IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
	§	
CRUCIAL, *et al.*,	§	
Plaintiff-Intervenors	§	
	§	MO-70-CV-64
v.	§	
	§	
ECTOR COUNTY INDEPENDENT	§	
SCHOOL DISTRICT, *et al.*,	§	
Defendants	§	

CRUCIAL'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR UNITARY STATUS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Introduction

This action stems from Ector County Independent School District's violations of Title IV of the Civil Rights Act of 1964, *42 U.S.C. § 2000c-6* (1976), and the Fourteenth Amendment by maintaining racially segregated schools. On March 27, 1984, this Court ordered Defendants to comply with a desegregation plan adopted by the Court. On June 30, 2005, the Court ordered the parties to brief two issues: 1) whether the school district has eliminated the vestiges of past discrimination to the extent practicable; and 2) whether the school district has complied in good faith with the desegregation order. Plaintiff-Intervenors, CRUCIAL,[1] *et al.*, file this brief in response to Defendants' Motion for Unitary Status and Brief in Support and request that the Court continue their judicial oversight over Ector County Independent School District, *et al.*..[2]

[1] CRUCIAL is the acronym for the Committee for Redress, Unity, Concern and Integrity at All Levels.
[2] CRUCIAL reserves the right to further brief the Court based on the report by the Intercultural Development and Research Association due in January 2006, and based upon Defendants' responses to CRUCIAL's outstanding discovery requests.

Statement of Facts

Prior to 1954, many school districts throughout the United States offered an inferior education to some students solely based on their race, ethnicity, national origin, and other protected status. *See Brown v. Board of Educ.*, 347 U.S. 483 (1954). In 1954, the United States Supreme Court declared that racial segregation in public schools is unconstitutional. *Id*. In the face of widespread non-compliance with its ruling in *Brown v. Board*, the Supreme Court ordered the school districts in that litigation to desegregate "with all deliberate speed." *See Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*). And in 1968, because of school districts' continued, outright defiance of the mandate to desegregate their schools, the Supreme Court stated "the time for mere 'deliberate speed' has run out," and declared that recalcitrant districts must institute a plan that "promises realistically to work, and promises realistically to work *now*." *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968) (emphasis in original).

Thereafter, many school districts began the process to immediately desegregate their schools but others continued to defy the Supreme Court's decision and the United States Constitution. Defendant Ector County ISD was among those districts that continued to operate a separate and unequal school system based on a student's race, ethnicity, or national origin. *See United States v. Ector County Indep. Sch. Dist.*, 722 F.2d 1182, 1185 (5th Cir. 1983) ("*Ector County*"). For that reason, the United States of America brought suit against Defendants in 1970.

On August 26, 1970, this Court entered an interim order requiring Defendants to desegregate their school system and requiring both parties to submit a desegregation plan. *See* Order dated August 26, 1970, Ex. I-1 ("1970 Order," hereinafter). The 1970 Order required the district to: develop a plan that included a compensatory education provisions for non-English

speaking students; desegregate the faculty and other staff; include elementary students in its majority to minority transfer policy; ensure that the transportation system is provided in a non-segregated, non-discriminatory manner; construct schools and select sites for temporary classrooms in such a manner so as to prevent the recurrence of a dual school structure; permit transfers to and from another school district only on a non-discriminatory basis and so long as the cumulative effect of transfers did not reduce desegregation in either district or reinforce the dual school system; and desegregate in classroom, non-classroom and extracurricular activities. *Id*. However, Defendants did not present a desegregation plan to the Court until years later.

In February 1981, CRUCIAL intervened on behalf of minority students and their parents charging that Defendants violated the 1970 Order by continuing to operate a segregated school system and by failing to submit a desegregation plan. *Ector County*, 722 F.2d at 1185. The District Court held a trial and, as the Court of Appeals noted, this Court's "unchallenged findings reflect[ed] a particularly *egregious pattern of intentional segregation* by Ector County ISD extending into the 1981-82 school year." *Id.* at 1191 (emphasis added). Among its findings, this Court stated that the Ector County ISD "not only continued to fail to meet its duty to dismantle its dual school system, but actually increased the segregation in its schools of both Blacks and Mexican-Americans." *Id*. at 1184-85.

It was not until March 27, 1984, nearly fourteen years after this Court's original order and nearly 30 years after the *Brown* ruling, that this Court finally adopted the present plan ("the 1984 Plan," hereinafter) for Defendants to desegregate their school system. The 1984 Plan provided that the District: a) desegregate the faculty and other staff; b) ensure majority to minority transfers; c) provide transportation in a non-discriminatory and non-segregative basis; d) prevent the recurrence of a dual structure in facilities construction and site selection; e) ensure

that transfers both in and out of the district are allowed on a non-discriminatory basis and that the cumulative effect does not reduce desegregation in either district or reinforce the dual school system; and f) desegregate in classroom, non-classroom, and extra-curricular activities. *See* Complete Plan for Desegregation of Ector County ISD, Ex. I-2.

Argument

The purpose of a court-ordered desegregation plan is to transition from a dual system to a unitary, nonracial system of public education. *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 436 (1968). In assessing the desegregation plan, the district court must review all of the facts in light of the circumstances present. *Id*. at 439. The Supreme Court has identified six relevant factors for evaluating whether a desegregation plan should be dissolved. Those factors are: student assignments, faculty, staff, transportation, extracurricular activities and facilities. *Id*., at 436. The Court may also consider the quality of education offered. *Flax v. Potts*, 864 F.2d 1157, 1161 (5th Cir. 1989).

In order to be released from judicial supervision in a desegregation case, a school district must show that: vestiges of past discrimination are eradicated to the extent possible; full and satisfactory compliance with the desegregation order has been made in areas where supervision is to be withdrawn; retention of judicial control is unnecessary or impracticable to achieve compliance with the order in the various facets of the system; and the district has demonstrated to the public and to the parents and students of the once disfavored race a good faith commitment to the whole of the order and to those provisions of the law and the Constitution that laid the predicate for judicial intervention. *Freeman v. Pitts*, 503 U.S. 467, 491 (1992). The Court should further assess the school district's history of compliance when evaluating these factors. *Id*.

