Cons. Nos. 98-1056, 98-1105, 98-1231,
98-1449, 98-2452, 98-2488, 98-3340, 98-3858

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PEOPLE WHO CARE, et al.,	On Appeal from the United States District Court for the Northern District of Illinois, Western Division
Plaintiffs-Appellees,	
v.	
	NO. 89 C 20168
ROCKFORD BOARD OF EDUCATION SCHOOL DISTRICT NO. 205,	The Honorable P. Michael Mahoney Magistrate Judge
Defendant-Appellant,	
and	
ROCKFORD EDUCATION ASSOCIATION, ROCKFORD BUILDING MAINTENANCE ASSOCIATION and EDUCATION OFFICE PERSONNEL ASSOCIATION,	
Defendants-Intervenors.	

CONSOLIDATED BRIEF OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTEREST

Appellate Court No: 98-1056, 98-1105, 98-1231, 98-1449, 98-2452, 98-2488, 98-3340, and 98-3858

Short Caption: People Who Care v. Rockford Board of Education

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. **NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.**

(1) The full name of every party or amicus the attorney represents in the case:

See Attachment 1

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Futterman & Howard, Chtd.; Gessler Hughes & Socol, Ltd.; Soule & Bradtke; Hartunian & Associates; Davis Miner Barnhill & Galland; Lehrer & Redleaf

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from of the table of contents of the party's main brief.

Attorney's Signature: Robert C. Howard

Date: 12/16/98

Attorney's Printed Name: Robert C. Howard

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Amended 10/6/97

Attachment 1 (to Certificate of Interest)

(1) The full name of every party or amicus the attorney represents in the case:

PEOPLE WHO CARE, an unincorporated association; LARRY & CHASTY HOARDE, minors, by their parent and next friend, Flossie Hoarde; JONATHAN HUGHES, a minor, by his parents and next friends, Sidella and Nathan Hughes; SIDNEY and ANDRE MALONE, minors, by their parent and next friend, Rev. Louis E. Malone; SHAHEED SALEEM, a minor, by his parent and next friend, Christine Saleem; ANISSA TRIPPLETT, a minor, by her parent and next friend Beulah Tripplett; ASIA EASON, a minor, by her parent and next friend, Granada Williams; JAMES and KELLY CURTIN, minors, by their parents and next friends, Larry Curtin and Sue Belvoir; LEONARDO MEDRANO, by his parent and next friend, Jesus Medrano; each individual suing as a class representative of the class certified by the court.

CERTIFICATE OF INTEREST

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i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

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Attorney's Signature: Robert E. Lehrer

Date: 12/16/98

Attorney's Printed Name: Robert E. Lehrer

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Phone Number: 312-332-2121

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JURISDICTIONAL STATEMENT[1]

The jurisdictional statement of Defendant-Appellant Rockford Board of Education ("RSD") is not complete or correct.

A. Orders Appealed

In Nos. 98-1056 and 98-1105 (the "Master Appeals"), RSD appealed, by notices of appeal filed 12/31/97 and 1/7/98: (1) a 12/3/97 order (A 149) allowing interim fees to the Master's attorney; and (2) a 12/9/97 order (A150-161) denying RSD's motions to bar the Master from using counsel and from communicating informally with the parties. In Nos.

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[1] Plaintiffs employ the following citation conventions.

"RB___" = RSD's opening brief.
"PDS" = Appellees' Circuit Rule 3(c) Docketing Statement, filed 12/1/98.
"PSR" = Appellees' Status Report, filed 10/30/98.
"MD Mem. 98-1231" = Plaintiffs' Memorandum in Support of their Motion to Dismiss Nos. 98-1231 and 98-1449, filed 4/30/98.
"MD 98-1056" = Plaintiffs' Motion to Dismiss Nos. 98-1056 and 98-1105, filed 2/20/98.
"A___" = RSD's Appendix.
"PA___" = Plaintiffs' Supplemental Appendix.
"D___" = district court docket number (pages within documents are "p.___" and transcript pages "T____").
"#___" = a CRO remedial program.
"F¶___" = a Statement of Facts paragraph.

Many dates are stated in the form "M/D/Y." Fiscal years are "FY___" (e.g., July 1996-June 1997 is FY97). The district court's 1996 Comprehensive Remedial Order ("CRO") was entered in segments (D1989, 1999, 2073, 2170, 2182, 2203, and 2278). CRO page numbers are cited "CRO___". The first CRO segment (pp. 1-46) and the governance and finance sections (pp. 201-214) are at PA 1-62.

98-1231 & 98-1449 (the "FY98 Budget Appeals"), RSD appealed, by notices of appeal filed 1/28/98 and 2/23/98, four of the district court's nine FY 1998 Budget Orders.[2]

In No. 98-2488 (the "ECE Appeal"), RSD by notice of appeal filed 6/10/98 appealed the district court's 5/12/98 order, approving and directing continued implementation of an Early Childhood Education ("ECE") program as part of the remedial programs required under the Comprehensive Remedial Order ("CRO").

In Nos. 98-3340 and 98-3858 (the "FY99 Budget Appeals"), RSD by notices of appeal filed 9/11/98 (No. 98-3340) and 11/5/98 (No. 98-3858) appealed the FY 1999 Budget Orders entered 8/13/98, 10/28/98, and 10/30/98. (A163-202.)

B. Appellate Jurisdiction

As stated at PDS 7, the district court had jurisdiction over this cause under 28 U.S.C. §§1331 and 1343(a)(3).

1. Nos. 98-1056 & 98-1105

For reasons explained in MD 98-1056, this Court is without appellate jurisdiction over Nos. 98-1056 and 98-1105.

2. Nos. 98-1231, 98-1449, 98-3340 & 98-3858

As explained in PDS 7-25, this Court has appellate jurisdiction over these appeals under 28 U.S.C. §1292(a)(1), but only in part.

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[2] The nine FY 1998 Budget Orders were entered 9/12/97, 10/15/97, 11/6/97, 12/8/97, 12/18/97, 1/27/98 (two orders), 2/2/98 and 2/18/98. The principal FY98 Budget Orders are A2-14.

3. No. 98-2488

This Court has appellate jurisdiction over No. 98-2488 (the "ECE appeal") under 28 U.S.C. §1292(a)(1) because the appealed 5/12/98 Order, by its terms, constituted a modification of the CRO, which is an injunction.

C. Status Of Plaintiffs' Motions To Dismiss

Of seven consolidated appeals in this proceedings, four (Nos. 98-1056, 98-1105, 98-1231 & 98-1449) are the subject of pending motions to dismiss. Plaintiffs stand on their Motion to Dismiss Nos. 98-1056 & 98-1105 (Master Appeals). Plaintiffs stand on their Motion to Dismiss Nos. 98-1231 & 98-1449, to the extent described at PDS n.9.

STATEMENT OF THE CASE

Nature of Case and Course of Proceedings

In this school desegregation and educational discrimination case, the district court in 1994 found RSD intentionally and repeatedly discriminated against a class of black and Hispanic school children, and enjoined it to "eliminate root and branch, throughout the school system, all vestiges of racial, ethnic and national origin discrimination against African-American and Hispanic students." People Who Care v. Rockford Bd. of Educ., 851 F.Supp. 905 (N.D. Ill. 1994); D1369. That order was not appealed.

In 1996 the district court entered a Comprehensive Remedial Order ("CRO"). The CRO described the general types of remedies and many of the specific remedial programs RSD would be required to implement to remedy its constitutional defaults, and directed RSD to fully fund those programs. The CRO anticipated the entry of annual budget orders detailing the remedial programs to be implemented in each year's "CRO Expenditure Plan." (CRO 212-14, PA60-62.) The first set of budget orders was entered Fall 1996 for FY 1997. (D2387.)

RSD took a limited appeal from certain CRO provisions, and appealed the FY97 budget orders. In People Who Care v. Rockford Bd. of Educ., 111 F.3d 528 (7th Cir. 1997) ("PWC 1997"), this Court reversed or remanded certain aspects of the CRO. However, as relevant to these appeals, PWC 1997 did not reverse any of the remedial programs required under the CRO and the FY 1997 Budget Orders. Subsequent to PWC 1997, the district court entered the FY 1998 and FY 1999 Budget Orders, some of which RSD now appeals. (98-1231, 98-1449, 98-3340, and 98-3858.) Those orders, without relevant exception, continued remedial programs approved in the FY 1997 Budget Orders. Those orders provided steadily declining CRO expenditure amounts and tax rates.

