, although the percentage white has decreased at a faster pace than the percentage black decrease. *Id*. at Figures 8 and 9. The total population in the District's geographical territory is approximately 51.6% black and 45.5% white. *Id*. The District is governed by an elected Board of Trustees composed of two black members and three white members. (*See* Affidavit of Superintendent Jaquelyn Thigpen; Ex. 2). Both the President of the Board and the Superintendent of schools are black. *Id*.

The District presently operates ten schools. There are two high schools, Eastside High and Cleveland High; two junior high schools, D.M. Smith Middle and Margaret Green Junior

[1] All references to exhibits refer to the exhibits attached to the District's Response in Opposition to this Motion.

High; and six elementary schools, Cypress Park, Nailor, Parks, Pearman, Bell, and Hayes Cooper. The District is comprised of five elementary attendance zones and two attendance zones for junior high and high school. (*See* Slaughter Report, Figures 1, 2 and 3; Ex. 1).

The District's overall student enrollment is 3,464. Of this total, 66.4% is black, 30.2% is white and 3.4% is other. Every school has a substantial black enrollment. Only one non-magnet school in the District has a majority white enrollment. This school, Parks Elementary, is 59% white, with a racial composition of 127 black students, 197 white students, and 13 other. If enrollment trends continue, Parks will become majority black within the next two years. (*See* Dr. Rossell's report at 18, Ex. 4). The school with the next highest percentage of white enrollment is Cleveland High, now perfectly desegregated at 50% white and 50% minority ("minority" includes blacks and other nonwhite races). Like Parks Elementary, Cleveland High is projected to become predominantly minority within one to two years. *Id*. at 19. Margaret Green Junior High is also nearly perfectly desegregated at 52% minority and 48% white. Pearman Elementary is 35% white and 65% minority. Hayes Cooper and Bell Academy, the District's two dedicated magnet schools, have student populations of 56% white and 44% black and 19% white and 81% black respectively. Four schools—Eastside High, D.M. Smith Middle, Cypress Parks Elementary, and Nailor Elementary—are virtually all black.

Students in the District must attend school in their zone of residence with two exceptions. First, any student whose race is in the majority at his or her assigned school may transfer to a school where his or her race is in the minority (an "M-to-M transfer"). Second, the District operates two dedicated magnet schools—Hayes Cooper and Bell—and three magnet programs within a school—Eastside High, D.M. Smith Middle and Nailor. Any student may participate in these magnet programs, as discussed more fully below.

For the 2010-2011 school year, the student enrollment by race at each school was as follows:

School	*Black*	*White*	*Other*	*Percentage*	*Total*
Cleveland High	234	261	23	45/50/5 %	518
Eastside High	327	2	1	99/.6/.4	330
Margaret Green J.H.	224	236	30	46/48/6	490
D.M. Smith Middle	280	0	0	100/0/0	280
Hayes Cooper Ctr.	148	204	12	41/56/3	364
Bell Elementary	222	54	3	80/19/1	279
Cypress Parks Elem.	304	0	1	99.6/0/.4	305
Nailor Elementary	300	6	4	97/2/1	310
Parks Elementary	127	197	13	38/58/4	337
Pearman Elementary	135	87	29	54/35/12	251
Total	2301	1047	116	66/30/4	3464

II. Background and History

A. The 1969 Order

The base desegregation order in this case was entered on July 24, 1969. The order enjoined the District from discriminating on the basis of race or color in the operation of its

school system. The order established a single set of neighborhood school zones, described in detail in the order, and summarized below:

Zone I:	Cleveland High (grades 7-12) – all of the District's territory west of the Illinois Central Railroad located in the District.
Zone II:	Eastside High (grades 7-12) – all of the District's territory east of the Illinois Central Railroad located in the District.
Zone III:	Hayes Cooper Elementary School (grades 1-6) – all of the northern third of the District (east and west of the Illinois Central Railroad.
Zone IV:	Nailor Elementary School (grades 1-6) – east of Illinois Central Railroad.
Zone V:	Bell Elementary School (grades 1-6) – east of the Illinois Central Railroad.
Zone VI:	Parks Elementary School (grades 1-6) – west of the Illinois Central Railroad.
Zone VII:	Pearman Elementary School (grades 1-6) – west of the Illinois Central Railroad.

A map of the student attendance zones is included at pages 3-4 of Exhibit 1.

The order was to be implemented in full at the beginning of the 1970-71 school year. Students grades 1-12 would be assigned to attend school in the zone where they reside. Requests for transfer to attend a school in another zone were permitted in special circumstances, especially when transfers would promote desegregation. The District was ordered to adopt an M-to-M transfer program, although transfers could be denied if the transfer requested was to an overcrowded school.

The attendance zones created by the 1969 order were projected to immediately integrate each school. Former City Administrator Jerome Norwood testifies that in 1969 there was at least a 17% white population in the city of Cleveland on the east side of the Illinois Central Railroad and an additional 365 white persons living to the east of the railroad tracks in areas within the district, but outside the city limits. (*See* Norwood Report; Ex. 3). He also notes that in 1975,

according to special census data, there was a 26% white population in the city living east of the railroad. *Id*. Thus, a significant number of white students were assigned to school zones attending Eastside High, Nailor Elementary, and Bell Elementary. *Id*.