Under the record before the Court, Defendants did not satisfy their burden of proving good faith compliance with this Court's Order or that they have removed the vestiges of discrimination to the extent practicable.

I. DEFENDANTS FAILED TO PRESENT SUFFICENT EVIDENCE TO THE COURT TO ESTABLISH UNITARY STATUS.

Defendants bear the burden of demonstrating that any current racial imbalance "is not traceable, in a proximate way, to the prior constitutional violation." *Hull v. Quitman County Bd. of Educ.*, 1 F.2d 1450 (5th Cir. 1993) (quoting *Freeman*, 503 U.S. at 494). Throughout their nine-page brief to the Court, Defendants failed to present any evidence showing compliance with the Court's 1984 Plan in the areas of transportation and bilingual education and presented only insufficient and inaccurate evidence with respect to the remaining *Green* factors and their specific duties under the Plan. As a result, Defendants failed to carry their burden that the current racial imbalance in the Ector County ISD is not attributable to its constitutional violations.

In *Moses v. Washington Parish School Board*, the Fifth Circuit held that although a district subject to a desegregation order cannot change the past, "it must do what it can, in good faith**,** to eliminate the past vestiges of discrimination" by demonstrating "over a reasonable period of time, a good faith commitment to eliminating the vestiges of past discrimination and to make meaningful progress toward becoming a fully integrated non-discriminatory school with respect to all facets of its operation." 379 F.3d 319, 327 (5th Cir. 2004). In their brief and supporting documents, Defendants fail to establish whether the District: "did what it could;" "did so in good faith;" and " eliminated the past vestiges of discrimination."

In its 1996 Desegregation Study of Ector County ISD, the Intercultural Development and Research Association (IDRA) cited numerous failings by Defendants, and problems located

within the Plan itself, that impeded the realization of desegregation in Ector County ISD. *See* IDRA Executive Summary, Ex. I-3. For instance, IDRA expressed serious reservations about many issues including, but not limited to, the following: the imbalance in ethnic/racial makeup of campuses within the District; the persistent achievement gaps between the minority groups and the limited extent of the District's efforts to overcome the effects of segregation upon achievement; the inadequacy of the bilingual education program; and limited student access to courses and programs within the District's schools, such as the gifted and talented and special education programs. *Id*. Defendants' own evidence proves that Defendants have not "done what they can" to eliminate the vestiges of discrimination with respect to all of the facets of their school system.

Defendants also assert that since no party has ever complained about the information in the annual reports, this fact alone shows that the District has complied in good faith with the plan. However, this argument fails in many respects. First, whether or not the District received any complaints does nothing to prove whether Defendants complied in good faith with the provisions of the Plan other than their duty to submit an annual report. Second, CRUCIAL has requested additional information from Defendants in the past, because CRUCIAL was concerned about the District's lack of efforts to comply in good faith with the terms of the 1984 Plan. *See, e.g.*, Letters from MALDEF to Defendants, Ex. I-4. Finally, the Court established the Tri-Ethnic Committee in order to "advise the school board and the school administration with respect to the continued implementation of the desegregation plan…" *See* Ex. I-2 at 4. The Tri-Ethnic Committee has made numerous requests for information of the District throughout the years and made many recommendations to the District in order to address noncompliance issues. *See, e.g.*, ECISD Tri-Ethnic Committee Report to U.S. District Judge Robert Junell for Status Conference

on June 30, 2005, Ex. I-5. Contrary to Defendants' assertions, many concerns were raised by the parties to this litigation related to Defendants' lack of compliance with the Plan.

Plainly, Defendants' brief and supporting documents fail to provide evidence sufficient to meet their burden with respect to any of the *Green* factors or the provisions of the 1984 Plan. Therefore, CRUCIAL requests that this Court retain supervision over the District and make further orders necessary to ensure that Defendants remove the remaining vestiges of discrimination to the extent practicable.

II. DEFENDANTS FAILED TO COMPLY IN GOOD FAITH WITH THE DESEGREGATION ORDER AND FAILED TO ERADICATE THE VESTIGES OF DISCRIMINATION TO THE EXTENT POSSIBLE.

To fill the evidentiary void created by Defendants with respect to their compliance with the Court's Order, CRUCIAL presents the following analysis of various facets of the District's operations that are directly relevant to the issues at hand. Upon review, it remains clear that Defendants did not comply in good faith with the provisions of the desegregation plan and did not eradicate the vestiges of past discrimination to the extent practicable. Many of the schools in the Ector County ISD are still perceived by the community as "minority" or "White schools" because of Defendants' failed efforts. Defendants' failures are attributable to: their misinterpretation and misapplication of the Plan; their direct noncompliance with the Court's 1970 Order and 1984 Plan; and their failure to take affirmative steps to appropriately address the constitutional violations.

1. Student Assignment

The Fifth Circuit has held that eliminating segregative student attendance patterns is key to eradicating the vestiges of discrimination. *Hull*, 1 F.2d at 1453. Under the 1984 Plan, the Court required Defendants to desegregate their student assignments through the use of magnet

programs and noncontiguous attendance zones, as well as other specified criteria. However, Defendants failed to abide by the Court's desegregation plan, because they applied the wrong formula for computing White enrollment in the District's schools; thus, their assertions concerning compliance with the Plan and the desegregation of student assignments must fail.

In 1984, the Court stated that the District should enroll at least 40% to 50% White students in each of its schools.[3] Ex. I-2, at 21-22. In order to build in flexibility due to a change in the racial composition of the District, the Plan further provided that "if the percentage of minority students increases beyond the 1981-82 combined percentage of 37.67%, there will be a corresponding decrease in the percentage of White enrollment for the purposes of evaluation." *Id.* at 23. As explained further below, the current minimum White enrollment—due to a demographic change in the District's enrollment— should be at least 22% under the Plan. However, Defendants erroneously state in their brief that the current minimum non-minority enrollment should be set at 13% By misapplying this Court's directive, the District has set a standard for desegregation that allows it to perpetuate, in many schools, the legacy of segregation.