After the parties stipulated in 1995 to an Early Childhood Education ("ECE") remedy the CRO declined to order one. (PA 29-33.) This Court remanded (PWC 1997 539), and the district court then ordered an ECE remedy from which RSD now appeals. (98-2488.)

In 1991 and 1993, Judge Roszkowski entered three Master Orders. (D308, D374, D1313.) RSD appealed none of the orders, and concurred in entry of the latter two. The

Master's appointment, powers and procedures were reaffirmed and finalized in the CRO, with RSD's concurrence. RSD took no appeal concerning the Master's informal communication and reporting procedures. It did take a limited (unsuccessful) appeal concerning certain substantive powers (PWC 1997 539). After changing counsel, RSD initiated a mandamus and appeals concerning certain procedures of the Master, which this Court dismissed. (PWC 1997 540-41.) RSD then filed new motions challenging the Master's procedures (not powers): the propriety of informal Master-party communications and assistance of counsel. RSD appeals the denial of the motions. (98-1105.)

RSD also appeals an interim fee order overruling objections to a two-month invoice from the Master's legal advisor. (98-1056.)

Statement of Facts

A. Master Facts

1. Judge Roszkowski's 1991 Master Order (D308) and Monitor Order (D374) adopted almost verbatim the master order approved by this Court in Williams v. Lane, 851 F.2d 867, 884 (7th Cir.), cert. denied, 488 U.S. 1047 (1989). (A153.)

2. RSD recommended Dr. Eubanks (then RSD's expert) to the Judge as an acceptable person if a Master were appointed. (A152.)

3. The 1991 Orders conferred related powers on the Master. The Master Order authorized him to examine RSD's compliance, develop recommended remedies, supervise

RSD's implementation of orders, and report periodically to the court. The Monitor Order directed him to oversee remedy implementation, identify and resolve disputes by communicating with the parties, and recommend dispute resolutions to the court. (A152-54.)

4. The 1991 Orders explicitly authorized the Master to "conduct... interviews with persons who he believes have information that will assist him in performing his duties, *including RSD's employees, agents and staff..., and counsel for the parties, Plaintiffs, parents, and students.*" (Emphasis added.) Both Orders authorized submission of informal reports, and the Master Order also authorized formal hearings and reports under Rule 53. (A152-54.)

5. RSD did not appeal either of the 1991 Orders.

6. After two years' experience with the Master and his methods, RSD agreed to continuation and expansion of the Master's authority. (A155.) Concurrently Judge Roszkowski independently entered the 5/5/93 Master Order expanding his powers. (A155.)

7. After three more years' experience, RSD reiterated those concurrences in the CRO-formulation process. In CRO-governance position statements, RSD supported the Master's continuation but sought elimination of an implementation committee ("PIC") in which Plaintiffs' counsel participated. (D1764, p.91-92.) Concerning the Master's communication procedures, RSD counsel stipulated at the evidentiary governance hearing 3/19-20/96, that "the Master has the ability to bring in anyone he wants, either individually or in groups, to discuss any issues he wants relative to the order." (CRO Hearing Transcript,

T5408-09.) Accepting RSD's position, the district court eliminated PIC from the CRO. (PA 52-53.)[3]

8. The 1991 and 1993 Master Orders were incorporated and reaffirmed in the final CRO order. (CRO 201-05, PA49-53.) RSD took no appeal from the provisions authorizing the Master's informal communication and reporting procedures.

a. RSD took a limited appeal from other CRO governance provisions, asserting that the Master's *substantive powers* were too broad, making him a "systemwide Master." PWC 1997 539 held that challenge "largely moot, or at least premature, ..."

b. RSD has taken no post-CRO appeal concerning the Master's substantive powers, but only concerning his procedural methods.

9. In accordance with the 1991, 1993 and 1996 orders, the Master has informally conferred almost daily since 1991, individually and in group settings, with RSD staff executives and employees, implementation consultants, counsel for each party, and Plaintiff Class and community members. RSD counsel have repeatedly conferred privately with the Master, as have counsel for Plaintiffs and the Unions.

a. The fact and scope (if not content) of such Master interviews has always been openly acknowledged and documented, including counsel's and the Master's

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[3] The foregoing Master facts are articulated in more detail in MD 98-1056, in the 12/8/97 order appealed (A150-61); and in the Statement of Facts in Appellees' Response Brief in RSD's 1997 mandamus and appeal (Nos. 97-1116 and 97-1157).

time records filed with the court since 1991 and dozens of fee submissions. For example, the invoices of RSD counsel, the Scariano firm, for 7/93 through 4/98 record 73 private telephone conversations with the Master. (PA158-59.) Furthermore, RSD General Counsel Quinlan communicated with the Master on more than 20 occasions. (PA160.)

b. The vast majority of the Master's informal communications are with RSD representatives (primarily RSD staff executives).

10. In late 1996 a group of self-described "tax objectors" formed a 4-3 majority of the Board of Education and has maintained majority control to this date. (Brief of Biondo, et al., No. 98-2452, p.10.) That group has filed a large number of motions and appeals seeking to relitigate numerous CRO provisions and other final orders and stipulations. (PSR 10/30/98, p.3-4, 12-15.)

a. In January 1997 that group changed lead counsel in this litigation. (D2552, 2559, 2580.)

b. Simultaneously (D2551) RSD filed its first appeal attacking the Master's procedures (Nos. 97-1116 and 97-1157). This Court dismissed RSD's appeals holding that the challenged orders were non-injunctive, procedural and moot. PWC 1997 540-41.

11. The Master's authority to use (with court permission) "consultants and experts to consult with him and otherwise to assist him in fulfilling the duties and responsibilities

assigned to him" has been established for eight years, and was part of the final CRO. (D308, p.2; D374, p.3; D1313; PA 48.)

12. RSD agreed to appointment of legal counsel for the Master in September 1995. (D1812.)

a. RSD joined 6/24/96 in Intervenors' Motion to Bar Further Representation of Master by Counsel. (D2222.) The court ruled 8/9/96 the Master could have counsel assistance until a final CRO is in place, with no appeals pending. (D2280.) RSD did not appeal that Order.

b. Since PWC 1997 the role of the Master's legal advisor has diminished. The 7/15/98 Order (D3076) explained:

> "The court takes this opportunity to explain Master's counsel's role: The Master requires counsel to assist him because the Master is not an attorney. Implementation of the CRO is an ongoing, complicated legal process. The Master may have specifically legal questions in the future regarding implementation of the CRO. The court believes that repeatedly dismissing and re-appointing Master's counsel each time legal questions arise would be inefficient, expensive, and burdensome to the court and to the parties."

c. Since PWC 1997, the Master has not participated in this case in the role of a litigant, either in hearings or otherwise.

B. Educational Input Remedies and The FY98 and FY99 Budget Orders

From 1995 through the FY99 budget process, the parties continue to be in substantial agreement as to the propriety, content and cost of the educational input (and other) remedial

programs.[4] (For FY98 and FY99, those concurrences are subject to RSD's general "mandate" objection that PWC 1997 affected the propriety or scope of some programs.)

1. CRO-Formulation Concurrences, 1995-1996

13. The liability finding here is four years old. It encompassed quality of education discrimination (Freeman v. Pitts, 503 U.S. 467 (1992)) and other within-school educational discrimination, in addition to traditional violations in student assignment, transportation, facilities and staff (the Green v. County Sch. Bd., 391 U.S. 430 (1968) factors). Many violations in both education and student assignment continued as recently as the 1996 CRO trial. (PSR 10/30/98, pp.9-11.)

14. After the liability finding, the Master was ordered to develop comprehensive remedial recommendations through consultation with all parties. (PA 6-9.) RSD submitted its 2/95 plan ("the RSD 1995 Plan"), broadly supporting educational input remedies. Large portions thereof were adopted in the Master's 8/6/95 Proposed Comprehensive Remedial Plan ("PCRP"). (D1787, Appendix I.)