The 1969 order also instructed the District to assign classroom teachers at not less than one of every six classroom teachers of a different race in each school "within the full extent of the district's ability to [] do, including the availability of qualified personnel." The only additional directive was that "there shall be full faculty and staff desegregation, to such an extent that the faculty at each school is not identifiable to the race of the majority of the students in any such school."

Also, if "consistent with the proper operation of the school system as a whole," the District was permitted to locate new schools and expand existing schools with the objective of eradicating the vestiges of the dual school system.

B. The 1989, 1992 and 1995 consent decrees

In 1989, the parties agreed to certain additions to the 1969 order with regard to student, faculty, and staff assignment. The decree elaborated on the existing M-to-M program by requiring annual notices and newspaper advertisements explaining the program, the application process, and the transportation policy. Further, the elementary school zones were changed to accommodate the introduction of a magnet school.

The 1989 consent decree also called for the District to develop a plan to desegregate Eastwood Junior High School (now D.M. Smith Middle School). The District applied for and received magnet funds for the school, and opened a magnet there in an attempt to promote greater desegregation. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). The consent decree further stated that the District would implement a magnet school at Hayes Cooper Elementary or one of

the other predominantly black elementary schools. The goal of the Hayes Cooper magnet school was to attract a 50% black and 50% white population, with an allowable deviation of ± 5%. Hayes Cooper accomplished that goal three years after the consent decree, and has maintained it, or remained very close since. *Id*.

With respect to faculty and staff assignment, the faculty and staff of each school were to reflect "to the extent feasible" the district-wide ratio of minority and nonminority faculty and professional staff. The District was also to develop a plan to recruit qualified black professionals and encourage voluntary transfers within the District. If these measures were insufficient to achieve the required desegregation, reassignments would be made at the beginning of the next school year.

Another consent decree was entered in 1992, when the District sought approval to implement a magnet school at the junior high level. The Government agreed, and the District created an Arts and International Baccalaureate program at D.M. Smith Middle School. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2).

Similarly, in 1995, the parties agreed to add another magnet program at Eastside High School dedicated to the Arts and the International Baccalaureate curriculum. *Id*.

Neither the order nor consent decrees entered by this Court required the District to implement a mandatory student reassignment plan. Nor did the order or decrees require racial balance within the schools.

C. 2010 Reorganization Plan

In a continued effort to enhance integration, the District elected to implement a magnet program at Bell Elementary in 2010. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). Based on the success of the Hayes Cooper magnet, the District elected to make Bell a "dedicated" magnet. *Id*.

This was accomplished by closing the school and reopening it as a magnet school. *Id*. Students already attending Bell were given the choice to remain there as a part of the magnet program or to be reassigned to any of the District's other elementary schools, save Hayes Cooper. *Id*. The racial makeup goal at Bell was 70/30 % black/white within three years. *Id*. As of 2011, Bell achieved that goal. *Id*. Now, 117 white children attend Bell, making its overall white population 33%. *Id*.

Also in 2010, the Board of Trustees briefly considered a plan to combine D.M. Smith Middle School and Eastside High to conserve resources. *Id*. However, after hearing the concerns of the middle school students' parents, the Board elected not to implement this plan. *Id*. Instead, the Board of Trustees conserved funding by allowing one principal to oversee Margaret Green Junior High and Cleveland High. *Id*. D.M. Smith and Eastside continue to have their own principals and there has been no combination of any high school and junior high students at either school. *Id*.

ARGUMENT

The District acknowledges and accepts its affirmative duty to desegregate its schools. *Green v. County School Board of New Kent County, Va.*, 391 U.S. 430, 437-38 (1968). The Government's Memorandum in this case has mischaracterized the facts surrounding the District's four decades of integrative efforts and offers incomplete analyses of the relevant legal standards measuring the District's constitutional compliance. The District has eliminated, to the extent practicable, all vestiges of the former dual system as to student assignment.

Not every desegregation tool tried by the District has succeeded. But the constitution does not require success for every desegregation mechanism attempted. Rather, the task of desegregation is "guided by equitable principles," permitting practical flexibility in shaping

constitutional remedies and "adjusting and reconciling public and private needs." *Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1, 12 (1971).

The relief the Government seeks is improper for three reasons. First, the Government's apparent standard for measuring constitutional compliance defies the longstanding mandate against racial balancing. More sophisticated measures actually considering students' interracial exposure and the distribution of students of each race throughout the District show the success of its desegregation efforts. Second, the District's magnet programs and robust majority-to-minority transfer initiative prove its good faith in attempting to achieve desegregation. The fact that some of these initiatives have experienced more success than others is not constitutionally significant. Finally, the District must not be held responsible for demographic changes unrelated to former state-imposed segregation. Without considering the intervening forty years, the Government argues the District is not desegregated because it continues to have racial imbalances at some schools similar to those at the time of the 1969 order. Any present imbalances in this case, however, stem solely from private choices, not from any remnants of *de jure* segregation.

