IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **BOARD OF EDUCATION OF THE CITY OF CHICAGO,** Defendant.	Civil Case No. 80 C 5124 Hon. Charles P. Kocoras, Chief Judge

PRE-HEARING BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE MEXICAN AMERICAN LEGAL AND EDUCATIONAL DEFENSE FUND ON UNITARY STATUS

INTRODUCTION

This brief addresses the issue of whether the Chicago Public Schools System should be declared unitary in relation to its obligation to ensure racial integration in student admissions to magnet, gifted and selective enrollment schools ("MGSE schools").[1] Amici also seek to inform the Court on the constitutionality of the post-unitary use of race as one of several factors in student admissions policies when directed towards achieving racial and ethnic diversity.

In order to satisfy the "good faith" requirement of the 3-part test to determine unitary status established by the Supreme Court in *Board of Education of Oklahoma City Public School v. Dowell*, 498 U.S. 237 (1991), the Board must demonstrate to this Court that the Board's specific policies, decisions and courses of action that will extend into the future will comply with the provisions of the Constitution that were the predicate for this Court's intervention in the case.

[1] This brief does not address the provisions of the decree related to the Board's obligations with respect to English Language Learners ("ELLs"). Section IV of the Second Amended Consent Decree ("SACD"). Unlike the issue of student admissions to MGSE schools, the Government intends to contest the adequacy of the Board's compliance with the ELL provisions of the SACD. Consequently, Amici intend to file a post-hearing brief on ELL issues based on evidence adduced at the hearing.

Based on the Board's responses to discovery, including their experts' reports and depositions, the Board cannot make such a showing because it does not have plans regulating student admissions to MGSE schools or transfers that are sufficiently definite at this time. Until that showing is made, the Board cannot be released from provisions of the SACD related to these areas.

In addition, based on the reports of the Board's expert witnesses, it appears that once unitary status has been attained and the decree has been vacated, the Board intends to discontinue the use of race, in any manner, as a factor in student admissions practices to MGSE schools – a measure that the district has employed for many decades under the decree to integrate a portion of the CPS system, including some of its highest performing schools. While the Board appears to embrace the goal of continuing to seek racial diversity in MGSE schools after the decree is vacated, it asserts that this can be done without resort to race-conscious factors by relying instead solely on the use of socioeconomic status ("SES") of the student's neighborhood to make admissions decisions to MGSE schools. Richard D. Kahlenberg, *A Report to the Chicago Public Schools on Using Socioeconomic Status as a Factor in Student Assignment*, at 10-11, 15 (Dec. 1, 2008) (Dkt. #1291).

Amici respectfully submit that this Court must review any admissions policies when and if they are sufficiently defined by the Board prior to granting full unitary status. And, in light of evidence that SES-based policies, by themselves, may not achieve meaningful racial diversity and may instead result in increased racial isolation and resegregation, this Court should review any SES policies with great scrutiny. Finally, the Court also should consider whether the Board should be allowed to use admissions policies that flexibly consider race as one of several factors to further racial diversity and to ensure against discriminatory admissions policies. The use of

race in such a manner is countenanced by the Supreme Court decision in *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S.Ct. 2738 (2007).

BACKGROUND

On September 24, 1980, the United States Department of Justice ("DOJ" or "Government") and the Board of Education of the City of Chicago ("Board" or "CPS") entered into a consent decree, the Original Consent Decree ("OCD") in this case, to resolve the Government's complaint against the Board alleging, among other things, the discrimination in the assignment of black and Latino students. *United States v. Bd. of Educ. of the City of Chicago,* 554 F. Supp. 912 at n.1 (N.D. Ill. 1983). The OCD and the subsequent Student Desegregation Plan, both approved by this Court, contained provisions to desegregate the student body by noncoercive student transfers, integration of faculty and staff, establishment of magnet schools, bilingual programs, and remedial and compensatory education for minority school children who remained in racially isolated schools. *Id.* at 928; OCD ¶¶ I, III.

In January of 2003, this Court began to inquire about the status of the OCD and whether it continued to serve its original purpose in light of the changing demographics of the City of Chicago. Both parties and the amici submitted briefs to caution the Court against sudden dissolution of the decree. The Court's inquiry led to discussions between the Board and the Government as to what would be the best course of action to bring this case to a just resolution. These discussions culminated in the filing of a Modified Consent Decree ("MCD") (Dkt.# 1094).

