

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

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

**UNITED STATES’ OBJECTIONS TO
DEFENDANT’S PROPOSED DESEGREGATION PLAN**

The United States of America objects to the portion of the proposed desegregation plan related to student assignment, which was submitted by Defendant Cleveland School District (“Cleveland” or the “District”) on May 15, 2012 in response to the Court’s March 28, 2012 Order.¹

This desegregation case has now been pending for more than 47 years, during which time the District has failed to achieve the Court’s directive to integrate its schools as soon as possible. More recently, on March 28, 2012, the Court found that throughout those 47 years the District failed to racially integrate one of its two high schools, East Side High School (“East Side”), and

¹ The United States’ only objection to the portion of the District’s proposed desegregation plan addressing faculty reassignment is the implementation timeline, which the District proposed would be phased in by the end of the 2013-14 school year. Proposed Plan at 4. The District has agreed to reach its targets by the beginning of the 2013-14 school year, and amend its proposed plan accordingly.

one of its two middle schools, D.M. Smith Middle School (“D.M. Smith”). Mem. Op. [Doc. 43] at 25-26. Despite “recent demonstrated efforts” to attract white students to these all-black schools through the use of magnet programs, the District has been unable to integrate East Side and D.M. Smith, which were black schools by law in the District’s former de jure segregated school system. Id. at 34.

The Court ordered the District to submit a proposed desegregation plan to “further integrate [East Side] High School and D.M. Smith, and to achieve racial balance among its faculty.” Order [Doc. 42] at 1. Without prescribing a specific remedy, the Court stated that a desegregation plan must “promise realistically to work, and promise[] realistically to work now,” and that a proposed plan must “have real prospects for dismantling the state-imposed dual system at the earliest practicable date” to provide effective relief. Mem. Op. at 17 (quoting Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430, 436, 439 (1968) (internal quotation marks omitted)). As the Court suggested, “one obvious remedy” would be to consolidate the District’s two high schools and two middle schools. Mem. Op. at 40 n.9.

Notwithstanding the late hour in this litigation, the current plan proposed by the District to integrate East Side and D.M. Smith violates the requirements articulated in Green and echoed by the Court. It relies exclusively on new magnet initiatives nearly indistinguishable from previous programs that failed to achieve any integration in Cleveland at the high school and middle school level. The primary objective of the proposed plan is not to integrate East Side and D.M. Smith as a whole, but to create insular magnet programs in each school that meet specified demographic targets. Far from achieving durable integration, the ephemeral future gains resulting from this plan would depend year to year not only on the District renewing its commitment to support the underlying magnet programs, but also on the willingness of a large

percentage of white students who would otherwise attend Cleveland High to participate in those programs on a continuing basis. Moreover, since the plan is silent as to the anticipated size of the new magnet programs, the Court has no way to predict the impact or likelihood of success of the proposed programs on the racial composition of the student body at East Side and D.M. Smith. Finally, under the terms of the proposed plan, the new programs would not enroll any additional white students at East Side until, at the earliest, the 2014-15 academic year. In short, the District fails to satisfy the Supreme Court's directive that a desegregation plan must "promise[] realistically to work now." Green, 391 U.S. at 436.

Nothing in the proposed plan or accompanying expert report accounts for the District's prior failure to integrate East Side and D.M. Smith through the use of magnet programs, or explains how reconfigured magnet programs can "realistically" overcome the barriers that have diverted nearly every white student in the District away from East Side and D.M. Smith for more than 47 years. See Green, 391 U.S. at 436. Given the Court's mandate to desegregate Cleveland schools, and the District's well-documented inability to integrate East Side and D.M. Smith through voluntary measures, the absence of any contingency plan for integrating these schools if the new magnet programs fail to achieve their objective should compel the Court's rejection of this proposal.

In sum, what the District proposes is an initiative to re-introduce a failed magnet concept, through a plan that requires a minimum of three school years to implement and triggers no provisional remedy if integration fails to materialize. Because this plan does not meet minimum constitutional requirements, it is inadequate as a matter of law. The Court should therefore reject the portion of the proposed plan addressing the integration of East Side and D.M. Smith.

I. FACTUAL BACKGROUND

A. Cleveland's Previous Efforts to Integrate East Side High School and D.M. Smith Middle School Through the Use of Magnet Programs Have Failed.