I. The Government's proposed measure of desegregation is not constitutionally sound.

A. "Racial balancing" is a constitutionally infirm method for measuring a school district's desegregation efforts.

The threshold inquiry is a legal one. This Court must first determine the proper standard to assess the District's constitutional compliance. In its Memorandum, the Government virtually ignores this necessary component of the Court's analysis. Nowhere does the Government suggest the standard this Court should use to determine whether the District has committed a constitutional violation. At one point, however, the Government touches briefly on the matter in a footnote, suggesting that a district's "racial identifiability" is determined by its achievement of

a ± 15 - ± 20% ratio of each race compared to the overall racial makeup of the district. If this standard were used to judge the constitutionality of the District's integrative efforts, it is precisely the type of racial quota case law prohibits. Importantly, neither the prior orders of this Court, nor the consent decrees adopted by the parties expressly designate that a certain racial quota or elimination of all one-race schools must be achieved in order for the District to be constitutionally compliant.

Similarly, demonstrating particular schools are racially "imbalanced" does not, in itself, evidence a constitutional violation. *Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd*., 403 F.3d 246, 260 (5th Cir. 2005). Indeed, "desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.'" *Milliken v. Bradley*, 418 U.S. 717, 740-741 (U.S. 1974). Although the Government does not expressly state that its measure of constitutionality is racial balance, its focus on racial imbalances in the District is telling. While the Government has not submitted a "plan" for further desegregation, the Government's Memorandum betrays that achieving a racial quota in every school in the District is its ultimate goal.

In *Swann*, the U.S. Supreme Court directly addressed the issue of racial quotas or balancing as a requirement of desegregation. 402 U.S. at 23-25. While the Court acknowledged the utility of mathematical formulae as a starting point for a district utilizing integrative tools, it also decried any inflexibility that might result from the use of a fixed ratio. *Id*. at 25. No "per se" rule, the Court noted, "can adequately embrace all the difficulties of reconciling the competing interests involved" in a desegregation case. *Id*. at 26. The Supreme Court rejected any requirement of a "particular degree of racial balance" *Id*. at 24.

Further, racial balancing is a remedy far more extensive than the Fourteenth Amendment requires. *Id*. at 22-23. The case law is clear that "[r]acial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). Instead, it is only to be pursued when it is caused by a constitutional violation—when the racial imbalance is the result of past state-imposed segregation. *Id*. A fixed racial quota or requirement of strict racial balance—particularly when arrived at arbitrarily and without factual basis—virtually ensures that the Court will exceed its constitutional authority.

Equally important in this case is that the orders governing the District's desegregation obligations do not set forth any particular racial quota or balance that must be reached to demonstrate compliance. The Supreme Court has stated that a school district is "entitled to a rather precise statement of its obligations under a consent decree." *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995) (citing *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 246 (1991)). Here, the District's obligations are detailed in the this Court's 1969 desegregation order and consent decrees issued in 1989, 1992 and 1995. None of these orders require racial balance. The Government cannot unilaterally amend the District's desegregation obligations by importing its own interpretations of federal desegregation law or adding new requirements.

Moreover, this Court should be concerned with the practical implications of racial balancing. Justice Rehnquist once expressed his distress over a district court's determination that its task in desegregating a school district was to make "optimum use" of the students in the minority in a district. *Bd. of Educ. of City of Los Angeles v. Sup. Ct. of Cal*., 448 U.S. 1343 (1980). Rehnquist argued that students are not to be treated as "textbooks, visual aids, and the like." *Id*. Nor should courts "treat school children . . . as pigmented pawns to be shuffled about and counted solely to achieve an abstraction called 'racial mix.'" *Bradley v. Milliken*, 402 F.

Supp. 1096 (E.D. Mich. 1975). The Government's argument that racial imbalances demonstrate a constitutional violation is inconsistent with the case law governing desegregation issues.

Similarly, any assertion that racial balance is a necessary component of constitutional compliance is logically inconsistent with the proviso that a school district's desegregation obligations require the district only to "eliminate[] the vestiges of prior *de jure* segregation *to the extent practicable*." *Anderson*, 517 F.3d at 297 (citing *Hull*, 1 F.3d at 1454) (emphasis added). In the case of communities like Cleveland that have racial imbalances and an unstable racial composition, the practical ability to achieve certain racial goals within its schools is limited. Rote "balancing" simply does not consider the practicality of any particular desegregation plan.

In sum, the District's desegregation obligations have practical and legal limits. The District has no duty to undertake "heroic measures" to comply with these obligations. *Freeman*, 503 U.S. at 493. Nor does it have any constitutional duty to achieve maximum desegregation. *Hull v. Quitman Cty. Bd. of Educ*., 1 F.3d 1450, 1455 (5th Cir. 1993). "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id*.; *see also Hull*, 1 F.3d at 1455.