In 2005, the Court again raised questions about the future of the decree and asked the parties which provisions of the MCD should continue, if any, and set a hearing for May 15, 2006, to consider this question. The MCD was entered into for the purpose of bringing this long-standing litigation to an orderly and just conclusion, embodying the central purposes of the OCD.

Joint Mot. of U.S. and Bd. of Educ. of the City of Chicago for Approval of the Second Amended Consent Decree at ¶ 2 (May 1, 2006) (Dkt. # 1224). Subsequent to the entry of the MCD, disputes arose between the parties, described in various motions and briefs filed by the parties. The parties engaged in settlement discussions that resulted in a further revision of the agreement between the parties. The Court vacated the MCD and entered the Second Amended Consent Decree ("SACD") on August 10, 2006.[2] (Dkt #1239). The SACD continued the Board's obligation to employ race-conscious policies in admitting students to MGSE schools in a manner that advanced integration and lessened the racial isolation of students in other schools. The SACD is the subject of the Court's present inquiry.

ARGUMENT

I. In Order to Attain Unitary Status, the Board of Education Must Show it Will Not Discriminate After the Vacation of the Consent Decree

A. Legal Standards Governing Unitary Status and Partial Vacation of Desegregation Consent Decree

In Board of Education of Oklahoma City Public School v. Dowell, 498 U.S. 237 (1991), the Supreme Court established a three-part test under which a district court may end supervision over all or part of a desegregation decree, recognizing that school desegregation decrees are not intended to operate in perpetuity. *Id.* at 248. There must be a showing that (1) the board has "complied in good faith with the desegregation decree since it was entered," (2) "the vestiges of past desegregation ha[ve] been eliminated to the extent practicable," *id.* at 249-50, and (3) it is

[2] It is noteworthy that while the Government and the Board agreed to an automatic termination of the SACD, this Court rejected that term and instead retained the right of court review and approval of any termination of the SACD.

unlikely that the school board will return to its old ways.[3] *Id.* at 247. To determine whether vestiges of past discrimination have been eliminated, "the District Court should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.'" *Id.* (quoting *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 435 (1968)) (the *Green* factors).

Later, in *Freeman v. Pitts*, 503 U.S. 467 (1992), the Supreme Court reiterated these standards and held that the district court may order "partial withdrawal of its supervisions and control," *id.* at 489, on a finding of full compliance with the decree in those aspects where supervision is to be withdrawn, whether retention of judicial control is necessary or practicable to achieve compliance with the decree, and, most important here, whether the school district has demonstrated "its good faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first place." *Id.* at 491.

The U.S. Court of Appeals for the Seventh Circuit has relied on the standards established by the Supreme Court in *Dowell* and *Freeman* in school desegregation cases. *See, e.g., People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1074 (7 th Cir. 2001) (Posner, J., citing *Dowell*); *United States v. Bd. of Comm'rs of Indianapolis,* 128 F. 3d 507, 511 (7th Cir. 1997) (Posner, C.J., citing *Dowell* and *Freeman*). Both the Supreme Court and the Seventh Circuit have emphasized that "[p]roper resolution of any desegregation case turns on a careful assessment of the facts." *Freeman*, 503 U.S. at 474; *Green*, 391 U.S. at 439; *Bd. of Comm'rs of Indianapolis*, 128 F.3d at 512. The assessment of a school district's unitary status must be made on a record compiled in the district court. *Bd. of Comm'rs of Indianapolis*, 128 F.3d at 512.

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[3] This has also been interpreted as the "second prong of the good faith inquiry." *Dowell v. Bd. of Educ. of Oklahoma* City, 8 F.3d 1501, 1512 (10th Cir. 1993) *on remand.*

In determining unitary status, district courts typically hold evidentiary proceedings, review the record and issue comprehensive written findings reviewing the *Dowell, Freeman* and *Green* factors. *See, e.g., Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 273 F. 3d 960) (11th Cir. 2001) (court issued 140-page opinion to conclude school district had attained unitary status); *Coalition to Save Our Children v. State Bd. of Educ.*, 901 F.Supp. 784 (Del. 1995), *affd*, 90 F.3d 752 (3rd Cir. 1996) (making 308 separate factual findings, court concluded school district attained unitary status)); *Berry v. Sch. Dist. Of the City of Benton Harbor*, 195 F. Supp. 2d 971 (W.D. Mich. 2002) (after several weeks of testimony, district court issued comprehensive opinion concerning compliance with orders and each of *Green* factors). Amici stress that even in cases where the parties agree that a school district has attained unitary status, district courts should make detailed factual findings reviewing the appropriate factors. *Fisher v. Tucson Unified Sch. Dist. No. 1*, 2007 WL 2410351 at *3 (D. Ariz. 2007).

