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ABSTRACT

In this decision, Judge W. H. Rice finds the Cincinnati (Ohio) School District (CSD) in compliance with some provisions of a school desegregation consent decree from June 22, 1984, and not in compliance with others. The original decision was historic in allowing the school district charged with promoting or allowing unconstitutional segregation to choose for itself the means to arrive at desegregation goals. The consent decree required the court to determine compliance prior to June 1991. This decision determines that the CSD is in compliance with many areas. These include a passing grade on the Taeuber Index of Dissimilarity, a measure to the extent to which each school, or classification of schools as elementary, middle, junior, or senior high reflects the racial composition of the district as a whole. In other areas, compliance has not been achieved, and the Court retains jurisdiction over the following: (1) staff racial balance; (2) unbiased discipline policies; and (3) low-achieving schools. It is expected that staff racial balance will be resolved promptly, at which time jurisdiction will be removed. Court jurisdiction will continue for low-achieving schools and unbiased discipline policies, for a minimum of 2 years, with monthly consultation on a new plan the CSD must submit within 30 days. (SLD)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MONA BRONSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.,

Defendants.

Case No. C-1-74-205

Judge Walter Herbert Rice

DECISION AND ENTRY CONCLUDING THAT CINCINNATI SCHOOL DISTRICT IS IN COMPLIANCE WITH RESPECT TO CERTAIN ASPECTS OF CONSENT DECREE AND NOT IN COMPLIANCE WITH RESPECT TO OTHERS; PURSUANT TO ITS TERMS, CONSENT DECREE MODIFIED TO RELEASE THIS COURT'S JURISDICTION OVER CINCINNATI SCHOOL DISTRICT ON THOSE ASPECTS OF CONSENT DECREE WITH WHICH IT IS IN COMPLIANCE AND TO RETAIN CONTINUING JURISDICTION FOR A MINIMUM PERIOD OF TWO YEARS OVER CERTAIN OF THOSE ASPECTS OF CONSENT DECREE WITH WHICH IT IS NOT IN COMPLIANCE; LENGTH AND TERMS OF CONTINUING JURISDICTION SET FORTH; CONFERENCE CALL SET

On February 15, 1984, the people of Cincinnati, represented by Plaintiffs, a group of school children in the Cincinnati Public School System, and the Defendant, the Board of Education of the Cincinnati School District (CSD), came together and, in the best interests of all concerned, settled this school desegregation lawsuit. It was both a historic and a significant moment. For the first time, a lawsuit which had been filed seeking a remedy of court-ordered desegregation had been settled and settled in a manner that allowed the very school district which had been charged with promoting or allowing

unconstitutional segregation within its midst to be placed in the unique position of "Captain of its Own Ship," with a destination to the voyage defined in terms of objective desegregation goals, negotiated at arms length between people of good faith (as opposed to being ordered by a court as a remedy subsequent to a finding of intentional, systemic discrimination), but with the means to achieve that successful voyage, those agreed upon desegregation goals, wholly and totally left to the discretion and informed judgment of that school district's board of education.

That this litigation was settled short of trial was a tribute both to the good faith and good will of the participants, secure in the knowledge that all parties desired and were committed to the same goal---quality, integrated education---and to the realization that in a hard-fought, fully litigated school desegregation lawsuit, there are no winners, for regardless of which side ultimately prevails, after years of trials and appeals, after untold thousands or millions of dollars in expenses and fees and after millions of words spoken in anger within the crucible of a courtroom setting, all parties would be the losers, plaintiffs, defendants and the people and educational system of Cincinnati, due to the residue of bitterness, anger and division that would hover over and poison the effectiveness of the school system for years to come.

The Agreement which ended this litigation, which was ultimately approved by this Court and incorporated into a Consent

Decree on June 22, 1984, requires the Court to determine, prior to the scheduled expiration date of the Decree on June 30, 1991, whether there has been compliance with the underlying Settlement Agreement.[1] If the Court finds that compliance has been achieved, it is to dissolve the Decree. If, on the other hand, the Court finds that total compliance has not been achieved, it may retain jurisdiction and order such additional steps as it deems necessarily appropriate. See Section 13 of Consent Decree approved June 22, 1984.

It is not the function of this document either to determine the present quality of education within the Cincinnati School District, to suggest methods by which that quality can be improved or to render a decision on whether that school district, having been granted ultimate discretion as to the method of achieving mutually bargained for and agreed upon desegregation goals, aided and assisted by 35 million dollars of state funds over the seven-year period of the Consent Decree, has made the most of the opportunity, as some would suggest, or has "flat-out blown that opportunity," as others are wont to say. Answers to those questions, intriguing though they may be, are for the people of Cincinnati rather than for a federal court to make. Rather, this writing is in the nature of a report card, grading

[1]The parties entered into the Settlement Agreement on February 15, 1984. Following a hearing in April, 1984, that Settlement Agreement was approved as a Consent Decree on June 22, 1984. The Settlement Agreement was thus incorporated into and became the Consent Decree. At times throughout this Opinion, the terms "Settlement Agreement" and "Consent Decree" are used interchangeably.

the Cincinnati School District upon its compliance (or lack of same) with the Consent Decree, in order to determine whether the District will receive a passing grade for compliance, and thus the termination of the Consent Decree and this Court's jurisdiction, or a less than satisfactory rating in this regard, thus requiring this Court to retain that jurisdiction in whole or in part.

In assessing these grades, the Court has had the absolutely invaluable and incomparable assistance of a dedicated community-wide Task Force, an able and highly qualified Facilitator and a group of hard working, ethical and honorable attorneys. The Task Force, established under the terms of the Settlement Agreement, with the objective of mobilizing and securing the widest possible support throughout the community for a fair and effective performance of the Consent Decree, has, since its initial meeting on January 10, 1985, worked tirelessly toward the goal of quality, integrated education for the school children of Cincinnati. Words can never be adequate enough to express this Court's appreciation to the members of the Task Force for the tireless manner in which they have gone about their work and the meaningful and significant contribution they have made both to the process of monitoring the Consent Decree and to the community as well.

