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

DIANE COWAN *et al.*, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. BOLIVAR COUNTY BOARD OF EDUCATION *et al.*, Defendants.	Civil Action No. 2:65-CV-00031-GHD

UNITED STATES' OBJECTIONS TO
THIRD SUPPLEMENTAL REPORT BY DR. CHRISTINE ROSSELL

At the December 11, 2012 hearing on the objections of Plaintiff-Intervenor United States of America (the "United States") to the proposed desegregation plan submitted by Defendant Cleveland School District (the "District"), the United States objected to the District's filing of a third supplemental expert report [Doc. 63] ("Third Supplemental Report") on December 10, 2012—literally on the eve of hearing—as untimely, prejudicial, and procedurally defective. In response to the United States' objections, the Court permitted the United States to file written objections to the Third Supplemental Report by January 1, 2013. In further support of its objections, the United States hereby submits the following:

1. Dr. Rossell's Third Supplemental Report confirms that she undertook little to no analysis to determine the viability of the magnet school plan as a desegregation tool in this

school district, relying instead on data and old survey results from other school districts. A desegregation plan must take into account the specific community to which it will apply. *See Thompson v. School Bd. of City of Newport News*, 465 F.2d 83, 86 (4th Cir. 1972) ("It is of course, axiomatic that every plan must take into consideration the unique characteristics of the school district to be served.") (citing *Green v. County Sch. Bd. of New Kent Cnty.*, 390 U.S. 431, 439 (1968)). Furthermore, courts look with disfavor on expert reports that simply regurgitate earlier studies or data collection, including in school desegregation cases. *See, e.g.*, *Wessmann v. Gittens*, 160 F.3d 790, 804-06 (1st Cir. 1998) (declining to credit opinions of expert witness who never conducted a scientifically validated study but merely reviewed "statistics concerning teacher seniority, and anecdotal evidence about teacher attitudes supplied by school officials").

The District's burden in this case is to demonstrate that sufficient numbers of white children would voluntarily choose to attend East Side High School or D.M. Smith Middle School to achieve meaningful integration. It offers no evidence to meet that burden. Dr. Rossell repeats in the Third Supplemental Report that she neither consulted with nor surveyed any parents in the Cleveland community in assessing the viability of the District's proposed plan or any other alternatives. *See* Third Supp. Report at 6-7.[1] Indeed, she admits that "[t]he last survey that [she] conducted was in . . . Hattiesburg, Mississippi in 1998" and merely "expect[s] the same results" in the Cleveland of today. *Id.* at 7. However, the survey in that case only asked parents whether they would support or oppose a desegregation plan based on neighborhood schools with voluntary transfers. *Id.* at 7 & n.11. Notably, it did not ask white parents whether they would exercise such choice to attend predominantly black schools—nor, of course, could it predict what

[1] Although Board President Maurice Lucas testified that he believed parent-teacher association members met with Dr. Rossell during her April 2012 visit, Dr. Rossell's reports contradict this testimony, as she has stated that she relied exclusively on her meetings with school principals, the superintendent, and school board members to ascertain the opinions of African American parents in the district. *See* Supp. Report [Doc. 44-3] at 2; Second Supp. Report [Doc. 51-1] at 2-3; Third Supp. Report at 6.

parents in another community might think nearly fifteen years later. In short, neither Dr. Rossell nor the District has provided the Court any evidence that white families, who have previously chosen not to enroll their children at East Side or D.M. Smith despite the availability of existing magnet programs, will begin to do so now. For these reasons, the Court should view Dr. Rossell's hypotheses on the opinions of Cleveland parents, black or white, as unpersuasive and ultimately irrelevant to its consideration of the Constitutional sufficiency of the District's plan.

2. The Third Supplemental Report is, for all intents and purposes, an untimely and improperly submitted surreply to rebut the United States' October 26, 2012 Reply Brief [Doc. 54] ("Reply Brief"). The report serves mainly to debate legal arguments and the significance of certain factual information included by the United States in its reply brief, which itself was intended to rebut the expert's previous arguments. Under Local Rule 7(b)(4), "[c]ounsel for movant desiring to file a rebuttal may do so within seven days after the service of the respondent's response and memorandum brief," and "must make any request for an extension of time in writing to the judge who will decide the motion." The District did not seek leave of the Court to enter the report into evidence until the December 11 hearing. It electronically filed the report with the Court only one day earlier, without any accompanying motion. Furthermore, "[u]ntimely designation or supplementation is only appropriate upon a showing of 'good cause.'" *Cleave v. Renal Care Group, Inc.*, No. Civ.A. 2:04CV161-P-A, 2005 WL 1629750, at *1 (N.D. Miss. July 11, 2005). The District has offered no showing of good cause for submitting this report until 45 days after the United States' filed its Reply Brief.

3. The Third Supplemental Report improperly contains legal analysis and conclusions. For the same reasons explained at length in the Reply Brief, Rule 407 of the Federal Rules of Evidence prohibits an expert from asserting legal conclusions or stepping into the shoes of an

attorney. *See* Reply Brief at 6-7. The Third Supplemental Report expressly purports to evaluate case law cited by the United States in the Reply Brief. Third Supp. Report at 1. Such legal analysis is outside the province of an expert witness and the Court should disregard it.