B. More scientific standards considering actual racial exposure and distribution of students of each race throughout the school system, demonstrate the District's successful efforts to eliminate the vestiges of its former dual system.

i. Desegregation, as measured by actual interracial exposure and racial distribution, continues to improve in the District.

Dr. Christine Rossell is one of the nation's leading experts on school desegregation. (*See* Dr. Rossell's Report; Ex. 4). Dr. Rossell has prepared a report provided as Exhibit 4. Rather than simply looking at crude racial percentages to evaluate the effectiveness of a desegregation plan, Dr. Rossell uses more comprehensive scientific tools to actually measure integration. *Id*. at

11-13. The index of interracial exposure measures the degree to which the average black student is exposed to white students. *Id*. at 12-13. The index of dissimilarity measures actual distribution of white and black students throughout the school system. *Id*. at 11-12. Desegregation experts commonly utilize these tools and other courts have considered them relevant to the desegregation analysis. *Belk v. Charlotte-Mecklenburg Bd. of Educ*., 269 F.3d 305, 320-21 (4th Cir. 2001); *Coalition to Save Our Children v. State Bd. of Educ*., 90 F.3d 752, 762-63 (3d Cir. 1996).

With respect to interracial exposure, the District far outpaces all other Delta school districts in the percentage of white students in the average black child's school. (*See* Dr. Rossell's Report at Figure 9; Ex. 4). In fact, the District has more than four times the interracial exposure of the second-best school in the region. *Id*. On an even larger scale, the District currently has an overall racial balance greater than five southern school districts already declared unitary, including Mobile, Alabama; DeKalb County; Georgia, Fulton County, Georgia; Kansas City, Missouri; and Dallas, Texas. *Id*. at Figure 14.

Moreover, Cleveland is one of the few school districts in the country with *increasing* interracial exposure, despite the fact that its overall percentage of white students has steadily declined. *Id*. at 13-14. "It cannot be emphasized enough how unique it is to have a school district with increasing interracial exposure, particularly in Mississippi, but also in the rest of the U.S." *Id*. at 14. Without disruptive intervention and if the current trends continue, Dr. Rossell calculates that the difference between the percentage white in the school system as a whole and the percentage white in the average black child's school (currently only about nine percentage points) will soon disappear entirely. *Id*. at 13.

Likewise, Dr. Rossell has concluded that with regard to the index of dissimilarity, "the races are becoming more evenly distributed across the Cleveland schools." *Id*. at 12. According to Dr. Rossell, the District's Fall 2010 reorganization plan further reduced racial imbalance within the school district. *Id*. at 12.

ii. The District's commitment to the magnet school program has resulted in constitutionally significant changes in the racial makeup of the Cleveland schools.

The magnet programs implemented by the District have had two positive effects on the students and the community: (1) these programs have resulted in significant integration at two formerly all black elementary schools, and (2) they have created excellent academic environments at all schools where implemented. In particular, Hayes Cooper Center and Bell Academy are magnet school success stories, creating integrated populations at formerly 100% black schools. While not achieving the integration success stories of Hayes Cooper and Bell, the magnet programs at Nailor, D.M. Smith and Eastside High School provide outstanding educational opportunities for the children attending those schools.

a. Hayes Cooper

Under the 1989 consent decree, the District began its first magnet school at Hayes Cooper Elementary School. Its ultimate population goal was 50/50 black/white with an allowable ± 5% deviation. The theme chosen for the school was Math, Science and Technology. The United States Department of Education has consistently supported the program at Hayes Cooper, providing magnet funds for three cycles: 1991-1993, 1993-1995 and 2004-2007. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). In 2007, Hayes Cooper became an authorized International Baccalaureate ("IB") Primary Years Program, which encourages learning across disciplines, individual and collaborative research, community service, and study across a broad range of subjects drawing content from educational cultures around the world. *Id*.

Since opening in 1991, Hayes Cooper magnet school has been a success. The school first reached its benchmark racial population in 1992 and has consistently enrolled an integrated student population over the last two decades. *Id*. Hayes Cooper has also been an academic leader in the District and the State of Mississippi. *Id*. Among other achievements, the school has scored in the highest percentile on state tests in the last several years and was named a Department of Education "Blue Ribbon School." *Id*. While Hayes Cooper did not receive magnet funds for the 2007-2010 cycle, the District continues to operate Hayes Cooper as a magnet program. *Id*.

b. D.M. Smith Middle School, Eastside High and Nailor Elementary

In 1992 and 1995, two consent decrees were entered whereby the Government and the District agreed that magnet programs should be established at both Eastwood Junior High (D.M. Smith Middle School) and Eastside High School. Despite a white population in these schools' attendance zones in 1980, by 1989, neither had attracted any significant white enrollment. (*See* Slaughter Report at Figure 10; Ex. 1).

In 2004, the District obtained funding from the U. S. Department of Education for Performing and Visual Arts magnet programs and International Baccalaureate curriculums to be instituted at both Eastside and D.M. Smith. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). Eastside and D.M. Smith received, along with Hayes Cooper, a combined total of $5,129,457 from the U.S. Department of Education for the 2004-2007 magnet cycle. *Id*. The District immediately began training teachers and implementing the new curriculum at those schools. *Id*. It also launched a campaign to advertise the magnet programs. *Id*. Despite these efforts, the Eastside and D.M. Smith magnets did not attract the projected white student population, but did provide the students attending these schools valuable academic training and programs.