The court-appointed Facilitator, Dr. Robert Evans, has likewise aided the monitoring process by the professional, low-key and objective manner in which he has served as the eyes and

ears of the Court and as both a moderating influence and, wherever deemed necessary, as a prod to the parties and the Task Force to keep the goal of preserving the integrity of the Consent Decree for the greater good of the Cincinnati school children ever in mind.

The attorneys deserve words of praise as well, not only for their work in the settlement process but also for their efforts subsequent to the approval of the Agreement by the Court.[2] These attorneys have succeeded in preserving the harmonious atmosphere that allowed settlement to occur and, by avoiding partisan bickering and posturing, have allowed this Court the benefit of facts brought forth during the three interim hearings held since the entering of the Consent Decree.

All of the above: Task Force deliberations, minutes and reports; Facilitator's reports; facts brought forth at interim hearings held in open Court, as well as this Court's observations (which will be commented upon below), thought processes and conclusions reached from a consideration of the foregoing, have enabled this Court to render this report card.

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[2]Along with the attorneys whose work facilitated the settlement process and who have remained with this case throughout this Court's seven-year period of jurisdiction (Thomas Atkins, William Taylor, Trudy Rauh and Mark O'Neill), special mention must be made of those who, once active in the process, have gone on---G. David Schiering, a former School Board member, who has returned to full-time private practice; David Nichols, Special Counsel for the State, tragically gone before his time; and Reginald Govan, who has likewise returned to the private practice of law---and of those who became active in the process only after the Agreement was approved by the Court---John West, John Concannon and William McClain.

Upon consideration of all relevant factors, and based upon the following reasoning, citations of authority and observations, this Court grades the Cincinnati School District as follows for its efforts at compliance during the seven-year term of the Consent Decree: very good in spots, tolerably good in another, not so good in part and, on balance, just not quite good enough for this Court to remove its jurisdiction entirely. Accordingly, the Court will release the Cincinnati School District from those provisions of the Consent Decree upon which this Court has found compliance, will retain jurisdiction over those aspects of the Decree upon which this Court has not found compliance by the Cincinnati School District and, finally, will set forth both the length and terms of this Court's continuing jurisdiction.

Before setting forth its reasoning behind the above conclusions, this Court wishes to set forth certain observations which it deems pertinent for the discussion which will follow:

First, it cannot be over-emphasized that the Settlement Agreement was just that---a voluntary, agreed upon settlement, between two parties to litigation, reached after a number of weeks of arms-length negotiations. As such, the Agreement, while requiring certain goals and results of and from the Cincinnati School District, allowed the District to arrive at those goals and results by means and methods of its own choosing. This Settlement Agreement was not a Court Order which, following a finding of intentionally systemic discrimination, imposed upon a school system a series of mandated results, coupled with a

detailed plan to achieve those results. Because of the nature of this Consent Decree, incorporating as it does a Settlement Agreement, this Court is powerless to and, therefore, will not criticize or offer any opinion on the manner by which the Cincinnati School District has carried out its obligations under that Decree, in the particulars upon which this Court has found compliance. Accordingly, this Court will not comment either on the fairness or otherwise of the District's staff racial balance policy or on the interesting and crucial questions of whether the District, by concentrating its attention on the alternative schools and magnet programs as a means of reaching its integration goals, has both unnecessarily strained the District finances and/or placed too little emphasis upon and, therefore, crippled or at least seriously injured the District's neighborhood schools.

Second, the loss of Superintendent, Dr. James Jacobs, little more than a year following the approval of the Settlement Agreement, was a tragic one for the Cincinnati School District. This is so, not because he was superior to his ultimate successor, Dr. Lee Etta Powell, who is a professional of great competence and dedicated to the school children of Cincinnati, but because Jim Jacobs, having been Superintendent during the pendency and settlement of this school desegregation lawsuit, realized full well the extent to which the settlement saved the school district and the City of Cincinnati from the chaos that would have inevitably resulted from a trial and a verdict on that

lawsuit, regardless of which side had ultimately prevailed. As a result, Superintendent Jacobs looked upon the Bronson settlement as a golden opportunity to achieve quality, integrated education, through the implementation of certain educational tools (alternative schools, etc.), aided and assisted by 35 million dollars in state funds, all the while preserving the integrity and ability of the Cincinnati School District to chart its own course. The Superintendent who ultimately came on board had no such historical perspective or institutional memory. When she came to Cincinnati, the Bronson settlement was an established fact. With the absence of this historical perspective and the sense of deliverance from litigation, the attendant urgency to comply was lacking. The present Superintendent, with all of her strengths and attributes, failed to instill in her administration a sense of needed urgency to carry out the Consent Decree. As such, Bronson became viewed as little more than an albatross to be hung around the neck of the Superintendent and the school administration. With the loss of the sense of urgency went the loss of the opportunity to comply fully with the Consent Decree, particularly in the areas of the low-achieving schools and unbiased disciplinary policies.[3]

Third, there may be those who complain of the so-called "overpowering federal presence," and who use that involvement as

[3]By the time of the third interim hearing, held on January 22, 1991, it could no longer be said that Superintendent Powell lacked this sense of urgency in carrying out the Bronson Settlement. Her testimony reflected an administrator firmly in charge and enthusiastic about the task ahead of her.

a scapegoat for all of the school system's real or imagined ills. Yet, if the reader will forgive the undersigned a blatantly self-serving statement, never, ever, in the entire history of school desegregation litigation, has there been a more benign, a less intrusive federal presence than in this, the Cincinnati school desegregation case.

