

9/26/83

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

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UNITED STATES OF AMERICA,	.	Docket No. 80 C 5124
Plaintiff,	.	
v.	.	Chicago, Illinois
CHICAGO BOARD OF EDUCATION, etc.,	.	September 26, 1983
Defendant.	.	8:00 a.m.
.....	.	

TRANSCRIPT OF PROCEEDINGS  
BEFORE HONORABLE MILTON I. SHADUR

TRANSCRIPT ORDERED BY:

APPEARANCES:

For the Plaintiff:	ALEXANDER ROSS and PEGGY GORDON, Assistant United States Attorneys;
For the Defendant:	ROBERT HOWARD C. RICHARD JOHNSON HUGH MC COMBS ROBERT WEISSBOURD
Court Reporter	Dolores Brennan 219 South Dearborn Street Chicago, Illinois 60604

1 THE CLERK: 80 C 5124, United States against Board of  
2 Education.

3 MR. HOWARD: Good morning, your Honor. Robert Howard,  
4 C. Richard Johnson, Hugh McCombs and Robert Weissbourd for  
5 the Board of Education.

6 MR. ROSS: Alexander Ross and Margaret Gordon for the  
7 United States.

8 THE COURT: Counsel, is the motion for leave to inter-  
9 vene on behalf of the Desegregation Assistance Centers, and  
10 also I suppose alternatively, to file a brief amici, is that  
11 set for now? I didn't see the notice date in connection with  
12 it.

13 MR. HOWARD: I don't recall that there was any notice.  
14 It came with a cover letter to the clerk, which I think said,  
15 Please accept for filing, but I don't recall the date.

16 I am sorry, I told Miss McNamara, who represents  
17 the Women's Equity People that we would be here today, but I  
18 don't think I talked to anyone in Mr. Brown's office. There  
19 is no notice date established with respect --

20 THE COURT: Well, it seems to me that is something that  
21 it would have been more convenient, of course, to have had it  
22 dealt with this morning since we have this time set aside, but  
23 we will talk about that then subsequently in terms of scheduling

24 Let us address then the current motion of the  
25 Board to extend the Court's order of June 30th as previously

1 modified by this Court's order of July 26, orders more  
2 accurately, and also as impacted by the Court of Appeals  
3 decision of September 9.

4 First of all, Mr. Ross, there is no problem, I assume  
5 or Miss Gordon, there is no problem with any notice aspects  
6 of this.

7 MR. ROSS: None, your Honor.

8 THE COURT: Would you like to address the position  
9 of the Board, which I think is spelled out pretty well in its  
10 motion?

11 MR. ROSS: Yes, I would, your Honor.

12 THE COURT: Pardon me for just a second. Let me just  
13 ask also as a preliminary question, is there any issue of power  
14 here? That is, are you satisfied that the decisions as exem-  
15 plified by a series of Court of Appeals decisions, most  
16 recently that State of Connecticut v. Schweiker, and also at  
17 least the inferential dictum in our own Court of Appeals  
18 decision in a slightly different context, in that Simer against  
19 Rios case, would apply to authorize such an order if it were  
20 appropriate.

21 MR. ROSS: Yes, your Honor. I do think that the  
22 Court has such power. As you might well imagine, the DC Circuit  
23 is filled with cases of that kind, and I am convinced that it  
24 is very clear that you do have the power.

25 THE COURT: Thank you.

1 MR. ROSS: The United States and the Board of  
2 Education are fairly well in agreement on the need to escrow  
3 the funds. We are a little bit, not in agreement on the way  
4 to do that.

5 I am told by the people at the Department of Educa-  
6 tion that it is necessary to make the people who would have  
7 gotten these grants conditional obligees before the end of  
8 the fiscal year, to be safest about whether the money is ade-  
9 quately prevented from lapse, and you have a proposed order  
10 attached to the Board's motion that is a little bit different  
11 from a proposed order that counsel and I have worked out on  
12 Friday.

13 I also have a proposed order which addresses some  
14 of the other issues, and for the convenience of the Court we  
15 have separated the escrow portion that we agreed upon into a  
16 third document so that we will give all three to you, and you  
17 will see where the differences lie. But, as far as prevent-  
18 ing the funds from lapsing, I think it is necessary for the  
19 Court to take some action and that the Court has that power.

20 Now, would you like me to address the other part of  
21 the Board's motion?

22 THE COURT: Yes, please, if you would.

23 MR. ROSS: The Board has mentioned the proposed  
24 legislation, and at this point no one has any idea of what  
25 kind of legislation, and when, and if, and I think we need

1 to come back to court as soon as some action is taken in  
2 that regard.

3 I hope that -- If your Honor will recall, the recent  
4 history of appropriation by continuing resolution, there have  
5 been midnight on the 30th fights, and threats of vetoes over  
6 any number of issues, and I would imagine with the fiscal year  
7 ending on a Friday, that that would give both the White House  
8 and the Congress a whole weekend to jockeyback and forth on  
9 what the continuing resolution will look like.

10 So I would guess it will be at least Monday, if not  
11 possibly later before that legislation is passed, and with or  
12 without some legislation having to do with the Chicago School  
13 Board.

14 So I think that I would, as far as that is concerned  
15 I would think we just can't speculate as to what is going to  
16 happen, and a lot of things in this case and what happens next  
17 really depend on the outcome of that legislative proposal,  
18 and I think we should put things in abeyance until that time.