In sum, in order to be granted unitary status, the Board must make a showing on the record that (1) it has complied in good faith with the desegregation decree since it was entered, (2) the vestiges of past desegregation have been eliminated to the extent practicable, and (3) it is unlikely that the school board will return to its old ways by showing a good faith commitment to the constitutional rights that were the predicate for judicial intervention. Below we show that the Board appears unable to make the requisite showing of a good faith commitment because of the lack of concrete policies, decisions and courses of action extending into the future regarding admissions to MGSE schools.

B. The Board Must Have Well-Defined Future Policies in Order to Meet the Good-Faith Requirement

In *Freeman v. Pitts*, the Court recognized the importance of defined future plans:

> Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of the decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance.

Freeman, 503 U.S. at 489-90. "[O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a *course of action* that gives full respect to the equal guarantees of the Constitution." *Id.* at 490 (emphasis added). Indeed, the Board has agreed in this very case that it has an obligation to develop policies and procedures for implementation after unitary status is attained in areas such as student and faculty assignment, admission to magnet schools, and the opening and closing of schools. Def.'s Mem. Detailing the Legal Standards to Determine Unitary Status and Proposing a Timetable for Just Resolution of This Case, at 13 (Feb. 14, 2003) (Dkt. #1074).

The good faith showing described in both *Dowell* and *Freeman* means that "specific policies, decisions and courses of action that extend into the future must be examined to assess the school system's good faith." *Dowell v. Bd. of Educ. of Oklahoma* City, 8 F.3d 1501, 1513 (10th Cir. 1993) *on remand*, (relying on *Brown v. Bd. of Educ.*, 978 F. 2d 585, 592) (10 th Cir. 1992). And, the Board must do more than express the intent to comply with the Constitution in the future. "Mere protestations of an intention to comply with the Constitution in the future will not suffice." *Brown*, 978 F. 2d at 592; *see also Dowell*, 8 F.3d at 1513 (internal citations omitted). In *Fisher v. Tucson Unified School District No. 1*, the district court refused to make the requisite good faith finding because the school district did not submit an exit plan detailing specific policies, decisions and courses of action extending into the future. *Fisher*, 2007 WL 2410351 at *4. The court held that "it is necessary as a practical matter to present such an exit plan to the Court to establish Defendants' good faith commitment to the future operation of the

school system in compliance with the constitutional principles that were the predicate for the Court's intervention in this case," *id.* at *13. Because the record was devoid of any specific policies, decisions, or proposed courses of action extending into the future, the court was unwilling to close the case, stating that

> Post-unitary goals, requirements, and provisions shall be clearly stated, measurements of success and effectiveness shall be established, timely and periodic review and reporting to the community regarding implementation, operation, and progress shall be established, and there shall be mechanisms for direct communication from the public to the School Board. This Court shall approve the transparency of the post-unitary provisions to ensure that the community at large has access to all the information necessary to oversee [the district's] compliance with them.

Id. at *14. The court ordered the parties to work together in good faith to develop post-unitary provisions and ordered that the provisions address the *Green* factors, noting that the future plans and provisions are relevant for ensuring defendant's future good faith and are not simply remedial measures. *Id.* at *15.

C. The Board Has Not Identified Specific Future Policies Regarding Admissions to MGSE Schools

The Board has not proposed a definite plan for how it will handle admissions to MGSE schools once the district has been declared unitary. The Board submitted various expert reports on December 1, 2008, pursuant to the Court's Order on September 22, 2008, and in compliance with Rule 26 of the Federal Rules of Civil Procedure. One of the Board's experts, Richard D. Kahlenberg, submitted the report titled "A Report to the Chicago Public Schools on Using Socioeconomic Status as a Factor in Student Assignment" ("Kahlenberg Report") (Dkt. #1291). While the report includes Kahlenberg's opinions, Section 6, "Recommendations for Chicago's Magnet and Selective Programs," is devoid of any concrete policies, decisions or courses of action that the district might implement going forward. Instead, Kahlenberg recommends

broadly that CPS use SES as a way of promoting greater achievement, racial and economic diversity in the schools, and states that in the coming weeks he will be working with CPS "to make recommendations on the contours of a possible socioeconomic-based student assignment policy..." Kahlenberg Report at 29. As of Kahlenberg's deposition on January 9, 2009, no further progress had been made on this front. Tr. of Dep. of Kahlenberg at 19-31 (Jan. 9, 2009) (attached as Exhibit A).

