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New Federalism in Education: The Meaning of the Chicago School Desegregation Cases

*Neal Devins**
*James B. Stedman***

Introduction

The federal government has traditionally had an adversarial relationship with state and local governments in school desegregation cases. Frequently, local school systems have either illegally segregated children on the basis of race or failed to use their financial resources to correct racial imbalance. Since nondiscrimination was central to public policy in the 1960's, federal aid to schools was made contingent upon nondiscriminatory practices. Recently, the Reagan administration has taken steps to restore what it sees as harmony in the area of education between the federal government and state and local governments. This article explores the consequences of these efforts, focusing specifically on the interaction between the "new federalism" in education and the school desegregation litigation in Chicago.

In *United States v. Board of Education* ("Chicago")¹ the Reagan Department of Justice ("DOJ") approved a plan designed by the Chicago Board of Education (the "Board") which relied exclusively on voluntary desegregation methods, such as magnet schools and majority-to-minority transfers. Prior to *Chicago*, the federal government had often sought comprehensive mandatory remedies (such as busing) in school desegregation lawsuits. The Reagan administration, claiming that such mandatory techniques were ineffective, in this case expressed both its clear preference for voluntary means of deseg-

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The term "new federalism" in education is applied to the Reagan administration's efforts to reduce federal involvement in education, as well as to legislative and judicial responses to those efforts.

1 554 F. Supp. 912 (N.D. Ill. 1983).

regation and its willingness to accommodate local preferences. The district court agreed.

The *Chicago* court upheld the Board's plan as constitutional, holding that voluntary techniques can satisfy the Supreme Court's requirement that desegregation remedies be effective.² The court apparently believed that together the city and the federal government would provide enough money to upgrade the schools, thus giving white students a significant incentive to attend the newly-enhanced minority schools. Without this money, the voluntary desegregation plan was unlikely to be effective.

At the same time that the Reagan administration has been willing to approve school desegregation remedies that suit local preferences, it has had some success in introducing and gaining legislative acceptance of a "new federalism" in education, aimed at reducing federal involvement. In 1981, categorical aid designed to encourage the adoption of federally-approved school desegregation programs was eliminated along with other categorical aid programs.³ These programs were replaced by a block grant of federal funds which local school systems could spend to suit their own preferences. This block grant approach presumes that, overall, federal and state and local policy goals are in harmony with each other. As the Reagan administration contends, "[t]he Federal role is to supply necessary resources, not to specify in excruciating detail what must be done with these resources."⁴

Chicago suggests some of the limits of the present education block grant for financing school desegregation. First, the block grant approach does not concentrate federal funding on districts facing the high costs of desegregation. Second, since local school districts historically have not undertaken school desegregation without outside pressure, they should not be expected to use these block grant funds for such activities. Third, since the block grant does not provide local school systems with an incentive to undertake such projects, the Reagan administration's pursuit of voluntary desegregation may be adversely affected by its "new federalism" in education. In short, if the federal government views desegregation as a compelling national

2 See text accompanying notes 140-85 *infra*. Unlike *Chicago*, recent Supreme Court decisions on this issue centered on the scope of mandatory pupil transportation remedies. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 536 (1979).

3 See text accompanying notes 62-76 *infra*.

4 WHITE HOUSE, AMERICA'S NEW BEGINNING: A PROGRAM FOR ECONOMIC RECOVERY 7-1 (1981).

policy objective, it cannot use a block grant funding structure which relies on local initiative.

This article analyzes the Chicago school desegregation litigation in the context of past and current federal equal educational opportunity policy. The first section gives an overview of federal policy on equal educational opportunity. It highlights the way federal financial assistance was used from 1965 to 1980 to encourage local school desegregation. The second section analyzes the Chicago litigation. It discusses the development and court approval of the Board's voluntary desegregation plan, and the impact of *Chicago* on the Reagan administration's efforts to have local school systems develop desegregation plans. The third section summarizes the questions that *Chicago* raises for federal policy.

I. Federal Assistance for Equal Educational Opportunity

Over the past two decades, the federal government has pursued a goal of equal educational opportunity. Federal funding has been used in two ways to advance school desegregation—as leverage to secure compliance with civil rights mandates, and as direct support of desegregation-related activities. The Reagan administration's "new federalism" policy has reconsidered the federal role in education, particularly federal efforts to secure equal educational opportunity.

Federal financial assistance to elementary and secondary schools was critical to achieving the first substantial breaches in the southern system of segregated schools. Between the mid 1960's and 1980, the federal government used legislative and judicial sanctions backed by substantial amounts of federal aid for education to secure equal educational opportunity for blacks on a nationwide basis. During the 1970's, it also gave direct financial assistance to help school districts throughout the country implement desegregation plans. The earlier federal policy of deference to local interests in education and concern that federal education initiatives not diminish local control of education were subordinated to the pursuit of the national goal of equal educational opportunity. As a result, the federal attitude toward certain local school systems through much of this period was often one of distrust. Federal administrators were unsure of those systems' willingness or ability to address minorities' educational needs. Beginning in 1981, the Reagan administration sought to restore the pre-1960's harmony between federal and local interests in education.

One result was the elimination of any significant federal aid for school districts' desegregation efforts.

A. *The Elementary and Secondary Education Act of 1965*

In the decade following the Supreme Court's decision in *Brown v. Board of Education*,⁵ that "in the field of public education the doctrine of 'separate but equal' has no place," less actual desegregation of southern schools occurred than in 1965. The implementation of the Elementary and Secondary Education Act of 1965 ("ESEA"),⁶ coupled with the issuance and enforcement of guidelines for Title VI of the Civil Rights Act of 1964,⁷ marked a significant shift in the relationship between the federal government and local school systems. The primary purpose of federal financial assistance for education was no longer to help schools do better what they were already doing; rather, it was to remedy their failure to provide equal educational opportunity to black children.⁸ Equal educational opportunity became a powerful, almost irresistible, motive for initiating federal education programs from the middle 1960's through the end of the 1970's.

Before ESEA's passage, there was little conflict over local school officials' desire for autonomy in school administration.⁹ The major pre-ESEA programs provided federal assistance for vocational education;¹⁰ for school districts adversely affected by the presence of military bases and other federal installations;¹¹ and for strengthening science, mathematics, and modern foreign language instruction.¹²

5 347 U.S. 483, 495 (1954).

6 Pub. L. No. 89-10, 92 Stat. 2153 (1965); S. BAILEY & E. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* 153 (1968). For the 1965-66 school year, the percentage of black children in biracial schools in the 11 southern states rose from 2% to 6%. In 1965, more districts started the desegregation process than had done so in the 10 years since 1954. For a description of ESEA, see text accompanying notes 19-20 *infra*.

7 Pub. L. No. 88-352, 78 Stat. 252 (1964).

8 P. PETERSON, *BACKGROUND PAPER*, in *Making the Grade: Report of the Twentieth Century Fund Task Force on Federal Elementary and Secondary Education Policy*, 83-105 (1983); 5 *ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: INTERGOVERNMENTALIZING THE CLASSROOM* 31-36 (1981); Hartle & Holland, *The Changing Context of Federal Education Aid*, 15 *EDUC. & URB. Soc'y* 408-31 (1983).

9 P. PETERSON, *supra* note 8, at 61.

10 *E.g.*, Smith-Hughes Act of 1917, 39 Stat. 929; Vocational Education Act of 1963, Pub. L. No. 88-210, 77 Stat. 403.

11 "Impact Aid" laws: Pub. L. No. 81-874, 64 Stat. 1100 (1950); Pub. L. No. 81-815, 64 Stat. 967, 976 (1950).

12 Title III, National Defense Education Act ["NDEA"] of 1958, Pub. L. No. 85-864, 72 Stat. 1580, 1588-90.

These programs, often initiated by a sense of national emergency, maintained the traditional balance between federal and local interests. The school desegregation issue was set aside in the face of other crises.¹³

Congress set the stage for a new kind of federal involvement in education when in Title VI of the Civil Rights Act of 1964 it declared, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁴ Although compliance with this mandate was initially to be sought through voluntary means, continued noncompliance could trigger the termination of federal funds.¹⁵

Title VI's passage was crucial to the enactment one year later of major federal elementary and secondary education programs. Until 1964, the question of segregated school systems' use of federal money had derailed numerous efforts to secure general assistance for elementary and secondary education.¹⁶ Title VI, originally a bargaining chip in the package of civil rights legislation submitted to Congress by President Kennedy,¹⁷ removed that question.¹⁸

Despite a decade-long fight by advocates of general federal aid to education, the new programs enacted in 1965 focused on the local school systems' failure to provide equal educational opportunities to disadvantaged children. In ESEA, Congress declared:

[It is] to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with

13 P. PETERSON, *supra* note 8, 61-81; G. ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 4-15, 26-27 (1969); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 8, 1-10.

14 Title VI, Civil Rights Act of 1964, Pub. L. No. 88-352 § 601, 78 Stat. 241, 252.

15 Title VI, Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241, 252. Title IV of the Act provided federal assistance for training and advisory services to address racial, religious, national origin, and sex desegregation issues in schools. This program continues to be funded separately (\$24 million for fiscal year 1984), although its activities are among those authorized for the new education block grant. Pub. L. No. 88-352, 72 Stat. 346 (1968); *see* note 67 *infra*.

16 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 8, at 19-29; S. BAILEY & E. MOSHER, *supra* note 6, at 21-22; Hartle & Holland, *supra* note 8, at 417.

17 G. ORFIELD, *supra* note 13, at 35, 39.

18 Another potential roadblock to major federal assistance to schools, the long-standing question of the participation of parochial schools in federal education aid programs, was financed in 1965 by use of the "child-benefit" approach, whereby federally-financed *services* were provided to private school students with federal dollars remaining in public hands. *See* P. MERANTO, *THE POLITICS OF FEDERAL AID TO EDUCATION IN 1965: A STUDY IN POLITICAL INNOVATION* 71, 81 (1967).

concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children.¹⁹

Although ESEA authorized funding for school libraries, textbooks, centers for developing exemplary programs for educational improvement, education research, and grants to strengthen state departments of education, the heart of the bill was its billion dollar program of aid for the compensatory education of educationally deprived children. This program set the terms for the "long awaited breakthrough in federal aid to education."²⁰

ESEA changed the tone and nature of federal involvement in education. Directed to local school systems' inability or unwillingness to address the needs of disadvantaged children, it clearly signalled that certain federal educational concerns were not necessarily in harmony with, or furthered by, local educational practices. In time, federal distrust of some local school systems grew. One manifestation was concern over possible local misuse of federal funds. "The federal government no longer assumed that local governments could operate federal programs without much supervision, became suspicious that funds were being diverted from statutory purposes, and launched a wide variety of studies and evaluations to ascertain program impact."²¹

The experience in the mid 1960's of Department of Health, Education and Welfare ("HEW") officials, seeking Title VI compliance from school districts receiving significant amounts of new ESEA funding, fed the federal government's distrust of local school systems.²² Despite widespread initiation of school desegregation activities, the more actual desegregation required by the federal guidelines, the greater the local resistance.

As HEW read Title VI's legislative history, its requirements were consonant with current court rulings.²³ As a result, it interpreted Title VI's desegregation requirements as being both flexible and potentially expansive. Regulations issued by HEW in December, 1964, stated that districts would be considered in compliance

19 Pub. L. No. 89-10, § 2, 79 Stat. 27, 27 (1965).

20 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 8, at 31.

21 P. PETERSON, *supra* note 8, at 83-84.

22 For a detailed analysis of the implementation of the Title VI guidelines, see G. ORFIELD, *supra* note 13. Many of the points made immediately below are drawn from his account.

23 G. ORFIELD, *supra* note 13, at 43, 93.

with Title VI if they were subject to a court order or if they submitted a desegregation plan subsequently approved by the Commissioner of Education.²⁴ As judicial standards developed calling for the immediate elimination of dual school systems,²⁵ and as the passage of ESEA in 1965 made Title VI enforcement in southern school districts of particular concern to HEW officials, "a device for gradual transition [was converted] into an engine of revolution."²⁶

The initial Title VI guidelines, issued in 1965, required the desegregation of all grades by 1967.²⁷ They specified that, at a minimum, affected districts would have to desegregate four grades (five in some instances) for the 1965-66 academic year. Districts could demonstrate their compliance by filing an assurance of compliance (not acceptable for districts with continuing dual system practices), coming under a court order, or filing an acceptable desegregation plan.²⁸

In 1966 HEW issued revised guidelines for the 1966-67 school year. They set performance standards for desegregation in affected districts and included faculty integration.²⁹ The revised guidelines set more rigorous standards for freedom-of-choice plans, reflecting increasing concern that these plans were intended primarily to maintain dual school systems, not dismantle them.³⁰

By the third year of Title VI's enforcement, the resistance of state and local officials and Congress' restiveness over HEW's heightened demands for desegregation were strong enough to freeze the guidelines. No changes were made for the 1967-68 school year.³¹ By then the requirements of federal court rulings on school desegregation began to exceed the HEW requirements.³²

24 21 CONG. Q. ALMANAC 568 (1965).

25 See notes 102-06 *infra*.

26 G. ORFIELD, *supra* note 13, at 45.

27 *Id.* at 98; 21 CONG. Q. ALMANAC, *supra* note 24, at 569.

28 *Id.*

29 G. ORFIELD, *supra* note 13, at 146; *Toward Equal Educational Opportunity, Senate Select Committee on Equal Educational Opportunity*, S. REP. NO. 92-000, 92nd Cong., 2d Sess. 196 (1972).

30 G. ORFIELD, *supra* note 13, at 146-47; *Toward Equal Educational Opportunity, supra* note 29, at 196-197.

31 G. ORFIELD, *supra* note 13, at 258.

32 *Id.* The Senate Select Committee on Equal Educational Opportunity in its report describes a process in which HEW requirements more closely paralleled court action, indeed anticipated the mandates of *Green v. County School Board*, 391 U.S. 430 (1968). That decision held that freedom of choice plans *per se* did not constitute compliance with *Brown*. Rather, the obligation of school districts was to implement a plan that would in fact desegregate schools "now." *Id.* at 439. The Select Committee reports that two months prior to that decision, HEW had issued new school desegregation guidelines "adopting an identical position." S. REP. NO. 92-000, 92nd Cong., 2d Sess. 197 (1972); see notes 102-04 *infra*.