The magnet initiative proposed by the District in its desegregation plan is difficult to distinguish from the programs that previously failed to integrate East Side and D.M. Smith. A consent order entered in 1992 authorized Cleveland to establish a magnet school at the junior high level, and a consent order entered in 1995 authorized the District to establish a magnet school at the high school level. Mem. Op. at 11. There is no indication that Cleveland attempted to establish magnet programs at either East Side or D.M. Smith between 1992 and 2004. See Opp. Br. [Doc. 27] at 15. From 2004 to 2007, the District obtained \$5,129,457 from the U.S. Department of Education to establish a performing and visual arts magnet program and International Baccalaureate ("IB") curriculum at each of three schools, East Side, D.M. Smith, and Hayes Cooper Elementary School. Id. Cleveland procured an additional \$6,050,734 from 2007 to 2010 to develop magnet programs at East Side, D.M. Smith, and Nailor Elementary School. Id. at 16.

It is undisputed that the programs established with these federal funds failed to achieve integration at East Side and D.M. Smith, notwithstanding the District's considerable efforts to develop high-quality magnet programs and market those programs to white parents and students.

As Cleveland acknowledged in its opposition to the United States' motion for further relief:

[In 2004], the District immediately began training teachers and implementing the new curriculum at those schools. It also launched a campaign to advertise the magnet programs. Despite these efforts, the [East Side] 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.

Id. at 15.

The District further attempted to integrate East Side by offering certain high school courses only at that school, and providing transportation to the students enrolled at Cleveland High who elected to take those courses. The Court observed that this program did not induce white students at Cleveland High to transfer full-time to East Side:

In addition to [East Side] High’s magnet program, in an effort to attract minority students to the school, the District “buses” students who attend [East Side] High and Cleveland High to each other’s schools to take certain classes in an attempt to enrich and equalize the educational experience of the two schools. Despite the District’s attempts to attract Caucasian students to the majority-African-American [East Side] High, today, the school is attended by 99.7% African-American students.

Mem. Op. at 25.

B. Cleveland’s Proposed Plan to Integrate East Side High School and D.M. Smith Middle School Would Simply Reinstitute Its Failed Magnet Approach.

The new plan proposed by Cleveland to integrate East Side and D.M. Smith has three primary components. See generally Proposed Plan [Doc. 44] at 1-4. First, the District proposes to “create, market and implement a new magnet program” at both East Side and D.M. Smith. Id. at 1, 3. The plan states that the racial composition of each program will be between 50 percent and 67 percent black and between 33 percent and 50 percent white, but nowhere specifies how many students the programs would accommodate. Id.² Second, the plan proposes to “revitalize and restructure” the IB programs at East Side and D.M. Smith. Tacitly recognizing that offering IB courses demonstrably failed to attract white students to East Side and D.M. Smith in the past, the District explains that the new IB program will be structured as a “program within a school”

² It bears reiterating that Cleveland makes no commitment in its proposed desegregation plan to achieve a target level of diversity at East Side or D.M. Smith as a whole—only a commitment to achieve a particular racial makeup within the new magnet programs established at each school. If the programs themselves are small in scale, their impact on the racial composition of the student body at East Side or D.M. Smith is unlikely to be significant, and certainly not adequate to comply with Cleveland’s obligation to integrate both schools.

rather than a “whole school attendance zone” magnet. Id. at 2, 3; Proposed Plan, Ex. C (Rossell Supp. Report) [Doc. 44-3] at 6-7. Finally, the District intends to continue its efforts to market to white students and parents certain courses and programs offered exclusively at East Side and D.M. Smith. Proposed Plan at 2-3.³ Notably, the District spent approximately \$11,250,000 in federal funds to develop and advertise its ineffective magnet programs between 2004 and 2010, but has no magnet school assistance money remaining from the federal government to support the new programs outlined in the plan. See id. at 2, 4 (“The District will implement and fully fund the proposals, although it may also seek grant funding.”).

Cleveland requested that the United States defer filing objections to its proposed desegregation plan until it could produce fall enrollment data indicating the number of white students at Cleveland High School who voluntarily chose to enroll in courses offered only at East Side for the Fall 2012 semester. See Motion for Extension [Doc. 45] at 2. The District produced this information to the United States on August 20, 2012 (attached as Exhibit A). In response to additional queries from the United States, the District reported that nine white students from Cleveland High School enrolled in more than one course at East Side. See Ex. A. No students enrolled in more than two courses, id., and according to the annual report filed by the District on August 17, 2012, not a single white student enrolled for more than two classes each at East Side, much less enrolling there full-time, see Court Report, Ex. A [Doc. 47-1].