According to school desegregation expert Dr. Leonard Stevens, the District's flat application of "percentage point differences" does not interpret the Order correctly and it is not consistent with commonly accepted desegregation principles.[4] *See* Preliminary Report of Leonard B. Stevens, Ed.D., Ex. I-6, at 11. Defendants could not possibly have complied in good

[3] The Court also stated that for Ireland, Defendants should enroll between 40% and 50% Black and Hispanic students; conversely, this would set the maximum White student enrollment for Ireland at 60%. *Id.*

[4] A "percentage point change" is the simple difference of two percentages, i.e., 40% - 27%= 13%. According to Dr. Stevens, Defendants noted the 27% increase in minority enrollment and then subtracted that amount from the 40% to arrive at 13% and then added the 27% increase to 60%, presumably from the Ireland enrollment figure, to arrive at 87%. Ex. I-5, at 11.

faith with the terms of the plan and removed the vestiges of discrimination *to the extent possible* when they misapplied and misinterpreted the student assignment provisions of the Plan.

Dr. Stevens states that in order to properly evaluate segregative student assignments under the 1984 Plan, you must compute the percentage change in racial compositions from 1981-82 to the present in terms. *See id.* at 8-9. In other words, in 1981-82, the White student population was 62% and the minimum White enrollment was set at 40%. In terms of percentages, the Court set the minimum White enrollment at 65% of the then-existing White enrollment (40% of 62% is "65%"). Applying the 65% rate to today's 34% overall White student population, Dr. Stevens concludes that for the elementary schools in the District, the White enrollment should be at least 22% (65% of 34% is 22%. *Id.*

Based on the correct computations, Dr. Stevens concludes that 21 years after the Court implemented the 1984 Plan, the District continues to have 4 out of 25 elementary schools out of compliance and two additional schools on the border of noncompliance with only a 22% White student population.[5] *Id.* at 14.

Furthermore, Dr. Stevens characterizes five additional schools as "desegregation anomalies."[6] *Id.* at 14. By enrolling an abnormally high quantity of White/other students, such composition tends to undercut desegregation by leaving "other schools in the district with fewer White students for their own racial diversity." *Id.* at 15. Coupled with the fact that nearly twenty five percent of the District's elementary schools remain at or below the minimum number of White students required under the plan, the status of these schools provides further evidence that Defendants have failed to comply with the Plan in good faith and that Defendants have not eliminated the vestiges of discrimination to the extent possible.

[5] The schools not within compliance are Magnet Hays, Magnet Cameron, Cavazos, and Sam Houston. The schools at the edge of compliance are Magnet Zavala and San Jacinto.
[6] The anomaly schools are Magnet Reagan, Gonzales, Ross, Johnson and Jordan.

Defendants' own admissions concerning racial isolation and segregative tendencies in the community compound the problem. In its 2004 Magnet Schools Assistance Program application to the U.S. Department of Education, the District petitioned the Department of Education for funds for magnet programs to address the "severe problems" created by three separate high-minority schools, including the racial isolation of the students and the poor quality of instruction. 2004 MSAP Application, Ex. I-7, at 26. Defendants described the community's perception of these schools as high-minority schools lacking an adequate program of studies. *Id*. In Defendants' own words, they conceded: "Historically, when schools in the district exceed 65% minority, the chances that they become 100% is greatly accelerated." *Id*. at 25.

Using "68%" as a baseline for evaluating the District's schools, Dr. Stevens recognized a total of thirteen elementary schools that met the District's own definition of schools at risk of becoming racially identifiable as Black and Latino schools. Ex. I-6, at 15. The community continues to perceive many of these schools as minority schools. However, Defendants have failed to remedy the situation. In Dr. Stevens' opinion, the District is not yet in compliance with the student assignment portion of the court-adopted desegregation plan. *Id*. at 16.

1a. Reagan Elementary

Defendants' administration of student assignments at Reagan Elementary, which is perceived as the best performing elementary in the District, also raises concern with the District's good faith compliance. Reagan Elementary is a magnet school created under the 1984 Plan. Ex. I-2, at 22. In order to enroll at Reagan, students must apply and meet a minimum score on the standardized test; Black and Hispanic students fail to meet this minimum score at much higher rates than White students.[7] The school emphasizes academics and in 2004, Reagan students passed each state standardized test in Grades 3-6 at rates of 96% or greater, compared to

[7] It is believed that Reagan Elementary is the only magnet school that bases enrollment on a standardized test.

district-wide averages that fell as many as thirty percentage points below the average Reagan score *See* Reagan Elementary Individual Campus Profile, Ex. I-8.

Under the original Plan, the District was to enroll between 40% and 50% White students. Ex. I-2, at 22. However, the District has failed to adjust the White enrollment to comport with the demographic changes and, instead, it seeks to maximize the White enrollment at Reagan. At high-performing Reagan Elementary, rather than attempt to avoid re-segregation or to alter the community's perception of Reagan as a "White" school, Defendants have strived toward maximizing the number of White/other students attending the school at 50%. *See* Ex. I-5, at 3. Defendants' implementation of the Plan at Reagan even differs from their handling of the racial compositions at the other magnet schools, where the District seeks to enroll as little as 13% White students. Ultimately, Defendants have failed to adjust the White enrollment at Reagan in accordance with the Plan, resulting in a school that is racially identifiable as a "White" school.

Furthermore, at Reagan Elementary, the Tri-Ethnic Committee alleged that White parents in the District were knowingly and falsely identifying their child as Native American in order to have the child admitted into Reagan. *Id.* at 2. After numerous attempts by the Committee to get the District to address and remedy the problem, the District finally took action in August of 2005 but only after the problem was presented to the Court in the submission of the ECISD Tri-Ethnic Committee Report in June 2005. At this time, it is still unknown whether the District's actions will remedy or has remedied the problem.