By 1969, with the Nixon administration in office, both the executive and legislative branches were increasingly found opposing the federal courts on school desegregation questions.³³ Mounting concern over the extension of desegregation to districts outside the South, and heightened opposition to the use of mandatory reassignments ("busing"), led to increased efforts by both branches to curb federal action in school desegregation.³⁴

Almost as quickly as they had coalesced, the forces that made the first substantial inroads into the South's segregated school systems were challenged and ultimately dissipated. Congressional reaction to HEW's enforcement, cast in part as concern about improper extension of federal control over education, succeeded in slowing the momentum of the federal enforcement efforts. Although federal court decisions continued to challenge local school policies and practices on questions of race, the "rare historic moment when the President, congressional leadership, and the public all recognized that protection of the rights of black Americans was the fundamental [social and educational] issue" had passed.³⁵ Repeated congressional efforts to curb HEW's enforcement of Title VI finally resulted in language that significantly limited its authority, particularly with re-

33 G. ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* 243 (1978).

34 G. ORFIELD, *supra* note 33, at 235-42. The mandatory reassignment of children was opposed by the President who was wedded to the neighborhood schools as the basis for school assignments. In his March 24, 1970, statement on school desegregation, President Nixon stated:

I am dedicated to continued progress toward a truly desegregated public school system. But, considering the always heavy demands for more school operating funds, I believe it is preferable, when we have to make the choice, to use limited financial resources for the improvement of education—for better teaching facilities, better methods, and advanced educational materials—and for the upgrading of the disadvantaged areas in the community rather than buying buses, tires, and gasoline to transport young children miles away from their neighborhood schools.

Statement by the President Setting Forth Administration Policies, 6 WEEKLY COMP. PRES. DOC. 424, 428 (Mar. 30, 1970); *see also Federal Policy Switch Slows School Desegregation*, 28 CONG. Q. at 805-11 (Mar. 20, 1970).

In Congress, there have been repeated efforts to define the scope of the 1964 civil rights statutes and the administrative activities taken on their behalf. Efforts made to preclude their application to *de facto* school segregation included the language in section 401 of Title IV of the Civil Rights Act defining the term "desegregation" as not including assignment to address racial imbalance, and the amendments offered in 1968 by Representative Whitten to the HEW FY 1969 appropriations bill to prohibit the use of HEW funds to require school districts to assign students to any particular school (amended in the legislative process to limit their application to *de facto* segregation). Pub. L. No. 90-557, 82 Stat. 969, 994-95 (1968). Of interest, the Whitten amendments have been added to every HEW or Department of Education appropriations act since then.

35 G. ORFIELD, *supra* note 13, at 39.

gard to mandatory reassignments.³⁶ Nevertheless, by the end of the 1960's, the efforts of the federal government had dramatically eroded southern school segregation. For example, between 1963 and 1968, the percentage of black children in all-black schools in the South dropped from ninety-eight percent to twenty-five percent.³⁷

B. *The Emergency School Assistance Program of 1970*

The federal courts heightened their demands for desegregation in the late 1960's.³⁸ Southern school officials were faced with the task of immediately eliminating their dual systems. President Nixon called for federal funds to assist "school districts in meeting special problems incident to court-ordered desegregation."³⁹ He requested \$500 million in fiscal year ("FY") 1971 funds and \$1 billion in FY 1972 funds for the effort.⁴⁰ He justified this substantial financial investment in school desegregation as follows:

Communities desegregating their schools face special needs—for classrooms, facilities, teachers, teacher training—and the Nation should help meet those needs.

The Nation also has a vital and special stake in upgrading education where *de facto* segregation persists—and where extra efforts are needed if the schools are to do their job. These schools, too, need extra money for teachers and facilities.⁴¹

Devised as part of Nixon's "southern strategy" to foster Republican party support in the South,⁴² the funding proposal gained backing from school officials and desegregation advocates.⁴³ The Emergency

36 The so-called Eagleton-Biden amendment, attached to every piece of HEW or Department of Education appropriations legislation since 1977, reads as follows:

None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, in order to comply with Title VI of the Civil Rights Act of 1964. For the purpose of this section an indirect requirement of transportation of student includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition described in this section does not include the establishment of magnet schools.

Pub. L. 98-139, § 306, 97 Stat. 871, 895 (1983).

37 G. ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-80*, at 5 (1983).

38 See notes 102-07 *infra*.

39 Statement by the President, *supra* note 34, at 436.

40 *Id.*

41 *Id.*

42 P. PETERSON, *supra* note 8, at 126-27.

43 G. ORFIELD, *supra* note 33, at 245.

School Assistance Program ("ESAP") was initiated with funds appropriated under discretionary authority of the Commissioner of Education in 1970, and \$171 million was provided for it over the course of its slightly more than two year existence.⁴⁴

C. *The Emergency School Aid Act of 1972*

ESAP was hastily assembled and several evaluations concluded that it was poorly administered.⁴⁵ The General Accounting Office studied the program and concluded that its funds had frequently been awarded to segregated districts and often were not used to further desegregation.⁴⁶ After protracted congressional debate, ESAP's successor, the Emergency School Aid Act ("ESAA"), was enacted as part of the Education Amendments of 1972.⁴⁷ Designed to avoid many of its predecessor's failings, including the funding of segregated districts, ESAA imposed strict non-discrimination standards for school districts' eligibility. Compliance was to be determined by a "pre-grant" review of the applicant school districts.⁴⁸ To be eligible, districts had to be implementing a plan requiring desegregation of children or faculty pursuant to either a final court order or an order of a state agency or official, a desegregation plan approved under Title VI, or a voluntary plan for the elimination of minority group isolation.

Between FY 1973 and FY 1981, \$2.2 billion was provided to desegregating school districts under ESAA for staff training, additional staff, new curriculum development, community relations activities, and in its final years, the financing of magnet schools.⁴⁹ Amended several times over the course of the decade, ESAA in its last two years focused increasingly on activities directly related to the implementation of desegregation plans and on those districts most recently adopting desegregation plans, rather than on compensatory education (an approved use of funds before passage of the Education

44 *The Emergency School Aid Act*, 9 AM. EDUC. 9 (1973).

45 G. ORFIELD, *supra* note 33, at 246-47.

46 GENERAL ACCOUNTING OFFICE, NEED TO IMPROVE POLICIES AND PROCEDURES FOR APPROVING GRANTS UNDER THE EMERGENCY SCHOOL ASSISTANCE PROGRAM (Mar. 5, 1971); GENERAL ACCOUNTING OFFICE, WEAKNESSES IN SCHOOL DISTRICTS' IMPLEMENTATION OF EMERGENCY SCHOOL ASSISTANCE PROGRAM (Sept. 29, 1971).

47 Title VII, Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

48 J. Stedman, *The Possible Impact of the Education Consolidation and Improvement Act of 1981 on Activities That Have Been Funded Under the Emergency School Aid Act*, Congressional Research Service (Jan. 11, 1982), reprinted in *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 733-54 (1982).

49 *Id.*

Amendments of 1978).⁵⁰ Over time, the "emergency" that the program addressed evolved from meeting immediate desegregation requirements to resolving the enduring problems associated with school desegregation.⁵¹ It must be noted that ESAA funds were not to be used for student transportation (a restriction particularly opposed by local school officials) and were not to supplant state or local funds.⁵² Until passage of the Education Amendments of 1978, the latter requirement proscribed the use of ESAA funds for court-ordered activities under eligible desegregation plans.⁵³

D. *ESAA's Pre-Grant Review*

HEW's pre-grant review process merits additional scrutiny. For most of the program's anti-discrimination provisions, disproportionate impact of a school district's policies or practices on minority children or faculty was sufficient for a finding of ineligibility.⁵⁴ But school districts found in violation of those provisions could secure waivers of ineligibility if they agreed to take specific, remedial desegregation actions.⁵⁵ HEW had to initiate court-ordered Title VI compliance proceedings against any district that failed to secure a waiver of its ineligible status under the ESAA pre-grant review process.⁵⁶

One measure of the effectiveness of the pre-grant review is the extent to which ineligible districts secured waivers. Between FY 1975 and FY 1981, of the 731 districts declared ineligible (excluding those incorrectly identified by HEW to be in violation), 502 or sixty-nine percent secured waivers.⁵⁷ During a particular two-year period, the

50 Title VI, Education Amendments of 1978, Pub. L. No. 95-561, § 601, 92 Stat. 2143, 2250-68.

51 L. FERRARA, E. REISNER, B. GUTMANN, & M. BRAUEN, EMERGENCY SCHOOL AID ACT (ESAA): A FEDERAL PROGRAM TO MEET DESEGREGATION RELATED NEEDS, DECISION RESOURCES 3, 7-8 (Aug. 1982)(draft prepared for the U.S. Dep't of Educ.).

52 G. ORFIELD, *supra* note 33, at 246; L. FERRARA, *supra* note 51, at 13.

53 L. FERRARA, *supra* note 51, at 13.

54 See Board of Educ. v. Harris, 444 U.S. 130 (1979).

55 A local educational agency was ineligible if, after June 23, 1972, it had: (1) transferred property or given services to a private school or system without first determining that it was not racially segregated and did not discriminate; (2) discriminated in the hiring, promoting, or assigning of employees; (3) assigned children to or within classes so that minority group students were separated from others for a substantial part of the day; or (4) discriminated in any other way, such as limiting the activities in which minority group children might participate. 20 U.S.C. § 3196 (prior to repeal).

56 Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977). *Califano* validated the effort of civil rights plaintiffs to force HEW to comply with its earlier specified effects-oriented requirements. *Califano* arose in the context of public higher education desegregation plans, but its principle extends broadly to Title VI compliance procedures.

57 J. Stedman, *supra* note 48, at 747. A significant portion of those failing to secure waiv-

pre-grant review process resulted in the reassignment of approximately 244,000 school children from racially isolated classes.⁵⁸ A former director of the Office for Civil Rights, the entity within HEW responsible for the pre-grant reviews, testified before a congressional subcommittee: "It is our judgment that the pre-grant conditions of the kind contained in the ESAA statute are among the most effective ways of enforcing non-discrimination provisions of law and ensuring equal opportunities for the beneficiaries and potential beneficiaries of federal financial assistance."⁵⁹

E. *The "New Federalism" in Education—Chapter 2 of The Education Consolidation and Improvement Act of 1981*

During the Carter administration, ESAA was modified by the Education Amendments of 1978 in response to criticism that it was unduly funding old desegregation plans and that its funds were used excessively for compensatory education, an activity already being funded by Title I of ESEA.⁶⁰ Yet it remained a significant source of federal assistance for school desegregation, with annual appropriations in some years exceeding \$300 million.⁶¹

With the advent of the Reagan administration, ESAA ran afoul of the "new federalism" in education. On February 18, 1981, the White House issued "America's New Beginning: A Program for Economic Recovery,"⁶² a lengthy list of proposed changes to federal programs to reduce federal expenditures and the federal presence in many areas of domestic life. For elementary and secondary education, it called for consolidating forty-five federal programs in order to "shift control over education policy away from the Federal Government and back to State and local authorities—where it constitutionally and historically belongs."⁶³ In support of its block grant program, the administration argued:

ers were ineligible because their desegregation plans were ineligible, not because of civil rights violations.

58 *Id.* at 748.

59 J. Stedman, *supra* note 48, at 749 (statement of David S. Tatel). For another positive assessment of the pre-grant review process, see P. HILL & E. MARKS, *FEDERAL INFLUENCE OVER STATE AND LOCAL GOVERNMENT: THE CASE OF NONDISCRIMINATION IN EDUCATION* (Dec. 1982) (prepared by the Rand Corp. for the Nat'l Institute of Educ.). It must be stressed that evaluations of the programs supported by ESAA funding are mixed. J. Stedman, *supra* note 48, at 744-45.

60 See notes 50 and 53 *supra*.

61 J. Stedman, *supra* note 48, at 736.

62 WHITE HOUSE, *supra* note 4.

63 *Id.* at 7-1.

Existing multiple program requirements are burdensome, inflexible, unresponsive, and duplicative, resulting in waste of resources at all levels of government; the block grant approach will eliminate such unneeded Federal rules. The Federal role is to supply necessary resources, not to specify in excruciating detail what must be done with these resources.⁶⁴

Among the Reagan administration's first actions in the area of school desegregation was to request a cut of \$59.3 million in FY 1981 ESAA funds.⁶⁵ The Senate, newly under Republican control, sought to cut ESAA funding by \$117.8 million, or fifty percent. This effort was compromised in a conference committee with the House on the Supplemental Appropriations and Rescissions Act, 1981. ESAA's FY 1981 funding was reduced by \$87.1 million, from \$236.3 million to \$149.2 million.⁶⁶ Then in midyear, the Omnibus Budget Reconciliation Act of 1981⁶⁷ (the legislative response to the administration's call for the "new federalism" in education), repealed over two dozen separate categorical education programs and authorized their various activities in a new education block grant, Chapter 2 of the Education Consolidation and Improvement Act of 1981 ("Chapter 2").⁶⁸ Among the programs repealed and consolidated was ESAA, the only repealed program targeted at minority school children.⁶⁹

Although ESAA's inclusion in the education block grant aroused little public debate, it became clear at the end of 1981 and the beginning of 1982 that school districts with significant ESAA funding were likely to experience dramatic reductions under Chapter 2. The Chapter 2 allocation process spreads funds across potentially

64 *Id.* The criticism leveled at federal education programs by the Reagan administration is supported by many who feel that federal dollars, constituting only 8.6% of all public school expenditures in 1981-82, have been used excessively to direct and control local education. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 1982, at 21, table 14 (1982).

65 46 Fed. Reg. 18,210 (1981).

66 127 CONG. REC. H2645 (daily ed. June 4, 1981). The legislation was signed into law as Pub. L. No. 97-12, 95 Stat. 14 (1981).

67 Pub. L. No. 97-35, 95 Stat. 357 (1981).

68 Title V, Subtitle D, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 469-80 (1981).

69 L. DARLING-HAMMOND & E. MARKS, THE NEW FEDERALISM IN EDUCATION: STATE RESPONSES TO THE 1981 EDUCATION CONSOLIDATION AND IMPROVEMENT ACT 18 (1983) (prepared by the Rand Corp. for the U.S. Dep't of Educ.). Three categories of activities are authorized by Chapter 2: basic skills development, education improvement and support services, and special projects. The second of these categories authorizes the activities formerly funded by ESAA. These are described as programs to address educational problems stemming from the isolation of minority group students, to develop and implement desegregation plans, and to meet the needs of children in schools undergoing desegregation.

all 16,000 local school districts to be used for activities previously authorized by many separate categorical programs.⁷⁰ In addition, in its first two years of operation, fewer dollars were available for Chapter 2 activities than had been appropriated in FY 1981 for the antecedent programs.⁷¹ The House Subcommittee on Civil and Constitutional Rights reported in March, 1982, that as a result of these funding reductions, desegregation activities "will diminish if not disappear in many communities. For example, the funding for fiscal year 1982 for the entire State of Delaware [under Chapter 2] is 50 percent less than the 1981 ESAA funding just for the New Castle County school district."⁷² Among the Nation's largest school districts, those with FY 1981 ESAA grants of over \$1 million lost between six and seventy-nine percent of their antecedent federal funding in FY 1981 under the block grant.⁷³

Local school districts, given the freedom under Chapter 2 to choose among a relatively broad array of activities, appear unlikely to direct their funding to desegregation. The most popular expenditure has been on instructional equipment (reported by over eighty-eight percent of the districts responding to one survey).⁷⁴ One explanation of the interest in equipment, particularly computer hardware, is that many districts received relatively small grants, insufficient for initiating any broad-based programs.⁷⁵ Spending on ESAA-like ac-

70 Chapter 2 allocates its funding among the states according to each state's share of the national population aged 5 to 17. At least 80% of the state's allocation must be distributed to local educational agencies using a state-derived formula. That formula must be based on public and private school enrollments, adjusted to reflect "high cost" students (those from low-income families, those in economically-depressed area, or those living in sparsely populated areas). Local school authorities have complete discretion to choose among the various activities authorized by Chapter 2. Pub. L. No. 97-35, §§ 563, 565-66, 95 Stat. 357, 469-71 (1981) (codified at 20 U.S.C. §§ 3813, 3815-16 (1982)).