15. Concerning the relationship of educational input remedies and educational outcome measures, RSD's 8/21/95 Response to the PCRP opposed outcome requirements and

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[4] For purposes of this brief, "educational input remedies" means resources and programs provided to improve education for minority students in areas of school operations where the liability and remedial orders in this case make a remedy appropriate and practicable. The term "educational input remedies" is used in contradistinction to "educational outcome requirements," several of which were reversed in PWC 1997.

simultaneously supported input remedies for the purpose of increasing minority student achievement:

> Minority Student Participation and Performance. RSD rejects all guaranteed outcome-based components and standards. However, RSD continues to support the identification and implementation of research-based programs which have demonstrated the ability to improve minority student achievement and to close the achievement gap between majority and minority students.

(D1793, p.10.) RSD concurred with other Master educational-input remedial proposals, many RSD helped formulate. Plaintiffs also supported those remedies. (D1795.)

16. The CRO evidentiary hearing 11/22/95 Stipulation reiterated the August 1995 concurrences. (PA70-75.)

17. The CRO adopted many, though not all, educational input remedies concurred in by Master and parties. CRO Part III, entitled "Educational Components/Stipulated Areas," addresses educational input remedies based on the 11/22/95 Stipulation and other CRO-hearing testimony and evidence. (PA14-47.) (Separately, educational outcome measures were addressed in CRO Part VI, entered 6/7/96 after separate hearing thereon.) (CRO 156.)

18. The CRO Judgment was finalized 8/8/96. RSD appealed only nine specific points, concentrating on quantitative outcome requirements in educational and staff remedies. RSD did not appeal any educational-input remedies, nor any student assignment, facilities or transportation remedies. (PWC 1997 533, 534-39.) (See RSD brief 11/18/96 in Nos. 96-2410, 96-3022, 96-3226, 96-3244, 96-3283.)

2. FY97 Budget

19. CRO 202 set forth a yearly CRO-budget approval process. The Master proposes yearly expenditure plans after consultation with RSD administration and others. RSD is then permitted to object to the Master's proposed plan. (PA50; A9.)

20. The Master proposed his FY97 budget 9/4/96. (D2356.) Specific remedial programs implementing the CRO were identified by "program numbers" running from 7100 to 7995. The major remedial categories are:

7100	Administration, Curriculum, Research/Evaluation, Personnel
7200	Magnet Schools
7300	Community Academies (schools in minority neighborhoods)
7400	Community Schools (other elementaries)
7500	Middle Schools
7600	High Schools
7700	Roosevelt Secondary Academy
7800	Controlled Choice Parent Information and Family/Community Services
7900	Staff Development
7990	Bilingual Services

A program number often includes several detail allocations. For example, #7340 Reading Recovery includes teachers at several schools, test materials, supplies, teacher training, and travel allocations. Other program numbers encompass only one staff position.

21. For purposes of this appeal the FY97 and FY99 budgets are programmatically identical. The FY99 budget on appeal includes 70 remedial programs. (PA117-133.) 67 of those -- all but three, or 95% -- were in the FY97 budget. (Compare PA117-133 with D2377, Exhibit F, PA82-106.)

a. The three programs in the FY99 budget but not the FY97 budget are 7270 (Magnet Schools), 7994 (Transportation), and 7652 (High School Parent Liaison -- $24,589). Of those three, only #7652 is appealed in the FY99 Budget Appeal; but that program is also in RSD's FY99 alternative budget.

b. In addition to the 67 programs that correspond to FY99, the FY97 expenditure plan included 14 other remedial programs since eliminated. (There is also some program renumbering from FY97 to FY99 in the 7200 category.)

22. In FY97 as in FY99, RSD presented its own budget and objections to the Master's budget. (Id., PA76-107.)

a. RSD stated its FY97 budget "supported and proposed" all but four programs in the Master's budget. (PA79.)

b. The four programs not supported by RSD were:

7125	General Director Desegregation
7137	Student Assignment Implementation
7199	Master's Counsel
7635	Counseling Study

The Court *granted* RSD's #7125 objection and denied the others. (D2387.)

c. RSD proposed FY97 expenditures of $22.4 million. RSD's FY97 objections totaled $1.8 million. The Court *granted* $775,000. The remaining $1,027,000 RSD/Court difference was 4%. (D2387.)

23. RSD's submission affirmatively advocated the FY97 remedial programs, "assuring... the Court and the community that all proposed expenditures are securely grounded in the requirements of the Comprehensive Remedial Order." (PA78).

24. RSD appealed the FY97 budget order (No. 96-3662, eventually consolidated with the CRO appeal). RSD's brief primarily addressed revenue issues rather than programs or expenditures. RSD's four-page expenditure argument only said the remaining $1,027,000 objections should have been granted. RSD did not challenge the propriety of any remedial program. (PA108-113.)

25. This Court in PWC 1997 did not reverse any of the FY97 budget orders, and did not reverse or disallow any remedial programs in the FY97 CRO budget.

3. FY98 Budget

26. The FY98 budget approved 9/12/97 totaled $22.743 million, down $700,000 from FY97. (A2-3.)

27. Comparing FY98 to FY97, the Court stated: "No major new programs are added. No large-scale programs are removed." (A10.)

28. RSD's new Board and counsel adopted a horizontal, "categorical" approach, requesting:

a. "Purchased services" reduced 56% to a flat $1,000,000.

b. "Supplies" reduced 64% to $500,000.

c. All equipment, most travel, dues and fees expenditures eliminated.

d. Approximately 10 remedial staff positions eliminated. (##7141, 7215, 7850, 7651, 7911, 7550, 7663, 7800, 7850.)

These objections (approximately $3,500,000) were 15% of the Court's budget. (D2756, pp.27-28; D2760, pp.1-3.)

29. RSD objected only to parts of two programs as contravening the PWC 1997 mandate. (#7150, Minority Teacher Recruitment, #7160 Evaluation Office Consultants; D2756, pp.17, 19-20.) The court *granted* the first objection.

30. RSD sought elimination of only three programs (#7651, 7550, 7663.) Two were *granted*. (#7550, 7663; A3.)

4. FY99 Budget Proposals and Order

31. The Master's FY99 budget included 69 remedial programs. (D2992.) All had been in the FY98 and FY97 CRO budgets. (F¶21,27.) (The Court's eventual budget contains 70. PA117-133.)

32. For FY99, RSD presented an "alternative budget" supporting all but three of the 69 programs in the Master's budget. The Master recommended $21.4-million expenditures, and RSD recommended $19.7 million, a $1.7-million difference, or 8%. (D2992, p.24; D3015 p.15 and D3028 p.3.)[5]

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[5]RSD's alternative budget was subject to its "Mandate Objection" to 30 remedial programs, i.e., that the district court's approval of such programs transgressed the mandate in PWC 1997. At PDS n.4, Plaintiffs put the number of FY98 and FY99 mandate-objection programs at "some 36 programs." The actual number, however, appears to be 30. First, RB objects to two programs that were deleted upon its FY98 objection. (RB28-29, ##7550,

33. RSD's Superintendent testified the "alternative budget" reflected starting-from-scratch analysis of the liability findings, the CRO, the 3-year implementation experience, and staff feedback. He created a grid linking each remedial program back to the relevant liability finding(s) and CRO remedial requirements. He made the remedy as cost-efficient as possible. His (and RSD's) conclusion was that RSD needed $19.7 million to bring about the CRO remedy. (D3034, 5/12/98 T71-78.)

34. The Superintendent testified all those factors justified continued support and implementation of all (but three) programs in the Master's FY99 budget (D3099, T42-43):

> Mr. Howard: And for every program number in which the Master has an allocation, RSD also has an allocation in its budget, with two exceptions, right? One is the ASEE position and the other is the Master's counsel?
>
> Dr. Epps: That's correct.
>
> ...
>
> Mr. Howard: There is a third area in which RSD didn't make an allocation, but there is an agreement that there is an expense there, right? There's an interest expense that we all agree has to be paid this year?
>
> Dr. Epps: That's correct.