³ Cleveland also proposes in the plan to provide the necessary funding and transportation services, and to increase the attractiveness of D.M. Smith through renovations designed to eliminate its current “open concept.” Id. at 2-4.

II. ARGUMENT

A. **The Court Should Reject the District’s Proposed Desegregation Plan Because It is Deeply Flawed and Not Calculated to Achieve Meaningful Integration at East Side or D.M. Smith.**

The District’s proposed plan for East Side and D.M. Smith pins all hopes of further integration on as-yet-undeveloped magnet programs and aspirational, ambiguously defined enrollment goals for those programs. Moreover, the plan provides no persuasive evidence that meaningful integration of these two segregated black schools can or will be achieved on a schedule required by this Court in reliance upon Supreme Court authority. Quite simply, the District has failed to meet its affirmative obligation to “do all in its power” to desegregate these schools to the greatest possible extent and without further delay. See Davis v. E. Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1435 (5th Cir. 1983); Green, 391 U.S. at 438 (“[A] plan that, at this late date, fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable.”). In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court noted “the need for remedial criteria of sufficient specificity to assure a school authority’s compliance with its constitutional duty.” 402 U.S. 1, 26 (1971). Here, the District’s proposed plans for East Side and D.M. Smith, which it describes to the Court as “strategies to improve integration,” Proposed Plan at 1, 3, fail to provide sufficient specificity as to how these strategies will, in the implementation, correct the constitutional deficiencies identified by the United States and the Court.

At both East Side and D.M. Smith, the District proposes creating a new magnet program within the school, with a targeted racial makeup of approximately 50-67% black and 33-50% non-black (based on current enrollment figures). The District does not explain how it expects to reach these targets, except that it intends to “[b]uild upon the success” of existing efforts to attract

white students to certain courses and activities at East Side and D.M. Smith. See Proposed Plan at 2. As described in Section I.B. above and illustrated by the District’s own data in Exhibit A, this “success” has been limited, at best. At East Side, no white students are currently enrolled as full-time students at either school. See Ex. A. Only nine white students are taking more than one class at that school, and none were enrolled in more than two classes. See Ex. A. The data submitted by the District to support the proposal provide no assurance that the “[r]evitalize[d] and restructure[d]” programs will do much better in attracting significant numbers of white students to East Side and D.M. Smith, nor that these programs would induce a critical mass of white students to take the unprecedented step of transferring to those schools as full-time students.

Even if the District does enroll high enough numbers of white students in the magnet programs at East Side and D.M. Smith, it remains unclear what impact this would have on the overall desegregation of each school. First, by adopting a stand-alone, within-school magnet program at each school, the District neglects its obligation to desegregate the learning environment for students at East Side and D.M. Smith who do not participate in the magnet programs. Any white students attracted to East Side or D.M. Smith by the magnet programs would take coursework almost exclusively with other students in those programs—the rest of the student population, which would remain all- or virtually-all-black, would, by design, have little to no interaction with or exposure to white students at school. In effect, the black students not enrolled in the magnet programs—quite possibly the majority of each school—could go through their entire middle school and high school careers without actual or meaningful exposure to white classmates. For this group of students, the vestiges of segregation would continue unabated under the District’s proposed plan.

Second, even if a stand-alone magnet program was a viable desegregation tool, the number of white students enrolled in the program would need to be substantial to significantly alter the racial demographics of the schools. The District provides no realistic estimate of attendance or timetable for expanding the size of the two schools' magnet programs, apparently willing to presume that enough students who would otherwise go to Cleveland High or Margaret Green Junior High will enroll in the program.

It is not surprising that Cleveland avoids specifying the target number of white students it hopes to attract full-time to East Side and D.M. Smith. Simply put, it is far-fetched to suppose that within two years the District can enroll sufficient white students at each school to meet any legal definition of integration. According to the 2011-2012 report filed by the District on August 17, 2012, East Side enrolled 341 students during the 2011-2012 school year (340 of whom were black), and D.M. Smith enrolled 299 students (all of them black). The racial composition of students district-wide was 67.1% black and 29.0% white in 2011-2012. Under the most lenient integration standard the Court could apply—requiring each school's racial composition to fall within twenty percent of the district-wide average—the District would need to add approximately 50 full-time white students to East Side's existing student population (which would result in an 87.0% black student body) and approximately 45 full-time white students to D.M. Smith (which would also result in an 87.0% black student body) to eliminate the racial identity of each school.