Fourth, it must not be overlooked that much good has occurred during the seven-year term of the Consent Decree (both within and beyond the scope of that Decree), that many good things are continuing to occur and, based upon solid foundations built over the past several years by dedicated administrators, principals, teachers and support staffers, will continue to occur into the foreseeable future. The people of Cincinnati have much to be proud of in their schools. Financial troubles, lower than desirable test scores and this Court's having found less than 100 percent compliance with the Consent Decree should neither obscure the fact that in many respects things are in place that will pay dividends in the future nor temper the enthusiasm and desire of the people of Cincinnati to work for the continued improvement of their schools.

Among the many good things that have occurred (or have continued to occur) within the Cincinnati Public School System within the past seven years are the following, upon which this Court concludes that the Cincinnati School District has complied with the Consent Decree:

1. The Cincinnati School District has established an outstanding and nationally recognized system of alternative schools as part of its desegregation efforts.

2. The Cincinnati School District has effectively implemented re-districting and other techniques to break out of the district's racial isolation.

3. The Cincinnati School District's open enrollment policy has made an effective contribution toward reducing school desegregation.

4. Except for buildings which contain both racially divergent alternatives and traditional schools, the Cincinnati School District has not racially isolated students within buildings.

5. As a result of recent improvements in Cincinnati School District's bus pass policy, alternative school students are encouraged to and, in fact, do participate in a wide range of extra-curricular activities as contemplated by the Agreement.

6. In the absence of arguments or contentions to the contrary, it can (and will) be presumed that the Cincinnati School District has been able to continue the successful implementation of a policy designed to insure that tests administered throughout the district do not reflect cultural bias.

7. The NAACP, Cincinnati Board of Education and Cincinnati Metropolitan Housing Authority have cooperated in addressing the housing issues as contemplated by the Agreement.

In all the above areas in which this Court has found compliance with the Settlement Agreement, the Court hereby surrenders its jurisdiction over and, therefore, releases the Cincinnati School District from the operation of the Consent Decree.

A consent decree is essentially a settlement agreement subject to continued judicial policing. Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). A consent decree has the attributes of both a contract and a judicial decree. Id. See also, United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n. 10 (1975). Because a consent decree is a final judicial order, the provisions of an approved Consent Decree act as an injunction. Id. "The injunctive quality of consent decrees compels the court to: 1) retain jurisdiction over the decree during the term of its existence ...; 2) protect the integrity of the decree with its contempt powers ...; and 3) modify the decree should 'changed circumstances' subvert its intended purpose ...." Id. (citations omitted).

Because a consent decree has the attributes of a contract, it is to be construed for purposes of enforcement in the manner of a contract. ITT Continental Baking, supra, 420 U.S. at 238. As such, a consent decree should be construed consistently with fundamental precepts of contract construction. Id. at 238-40; Halderman v. Pennhurst State School and Hospital, 901 F.2d 311,

318 (3rd Cir. 1990).[4] However, a consent decree must be construed as written not as it might have been written if the plaintiff had prevailed on all his factual and legal theories. United States v. Armour & Co., 402 U.S. 673, 682 (1971). Therefore, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties." Id. Consistent with principles of contract construction, the parties are bound by what they agreed to, no more and no less; the parties are entitled to be bound only by what they have agreed to and no more.

When a consent decree is enforced, the most common method of enforcement is through contempt proceedings. However, because a consent decree is an injunction, a court may use all equitable powers to enforce it.

The Court has the power to extend its period of continuing jurisdiction. The Decree itself contemplates that if there has not been compliance with it, the Court may (but is not necessarily required to) retain jurisdiction over the Consent Decree. Section 13 of the Consent Decree, referenced above, which includes the provision for the hearing at the end of the Consent Decree, provides, in part:

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[4] Among the aids which a court may rely upon in construing a consent decree are the circumstances surrounding the formation of the consent decree, the technical meaning of words used in the consent decree and other documents expressly incorporated into the decree. ITT Continental Baking, supra, 420 U.S. at 238.

> If the Court finds [after the hearing] that compliance has been achieved, it shall dissolve the Decree. If the Court finds that compliance has not been achieved, it may retain jurisdiction and order such additional steps as it deems necessary and appropriate.

Clearly, this language authorizes the Court, upon a finding that there has not been compliance with the Consent Decree, to extend jurisdiction.

Thus, the question before this Court is whether there has been compliance with the Consent Decree. Plaintiffs, in their post-hearing brief, argue that there has not been compliance in the following areas: 1) the goals as measured by the Taeuber Index; 2) the low achieving schools; 3) unbiased discipline policies; 4) staff racial balance; and 5) failure to comply with § 3(c)(1) of the Consent Decree by allowing Burton and Bond Hill to operate as alternative programs when these programs remained racially isolated (90% or more of one race) for more than a year after the Consent Decree was approved.[5]

1. The Taeuber Index

The Agreement set a district-wide standard under the Taeuber Index of Dissimilarity to be achieved by the seventh year, with the school district committed to use its best efforts to achieve annual progress. The Taeuber Index measures the extent to which each school (or classification of schools---elementary, middle

[5]At the hearing of January 22, 1991, the Plaintiffs' focus was on the first three areas of non-compliance.

and junior high and high schools) reflects the racial composition of the district as a whole. It combines the result of that measurement, and computes a single number between 0 and 100. A reduction in racial isolation causes a reduction in the number (on the Taeuber Index, 100 reflects complete racial isolation and 0 shows that each school, or group of schools, mirrors the racial composition of the district as a whole). In the 1973-74 school year (when this lawsuit was filed), the district-wide Taeuber Index was 76. By the 1983-84 school year (when this litigation was settled), it was approximately 53, a reduction of 23 points in 10 years for an annual average reduction of 2.3 points. Under the Settlement Agreement, the 1983-84 school year index of 53 was to be reduced to approximately 36 (36.5 for elementary schools, 36 for middle and junior high schools and 34 for senior high schools), a reduction of 17 points in seven years, for an average annual reduction of 2.4 points.