19 THE COURT: Just as a matter of information, and  
20 I hesitate to use the term last act because I suspect that  
21 last scene is more appropriate if we are going to be using  
22 some figure of speech, my information on that, of course, is  
23 I assume less current than yours because it consists of the  
24 Will Roger's approach, what I read in the papers. And, the  
25 last thing that I had seen in that respect was a reference to

1 Congressman O'Neil having succeeded in getting a No Amendment  
2 provision that was not particularly focused at all, indeed, on  
3 what Congressman Yates had done, but rather, focused on some  
4 other effort to include what he viewed as encumbering amend-  
5 ments to the appropriation bill. And, past that I saw  
6 nothing at all. So it may be if anybody can fill me in just  
7 as a matter of information, if you have more current material,  
8 it would be useful.

9 MR. HOWARD: I don't have any further information,  
10 your Honor. The only comment I would make about that is that  
11 there is some possibility, perhaps remote or maybe non-  
12 existent, of bipartisanship with respect to the particular  
13 provision we are concerned about.

14 Maybe I should say multi-partisanship rather than  
15 bipartisanship. So that might overcome that particular  
16 obstacle.

17 THE COURT: In any case, nobody has anything more  
18 current than that. Fine.

19 Go ahead, Mr. Ross.

20 MR. ROSS: Well, briefly, your Honor, with respect  
21 to the extension of the freeze against the funds, the United  
22 States would argue that the findings of this Court that were  
23 affirmed and relied upon by the Seventh Circuit, the page I  
24 guess it is 9 of the slip opinion, 8 or 9, refers to your  
25 specific findings about the funds that the Secretary had and

1 did not make available to the Chicago Board, and citing  
2 findings to deal with Title IV and the Secretary's discre-  
3 tionary fund.

4           Anyway, it is my position that the Court appears  
5 to have narrowed the scope of the need for the freeze order,  
6 and we would ask this Court not to continue the freeze with  
7 respect to those Special Programs and Population Accounts,  
8 are funds that don't have anything to do with Title IV and  
9 the Secretary's discretionary fund.

10           That would be the Virgin Islands, the Territorial  
11 Assistance, the Women's Equity Program, and --  
12 but, with respect to Title IV and the discretionary funds,  
13 we believe that the Court of Appeals opinion justifies con-  
14 tinuing that freeze, and that obviously makes it necessary  
15 from our point of view that some amount of money continue to  
16 be payable to these grantees so that they can continue to  
17 operate at their previous levels.

18           The Board in its proposed order has suggested  
19 until October 15, which is two weeks into the fiscal year,  
20 and the United States has in its proposed order, asked for  
21 a two-month extension of that.

22           Other than arbitrary time-picking, I suppose that  
23 short extensions on the assumption that we will be back in  
24 court looking to see whether a further extension is necessary  
25 makes sense, but I am told that it is extremely difficult

1 amount of paperwork to have such a short extension, and with  
2 the prospect of another one. I would ask --

3 THE COURT: Two factors bear on that. One practical  
4 from my own point of view, and the other one practical from  
5 the point of view of other grantees dependent upon the funds.

6 MR. HOWARD: Your Honor --

7 THE COURT: Yes, Mr. Howard.

8 MR. HOWARD: I do have something to add, which is  
9 not in the motion on that point.

10 THE COURT: All right, go ahead. I wasn't about to  
11 rule. I just wanted to tell you two factors that I wanted to  
12 deal with, but go ahead, let us hear your input.

13 MR. HOWARD: Well, Dr. Love met on Friday in  
14 Washington with representatives of the Council of Chief  
15 State School Officers. That council includes, basically, all  
16 the Title IV grantees who are state educational agencies, as  
17 well as representing grantees of some of the other programs  
18 which are operated through state departments of education.

19 There was consensus between the Board and the Council  
20 of Chief States School Officers, that the proper extension  
21 was to the 15th of October. That we should come back imme-  
22 diately after the fiscal year, or rather, after the end of  
23 the current fiscal year and see what Congress has done, and  
24 then consider further action, but that both the Board and a  
25 large group of potential grantees believed, and do believe



1 that the proper extension is two weeks rather than some much  
2 longer period of time which might take this issue off the  
3 burner.

4 MR. ROSS: Well, your Honor, to the extent that  
5 this non-record evidence of agreement between the Board and  
6 the Chief State School Officers is relevant, it is incon-  
7 sistent with what I have been hearing from the people at the  
8 Title IV Centers. Every little bit of indefiniteness piles  
9 up on them, and people are leaving, and they have had to have  
10 been let go, and as I am sure documents filed by the proposed  
11 intervenors will tell the Court.

12 THE COURT: There is one item of which I will take  
13 judicial notice. I am going to be away from October 6th to  
14 the 27th, so that that clearly bears upon whether we are  
15 going to be looking at an October 15th date that would create  
16 the potential of the well drying up while I am elsewhere.

17 MR. HOWARD: That is why we suggested, your Honor,  
18 that we come back on the 5th. The date is to the 15th, but  
19 we come back on the 5th.

20 THE COURT: I noticed that. The other problem  
21 which is the second one that I was going to address in that  
22 regard, is precisely the kind of consideration I see mentioned  
23 by the proposed intervenor cum amici in their presentation,  
24 and that is that it is a very difficult matter for them to  
25 function in real-world terms, if they are living from payday

1 to payday without the ability to do any kind of planning at  
2 all, and I have a lot of sympathy for their point of view.  
3 It is, after all, not this Court that has pitted as adver-  
4 saries, people that should not be. It is really not this  
5 Court's determination that creates a confrontation between  
6 the Board of Education and its desegregation plan on the one  
7 hand, and the needs of such grantees as these university-  
8 affiliated RVAC's on the other.