71 According to "The Fiscal Year 1983 Budget," released by the Department of Education on Feb. 8, 1982, the FY 1981 appropriation for the antecedent programs to Chapter 2 was \$537.485 million. The Departments' "The Fiscal Year 1984 Budget," released Jan. 31, 1983, lists the FY 1982 appropriation for Chapter 2 at \$470.4 million. "The Fiscal Year 1985 Budget," released Feb. 1, 1984, reports that the FY 1983 appropriation for Chapter 2 was \$479.42 million. (These Budgets on file with authors.)

72 School Desegregation, H.R. REP. NO. 12, 97th Cong., 2d Sess. 25 (1982).

73 R. JUNG & T. BARTELL, FISCAL EFFECTS OF THE CHAPTER 2, ECIA BLOCK GRANT ON THE LARGEST DISTRICTS AND CITIES 11, 13 tables 3 & 4 (May 1983) (prepared by Advanced Technology, Inc., for the U.S. Dep't of Educ.). Of the 13 districts in this sample that had FY 1981 ESAA awards in excess of \$1 million, the *entire* Chapter 2 allocation for FY 1982 for 8 of them was *less* than their FY 1981 ESAA funding. *Id.*

74 AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, THE IMPACT OF CHAPTER 2 OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT ON LOCAL EDUCATION AGENCIES 13, table 6 (1983).

75 *Id.* at 18.

tivities has been much less popular (reported by only six percent of the responding districts).⁷⁶

F. *Conclusions*

Several points are made clear by reviewing the experience of federal financial support of school desegregation over the past two decades. The federal government has at its disposal a number of tools for addressing equal educational opportunity in local school systems. In the mid 1960's, the prospect of substantial levels of ESAA funding gave HEW's efforts to enforce Title VI an impact they would otherwise not have had. But resistance grew as HEW increased its demands for school desegregation as the price for federal aid. Ultimately, HEW's enforcement was blunted, but the federal courts handed down major decisions in the late 1960's and early 1970's that maintained the pressure for school desegregation. One federal response to that pressure was to provide over \$2 billion through ESAA in support of desegregation-related activities in the 1970's.

In the 1980's, with the first major legislative step toward the "new federalism" in education, financial support targeted at desegregation was largely eliminated, and with it a means of pursuing equal educational opportunity. The history of the period reveals that without outside pressure, most school districts are not likely to pursue that goal. Thus the present education block grant appears to exert little or no leverage on school districts' desegregation practices. Indeed, some have argued that the "new federalism" in education directly opposes certain other federal goals, including the achievement of equal educational opportunity.⁷⁷

76 *Id.* at 13, table 6. In addition, 5% of the responding districts spent their FY 1982 Chapter 2 dollars on "desegregation training and advisory services" (the activities authorized by Title IV of the Civil Rights Act of 1964). *See also Block Grants Have Weakened Federal Programs for the Educationally Disadvantaged, Subcomm. on Intergovernmental Relations and Human Resources of the Comm. on Government Operations, 98th Cong., 1st Sess. 15 (1983).*

77 [W]hat is called the New Federalism is really equivalent to the pre-1960s old federalism, in which SLEAs [state and local educational agencies] simply made decisions that satisfied their own priorities without considering those of the nation. That was the driving force for the federal fiscal interventions in the first place. Unfortunately, the dilemma of harmonizing educational policies at a state and local level with the needs of the nation has not disappeared, and the New Federalism does *not* represent a real alternative to federal fiscal policy in this area.

Levin, *Federal Grants and Educational Equity*, 52 HARV. EDUC. REV. 456 (1982); *see also* L. DARLING-HAMMOND & E. MARKS, *supra* note 69, at 82.

II. The Desegregation Litigation in Chicago

In his January 1983 decision, *United States v. Board of Education*,⁷⁸ Judge Milton Shadur upheld as constitutional a desegregation plan prepared by the Chicago Board of Education. The issue presented in the case was significant since the plan, the result of a consent decree between the United States and the Board,⁷⁹ was designed to desegregate Chicago schools without mandatory pupil reassignments.⁸⁰

The Chicago case is also significant as a manifestation of the "new federalism": the Board was able to craft a desegregation plan according to its own policy preferences. Previously, the federal government approached the remedial issue in school desegregation lawsuits in an adversarial manner—generally seeking comprehensive remedies which included mandatory pupil reassignments. In *Chicago*, the Reagan administration demonstrated that it would not ask for busing.⁸¹

A. Background of Chicago

Under the Carter administration, federal efforts to require the Board to desegregate its school system formally began on April 9, 1979,⁸² when HEW notified the Board that it was ineligible to receive ESAA funds because its practices constituted racial discrimina-

78 554 F. Supp. 912 (N.D. Ill. 1983).

79 Order, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980).

80 See Glenn, *Cautious Pragmatism in Chicago Plan*, EDUC. WEEK, Mar. 9, 1983, at 24; see also notes 135-40 *infra*.

81 It is important to recognize that Congress has authorized the Department of Justice to file desegregation lawsuits. See Civil Rights Act of 1964. The Department has acted on this authority in almost every school desegregation lawsuit brought before the Supreme Court. See amicus brief in *Nashville*. For a discussion of Reagan administration policies on this issue, see notes 135-39 *infra*. Prior to the Reagan administration's antibusing policies, the Department had almost always sought to expand both the bounds of the definition of illegal discrimination and the parameters of desegregation remedies. The Reagan administration, however, views the busing remedy as devisive and ineffective. See note 136 *infra*.

82 The federal concern with school desegregation in Chicago has a long history. In light of the discussion in Section I, perhaps the most significant aspect of that federal concern was the aborted effort in 1965 by HEW to cut off the flow of ESEA funds to the Chicago school system. See G. ORFIELD, *supra* note 13, at 152-207; S. BAILEY & E. MOSHER, *supra* note 6, at 151-53. Fear that the Chicago school superintendent might misuse the newly available ESEA funds to maintain segregated schools prompted Commissioner of Education Keppel to defer action on grants to the district. HEW had already initiated an investigation of the Chicago schools in response to complaints of Title VI violations. Critics of the action quickly characterized it as a federal effort to control education. Mayor Daley of Chicago spoke personally to President Johnson about the issue at a meeting in New York. Shortly thereafter, HEW agreed to release Chicago's funds in exchange for a commitment from the school board to reaffirm earlier resolutions on school desegregation in the city and to investigate school attendance boundaries.

tion in violation of Title VI. On September 17, 1979, HEW informed the Board that it would refer the matter to the DOJ in one month if the Board had not by then rebutted or explained HEW's finding of illegal segregation.⁸³ HEW also demanded that the Board develop a plan to remedy its segregation.⁸⁴ On October 29, 1979, HEW referred this matter to the DOJ.⁸⁵ Despite its failure to secure ESAA funding for the 1979-80 school year, the Board applied for the same funding the next school year.⁸⁶ HEW again refused the request.⁸⁷

Formal DOJ involvement began on April 21, 1980, when it notified the Board of its intention to file a desegregation lawsuit.⁸⁸ Following this announcement, the Board and DOJ sought through negotiations to develop a traditional, mandatory student assignment plan.⁸⁹ The first negotiations failed since the parties could not agree on either specific racial percentages for the reassignments or on the amount of federal funds the Board would receive to implement such a plan.⁹⁰ After this round, a new Board took office and succeeded in negotiating a consent decree.

At this stage, what was to become the Chicago lawsuit evidenced the type of give-and-take between the federal government and local school systems typical of other desegregation cases. The Board wanted federal dollars. The DOJ wanted to advance national desegregation objectives. At the same time, the federal government may have had the ulterior motive of seeking political support for President Carter's 1980 reelection campaign.⁹¹

⁸³ Complaint at 3, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980).

⁸⁴ *Id.*

⁸⁵ *Id.* at 4. On Oct. 17, 1979, the Board specifically denied that it had committed illegal discriminatory practices. *Id.* at 3. On Oct. 18, 1979, HEW demanded that the Board "submit . . . an acceptable desegregation plan within ten days." *Id.* at 4. The Board failed to submit a plan to HEW.

⁸⁶ *See id.*

⁸⁷ *See id.* at 4. The Department of Education affirmed HEW's decision on June 12, 1980. *Id.*

⁸⁸ *See* Brief for the Board of Educ. of Chicago at 6, *United States v. Board of Educ.*, No. 83-2308, No. 83-2402, No. 83-2445 (7th Cir. 1983).

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ This suggestion is supported by a shift in Carter administration remedial objectives in the Chicago case. Zielenziger, *Chicago on Collision Course with U.S. on Desegregation*, *Washington Post*, Oct. 13, 1979, at A3, col. 1. HEW's Office for Civil Rights reportedly wanted the Chicago school board to agree that mandatory busing would be used if voluntary methods failed to achieve a pattern of pupil distribution in which no public school could be greater than 50% white or 65% black. HEW reportedly rejected Superintendent Joseph P. Hannon's "Access to

On September 14, 1980, the Board and DOJ jointly petitioned the United States District Court for the Northern District of Illinois to enter the consent decree,⁹² and the DOJ filed a complaint charging the Board with illegal, racially-discriminatory conduct.⁹³ Judge Shadur approved the decree the same day.⁹⁴

1. The Consent Decree

Rather than specifying the details of a desegregation plan, the consent decree outlined general principles that the Board would use in its attempt "to remedy the present effects of past segregation of Black and Hispanic students."⁹⁵ For example, instead of defining a desegregated school or what percentage of the system's schools should be desegregated, the decree provided only for "the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago."⁹⁶

Yet despite its general language, the consent decree recognized that the Board had the responsibility of developing a plan falling within the "broad range of constitutionally acceptable plans."⁹⁷ Additionally, the Board and DOJ agreed that "specific racial ratios in schools [are not] a necessary remedy in desegregation cases, that racial and ethnic balance throughout the Chicago School District is neither practicable nor required, and that no particular definition of a desegregated school is required."⁹⁸ As a correlative, the decree specified that mandatory pupil reassignment and transportation

Excellence" plan because, among other things, it was too vague and relied principally on voluntary measures.

92 Joint Motion of the United States and the Board of Education for Entry of Consent Decree, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980).

93 Complaint, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980). It is common practice for the simultaneous filing of a consent decree and a complaint in a school desegregation lawsuit. See, e.g., Mirga & Caldwell, *U.S. Approves Voluntary Plans to Desegregate*, EDUC. WEEK, Feb. 1, 1983, at 1.

94 Consent Decree, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980).

95 Consent Decree at 4, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Sept. 24, 1980). The Board, however, did not admit to illegally segregating Chicago's schools. *Id.* at 2.

96 *Id.* at 4. In a similar vein, the decree provided that "[t]o the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups," and that "[t]he plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group." *Id.* at 4-5.

97 *Id.* at 5. The DOJ reasoned that "the Board's familiarity with and sensitivity to the unique situation presented in Chicago . . . [will enable it] to select from within the constitutional range the plan that best meets the needs of the Chicago School District." *Id.*

98 *Id.* at 5.

remedies would be used only "to the extent that other techniques are insufficient."⁹⁹

Voluntary desegregation offers participating students the significant benefits of choice. Yet for such a plan to be effective, students must have sufficient knowledge and incentive to choose to transfer among schools. Additional money may be needed to inform the community of various educational opportunities and to make alternative schooling options truly worthwhile. In Chicago, for example, the school board budgeted approximately \$300 million to implement the desegregation plan for two years.¹⁰⁰

Local school systems may prefer voluntary techniques in order to retain their traditional responsibility for education policy decisions. This preference is consistent with the "new federalism" in education.¹⁰¹ To pass constitutional muster, however, voluntary plans must effectively desegregate area schools.

Brown's promise of equal educational opportunity was severely limited by recalcitrant school systems, which implemented voluntary freedom-of-choice plans. Typically, no white children and very few black children chose to cross the old racial lines. In 1968, the Supreme Court invalidated such plans in *Green v. Country School Board*.¹⁰² It ruled that previously segregated school systems had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."¹⁰³ The Court demanded that school boards come forward with a plan "that promises realistically to work now."¹⁰⁴ *Green* did not require mandatory pupil assignments. Yet, the Court clearly suggested that choice, by itself, would not satisfy desegregation obligations.

Mandatory busing remedies were first approved by the Supreme Court in 1971. In *Swann v. Charlotte-Mecklenburg County Board of Education*,¹⁰⁵ the Court required lower courts to look at the actual effects of a desegregation plan. *Swann* recognized the use of white-black pupil

99 *Id.* at 6.

100 As noted in the district court's June 30 ruling, "[f]or school year 1983-84 [the] Board has budgeted \$66.9 million for the implementation of the Plan [and the] Board presently projects a budget deficit of approximately \$200 million for its 1983-84 fiscal year." 567 F. Supp. at 274. The DOJ disputed these figures.

101 See notes 63-64 *supra*.

102 391 U.S. 430 (1968).

103 *Id.* at 437-48.

104 *Id.* at 439.

105 402 U.S. 1 (1971).

ratios as "a starting point in the process of shaping a remedy,"¹⁰⁶ and that compulsory busing was an appropriate starting point remedy. The Court acknowledged that in order to eliminate all vestiges of an unconstitutional dual school system, desegregation remedies may be "administratively awkward, inconvenient, and even bizarre."¹⁰⁷ *Swann*, however, does not forbid the use of voluntary techniques. Instead, *Swann*'s sole demand is that school boards *effectively* desegregate area schools.

Recent court-ordered desegregation remedies still emphasize mandatory pupil reassignments, however.¹⁰⁸ Chicago thus appears to be the administration's test case¹⁰⁹ to see whether the DOJ can successfully implement its anti-busing policies.¹¹⁰

The consent decree's emphasis on expansive Board authority and its preference for desegregation techniques not involving transportation represents a drastic shift from prior DOJ tactics. The Carter administration's preference for both an expansive definition of illegal segregation and area-wide mandatory transportation remedies may be seen in its handling of other cases.¹¹¹ In *Columbus Board of*

106 *Id.* at 25.

107 *Id.* at 28.

108 In the Nashville desegregation, for example, the court of appeals held that modifications in desegregation remedies must comport with current black/white student population ratios, despite the district court's finding that such an approach cannot effectively desegregate the schools and is educationally unsound. *Kelley v. Metropolitan County Bd. of Educ.*, 492 F. Supp. 167 (N.D. Tenn. 1980), *rev'd*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 104 S. Ct. 834 (1983). For a critique of the appellate ruling, see Devins, *New Dilemmas and Opportunities in Integrating Schools*, EDUC. WEEK, Mar. 9, 1984, at 24. For a related case, see *Tasby v. Estes*, 412 F. Supp. 1192 (N.D. Tex. 1976), *rev'd*, 572 F.2d 1010 (5th Cir. 1978), *cert. denied*, 444 U.S. 437 (1980).