The Board's other expert that touches on the use of SES factors for student "allocation," David G. Blanchflower, also submitted a report that contemplates the use of SES factors for CPS, but is far from constituting any sort of detailed plan or course of action. In Section 10 of "Report by Defendant's Expert," ("Blanchflower Report"), he states that "it makes sense" for CPS to "look into ways of allocating students to schools" using SES criteria. Blanchflower Report at 50 (Dkt. #1293). He describes a methodology that could be used by CPS to determine the SES status of neighborhoods to use as a proxy for the SES of the student's family, presuming that that individual SES information would not be readily available to the district. *Id.* at 51-53.

In written discovery requests served on the Board by the DOJ on September 26, 2008, the DOJ requested "[a]ll documents regarding how the District intends to admit students to magnet and specialized schools once the District's desegregation obligations under the SACD are dismissed." Pl.s' First Set of Interrog. and Doc. Req. at 10 (Sept. 26, 2008). On October 27, 2008, the Board answered the DOJ's request with the following response: "CPS will respond to this Document Request no later than the December 1, 2008, time frame afforded for such disclosures by the Court in its September 22, 2008 Order." Def.'s Ans. to Pl.'s First Set of Interrog. and Doc. Req. at 14 (Oct. 27, 2008) (Discovery requests and answers attached hereto as Exhibit B). Fact discovery closed on November 17, 2008, and the deadline for the submission of

expert reports was December 1, 2008. It is apparent that the Board has no written, defined policy for admission to MGSE schools.

Thus, the Board has not established a sufficiently definite plan detailing the policies, decisions and courses of action extending into the future regarding admissions to MGSE schools. It seems the only future commitment the Board has made at this point is to plan to develop a plan for admissions to these special programs.[4] The Board's commitment to plan does not rise to the level of meeting the good faith requirements in *Dowell* or *Freeman* needed to attain unitary status.

D. Until the Board Submits a Sufficiently Detailed Plan to the Court, the Board Cannot Be Released from Provisions of the Second Amended Consent Decree Related to Admissions to MGSE Schools

In view of the intense factual basis required for the determination of unitary status and the apparent lack of a sufficiently detailed plan regarding future admissions policies for MGSE, the Board cannot be declared unitary with respect to those provisions of the SACD. In the SACD, the parties agreed that CPS would use a variety of strategies to assign students to schools in an effort to "establish and maintain as many schools with desegregated enrollments as practicable" including the use of magnet schools and specialized schools (selective enrollment high schools, gifted centers, classical schools, academic schools, IB preparatory and other options). SACD ¶ I.A. Under the SACD, CPS shall achieve and maintain desegregated magnet and specialized schools—schools that have enrollments that are 15% to 35% white and 65% to 85% minority—through race-conscious student assignment policies. SACD ¶ I.B. CPS achieves

[4] The SACD also makes provisions for other voluntary options to increase desegregated enrollment in schools such as Majority to Minority Transfers ("transfers") which allows students the opportunity to transfer from a school where they are in the racial or ethnic majority to one where they are in the racial or ethnic minority where there is space and provisions for transportation. SACD ¶ I.E. These transfer provisions have not been addressed by the Board or the reports of the Board's experts.

these racial goals through the explicit consideration of the race of individual student applicants.

The reality is that under any circumstances, the Board is not presently prepared to implement any new policy and that CPS will operate under the existing admissions plan at least for the 2009-2010 school term and will continue to do so until it develops a new plan. Thus, the Board must continue to adhere to the provisions of the SACD and cannot be declared unitary unless and until it submits a sufficiently detailed plan for future admissions.