7663, middle/high school improved performance incentives.) Second, plaintiffs incorrectly "double-counted" four programs (##7330, 7520, 7537 and 7651), RSD having placed those in two different categories. See PDS n.4. Attachment I lists and categorizes all RSD program objections.

35. The three "disputed programs" are:

#7100, interest expense (cash-flow financing)	$300,000
#7120, Office of Assoc. Supt. Education/Equity	$176,307
#7199, Master's counsel	$60,000
Total:	$536,307

The Court *granted* the #7100 objection (A184); denied #7199 (A175); and partially granted #7120. (A170-71.)[6]

36. There was substantial agreement on the nature of the 66 programs the Master and RSD jointly supported (subject to RSD's mandate objection) and disagreement only on details such as the number of staff positions or amounts allocated for certain expenses. These "detail differences" within agreed programs involved various pluses and minuses, but netted to $1.2-million, or 6%. (The $1.7-million initial difference, less the three "disputed programs".) (Compare D2992 and D3028; see comparisons D3079, Master's 5/29/98 Comments.)

37. RSD's budget acknowledged there are not "significant differences" between the Master's budget and its own concerning most educational input remedies. (D3015, p.16) It

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[6] Following the bifurcated approach the 1/27/98 Order established (A10), RSD filed a separate motion to modify the CRO deleting #7120. (D2959.) RSD also moved separately regarding Master's counsel. (D2683.) There was no other CRO modification motion for FY98 or FY99.

The 1/27/98 Order makes CRO modifications (by adding/dropping programs) separate from the budget process, in separate evidentiary hearings. RSD received evidentiary hearing 6/16/98 on its D2959 motion concerning #7120, and a separate Order 8/13/98 deferred final ruling but kept the ASEE position vacant until early 1999. (D3094-95.) RSD did not appeal.

identified as significant (a) the three "disputed programs," and (b) a $1.1-million difference in magnet costs, and stated:

> "As for the remaining portion of the budget, the differences between the Master's proposal and RSD's alternative budget are not significant."

38. RSD's FY99 budget included many positions RSD questioned in FY98, including all human relations, student support and parent liaison positions, and most curriculum implementor positions. (RSD includes these in #7200, 7212, 7230, 7300, 7315, 7330, 7400, 7411, and 7415.) (D3015, Exhibit 3; RB52; D3079, pp.4-6.)

39. RSD's budget proposed no remedial programs not already in the Master's budget.

40. Following hearings, the 8/13/98 Order (A167) resolved these similarities and differences:

a. Adopted all remedial programs supported by both Master and RSD budgets.

b. On those agreed programs, adopted the Master's expenditure detail, $1.2 million more than corresponding RSD proposals.

c. Compromised on the three "disputed programs." (F¶35.)

41. Reasons stated for adopting the Master's expenditure details included:

a. The Master's staffing presentation and overall expenditure plan were more complete, detailed and consistent than RSD's presentations. (A164-66; A167-70.)

b. RSD did not carry its burden of establishing its objections. (Id.)

c. RSD's Superintendent testified it would fund the same programs for 6% less by shifting various CRO activities to federal ESEA Title I funding. Plaintiffs' post-hearing submission showed that would violate "supplement-not-supplant" provisions of the Title I statute. (D3078, p.10-13.)

42. Contrary to RB16 and 29, neither the CRO nor any budget order provides for "helping the community access social services, health care or electricity." The CRO explicitly *rejected* the "proposal that RSD provide... linkages with... social service agencies... health services, the criminal justice system...," as outside the Missouri v. Jenkins, 515 U.S. 70 (1995) ("Jenkins III") principle that remedial decrees must directly address the constitutional violation. (CRO 28, PA29.) CRO 27 did approve seeking substantial community and parental involvement in the desegregation process, particularly minority parents and the minority community, and providing parental aides and mentoring programs. (PA28.)

5. CRO Financial Projections and Actual Costs to Date

43. CRO Part XII, 209-14, considered expenditure levels, revenue sources and local tax burdens. It projected local tax revenue for annual CRO operating budgets ("Fund 12") would start at $25 million and increase 4% for four years. It projected a $1.66 Fund 12 tax rate ($500 taxes on a $30,000 EAV home.) (PA57-62.)

44. CRO 213 (PA61) established a corresponding cap on Fund 12 taxes, which both parties appealed and this Court reversed (PWC 1997 538). No other CRO finance provision was appealed.

45. Rather than increasing as projected, actual Fund 12 costs and tax rates have declined since 1996.

Projected Budget CRO 214 Year at 4%	Projected Tax Rate if EAV + 4%/yr.	Actual CRO Exp. Plan[7]	Actual Fund 12 Tax Rate[8]
FY 1997	$25.0 $1.66	$23.449	$1.30
FY 1998	26.0 $1.66	22.743	$1.18
FY 1999	27.3 $1.66	21.856	$1.01
FY 2000	28.4 $1.66		

46. CRO 214 projected Fund 12 representing 15% of RSD's total budget. (18/118 = 15%; PA62.) Actually, FY99 Fund 12 represents 10% of RSD's $216-million budget. (D3116, Exhibit C, p.3, 8/11/98 Budget.)

47. RSD states total remedies exceed $144 million since 1989. (RB53.) But that is still only about 10% of RSD's approximately $1.5 billion aggregate expense since 1989. (Id.)

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[7] Annual budget amounts from D2387, D2778, and A192.

[8] Tax rates from PA134-36. The FY99 tax rate is the court's final levy amount ($19.576 million, A200), divided by 1998 EAV ($1.941 billion, PA135).

6. Actual Amount and Use of Unspent FY98 Funds

48. RSD stipulated the FY99 revenue hearing would consider only FY98 unspent funds, not earlier-year amounts. (PA144.) The parties submitted a factual stipulation rather than testimony at that 9/17/98 hearing. (PA137.)

49. Only 11% of the FY98 budget remained unspent at final reckoning of expenditures-versus-budget.

a. Actual unspent funds are $2.601 million of $23.743-million budgeted (11%). (A198, F¶45.)

b. RSD's $1,068,000 disagreement (D3133, p.5) would make unspent funds only 15%.

50. Mid-year unspent-funds reports (especially in May, e.g., RB8, 18) are unreliable data concerning actual year-end salvage. Final accounting is in September. (A190.)

51. The court *concurred* 84% with RSD on charging "capital expenditures" against FY98 unspent funds.

a. The Master identified $1.97 million capital needs. RSD concurred, but wanted those charged against $3.1-million construction funds.

b. The court *granted* RSD's request on $1.65 million, or 84%. Only $321,000 went against FY98 unspent funds. (A198-99.)

52. The Haskell expenditure was from previously-approved FY98 magnet funds.

a. RSD cross-examined the Master about Haskell in the FY99 budget hearing. (D3098, T147-52.) It could have again in the FY99 revenue hearing 9/17/98. (A189.)

b. The Board approved a year-round Haskell magnet. The Master and Superintendent agreed air conditioning is essential. (D3179, p.3.)

c. Air conditioning only white schools was part of the facilities discrimination violation. (851 F.Supp. 1082.)

C. FY98 and FY99 Hearing Procedure Issues

53. In both FY98 and FY99, the Master disclosed his information sources before the hearing (mostly RSD staff but also Plaintiffs' counsel). For FY99 the Court did hold hearings, swear witnesses, identify exhibits and make findings. (F¶54-62.)

1. FY98

54. The Master's 8/6/97 budget narrative (D2753, "MNAR") identified persons he consulted: "District building and central administration staff including the [Superintendent, ASEE, Desegregation Director]" and plaintiffs' counsel. (MNAR 12-15.) His sources were not "unidentified."

55. RSD made no attempt before the 9/9/97 hearing to obtain further information or make any hearing-procedure request. In the day-long FY98 budget hearing, RSD made

no request for testimony, cross-examination or further information from the Master, or to present RSD witnesses. (A16-143.)

56. Thereafter, RSD moved 9/19/97 to reconsider, requesting alternatively no additional written findings or an evidentiary hearing. (D2777.) The 1/27/98 order *granted* the first alternative. (A7-10.)

2. FY99

57. The 1/27/98 order also established prospectively the bifurcation of CRO-modification motions/hearings from annual budget proceedings. (A9-10; n.6, supra.)