9           So it seems to me that precisely the same purpose  
10 that you are talking about, Mr. Howard, could better be  
11 served by a somewhat longer date that would -- Well, wait a  
12 minute -- that would bridge until my return, and at the same  
13 time keep the October 5th date as the real date for us to take  
14 a fresh look so that nobody is going to operate under the  
15 assumption -- What is the point of entering a date that we  
16 know must be changed from the realities of my own availability

17           MR. HOWARD: Let me give you an example, your Honor.

18           First of all, let me say the date of two weeks is  
19 chosen rather more for its potential to increase the amount  
20 of funds than for trying to conserve those funds for the Board  
21 It is not chosen as a device solely to protect the Board's  
22 interest, but one that we believe has the greatest chance of  
23 maximizing the return for everybody. That is the basis of the  
24 choice.

25           THE COURT: I know that, except that is not realistic

1 because I'm not going to be here on that date.

2 MR. HOWARD: With respect to the Special Programs  
3 Fund which Mr. Ross speaks of, that is the non-Title IV, non-  
4 discretionary fund portion, there is the possibility in one  
5 of the pieces of legislation that has been passed out of  
6 House Appropriations, that those funds might be insulated  
7 against reprogramming, and therefore, in effect, may be appro-  
8 priate to release those funds if that legislation were to pass  
9 That is one reason.

10 It just seems to me when you are looking at a 45-day  
11 continuing extension, that the prospect of court action which  
12 would extend funds for the entire period of time which is  
13 covered by the continuing resolution which Congress is looking  
14 at, the court action extending funds for 45 days might well  
15 lead Congress to think that legislative action just isn't  
16 necessary at this point, and that Congress could consider this  
17 matter in November when the continuing resolution would be  
18 expiring.

19 So what I am concerned about is that an extension  
20 of that length will just take this matter off the Congressiona  
21 Agenda altogether.

22 THE COURT: What I had in mind very frankly, was a  
23 November 1st date. That would enable us to bridge the time  
24 that I would be returning, and at the same time have us keep  
25 an October 5th date to see what developments had occurred in

1 the interim period.

2 MR. HOWARD: Well, I don't know what else to say,  
3 Judge. I really believe that the prospect of Congressional  
4 action to bring some broader resolution to this issue, is  
5 best enhanced with the October 15th date, and the Council of  
6 Chief States School Officers thought so too.

7 THE COURT: Although I know that appearances are  
8 often the master of reality, I still have some difficulty in  
9 understanding how that may be true if we choose a date that  
10 we know cannot possibly be one that is going to stay in place.  
11 It seems to me the same message can be delivered by choosing  
12 a date that is more realistic in terms of the Court's  
13 calendar, but on which it is indicated that that is really it  
14 because of the fact that unless other alternatives are provide  
15 we now have the Court of Appeals having agreed that that is  
16 what has to be done with these funds.

17 So that it seems to me that the editorial comment  
18 on what the meaning of a court order is, is something that the  
19 parties ought to be relied on for. It is not my intention to  
20 create a sort of interrorem propsect with a meaningless  
21 date, which is what October 15th would be, unless you would  
22 want to be tendering this to some other judge of this court,  
23 and I am not sure that that would make any sense at all.

24 MR. HOWARD: No, I think that would not be a good  
25 idea.

1 THE COURT: All right. Then what I am going to do  
2 is to use the November 1st date for that freeze, and what we  
3 will have is an October 5 status hearing at 10:00 o'clock,  
4 and we will also set aside an October 28th at 10:00 o'clock  
5 time. I anticipate that we will be having that date and we  
6 ought to set it aside.

7 Now, Mr. Ross, what other items do you want to point  
8 out that will focus the areas of difference that are going to  
9 be represented in the orders you are tendering?

10 MR. ROSS: All right. Your Honor, with respect to  
11 the difference between the Board's escrow provision, and the  
12 second provision in a separate order, the difference is that  
13 the Board's order does not make the other grantees conditiona  
14 obligees of these funds. I am not sure what --

15 THE COURT: That is something as to which I assume  
16 the Board would have no position. That is, if the funds are  
17 not, in fact, going to be used for Board purposes, and as I  
18 understand what Mr. Ross is saying, there is a concern legally  
19 whether the result will be somewhat the same as real property  
20 law, you know, when the reversion falls in, and the funds then  
21 go back to the place of origin, which means the public  
22 treasury generally, as distinct from the other parties having  
23 at least a call on those funds.

24 MR. HOWARD: I would even say, your Honor, more than  
25 not caring, the Board does care. Our first choice is our own

1 programs, and our second choice is the grantees.

2 THE COURT: So you would share Mr. Ross' suggestion?

3 MR. HOWARD: Well, the language of Mr. Ross'  
4 proposed order on that point is language that we have worked  
5 on together and we are generally in concert on.

6 We have two concerns, and I think you would see  
7 these expressed in the last paragraph of Mr. Ross' proposed  
8 order.

9 THE COURT: Doe somebody care to provide me with a  
10 copy of that? It would be interesting.

11 MR. HOWARD: I am sorry.

12 (Document tendered to the Court)

13 One is a question of standing, and the other is  
14 the question of obligation. That is, we don't mind doing  
15 something which preserves, or which avoids the evaporation  
16 of the possibility of the grantees getting the funds.

17 We are concerned that what is done have no impact  
18 whatsoever to improve their standing in relation to the Board.  
19 Either their standing in the legal sense of access to the  
20 litigation, or their standing in the substantive sense of  
21 access to the funds.

22 In other words, we are happy to help them not be  
23 knocked out of the game by a quirk, but we don't want to give  
24 them any advantage in the game in either of those respects.

25 THE COURT: Well, this really anticipates the

1 reaction I was going to express to the motion of the proposed  
2 intervenors because at least in my perception, they have not  
3 established one important condition of intervention, and that  
4 is that their interests are not adequately protected by the  
5 provision of the present litigants.

6 Up to now the United States has been a very vigorous  
7 proponent of the position of the other grantees. It has urged  
8 their position, indeed, as the predicate for this Court not  
9 acting, and has also urged that before the Court of Appeals.