II. Race, As One of Several Factors, May Be Constitutionally Employed in a Post-Unitary Admissions Plan

During the recent history of this case, this Court has never seriously called into question the importance of reducing racial isolation in public elementary and secondary schools that are, distressingly, subject to increasing re-segregation across the country. There is an ongoing prevalence of segregation in elementary and secondary schools, and this trend is reflected in magnet schools as well. Erica Frankenberg & Genevieve Siegel-Hawley, THE FORGOTTEN CHOICE? RETHINKING MAGNET SCHOOLS IN A CHANGING LANDSCAPE, 16 (Nov. 2008) (citations omitted). Eighty-five percent of CPS students attend "racially identifiable" schools (schools with a minority enrollment above 85 percent). Blanchflower Report at 24. The Board's expert reports that the proportion of African American students in high school magnets declined from 52 percent in 2000 to 37.8 percent in 2007. *Id.* at 17. Data from CPS' annual Racial Ethnic Surveys demonstrates that the enrollment of African American and Latino students at selective enrollment high schools has also declined over time. For example, at Payton High School, there has been a 27 percent drop in the combined enrollment of African American and Latino students, down from 65 percent in 2001 to 38 percent in 2008, while the enrollment of white and Asian students has increased nine and seven percent respectively during that time. CPS, Racial Ethnic Surveys, *available at* http://research.cps.k12.il.us/cps/accountweb/Reports/RacialSurvey. In

other instances, African American and Latino students are not well represented in these selective enrollment schools. For example, since 2000, the African American population at Northside High School has remained at a low five percent. *Id.* Likewise, Lane Tech High School has maintained an African American population that dropped from 18 percent in 2000 to just 13 percent today.

The Supreme Court first held that student body racial diversity was a compelling interest in the context of higher education in *Grutter v. Bolinger*, 539 U.S. 306, 328-33 (2003). More recently, in *Parents Involved in Community Schools v. Seattle School District No.1*, a majority of Justices found a compelling interest in promoting student diversity and avoiding racial isolation in K-12 schools. 127 S.Ct. at 2797 (Kennedy, J., concurring). Racial diversity in public schools is even more compelling in the K-12 context than it is in higher education, in large part because K-12 education, which must be provided for all students, reaches more students, and at an earlier stage of their development when they are more impressionable. The Supreme Court declared in *Brown* that the benefits of a diverse educational environment include in large part qualities beyond objective measures, intangible considerations such as the opportunities to engage in discussions and exchange views with other students, noting that "[s]uch considerations apply with added force to children in grade and high schools." *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494-95 (1954). *See also Hart v. Comm. Sch. Bd. of Brooklyn*, 536 F.Supp 2d 274, 283 (E.D.N.Y. 2008) (finding that the same considerations relied upon in higher education race-conscious admissions decisions *Grutter* and *Bakke* should be applied to grade schools "where characteristics for future success or failure are imprinted on students").

A. The Use of Race as a Factor for Admissions to MGSE Schools May Continue to be Used by the Board After Unitary Status is Attained

MGSE school programs have been the Board's tools of choice to promote diverse and integrated schools in the district. This Court has called the magnet schools "one of the crown jewels" of CPS. Tr. of 9/22/05 at 23. In September of 2004, in anticipation of seeking unitary status, the Board convened the Blue Ribbon Commission ("Commission") to recommend options for managing admissions to CPS' magnet schools, including gifted, classical and selective enrollment elementary and high schools in the future. *Options for Managing Admissions to CPS Magnet Schools,* Blue Ribbon Commission Report at 2 (Feb. 2005) ("Commission Report") (Attached as Ex. C).

The Commission found that in a number of these schools, the applicant pool is not diverse enough to guarantee a diverse student body without some attention to race and ethnicity during the process, noting that "unless race continues to be a selection factor, there is a danger of losing diversity in some schools, which in turn would deprive students of...valuable learning experiences..." Commission Report at 7. Further, the Commission stated that "it is necessary that school districts have the option to use race and ethnicity when they believe that, without the use of race as one of the factors in the admission process, students will not be able to have the educational benefits of diversity or to avoid the harms of racial isolation." Commission Report at 8. The Commission advised the Board that CPS should continue using race and ethnicity as a factor in selecting students, along with race neutral factors, and that CPS should "implement flexible race and ethnic admission guidelines, depending on the applicant pool." *Id.* at 11.