In November, 1990, the school district announced that as a result of a process, begun on November 13, 1990, of filling all alternative school vacancies with waiting list students, primarily at the elementary school level, substantial reduction in the Taeuber Index had been achieved, sufficient to reduce the Taeuber at the elementary school level to 36, at the middle and junior high school level to 32.2 and at the senior high school level to 30.2 (levels amounting to achieved as opposed to Settlement Agreement goals of 103 percent, 149 percent and 146 percent, respectively).

While one might question the educational soundness of school transfers in the midst of a semester, the fact remains that those who drafted the Settlement Agreement negotiated specific targets or goals, specific numbers on the Taeuber Index, not the manner, method or means of reaching those targets or goals. As long as the methods used by the Cincinnati School District are not illegal (and mid-semester transfers are decidedly not illegal), they are a permissible method of reaching the desired level on the Taeuber Index. Likewise, the use by the Cincinnati School District of November enrollment data, rather than the October state funding enrollment data, previously utilized by the district to determine progress at the elementary school level, and the use of data from different periods to compute Taeuber Index progress for elementary schools (November) as opposed to senior and middle/junior high schools (October), are, in the absence of language in the Consent Decree forbidding the use of such data or mandating a different approach, permissible methods of computing the Taeuber Index.

The Plaintiffs concede that the Cincinnati School District has met its Taeuber Index targets for the middle/junior high and senior high school levels. However, they contend that under an "alternate" method of computing the Index[6], the school district

[6]Prior to the 1980-81 school year, the Cincinnati Public Schools treated combination buildings, i.e., buildings containing both an alternative and a neighborhood program, as two separate schools in the Index computation. When this change in methodology was reviewed in December, 1985, the Task Force adopted the following recommendation:

has fallen short of meeting the desired figures at the elementary school level. Plaintiffs state that by agreement between the parties, submitted to this Court on October 24, 1985, the Cincinnati School District agreed to annually compute its Index progress in accordance with this "alternate" method in addition to its "traditional" method, and that, therefore, the "alternate" method should be used to measure the school district's compliance under the Consent Decree. Since the gap between the two methods, at the elementary school level, is presently 0.9 points, Plaintiffs contend that the Cincinnati School District is not yet in compliance at that level.

While the Court vividly recalls the issue of the alternate versus traditional method of computation of the Taeuber Index being raised during the first interim hearing, the Court also recalls being advised by the parties that no decision needed to be rendered on which was the preferred method under the Consent Decree. No request was made to the Court to modify the Consent Decree by incorporating within that Decree the fact that the Cincinnati School District agreed not only to compute progress

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In order to make effective Section 7 of the Settlement Agreement, combination buildings should be treated as separate schools and a Taeuber Index computed and maintained on that basis, where their populations are racially skewed in opposite directions, unless it can be shown that there is substantial student contact between alternative and regular students in these buildings. For this purpose 'substantial student contact' should be defined as a majority of the school day.

under the Taeuber Index via the alternate method but also to be bound by the results of said computation insofar as measurement of its progress under the Decree was concerned. An agreement to compute a Taeuber Index by use of a certain method falls far short of agreeing to be bound by the results of said computation.

In the absence of a provision in the Consent Decree that the Taeuber Index must be measured under both the traditional and the alternate method and, further, that the Cincinnati School District must achieve the required targets under both methods of computation, to require the school district now, some seven and one-half years after the Agreement was negotiated and some seven years after that Agreement was adopted as a Consent Decree by this Court, to meet a requirement for which it neither bargained for nor agreed upon would be tantamount to changing the Agreement, the rules, at the end of the game. Parties are, as has been previously stated, entitled to be held only to what they have bargained for in a contract and no more. As long as the method of computation utilized by the Cincinnati School District is not unreasonable or misleading (and the label "traditional method" implies that it is neither) and as long as no different or additional method was required in the Decree, together with the requirement that the school district satisfy both, the Cincinnati School District is free to follow the traditional method of computation and to expect to be declared in compliance if computation thereunder meets the target set forth in the Decree. The Cincinnati School District is in compliance with the

target set forth in the Consent Decree, as measured by the traditional method of computing the Taeuber Index and, accordingly, is released from this Court's jurisdiction over that portion (Section 2) of the Consent Decree.

2. Low-Achieving Schools

Section 8 of the Consent Decree required the CSD to continue to target school improvement programs at students in low-achieving schools ("LAS").[7] Additionally, § 8 recognized that the Superintendent "has developed and is developing special strategies for improving the basic skills of students in low-achieving schools while addressing the educational needs of low-achieving students wherever they are assigned. [CSD] will implement such a program at a total cost of approximately 5 million dollars over the seven year term of this Agreement." In the Report of the Facilitator of November, 1990, as well as in the testimony introduced at the hearing of January 22, 1991, there is a full description of the history of the initiatives directed at the LAS. During the first two years of the Consent Decree, a program called Effective Schools was directed at the LAS. The Effective Schools Program showed initial promise. However, this period of initial success was followed by a three

[7] The CSD now refers to the Low-Achieving Schools as the "Coalition of Innovative Schools." As the Consent Decree uses the term "Low-Achieving Schools," the Court will use that term in this Decision rather than the far more euphemistic term now employed.

year period of what can best be described as "benign neglect." This period was highlighted by declining test scores of students in the LAS. A warning from Facilitator Robert Evans, coupled with his recommendations to focus on developing strong leadership and teaching staffs, was largely ignored. The period of benign neglect was in turn followed by the adoption of a new comprehensive five-year plan in the 1989-1990 school year.[8] While § 8 of the Consent Decree does not impose objectively quantifiable goals and results which must be reached (for instance, § 8 does not require that the students in the LAS reach specific levels in their standardized test results),[9] the Consent Decree, as is the situation with all contracts even through the most restrictive of constructions, imposes upon the CSD the element of good faith. In other words, the CSD was required to implement a plan which, based upon a track record developed within and over the seven-year term of the Consent Decree, had a reasonable chance of successfully addressing and ameliorating the problems of the LAS. Section 8 also obligated the CSD to seek to improve the LAS throughout the entire course of the agreement, not merely to implement a program, regardless

[8]More than the first year of this program was spent on planning and implementation. Therefore, this program has had the opportunity to benefit students for less than one school year. Moreover, there has also been less than one school year to gauge whether the program will be successful and actually benefit the students in the LAS.