Defendants also deterred Spanish-speaking children from attending Reagan Elementary by failing to assign Spanish-speaking staff in the front office of the school until recently. *Id*. at 1. Once again, Defendants failed to prevent the problem from occurring in the first place. In fact, the District's response to the Tri-Ethnic Committee's concern runs counter to its obligations

[8] It is believed that Reagan Elementary is the only magnet school that bases enrollment on a standardized test.

under the case law to "act now," stating: "This (lack of a Spanish-speaking staff member) is a staffing issue that involves personnel and people, and therefore, sometimes we do not feel we can act 'immediately.'" *Id*. Actions like the ones at Reagan support CRUCIAL's claim that Defendants do not seek to carry out the mandates of the Plan in good faith or to meet their constitutional obligations to remove the vestiges of discrimination to the extent possible.

CRUCIAL acknowledges that the District has made some efforts to integrate the student population. However, as the Supreme Court has noted, as long as a school district remains under the supervision of a federal court pursuant to a desegregation order, the district must take all steps necessary to eliminate the vestiges of the unconstitutional system. *Freeman*, 503 U.S. at 485. While under court supervision, the District has failed to employ available means to eliminate the vestiges of discrimination.

2. Faculty and Staff

Defendants failed to provide sufficient evidence detailing their efforts to comply with the Court's Order concerning faculty and staff and the removal of the vestiges of discrimination. Defendants referenced their continuing efforts to overcome the challenge of recruiting minority faculty and staff by attaching the following to their brief: *proposed* recruiting lists for the years 2000-01 and 2001-02; a letter from the former assistant superintendent—and current superintendent—Wendell Sollis limiting fall recruiting trips; and recruiting schedules for 2003-05. *See* Ector Br., Ex. D-16. Without more, these exhibits are irrelevant to the issue before the Court. The material provided by Defendants wholly fails to address current faculty and staffing patterns in the District Consequently, Defendants have failed to present any evidence of good faith compliance or the removal of the vestiges of discrimination concerning faculty and staff.

Further, Defendants failed to discuss any facts relevant to the faculty and staff assignment provisions of the Plan. The 1984 Plan provides that the District must assign its staff so that "the ratio of Black, Hispanic and White staff members in each such school is substantially the same as the ratio of Black, Hispanic and White staff members in, respectively, all of the elementary schools, all of the junior high levels, or all of the high schools." Ex. I-2, at 26. The Court defined "substantially the same" as a 10% variation from the district-wide percentage for each level of schools. *Id*. However, in its submission to this Court the District never addressed how it complied with the Plan. Instead, Defendants simply calculated the total number of principals, teachers, and educational aides when it mentioned the increase in minority faculty and staff district-wide from 1996 to 2005; such a calculation bears no relation to Defendants' duty to desegregate the assignment of faculty and staff under the Plan.[9]

2a. Educational Staff Analysis

When aggregating teachers, teacher aides, and principals[10] and applying the 10% variation to the percentage ratio for Blacks, Hispanics and Whites, Defendants' current faculty and staff assignment conflicts directly with the Plan at the elementary level. According to the most recent data for 2004-05, the percentages of teachers, teacher aides, and principals ("educational staff," collectively) at the elementary level are as follows: 63% White/other; 4% Black; and 33% Hispanic.[11] *See* Ex. I-6 at 20. Of the District's twenty-five elementary schools,

[9] It should be further noted that according to the Ector County ISD AEIS Report for 2003-04, the district employed teachers as follows: 3.6% African American, 20.2% Hispanic, and 75.2% White. *See* 2003-04 AEIS Report, Ex. I-16, § II, at 3. These figures conflict with those reported by the district in its Annual Report submitted to the Court.
[10] The Court also indicated "other staff who work directly with students" but this data has not been reported by Defendants. *See* Plan, Ex. I-2, at 26.
[11] These figures do not include the early education centers for the same reasons set forth in Dr. Stevens' report and also include Whites with other non-Hispanic, non-Black staff members. Ex. I-6, at 7 n.7; at 4 n.2. By comparison, when including the early education centers, the ratios are 60% White, 4% Black, and 35% Hispanic. *See* Aggregated Educational Staff Chart, Ex. I-9. Of the 27 elementary schools, four have less than 50% White teachers and ten have more than 70% White teachers; thus, *fourteen* of the schools remain noncompliant with respect to

thirteen failed to meet the standard for Latino educational staff or White/other educational staff, or both. *Id*. This includes:

i. seven schools that are under-represented with respect to Latino staff;

ii. six schools that are over-represented with respect to Latino staff;

iii. four schools that are under-represented with respect to White/other staff;

iv. five schools that are over-represented with respect to White/other staff; and

v. nine schools that are non-compliant with respect to both Latino and White/other staff.

Id.

As for the Black educational staff at the elementary level, Defendants' reluctance, or failure, to hire and retain at least ten percent of Black educational staff prevents a strict analysis under the Plan since the Plan allows for a 10% variation. However, it should be noted that in the District in 2005: three schools failed to employ even one Black teacher, teacher aide, or principal; twelve schools employed only one Black teacher, teacher aide, or principal; and the most Black educational staff employed at any school was six. Ex. I-9.

Dr. Stevens further notes how the racial staffing assignments often mirror the student enrollments in ECISD. Of the ten Ector County ISD elementary schools that exceed 34% White/other student enrollment, nine of these schools exceed the White/other educational staff average. Ex. I-6, at 21-24. Of the fifteen schools that exceed 66% Black and Hispanic enrollment, thirteen have educational staff whose Black and Hispanic averages exceed the Black and Hispanic staff average in the elementary schools. *Id.* Schools in which the racial composition of the staff tracks that of the student body become more racially identifiable and the

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White teachers alone. Of the 27 elementary schools, a total of 14 schools also fall outside of compliance with respect to Hispanics: eight schools with less than 24% Hispanics and six schools with more than 45%. *Id.*

community tends even more to perceive those schools as "White" schools and or "minority" schools.

Despite the aforementioned gross noncompliance in faculty and staff assignments, Defendants have not sought to address or remedy the situation, and even ignore the Court's mandate to desegregate the faculty and staff under the following directive:

> 1. The ECISD shall, to the extent necessary to carry out the provisions of this policy, direct members of its staff as a condition of continued employment to accept new assignments.