109 The significance of *Chicago* is seen in this colloquy between Assistant Attorney General Reynolds and then-Congressman Harold Washington at Congressional hearings on desegregation:

Mr. Washington. You seem to have great confidence in a voluntary student transfer program. Are you using Chicago as an example of a voluntary program that could work?

Mr. Reynolds. I think Chicago is a volunteer program that will work. . . . I think that overall that the plan that is being followed in Chicago is one that people are very optimistic and positive about, and I think it is working.

School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of House Comm. on the Judiciary, 97th Cong., 1st Sess. 733-54 (1982).

110 See, e.g., Kirp, *Busing Politics and Judges*, Chicago Trib., Oct. 17, 1982, § 2 at 7.

111 The Carter administration also sought the adoption of an expansive definition of racial discrimination in the areas of tax-exemption for private schools. In August 1978, the Carter IRS sought to deny tax-exemption for private schools whose percentage of minority students was less than 20% of the minority population in the area served by the school. 43 Fed. Reg. 37,296 (1978). Congress stayed the implementation of these guidelines by passing riders to the Treasury Appropriations Act of 1980. Pub. L. No. 96-74, § 615, 94 Stat. 559, 577

*Education v. Penick*¹¹² and *Dayton Board of Education v. Brinkman*,¹¹³ for example, the Supreme Court accepted the Carter DOJ's argument that "a pre-1954 substantive violation [of *Brown*], unremedied by affirmative action of the *Green/Swann* standard [e.g., comprehensive mandatory pupil reassignment] is the cause of current observed segregation" That is, a "racially desegregated society exists absent discriminatory governmental action."¹¹⁴ The departure in *Chicago* from previous Carter administration policies led to accusations that the Board-DOJ consent decree was a political sell-out designed to assist the 1980 Carter reelection campaign.¹¹⁵ Ironically, judicial adoption of these Carter administration views suggested that the Board's voluntary desegregation plan might raise significant constitutional issues.¹¹⁶

2. Attempts to Intervene

The consent decree caused a public outcry among national civil rights groups. Within a week after its entry, the metropolitan Chicago NAACP filed a motion to intervene as a party plaintiff.¹¹⁷ It called the "[g]overnment's approval . . . a clear, blatant and unconscionable failure to fulfill its duty in this litigation to represent the rights and interests of black students of the Chicago Public

(1979). For a general discussion of Carter administration efforts to advance the concerns of civil rights groups in the tax-exemption controversy, see McCoy and Devins, *Standing and Adverseness on the Issue of Tax-Exemptions for Racially Discriminatory Private Schools*, 52 FORDHAM L. REV. 441 (1984).

112 443 U.S. 449 (1979).

113 443 U.S. 526 (1979).

114 J. BLUMSTEIN, LEGAL ISSUES IN THE DESEGREGATION OF POST-SECONDARY EDUCATION 16-17 (1981)(V.I.P.S. Working Paper). University of Chicago Law Professor Edmund W. Kitch thought that these decisions spoke to an even broader proposition:

[In *Columbus* and *Dayton*] the Court endorses an approach to the 'factual' question that makes proof of a neighborhood school into proof of racial discrimination. It then approves a remedy which, by implication, assumes that a neighborhood school policy, when combined with any significant residential segregation, is unconstitutional.

Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 SUP. CT. REV. 1, 6 (1980).

115 Denton, *U.S., Chicago Reach Pact on Desegregation*, Washington Post, Sept. 25, 1980, A1, at col. 6. Thomas I. Atkins, general counsel for the NAACP, referred to the consent decree as follows: "An elephant labored and produced a mouse In the absence of substantive content, . . . the timing becomes suspect." See also *Unique Chicago-Justice Desegregation Pact Approved*, Educ. Daily, Sept. 26, 1980, at 1-2.

116 See, e.g., Kirp, *supra* note 110, at 7 ("The federal courts will likely disapprove of [the Board plan] . . . to do otherwise would seem to signal abandonment to the judicial commitment to undo the effects of Jim Crow.")

117 See *United States v. Board of Educ.*, 88 F.R.D. 679, 680 (N.D. Ill. 1981).

Schools,"¹¹⁸ and suggested that the Board's plan offered no promise of effectively desegregating Chicago's schools,¹¹⁹ since it considered white-Hispanic schools to be integrated.

Similar motions to intervene were filed in mid-November by the Mexican American Legal Defense and Educational Fund and the Puerto Rican Legal Defense and Educational Fund.¹²⁰ The Chicago Urban League,¹²¹ like the NAACP, attacked the Board's inclusive definition of minority students, a definition which grouped black and Hispanic students into a single minority classification. The NAACP and Urban League argued that such a grouping would result in the plan's failure to address the specific needs of black schoolchildren.¹²² The Board and DOJ opposed the motions.¹²³ On January 6, 1981, Judge Shadur denied them.¹²⁴ The court reasoned:

Intervention at this stage of the proceedings would deflect the litigation from its essential goal of producing at the earliest feasible date a desegregated school system for the Chicago public schools, and more importantly, for the very classes whose rights the intervenors seek to protect.¹²⁵

The court noted that intervenors might attempt to open up the issue of the Board's liability—an issue whose resolution would take at least one year.¹²⁶ The court accepted as true the DOJ contention that "in public law litigation, where compliance depends in part on public acceptance and the least possible acrimony between the parties, settlement is particularly welcome for it signifies cooperation between the parties."¹²⁷ Finally, the court noted that in cases like this, there was a presumption that the DOJ would adequately represent the

118 NAACP Memorandum in Support of Motion to Intervene at 1, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Feb. 26, 1982).

119 *See* Reply Memoranda of Board of Education in Support of Desegregation Plan at 7, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Apr. 1, 1982).

120 *See id.* Interestingly, the groups who opposed the Board's plan were either national organizations or local chapters of national organizations. These groups were seeking to impose upon the Board the pre-Reagan federal view of school desegregation.

121 *See* Chicago Urban League, *An Assessment of the Chicago Board of Education's Desegregation Plan* (Feb. 16, 1982) [hereinafter cited as Chicago Urban League].

122 The Urban League contended that "traditional minority group status should not be a sufficient criterion for inclusion with blacks as groups requiring a remedy from past racial isolation. . . . Rather than white vs. nonwhite, the basic dichotomy in terms of racial segregation in schools has been black vs. nonblack." *Id.* at 1-2.

123 *United States v. Board of Educ.*, 88 F.R.D. 679, 681 (N.D. Ill. 1981).

124 *Id.*

125 *Id.* at 682.

126 *Id.* The Board never admitted liability at any stage in these proceedings.

127 *Id.* at 681 (quoting Memorandum of United States requesting entry of consent decree).

public interest.¹²⁸ Consequently, Judge Shadur suggested that intervenors wait until the Board had developed a plan, at which time the court could review “any arguable failure to protect [the prospective intervenors’] interests or inadequacy of representation” by the DOJ.¹²⁹

The court also stressed an essential difference between a consent decree settlement and a traditional, court-ordered desegregation remedy:

Under the Consent Decree the primary responsibility for developing the plan is on the *Board*, and . . . [provided the Board plan is constitutional, this] Court will not superimpose its own views of what other constitutional means might be preferable. . . . Judges should not substitute their own judgment as to optimal settlement terms for the judgement of litigants and their counsel.¹³⁰

At the same time, the court maintained that “[i]t has not abdicated its constitutional responsibilities, and if the litigants were to agree on a plan that did not conform to the Constitution, this Court would reject that plan.”¹³¹ Judge Shadur has stated that his “Court is neither the intended designer nor the intended czar of the Chicago school system and its plan of desegregation.”¹³²

3. Advent of the Reagan Administration

Before the Board developed its plan, Ronald Reagan defeated Jimmy Carter in the 1980 presidential election. The Reagan DOJ’s approach to desegregation generally was at odds with that of the Carter DOJ. The Chicago consent decree between the Carter DOJ and the Board, however, paved the way for a major test of the Reagan view. In July 1981, the Department—apparently influenced by attorneys familiar with the Carter DOJ’s understanding of the decree—rejected a proposed set of planning principles developed by the Board.¹³³ Later, however, the Department—apparently acting under new DOJ policies—reversed its position, approving the school

¹²⁸ *See id.* at 686.

¹²⁹ *Id.* For a discussion of arguments proffered by the NAACP in its efforts to intervene in the case subsequent to the Board’s filing of a plan, see notes 156, 168, 186-90 *infra*.

¹³⁰ *Id.* at 687, quoting *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980).

¹³¹ *Id.*

¹³² 554 F. Supp. at 914.

¹³³ Mirga, *Busing Will Not Help to Desegregate Chicago Schools, Federal Judge Rules*, EDUC. WEEK, Jan. 19, 1983, at 9.

system's adoption of a voluntary strategy.¹³⁴

The Reagan DOJ categorically opposes mandatory pupil transportation remedies.¹³⁵ Assistant Attorney General for Civil Rights William Bradford Reynolds has expressed concern that mandatory pupil transportation remedies "are threatening to dilute the essential (national) consensus that racial discrimination is wrong and should not be tolerated in any form,"¹³⁶ and that involuntary busing "has failed to advance the overriding goal of equal educational opportunity."¹³⁷ He suggested that "[a]dherence to an experiment [such as busing] which has not withstood the test of experience obviously makes little sense."¹³⁸ Instead of mandatory pupil transportation, DOJ now advances a remedial strategy program which includes "voluntary student assignment program[s], magnet schools, and enhanced curriculum requirements, faculty incentives, inservice training programs for teachers and administrators, school closings, if [there is] excess capacity, or new construction."¹³⁹

134 *Id.*

135 The Reagan DOJ—in determining whether it should initiate a school desegregation lawsuit—also refuses to make use of the so-called *Keyes* presumption that proof of intentional segregation in a significant portion of a school district infers that there was intentional segregation in other racially imbalanced portions of the district. *See Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973). This presumption was based on the Court's recognition of the difficulty of proving intentional segregation in northern and western school systems where segregation had not been mandated by state laws. The Supreme Court had devised the *Keyes* presumption because it felt that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are subjects of those actions." 413 U.S. at 203. Assistant Attorney General for Civil Rights Reynolds offered the following rationale for DOJ's refusal to use *Keyes* in its decision to initiate litigation: "To avoid imposition of a systemwide desegregation plan, which often includes systemwide busing, a school board subject to the *Keyes* presumption must shoulder the difficult burden of proving that racial imbalance in schools elsewhere in the system is not attributable to school authorities." *School Desegregation: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 617 (1982) (Testimony of William Bradford Reynolds) [hereinafter cited as Testimony].

136 Speech before the Delaware Bar Ass'n, at 9 (Feb., 1982). Mr. Reynolds also remarked on that occasion:

The flight from urban public schools has eroded the tax base of many cities, which has in turn contributed to the growing inability of many school systems to provide high-quality education to their students—whether black or white. Similarly, the loss of parental support and involvement has robbed many public school systems of a critical component of successful educational programs. When one adds to these realities the growing empirical evidence that racially balanced public schools have failed to improve the educational achievement of the students, the case for mandatory busing collapses.

137 Testimony, *supra* note 135, at 618.

138 *Id.*

139 *Id.* at 631.

B. *The District Court Upholds the Board's Proposed Plan*

On January 22, 1982, the Board filed a proposed desegregation plan¹⁴⁰ which did not include any mandatory pupil reassignments. On February 11, 1982, the DOJ expressed its approval of the Board's voluntary plan.¹⁴¹

The plan rested on the Board's policy strongly favoring voluntary means of desegregation:

The Board has determined, based both on its experience and careful analysis, that desegregation techniques which are not compulsory on children are the most effective and most practicable in achieving stable desegregation. Voluntary methods emphasize education. They provide to all children and their families the opportunity to attend a school because they believe that educational opportunities will result. These affirmative choices not only enhance desegregation, but do so in a positive manner which is supportive of the educational objectives of the school system. Therefore, they are the techniques which are the most likely to produce both stable desegregation and educational enrichment.¹⁴²

The Board alleged that it was "more important to increase the number of children in desegregated schools than to try to cause individual schools to conform to some preconceived racial composition."¹⁴³ It claimed that its primary objective was to create "stable" desegregated schools.¹⁴⁴

There was extensive racial imbalance in the Chicago schools before the Board's plan. In 1980, 370 out of 584 public schools had minority populations of over eighty-five percent, while ninety-seven schools had minority populations under thirty-five percent.¹⁴⁵ The Board, rather than trying to spread the seventeen percent white population throughout the system, established a goal of at least thirty-five percent minority enrollment in the ninety-seven predominantly white schools.¹⁴⁶ The Board also sought to desegregate some predominantly minority schools by turning twenty-nine of them into

140 Memorandum in Support of Board of Education's School Desegregation Plan, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Jan. 22, 1982).

141 The United States' Assessment of the Chicago School Board's Comprehensive Student Assignment Plan, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Feb. 11, 1982).

142 *United States v. Board of Educ.*, 554 F. Supp. 912, 917 (N.D. Ill. 1983).

143 Memorandum, *supra* note 140, at 14.

144 *Id.* at 15.

145 *Id.* at 25.

146 *Id.* The Board contended "that predominantly minority schools (unlike predominantly white schools) cannot all attain the definition of desegregated schools." 554 F. Supp. at 918; *see* notes 172-80 *infra*.

specialized magnet schools.¹⁴⁷ Since white student enrollment had been declining steadily as white families moved to the suburbs,¹⁴⁸ “[t]he Board concluded that the desegregation techniques which would be most successful . . . would either be techniques which would continue children in nearby schools . . . or . . . which encourage but do not compel children to attend schools where their enrollment will be desegregative in nature.”¹⁴⁹ The plan identified three categories of naturally “integrated schools,”¹⁵⁰ whose stability the Board sought to preserve by limiting voluntary transfers. Because of Chicago’s racially segregated housing patterns, most of these schools were composed of white and Hispanic students.¹⁵¹

In approving the Board’s plan, the DOJ recognized that

[t]he plan is premised on the belief . . . that there is a substantial number of parents who want to have their children enroll in integrated schools in this manner and the belief is that a thorough recruitment and publicity campaign . . . can reduce racial and ethnic isolation in Chicago’s public schools to the greatest extent practicable.¹⁵²

The DOJ agreed with the Board that “voluntary transfers can be more effective for black students because they historically have been more responsive to this technique than have other minority students.”¹⁵³ It cited with approval a Board-funded survey of parents’ attitudes that indicated that desegregation could be accomplished through the Board’s proposed techniques.¹⁵⁴ Finally, the DOJ concluded that the plan “creates a careful balance between the concepts of ‘maintaining stability’ and the right of minority students to

147 Memorandum, *supra* note 140, at 31.

148 *Id.* at 16.