[9]There is one quantifiable requirement contained in § 8, the obligation of CSD to expend approximately $5 million on strategies directed at the LAS. Plaintiffs do not contend that this sum was not expended.

of the quality of that program, so close to the end of the Consent Decree period that it is impossible to say at this juncture whether that program has a reasonable likelihood of success.[10,11]

Based upon the history of the Cincinnati School District's initiatives directed at the LAS, the Court concludes that CSD has not complied with § 8 of the Consent Decree. It has not adopted consistent initiatives directed at the LAS which could provide a track record by which its good faith can be judged. Moreover, it has not implemented programs directed at the LAS throughout the entire term of the Consent Decree. Accordingly, pursuant to § 13 of the Consent Decree, the Court will retain continuing

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[10] During the fairness hearing of April 24, 1984, which this Court held to determine whether to adopt the Settlement Agreement reached by the parties as a Consent Decree, William Taylor, Esq., lead negotiator for the Plaintiffs noted that the LAS initiative "will provide educational opportunities for students who will not in the near future obtain the benefits of a desegregated education." Doc. #715 at 32. Moreover, in adopting the Settlement Agreement as the Consent Decree now under consideration, this Court recognized that § 8 of the Consent Decree would result in "a strong program of remedial education" being directed at the LAS. Bronson v. Board of Education, 604 F. Supp. 68, 75 (S.D. Ohio 1984).

[11] Within the LAS, class sizes have been reduced, thus allowing each child to receive more individualized instruction from his or her teacher. This result is primarily attributable to an infusion of Title I funds from the federal government, rather than from any plan or initiative directed by or from the Cincinnati School District (the individual school building principals retain the discretion as to how these funds are spent. The bulk of these principals have opted to utilize these funds to reduce class size.)

jurisdiction for at least a two-year period of time over the implementation of § 8 of the Consent Decree.[12]

Over the course of three days, this Court visited every one of the low-achieving schools, speaking to principals, supervisors, teachers and students.[13] One wishes, in describing these experiences, that there existed within him the soul and writing ability of a poet, rather than the prosaic writing style of a lawyer turned Judge. Suffice it to say, that when one realizes the obstacles against which these dedicated

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[12]Although the Cincinnati School District indicated that it intends to continue to implement the present program after the termination of the consent decree, the Court, in absence of continued jurisdiction over this portion of the consent decree, does not understand that the Cincinnati School District would be legally bound to do so.

[13]This is a statement which apparently not one Board member can make. Based upon discussions with principals in each school, it appears that one Board member has visited almost all of the schools, another has visited two or three and no other Board member has visited any one of these school buildings. While this Court's survey is far from scientific, the small universe that was required to be sampled gives credibility to the above findings. This Court finds these facts to be as inconceivable as they are unconscionable. It is absolutely inconceivable (read "unbelievable") to this Court that duly elected public officials, charged by their constituents with the stewardship over public education within their city, would fail to visit and to become involved in these schools where "the action truly is," where the battle for the hearts, souls and minds of school children living in the heart of the central city will be fought through the remainder of this century and far, far into the next. This is a battle which we, as a society, cannot afford to wage with less than every resource at our command, for it is a battle, a war that we cannot afford to lose if we are to preserve in any respect the quality of life we all expect in this country. For a General not to visit this battlefield, for a General to approve and/or to make policy for these schools without firsthand knowledge of the conditions to which those policies are directed is nothing less than unconscionable.

people fight every day of their working lives, when one realizes that they keep alive the expectation and promise of success in their pupils' minds, rather than the inevitability of failure, then one realizes that when he is in the presence of a principal or teacher in these schools, he is in the presence of true giants, whose work and daily contributions make the lives and contributions of others, more highly publicized or more richly rewarded in financial terms, seem meaningless by example.

3. Unbiased Discipline Policies

The subject of discipline is covered in § 6 of the Decree, which provides, in part:

> The Cincinnati Board of Education currently has in force policies which require the unbiased application of discipline ... Those policies ... will remain in force subject to any modifications determined by CSD to be necessary to assure their effectiveness.

Section 6 also calls for the creation of a district-wide, ad hoc discipline committee, to review CSD discipline policies. The committee was to meet on an annual basis and to convey its findings to the Superintendent. A member of the NAACP was to be a member of the committee.[14]

Section 6 of the Consent Decree did not establish a specific policy of discipline, nor did it require the CSD to change its existing policies regarding discipline. Rather, it imposed two

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[14] Section 6 also addressed the question of unbiased testing. The Plaintiffs do not contend, and there is no evidence to suggest that the CSD did not comply with § 6 with respect to unbiased testing.

obligations on the CSD: to continue its policies requiring the unbiased application of discipline and to establish a process, in which the Plaintiffs had the right to participate, by which the CSD was required to review its discipline policies on an annual basis. The Plaintiffs argue that the CSD has failed to comply with this provision in two particulars. First, the Plaintiffs contend that the CSD failed to comply with the Consent Decree by not conducting the requisite review in 1989. Second, Plaintiffs contend that the Consent Decree has been breached because the disparity of discipline between black and white students suggests that unbiased discipline policies do not exist.