10 So that I agree, I would not contemplate the entry  
11 of an order in which this Court makes a determination that the  
12 funds are to be made available to other grantees. That is  
13 really not this Court's function. It is not my function to  
14 be adjudicating what the rights of other grantees are or are  
15 not. Rather, the issue is whether the Secretary is going to  
16 be in a position to exercise the Secretary's discretion, and  
17 that is all that has to be preserved past September 30th.  
18 That is, the notion that for some finite period of time, after  
19 I make my determination that the Secretary has the retained  
20 power to exercise discretion in accordance with whatever the  
21 provisions are, whether Title IV, or any other, so that it  
22 seems to me that language that would do something more than  
23 that, and would place other grantees in some kind of a bidding  
24 contest, is really inappropriate.

25 It is not within the scope of this litigation at

1 at all, and it also misperceives what the role of this Court  
2 is. Indeed, I don't suggest this as the motivation for it  
3 at all, but it tends to perpetuate this false notion that it  
4 is this Court rather than what I have viewed as the stone-  
5 walling position of the United States, that has pitted these  
6 parties against each other needlessly as contenders.

7 So, Mr. Ross, I am sympathetic toward the point  
8 that you make, but I am not going to do it in the manner that  
9 is set up in this proposed order.

10 MR. ROSS: Your Honor, it seems to me that the  
11 disclaimer language on page 3, starting with the paragraph,  
12 "The sole purpose," describes exactly what you just said  
13 ought to<sup>be</sup> understood about these paragraphs.

14 THE COURT: Yes, but look at the last sentence.

15 MR. HOWARD: That got added between Friday and today

16 MR. ROSS: No, it didn't get added between Friday  
17 and today. It was worked out with counsel, Mr. Weissbourd  
18 and I worked it out, and Mr. Howard is incorrect in saying it  
19 was added between Friday and today.

20 There is no intent anywhere here to do anything to  
21 the Board. There is no intent to do anything except if and  
22 when this Court should rule that Chicago would not be entitled  
23 to these funds, that the ordinary statutory distribution of  
24 these funds take place. That is the intent of this language,  
25 and Mr. Howard knows that.



1 THE COURT: Well, again, I am not speaking in  
2 terms of any motivations at all. Rather, I think that that  
3 language is inartful to do the job that I think is appropriate  
4 and that is to make it plain that what is being done is to  
5 retain the discretionary power of the Secretary and not for  
6 this Court to be determining that funds are to be made avail-  
7 able to grantees.

8 Mr. Howard, I recognize that the Board's preference,  
9 but that is a sociological one, would be -- No, seriously,  
10 would be for other grantees to get the funds if the Board  
11 can't, but I am not in the business of adjudicating that.  
12 That is not my lawsuit, and therefore, if what I understand  
13 is the point is to make certain that we don't have a lapse  
14 that causes these things to fall back automatically, but that  
15 rather, they should be subject to the Secretary's exercise  
16 of discretion, then that is the language that ought to be in  
17 the order.

18 MR. HOWARD: Let me add this point, your Honor. It  
19 is not only the question of the Court making any determination  
20 concerning the grantees' rights. That is not the only thing  
21 we are concerned about. We are concerned about any departure  
22 from the order of June 30th which said the Secretary shall not  
23 further obligate these funds.

24 We are concerned that somewhere in the bureaucratic  
25 language, which frankly, as Mr. Ross and I know, came from

1 OMB, and DOE, and so on, and we folks in the Midwest aren't  
2 quite sure what it all might mean, we are concerned that  
3 somewhere in there is the kernel of Executive obligation that  
4 will come back later to haunt us.

5 THE COURT: We in the Midwest know all about  
6 kernels.

7 MR. HOWARD: That is true. We may be willing to  
8 live with some such language as this, and indeed we worked  
9 on this language with Mr. Ross, if it is absolutely clear  
10 that there is nothing here other than preventing the lapsing  
11 of funds, that is, preventing the evaporation of the possi-  
12 bility that those grantees could get the funds if the Board  
13 doesn't get them.

14 MR. ROSS: Your Honor, I think we can resolve this  
15 by making on the record in this court the same assurance we  
16 made to Mr. Howard somewhere between twelve and fifteen times  
17 in the last 48 hours. That is, that this proceeding is  
18 solely to keep the funds from lapsing, and that these dis-  
19 claimer provisions in my proposed order, are simply to allow  
20 for the possibility that there will come a time when the  
21 Secretary, when these funds are to be distributed to the  
22 grantees, and we certainly don't want the Court deciding which  
23 grantees will get the money, and this leaves that discretion  
24 to the Secretary.

25 That is simply the sum total, I assure you,

1 Mr. Howard, of what this is for.

2 THE COURT: Mr. Ross, although I appreciate your  
3 assurances, I am also painfully aware that estoppel doesn't  
4 lie against the government, and so what we are going to do  
5 is make sure that the order sets out that conclusion very  
6 specifically.

7 MR. ROSS: Well, I think --

8 THE COURT: We will work on it. I agree at this  
9 point you are really dealing with a matter of semantics.

10 MR. ROSS: I think so.

11 THE COURT: And it is something I think can be  
12 handled in terms of language. Are there any other items?

13 MR. ROSS: There are some other items here that I  
14 would like to address.

15 THE COURT: Sure.

16 MR. ROSS: The Board of Education has moved that  
17 this Court also escrow and keep from lapsing some indefinite  
18 amount of funds in other of the Secretary's accounts that  
19 might lapse as of the end of the fiscal year.

20 In my proposed order I have suggested that there  
21 are two reasons why those funds should not be escrowed. One  
22 is that I think it is clear from the Seventh Circuit opinion  
23 that the Board has no more interest in funds that haven't  
24 been appropriated for anything, and these funds here.