149 *Id.* at 17.

150 The district court described these categories as follows: (1) “‘stably integrated schools’, which because they are now and are projected to remain naturally integrated [30% white and 30% minority minimum representation], . . . are subjected to some limits on voluntary transfers;” (2) “schools now ‘stably integrated’ but with projected racial changes that would threaten that status—here various techniques. . . are adopted to preserve their present stability” and (3) “‘stable mixed schools’ (having 15-30% present and projected white enrollment), as to which various techniques . . . are intended to maintain or increase current levels of integration.” 554 F. Supp. at 917.

151 See 554 F. Supp. at 922 (“there is more natural integration of white and Hispanic children”), and notes 167-72 *infra*.

152 Assessment, *supra* note 141, at 4.

153 *Id.* at 17.

154 *Id.* at 19-22. Despite this approval, the United States recognized “that the overall results of voluntary programs in Chicago have been disappointing in past years.” *Id.* at 30. For a discussion of minority group comments concerning past voluntary programs, see notes 181-87 *infra*.

transfer."¹⁵⁵

1. Constitutional Arguments Against the Board's Plan

The court ruled in the Board's favor on several constitutional objections raised by the NAACP. The first concerned the standard for integrated schools. The plan defined a school as "integrated" or "desegregated" if it had at least thirty percent minority and thirty percent white students. Consequently, although the Chicago system was only seventeen percent white, schools which were seventy percent white would be considered desegregated. In practice, because of the sparsity of white students, "[a]fter two years of implementation [of the Chicago plan], 8,500 students remained in all-minority elementary schools, compared to 10,131 when implementation began."¹⁵⁶ The court¹⁵⁷ nevertheless concluded that the thirty percent majority/minority standard was in accord with school desegregation decisions in Milwaukee,¹⁵⁸ St. Louis,¹⁵⁹ Atlanta,¹⁶⁰ Dallas,¹⁶¹ and Washington, D.C.¹⁶² Yet school desegregation decisions in Columbus,¹⁶³ Dayton,¹⁶⁴ Charlotte-Mecklenberg,¹⁶⁵ Nashville,¹⁶⁶ and several other cities had required that strict attention be paid to black-white student population ratios.

Second, the court validated the plan's grouping of both blacks and Hispanics into a single "minority students" category. The Board argued that it was appropriate "to seek the desegregation of white

¹⁵⁵ Assessment, *supra* note 141, at 24.

¹⁵⁶ Memorandum, *supra* note 118, at 15. *But see* Reply Memorandum, *supra* note 119, at 35-41.

¹⁵⁷ The Court, however, did suggest that the Board was sincere in its effort to desegregate Chicago schools. *See, e.g.*, 554 F. Supp. at 919-20 ("It is the Board's stated intention to continue to push for integration. . . . Nor is that just a paper commitment; it is real.")

¹⁵⁸ *Armstrong v. Board of School Directors*, 616 F.2d 305, 311 n.8 (7th Cir. 1980).

¹⁵⁹ *Adams v. United States*, 620 F.2d 1277, 1296 & n.30 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980).

¹⁶⁰ *Calhoun v. Cook*, 362 F. Supp. 1249, 1251 n.7 (N.D. Ga. 1973), *aff'd following remand*, 522 F. 2d 717, 718 (5th Cir. 1975).

¹⁶¹ *Tasby v. Wright*, 520 F. Supp. 683, 711 (N.D. Tex. 1981). *But see* *Tasby v. Estes*, 412 F. Supp. 1192 (N.D. Tex. 1976), *rev'd*, 572 F.2d 1010, 1014 (5th Cir. 1978), *cert. denied*, 444 U.S. 437 (1980).

¹⁶² *Hobson v. Hansen*, 269 F. Supp. 401, 411 n.9 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

¹⁶³ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *see* note 114 *supra*.

¹⁶⁴ *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 536 (1979); *see* note 114 *supra*.

¹⁶⁵ *Swann v. Charlotte-Mecklenburg County Bd. of Educ.*, 402 U.S. 1 (1971); *see* notes 105-07 *supra*.

¹⁶⁶ *Kelly v. Metropolitan Bd. of Educ.*, 492 F. Supp. 167 (M.D. Tenn. 1980), *rev'd*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 834 (1983).

children from all groups of minority youngsters.”¹⁶⁷ Speaking for the other side, the NAACP suggested that because of the inclusive definition, “Chicago, a system which is 60% black, [will have] no more than 10% black students . . . [participating] now, or in the future, in a ‘system wide’ desegregation plan, purportedly designed, *inter alia*, to remedy the present effects of segregation of black students.”¹⁶⁸ In sum, the NAACP contended that the Board’s plan did not meet the *Green v. County School Board* requirement that school boards come forward with a plan “that promises realistically to work now.”¹⁶⁹ The court upheld the Board, reasoning that “courts that have dealt with desegregation issues in multi-ethnic school districts have consistently approved plans with an inclusive definition of minorities like that adopted by the plan.”¹⁷⁰ At the same time, the court noted that “there is a good deal to be said in policy terms on the other side of the issue.”¹⁷¹ It acknowledged that “[i]n the practical sense, . . . schools with (say) 65% white and 35% hispanic students [could be] counted as ‘desegregated,’ even though [they] contain . . . no members of the black population that itself makes up 60% of the entire school system.”¹⁷²

Third, the court ruled that the racial composition of Chicago’s schools made desegregation of all minority schools unfeasible.¹⁷³ Instead, the court agreed with the Board’s contention that desegregating all primarily white schools would result in the greatest number of stably desegregated schools.¹⁷⁴ The court based its decision on the proposition of *Milliken v. Bradley*,¹⁷⁵ “that the continued existence of one-race schools [does not] pose the kind of clear unconstitutionality requiring disapproval of a desegregation plan.”¹⁷⁶ *Milliken* narrowly held that desegregation “does not require any particular racial balance in each school, grade, or classroom.”¹⁷⁷ But *Milliken* did not involve a desegregation plan, such as Chicago’s,

167 Memorandum, *supra* note 119, at 47.

168 *Id.* at 30.

169 391 U.S. 430, 439 (1968). According to the NAACP, “[w]here it cannot be shown that allowing free choice or free transfer would not further delay student desegregation, such techniques are constitutionally unacceptable.” Memorandum, *supra* note 118, at 31.

170 554 F. Supp. at 921. For a list of references, see *id.* at 921 n.11.

171 *Id.* at 921.

172 *Id.* at 920-21; see notes 145, 151 *supra*.

173 554 F. Supp. at 923 (“In a largely minority school system like Chicago’s, . . . it is not feasible to desegregate all the primarily minority schools. . . .”).

174 Reply Memorandum, *supra* note 119, at 42.

175 418 U.S. 717 (1974).

176 554 F. Supp. at 923 (citing *Milliken v. Bradley*, 418 U.S. 717, 740-741 (1974)).

177 418 U.S. at 740-41.

which would not alter the racial composition of most predominantly black schools.¹⁷⁸ In fact, in 1977 the Supreme Court affirmed a Sixth Circuit ruling in a related case, *Bradley v. Milliken*,¹⁷⁹ that rejected as erroneous the Detroit school board's argument that "mere elimination of identifiably white schools satisfied the criteria of *Brown*."¹⁸⁰

The last substantive issue resolved by the district court in *Chicago* concerned the plan's failure to use mandatory pupil reassignment techniques. To support its premise that "[t]he use of desegregative techniques other than compulsory transportation will produce the maximum feasible degree of stable desegregation,"¹⁸¹ the Board expressed its general preference for neighborhood schools and "pointed to the results of a NORC¹⁸² survey which indicated that a mandatory busing program would accelerate the decline of white enrollment in the system."¹⁸³ Accepting the Board's estimate of the likely effect of mandatory busing, and recognizing the Board's broad authority under the consent decree, the district court approved the Board's approach.¹⁸⁴ It found that "[u]nder the circumstances here the Board cannot be faulted in constitutional terms for not having ventured needlessly onto that battlefield."¹⁸⁵

The NAACP and Urban League strongly differed with the court's ruling on mandatory reassignments. Both groups noted that "there is a long track record in Chicago establishing the ineffectiveness of voluntary free choice techniques to make any meaningful impact in reducing the severe racial isolation in the district's schools."¹⁸⁶ They argued that

the plan contains an unstated assumption on which many of the plan's features depend—namely—that the danger of white flight is so imminent and would be so destructive that it is the overriding consideration to be avoided at all costs. The extreme pre-eminence accorded this viewpoint is racist and thus

178 See notes 145-46, 148, and 167 *supra*.

179 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

180 540 F.2d at 139; see also Memorandum, note 118, at 15-17.

181 554 F. Supp. at 924 (quoting plan at 271).

182 National Opinion Research Center.

183 554 F. Supp. at 924.

184 The DOJ Assessment approaches this issue in a similar manner. See Assessment, *supra* note 141, at 13-14, 19-22. The district court noted, however, that "[t]his opinion reserves judgment on the propriety of these limitations. [For the future may] . . . demonstrate . . . a need for mandatory busing. . . ." 554 F. Supp. at 924 n.12.

185 554 F. Supp. at 926.

186 Memorandum, *supra* note 118, at 33-35; see also Chicago Urban League, *supra* note 121, at 35-37. The Board, however, argued that problems of design, implementation, and finance were the cause of problems in the earlier plan. See Brief, *supra* note 88, at 30-33.

unconstitutional.¹⁸⁷

These comments are in accord with other courts' reasoning in desegregation decisions.¹⁸⁸ In Nashville,¹⁸⁹ for example, the Sixth Circuit virtually ignored the district court's findings as to the ineffectiveness of the busing remedy and ordered county-wide busing. Another alleged flaw in the plan that the NAACP especially noted was its failure to focus on the racial isolation of black schoolchildren:

[W]ith very few exceptions, no black or other minority student not now in, what the Board considers a desegregated or integrated school, will be provided an integrated education unless he or she transfers to a white receiving school or a magnet or metropolitan school/scholastic academy. Conversely, *every* white child in the district is guaranteed to receive an integrated education without having to leave his/her neighborhood school.¹⁹⁰

2. Assessment of the Court's Ruling

It is difficult to assess whether the *Chicago* court acted improperly in denying the NAACP's motion to intervene or in upholding the Board's plan. The plan offered the advantages of being both politically popular and a quick response to the problem of racial imbalance in Chicago schools. Additionally, there exists a judicial presumption that the government will adequately represent the "public interest." Finally, since the consent decree was contractual in nature, it was to be expected that the Board would have discretion to develop a plan within the broad parameters of the decree and the Constitution. Correlative to this, a consent decree need only provide for a constitutionally acceptable remedy. On the other hand, the plan's failure to set goals of acceptable levels of desegregation, combined with its conclusive definition of minority students, is problematic given the Supreme Court's mandate in *Brown* that school systems have an "affirmative duty" to come forward with a plan "that promises realistically to work now."

The Reagan administration found the court's decision "extremely encouraging."¹⁹¹ "The court found the plan to be clearly within the broad range of constitutionally acceptable remedies," commented William Bradford Reynolds, the assistant attorney general

187 Urban League, *supra* note 121, at 49; *see also* Memorandum, *supra* note 118, at 19.

188 *See* Memorandum, *supra* note 118, at 19; notes 152-55 *supra*.

189 *Kelly v. Metropolitan Bd. of Educ.*, 687 F.2d 814 (6th Cir. 1982); *see also* Devins, *School Desegregation Law in the 1980's*, 1984 WM. & MARY L. REV. 1.

190 Memorandum, *supra* note 118, at 46.

191 Mirga, *supra* note 133, at 9.

for civil rights.¹⁹² "We remain confident that the proper implementation of this plan, which is based mainly on magnet schools and voluntary transfers, can achieve more lasting desegregation than a mandatory student reassignment plan."¹⁹³

The court's approval of the plan is a breakthrough for the Reagan DOJ. It allows the administration to pursue its antibusing policies by entering into similar consent decrees with school districts subject to desegregation obligations.¹⁹⁴ The *Chicago* decision also supports administration moves to give state and local education systems greater authority.¹⁹⁵

Chicago, through its recognition of the Board's expansive power under the consent decree, suggests that the executive can vest substantial authority in state and local school systems to monitor their own desegregation activities. Although such "divestiture" represents a dramatic shift from the pre-Reagan enforcement of federal civil rights statutes and equal protection clause guarantees, responsible judicial supervision of local school desegregation efforts can ensure that school systems satisfy the terms of constitutionally acceptable consent decrees. The *Chicago* case may foster this. *Chicago* also demonstrated that the scope of a desegregation order may be defined by the parties involved in the lawsuit and not the preferences of outside interest groups. The DOJ agreed to the plan, and the court, by denying several motions to intervene, refused to allow minority groups to raise their constitutional objections to the plan directly.¹⁹⁶

III. The Chicago Board of Education Sues to Obtain Federal Financial Assistance

The district court's approval did not end litigation over the Chicago desegregation plan. Even after the DOJ "praised the Board's implementation of the Plan as 'excellent' and 'in good faith' . . . , and the District Court has found that the Board's efforts to meet its obligations under the Consent Decree [to be] in good faith,"¹⁹⁷ the

192 *Id.* . . .

193 *Id.*

194 This has already happened in Bakersfield, California, and Lima, Ohio. See Mirga & Caldwell, *supra* note 93, at 1.

195 See notes 63-64 *supra*.

196 Since the district court upheld the plan as constitutional, it is unlikely that future efforts to intervene or collateral attacks can be successfully maintained. In fact, in a related action, the district court denied a motion to intervene in *Chicago* for precisely this reason. *Johnson v. Board of Educ.*, 567 F. Supp. 290 (N.D. Ill. 1983).

197 Brief, *supra* note 88, at 2.

issue remained of who should fund the plan. Section 15.1 of the consent decree provided that "[e]ach party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."¹⁹⁸ Whether this provision requires the federal government to provide special desegregation assistance to Chicago is presently the subject of litigation in *United States v. Board of Education*¹⁹⁹ ("*Chicago II*").

On June 30, 1983, Judge Shadur ruled that the decree obligated the United States to provide assistance.²⁰⁰ To reinforce his order, Judge Shadur froze approximately \$250 million of federal education funds.²⁰¹ Because of the district court's ruling, Congress had allocated—over executive objection—²⁰² \$20 million dollars to the Chicago school system.²⁰³ The Seventh Circuit affirmed on September 9, 1983.²⁰⁴

A. *The "New Federalism" and Chicago II*

Chicago II raises several issues significant to understanding the effects of the "new federalism." First, federal expenditures under the current block grant do not appear to provide sufficient support for expansive desegregation remedies.²⁰⁵ Second, effective voluntary desegregation techniques—although not involving the cost of busing—may be more expensive than mandatory ones.²⁰⁶ Third, the "new federalism" did not provide for transitional assistance to school districts which had relied on ESAA and similar programs to ensure adequate funding for their desegregation plans.²⁰⁷ Finally, proponents of the "new federalism" focus on reducing federal involvement in local educational decisionmaking; albeit an important concern, it is one that may limit federal action on behalf of minority students.²⁰⁸

198 Consent Decree, *supra* note 95, at 12, § 15.1.

199 567 F. Supp. 272 (N.D. Ill.), *aff'd*, 717 F.2d 378 (7th Cir. 1983).