In recent years, the District has been successful in continuing magnet grant funding for D.M. Smith and Eastside for a second cycle—2007-10—and has added Nailor Elementary to its magnet proposal as well. *Id*. For this second cycle, D.M. Smith, Eastside and Nailor received a combined total of $6,050,734.00 in magnet funds which were to be used to continue implementing the Performing and Visual Arts curriculum and IB curriculum. *Id*. Nailor, Eastside, and D.M. Smith all received IB authorization. *Id*.

c. Bell Academy

In an effort to increase integration at Bell Elementary, the Board of Trustees authorized a magnet program there. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). Since 1969, Bell's population has remained nearly 100% black. *Id*. In 2010, Bell Academy for Math, Science, Health and Wellness opened, resulting in a student enrollment that was 80% black and 20% for the 2010-2011 school year. *Id*. For the 2011-2012 school year, the Bell student population is even more diverse at 65% black and 33% white. *Id.*

Bell has received U.S. Department of Education magnet funding for the cycle 2010-2013 in the amount of $2,909,496.00. *Id*. This funding will be used to implement the math, science, health and wellness curriculum at the school. *Id*. In order to begin the Bell magnet, the District allowed children assigned to Bell to choose (1) the Bell magnet program; (2) an M-to-M transfer to Parks (the District's only majority white school) or (3) be placed at Pearman, Nailor or Cypress Parks. *Id*. None of these assignments resulted in the resegregation of an already integrated school. *Id*. In fact, assignments at Parks and Pearman only increased integration at those schools. *Id*. Moreover, by making these changes, the District created another wholly integrated elementary school—Bell Academy. *Id*.

d. 2010 Reorganization

At the same time, the District reorganized Nailor and Cypress Parks so that K-2 students would attend Nailor and 3-5 students would attend Cypress Parks. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). The Superintendent, Dr. Jaquelyn Thigpen, made these changes for educational reasons. *Id*. The 1989 Order required the District to work to improve the instructional programs at these schools two schools specifically. The District has done just that by adjusting the academic approaches at these two schools to enhance student and teacher performance.

iii. The majority to minority transfer program in the District evidences its commitment to continuing desegregation.

In addition to the commitment to and successful execution of its five magnet programs, the District has also found that by consistently encouraging and implementing an M-to-M transfer program, it has further integrated the District. Dr. Rossell, in her report, confirms the success of the District's M-to-M program. (*See* Dr. Rossell's Report at 4-5; Ex. 4).

The majority to minority policy was first authorized in the 1969 order and was reiterated in the 1989 consent decree. Since its first year, the M-to-M transfer policy has worked to increase integration and continues to work. In 1971, only a small number—26 students—utilized the M-to-M transfer program. By 1975, however, that number had risen 162 students, a six-fold increase. Likewise, in 1980, M-to-M transfers increased again when 192 students transferred under the policy.

These M-to-M transfers continued throughout the 1990s with no drop in participation. In fact, in 1995, the District saw 417 M-to-M transfers within the District. M-to-M transfers have been so successful that by the year 2000, the program had contributed to the full integration of the formerly all white Pearman Elementary, Parks Elementary, Cleveland High School, and Margaret Green Junior High.

Participation in the transfer program remains strong. During the 2010-2011 school year, 229 students utilized an M-to-M transfer. In fact, Pearman, a formerly all white school, is now majority black. Margaret Green Junior High and Cleveland High (formerly all white) are also nearly 50/50 black/white in population. Parks Elementary is now 38% black and 58% white.

While certain demographic shifts have led to increased black populations in the historically majority white zones, it is undeniable that the M-to-M transfer policy employed by the District has been successful.

II. The Government's "balancing" approach undercuts the District's efforts to maintain a stable enrollment for students of all races.

As a part of this Court's equitable role, it must consider the practical implications of the relief implicitly requested by the Government. While private decisions may not enter the Court's analysis, the Fifth Circuit has permitted the stability of desegregated enrollment to play a role in a district court's ruling. Specifically, in *Stout v. Jefferson County Board of Education*, the court considered the government's opposition to a desegregation order that allowed the continuation of two all black schools in a school district that was 80% white and 20% black. 537 F.2d 800, 801 (5th Cir. 1976). The government proposed pairing these schools with two other schools that were 60% white and 40% black. The district court, however, ultimately rejected this plan. *Id*.