4. A supplemental report is not an appropriate tool to give a party a further chance to develop its case. *See* Reply Brief at 4-5. This is particularly true where, as here, that party already obtained an extension of time for its expert to prepare an earlier supplemental report, the introduction of the expert report would unnecessarily delay the final disposition of the pending case. *See, e.g.*, *Simmons v. Johnson*, No. 06-325-A-M2, 2008 WL 474203, at *3 (M.D. La. Feb. 14, 2008) (refusing to admit supplemental report where expert deadlines had already been extended, noting the Court's "inherent power to control its docket and to prevent undue delays in the disposition of pending cases"). Remarkably, the District is asking for additional time to prepare a response to these objections, *see* Letter from Jamie Jacks to Court, Dec. 21, 2012 [Doc. 71], which would result in even further delay.

5. The United States cited *United States v. Mississippi & McComb Municipal Separate School District*, No. 70-4706 (S.D. Miss. Apr. 18, 2008), for the legal propositions that "[n]o one would argue that it is constitutionally permissible to maintain all-black schools solely for the purpose of preventing white flight" and that true integration occurs only where there are opportunities for meaningful racial interaction outside a single classroom or homeroom, Reply Brief at 9, 10, not, as Dr. Rossell implies, as a factual analog to this case.

6. Dr. Rossell's discussion of Lincoln Parish—a Louisiana desegregation case cited by the United States in its Reply Brief as one of many possible illustrative examples of a majority-black school district that did not experience significant white flight after implementing a school consolidation plan—is based on erroneous assumptions and factual errors. Although the purpose

of this case is certainly not to debate the success of a desegregation effort in another district in another state, the United States offers the following corrections for the record:

a. Dr. Rossell incorrectly stated that the 2012 Superseding Consent Order in Lincoln Parish (attached as Ex. B to the Reply Brief [Doc. 54-2]) "resulted from DOJ's objection to Lincoln's motion for unitary status." Third Supp. Report at 2. The Lincoln Parish School Board filed no such motion; the consent order was voluntarily reached by the parties after ongoing negotiations in which the Court was involved.

b. Dr. Rossell attributes an enrollment decline in the overall population of the consolidated K-4 schools in Lincoln Parish's Ruston zone to "white flight" resulting from the consolidation plan. Although the K-4 population in the Ruston zone declined this school year relative to last year, the United States disputes Dr. Rossell's conclusion that this was causally linked to the school pairing plan. Among other things, the enrollment decline can be attributed to a several factors, including:

- normal year-to-year fluctuations in student enrollment;
- a one-time expansion of capacity at the A.E. Phillips Lab School at Louisiana Tech University (a public school admitting students from throughout Lincoln Parish), which attracted both black and white students;
- the District's enforcement of more stringent intra-district student transfer policies required by the 2012 Superseding Consent Decree (Doc. 54-2 at 11-16), which resulted in shifts of black and white students between the Ruston zone and other attendance zones; and
- the availability this school year of state-funded private school vouchers to students attending some underperforming schools in the Parish.

In combination, these factors equally affected the black and white student populations; but, as stated in the Reply Brief, the proportion of white students remained constant. There is simply no evidence that the pairing plan or "white flight" caused the smaller K-4 student population in the Ruston zone this year. Moreover, Dr. Rossell's conclusions about Lincoln Parish are even less probative than those about Cleveland given that she has no direct professional experience with Lincoln Parish.

c. Dr. Rossell's prediction of future white flight in Lincoln Parish is further discredited given that the Parish has, for many years, successfully operated a single-grade structure for Ruston zone students in grades 6 through 12 (in a sixth-grade academy, a junior high school, and a high school), while maintaining significant percentages of white students, tracking the zone-wide enrollment figures, in each of those schools. *See* Reply Brief, Ex. C [Doc. 54-3], Table 1.

d. The United States disputes Dr. Rossell's assertion that "consolidation is the same thing as involuntarily (aka mandatorily) reassigning students between existing schools." Third Supp. Report at 8-9. A consolidation plan can take various forms, including, but not limited to, using existing school facilities with new grade-level configurations (e.g., a ninth-grade academy and a grade 10-12 school; two high schools serving grades 9-10 and 11-12, or some other configuration), or constructing new school facilities to which all students are assigned. Rather than a situation in which "*some* students would have to be moved involuntarily from one facility to another or have a sudden and dramatic change in the racial composition of *their* school," *id.* at 9 (emphases added), a consolidation plan shifts *all* students to a new school (housed in an existing or new facility) that will belong to all of them.

e. In response to Dr. Rossell's assertion that "[t]here is insufficient capacity at the middle or high schools to simply put the students from one set of schools into another," *id.* at 9, the United States notes that this analysis fails to consider various other grade-level configurations using existing school facilities.

Conclusion

At no point has the District addressed the United States' legal arguments that the proposed plan is unlikely to meet the District's constitutional obligation of presenting a plan that "promise[s] realistically to work, and promises realistically to work now" and has "real prospects for dismantling the state-imposed dual system at the earliest practicable date." *Green*, 391 U.S. at 436, 439. Instead, it has deferred to an expert witness whose reports, for the reasons described above, fail to provide satisfactory proof that the proposed magnet plan will effectively serve to integrate East Side High School and D.M. Smith Middle School. To satisfy its burden of showing that the magnet program would be effective, the District must, at minimum, provide proof that its plan would not suffer from a similar fate to its previous efforts to implement magnets at these two schools without any success in attracting white students—which it has not done. As any consolidation plan is guaranteed to be more effective in eradicating the structural and historical barriers that still stand in the way of a fully desegregated school system in Cleveland, the United States urges the Court not to delay this process any further, and to reject the District's deficient proposal in favor of a consolidation plan that will promise to realistically work by the beginning of the 2013-2014 school year.

Dated: December 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2012, I served copies of the foregoing Objections to Third Supplemental Report by Dr. Christine Rossell to the following counsel of record by electronic service through the court's electronic filing system:

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