Ex. 2 at 26. Defendants failed to use this policy in order to comply with the Court's plan concerning educational staff assignment. Instead, Defendants allowed more than one-half of their elementary schools to remain segregated or become re-segregated with respect to educational staff. As in 1982, today "the amount of faculty desegregation has been clearly insufficient to satisfy defendants' duty in this area and has served to identify the schools to which such assignments were made as intended for minority students." Findings of Fact and Conclusions of Law, May 28, 1982, p. 36.

2b. <u>Certificated Staff (Principals and Teachers, not Aides)</u>

Because Defendants were ordered to desegregate in each area of faculty, principals, and other staff (s*ee* 1970 Order, Ex. I-1), and because licensed teachers and building administrators are the primary and most influential educators (*see* Ex. I-6, at 24-25), CRUCIAL conducted a further analysis of teachers and principals, combined. This analysis provides the Court with further direct evidence related to the extent of Defendants' efforts to remove the vestiges of discrimination. This is especially important in cases where the vestiges of discrimination against one subgroup can be masked by an aggregate analysis of the subgroups.

According to Dr. Stevens and the District's own data, within the ECISD the "certificated staff" is less diverse than the "educational staff." *Id*. The following depicts the comparisons of the two:

	% White/Other	% Black	%Hispanic
Elementary Schools			
Certificated	70%	3%	27%
Educational	63%	4%	33%
Junior High Schools			
Certificated	79%	6%	15%
Educational	67%	7%	26%
High Schools			
Certificated	86%	3%	11%
Educational	78%	4%	18%

Dr. Stevens found fourteen of the twenty-five elementary schools out of compliance with respect to Hispanic certificated staffing and ten schools out of compliance with respect to White certificated staffing. *Id*. at Attachment B. Among the schools found out of compliance included Johnson with only 5% Hispanic and 95% White certificated staff; and Gonzales with only 7% Hispanic and 87% White certificated staff. *Id.* Furthermore, Hood Jr. High fell out of compliance with respect to Hispanic certificated staffing at 30% and White staffing at 63%. *Id.* In the attached report, Dr. Stevens emphasizes the point that the component of a school desegregation program mostly within the control of Defendants is staffing assignment. *Id.* at 26. However, the District has failed to take any affirmative acts to comply with the Plan and ultimately, has failed to remedy the lasting segregation in its faculty assignments.

2c. Hiring and Retention of Teachers and Principals

Under the 1984 Plan, the Court ordered the District to "intensify its efforts to attract a greater number of Black and Hispanic teacher applicants." Ex. 2 at 27, ¶ 3. However, as stated before, Defendants have not presented sufficient evidence to the Court to show their intensified

efforts. Further, Defendants' own teacher and principal workforce numbers cast serious doubt on any real efforts to attract and retain Black and Hispanic applicants.

Overall, the racial composition of teachers at the elementary school level for 2004-05 is: 69% White, 30.6% Hispanic and 2.6% Black (3 out of 41). *See* 2004 ECISD Annual Report, Faculty and Staff, previously filed with the Court. At the secondary schools, the District does not fare much better. White teachers constitute 77.2% of the total junior high teachers but Black and Hispanic teachers constitute only 21.4%. *Id.* At the high school level, the disparities are even greater. White teachers comprise 82.7% of the total high school teachers at Odessa and Permian high schools but Black and Hispanic teachers comprise only 17.3% of the teachers. *Id.*

Regarding the racial composition of principals, at the elementary level White principals constitute 64% of the total number of principals compared to only 34.1% Black/Hispanic minority principals.[12] *Id*. At the junior high level, the District has made better progress -- White s and minorities both comprise 47.4% of the principals. *Id.* However, at the two main high schools, Whites comprised 69.2% of the principals compared to only 30.8% of Black and Hispanic principals. *Id*. At the alternative schools, Black and Hispanics comprise nine of the eleven principal positions. *Id*. These staffing ratios suggest both the achievability of and the District's overall failure to make good faith efforts to intensify their recruitment and retention of minority teachers and principals.

3. Gifted and Talented Program

Defendants assert that they complied with the Court's order by simply instituting a Gifted and Talented Program ("GT Program") that is available to each and every student at every grade level. Ector County Br. at ¶ 19. Defendants further state that the programs are voluntary. *Id*. Defendants then readily dismiss the gross disparities between the minority student population

[12] These figures include numbers for both principals and assistant principals.

within the programs: 37% of GT Program students are minority compared to their district-wide, population of 64%. *Id.* Essentially, Defendants assert that they have a GT Program that is similar to the one that existed prior to 1984 and that is "voluntary" and "open" to all children of all races yet remains segregated. Defendants' self-described "voluntary" GT Program also closely resembles the "freedom of choice plans" rejected by the Supreme Court in *Green v. County School Bd. of New Kent County,* in which the Court found that a dual school system that opens the doors to Black children "merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.." 391 U.S. 430, 437-438 (1968). The Supreme Court went on to state that such dual systems cannot simply lie back and wait but are "clearly charged with the 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." *Id.* In this case, Defendants merely "opened" the doors to the GT program but failed to affirmatively act with respect to increasing minority enrollment and desegregating the GT Programs in the schools.

Not only have Defendants failed to affirmatively act to remove segregation in the GT Program, but Defendants' own assertions of a "voluntary" program are misleading. First, Defendants misrepresent that the GT Program is available to each and every student, as though every student who "volunteers" to enter into the program will indeed be accepted into the program. The District itself reviews records of students for possible placement in the GT Program. See, *e.g.*, Kindergarten Application for G/T Program, Ex. I-10. Students also cannot volunteer for the GT Program by merely signing up, but they must actually submit an application through a process different from that used to enroll in school. *Id.* Defendants further mandate

several criteria that must be met by a student in order to be considered for placement in the program.[13] *Id.* Lastly, a student's application must be approved by district personnel. *Id*.

At the secondary level, the GT Programs also are not available to every student. At the junior high level, students must be nominated and meet certain entrance criteria. *See* Junior High Application, Ex. I-11. At the high schools, students must contact their counselors who then recommend the students for placement in advanced courses. *See* High School Announcement, Ex. I-11. Not only does the District maintain barriers to enter into the GT Programs, but the District also fails to justify or validate the criteria for entry into the program.