25 In order to get its hands on these funds that might

1 lapse at the end of the end of the year, it would require  
2 legislation in no way different from new legislation involv-  
3 ing any dollars in the U.S. Treasury.

4 Other than that, there are good practical reasons  
5 for not escrowing those funds. There are some twelve to  
6 fifteen different accounts that those funds are in, and the  
7 reasons why there is extra money left at the end of the year  
8 vary quite a bit from program-to-program. In many of them  
9 Congress appropriates somewhat more than it is believed the  
10 Secretary needs for that program just in case it is necessary,  
11 and then the funds lapse if they are not used, and they are  
12 essentially reappropriated and reauthorized the following  
13 year. It is more a bookkeeping transaction than anything  
14 else.

15 But mostly, for the reasons that there is no  
16 difference between those funds and any other dollars in the  
17 Treasury that the United States would think that that part  
18 of the Board's request should be denied.

19 THE COURT: How do you read Footnote 10 of the  
20 Court of Appeals' opinion and the corresponding text, and  
21 then turning over to page 13 which describes what the Court  
22 of Appeals affirmed in terms of a freeze.

23 MR. ROSS: Well, I don't think there is any doubt  
24 that there is an inconsistency between page 9 and the freeze.

25 MR. HOWARD: Your Honor, I think that it may be a

1 question of what is the status quo in this instance. While  
2 we agree that some act to reappropriate those funds would be  
3 necessary, that is, some Congressional action would be neces-  
4 sary for these funds to flow to the Board, still they are at  
5 present, legislatively set aside for the Department of  
6 Education, and it is that which we want to preserve.

7 THE COURT: Does somebody want to answer my question  
8 though because really, after all, what I have is -- By the  
9 way, the mandate's returned, isn't it? They were supposed to  
10 have an immediate mandate. So what I am supposed to do is  
11 function in terms of what the Court of Appeals said.

12 What the Court of Appeals said was that the provi-  
13 sions that temporarily freeze certain federal funds, but  
14 exempt additional funds are affirmed, and they refer  
15 back to Note 10.

16 Note 10 and its corresponding text, includes as I  
17 read it at least in the frozen funds, the Special Programs  
18 and Populations Accounts Fund.

19 If that is true, then hasn't that been affirmed?

20 MR. HOWARD: There is no doubt about that, and  
21 that is absolutely correct. What we are talking about now  
22 is something other than Special Programs' Funds. That is  
23 excess funds that may be in the Aid to the Handicapped Act,  
24 for example. That is, funds that are outside the scope of  
25 the Court's original order, which would lapse on September 30

1 if nothing is done.

2 Now, I think there is no question at all that the  
3 Special Programs Fund, that the freeze of those funds is  
4 affirmed by the Court of Appeals' order, and therefore, that  
5 aspect of Mr. Ross' comments, there is no doubt in my mind  
6 that those funds should continue to be frozen, especially sinc  
7 he relies on the Court of Appeals' opinion, that as you point  
8 out, they affirmed the freeze order that covers those funds..  
9 So, I think there is no doubt about that.

10 What we are talking about here is funds in unrelated  
11 appropriations accounts, which are in the Department of Educa-  
12 tion which would lapse on the 30th of September unless some  
13 action is taken.

14 In our view the fact that those funds have been  
15 set aside by Congress, and will be excess at the end of the  
16 year, creates, if you will, a windfall. All we want to do,  
17 we don't want any leverage on the windfall. We just don't  
18 want it to go away.

19 THE COURT: Is to have potential access to the funds  
20 Is that what you are saying?

21 MR. HOWARD: Yes.

22 THE COURT: Are you including, are you talking  
23 about guaranteed student loans?

24 MR. HOWARD: We are not including that because that  
25 is not going to lapse at the end of the year.

1 THE COURT: All right.

2 MR. HOWARD: In other words, we are saying anything  
3 which would carry over we are not going to touch.

4 THE COURT: Mr. Ross, I fail to understand. What  
5 is the problem with that?

6 MR. ROSS: The problem, essentially, is why do it  
7 because there is no difference between that money and unappro-  
8 priated money in the Treasury. There simply is no practical  
9 difference as far as the Board is concerned between --

10 THE COURT: Well, there may well be in terms of  
11 what you might characterize as Congressional equity. That  
12 is, the fact that funds -- I recognize that all money is green  
13 and we are taught in law school about the fungility, but the  
14 fact is that dollars are viewed as having been once committed  
15 to education purposes, and are now left in a position in  
16 which they remain accessible for that purpose, stand in a  
17 very different posture from the notion of free funds in which  
18 everyone is competing afresh for Congressional funding.

19 You are right in the sense that so long as  
20 Congressional action is required, conceptually perhaps, like  
21 Gertrude Stein, Congressional action is Congressional action  
22 is Congressional action, but it seems to me there is an  
23 appropriate distinction to be made between funds that have  
24 once been placed into the concept of use for educational  
25 purposes and are then retained for that purpose, so that

1 determination may be made.

2 Now, that is one on which I really don't understand  
3 any purpose to be served by the United States' position. You  
4 are simply saying that in the interest of precision you think  
5 that those should not be included there.

6 MR. ROSS: Well, let me say two things, your Honor.  
7 In many respects there is a great deal of sex appeal to Mr.  
8 Howard's argument. This is the Secretary's loose change, and  
9 he would like to get his hands in the Secretary's pockets.

10 MR. HOWARD: Oh, no. I just don't want him to  
11 throw it away.

12 MR. ROSS: I understand that, and it is not Mr.  
13 Howard's proverbial MX Missile Funds running out at the end  
14 of the year because it says Education on it.

15 On the surface I don't think it would do much harm  
16 if an injunction against that lapse didn't last long, but it  
17 will interfere with planning and budgeting for other years  
18 if it lasts very long.