200 567 F. Supp. 272 (N.D. Ill. 1983).

201 *Id.* at 285-90.

202 See notes 256-58 *infra*.

203 See notes 250-262 *infra*.

204 717 F.2d 378 (7th Cir. 1983). On August 13, 1984, the district court entered a judgment for \$103.858 million against the United States. Order, *United States v. Board of Educ.*, No. 80-C-5124 (N.D. Ill. Aug. 13, 1984).

205 See notes 72-75 *supra*.

206 The costs for voluntary desegregation using magnet schools may be substantial and may in some instances surpass those of mandatory assignment plans. Caldwell, *Magnet Schools: The New Hope for Voluntary Desegregation*, EDUC. WEEK, Feb. 29, 1984, at 1, 15-16.

207 See notes 72-75 *supra*.

208 See notes 63-64 *supra*. But see note 5 *supra*.

In its appeal brief, the Board contended that the government had "entered into a consent decree by which it agreed, . . . under judicial supervision, to be mutually responsible with a school board for funding a desegregation plan."²⁰⁹ The Board felt that this obligation amounted to a specific commitment to Chicago, not merely a general obligation that permitted Chicago to compete with other school districts for congressionally-authorized education funds. The DOJ disagreed, and claimed that the consent decree "does not require the Executive Branch . . . to prefer Chicago over other school districts . . . in dispensing federal financial assistance and structuring federal assistance programs."²¹⁰ On May 31, 1983, the Board petitioned for an order directing the United States to comply with Section 15.1 of the decree.²¹¹ The cases required the court to determine what constitutes a "good faith effort" by the government, and which funds were "available" for Chicago school desegregation.

A primary cause of the funding dispute in Chicago was the substantial reduction in federal desegregation assistance resulting from the "new federalism" in education as it was partially translated into legislation.²¹² According to the Board:

Since federal fiscal year 1981, the Executive Branch has been engaged in a continuous effort to strip away all means by which it could fulfill the United States' obligations under the Consent Decree. Despite the continued availability of financial resources [still available to the Secretary of Education], the Executive Branch has provided virtually no direct financial support for the Board's desegregation efforts.²¹³

The Board cited the administration's failure to support desegregation efforts or make a special effort to use available funds, noting that President Reagan vetoed legislation designed specifically to assist Chicago.²¹⁴ It further suggested that the administration was openly hostile to its efforts to secure federal desegregation assistance.

209 Brief, *supra* note 88, at 1.

210 Brief for the United States at 16, *United States v. Board of Educ.*, Nos. 83-2308, 83-2402, 83-2445 (7th Cir. Aug. 15, 1983). The Board requested both declaratory and injunctive relief.

211 See 717 F.2d at 380. (Specifically, "The Board asked the district court.")

212 See notes 256-58 *infra*; see also notes 72-73 and 110 *supra*.

213 Brief, *supra* note 88, at 10. The Board also noted both its compliance with the consent decree and its need for financial support. The Board contended that "[i]n a period of severe financial constraint, desegregation implementation has been the only programmatic area in which the Board has continually increased its annual level of expenditure. . . . In spite of the Board's efforts, however, it does not have financial resources adequate for full implementation of the Plan." *Id.* at 8.

214 *Id.* at 10-11; see note 250 *infra*.

The Board's failures in working with the federal government led to the filing of *Chicago II*. The first issue the court addressed required it to determine, from the decree's "four corners,"²¹⁵ the parties' intent in Section 15.1²¹⁶

The district court unequivocally held that the United States had an affirmative obligation to assist the Board's efforts to secure federal funding. It found that "the United States' promise to make every good faith effort" to find and provide available funds entailed a "serious and substantial obligation."²¹⁷ The court further noted that this obligation required consistency in federal policy; the government "could not in good faith, having entered into the Consent Decree, work actively to make financial resources unavailable."²¹⁸

In its appeal, the DOJ vigorously challenged these rulings. It alleged that the court improperly read Section 15.1 as (1) a guarantee of federal financial support,²¹⁹ (2) "an open-ended commitment to provide federal assistance,"²²⁰ and (3) a limitation on the range within which the executive branch would determine national educational policy and related legislative proposals.²²¹

The Board, in turn, suggested that the government misinterpreted both the consent decree and the district court's order. It viewed Section 15.1 as "a substantial affirmative promise."²²² The

215 567 F. Supp. at 281.

216 The case did not raise the issue of the enforceability of consent decrees. The court simply stated: "Consent decrees are binding orders that have the same force as any other judgment. Accordingly, the Consent Decree is fully enforceable by this court." 567 F. Supp. at 281.

217 *Id.* at 283.

218 *Id.* at 282.

219 See Brief, *supra* note 210, at 17, 36. For example, in *Fox v. Dep't. of Housing and Urban Development*, 680 F.2d 315 (3rd Cir. 1982), the Third Circuit interpreted a consent decree in which HUD agreed to use its best efforts to obtain necessary federal approvals for construction of a specific housing project to be built according to the terms of the decree. The Third Circuit held that this "best efforts" clause was not an "undertaking by HUD, express or implied, to provide . . . financing." *Id.* at 320; see also cases cited in Brief, *supra* note 210, at 18.

220 Brief, *supra* note 210, at 17.

221 See Brief, *supra* note 88, at 20, 47.

222 *Id.* at 19. In support of this contention the Board referred to *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982) ("Best efforts" obligation includes appeal to legislature for appropriation of funding.); *Ricci v. Okin*, 537 F. Supp. 817, 837 (D. Mass 1982) ("Best efforts" implies "all steps within their lawful authority."); *Geiser v. United States*, 627 F.2d 745 (5th Cir. 1980) ("Best efforts" entails a serious affirmative obligation.).

As to the meaning of the Consent Decree, the Board argued:

On its face, § 15.1 of the Consent Decree plainly creates a mutual obligation of the parties to do everything possible to provide financing to assure the success of the Plan. The word "find" describes an obligation to identify and procure potential

“new federalism” in education, which resulted in the elimination of ESAA and other programs, consequently was seen by the Board as a breach of the government’s “substantial affirmative promise.”²²³ The Board further pointed to government memoranda interpreting Section 15.1 which said that “each party is obligated to search for every available means to provide adequate financial resources for the implementation of the Desegregation Plan,”²²⁴ and that the Board should “receive the maximum amount of financial and technical assistance that this Department [of Education] can provide.”²²⁵

The Board’s contention, that the federal government had obligated itself to provide funding to implement the desegregation plan,²²⁶ raises the second significant factual issue in *Chicago II*: whether the Department of Education had ready access to funds which could help support Chicago school desegregation. In affirming the district court’s order, the Seventh Circuit placed great emphasis on these questions of fact. It first noted that Section 15.1 was written in language so broad as to be ambiguous.²²⁷ Consequently, it based its determination on extrinsic evidence introduced by the Board and DOJ. The Seventh Circuit found persuasive government memoranda—introduced by the Board—that suggested that Chicago receive the maximum amount of desegregation assistance available to the Department of Education.²²⁸

Based on this determination, the appellate court next had to

means of funding. “Provide” obviously means to give such funding to the Board. “Every available” refers to funds that are or might be made subject to a party’s control. “Adequate for implementation of the Plan” serves to limit the parties’ obligations to amounts necessary to carry out the Plan. This language of § 15.1 is of course preceded by the phrase “every good faith effort” which, while not a guarantee, clearly requires a most serious and substantial effort to attain the result described in the provision.

Brief, *supra* note 88, at 17.

223 See notes 63-75 *supra* for a discussion of Reagan administration programs.

224 See Brief, *supra* note 88, at 25.

225 *Id.*

226 The School Board alleged that:

Only after applying § 15.1 to the current facts of this case and determining that at least \$15 million is currently available to the Executive Branch which could be provided to the Board, and that at least \$14.6 million is needed for adequate implementation of the Plan which cannot be provided by the Board despite its good faith efforts, did the District Court conclude that the United States is obligated to provide funding of at least \$14.6 million for the current year.

Brief, *supra* note 88, at 15.

227 “[A]side from the board language that permeates all of 15.1 the word ‘available’ is capable of more than one meaning.” 717 F.2d at 382.

228 See *id.* at 383; see also notes 224-25 *supra*.

reach the issue of whether the government had acted in good faith. The district court had held that the government had breached its obligation on two grounds. First, the "new federalism" violated the consent decree's "good faith" requirement (since these policies reduced the amount of federal funds provided to local educational agencies for desegregation expenses),²²⁹ and second, the government breached its "good faith" obligation by failing to direct available funds to the Board.²³⁰ On the first ground, the Seventh Circuit remarked that "a significant constitutional issue may exist as to whether a finding of lack of good faith properly can be based upon such a series of sweeping Executive policy decisions and recommendations."²³¹ It did not reach that question, however.²³² Instead, it affirmed the district court's rulings on the more limited ground that the Department of Education could have directed more funds to Chicago school desegregation.²³³

The DOJ contended before the appellate court both that adequate funds were available to the Board and that no other sources were available to finance Chicago school desegregation. It stressed that "[i]n fiscal year 1982, the Board received \$6.3 million under

229 See 567 F. Supp. at 283; see also 717 F.2d at 383.

230 See 567 F. Supp. at 284-85; see also 717 F.2d at 383.

231 717 F.2d at 383. In its brief, the United States suggested that "[t]he district court's error in interpreting the decree is magnified by its order denying essential funding to grantees selected by Congress or the Executive and simultaneously seeking a reversal of Congressional and Executive discretionary decisions." Brief, *supra* note 210, at 47. In support of this contention, the United States cited Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519 (1978). In that case, the Supreme Court held that courts should defer to the policy choices made by executive officials in carrying out their statutory directives "[a]bsent constitutional constraints or extremely compelling circumstances." *Id.* at 543. The United States also questioned the scope of the district court remedy as an abuse of discretion. See text accompanying note 221 *supra*.

In seeking to refute this claim, the Board contended that:

The basic purpose of the separation of powers doctrine, to serve as a check against oppression and prevent the accumulation of power in one branch of government, would certainly not be served by permitting the Executive Branch to negotiate and enter an agreement, in which it undertook to "make every good faith effort" to provide financing for the Plan, and then render its promise meaningless through later "discretionary" actions.

Brief, *supra* note 88, at 44.

The Board further noted that the Executive was not forced either to violate congressional restrictions on education funds or introduce legislation to provide money for the Plan. See *id.* at 38-39. The United States argued that this Board claim was in error. See Brief, *supra* note 210, at 38-45. The district and appellate courts both resolved this issue in favor of the Board, however. See notes 237-46 *infra*.

232 717 F.2d at 383 ("That important question, however, need not be addressed at this time, in light of this court's direction regarding the remedies. . . .").

233 *Id.*

Chapter 2 of ECIA, almost double what it had received in the antecedent programs to Chapter 2. All of those funds are, by statute, available for desegregation expenses at the Board's discretion."²³⁴ The DOJ further noted that in FY 1983 more than ten million additional dollars were potentially available to the Board for its desegregation program than in 1982.²³⁵ Finally, it argued that "many of the expenses designated by the Board as desegregation expenses would be incurred regardless of whether the Board was implementing its plan."²³⁶

The Board sought to refute these arguments by noting that it would have been eligible for the same amount of desegregation assistance had it not entered into the consent decree or implemented a desegregation plan.²³⁷ The Board implied that it never would have "agree[d] to develop and implement a costly plan . . . in exchange for money it already had."²³⁸ The district court agreed with the Board and held that the "Board cannot obtain adequate financing for full implementation of the Plan without receiving financial help from other sources, including the United States."²³⁹

In addition to claiming that it had adequately funded Chicago school desegregation, the DOJ argued that no additional funds were available to assist Chicago. It suggested that statutory and regulatory guidelines prohibited additional expenditures on Chicago school desegregation.²⁴⁰ The district court, following the Board's analysis of

234 Reply Brief for the United States at 14, *United States v. Board of Educ.*, Nos. 83-2308, 83-2402, 83-2445, (7th Cir. Aug. 19, 1983). School boards, however, generally do not spend these funds on desegregation related activities. Another analysis reached a different conclusion concerning Chicago's funding experience under the block grant. See note 277 *infra*.

235 See Brief, *supra* note 210, at 12-13.

236 Reply Brief, *supra* note 234, at 14. The government noted: "For example, the Board considers rehabilitation of school buildings in racially isolated areas a desegregation cost even though it would admittedly have to undertake such repairs in any event." *Id.*

237 Brief, *supra* note 88, at 32.

238 *Id.* Yet before the Board entered into the consent decree, it was ineligible to receive funds specifically designated for desegregation-related activities. See notes 3-12 *supra*.

239 567 F. Supp. at 283.

240 See Brief, *supra* note 210, at 38-46. The Government's brief specified limitations on several aid programs identified by the district court and school board: (1) Title IV of the Civil Rights Act of 1964 (training and advisory services) where the government claimed that "[i]n order to permit the Board to receive any substantial award under Title IV this year, the current competition for State educational agency awards would have to be overturned, and the Department of Education would have to cancel its commitment to make continuation awards for desegregation assistance centers." Brief, *supra* note 210, at 39; (2) ECIA Chapter 2 where the government argued that "[t]he Secretary of Education has no authority granted by the statute or regulation to direct the states' allocation of Chapter 2 funds to local education agencies." *Id.* at 42; (3) ECIA-Discretionary Funds where the government alleged that "any grant made to the Board would have to fund costs other than general operating costs incurred

the relevant statutes and regulations,²⁴¹ had found that “[f]unds are currently available in the Discretionary Fund and in the Special Programs and Populations Fund, in amounts exceeding \$15 million, that could be provided by the Secretary of Education to the Board for desegregation assistance.”²⁴²

The district court had granted the Board’s request for the \$14.6 million in federal aid which the Board claimed was required “for full implementation” of its costly, voluntary desegregation plan.²⁴³ The court found that the Secretary of Education had access to approximately \$35 million in unobligated Title IV and discretionary funds.²⁴⁴ Based on these rulings, it “directed the United States to undertake an affirmative program of making every good faith effort to find and provide the \$14.6 million and such other funding as the court may determine.”²⁴⁵

in implementing the desegregation plan.” *Id.* at 44; and (4) the government claimed that a variety of regulations would make impracticable the reprogramming of “[f]unds appropriated for Women’s Educational Equity, Follow Through, Aid to the Virgin Islands, and Territorial Teacher Training. . . .” *Id.* at 45.