The court expressed serious concerns that prior efforts to desegregate these schools were met with a boycott of white students projected to attend them. *Id*. at 802. Because the two schools with which the one-race schools were to be paired were both desegregated and functioning effectively, the court concluded that the pairing would result in a loss of desegregated education for both white and black students at those schools, without actually providing desegregated education at the one-race schools. *Id.*

Naturally, the government attacked the district court's conclusions as impermissibly considering "white flight" as a reason not to uproot its dual school system. *Id*. The court however, concluded that notwithstanding the existence of the one-race schools, the dual system had actually been uprooted. *Id*. Where the vestiges of former segregation had been eradicated, the court concluded that the destabilization of desegregated and properly functioning schools was simply unacceptable. *Id.*

Similarly, in *Flax v. Potts*, the Fifth Circuit discussed the practical considerations governing a district court's analysis of specific desegregation efforts. 864 F.2d 1157, 1160 (1989). Among the factors the Fifth Circuit weighed when assessing the district court's desegregation plan in *Flax* was the extent to which the plan "stabiliz[ed] the overall racial composition of the district." *Id*. The district had sought to cease busing of students that was a part of its original desegregation plan. *Id*. at 1158. The district court concluded that fewer students would leave the district if busing were terminated, causing the racial composition of the district as a whole to stabilize and create more residential integration. *Id*. at 1161. The court reached this conclusion even though terminating busing in this district would temporarily lead to limited resegregation. *Id*. The Fifth Circuit adopted wholesale the district court's finding, noting that "the long term effect [of a desegregation policy] is a relevant consideration." *Id*. at 1162 (citing *Pitts v. Freeman*, 755 F.2d 1423, 1427 (11th Cir. 1985)).

The Court in *Flax*—as it did in *Stout*—concluded that it could consider white flight if the purpose is to promote integration rather than prevent it. *Id*. at 1162 n.11. A school district "has a legitimate interest in retaining a sufficient number of white students to provide an integrated educational experience for the students." *Id*. This Court can and should consider the ways the District's functioning and successful schools may change if racial balancing is attempted.

The Government's attempt to preemptively argue against the consideration of white flight is misplaced. A school district may not cite fear of white flight as a reason for refusing to eliminate the vestiges of its former dual school system. *United States v. Scotland Neck City Sch. Bd*., 407 U.S. 484, 491 (1972). However, white flight may be considered when a court is "choosing among constitutionally permissible plans." *United States v. Pittman*, 808 F.2d 385, 391 (5th Cir. 1987). Here, the District's primary argument is that its current plan is constitutional, and that the Cleveland schools are desegregated. Still, the Government has asked this Court to require implementation of a new plan. But any plan seeking racial balance in the schools will cause the racial destabilization discussed in *Flax* and *Stout*. As between the District's current plan and a mandatory reassignment plan, this Court may consider which plan will best preserve the racial stability of the District.

As discussed in Dr. Rossell's report, the District's white population is already decreasing on a yearly basis. (*See* Dr. Rossell's Report at 10-11; Ex. 4). Yet under the District's current plan, both of Dr. Rossell's indicators of desegregation—the index of dissimilarity and interracial exposure—have steadily improved since 1967. *Id*. at 12-14. In other words, schools within the system have persisted in becoming more racially balanced and in providing maximum interracial exposure for each student. *Id*.

However, among school districts that have implemented mandatory desegregation plans, that plan has precipitated declines in both racial balance and interracial exposure. *Id*. at Figures 18, 19, 20, 21, and 22. Indeed, the school districts described in the Dr. Rossell's report forfeited their entire white populations—and thus their desegregated schools—within a decade of implementing the mandatory plans. *Id*. at 14-18. Districts utilizing voluntary neighborhood schools, on the other hand, have maintained stable enrollments of both races, and continue to

boast desegregated schools. *Id*. When choosing between a mandatory reassignment plan—a proven failure—and the District's current desegregation practices, this Court may consider that greater stability and more desegregation will result from the District's plan.

On the whole, the Government's proposals in this case evince a limited understanding of the Cleveland community and of the operation of its school system. This is precisely the reason the Supreme Court has placed significant emphasis on the need to return school districts under desegregation orders to local control. *See Milliken*, 418 U.S. at 741-42. "No one's interest is furthered by subjecting the Nation's educational system to 'judicial tutelage for the indefinite future.'" *Freeman*, 503 U.S. at 505 (Scalia, J., concurring) (quoting *Dowell*, 498 U.S. at 249). The District—which is led by an African-American president and superintendent—has made the best practicable desegregation efforts possible to comply with both this Court's orders and with the Constitution. Dr. Rossell's report demonstrates what the District's board has long understood—the cause of desegregation is best served by the District's current configuration, which both ensures maximum interracial exposure and preserves the racial stability of the schools.

III. The District has eradicated the vestiges of *de jure* segregation, and may not be held responsible for de facto segregation resulting from demographic changes within the District.

A school district under a court-imposed desegregation order must eliminate the vestiges of former *de jure* segregation. It need not cure segregation resulting from other unrelated factors. The Fifth Circuit has drawn a distinction between these two types of segregation. The Court has refused to hold school districts responsible for racial imbalances resulting from demographic changes within the community.