19 THE COURT: I don't contemplate that any of this,  
20 I hope, is going to last very long.

21 MR. ROSS: I would hope not, but I would like --  
22 Your Honor, there are still some funds --

23 THE COURT: Certainly not as long as it takes to  
24 build an MX missile.

25 MR. ROSS: There are still some funds from the



1 ESA Program in 1975 that are in escrow in some cases where  
2 they are still scrapping over that.

3 THE COURT: I can count on the litigants to remind  
4 me about this, and I am not planning to set up any long-term  
5 deep freeze for these dollars.

6 MR. ROSS: And in some cases, for example, your  
7 Honor, there are statutory scholarship funds where Congress  
8 appropriates more than it thinks are necessary, and at the  
9 end of the year it lapses, and then they reappropriate it.

10 THE COURT: Mr. Ross, there is a very simple way  
11 to deal with this, and that is, you know court is around and  
12 you can always come back. There is no desire, certainly on  
13 my part, to create some kind of long-term residual funding  
14 that is off in some dust-swept corner.

15 MR. ROSS: Fine. I think we are all on the right  
16 track then.

17 THE COURT: Then I think that inclusion of those  
18 amounts is quite appropriate.

19 MR. ROSS: Your Honor, before I finish, there is  
20 one last item that I would like to raise.

21 I have been asked by the Department of Education  
22 to ask the Court to free up some of the Secretary's discre-  
23 tionary funds, which as you may recall no moneys have been  
24 spent since June because the previous order was to give out  
25 some money to these continuing grantees from last year.

1 THE COURT: Right.

2 MR. ROSS: The Secretary has requested that with  
3 respect to the March 31, 1983 advertisement for competition  
4 for grants, that he be allowed to award the top-rated grant  
5 in each of the categories in there, plus the top-rated  
6 technology grants, and I am informed by the Department of  
7 Education that these are programs that are tied into the  
8 school year and if they don't get going soon they are going  
9 to completely be missed, and some of them are extremely  
10 important, as again as I have said this to the Court before,  
11 have to do with the National Commission on Excellence, and  
12 distributing techniques around the country, and I am informed  
13 that the Secretary, that 1.2 million could make the grants  
14 that I have requested.

15 Now, other than that, they can wait, but he really  
16 would like to get some grants going, and that overall would  
17 be a lower proportion of the discretionary fund than has  
18 been spent of the other programs that have been frozen.

19 MR. HOWARD: We are absolutely against any release  
20 of funds from the discretionary fund.

21 In the case of the Title IV and Special Programs  
22 Accounts, you have ongoing programs funded for several years  
23 which have people on the payroll. That is the whole basis  
24 of the allowance of funds to those grantees, even though they  
25 are not grantees, and even though there is a freeze order.

1           When you start talking about doing the same thing  
2 with new grant awards, and indeed, when you start talking  
3 about picking one in each category, it is meaningless to the  
4 achievement of any of the goals that those programs may have  
5 been aimed at, but it is very meaningful to us.

6           THE COURT: Mr. Ross, you know again, and I don't  
7 say this to fault you, you are relaying a message, but what  
8 this bears a strong resemblance to is the same notion that it  
9 is something that this Court did that juxtaposes the Board  
10 of Education of the City of Chicago in opposition to other  
11 worthy educational causes.

12           That is not true at all. There is \$20 million  
13 that would have been available to the Board of Education that  
14 is, according to my calculations, what, 16-2/3's times your  
15 \$1.2 million that you are talking about here.

16           So the notion that somehow what ought to be done is  
17 to open up the screw by a quarter-of-a-turn, is really in  
18 all candor, one that doesn't sit well given the purposes of  
19 this Court's order, and the fact that it is really a false  
20 perception to think about the Board of Education as somehow  
21 having made an effort to deprive other appropriate grantees  
22 of funds to which they are entitled.

23           You know, this is not a floodgates kind of problem.  
24 I recognize the limited kind of request that you are making,  
25 but in principle, it is simply not appropriate. I don't know

1 why we should distinguish one source of a new request for  
2 funding from others. I am sure that out there in these  
3 requests there are a great many more than what you character-  
4 ize as the top-rated grants, and I have read with a great deal  
5 of sympathy the statement of the several Race Desegregation  
6 Assistance Centers, all of which have an appropriate kind of  
7 claim, it seems to me, on the public treasury, but this Court  
8 only deals with its piece of litigation and that is the only  
9 one I can treat with.

10 So I cannot, under the present circumstances, deal  
11 with that kind of request favorably as creating a sort of  
12 added escape hatch for what is presently involved.

13 Let us see whether the information that we get  
14 during this next uncertain week is something that is going to  
15 give us a better shot so that all of the worthy grantees are  
16 going to be in a position to have access to funds, as I  
17 suspect they should.

18 MR. ROSS: Thank you, your Honor.

19 THE COURT: I am not going to include that.

20 Now, is there anything else in terms of the  
21 difference between the Board's proposed order?

22 MR. HOWARD: No.

23 THE COURT: Then what I will need is a recast  
24 version to deal with what we have talked about this morning.

25 I am not going to be on trial today because our

1 trial finished up last week and I have got a jury instruction  
2 conference beginning at 10:15, but I suspect that I should  
3 have, I don't know how long that is going to take, but I  
4 should have some time this afternoon so if you can get a copy  
5 of the ordered delivered maybe by the noon hour, I will make  
6 it a point to take a look at it over the noon hour.

7 MR. HOWARD: Yes, we will deliver an order which  
8 your Honor, I think, will represent an amalgamation of the  
9 government's position and ours on the lapse question, and  
10 generally the balance of the rest of our order.