Second, Defendants' presentation of the GT enrollment is misleading. Defendants state that minority participation in the GT Program increased from 28% in 1995-96 to 37% in 2005, but they fail to account for the corresponding change in overall student population over the same time period.[14] According to Defendants, the overall White student population fell from 45% in 1996 to 34% in 2004-05 (a 24.4% decrease). *See* Overall White Student Population and GT Population, Ex. I-12, at 1. At the same time, the White GT student population only fell from 69% in 1996 to 59% in 2004-05 (a decrease of only 14.5%). Despite a dramatic fall in the overall White student enrollment, the White GT student enrollment remained strong and declined only at a nominal rate.

Conversely, the combined Black-Hispanic minority student population increased from 54% in 1996 to 64.8% in 2004-05 (16.7% increase); however, the Black-Hispanic minority GT

[13] The Texas Education Code defines as "a child or youth who performs at or shows the potential for performing at a remarkably high level of accomplishment when compared to others of the same age, experience or environment and who: 1) exhibits high performance capability in an intellectual, creative, or artistic area; 2) possesses an unusual capacity for leadership; or 3) excels in a specific academic field. TEX. EDUC. CODE § 29.121. Defendants tend to rely heavily upon academic achievement.

[14] Defendants' figures are also misleading because their definition of who constitutes a "minority" is inconsistent. The "28%" figure relied on represents the combined "Black" and "Hispanic" participation rate, but the "37%" figure in 2004-05 represents all non-White students. The combined "Black and Hispanic" participation rate in 2004-05 is only 35%.

student population only increased at a slightly higher rate from 28.3% in 1996 to 35% in 2004-05 (19.1% increase).[15] *Id* at 2. Thus, Black and Hispanic students have closed their participation gap by only three percent points over nine school years; such evidence does not support Defendants' assertions that they have complied in good faith with the mandates of the Court, or that they have taken all necessary steps to remove the vestiges of discrimination—especially in light of the absence of any affirmative acts by Defendants to integrate the GT program.

At the high school level, where students prepare themselves to compete and enter into the post-secondary employment and collegiate world, the figures are even more disturbing. Of the 581 total students in the program, 64% were White and only 31.6% were minority (30% Hispanic, 1.6% Black). *See* GT High School Chart, Ex. I-12 at 3. By the twelfth grade, White students comprised 69% of the GT students, but Black and Hispanic students comprised a mere 26.6% of the students (26% Hispanic; .6% Black). *Id.* In fact, from 2001 to 2005, as the overall number of minority students in the District continued to rise in the high schools, the overall number of students participating in the GT Program plummeted from a total of 903 in 2001 to 581 in 2005, a decline of 35.7%. *Id.* at 5. In effect, Defendants have limited the size (and thus access into) their GT program at a time when minority enrollment in the District has increased.

These figures concerning the GT Program in Ector County ISD support three important conclusions: 1) access to the educational opportunities of the GT Program continues to differ greatly, based on a student's race and ethnicity; 2) the GT classes remain largely segregated throughout the District; and 3) Defendants have failed to adequately eliminate the vestiges in the GT Program to the extent possible.

[15] In fact, the GT participation rate for Black students actually fell from a dismal 2.4% rate in 1995-96 to less than 2.2% in 2004-05.

4. Bilingual Program

The Court's Order also mandated that Defendants "continue to implement a bilingual education program which meets the statutory and regulatory requirements of the Office for Civil Rights of the Department of Education and the State Bilingual Plan administered by the Texas Education Agency." Ex. I-2, at 34. The Plan further mandated that the non-English speaking students should be served in either self-contained or resource rooms, depending on the extent of the "language handicap." *Id.* at 6. However, Defendants have not provided any evidence or briefing on this matter to the Court. Therefore, the Court should not relinquish its judicial supervision of Defendants' bilingual program.

CRUCIAL further draws the Court's attention to some very troubling facts concerning Defendants' "good-faith efforts" to implement a bilingual education program. Ector County ISD underwent a significant change in demographics from a White-majority district to a Hispanic-majority district within the past twenty years and their bilingual student population has grown to 11.2%, nearing the state average of 14.1%, in 2003-04. *See* Bilingual Student Population Chart, Ex. I-13. However, Defendants have financially neglected their bilingual education program with Defendants' budget allocation for the bilingual program (currently .6%) falling far below the state average allocation of 4.3%. *Id*.

Further, although the bilingual students (11.2%) outnumber the gifted and talented students (7.8%) by roughly thirty percent, Defendants allocate a larger percentage of their budget towards the GT program (.7%) compared to the bilingual program (.6%).[16] *Id*. Even more

[16] The State of Texas provides funding for the GT Program at an allotment equal to 12% multiplied by the adjusted basic allotment, but limits funding to no more than five percent of a district's students. *See* TEX. EDUC. CODE § 42.156. Bilingual Programs are funded with an allotment equal to 10% multiplied by the adjusted basic allotment for each student in average daily attendance and is not limited to a percentage of a district's students. TEX. EDUC. CODE § 42.153. Therefore, Defendants cannot argue that the state provides the district with more funding for its GT Program.

troubling is the fact that the bilingual program is a general education program and the GT Program is an "enrichment" program. Defendants' failure to adequately fund the Hispanic-majority bilingual program, especially when compared to the state average and the District's own majority-White GT Program, further evidences their failure to comply with the Court's order to establish a compensatory education program for the limited-English proficient students.

The lack of financial support for the bilingual education program has led to insufficient materials, including textbooks and bilingual manipulatives, as well as a lack of certified teachers and other necessary components of a quality bilingual education program. Under the Texas Education Code, districts with more than 20 limited-English proficient ("LEP") students must provide a bilingual education program to its elementary students (for post-elementary students, districts may offer an English as a Second Language program, "ESL"). TEX. EDUC. CODE § 29.053. Additionally, teachers serving the students must be certified in bilingual education or English as a Second Language, respectively. TEX. EDUC. CODE § 29.061. Rather than ensuring that it hires and retains a sufficient number of certified teachers to meet the basic needs of its largely Hispanic LEP students, the District continuously seeks "exceptions" for the bilingual education program and waivers for its ESL program. *See, e.g.*, Request for Exceptions for 2004 and 2000, Ex. I-14. In fact, Defendants have sought these exceptions and waivers for at least the past six consecutive years. *Id.*

Further, the Texas Education Agency (TEA) investigated and criticized Defendants for their repeated requests for exceptions to the bilingual education program. *See* Excerpt from District Response #46, Ex. I-15. In Defendants' words, TEA admonished Defendants for failing to implement a program that "will more adequately allow limited English proficient students a meaningful opportunity to master the essential knowledge and skills for all required subjects."