Plaintiffs' first contention involves an allegation that CSD breached its obligation to carry out an ongoing, annual process of reviewing policies regarding discipline. The Court agrees. The Cincinnati Board of Education concedes that the annual review required by § 6 of the Consent Decree was not conducted in 1989. The failure to conduct the review in 1989, thus necessarily depriving the Plaintiffs of their right to participate in that review, breached the obligations imposed upon the CSD by the Consent Decree. Furthermore, this cannot be considered an immaterial breach because in 1988 and 1989, the CSD was in the process of instituting new disciplinary policies.

Plaintiffs' second contention presents what is perhaps the most difficult question. In particular, Plaintiffs contend that the CSD has failed to continue its policies regarding the unbiased application of discipline. In support of this

contention, Plaintiffs point to the testimony of Dr. Lionel Hampton Brown, an assistant superintendent for the CSD, who testified that black students were twice as likely to be suspended as white students.[15] While acknowledging that the CSD is concerned over the disparity, Dr. Brown asserted that this raw numerical disparity did not indicate that the CSD maintains biased disciplinary procedures. Rather, he indicated that the disparity may result from the society from which students come. For instance, he testified that there are more children at risk than ever before attending schools and that there are now more children coming from single family homes.

Resolution of this question pits differing perceptions against each other. Certainly, the mere fact that there is such a large disparity in the number of students suspended does not necessarily establish that the CSD has abandoned its policy of unbiased application of discipline. However, this disparity creates within the Plaintiffs the perception that discipline is not being applied in an unbiased manner. On the other hand, the CSD's perception is that the disparity is caused by social conditions beyond its control. In this area, perceptions are vital because the CSD simply does not have a definitive explanation as to the cause of the disparity in suspensions.

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[15] Dr. Brown testified that three times as many black students as white students were suspended. However, when this figure was adjusted because there are more black students in the school system than white students, the ratio was reduced to two to one.

Under these circumstances, the Court cannot make findings (due to the absence of facts upon which to conclude which perception is correct) as to whether the CSD has failed to comply with § 6 of the Consent Decree by abandoning its policy of the unbiased application of discipline. The Court has indicated above that the CSD breached the Consent Decree by not conducting the requisite annual review in 1989. Therefore, the Court will retain jurisdiction over § 6 of the Consent Decree, as it relates to discipline, for at least a two-year period of time. This retention of jurisdiction will require two additional annual reviews of CSD discipline policies, with participation by the Plaintiffs. During the process of those reviews, the parties must determine the cause of the disparity in suspensions. At the end of the two year period, the Court will revisit the question or whether the CSD has maintained or has abandoned its policy of the unbiased application of discipline.

4. Maintenance of Staff Racial Balance

Section 5 of the Consent Decree required the CSD to maintain its staff racial balance policy. Section 5 provides:

> The Cincinnati Board of Education currently has in force a policy which requires that the staff in each of its schools has a racial composition which is within 5% of the racial composition of the staff in the district as a whole. The Board shall maintain that policy in effect and take the steps necessary to ensure that it is enforced.

Concerns regarding § 5 are a new phenomenon. During the first few years of the Consent Decree, few if any schools were not in

compliance with the staff racial balance policy. However, at the time of the hearing on January 22, 1991, twenty schools, or approximately 25% of the schools in the system, were out of compliance with the policy. The parties have filed a stipulation of facts (Doc. #779) which indicated that by May 24, 1991, the number of schools not in compliance had dropped to ten. Additionally, the CSD has a proposal for future compliance with § 5. See Memorandum attached to Stipulation (Doc. #779)

The CSD does not claim to be in compliance with the staff racial balance policy. Rather, it argues that it can be in compliance by June 30, 1991, or on any other date selected by the Court.[16] Indeed, the Court finds that the CSD is not in compliance with § 5 of the Consent Decree. Therefore, the Court hereby orders the CSD to be in compliance with the staff racial balance policy by the first day of the 1991-1992 school year. The Court will retain jurisdiction over § 5 of the Consent Decree to assure compliance with this order. Upon certification by the CSD shortly after the beginning of the 1991-1992 school year that all schools are in compliance with the staff racial balance policy, the Court will dissolve its jurisdiction over § 5 of the Consent Decree. At that time, the Board will be free to adopt, at least in so far as the Bronson Consent Decree is concerned,

[16]During a telephone conference with all counsel conducted in May, 1991, the CSD offered to transfer teachers during the last few weeks of the school year in order to bring all schools into compliance with the staff racial balance policy. The Court declined to require the proposed transfers, fearing that it would disrupt the education of many students during those last few weeks of the school year.

whatever policies regarding staff racial balance it deems advisable, whether through collective bargaining or otherwise.[17]

Finally, the Cincinnati Federation of Teachers ("CFT"), one of the Plaintiffs in Jacobson, has filed comments in this case (undocketed), requesting that in the event that the Court extends jurisdiction over this aspect of the Consent Decree, it (the Court) direct modifications in the method by which the policy is implemented and that the Court acknowledge that the Board may negotiate with the CFT regarding the implementation of the policy. The Court will decline to order modifications in the manner in which the policy is implemented. However, the Court is in total agreement with the CFT that the Board may negotiate with it regarding the method by which that policy is implemented. As long as all schools are in compliance at the beginning of the 1991-1992 school year, the Court will relinquish jurisdiction over this aspect of the Consent Decree. Any lawful means may used to achieve compliance prior to that date and the parties are free to bargain over the manner and the means of implementation of that policy. Additionally, once compliance is reached and

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[17] In the case of Bea Jacobson, et al., v. Cincinnati Board of Education, et al., Case No. C-1-90-449 (S.D. Ohio), this Court concluded that the implementation of the staff racial balance policy did not violate the Fourteenth Amendment. However, the method in which the policy is implemented may be considered "unfair" to some teachers in some instances, in particular when it requires the involuntary transfer of teachers and when it denies teachers the ability to exercise their transfer rights, secured through collective bargaining, when the school from which a teacher seeks to transfer is already out of compliance with the policy.

this Court has relinquished jurisdiction, the CSD and CFT will have complete freedom to bargain over how this policy or any other policy the Board sees fit to adopt in this regard is implemented. Indeed, they may reach such an agreement before the Court relinquishes jurisdiction over this aspect of the Consent Decree, to be effective as soon as this Court has acknowledged that compliance under the present Agreement has been accomplished, as long as there is compliance under the present policy at the beginning of the 1991-1992 school year.