The Board provides no plan for drawing this significant number of white students away from Cleveland High and Margaret Green in order to reach this minimal level of compliance. Though encouraging additional black students at East Side and D.M. Smith to transfer to west side schools would be an important component of any integration plan, the plan eliminates

programs at Cleveland High and Margaret Green that might attract these students, including certain remedial courses and choral music programs. Proposed Plan at 2. It therefore seems unlikely that black students zoned to attend East Side or D.M. Smith who want or need these classes would choose to attend Cleveland High or Margaret Green, meaning that integration will have to be accomplished primarily (if not completely) by enrolling white students full-time at East Side and D.M. Smith. Without any information on the anticipated size or capacity of the programs, it is impossible to project the desegregative impact of the magnet strategy on the overall student demographics at East Side and D.M. Smith.

The District's proposed plan does no more than repackage a desegregation tool already available under the operative orders in this case. Specifically, any white student who would wish to enroll at East Side or D.M. Smith—to take advantage of those schools' existing or future programs—has always been able to do so pursuant to the majority-to-minority transfer provisions in the 1989 Consent Order. The District, in its plan, does no more than offer a promise that it will polish and market some version of its existing programs to those students—without the benefit of millions of dollars in federal magnet funds it relied upon from 2004 to 2010. What the District does not do is use any of the structural desegregation tools at its disposal to actually ensure integrated learning environments in its schools. As the Court suggested, consolidating the high schools and middle schools would be one obvious remedy. Rezoning existing attendance boundaries could also produce meaningful integration.

B. Ratifying the Proposed Plan in its Current Form Would Nullify the Effect of the Court’s Liability Determination, and Prejudice the United States’ Enforcement Interests.

A central premise of the United States’ Motion for Further Relief is that East Side and D.M. Smith—which have always been one-race black schools—were never integrated because the District relied exclusively on magnet programs to create racial diversity:

Cleveland’s long history with magnet programs suggests that such programs may enjoy limited success at the elementary school level. Empirically, however, magnet schools are not a feasible substitute for the structural reforms typically required to dismantle a de jure segregated school system; including school clustering, school pairing, school consolidation and/or reconfiguring attendance zone boundaries.

Motion for Further Relief [Doc. 6] at 16. After reviewing the factual record, the Court reached the same conclusion in its Memorandum Opinion:

Despite the District’s efforts at achieving integration, some of its stalled progress may be the result of demographic factors outside its control. However, other stalled progress may be the result of having never successfully eradicated the vestiges of the dual school system.

Mem. Op. at 30.

In the final analysis, the District should not be permitted to resolve its violations of the desegregation orders by reinstating the same programs that resulted in those violations in the first place. Judicial approval of the proposed plan would return the United States to the same position it occupied when it moved for further relief—contesting the District’s exclusive reliance on ineffective voluntary measures to dismantle one-race schools. If, after three additional school years, this latest plan fails to achieve meaningful integration at East Side and D.M. Smith, the United States would be compelled to file another motion for further relief, and the District would presumably seek yet again to present a cosmetically modified magnet initiative as its new desegregation plan. As this Court has recognized, the Constitution places clear limits on a

school district's latitude to recycle ineffective voluntary policies as its sole response to persistent racial segregation. See supra at 2. Cleveland exceeded those limits long ago.

III. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court reject the portion of the proposed plan addressing the integration of East Side and D.M. Smith, and either order, or direct the District to devise, a new plan that ensures East Side and D.M. Smith will be fully integrated by the beginning of the 2013-14 school year. A proposed order for the Court's consideration is attached as Exhibit B.