Id. Unlike other districts in Texas that may be confronted with a shortage of certified bilingual and ESL teachers, TEA found that bilingual teachers were available in the Ector County ISD to meet the needs of the LEP students but that many teachers left for various reasons, including a lack of commitment to Ector County ISD's program and its philosophy. *Id.*

The District responded to TEA's evaluation and created a Bilingual Improvement Team to address its deficient bilingual education program. In order to increase access to certified bilingual teachers, the Bilingual Improvement Team recommended clustering schools and a "Top Shelf Teacher" program. However, Defendants rejected these recommendations. Such decisions prevented Defendants from fulfilling their duty to provide a bilingual education program that meets minimum state standards and to provide the necessary learning environment based on the student's language proficiency.

One can easily predict the shortfalls in student achievement that flow from the deficiencies in Defendants' bilingual education program. As a result of the inadequate bilingual program, the LEP students in the District continue to fail to meet the minimum standards set for the state standardized TAKS (Texas Assessment of Knowledge and Skills) tests at very high rates. For all grades tested in 2004, only 32% of all LEP (limited English proficient) students in the Ector County ISD met the minimum state standard for each test taken. *See* 2003-2004 AEIS Report, Ex. I-16, at 5. The LEP students at the secondary level failed to achieve the minimum scores at even greater rates, with only 9% of 7th graders, 3% of 8th graders, 9% of 9th graders, *less than 1%* of 10th graders, and only 17% of 11th graders meeting the minimum standard. *Id.* at 3-4.

In the end, the LEP students are pushed out of the very system that was charged with retaining and educating them. Under the state's own definition of a drop-out[17], a staggering 27.7% of the LEP students in the Class of 2003 "dropped out" compared to 7.4% of the White students who "dropped out" in Ector County ISD. *Id.* at 9. Ultimately, the inadequate bilingual education program offered by Defendants graduated a disturbingly low 44.6% of the LEP students in 2003. *Id.*

Not only have Defendants denied LEP students access to, and the benefits of, a quality bilingual education program, but they also fail to enlist LEP students in the District's various programs and activities. For example, in the Gifted & Talented Program, LEP students represent less than 1.5% of the entire GT student population. *See* 2000-2005 Data for MALDEF, Ex. I-17. In the past three years, Defendants did not enroll any LEP students in their GT Program for grades 6-12; only 7 LEP students in 2001-02; and only 2 LEP students in 2002-03. *Id.* At the District's highest performing elementary, Reagan, Defendants did not offer a bilingual education program; only seven LEP students attended the school in 2005, only six in 2004, nine in 2003, one in 2002, and two in 2001. *See* Reagan LEP Data, Ex. I-18. In contrast to the enrollment of LEP students in demanding educational programs, Defendants freely enroll LEP students in the special education program, with LEP students comprising 17% of the total enrollment for grades 9-12 in 2001; 21% in 2002; 30% in 2003; 26% in 2004; and 17% in 2005. Ex. I-17. Such assignment patterns are highly suspect when compared to the total LEP enrollment of 11%.

5. Quality of Education

In 1982, this Court made numerous findings concerning the poor student performance and lack of educational opportunities for minorities. (Findings of Fact and Conclusions of Law,

[17] Of course, this data is based on the state's own definition of a "dropout," which was highly criticized by Travis County District Judge John K. Dietz in the most recent Texas school finance litigation, *West Orange-Cove Consol. Indep. Sch. District v. Neeley*.

§ III) The 1984 Plan ordered Defendants to provide many educational programs aimed at improving minority student achievement. For instance, Defendants were ordered to provide academic skill-improvement classes for those students not reading at grade level, but Defendants have provided no evidence of their compliance with the order. *See* Ex. I-2, at 5. The Plan also required Defendants to provide a compensatory education program to reach proficiency levels on standardized tests, as well as "Rooms of Fifteen" programs. *Id.* at 6, 24. However, in their submission to this Court, Defendants did not present any evidence of compliance with these provisions of the Plan.

Achievement of minority students in Ector County ISD has trailed that of Anglo students since the time of segregation, but Defendants have not affirmatively acted to remedy the disparities lingering from the past segregation. Defendants continue to offer Black and Hispanic students an inferior education. As mentioned earlier, Defendants continue to operate a largely segregated GT Program. Furthermore, with respect to the Advanced Placement and International Baccalaureate examinations (in which students may receive college credit), Defendants often fail to even test Black and Hispanic students. In 2003, the District tested only 3.9% of the Black students and 12.7% of the Hispanic students, compared to 34.8% of the White students. Ex. I-16 at 9. With respect to the SAT and ACT examinations, Defendants tested only 23% of the Hispanic students and 41% of the Black students, compared to 53% of the White students. *Id.* at 10. The test results of minorities are even more discouraging; only 8% of the Black students and 11% of the Hispanic students scored at or above the criterion[18] for the ACT/SAT compared to 27.2% of White students in the district. *Id*.

[18] The "at or above criterion" determined by the Texas Education Agency is a score of 1110 for the SAT and 24 for the ACT. *See* http://www.tea.state.tx.us/perfreport/aeis/2004/glossary.html. The mean SAT in ECISD for Blacks was 853, for Hispanics it was 912, and for Whites it was 994. The mean ACT score was 17.0 for Blacks, 18.6 for Hispanics and 21.9 for Whites. Ex. I-16 at 10.