58. Nonetheless, the court held an evidentiary, testimonial FY99 budget hearing over six weeks (5/12, 6/16 and 6/21/98). The hearing transcripts total 325 pages. (D3034, 3098, 3099.)

59. For FY99, the Master again clearly identified persons he consulted:

a. The 5/1/98 submission identified various RSD school and central office staff. (D2992, pp.1-2.) The Master testified he conferred with Plaintiffs' counsel (D3098, T74, 106.) The court confirmed the Master's sources. (A169-70.)

b. The Master's consultation process paralleled the Superintendent's process preparing RSD's "alternative budget." (A169; D3034, T71-78.)

60. The Master reported 5/1/98 that each allocation had a written expenditure plan developed by RSD personnel and the Master. (D2992, pp.1-2.) He testified extensively

concerning these plans, the detail underlying his narrative and spreadsheet budgets. (D3098, T72-77.)

a. He had those plans during testimony and offered them to RSD. (D3098, T166.) The documents were not "unidentified." (RB23.)

b. Plaintiffs asked whether those plans should be an exhibit. RSD counsel declined. (D3098, T176-77.)

61. Concerning different documents (two letters) one month earlier, RSD requested three minutes and received a recess to examine correspondence the Master relied on. (D3034, T11-27. Cf. RB23-24.)

62. RSD never objected during FY99 budget hearings the Master was required to proceed through formal Rule 53 hearings and findings, or that his informal communications (mostly with RSD's staff) were improper.

D. Early Childhood Education

63. The RSD 1995 Plan proposed an ECE remedy serving all 3- and 4-year-old children residing in Community Academy (predominantly minority) attendance areas. RSD's Plan estimated 2,000 such children, half already receiving service, and proposed serving the remaining 900-1,000. (PA147-49.)

64. The November 1995 stipulation reiterated this commitment. (PA72.)

65. Nevertheless, CRO 29-32 declined an ECE remedy. (PA30-33.) This Court remanded (PWC 1997 539).

66. On remand, the court requested an ECE proposal based on "the original ECE Plan agreed to by the parties at the time of the CRO hearings." (D2924.)

67. The Master's 3/24/98 report documented feasibility and value of ECE and described RSD's program. He proposed gradually serving "all 3- and 4-year-old minority children residing in the former C.8 attendance zones," estimating 690 such students. He recommended initial FY99 expansion for 288, which RSD staff confirmed feasible. (D2967, p.8-12.)

68. RSD's ECE position throughout strongly supported maximizing ECE within state funding. (e.g., D2996, p.1-2.)

69. At ECE evidentiary hearing 4/23/98 the Master presented his report and was cross-examined. RSD challenged no aspect of the Master's Report or testimony except feasibility of 288-student FY99 expansion. (D3033.)

70. Staff testified RSD was applying for FY99 state funding to expand 80-120 children. (D3033, T97.)

71. The 5/11/98 ECE Order found ECE an appropriate CRO remedy, praised RSD's program, and left control with RSD. It *adopted* RSD's 80-student FY99 expansion. Noting ECE is state-funded, it authorized $200,000 as backup funding were RSD's proposal unsuccessful. (D3016.) It did not "mandate" tort funding. (RB54.)

72. RSD received state funding for 120 additional students. RSD staff notified the Board 8/25/98 this "eliminates need to access Fund 12." (PA 152.)

ISSUES PRESENTED

Issues Presented in Nos. 98-1331, 98-1449, 98-3340 & 98-3858

1. Whether RSD's "Mandate objection" to remedial programs approved in the FY98 and FY99 Budget Orders must be rejected in light of:

(a) RSD's failure to raise this objection in the FY98 Budget proceedings, except as to one program;

(b) RSD's failure to show that any change in law rendered by PWC 1997 required modification of the CRO under Fed.R.Civ.P. (60)(b)(5), when this Court's decision did not reverse any of the challenged programs, and these programs serve legitimate goals not invalidated by this Court's decision?

2. Whether, as to RSD's "non-mandate objections" to remedial programs approved in the FY98 and FY99 Budget Orders, this Court should not reach the merits of those objections, because it is without appellate jurisdiction to review them or because the standard for modification of judicial decrees under Fed.R.Civ.P. 60(b)(5) obliges that result?

3. Whether RSD's procedural objections to the FY98 and FY99 Budget hearings must be rejected in light of:

(a) RSD's failure timely to raise, in the FY98 and FY99 Budget proceedings themselves, these procedural objections;

(b) its having received below the procedures it here requests?

4. Whether RSD's procedural objections to the FY98 Budget proceedings are moot?

5. Whether RSD's procedural objections to the FY98 and FY99 Budget proceedings, based on the Master's role therein, must be rejected in light of:

(a) RSD's agreement to the procedures to which it now objects on appeal;

(b) its failure timely to appeal orders authorizing such procedures; and

(c) the clear propriety on the merits of the Master's communication and reporting procedures?

6. Whether the district court gave appropriate consideration to RSD's financial condition in entering the FY98 and FY99 Budget Orders, in light of, among other facts, that these orders approved CRO budgets that were lower than the CRO itself projected and lower than the FY97 budget?

Issue Presented in No. 98-2488

7. Whether the district court properly exercised its discretion in approving and directing the continued implementation of RSD's own Early Childhood Education program as one of the programs required under the CRO?

Issues Presented In Nos. 98-1056 & 98-1105

8. Whether this Court is without appellate jurisdiction over these appeals?

9. Whether the district court properly exercised its discretion in denying RSD's motions to bar the Master's legal advisor and his alleged ex parte communications?

SUMMARY OF ARGUMENT

This is an unusual appeal. It arises from the desperate effort of RSD's new tax-protest Board to relitigate matters previously resolved, and to create chaos out of order.

Every issue raised here is governed by prior orders not appealed, or RSD stipulations, or is inappropriate for determination due to lack of jurisdiction or failure to raise the issue below. If this Court applies the normal rules applicable to such circumstances, it would reach the merits of virtually none of these appeal issues. (§I.A.)

That course of action would have the highly salutary effect of bringing finality to the remedy-formulation stage of this case, and putting a firm halt to the "avalanche of appeals" strategy the RSD Board is pursuing.

There is one substantial merits issue: did PWC 1997's reversal of quantitative outcome requirements in educational and staff remedies in any way limit educational-input remedies? Significantly, RSD stipulated to the appropriateness of input remedies -- while opposing outcome requirements -- in the CRO hearing, and did not appeal that aspect of the CRO. Correspondingly, PWC 1997 did not prohibit input remedies, but rather accepted them in its discussion of compensatory education remedial programs and early childhood remedies. In any event, all the programs in question serve valid remedial purposes other than increasing minority achievement. (§II.A)

Apart from that, the powerful fact is that virtually no FY98 or FY99 remedial-program issues remain for this Court to resolve. Of the court's 70 programs, RSD's "alternative

budget" concurs that all (but two) are appropriate under the liability findings and the CRO (subject to the "mandate" objection). In ordering those programs the court *granted* RSD's position. Furthermore, those remedial programs were previously finalized because they were in the FY97 budget order, and were neither appealed nor reversed in PWC 1997.

Within those agreed programs, there is only a $1.2-million difference (6%) in proposed costs. For several reasons, that renders inappropriate, and surely unnecessary, decision of the myriad quibbles comprising that $1.2 million. (§II.B.)

It is important to pause, and recognize the considerable accomplishment just described. It is certainly a major achievement by the district court, Master, RSD and staff, and even the RSD Board, that but for the "mandate" issue there is no material disagreement as to what remedial programs are proper to implement the CRO, and what the cost of those programs currently should be. If this Court resolves the "mandate" issue and declines to entertain annual budget disputes of micro-magnitude, there is good prospect that this litigation will settle down to a stable remedial phase, at both the district and appellate court levels, as well as in the Rockford school system and community. As indicated in Plaintiffs' 10/30/98 Status Report, that is what Rockford's business, religious and civic leaders hope for. (PSR pp.5, 7-9, 14.)