In *Parents Involved in Community Schools* (*"PICS"*), the Supreme Court rejected the use of race in student assignment plans that "do not provide for a meaningful individualized review of the applicants but instead rely on the race of a student in a non-individualized, mechanical way," 127 S.Ct. at 2754 (internal citations omitted), but the Court did not foreclose the

consideration of race altogether. For the first time, a majority of Justices, the four dissenting Justices and Justice Kennedy, concurring, found a compelling interest in promoting student diversity and avoiding racial isolation in K-12 schools: "A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population." *PICS*, 127 S.Ct. at 2797 (Kennedy, J., concurring). Further, Justice Kennedy acknowledged the need in some cases to consider race in school assignments: "Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered." *Id.*

While the opinion strongly discouraged the use of race in a mechanical, non-individualized way that would serve the objective of racial balancing, Justice Kennedy explicitly endorsed the following race-conscious methods: (1) strategic site selection of new schools; (2) drawing attendance zones with general recognition of the racial demographics of neighborhoods; (3) allocating resources for special programs; (4) recruiting students and faculty in a targeted manner; and (5) tracking enrollments, performance and other statistics by race. 127 S.Ct. at 2792 (Kennedy, J., concurring). [5] Justice Kennedy added that race could be a component of other assignment methods as long as they reflect a "more nuanced, individual evaluation of school needs and student characteristics." *Id.* at 2793.

[5] The *PICS* decision should be read in light of the principle set forth by the Supreme Court in *Marks v. United States*, 430 U.S. 188, 193 (1977) that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds." The *Grutter* Court applied *Marks* to endorse the view of Justice Powell's concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) that student body diversity is a compelling state interest. *Grutter*, 539 U.S. at 325. Accordingly, it is the view of Justice Kennedy in *PICS* that represents the guiding standard on the use of race as one of a number of appropriate factors.

Importantly, Justice Kennedy warned: "The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds." *Id.* at 2797. Lower courts have recognized the continuing and current problem of segregated schools, even if not the result of *de jure* segregation, and the harms that can stem from racially isolated schools: "[T]he cruel irony is that racial isolation, albeit not as the produce of *de jure* segregation, largely remains as foreboding and potentially deleterious as it was when federal court supervision began…[D]espite the societal progress that has been made in dismantling systems of segregation, many of the concerns highlighted in *Brown* still remain as viable today as when that opinion was first authored." *Anderson v. Sch. Bd. of Madison Cty.*, 517 F.3d 292, 305-06 (5th Cir. 2008) (Stewart, J., concurring). While some district courts have followed the *PICS* mandate to strike down student assignment plans that classify and assign students on the basis of race alone, *see, e.g., Fisher v. Tucson Unified School District No. 1,* WL 2410351 at *11-12, the decision, and particularly Justice Kennedy's controlling opinion, leave room for the use of race-conscious admissions in a nuanced and flexible way.

In light of national trends and as recognized by the Commission, there is a danger that without the consideration of race in the admissions process, the MGSE schools in Chicago will segregate rapidly. In developing a sufficiently detailed plan for admissions in the future, the Board should consider and this Court should approve the use of race-conscious methods that would be permissible under *PICS* and that would ensure that all children in CPS have the opportunity to attend the "crown jewels" of the district.

B. The Use of Socioeconomic Status Alone Has Not Been Proven to Create a Meaningful Amount of Racial Diversity

If the Board is committed to a post-unitary goal of racial diversity in the MGSE schools, it is not likely that a policy based on SES factors alone will meaningfully advance such a goal. The Board, through its experts, proposes using socioeconomic status for admissions to MGSE schools as a race-neutral alternative that will yield racial diversity in these schools. In support of that position, the Board seems to rely on the opinions of its expert Richard D. Kahlenberg, who asserts that SES policies are "successful in producing racially diverse environments." Kahlenberg Report at 15. However, in his report, Kahlenberg cites evidence that SES-based admissions policies would lead to only half of the racial integration achieved through the use of race-conscious admissions policies. *Id.* at 12 ("According to a 2002 Century Foundation study conducted by Duncan Chaplin of the Urban Institute, integrating poor and nonpoor students results in 55.6 percent as much black/white integration as poor/nonpoor integration at the district level.") (citations omitted).

In addition, Kahlenberg states in the report that there is no better way to achieve racial integration than by using race itself, *id.* at 10, and in other writings has also opined that "class should be a supplement to rather than a replacement for race" in school assignments. Richard D. Kahlenberg, *Socioeconomic School Integration – A Reply to Responses*, POVERTY & RACE (Poverty & Race Research Action Council, Washington D.C.), Nov./Dec. 2001 (internal quotations omitted). In a recent study designed to explore the extent to which race-neutral SES-based plans produce ancillary racial integration, the researchers concluded that "under conditions typical of large school districts in the United States and under practical income-desegregation policies, achieving income desegregation guarantees *little to no racial integration.*" Sean F. Reardon et al, *Implications for Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVAL. & POL'Y ANALYSIS 49, 63 (2006) (emphasis added).