Not only do these measures call into question Defendants' good faith efforts to remedy the inferior education provided to minority students, further evidence lies in the overall graduation and dropout rates for the disaggregated groups. For the Class of 2003, only 69.6% of Hispanic students and 66.3% of Black students graduated but better than four out of five White students graduated (80.6%).[19] *Id*. at 9. For the same class, 13.7% of Hispanic students and 10.2% of Black students dropped out of school compared to 7.4% of White students. *Id*. Though not quite as disparate as the gaps for LEP students, the District continues to push out its Hispanic and Black students at rates far greater than its White students.

Defendants' failure to provide a quality education to their minority students is further evidenced by the TAKS scores. For the year 2003-04, an incredible 70% of all Black students failed to meet the *minimum* standard on each of the TAKS tests and 58% of the Hispanic students failed to meet the standard. *Id*. at 5. By comparison, 41% of the White students failed to achieve the standard. *Id.* Comparing the four schools with the highest White/other enrollment[20] to the four schools with the lowest White/other enrollment, the schools with the highest White/other enrollment perform at much higher levels on the TAKS test. *See* AEIS Excerpts, Ex. I-19 and I-20. For the year 2003-04, an average of 79.75% of the students met the minimum TAKS standard for all-tests-taken at the four schools with the highest White/other enrollment compared to only 64.75% of the students at the four schools with the lowest White/other enrollment. *Id.*

Defendants also retained, or "held back" at their grade level, the Black and Hispanic students at far greater rates than the White students. For the elementary schools, of the 282 total

[19] By comparison, the state average graduated 84.2% and had 4.5% dropout.
[20] The highest percentage White/other schools are Magnet Reagan, Jordan, Johnson, and Ross. *See* Ex. I-19. The lowest percentage White/other schools are Cavazos, Sam Houston, Magnet Cameron, and Magnet Hays. *See* Ex. I-20.

students retained in their grade level in 2003-04, 75% were Black or Hispanic compared to 25% White. *See* Ector County ISD Retentions, Ex. I-21. At the junior high and high school levels, roughly three out of every four students retained were Black or Hispanic. *Id*. Comparing the total number of high school students by race to the number retained in the high schools in 2004-05, one out of every seven Black students was retained, one out every nine Hispanic students was retained, but only one out of every nineteen White students was retained. *Id.*

Disparate Discipline

Defendants also tend to discipline Black and Hispanic students more often than White students, as evidenced by the disciplinary referral rates and enrollments in the alternative educational program. At the junior high level, nearly four out of five students referred for disciplinary problems were Black or Hispanic, though they comprised only 62% of the total enrollment. *See* Ector County ISD Referrals, Ex. I-22. At Nimitz Junior High, Blacks comprised 22.5% of the total referrals, though they only made up 9.9% of the total enrollment. Comparing the average number of referrals to students district-wide at the junior high level, there is almost a 10:1 ratio for Black students referrals/Black students; a 7:1 ratio for Hispanic student referrals/Hispanic students; and a 3.6:1 ratio for White student referrals/White students. *Id*. Hence, for every Black student, there are ten black student referrals and less than one-half that for white students.

Further, Defendants remove Black and Hispanic students from the general education program and place them in the alternative schools at substantially greater rates than White students. At the alternative schools AIM High and at AAA, Black and Hispanic students make up 77% of the total enrollment, respectively, though they only comprise 60% of the total high school population. *See* 2004 Annual Report, filed with the Court. At the Alternative Center for

grades 7-12, 84% of the total students enrolled in 2004-05 were either Black or Hispanic. *Id*. These alternative schools tend to provide a much poorer quality education than the other schools. Despite the apparent disparate treatment afforded to Black and Hispanic students, the District has failed to investigate the matter.

6. Transportation

In their submission to the Court, Defendants failed to provide any evidence of their good faith efforts to comply with the desegregation plan concerning transportation and whether the vestiges of discrimination were removed to the extent practicable. In 1996, IDRA cautioned the District in its report, stating: "It is noted that at every level, Hispanic students appear to be bussed to schools at a higher rate than are Anglo students. There may be very plausible reasons as to why this is so…" See IDRA's Ector County ISD Desegregation Study Excerpt, Ex. I-23. IDRA also noted that none of the forms for parents regarding transportation fees or waiver of fees were translated into Spanish. However, the District has not addressed these concerns regarding its compliance with the Plan and its duty to desegregate its transportation system.

For the year 2004, Hispanic students continued to be bussed to schools at far greater rates than other students and on buses comprised of mostly Hispanic students. Although Hispanic students comprise 59% of the District's population, 68 out of 140 bus routes carried more than 69% Hispanic students, including 22 buses with more than 90% Hispanic. *See* 2004 Ector County ISD Bus Assignments, Ex. I-24. White students comprise 34% of the District's population, but on 29 buses they constitute greater than 44% of the students. *Id.* These figures echo the concerns of IDRA expressed in 1996, but the District has not presented any evidence that the disparate bus assignments are unrelated to the vestiges of discrimination.

7. Extracurricular Activities

Similar to its GT Program, Defendants assert that their extracurricular activities are open to all on a voluntary basis and that, thus, they have complied with their duties under the Plan. The District cites to the district-wide participation rates in extracurricular activities but such evidence does not conclusively establish that each activity is open to all or that some students are not deterred from signing up because of the vestiges of discrimination. For example, a CRUCIAL parent alleged that she was told by a District staff member that there never has been a "black paw" on the "Black Magic" dance team at Odessa Permian, and there never will be. Even looking at the District's figures under exhibit D-17 of their report, the choir and the debate team have remained largely White over the years.[21]

Conclusion

For the reasons set forth above, CRUCIAL respectfully requests that this Court maintain its supervision over Ector County ISD's operations and order further relief as appropriate.

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Respectfully submitted,

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[21] CRUCIAL is waiting for additional data from the district concerning extra-curricular and co-curricular programs, as well as other data. Furthermore, the Plan provides for other measures such as staff training and the parental involvement program but these matters remain unaddressed by Defendants in their submission to this Court. Thus, CRUCIAL reserves the right to brief the Court should Defendants present any evidence on those matters.

CERTIFICATE OF SERVICE

I certify that a true copy of the aforementioned document was forwarded via priority mail, to the following on this 3rd day of November, 2005:

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