On the "fair hearing" issue, the simple answer is that in FY99 RSD got all elements of procedural fairness to which it claims entitlement -- including a full evidentiary hearing and pre-hearing disclosure of the Master's information sources. For FY98 RSD waived this

issue by making no objection until after the hearing. The FY98 issue is also moot because FY99 approved the same programs after a hearing. (§§ II.C.1-2.)

That brings us to the most remarkable invention of RSD's opening brief. RSD contends it is improper for the Master to communicate informally with the parties in preparing his annual budget recommendations. (The vast majority of the Master's contacts are with RSD staff executives, whom RSD calls "unidentified persons.") This contention first sees daylight in RSD's appellate brief, not having been asserted in the FY99 or FY98 budget proceedings, nor at any time since the Master Order was entered in 1991.

That 1991 Master Order was essentially a verbatim copy of the one approved by this Court in Williams v. Lane, 851 F.2d 867, 884 (7th Cir.), cert. denied, 488 U.S. 1047 (1989). It expressly authorized the Master to communicate informally with a range of persons, including District staff, community members and counsel for the parties, and authorized him to report to the Court informally. The Order also authorized formal Rule 53 hearings, but the Master has never used that procedure. For seven years RSD has expressly and repeatedly agreed to and availed itself of the Master's informal communication and reporting methods -- because that promotes negotiation and minimizes litigation.

RSD did not appeal the 1991 Master Order, even when it was finalized in the 1996 CRO. The district court and the Master have faithfully conformed to the explicit terms of that Order concerning communication and reporting methods. Frankly, this is an issue on which RSD should be reprimanded for its wholly unwarranted attack on the integrity of the Master and the court. (§II.C.3.)

Issues about the use of FY98 unspent funds are largely illusory. The court *granted* most of RSD's proposals concerning allocation of those funds. RSD's attempt here to dip into the Construction Fund to reduce FY99 operating-budget tax levies is dubious, and was expressly waived by RSD's trial counsel. (§II.D.)

The district court has thoroughly considered financial practicability, indeed from Plaintiffs' perspective given it too much weight. The CRO finance section projected an annual budget increasing from $25 million in FY97 to $27.3 million in FY99, with a flat $1.66 tax rate (which RSD did not appeal). Instead, for FY99 the court *granted* a budget $5.5 million lower, and a vastly lower $1.01 tax rate. (The low rate arises from *granting* RSD's request -- opposed by Master and Plaintiffs -- that $2.6 million unspent FY98 funds be considered "revenue" for FY99.) Overall, as the CRO budget has declined and RSD's regular budget increased, the CRO has fallen to only 10% of RSD's overall expenditures. (§II.E.)

RSD struggles to find something appealable about an Early Childhood Education order that costs RSD nothing. RSD directly mis-states the order, saying it mandated tort funding. In fact it *granted* RSD's proposal that state funding be used -- funding that arrived 10 weeks before RSD's brief. It also *granted* RSD's proposal on size of ECE expansion (80 students), declining a larger expansion supported by the Master and Plaintiffs. All told, Plaintiffs suggest that affirming ECE requires this Court to decide no substantial dispute. (§III.)

Finally, there is RSD's attempt to relitigate procedural issues about the Master far less significant than the Master-procedural issues for which PWC 1997 found jurisdiction lacking. Furthermore, on the merits, the district court and Master have ceased since PWC 1997 whatever occasional "litigant" activities this Court questioned -- another example of their adhering to PWC 1997, while RSD disrespects it. (§IV.)

As this overview demonstrates, RSD's opening brief is a remarkable exercise in creating a false picture that there are major disputes for this Court to decide, or that on this record they are properly presented for decision.

Through those tactics and its stream of *ad hominem* rhetoric, RSD seeks to manipulate this appellate proceeding by portraying wholly false propositions -- that the Master is acting in a procedurally unfair manner, that the district court is consistently and arbitrarily ruling against RSD, and consequently that the district court proceedings in this case are somehow in disarray or are over-reaching in the procedures and orders being adopted.

RSD hopes that, rather than having its remedial obligations confirmed by this court, it can provoke unwarranted frustration in this Court about the volume of litigation (which RSD is generating), and about the prospects for a stable remedial phase in the district court. Recognizing it is not entitled on the merits to a reduction in the scope of the remedies, RSD hopes it can nevertheless secure a quantum reduction in the remedial process by eliciting unwarranted action from this court undermining the district court and the Master. RSD hopes it can destroy the constitutional message by killing the judicial messengers. Thus RSD's invocation (RB36) of Circuit Rule 36. (§V.)

In contrast, Plaintiffs believe that this Court seeks, in deciding the current appeals, not to pre-emptively remove from the Plaintiff Class the remedy they secured by the recent final liability and remedial adjudications, but rather to end the constant relitigation of old issues and create a period of repose for remedy implementation. As noted in Plaintiffs' 10/30/98 Status Report, the best solution to all these concerns is a straightforward decision of the issues properly presented on this appeal, and an equally straightforward rejection of RSD's relitigation strategy and of its unfounded attacks on the Master and the district court.

ARGUMENT

I. INTRODUCTION: CONTROLLING LEGAL PRINCIPLES

A. Principles Limiting RSD's Relitigation Attempts

Because RSD's appeals are attempts to resurrect previously litigated and finally decided issues, and issues it consented to or otherwise waived, Plaintiffs set forth three operative principles curtailing this relitigation strategy.

First, RSD may not now appeal issues determined in the 1996 CRO and companion FY97 Budget Order, a final Rule 54 judgment, which it deliberately forewent appealing in 1996. Three related doctrines (discussed in more detail in MD Mem. 98-1231), oblige application of the first principle here.

1. Jurisdictional Limits over Untimely Appeals. To modify a final injunction, a party must prove a "significant" change in controlling fact or law, and may then appeal an order denying such modification under 28 U.S.C. §1292(a)(1). See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393 (1992). But if the modification motion is a mere pretense for belated appeal of the original injunction (i.e., there is no legitimate claim to a significant change in fact or law), "we penetrate through form to substance and treat the appeal from the denial of the motion... as an untimely appeal from the injunction, and dismiss the appeal [under F.R.A.P. Rule 4] for lack of jurisdiction." S.E.C. v. Suter, 832

F.2d 988, 990 (7th Cir. 1987). See Transportation Cybernetics v. Forest Transit Com'n, 950 F.2d 350, 353 (7th Cir. 1991) (application of Rule 4 to dismiss appeals is "an application of the doctrine of issue preclusion"); Buckhanon v. Percy, 708 F.2d 1209, 1212 (7th Cir. 1983) (§1292 (a)(1) jurisdiction over orders modifying or refusing to modify injunction "is not intended to allow litigants to circumvent by the filing of repetitive motions the time limitation for taking appeals").

2. Issue Preclusion. See Avitia v. Metropolitan Club of Chicago, Inc., 924 F.2d 689, 691 (7th Cir. 1990) (barring later appeal of issue conclusively determined by a prior final appealable order that the party chose not to appeal (despite the opportunity to do so) and the time to appeal that order has expired).

3. Waiver/Law of the Case. See Schering Corp. v. Illinois Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996) (barring defendant from bringing in second appeal an issue that could have been raised in an earlier appeal: "[A] ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case."), citing Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995) ("appellate courts are precluded from revisiting not just prior *appellate* decisions but also those prior rulings of the *trial* court that could have been but were not challenged on an earlier appeal.")

Application of the first principle defeats RSD's attempts to relitigate the propriety of educational input remedies (§II.A), programs approved in the FY97 Budget Order (§II.B), and informal Master-party communications (§§ II.C.3 and IV). Allowing RSD to bring new

appeals challenging issues that could have been raised in the PWC 1997 appeal invites the "avalanche of appeals" swelling this Court's already-busy docket, about which this Court has already expressed concern. People Who Care v. Rockford Bd. of Educ., 153 F.3d 834 (7th Cir. 1998) ("PWC 1998"). By holding back these challenges for two years while it appealed other aspects of the CRO, RSD multiplied the number of present appeals, and seeks to open the door to a huge number of future appeals.