11 MR. ROSS: For clarity sake, you are going to extend  
12 the temporary funding until the 1st of November?

13 THE COURT: Right.

14 MR. ROSS: You are not going to release --

15 THE COURT: Make it October 31st. I suppose the  
16 month end is an appropriate time.

17 MR. ROSS: And so that and the extension of the  
18 entire freeze otherwise, and the lapse of the three things  
19 which should be included.

20 THE COURT: Right.

21 MR. ROSS: And with respect to the funds that are  
22 going to be left over in the Secretary's other accounts, the  
23 Court is inclined to include those.

24 THE COURT: Yes.

25 MR. ROSS: And the same -- Of course, there aren't

1 any conditional obligees. All right, your Honor.

2 MR. HOWARD: There are a couple of other matters,  
3 your Honor.

4 One is that today was to be a day for us to hear  
5 something about the general position of the United States on  
6 this matter as to at least what direction they are going in  
7 in response to the Court of Appeals suggestion or mandate that  
8 the government be allowed to develop its own remedial plan.

9 The clock is running on that. It has been three  
10 weeks. We don't want to wind up at a point later where there  
11 has been a further determination by this Court, and then the  
12 government says, Well, now, we have to think about it.

13 THE COURT: I assume one part of the government's  
14 plan in remedial terms is promoting this legislation.

15 MR. ROSS: Your Honor, Mr. Howard is shaking his head  
16 and he doesn't really know as much as I do, or I don't know  
17 as much as he does about his promoters of the legislation.  
18 I think we just have to wait and see. I think the 5th of  
19 October will be plenty soon enough.

20 THE COURT: I trust the government is not waiting.  
21 That is, your branch of the government may be, and appro-  
22 priately because you are litigating this one, but I trust  
23 that the Executive Branch has read the opinion too.

24 MR. ROSS: It has, your Honor.

25 THE COURT: Mr. Howard, I think that October 5th is

1 the most appropriate time, although I want Mr. Ross to  
2 understand that at that point we should expect to have a  
3 formulated position on the part of the United States.

4 MR. ROSS: I think that is reasonable, your Honor,  
5 and I would point out that it is unlikely that any kind of  
6 legislation by Congress would resolve this entirely.

7 THE COURT: That's right. I understand.

8 MR. ROSS: Because the Board has served me with its  
9 plan for its top-of-the-line desegregation plan, and --

10 MR. HOWARD: No, that was the Pontiac version,  
11 Mr. Ross, not the Cadillac.

12 MR. ROSS: I have been reading that, and we will be  
13 back in one form or the other, so that I think it in many  
14 respects, really doesn't matter what the legislation, how  
15 it comes out. I believe we will probably have to have a  
16 remand hearing of some kind at which time we take care of the  
17 matters that have been outlined by the Seventh Circuit.

18 But I would say this, your Honor. I would like to  
19 be able to settle with some specificity, the question of what  
20 is available for Chicago before we get into what could be an  
21 endless hearing of how much it needs because I have been serve  
22 with an incredible stack of documents, and I assure you that  
23 unless and until the gap between what is potentially available  
24 from the federal government for the Chicago Board, and the  
25 unending appetite of the Chicago Board for funds, somehow

1 meet we are going to have a long and difficult time in this  
2 court.

3 But, that is in the future, and I hope that doesn't  
4 happen.

5 MR. HOWARD: I am not going to extend this analogy  
6 about starvation and so on, because that is the direction I  
7 would go in since the Board received virtually no funds.

8 Your Honor, what I think is implicit, if not more  
9 in Mr. Ross' comments, is that we are going to go through  
10 another trench war on the question of availability. There  
11 doesn't seem to be any inclination to take a broader view to  
12 go to work on the question of providing funds to try to  
13 eliminate the conflict between the Board and other grantees.  
14 Just nothing of that sort from the government, and it appears  
15 to me when Mr. Ross says we want to find out what is avail-  
16 able, what he means is he wants more briefs on the question of  
17 whether the Title IV funds can go to the Board, whether the  
18 Discretionary Fund can go to the Board.

19 So, if we have to do that, I would hope we don't,  
20 I would have hoped those issues were resolved, but if we have  
21 to do that let's get it over with because it seems to me that  
22 we need to be addressing the questions of what are the Board's  
23 needs, and what can the government do other than negative,  
24 other than resistance, to try and help fulfil those needs.

25 THE COURT: Mr. Howard, you know the Court of Appeal



1 specifically said that it was not facing another more diffi-  
2 cult question that was before it, choosing in its infinite  
3 wisdom to leave that to the district courts to treat with in  
4 the first instance. But, you know, I would assume that that  
5 question may well be affected by the factor that the Court of  
6 Appeals did not address, and that is the history, the so-far  
7 aborted history of this other legislation because that does  
8 seem to me to bear on questions of availability if I have to  
9 confront those.

10 I think that the point that you are making is really  
11 premature because of the fact that we are dealing with so  
12 much more uncertainty now than I hope will be the case, let  
13 us say, a little over a week hence and that is the reason it  
14 seems to me, it is more appropriate to defer that issue until  
15 the October 5th date.

16 Miss Fritzsche, I know you have been anxious to  
17 talk about something. You just stepped up.

18 MS. FRITZSCHE: Your Honor, I for once would like  
19 to change the topic of conversation from money to something  
20 else.

21 I am here on behalf of the Community Organizations,  
22 and I think I ought to speak for the Urban League. We all  
23 would like to have time to respond to the filing of the  
24 educational components by the Board of Education on August 29.

25 As you may recall --

1 THE COURT: I had gotten a request for an extension  
2 to September 27th, as I understand it.

3 MS. FRITZSCHE: Those are two different things.  
4 Those are our comments made on the original desegregation,  
5 the first part of the desegregation review filed on April 15,  
6 as far as student transfer and designation was concerned.