5. Continued Operation of Racially Isolated Alternatives

Plaintiffs argue that the continued operation of Burton and Bond Hill Schools as alternatives when they remained racially isolated more than a year after entry of the Consent Decree violated § 3(c)(1) of that Decree.[18] Section 3(c)(1) provides that unless the CSD redesigned the program in a way it believed would reduce racial isolation, state funds may not be used for an alternative which remains more than 90% one race a year after the execution of the settlement agreement. Moreover, § 3(c)(1) provides that even if state funds are not used, the CSD, if it wishes to continue an alternative, must make efforts to reduce racial isolation in that alternative. The "evidence" cited by Plaintiffs seems to indicate that the CSD operated college

[18]For purposes of § 3(c)(1), a racially isolated school is defined as one in which 90% or more of the students are of one race. In the cases of Burton and Bond Hill, more than 90% of the students were black.

preparatory alternatives at Burton and Bond Hill throughout the seven year period of the Consent Decree even though they were each more than 90% black. However, the parties stipulation indicates that the CSD has carried out its intention to discontinue its designation of Burton and Bond Hill as alternatives for the purpose of receiving desegregation funds. Therefore, the Court concludes that the CSD is not out of compliance at this time with § 3(c)(1) of the Consent Decree.[19]

So the report has been rendered: good grades on many areas covered by the Consent Decree, a passing grade in the all-important Taeuber Index category, and below passing grades in the areas of staff racial balance, unbiased discipline problems and the low-achieving schools.

This Court has no doubt that in the area of staff racial balance the Board can be in compliance by the first day of this year's fall semester. Once that is accomplished, and the Court so advised, its jurisdiction over that aspect of the Consent Decree will dissolve.

With regard to the areas of the low-achieving schools and unbiased discipline policies, however, the Court's continuing jurisdiction will be of a greater duration and of a more

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[19]While there may have been a violation of the Consent Decree when Burton and Bond Hill continued to receive funds throughout the operation of the Decree, the Court concludes that the Plaintiffs waived their right to complain of same by failing to utilize § 12 of the Consent Decree to enforce this provision, through an action for specific performance, at any time during the term of the Decree.

intensive nature. A minimum two-year period of continuing jurisdiction should allow this Court ample time to determine the probability of success of the initiatives implemented by the Cincinnati School District with regard to the LAS in the 1989-90 school year. Such a period of continuing jurisdiction should allow answers to the questions of whether the latest Board plan for unbiased disciplinary policies can be successful and of whether the seeming statistical disparity between black and white suspensions is evidence of a biased disciplinary policy on the one hand or subject to a rational explanation on the other.

During this extended period of continuing jurisdiction, it is the Order of this Court that, in the area of low-achieving schools and unbiased disciplinary policies, this Court's Facilitator is to consult with the Superintendent (or Interim Superintendent), the Director of Student/Alternatives Office, the overseer for the low-achieving schools and that Deputy Superintendent with responsibility in the area of system-wide discipline, on a monthly basis, in order for the progress in both areas to be reported to the Facilitator and, through him, to the Court. In addition, within 30 days from the date of this Opinion, the CSD must submit to this Court, for its approval, a detailed plan as to how the District intends to interact with, to relate to and to utilize the expertise and enthusiasm of the Facilitator and the Task Force in the areas in which this Court has retained jurisdiction. The Court reserves the right to approve or to disapprove of that plan.

An interim hearing will be held in late June of 1992, for this Court to hear testimony as to the progress of the parties in these areas. A scheduled final hearing will be held in June of 1993. Should this Court, at that time, find the Cincinnati School District in full compliance with those portions of the Consent Decree regarding low-achieving schools and unbiased disciplinary policies, this Court's continuing jurisdiction will end and the Consent Decree will be dissolved. Should the Court not be able to make said findings, a further period of continuing jurisdiction will be ordered.[20]

During this continuing period of jurisdiction, the community-wide Task Force, as presently constituted, is to remain in existence, meeting on a monthly basis, with their areas of inquiry limited to the low-achieving schools and to the maintenance of unbiased policies of discipline. Although their areas of inquiry will be limited, it is the hope of this Court that the Task Force will serve as a resource and as a liaison between the Cincinnati School District and the community to bring the concerns and suggestions of the community with regard to the LAS to the CSD, to better acquaint the community with the progress in the low-achieving schools, and to engender support

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[20]The Court is neither optimistic nor naive enough to believe that all the problems of the low-achieving schools can be solved within the remaining period of continued jurisdiction. The problems of the schools and of those who attend them were not created within a finite period of time and they cannot be solved within a finite period of time, either through a Consent Decree or with the stroke of a Judge's pen. It is, however, neither overly optimistic nor unduly naive to expect progress---meaningful progress---within a finite period, however short.