At best, solely SES-based assignment policies provide only an indirect and meager tool to achieving racial diversity and evidence suggests that these policies may be more successful in districts that have a lower proportion of low income students than CPS. In his report, Kahlenberg profiles the individual approaches of five school districts currently implementing SES school integration: Wake County, North Carolina; La Crosse, Wisconsin; Cambridge, Massachusetts; San Francisco, California; and Jefferson County, Kentucky. Kahlenberg Report at 19-28. He briefly evaluates the five district plans based on educational outcomes and the impact on racial diversity, but he is only able to evaluate the racial integration component for three of the five districts due to a lack of data for the remaining two districts. *Id.* at 25-28.

Based on his analysis, the beneficial impact of SES on racial integration in the school districts Kahlenberg has chosen to profile is far from clear. Kahlenberg asserts that Wake County's economic plan has produced "robust racial diversity." *Id.* at 26. While it may be true that Wake County schools have not rapidly resegregated since the implementation of an SES integration plan in 2000,[6] one explanation is that only 40 percent of the district's students are considered low income, and the vast majority of those students are black and Latino. Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAGAZINE, July 30, 2008. In the CPS system, 84.9 percent of the students qualify as low income by commonly used measures.[7] Even with such a close correlation between class and race, the proportion of students in racially segregated schools in Wake County has risen from 25 percent to 32 percent. *Id.* Thus, it seems much more likely that CPS would be vulnerable to the rapid resegregation experienced by other

[6] Kahlenberg reports that under the old racial integration policy, 64.6 percent of Wake County schools were racially integrated by the district's own measure in 1999-2000, and two years later, under the new SES integration policy, 63.3 percent of schools were racially desegregated. Kahlenberg Report at 26 (citations omitted). In his deposition, Kahlenberg agreed that the outcome measured just two years after implementation of the SES plan would be affected in part by the incremental phasing in of the SES plan. Tr. of Dep. of Kahlenberg at 40 (Jan. 9, 2009).

[7] CPS At A Glance, *available at* http://www.cps.k12.il.us/AtAGlance.html (last visited January 18, 2009).

large school districts with a high proportion of low income students, such as the San Francisco Unified School District ("SFUSD") discussed below, under an SES-only admissions plan for its MGSE schools.

Kahlenberg suggests that the economic plan in Cambridge has produced "substantial racial diversity," however, that plan allows for race to be used as a potential factor in student assignment. Kahlenberg Report at 27. Moreover, the NAACP Legal Defense and Educational Fund reports that the number of racially identifiable schools (schools that do not fall within the plus or minus 10% racial diversity range established by the district) have more than doubled in the Cambridge Public Schools since the district made the shift from a plan that specifically took account of race to a plan that uses SES as the principle factor in assignment, and race as a back-up measure should SES not produce sufficient racial diversity. NAACP Legal Defense and Educational Fund, Inc., STILL LOOKING TO THE FUTURE at 53 (2008); Kahlenberg Report at 22.

Kahlenberg admits that in San Francisco, economic diversity has not produced "as much racial diversity as the old racial desegregation plan," and that the number of schools that are considered segregated (more than 60 percent of students are of one race in one or more grade levels) rose from thirty in 2001-02 to forty-five in 2004-05. *Id.* at 26-28. *See also* Bazelon (July 20, 2008) ("The City of San Francisco…has undergone substantial resegregation since retooling its diversity plan to emphasize socioeconomic factors."). In a brief amici curiae submitted on behalf of respondent school districts in the *PICS* case, SFUSD asserted as its interest "its own unique experience, knowing first-hand that the use of race-neutral student assignment methods has led to severe resegregation in its schools, classrooms and programs" and stating that "the use of race in student assignment is necessary to avoid racial segregation." Br. of Council of Great

City Schs., et al., as Amici Curiae in Support of Respondents, 2006 WL 2882698 (U.S.) at * 30 ("Great City Schools Brief").