7 Five months later the Board filed on August 29,  
8 educational components, which you may recall is a rather  
9 weighty document just looking at it, and I am sure it is just  
10 as weighty if one would open it and read it. None of us have  
11 had time yet.

12 THE COURT: You mean it is big. You are not sure it  
13 is weighty.

14 MS. FRITZSCHE: That's right.

15 We would like time to respond to it and since it  
16 seems to us for this current school year, whatever comments  
17 we make are too late anyway, the school year has started, and  
18 we are thinking now about '84-85, that we would like to have  
19 some time to really give the subject the necessary attention  
20 it needs.

21 THE COURT: How long would you --

22 MS. FRITZSCHE: December 15.

23 THE COURT: When?

24 MS. FRITZSCHE: December 15.

25 THE COURT: December 15?

1 MS. FRITZSCHE: Yes. As you will recall, it came  
2 five months late, and it is partly for the reason as Mr.  
3 Howard pointed out, it took the School Board a long time to  
4 really put the material in any form and shape that it would  
5 be digestible by those who have to read it, it seems to me  
6 if it takes the originator of the document a long time to  
7 originate the document, it may take the purveyors, the readers  
8 quite some time to follow the intricacies of what I assume are  
9 statistical analyses.

10 THE COURT: I understand, and I appreciate that  
11 problem. It seems to me what we have to do is work backward  
12 in a meaningful way from when any changes might have to be  
13 put into place in order to take effect, even in the 1984-85  
14 school year.

15 That is, if you put a December 15th date for comment  
16 and then I have to review those in the sequence dealing with  
17 other litigation as well, and I may have some input as a  
18 result of my determination, then the question comes whether  
19 the Board, if any changes have to be made and I am not  
20 assuming that, I haven't after all seen the comments, whether  
21 it will be realistic for the Board to put them in place even  
22 for the following year. That is a question I don't know the  
23 answer to.

24 MR. HOWARD: Well, I am not sure I know the answer  
25 to it either, your Honor, but I am troubled at another level.

1 I don't want to say that the Board thinks that  
2 these folks should not say something, read the document and  
3 say something about it, but it seems to me that we had enough  
4 trouble, and it seems as if we continue to have trouble with  
5 respect to the student assignment question because there,  
6 although the Court established guidelines for the nature of  
7 the comments, that is they should address constitutional  
8 questions, the comments didn't bear much relation to the guide  
9 lines.

10 THE COURT: The same principle, of course, has to  
11 operate with respect to educational components. I will only  
12 add that it should be very obvious that it is, at least in my  
13 perception, much more difficult for a court to be making a  
14 judgment about whether educational components impinge adversely  
15 on the constitutional rights of the consumers of the product  
16 than with respect to student assignment programs that would  
17 permit, I won't say more simplistic response, but at least  
18 we have some criteria that are established in existing case  
19 law.

20 Now, at the same time I certainly can't foreclose  
21 comment. That is not appropriate, and all that you pointed  
22 out is that it is more of an uphill burden for people who are  
23 commenting on the plan in this respect to demonstrate consti-  
24 tutional infirmity, than the burden that relates to student  
25 assignment.

1 MR. HOWARD: I think a burden that needs more to be  
2 met than merely to say that the whole plan is a constitutional  
3 enterprise.

4 THE COURT: But you know, Mr. Howard, I don't know  
5 what you are dealing with. All that is being asked for is  
6 some time to frame those comments.

7 The very fact that you are emphasizing, properly,  
8 the difficulty of doing it is a best indication that the people  
9 who are going to try to cope with that issue in constitutional  
10 terms are going to need some time to try to shape that.

11 MR. JOHNSON: I think the problem is brought out  
12 by the request for a December 15th date, which implies an  
13 analysis and review of the plan, which gets more into its  
14 educational aspects rather than into its constitutional. It  
15 implies, I think, that various statistical analysis, review  
16 of alternative educational policies are what are at issue here  
17 and that constitutional analysis can surely be done before  
18 December 15.

19 THE COURT: If they are going to deal with it  
20 constitutionally, they are going to have to comment on its  
21 substance, which is about educational components. I don't  
22 know how you can separate those.

23 I will take the commenting organizations at their  
24 word, but they have to recognize that if they come in with  
25 something like that on December 15, and then I give the Board

1 the kind of time that it is going to require to deal with  
2 that, and then look at the amount of time it is going to take  
3 me to consider it, that you may well find that if any relief  
4 is appropriate, and I don't suggest that to be true, that it  
5 is very unlikely, given the fact that it has to do with  
6 educational policies and programs, that it could make even  
7 the '84-85 school year.

8 So if that is your request, I will give interested  
9 parties until December 15 to comment, and then the Board until  
10 February 15 for any response.

11 MR. HOWARD: And may we just reserve and revisit the  
12 question of response?

13 THE COURT: Sure.

14 MR. HOWARD: After we have seen what it is, because  
15 we may well think that it is material we have no obligation  
16 to respond to.

17 THE COURT: But if you are going to do that, I  
18 would expect you to come in on motion so that I will know at  
19 the earliest possible date what I am going to have to deal  
20 with on the issues.

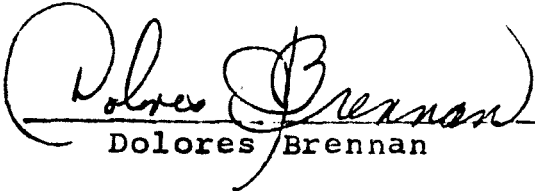
21 MR. HOWARD: Yes, absolutely.

22 THE COURT: All right, I shall see you then on  
23 October 5th at ten o'clock.

24 MR. ROSS: Thank you.  
25

CERTIFICATE

I CERTIFY that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

  
Dolores Brennan

10-17-83