among the community for those schools. The Task Force should also be prepared to serve a role as a liaison between the community and the CSD in the area of system-wide unbiased policies of discipline, by bringing to the CSD the concerns of the community in this regard and by bringing to the community the efforts of the CSD to secure racially unbiased policies and practices of discipline. The important role of the Task Force has neither been eliminated nor minimized by the fact that this Court's continuing jurisdiction is over only part of the original Consent Decree. Rather, the members of the Task Force should look upon the remainder of their work as an even greater challenge, concentrated as it will be upon two areas that are crucial to the effective functioning of the Cincinnati School District. It is to be hoped that the more focused charge of the Task Force will enable it to take on an even more significant role as it aids and assists the Cincinnati School District in its initiatives in the remaining areas within the purview of the Consent Decree.[21]

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[21]Much has been spoken of the fact that the Task Force may not be truly representative of a broad based range of constituencies within the Cincinnati School District. Without determining the truth of said observation, the parties are welcome to attempt to negotiate what they feel to be a more representative Task Force. Should such a revised Task Force be decided upon, a joint motion to modify the operation of the Consent Decree as it relates to the composition of the Task Force must be both submitted to and approved by this Court before it can become effective.

In spite of the fact that the Cincinnati School District has received below passing grades in the area of staff racial balance, low-achieving schools and unbiased disciplinary policies, the Court did seriously consider ending its jurisdiction over the Consent Decree and dissolving same on June 30, 1991. After all, with regard to staff racial balance, the Cincinnati School District has pledged that it can be in compliance at the beginning of the 1991-92 school year. With regard to low-achieving schools and unbiased disciplinary policies, plans <u>are</u> (albeit belatedly) in effect. In the persons of Dr. Lionel Brown and Dr. Cecil Good, among others, the Cincinnati School District appears <u>now</u> to have administrators with both the commitment <u>and</u> the capability (competence) to carry out any initiatives entrusted to them in these areas. In addition, it could be argued that there are a lack of identifiable, objective standards to be met by the Cincinnati School District with regard to these areas and that, therefore, all that is required is the good-faith implementation of programs, reasonably calculated to achieve positive results, to carry out the broad policy statements contained in the Settlement Agreement. Those arguments <u>might</u>, just might have <u>possibly</u> carried the day, had one more ingredient been placed into the mix, had one more factor been added to the equation. Had Cincinnati School District Superintendent, Dr. Lee Etta Powell, seemingly now infused with the urgency previously so lacking, been able to promise this Court, with the assurance that she

could live up to her promise, that the Bronson initiatives would survive the termination of the Consent Decree, that she would personally guarantee to the Court that the plans in place would achieve the objectives of the Settlement Agreement or that they would be fine tuned, if need be, to see that those objectives would be met (and that the CSD would be in compliance with the staff racial balance policy by the beginning of the next school year), then this Court, having the greatest of respect for the professionalism, integrity and competence of Superintendent Powell, might well have taken her at her word and cut the Gordian Knot that binds this Court and the Consent Decree to the Cincinnati School District.

However, that final ingredient, that final factor is not to be forthcoming. Superintendent Lee Etta Powell is, allegedly by her own hand, a lame duck. Lame ducks cannot make promises for they have not the ability to carry them out. The carrying out of any promises made by Superintendent Powell would be left to the discretion of her successor, who may or may not have any commitment to or interest in the continuation of the Bronson initiatives.

It is often said that "no one cares about poor children" or that "the poor have no constituency among a community's elected and appointed leadership." Without rendering a value judgment on those statements, generally, or without judging their applicability to Cincinnati, specifically, it is true, beyond dispute, that in a time of financial crisis, such as the one now

faced by the Cincinnati School District, the special needs of the poor are often disproportionately sacrificed and compromised on the alter of financial necessity and expediency. This, the Court cannot risk, particularly with the CSD not in compliance with the Consent Decree in two such crucial areas, with the financial problems of the District so great and with planning for the survival of the Bronson initiatives, following the termination of the Consent Decree, non-existent.

Therefore, the Consent Decree must remain undissolved with respect to these two areas and the Court must retain continuing jurisdiction to insure that the plans now in effect will be allowed to demonstrate a reasonable probability of achieving the broad policy behind the Bronson settlement.

To do otherwise, would be nothing less than a breach of faith, a breach of faith with the Plaintiffs, who settled this lawsuit only upon being first assured that special attention would be paid to these low-achieving schools, those schools which would inevitably remain primarily of one race, regardless of any innovative planning by the Cincinnati School District; a breach of faith with Superintendent Jim Jacobs, who put his not inconsiderable reputation for good faith and fairness on the line when he pledged his personal word, incorporated in the Settlement Agreement, to continue his efforts to provide quality education for the poor and the dispossessed in spite of their economic and social status; a breach of faith with the school children of Cincinnati; a breach of faith with the present day parents of

those school children who desperately look to the educational system as a means,---the only means---to raise their children out of their present way of life, a way of life not of their own choosing or of their own making, to a life where their children can have a reasonable probability of success, fulfillment and happiness generated through their own efforts and merit; and, finally, a breach of faith with the administrators, principals, teachers and staffers who labor, long and hard, every day of the school year in the low-achieving schools, and who, in spite of obstacles that can only be imagined (and cannot ever adequately be described) have never lost the faith, the belief that poor children can learn, can be taught in such a manner that they can and will be productive, contributing members of our society.

The Court will not breach this faith. To do so would be to subject the children in the low-achieving schools to the uncertain dedication and commitment of an as-yet-unnamed Superintendent, heading what will be at best a transitional administration buffeted by massive financial problems, led by a Board of Education whose members seemingly do not care enough, either individually or collectively, to visit and to monitor the progress within the very types of schools in which the future of our society will be determined. This, the Court cannot and will not do.

Those persons listed below will take note that a telephone conference call will be had with the Court, beginning at

4:45 p.m. on Tuesday, July 9, 1991, for the purpose of discussing any and all aspects of this Court's minimum two-year period of continuing jurisdiction.

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

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