241 See Brief, *supra* note 88, at 34-38. The Board directly challenged each of those DOJ contentions. Specifically, it suggested that the Secretary of Education has authority to read-just specific program allocations. According to the Board,

Congress provides funds to the Department of Education through lump sum appropriations to various budget (or appropriation) accounts. Each account encompasses several programs administered by the Department of Education and operates as the Department’s conduit for distributing funds to its various programs. . . . The programs which comprise SPP [Special Programs and Populations Appropriation, which was the primary source available to the United States] include Title IV, the Secretary’s Discretionary Fund, the Ellender Fellowship, Woman’s Educational Equity, and the Follow Through Program. . . .

Brief, *supra* note 88, at 35 n.*.

242 567 F. Supp. at 286.

243 Brief, *supra* note 88, at 8.

244 See 567 F. Supp. at 276, 278.

245 717 F.2d at 383. The appellate court further described the exact contours of the district court opinion:

This affirmative program is to include, to the extent necessary to meet the obligations of the United States: (1) efforts to provide the Board with funds that remain available for local desegregation assistance and that are located in the Secretary of Education’s Discretionary Fund and the Special Programs and Populations Account (which included Title IV monies); (2) efforts to secure congressional consent for the reallocation of excess funds from the Department’s Guaranteed Student Loan Program into a fund from which support may be provided to implement the Board’s desegregation plan; (3) efforts to identify other available monies or to reprogram or reallocate others excess monies; (4) support of legislative initiatives that would provide desegregation funding to school districts that have entered into consent decrees; (5) efforts to fund grantees and projects, which the Department had intended to fund through the Discretionary Fund and the Special Programs and Populations Account, with monies from other sources; and (6) cooperation with the

The Seventh Circuit, although agreeing that the government had breached its good faith obligation, vacated most of the district court's affirmative program. It felt that "it is not clear from the record before us that the United States had an adequate opportunity to challenge the remedies selected by the district court, particularly the \$14.6 million figure,"²⁴⁶ and to have additional hearings to determine the proper level of government funding.²⁴⁷ In addition, it found that the lower court had acted too hastily:

The district court acted with excessive dispatch in delineating specific remedies immediately after finding a violation of Section 15.1. Where another branch of government is found to be in violation of a court order, courts have shown a preference for allowing that branch to come into compliance voluntarily before imposing specific remedial measures.²⁴⁸

But to ensure adequate relief for the Board, the Seventh Circuit upheld the injunction against spending unobligated funds.²⁴⁹

The Seventh Circuit's ruling in *Chicago II* was quite narrow.

Board to identify the Board's desegregation activities that are eligible for funding under Title IV.

In its order of June 30, the district court also enjoined the United States from spending or taking action to obligate funds that are available for providing desegregation funding to the Board and that are located both in the Secretary of Education's Discretionary Fund and in the Department's Special Programs and Populations Account. (citations omitted). In addition, the June 30 order directed the United States to undertake an affirmative program to preserve the availability of excess funds (including student loan funds) in the amount of \$250 million that potentially can be used by the United States to fulfill its obligations under the Decree for the next five years.

Id. at 382-84.

246 *Id.* at 385.

247 *See id.*

248 *Id.* at 384. *See, e.g.,* *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977) (district court injunction designed to compel state to provide additional financing for hospitals vacated so as to permit the legislature to provide the financing on its own initiative); *Phem v. Malkom*, 507 F.2d 333 (2d Cir. 1974) (similar injunction vacated to allow New York City either to submit a remedial plan or at least offer suggestions for a judicial remedy).

The appellate court's conclusion on this issue seems particularly appropriate in light of the broad sweep of the district court remedy. With its \$14.6 million order and \$250 million freeze, the district court remedy substantially impacted on several other education programs. In its brief, the government noted:

The district court's order goes so far as to hold hostage funds appropriated by Congress for very specific purposes—(Aid to the Virgin Islands, Women's Educational Equity, etc.) having no relationship to desegregation assistance. This action effectively extinguishes the rights and expectations of hundreds of grantees and beneficiaries under these programs, none of whom were a party to these proceedings.

Brief, *supra* note 210, at 49; *see also* note 254 *infra*.

249 717 F.2d at 385.

The court limited itself to issues of fact, not legal principles. It concurred with the district court's finding that the government had an affirmative obligation to provide available funds to the Board, and that the Secretary of Education had access to additional monies which he could have directed to the Board. More interesting than these questions of fact, however, was the manner in which the executive and legislative branches responded to the district court's decision.

B. *Legislative and Executive Responses to Chicago*

In response to the district court's ruling, Congress sought to make additional monies available to enable the United States to comply with its obligations under the consent decree.²⁵⁰ On August 13, 1983, President Reagan vetoed one congressional effort,²⁵¹ but subsequently signed into law legislation continuing, among many appropriations, funding for Chicago.²⁵²

Congress had two motives for seeking to approve this funding. First, it intended to assist Chicago's implementation of a desegregation plan; second, it wanted to encourage the district court to lift the freeze on over \$250 million in congressionally-authorized education programs. With regard to the former reason, Congressman Yates (D-Ill.) remarked that "approving this amendment will [make it] possible to begin carrying out the agreement between the board of education and the Federal Government in accordance with the order of the Court in the case."²⁵³ Representative Conte (R-Mass.) directed his remarks to the issue of alleviating the burden placed on federal education programs by the district court's order. He argued:

The Department of Education should release these funds [to be appropriated for Chicago] only upon receiving assurance that the

250 On July 29, 1983, the House agreed to an amendment to H.R. 3069, Supplemental Appropriations, 1983, which would have provided \$20 million for Chicago from unobligated Guaranteed Student Loan funds. 129 CONG. REC. H5990-991 (daily ed. July 29, 1983). Due to an enrolling error, that amendment was not included in the bill sent to, and approved by, the Senate and subsequently signed into law. 129 CONG. REC. H6127 (daily ed. Aug. 1, 1983). As a result, H.J. Res. 338 was passed by both Houses to "correct" P.L. 98-63 and appropriate the \$20 million for Chicago. 129 CONG. REC. H6127 (daily ed. Aug. 1, 1983); 129 CONG. REC. S11293 (daily ed. Aug. 1, 1983). The measure was vetoed. See note 251 *infra*.

251 H. J. Res., 338, 129 CONG. REC. H6127 (daily ed. Aug. 1, 1983).

252 Congress approved language appropriating the \$20 million for Chicago in H.J. Res. 368, which contained appropriations for many federal agencies and programs. 129 CONG. REC. H7623-625 (daily ed. Sept. 28, 1983); 129 CONG. REC. S13184 (daily ed. Sept. 29, 1983). This resolution was signed into law on Oct. 1, 1983. Pub. L. No. 98-107, 97 Stat. 733 (1983).

253 129 CONG. REC. H5990 (daily ed. July 29, 1983) (remarks of Rep. Yates).

judicially imposed impoundment of discretionary funds for elementary and secondary education will be lifted. Otherwise, the States and cities affected by the judge's order will get no relief from this amendment. . .²⁵⁴

Congressman Conte also suggested that the Chicago situation pointed to the need for Congress to revitalize ESAA.²⁵⁵

In the letter accompanying the announcement of his veto of House Joint Resolution 338 (to correct an enrollment error in P.L. 98-63), President Reagan noted "the extraordinarily important constitutional principles raised by this particular measure."²⁵⁶ Specifically, he thought unconstitutional the district court's order freezing funds "appropriated by Congress for other educational programs."²⁵⁷ He based his veto "upon [his] conviction that its process of separated powers and checks and balances does not permit the judiciary to determine spending priorities or to reallocate funds appropriated by Congress."²⁵⁸

Congress responded to that veto by adding to a continuing resolution language appropriating \$20 million to Chicago from unobligated Guaranteed Student Loan funds.²⁵⁹ Congress also subsequently passed the so-called Weicker amendment, which sought to lift the district court's freeze on other federal education programs.²⁶⁰ As incorporated into Public Law 98-139, this provision

254 *Id.* (remarks of Rep. Conte). Similarly, Representative Yates noted: "[B]ecause of the Court's actions, the Follow Through grant for New Haven has been cut to \$21,714 [from \$173,713]. Follow Through grants for 76 other systems are similarly affected." *Id.* (comment of Rep. Yates). See note 248 *supra*.

255 Congressman Conte stated:

[I]f this situation requires any further resolution, the way it should be resolved is through the reauthorization of the Emergency School Assistance Act. As the Members will recall, this reauthorization has passed the House, on suspension, and is pending in the Senate. Any further action on this situation in the Appropriations Committee should depend upon that reauthorization. There are many other cities whose desegregation plans have been thrown into disarray, and it is not fair that one city should receive special treatment, at least prior to a final disposition of this case.

129 CONG. REC. H5990 (daily ed. July 29, 1983) (statement of Rep. Conte); see notes 279-95 *infra*.

256 Press Release, The White House, Aug. 13, 1983.

257 *Id.*

258 *Id.* This congressional action and executive veto were of no significance in the appellate court order. Since the appellate court based its decision on narrow "availability of funds" grounds, the issue of possible executive hostility to Chicago's (or any other school district's) desegregation efforts was not reached by the appellate court. This issue was briefed by both parties, however. See Brief, *supra* note 88, at 11; Reply Brief, *supra* note 234, at 11-12.

259 Pub. L. 98-107, 97 Stat. 733 (1983).

260 This amendment originally read:

No funds appropriated in any act to the Department of Education for 1983 and

read:

No funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for the Northern District of Illinois on June 30, 1983: Provided, that the court's decree entered on September 24, 1980, shall remain in full force and effect.²⁶¹

Despite the provision's limiting language, Senator Weicker (R., Conn.) noted that "[i]f additional funds were required to satisfy this case beyond the \$20 million [now] available, we will do whatever we can to provide these funds at the appropriate time."²⁶²

C. *Judge Shadur's June 8, 1984 Opinion*

In response to the Seventh Circuit's remand of *Chicago II*, Judge Shadur issued an opinion suggesting that the "United States is obligated to make every good faith effort to find and provide \$103.858 million" for the 1984-85 school year.²⁶³ He also found that the United States had failed to meet its obligation to "fashion its own proposed remedy,"²⁶⁴ but suggested that he might lift his freeze on various federal education programs.²⁶⁵

The key to this particular opinion was the court's flat rebuff to three DOJ arguments. First, Judge Shadur rejected the separation of powers argument that his earlier decision was "choking off deserving education programs."²⁶⁶ Second, he rejected the United States' con-

1984 other than those appropriated by section 111 of Public Law 98-107 shall be available to fund the consent decree of 1980 between the United States and the Board of Education of the City of Chicago.

129 CONG. REC. S13,506 (Oct. 4, 1983)(remarks of Sen. Weicker).

261 Pub. Law 98-139, § 209, 97 Stat. 871, 895 (Oct. 31, 1983).

262 129 CONG. REC. S13,506 (daily ed. Oct. 4, 1983) (remarks of Sen. Weicker).

263 *United States v. Board of Educ.*, 588 F. Supp. 132, 221 (N.D. Ill. 1984).

264 *Id.* at 211. Judge Shadur ruled that "[a]ll of the conduct of the United States . . . including its promulgation of regulations and proposals of legislation intended to render funds unavailable to [the] Board for use in implementing the Plan . . . constitutes both bad faith conduct and willful violations of the Consent Decree and orders of this Court and the Court of Appeals." *Id.* at 212.

265 *Id.* at 233-34.

266 *Id.* at 138. Judge Shadur stated:

Because the United States has deliberately violated its original agreement to fund the Chicago Desegregation Plan, this Court has reluctantly found it necessary to prevent the distribution to other possible grantees of United States educational funds, in order to preserve access to all the dollars that would be potentially available to fund the honoring of the United States' freely-undertaken (and freely broken) obligation to the Board.

tention that Chicago should spend available federal funds on school desegregation, claiming that “[s]uch a standard—forcing the robbing of Peter to pay Paul—would render the United States’ financial obligations meaningless.”²⁶⁷ Finally, the court refused to scrutinize the possibility that the Board was taking advantage of the United States by including general school improvement programs in the desegregation budget.²⁶⁸ In so doing, the judge recognized as legitimate any expenses that “materially aid [] the success of the overall desegregation effort.”²⁶⁹

The United States filed a response to the June 8 ruling.²⁷⁰ Basically, the United restated many of its arguments raised previously before the court of appeals. A central claim of its arguments was the fact that even if the president promised to seek special congressional appropriations to fund Chicago’s desegregation plan, the Court would be powerless to enforce such an agreement against the executive.²⁷¹ The United States argued that it was meeting its consent decree obligation, and pointed to a letter by Secretary of Education Bell to the Illinois Superintendent of Education which urged Illinois to provide more of its block grant funds to Chicago for school desegregation purposes.²⁷² The United States appealed the court’s order.²⁷³

D. *Conclusions*

Chicago II will probably be a costly lesson to the federal government. Yet, it should be able to avoid future *Chicago II*’s if the DOJ spells out in desegregation consent decrees what funding obligations the government is willing to undertake. The larger question, of whether and to what extent the federal government should assist local desegregation efforts, is not directly raised by the case. At the

Id. at 139. Judge Shadur similarly noted that

[t]o date, 11 separate letters have come in about the loss of a program that . . . sounds highly worthwhile. If the United States will not be candid and acknowledge that this baby, and all the other orphans created by the United States’ intransigence, must be laid at its doorstep and not that of this Court, either this Court or someone else ought to make that clear.

Id. at 138 n.1.

267 *Id.* at 218.

268 *See id.* at 220-21.

269 *Id.* at 221.

270 *See* United States’ Report to the Court, June 25, 1984.

271 *Id.* at 2.

272 *Id.* at 5-6.

273 *See* Brief for United States, *United States v. Board of Educ.*, No. 84-2405 (7th Cir. Aug. 23, 1984).

same time, by forcing Congress to address the problem of the financing of local desegregation efforts, *Chicago II* has resulted in its reevaluating the federal government's role in providing desegregation assistance.²⁷⁴ *Chicago II* is also a challenge to the Reagan administration to support initiatives which will result in sufficient federal expenditure for effective voluntary desegregation programs.

The basic substantive holding in *Chicago II*, that the government has an affirmative obligation to take positive steps to help fund the Board's plan, does not seem unreasonable. At the same time, the government probably did not intend to obligate itself to become financier of Chicago's costly voluntary school desegregation plan. The Board, as well, probably expected the bulk of government assistance to come from then existing federal aid programs. ESAA, the primary desegregation assistance program extant when the decree was entered into, provided sizable grants to urban school systems, but not on the order of the amount cited in the most recent opinion from Judge Shadur.²⁷⁵ It is difficult to conceive that the school board could have reasonably expected to receive from the Federal government annual grants for desegregation of anywhere near \$104 million.

IV. Implications of *Chicago*

A. *Legislative Concern With the Block Grant and Efforts to Revive ESAA*

The *Chicago* litigation speaks to more than the pursuit of equal educational opportunity in that city. It suggests that if the federal government is committed to financing school desegregation, the current block grant appears ineffective for the task.

The "new federalism" in education was intended to reduce federal intervention in local school affairs. To date, its principal result is Chapter 2 of the Education Consolidation and Improvement Act of 1981 ("ECIA") which repealed over two dozen categorical education programs, including the primary federal program assisting school de-

274 See note 255 *supra* and notes 279-95 *infra*.

275 Among the largest FY 1981 ESAA awards were the approximately \$7 million received by both Los Angeles and Milwaukee. J. Stedman, *supra* note 48, at 752.