In *Horton v. Lawrence County Board of Education*, parents complained that a school district operated three all-white schools and several majority black schools on a discriminatory basis. 578 F.2d 147 (5th Cir. 1978). The district was approximately 77% white and 23% black. *Id*. at 148. The Court in *Horton* expressed concern that the three current white schools were also historically white. *Id*. at 149. After analyzing the configuration of the three white schools, however, the Court concluded that their existence was predicated on existing residential patterns, and not on racial considerations. *Id.* at 150-151. Simply, the Court concluded that "blacks have never lived" in the area served by that school. *Id*. at 150. Ultimately, the Court refused to require reconfiguration of the existing zones so that the imbalances could be remedied. *Id*. at 151.

Likewise, in *Ross,* the Fifth Circuit tackled student attendance patterns in a predominantly black school district to determine whether the homogenous student population was a vestige of state-imposed segregation. *Ross v. Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983). The court noted not only the increase in minority students in the district, but the steady decline of white students and families as well. *Id*. at 220. It also considered relevant that when integration originally occurred in the district, the white students projected to attend the now predominantly black schools simply did not enroll. *Id*. at 226. In making this observation, the court was careful to distinguish between segregation caused by school policy, and segregation caused by integrative policies. *Id.* at 226-27. It ultimately rejected the government's contention that the one-race schools in the district were due to housing patterns resulting from past segregation. *Id*. at 227. The changes creating the one-race schools actually resulted from court-ordained policies, not from the district's past encouragement of segregation. *Id.*

Nevertheless, on page 26 of its Memorandum, the Government cites several cases purportedly standing for the proposition that the Fifth Circuit "has always been skeptical of one-race schools." The Government's most recent authority for this contention is the opinion in *Valley v. Rapides Parish School Board*, handed down in 1981. 646 F.2d 925, 937 (5th Cir. 1981). The Court there stated that it [could] not ignore the existence of one-race schools in the system." Yet the Government overlooks the court's subsequent discussion in *Valley*, which makes precisely the distinction that the District asks this Court to make: racial composition is relevant only if it results from past *de jure* segregation.

Similarly, the Government's citation to *Tasby v. Estes* should be rejected in favor of more recent and reliable case law. 517 F.2d 92, 103 (5th Cir. 1975). The portion of the *Tasby* opinion the Government cites is not only dicta but is contrary to precedent existing at the time the case was decided. The court in *Tasby* did not cite a single case supporting the assertion on which the Government relies. *Id*. This is probably because it is contrary to the Supreme Court's express dictate that "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann*, 402 U. S. at 26. Moreover, in subsequent Fifth Circuit cases, the Court emphasized that the eradication of one-race schools is not a constitutional mandate. *See Ross*, 699 F.2d at 218 (1983); *Flax*, 864 F.2d at 161 (1990); *Cavalier*, 403 F.3d at 258 n. 14 (2005).

Like *Horton* and *Ross*, demographic factors in this case have played a role in the racial makeup of the Cleveland schools. Information from 1970 demonstrates that there was at least a 15-20% white population on the east side of the railroad tracks when the original desegregation Order was issued. (*See* Norwood Report, Ex. 3). At that time, both the Court and the Government apparently agreed that the student assignment plan was constitutional.

Unfortunately, the white students projected to attend school on the east side never enrolled. Indeed, while the white population has declined on the east side, present census data indicates that to this day, there remains a white population in the D.M. Smith, Eastside High, and Cypress Park zones. These students are zoned to attend an east side school, but do not, apparently choosing private school instead. Similarly, the white population—and in fact, the overall student population—on the west side of the railroad continues a steady decline that began after integration. Neither this decline in the white population nor the failure of white students to enroll on the east side can be ascribed to *de jure* segregation when both have occurred subsequent to court-ordered integration.

Additionally, the Government cannot legitimately argue that the District failed to take steps to remedy continuing racial imbalances in the school district when the student attendance plan alone did not effect desegregation. The District's creation of several magnet schools and the most successful M-to-M program in the Mississippi Delta put an end to the exclusion of children from certain schools based on race. Now, black students in Cleveland assigned to predominantly black schools may nevertheless attend any majority white school. The fact is that the constitution does not require that the District's desegregation efforts result in perfect racial balance at every school. The constitution only requires the former dual system be uprooted. Here, Cleveland operates in a unitary fashion and need not take "heroic measures" to accomplish what the Constitution does not require.

The Government has had no problem with the District's student attendance plan for the past forty-five years. Over the course of one major court order and three consent decrees, the Government has never challenged the constitutionality of the plan. Even the most recent consent decree has gone unchallenged for almost seventeen years. The District's effective

implementation of zoning, magnet schools, and the M-to-M program is sufficient to establish constitutional compliance. The Government may not now demand more.

IV. The District has made good faith efforts to comply with the faculty and staff assignment plan.

The 1969 Order specified that

> Within the full extent of the district's ability to do so, including the availability of qualified personnel, not less than one of every six classroom teachers of a different race shall be employed and assigned to each of the schools or attendance centers for the 1969-70 school year; and for the 1970-71 school year and thereafter there shall be full faculty and staff desegregation, to such an extent that the faculty at each school is not identifiable to the race of the majority of the students in any such school.

The District has complied with this order. No school has less than one in every six classroom teachers 16.6% of a different race. (*See* Dr. Rossell's Report at 26; Ex. 4).