Perhaps the most telling fact is that CPS joined with SFUSD, the Council of Great City Schools, Magnet Schools of America, Public Education Network, and the United States Conference of Mayors in submitting the brief amici curiae in support of the Seattle and Jefferson County school districts.[8] In the brief, the school districts declare that race-neutral alternatives are insufficient to achieve the compelling interest of racial diversity and that evidence does not support the assertion that SES could be used instead of race to achieve the goal of racial diversity. *Id.* at *22-27.[9]

Because race-neutral alternatives such as the use of SES alone have not been proven to meaningfully serve what a majority of Supreme Court Justices have recognized as compelling interests—avoiding racial isolation and achieving a diverse student population, and in fact could be used to discriminate against students of color, this Court should not readily give its imprimatur to its use.

C. This Court Should Appoint an Independent Expert Pursuant to Rule 706 of the Federal Rules of Evidence to Examine the Impact of an Admissions Plan to MGSE Schools that Uses Socioeconomic Status

[8] The Bush administration submitted amicus briefs in the *PICS* case in support of petitioners arguing in the main that race-based student assignment plans violate the Equal Protection Clause of the Fourteenth Amendment because such plans are devoid of individualized consideration and are indistinguishable from a quota, but recognized that "[s]chool districts have an unquestioned interest in reducing minority isolation…". Br. for U.S. as Amicus Curiae Supporting Pet'r, 2006 WL 2415458 at *6-7 (U.S.) (Seattle); Br. for U.S. as Amicus Curiae Supporting Pet'r, 2006 WL 2415459 at *6-7 (Jefferson County). The Bush administration also argued that SES would advance the goal of racial diversity. Amici, at this time, are not informed as to whether the present Obama administration shares this view.

[9] They stated their collective interest as "school districts and national organizations that are deeply committed to providing high quality and equal educational opportunities for all of the nation's schoolchildren. Amici and their members are committed to preserving for their members the flexibility to make race-conscious student-assignment policies to maintain racially diverse student bodies." Br. of Council of Great City Schs., et al, as Amici Curiae in Support of Resp'ts, 2006 WL 2882698 (U.S.) at * 1.

The Board's proposed use of SES factors in an admissions plan must be examined by the Court to ensure that such race-neutral measures that can be a proxy for race are not used to discriminate in the future. Amici strongly urge this Court to appoint an independent expert pursuant to Rule 706 of the Federal Rules of Evidence to review the implications on students of color of any SES-based admissions policy the Board adopts. It is within this Court's purview to appoint an expert witness to aid in disposition of the case. FED. R. EVID. 706 ("The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."). *See Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962) ("Appellate courts no longer question the inherent power of a trial court to appoint an expert under the proper circumstances, to aid it in the just disposition of a case."). Several district courts have appointed experts in the context of school desegregation cases to make recommendations to formulate desegregation plans as well as to assess and evaluate the implementation of such plans. *See e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1,* 560 F.Supp. 876, 878 (1983); *Keyes v. Sch. Dist. No. 1, Denver, Colorado*, 540 F. Supp. 399, 404 (1982).

As discussed above in Sections I.A. and I.B, the Board has an obligation to show that its future admissions policies to MGSE schools will not be discriminatory. Because of the strong correlation between poverty and race, *see* Kahlenberg Report at 11, depending on how SES factors are used, there is the potential that SES-based policies could result in discrimination against students of color. An SES policy could in fact diminish the diversity in the MGSE schools by reducing the minority enrollment in those schools and cause more racial isolation in the system.

The Board's proffered use of SES in admissions decisions going forward does not dispositively demonstrate a good faith intent to implement nondiscriminatory policies after the

vacation of the consent decree. Any SES-based admissions policy must be examined by this Court for its projected impact to ensure that it will not be used in a way that would fly in the face of the constitutional rights that were the predicate for judicial intervention in this case in the first place. For this reason, Amici urge the Court to appoint an expert to aid in the determination of the impact of an SES-based plan on future admissions to MGSE schools.

CONCLUSION

Amici respectfully request this Court to deny unitary status to Defendant Board as to the admissions policies of MGSE schools because of the lack of a sufficiently definite post-unitary plan for student admissions. We further request the Court to review with great scrutiny any sufficiently detailed MGSE student admissions policies which control admissions to MGSE schools to ensure said policies do not discriminate on the basis of race; and finally, request the Court to appoint its own expert to assist the Court in making such an assessment.

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Respectfully submitted:

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