It is not within the scope of this article to analyze the soundness of these decisions. These decisions raise significant separation of powers issues. Initially, it is unclear whether the government can obligate itself either to commit funds or to seek to make funds available beyond the current fiscal year. It is also possible that, with the repeal of ESAA, government funding obligations were effectively voided. Finally, Congress may be able to alleviate the government obligation through the passage of legislation or appropriations measures. These issues, as well as others, will be addressed in a forthcoming article by Jeremy Rabkin and Neal Devins.

segregation efforts. The repealed program activities were continued as authorized activities for block grant spending. Since school districts have the discretion to spend their block grant funds for any authorized activity, the ECIA in effect treats them all as equally worthy of federal support. Thus, spending for school desegregation is treated as no more important than spending for instructional materials, or for programs in metric education or consumer education, all of which are approved for spending in the block grant.²⁷⁶

The block grant's current structure precludes concentrating federal funds on particular activities. Its funds are distributed among all local school districts in the country. In contrast, antecedent programs, including ESAA, focused on specific activities and often funded only a small number of districts. Chicago, as a result, apparently had a net decline between FY 1981 and FY 1982 in its funding for activities covered by the block grant.²⁷⁷ The impact of this shift in the distribution of resources may be exacerbated because the effective use of funds for certain activities depends in part upon the amount of funding available.²⁷⁸

Perhaps as significant as the level of assistance available is the reluctance of school districts to pursue equal educational opportunity absent outside intervention. Federal education support and the lev-

276 The Department of Education may soon learn this lesson about the current block grant—it provides little leverage on school districts' actions. The FY 1985 budget request for the Department of Education includes a \$250 million increase for the Chapter 2 block grant. According to Secretary of Education Terrel H. Bell, this increase is intended to finance reform recommendations made by the National Commission on Excellence in Education. He stated, "[t]hese funds can be used by States and local school districts to address such needs as upgrading high school graduation requirements in the 'five new basics,' training teachers, developing experimental pay plans, and expanding school days or years." Statement of T.H. Bell, Secretary of Education, on the "Fiscal Year 1985 Budget," U.S. DEP'T OF EDUC. NEWS, Feb. 1, 1984, at 3. Of course, the Department cannot require that districts in fact spend their Chapter 2 funds on those activities, a point already being made. In a recent article, a state coordinator of Chapter 2 activities in an unidentified Rocky Mountain State is quoted as saying, "[t]he local agencies have great discretion when it comes to spending this money. It will be a real challenge directing them to funnel their money into new areas, especially when you consider that the law specifically prohibits us from telling them what to do with their block grants." Mirga, *Chapter 2 Directors Question Plans for Block Grants*, EDUC. WEEK, Feb. 15, 1984, at 1, 14. Another coordinator from a northwestern state is quoted as saying, "we have about 200 small districts in my state and one of our smallest ones received a grant of \$65 last year. . . . What do you think they'll do with a 50-percent increase?"

277 Comparing the antecedent funding level for FY 1981 with that for the Chapter 2 block grant for FY 1982. R. JUNG & T. BARTELL, *supra* note 73, at 11, table 3. Chicago's drop in funding was \$426,017 (6.3% of its FY 1981 funding under the antecedent programs). But see notes 234-36, *supra* for DOJ contention that Chicago actually fared better under the block grant than it did under the antecedent programs.

278 See note 276 *supra*; American Association of School Administrators, *supra* note 74, at 18.

erage it provided over school districts were used to remedy the districts' lack of commitment to equal education opportunity demonstrated between 1954 and 1964. The ESAA pre-grant review procedure continued to exert pressure on districts as the price of federal aid. The lack of Chapter 2 spending by school districts on desegregation-related activities appears to be in keeping with the history of equal educational opportunity in local educational agencies. In particular, the way in which the block grant funds are spread among school districts and the great local discretion over their use contribute to the program's ineffectiveness in addressing school desegregation needs. This conclusion appears to be one of the motives for recent congressional action to create a new desegregation assistance program for schools.

Congressional interest in the effects of the education block grant on school desegregation grew over the past two years, resulting in passage by the House of a bill to revive a modified ESAA program and, subsequently, passage by both Houses of a program of assistance for desegregation-related magnet schools.²⁷⁹ Although undoubtedly it will not receive further Senate consideration due to passage of the magnet schools program, the House bill to re-establish an ESAA program merits some discussion because it illustrates congressional thinking on the block grant and desegregation assistance. The bill states that local educational agencies do not have the additional resources required to eliminate or prevent minority group isolation and to improve education for all children.²⁸⁰ It notes that some school districts need additional funds to complete activities begun with ESAA funds,²⁸¹ and authorizes \$100 million for FY 1984 and such

279 H.R. 2207 (Emergency School Aid Act) was passed by the House on June 7, 1983, under suspension of the rules. 129 CONG. REC. H3692 (daily ed. June 7, 1983). H.R. 1310 (Education for Economic Security Act) as passed by the Senate on June 27, 1984, contains a title authorizing a Magnet School Assistance Program. 130 CONG. REC. S8440 (daily ed. June 27, 1984). The magnet school title was added and the program approved by the Senate on June 6, 1984. 130 CONG. REC. S6682 (daily ed. June 6, 1984). The House approved the Senate-passed version on July 25, 1984. 130 CONG. REC. H7745 (daily ed. July 25, 1984).
280 Emergency School Aid Act, H.R. REP. 98-136 to accompany H.R. 2207, 98th Cong., 1st Sess. 3 (1983). The report on the legislation by the House Committee on Education and Labor stated:

The need for desegregation assistance has not diminished. Desegregation of public schools is a national goal, requiring a national effort to achieve. The absence of Federal aid makes it less likely that school districts will be as able or willing to undertake this massive commitment. Without the crucial educational and community activities supported by ESAA, school desegregation does not work.

Id.

281 The committee reported that the block grant "drastically reduc[ed] desegregation-related programs in hundreds of school districts around the country." *Id.* at 2.

sums as may be necessary for the next two fiscal years. The House proposal modifies the previous act primarily by eliminating a state-based allotment formula applied to a portion of ESAA funds. It would continue the nondiscrimination requirements and the pre-grant review from the previous act.²⁸²

In dissent, four members of the Education and Labor Committee argued that the school desegregation "emergency" was over, the "integrity" of the block grant was at stake, the legislation was unnecessary since ESAA activities were already authorized under the block grant, and ESAA funding had been misused in the past.²⁸³ The dissenters questioned whether the legislation was "only a first step in the dismantling of the block grant, as those who did not fare as well under the block grant funding process seek to regain Federal dollars."²⁸⁴

Representative Goodling (R-Pa.), in individual views presented in the committee report, stated that although he was an architect of the current education block grant, he viewed the legislation to reenact ESAA as honoring a "moral commitment to extend some limited, special assistance, particularly to those districts caught in the middle of an expensive ongoing desegregation plan when ESAA was repealed and placed in the block grant."²⁸⁵ On the House floor during deliberation, Representative Goodling observed that, despite the block grant's authorization of ESAA activities, "the substate formula decisions made at the State level have made it almost impossible for the districts that formerly relied heavily on ESAA grants to complete the programs they embarked upon."²⁸⁶ The idea that a revived ESAA would support voluntary desegregation efforts apparently appealed to many House members. Representative Goodling noted that ESAA is "a natural complement to the [Justice] Department's [voluntary] approach to school desegregation."²⁸⁷ Representative Conte expressed his support of the legislation "so that cities that have worked out voluntary, locally-developed plans, can continued their efforts to provide a quality education to all children."²⁸⁸

The desegregation assistance program ultimately passed by both Houses of Congress had its origin in the Senate. The previously dis-

282 *See id.*

283 *Id.* at 22-24.

284 *Id.* at 23.

285 *Id.* at 20.

286 129 CONG. REC. H3587 (daily ed. June 6, 1983).

287 *Id.*

288 *Id.* at H3588.

cussed House bill to revive ESAA encountered hostility in the Senate.²⁸⁹ A compromise over desegregation aid was nevertheless reached and adopted as an amendment to a bill to improve math and science education.²⁹⁰ The amendment authorizes \$75 million a year for FY 1984 through FY 1986 for a Magnet Schools Assistance program to support the planning, establishment, and conduct of magnet schools that are part of an eligible desegregation plan.²⁹¹

Some critics of a new ESAA program have argued that ways of targeting funds within the current education block grant short of establishing a new categorical aid program should be explored.²⁹² For example, intrastate allocation formulas could be made sensitive to the districts' desegregation-related needs, or the legislation could specify some priorities. One cannot tell, of course, whether continuing ESAA would have prevented the litigation in Chicago over the federal financial obligation to that city's desegregation plan.²⁹³ Nevertheless, its repeal certainly played a pivotal role in the litigation. Judge Shadur apparently viewed the fact that the administration

289 *Hatch Said to Seek Compromise on Desegregation-Aid Stalemate*, EDUC. WEEK, May 2, 1984, at 14.

290 130 CONG. REC. S6673-82 (daily ed. June 6, 1984) (adoption of amendment to S.1285); 130 CONG. REC. S8440 (daily ed. June 27, 1984)(passage of H.R. 1310 with text of S.1285 as amended inserted in lieu thereof).

291 *See* 130 CONG. REC. S6676 (daily ed. June 6, 1984) (remarks of Sen. Eagleton (D-Mo.) concerning the bill's narrow focus).

To be eligible for funding under the bill, a school district must have lost \$1 million in federal funding in the first year following the repeal of ESAA, or must be implementing a court or state-ordered desegregation plan, or a voluntary plan complying with Title VI. A district must further assure that it will not discriminate on the basis of race, religion, color, or national origin in hiring, promoting or assigning employees, assigning students to schools or courses of instruction (unless part of the desegregation plan), or in conducting extracurricular activities. According to the remarks of one sponsor, the Department of Education must show intent before finding a district in violation. 130 CONG. REC. S6681 (daily ed. June 6, 1984)(remarks of Sen. Hatch).

Supporters of the legislation cited numerous examples of school districts that had suffered serious funding losses with the repeal of ESAA. *See* 130 CONG. REC. S6675-76 (remarks of Sen. Eagleton), S6676-77 (remarks of Sen. Bradley (D-N.J.)), S6679-81 (remarks of Sen. Moynihan (D-N.Y.)) (daily ed. June 6, 1984).

292 House Report, *supra* note 280, at 23.

293 The availability of ESAA funding has played a similar role in previous litigation. In 1981, the Court of Appeals affirmed a lower court decision in litigation concerning school desegregation in St. Louis. One item being appealed was the lower court's failure to order that the U.S. had to pay for some of the costs of the desegregation of the city's schools. The Court of Appeals upheld the lower court, noting in part that in 1980-81 the U.S. had provided more than \$7 million in ESAA funds to St. Louis, and "the evidence in the record gives us no reason to believe that similar funding will not be available to continue implementation of the plan for the foreseeable future." *Liddel v. Board of Educ.*, 667 F.2d 643, 654 (1981); *see also Liddel v. Board of Educ.*, 491 F. Supp. 351 (1980).

“sought and supported in Congress the repeal of ESAA,”²⁹⁴ as one finding showing that “the Executive Branch . . . and the Department of Education have been engaged in a continuous effort to strip away all means by which they could fulfill the United States’ obligation under Section 15.1.”²⁹⁵

Chicago may also have an effect on a new desegregation assistance program. Judge Shadur has ruled that the consent decree requires the United States to provide funding for five years, beginning with the 1983-84 school year.²⁹⁶ Given the events of the past year, and in light of the substantial amount of federal assistance Judge Shadur has ruled is owed Chicago, a new desegregation assistance program might be a likely target for another judicially-imposed freeze pending resolution of the litigation.

B. *Implications of the Administration’s Education Policy*

Perhaps the greatest irony in this situation lies in the Reagan administration’s position on desegregation and the “new federalism.” On one hand, the administration clearly prefers voluntary desegregation methods to mandatory reassignment of students.²⁹⁷ Chicago, with its reliance on voluntary measures, may be something of a showcase for demonstrating the effectiveness of that approach in an urban school system.²⁹⁸ On the other hand, the administration apparently is not prepared to seek the financial support required to implement a voluntary school desegregation plan.²⁹⁹ Confronted with judicial rulings that it has an obligation to provide such support in Chicago, the administration responded by challenging them, even when it appeared that Chicago was unable to finance the plan alone. Thus, it is not clear what is of most importance to the Reagan administration—success of the Chicago desegregation effort, reducing federal involvement in education, or resisting perceived judicial threats to the balance of power controlling federal education funding.

For local school officials, *Chicago* teaches that the “new federalism” may be a two-edged sword. The likelihood may now be greater

294 567 F. Supp. at 276.

295 *Id.* at 280.

296 *Id.* at 287.

297 See text accompanying notes 135-39 *supra*.

298 See text accompanying notes 191-93 *supra*.

299 Recent consent decrees entered into by the DOJ with the school boards of Lima, Ohio, and Bakersfield, California, rely exclusively on voluntary desegregation methods. Neither decree provides for federal financial support for the plans. See Mirga and Caldwell, *U.S. Approves Voluntary Plans to Desegregate*, EDUC. WEEK, Feb. 1, 1984, at 1, 15.

of negotiating a consent decree with the DOJ that relies on voluntary methods of desegregation.³⁰⁰ But the "new federalism" not only seeks to reduce federal direction of education, but also seeks to reduce the federal financial presence in education, with the result that little federal funding is being directed to school desegregation. From a school district's perspective, the prospect of a voluntary, negotiated plan may be appealing, but the burden of financing that plan will rest solely on the school district and the state, unless the consent decree clearly obligates the federal government to provide this support. But it does not seem likely that the administration will agree to language similar to Section 15.1 of the Chicago consent decree.

Summary of Conclusions

The federal government professes an interest in equal educational opportunity. If that interest necessitates a federal funding role, the present education block grant appears inadequate to provide the financial support needed to assist local efforts to desegregate schools. As the situation in Chicago shows, the success of voluntary desegregation may be affected by the "new federalism" in education.

Addendum

On September 26, 1984, the United States Court of Appeals for the Seventh Circuit overturned the remedial order of the district court. United States v. Board of Educ., slip. op. No. 84 - 2405, (7th Cir. Sept. 26, 1984). The Court of Appeals noted that since the federal government was now "prepared to give the Board priority in the distribution of desegregation funds under existing federal programs," it had satisfied its contractual obligation to assist in the funding of Chicago school desegregation. Id. at 10 (emphasis added). The court rejected the district court's holding that the administration breached the consent decree by engaging in legislative activities that effectively reduced desegregation funds for the school board. The court did not determine an amount due to the Board, however, and remanded the case to the district court "for a determination of whether the Board is receiving the maximum level of funding that is available under the criteria of programs through which funds for desegregation can be dispersed." Id. at 13.

300 *Id.*