The consent decree entered in 1989 further addressed the issue, requiring "[s]pecifically, the faculty and professional staff at each school *to the extent feasible* shall reflect the districtwide ratio of minority and nonminority faculty." *Id*. (emphasis added). The difficulty in implementing this requirement under today's educational certification requirements is that elementary and secondary teachers are not fungible. Teachers certified to teach at elementary schools cannot teach junior high and high school grades, and vice versa. The point is that teachers are not easily interchangeable without proper certification. The 1989 consent decree provides no leeway. Yet in assessing compliance with faculty and staff assignment plans, courts generally permit a deviation of up to ± 20%. *Flax v. Potts*, 725 F. Supp. 322, 328 (N.D. Tex. 1989), *aff'd*, 915 F.2d 155 (5th Cir. 1990).

For school year 2010-11, using ± 20% as the measure, 60% of the District's schools are in strict compliance with the terms of the 1989 order. (*See* Dr. Rossell's Report at 28; Ex. 4). As Dr. Rossell concludes in her report, this shows dramatic improvement since 1967 regarding

teacher imbalance within the District. *Id*. In 1967, none of the schools had instructional staff racially balanced at ± 20%. In 2010-11, racial balance increased to 60% of the schools as measured by the categorical percentage of ± 20% and the more scientific exposure index. *Id*. Further, at two of the non-complying schools, there are twenty or fewer total faculty members. This means that a change in race of only a few teachers would bring them within the ± 20% deviation. (*See* 2010-11 Court Report).

The 1989 consent decree also ordered the District to develop a plan to recruit black faculty and staff. The Superintendent testifies that the District has undertaken extensive recruitment of minorities, particularly at predominantly African-American colleges and universities. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). The results of these efforts show in the comparison of black teachers in the District to the statewide percentage of black teachers. (*See* Dr. Rossell's Report at 29; Ex. 2). The District has a 35% black instructional staff, while the state of Mississippi, as a whole, has only 25% black teachers. *Id*.

Moreover, the District's hiring practices are nondiscriminatory and mandated by state statute. When a faculty position becomes available, the District receives applications which do not ask the race of the candidate. (*See* Affidavit of Jaquelyn Thigpen; Ex. 2). The candidates are placed in a file and sorted by qualifications. *Id*. The District hires only qualified instructional staff meaning that teachers must be certified to teach the subject or grade for which they are hired. *Id*. Qualified candidates are then selected for an interview by the principal and his/her interview team which consists of other faculty at the school. *Id*. Following a team interview, a recommendation for hire is made to the Superintendent, who then recommends the candidate to the Board of Trustees. *Id*.

The District is fully desegregated with respect to the composition of administrative staff. Fifty-three per cent of all building level staff are black. (*See* Dr. Rossell's Report at 29; Ex. 4).

CONCLUSION

A number of factors—including both the difficulty in assigning blame for racial imbalances and the simple passage of time—have complicated school districts' task in proving constitutional compliance. *Freeman*, 503 U.S. at 500-06 (Scalia, J., concurring). Nevertheless, the District here has satisfied both this Court's orders and federal law requiring desegregation to the extent practicable. Prevailing authority establishes that racial balancing is not constitutionally necessary. The only relevant measure of constitutionality considers whether present circumstances are directly traceable to prior *de jure* segregation. Here, both demographic factors and Dr. Rossell's analysis show that the District's present configuration is a mixed result of demographic changes and largely successful desegregation policies. The District has shown significant and steady improvement in both interracial exposure and racial imbalance. The Government's Motion for Further Relief is therefore without basis.

Respectfully Submitted, this the 18th day of August, 2011

CLEVELAND SCHOOL DISTRICT

By: /s/ Holmes S. Adams
Holmes S. Adams

OF COUNSEL:

Holmes S. Adams (MS Bar No. 1126)
John S. Hooks (MS Bar No. 99175)
Lindsey N. Oswalt (MS Bar No. 103329)
1018 Highland Colony Parkway, Suite 800
Ridgeland, MS 39157
T: 601.353.3234
F. 601.355 9708
holmes.adams@arlaw.com
john.hooks@arlaw.com
lindsey.oswalt@arlaw.com

Gerald H. Jacks (MS Bar No. 3232)
Jamie F. Jacks (MS Bar No. 101881)
Jacks, Adams & Norquist, P.A.
150 N. Sharpe Avenue
P.O. Box 1209
Cleveland, MS 38732
T: 662.843.6171
F: 662.843.6176
gjacks@jacksadamsnorquist.com
jjacks@jacksadamsnorquist.com

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2011, I served copies of the District's Memorandum in Support of its Response in Opposition to the United States' Motion for Further Relief to counsel of record by electronic service through the court's electronic filing system, otherwise via electronic or first class mail, postage pre-paid to:

Ellis Turnage, Esq.
Turnage Law office
P.O. Box 216
Cleveland, MS 38732

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

This the 18th day of August, 2011.

/s/ Holmes S. Adams
Holmes S. Adams