Dated: August 30, 2012

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I served copies of the United States' Objections to Defendant's Proposed Desegregation Plan and accompanying exhibits to counsel of record by electronic service through the court's electronic filing system, or alternatively via overnight mail, addressed to:

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/s/ Joseph J. Wardenski
JOSEPH J. WARDENSKI

EXHIBIT A

**International Baccalaureate and Upper Level Course Enrollment at ESHS
2012-2013 School Term**

IB Courses offered at ESHS to ESHS and CHS students	CHS	ESHS	Total
IB Psychology	4 Black 1 Asian 4 White	4 Black	13 students
IB Math I	7 White 2 Asian 2 Black	4 Black	15 students
IB Math I	4 White 1 Hispanic	3 Black	8 students
IB Math II	12 White 3 Black 1 Hispanic	1 Black	17 students
IB Biology I	11 White 3 Black 1 Hispanic	8 Black	23 students

Advanced Placement and other Upper Level Courses offered at ESHS to CHS and ESHS students	CHS	ESHS	Total
AP Calculus	1 White 1 Black	7 Black	9 students
Trigonometry	9 White 8 Black 1 Hispanic	1 Black	19 students
Trigonometry	6 White 6 Black 2 Asian	14 Black	28 students
Public Speaking	4 White 14 Black	8 Black	26 students

From: [Jamie Jacks](#)
To: [Fischbach, Jonathan \(CRT\)](#); [Wardenski, Joseph \(CRT\)](#)
Cc: [Melissa Lott](#); [Holmes Adams](#)
Subject: RE: IB numbers/Upper level classes
Date: Tuesday, August 21, 2012 3:14:33 PM

Dear Jonathan,

I have the following:

12 CHS students are enrolled in 2 classes at ESHS - the majority of these students (10 of the 12) are enrolled in 2 IB classes (Math and Biology).

The other 2 students are enrolled in Trig and IB Biology.

Of these 12 CHS students enrolled in dual ESHS classes, 9 are white, 2 are black and 1 is Hispanic.

There are 83 other CHS students taking one course at ESHS. I can do that racial breakdown if you would like me to. Just let me know.

Sincerely,

Jamie Ferguson Jacks
Jacks, Adams & Norquist, P.A.
150 North Sharpe Avenue
Cleveland, MS 38732
662.843-6171
662.843.6176 (fax)

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From: Fischbach, Jonathan (CRT) [mailto:Jonathan.Fischbach@usdoj.gov]
Sent: Tuesday, August 21, 2012 8:56 AM
To: Jamie Jacks; Wardenski, Joseph (CRT)
Cc: Melissa Lott; Holmes Adams; Fischbach, Jonathan (CRT)
Subject: RE: IB numbers/Upper level classes

Thank you Jamie –

With respect to the students from CHS enrolled in courses offered at ESHS, please indicate how many of those students are enrolled in 2 classes at ESHS, how many students are enrolled in 3 or more classes at ESHS, and the race of all students who fall into those two categories.

Thanks,
Jonathan

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

950 Pennsylvania Ave., NW
PHB, Suite 4300
Washington, DC 20530
phone: (202) 305-3753
fax: (202) 514-8337
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From: Jamie Jacks [mailto:jjacks@jacksadamsnorquist.com]
Sent: Monday, August 20, 2012 6:07 PM
To: Fischbach, Jonathan (CRT); Wardenski, Joseph (CRT)
Cc: Melissa Lott; Holmes Adams
Subject: IB numbers/Upper level classes

Dear Jonathan and Joseph,

Attached please find a chart outlining the CHS participation in Eastside High's IB courses and other upper level course for the 2012-2013 fall term. Please let me know if you have any questions.

Sincerely,
Jamie Ferguson Jacks
Jacks, Adams & Norquist, P.A.
150 North Sharpe Avenue
Cleveland, MS 38732
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662.843.6176 (fax)

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EXHIBIT B

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

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

ORDER

On March 28, 2012, the Court issued an Order requiring the Cleveland School District (“District”) to submit, by May 15, 2012, a proposed desegregation plan to further integrate East Side High School and D.M. Smith Middle School, and to achieve racial balance among the faculty at each of its schools. The District filed its desegregation plan on May 15, 2012. On August 30, 2012, the United States filed objections to the portion of the proposed plan governing the integration of East Side High School and D.M. Smith Middle School.

After reviewing the United States’ objections and the District’s response thereto, the Court affirms the objections. Accordingly, the Court rejects the portion of the proposed desegregation plan addressing the integration of East Side High School and D.M. Smith Middle School, and directs the District to devise a new plan that ensures these two schools will be fully integrated by the beginning of the 2013-14 school year. Cleveland shall submit its revised plan

within thirty (30) calendar days from the date of the Order, and the United States shall have forty (40) calendar days to confer with the District and, if necessary, file objections to the plan.

All Orders not inconsistent herewith remain in full force and effect.

THIS the _____ day of September, 2012.

SENIOR JUDGE