RSD should not be allowed to profit from laying back as the time for appealing these issues passed. Moreover, it is unfair to Plaintiffs to have to defend the same lawsuit on appeal over and over again as RSD conjures up previously decided issues that could have been raised in earlier appeals. As Judge Friendly observed, this would lead to the bizarre result that RSD, by choosing not to argue these issues on the CRO appeal, "should stand better as regards the law of the case than one who had argued and lost." Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982).

The second principle is that RSD is bound by its prior consents, waivers, stipulations, and conduct. See INB Banking Co. v. Iron Peddlers, Inc., 993 F.2d 1291, 1292 (7th Cir. 1993) ("we cannot consider any errors that may be assigned which were in law waived by the consent..."); Matter of Maurice, 21 F.3d 767, 771 (7th Cir. 1994) (failing to timely object to alleged error waives right to later appeal.); Dugan v. U.S., 18 F.3d 460, 463 (7th Cir. 1994) (party bound by its stipulations); Continental Illinois Corp. v. C.I.R., 998 F.2d 513, 518 (7th Cir. 1993) ("A party can argue inconsistent positions in the alternative, but once it

has sold one to the court it cannot turn around and repudiate it in order to have a second victory".)

The play of this second principle arises, in the first instance, from the proceedings leading to the CRO and FY97 Budget Orders. During such proceedings, RSD agreed to the propriety of educational input remedies (§II.A), Early Childhood Education (§III), and informal Master-party communications (§§ II.C.3 and IV). Moreover, in proceedings leading to the FY98 and FY99 Budget Orders on appeal here, RSD waived virtually all of its "mandate objections" to remedial programs (n.9, infra), and did not ever present in support of its non-mandate objections any significant changes in fact or law, as is required to win a modification of a prior injunction order, here the CRO. (See §II.B, infra.) Finally, RSD may not use its subsequent change of counsel (see F¶10(a)) as a springboard to vitiate its prior admissions, agreements, and waivers. See Jordan v. Continental Airlines, 1996 U.S. Dist. Lexis 14883 (E.D. Pa.); Metropolitan Life Insurance v. Cammon, 1990 U.S. Dist. Lexis 3852 (N.D. Ill.).

The third principle is that, to overcome the bar against relitigation of finally decided or waived issues, RSD must identify and demonstrate that exceptional circumstances exist, such as significant intervening changes in controlling law or fact, so that the failure to revisit the finally decided issue would result in a miscarriage of justice. Specifically, applying jurisdictional limits and issue preclusion, RSD must demonstrate "significant changes in controlling facts or legal principles" or other "special circumstances," to avoid the CRO's conclusive resolution of those issues. Montana v. U.S., 440 U.S. 147, 157-8 (1979).

Applying law of the case, RSD must prove that the late-challenged CRO orders are "clearly erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 618-9, n.8 (1983). To avoid its waivers, RSD must show that exceptional circumstances exist, that substantial rights are affected, and that a miscarriage of justice will result. Prymer v. Ogden, 29 F.3d 1208, 1214 (7th Cir. 1994). In this context, the salient point is that, with respect to each issue RSD seeks to revive here, RSD either makes no attempt whatsoever or utterly fails in proving such exceptional circumstances. (See §§ II.B, C.3, and IV, infra.)

B. Standard Of Review

The Master Appeals are from orders: (1) allowing fees to the Master's attorney and (2) denying RSD's motions to bar the Master from using counsel and from ex parte communications. The fee order is reviewable under an abuse of discretion standard. Harman v. Lyphomed, Inc., 945 F.2d 969, 973 (7th Cir. 1991). Review of the order denying RSD's motion to bar, which was based principally upon the district court's interpretation of its own prior orders in the case (A151-161), is deferential. Employers Ins. Of Wausau v. Browner, 52 F. 3d 656, 666 (7th Cir. 1995), cert. denied, 116 S. Ct. 699 (1996). The FY98 and FY99 Budget Appeals and the ECE appeal involve the review of a district court's exercise of its equitable powers to remedy past and continuing wrongs, and are reversible only where the appellant shows that the district court has abused its discretion. United States v. Paradise, 480 U.S. 149, 183-84 (1987). See Browder v. Illinois Department of Corrections, 434 U.S. 257, 263 (1978) (appeals from orders modifying or refusing to modify judgments reviewable

under abuse of discretion standard). Moreover, insofar as RSD raises in the FY98 and FY99 Budget Appeals questions about evidentiary rulings of the district court, review of these rulings is also under an abuse of discretion standard. Palmquist v. Selvik, 111 F.3d 1332, 1339 (7th Cir. 1997), except that to the extent that RSD failed to make a timely and specific objection to disputed evidence, review is for "plain error" only, Wilson v. Williams, 1998 WL 828426, *5 (7th Cir. November 30, 1998).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING THE FY98 AND FY99 BUDGET ORDERS

A. All Programs To Which RSD Objects On Mandate Grounds Are Proper Under The Circumstances In This Case.

RSD's principal FY99 objection is that 30 programs contravene the PWC 1997 mandate.[9] (F¶32 n.5; Attachment I, infra.) RSD frames this as a CRO modification required by the Mandate. (RSD Docketing Statement 11/12/98 at 6-8.)

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[9] Appellate jurisdiction to consider the Mandate objection exists under 28 U.S.C. §1292(a)(1). See PDS 15-16, 20-22. However, of 30 programs, RSD objected to only one (#7160, Office of Evaluation) in the district court in the FY98 budget proceedings. See Objections (D2756, pp.19-20). Those proceedings came four months after PWC 1997, so RSD had every opportunity to raise its Mandate objection. Since RSD raised it as to only one (#7160), RSD waived the objection as to all other programs. See Garlington v. O'Leary, 879 F.2d 277, 282 (7th Cir. 1989).

In its stricken FY98 Budget brief, RSD challenged approximately 41 programs. However, RB 27-35 makes no reference to 17 of those FY98 programs (listed at PDS n.5). As to those 17, Plaintiffs had argued lack of jurisdiction. MD Mem. 98-1231 at 12-35. Now that RSD has dropped those issues, this Court need not pass on that contention.

RSD primarily argues two points: (1) this Court's mandate means that all "remedial programs... created to achieve certain outcomes... [must] be modified" (RB15); and (2) the mandate includes a prohibition on "social engineering," and any programs relating to "community involvement and support" and "climate" are social engineering and must be eliminated (RB17-19, 29-31).

Plaintiffs will show that (1) this Court's reversal of certain outcome requirements doesn't eliminate programs for which attaining that outcome was only one of several purposes; (2) this Court's mandate does not prohibit educational input remedies which seek, in part, to address educational deficiencies caused by RSD's discrimination; and (3) this Court's "social engineering" language is not a directive for elimination of any specific programs, and in any event, does not prohibit "community involvement and support" and "climate" goals.

1. The Mandate -- What It Prohibits

A district court's obligation to follow the mandate is part of "law of the case" doctrine. Donohoe v. Consolidated Operating and Prod. Corp., 30 F.3d 907, 910 (7th Cir. 1994). An essential requirement is that issues deemed "law" of the case were actually decided. See Roboserve, Inc. v. Kato Kagaku Co., 121 F.3d 1027, 1031-32 (7th Cir. 1997)("Law of the case is limited insofar as it applies only to issues that were decided.")

What this Court was asked to rule on in PWC 1997, and what it decided, was that the CRO had erred by: (1) prohibiting tracking in class assignments (PWC 1997 535-36); (2)

imposing on non-tracked classes "racial quotas" that were "too tight" (537); (3) requiring the achievement test gap between white and minority students to be closed by 50% within 4 years (537-38); and (4) forbidding RSD from referring a higher percentage of minority students than white students for discipline unless "subjective" criteria were purged from the disciplinary code. (Id.)

In addition to these rulings, this Court laid out general admonitions. It emphasized that courts are not to venture into projects of "social engineering". (PWC 1997 534.) It stressed also that remedial orders "must be formulated with sensitivity to the separation of powers and the dignity of the states as quasi-sovereigns." (PWC 1997 533.)

Importantly, in PWC 1997, RSD did not ask for elimination of any of the remedial programs it now says violated the mandate. (F¶24.) See Roboserve, 121 F.3d at 1031.

2. The Mandate -- What It Does Not Prohibit

The issue of achievement requirements on standardized tests came to this Court via RSD's objection during the CRO hearing to "all guaranteed outcome-based components and standards." (F¶15.) Expressly limiting its objection to outcome requirements, RSD stated its unequivocal support for input programs, even those whose function is to improve minority student achievement on standardized tests. RSD also concurred with most other Master educational-input proposals, many RSD helped formulate. (Id.)

After RSD objected only to outcome requirements, the CRO adopted many, though not all, of the stipulated educational input remedies. The RSD appealed only nine specific

points, concentrating on educational and staff outcome requirements. RSD did not appeal any educational-input remedies. (F¶18.)

In holding insufficient the evidence quantifying the achievement gap, this Court said:

> There isn't even evidence that the gap in scholastic achievement... is any greater than the gap... in school districts that have not been found to have discriminated against their black and Hispanic students.
>
> ****
>
> The idea that the educational deficiencies of minority students in the Rockford public schools are due primarily to discrimination by the school authorities and can be rectified by an equitable decree is at once unsubstantiated by responsible evidence and -- since there is no evidence that these deficiencies are any greater than in school districts around the country that have not been held to have discriminated against minority students -- implausible.

PWC 1997 537-38.

In context, then, this Court's reference in to "educational deficiencies" refers to the achievement gap on standardized test scores, precisely because that was the issue facing the Court for decision. (PWC 1997 537-38.) On the other hand, educational deficiencies, as used by the Court, does not -- because the issues were never the subject of the 1997 appeal -- refer to educational injuries by way of diminished educational opportunities, inequities in educational quality, and racial stigma and isolation, all of which are attributable to RSD's adjudicated racial discrimination. See, e.g., 851 F.Supp. at 914-15, 958-59, 999, 1005 (RSD's discrimination in tracking caused stigmatization, diminished and "unequal" educational opportunities and inputs for minority students, and provision of inferior educational services); Id. at 1000-01 (fewer educational opportunities is effect of RSD's discrimination in counseling).

Further, there is nothing in this Court's decision suggesting that this Court rejected precedent recognizing that racial segregation breeds myriad educational consequences for minority students. See Milliken v. Bradley, 433 U.S. 267, 287-88 (1977) (pointing out that "pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures."). See also, Freeman, 503 U.S. at 492 (court noted that "quality of education" may be a proper remedial focus).

Indeed, this Court's PWC 1997 discussion strongly suggests approval of educational input remedies. This Court (1) remanded the issue of ECE (an input program of great success and efficiency) back to the district court for reconsideration (PWC 1997 539), and (2) by implication, supported input remedies for RSD's discrimination when it held "compensatory education (that is, remedial) programs" should not be subject to racial composition requirements. (PWC 1997 538.)

Finally, to the extent that compensatory/remedial programs facilitate student integration by assuring "minority parents that some level of compensatory programs are available to their children when they opt to attend [traditionally white] schools" (D2992, p.12), PWC 1997 did not invalidate these input programs.

All of these reasons expose the over-reaching of RSD's suggestion that the district court "erred in holding programs designed to... address educational deficiencies could be part of the remedial decree." (RB16-17).

3. This Court's Mandate Does Not Require Elimination Of The Programs To Which RSD Objects

Plaintiffs fully recognize that this Court's striking down outcome requirements with respect to standardized test scores and subjective discipline referrals demands elimination of any program whose sole purpose is attainment of those now invalid requirements. This is the plain meaning of applying an appellate mandate. What RSD seeks to do, however, is to go further and secure elimination of programs whose purpose or design include other legitimate, remedial aims not affected by this Court's decision.

The Supreme Court has made clear that the demise of one remedial justification for a program does not necessarily signal the program's elimination. Freeman, 503 U.S. at 491. The Court reasoned there may be other legitimate remedial goals to be achieved by those programs. Id.

Importantly, RSD itself recognizes that these programs are properly founded on the liability findings and remedial orders in this case. RSD's alternative budget proposes retention of all educational input programs. (F¶32-35.)

For these reasons, and those itemized below, every program RSD challenges as violating this Court's mandate is warranted and appropriate; each one furthers other legitimate remedial goals not even remotely the subject of this Court's mandate.

a. Reading Recovery (#7340), Success For All (#7330), and Higher Order Thinking Skills (#7381) (RB17)

These programs "are tailored to the constitutional violations and vestiges found in the use of ability groups and tracking." (PA19.) As compensatory programs for RSD's adjudicated tracking violations, "which had a tremendous detrimental impact on educational opportunities for minorities," they are warranted regardless of the fact they also have the salutary effect of increasing minority achievement. (PA24-25.) See also D2992, pp.12-13 (building-level integration and within-school integration goals are also furthered).

b. Curriculum Implementors, Student Support Specialists, Human Relations Specialists, Parent Liaisons (## 7220, 7230, 7330, 7350, 7411, 7412, 7415, 7520, 7537) (RB29,31)

These programs facilitate successful intra-district controlled choice student assignment by improving the performance of schools toward the goal of "attract[ing] majority students" to traditionally minority schools. (D2753, pp.5-6). See also, D2992 p.14 (positions help "better integrate [minority] students into the school setting" at traditionally white schools).

Further, these programs are "essential to the success of any desegregation plan" for the added reason that they are "crucial in gaining district-wide support for the CRO." (CRO 19-20, PA20-21) The task of gaining support for desegregation is not, as RSD argues, "social engineering." Likewise, the goal of improving "school climate" toward the end of encouraging intra-district transfers and facilitating integration of diverse student bodies is not "social engineering". See subpart 4, below.

To the extent RSD argues that staff in these positions have engaged in helping minority parents secure electricity or medical care, Plaintiffs agree those functions are not within the scope of the remedy. But this is a false issue, since the CRO itself expressly refused to authorize such activities. (F¶42.) If one of these persons may have in practice provided such services, that is RSD's unilateral activity, not a CRO-authorized or CRO-funded activity.

Finally, to the extent these positions help provide alternatives to discipline, they are not contrary to the mandate. See subpart e, below.

c. High School Attendance Specialists (#7651-52) (RB30,49)

These programs are devoted, at least in part, to compensating victims of RSD's discriminatory tracking (D2753) by "improv[ing] attendance of minority students at school and in classes" (D2753 p.8), in order to effectuate the goal of "improved learning." (A102.) This Court did not disapprove compensatory programs for the victims of discriminatory tracking. PWC 1997 535-36.

d. Saturday Program (#7561) (RB48-49)

While one purpose of the Saturday Academy was originally to help close the achievement gap, its other purposes include (1) educational compensation (i.e., in the form of extra class time) for discriminatory tracking, and (2) facilitating the successful integration of minority students (program directly linked to overcoming "racial isolation of students,

[and] the stigmatization of minority students as inferior"). (CRO 18, PA19.) See also, D2992 p.18 (facilitates within-school integration and is alternative for suspension).

e. **Discipline: (1) group of programs under Master's Narrative Part XIII: ##7510, 7520, 7531, 7533, 7537, 7590, 7595 and (2) group of programs under Master's Narrative Part XV: ##7621, 7623, 7631, 7633, 7635, 7651, 7664, 7690, 7695 and (3) #7935** (RB28-29.)

This Court did not strike down those aspects of the CRO relating to equity in discipline procedure and administration, or relating to eradication of other lingering vestiges of RSD's discrimination in discipline. Indeed, this Court appeared to accept the continued legitimacy of addressing racial unfairness in administration of discipline. See PWC 1997 538 ("[A]nd [quotas] incidentally are inconsistent with another provision of the decree, which requires that discipline be administered without regard to race or ethnicity."). These programs are not contrary to the mandate, therefore, to the extent they facilitate racially equitable administration of discipline, help eradicate lingering effects of past discrimination in discipline, and/or facilitate other goals unrelated to discipline. Specifically:

1) #7531 is targeted in part (as is #7631) for the express purpose of providing "alternatives to suspension." (D2753 pp.7-8). RSD does not explain how this goal is an impermissible "quota" or otherwise in violation of this Court's ruling on subjective discipline criteria.

2) Program #7935 is for "staff development activities in the area of 'piloted' uniform code of student conduct and development of alternative discipline, climate changes and diversity training." (D2753 p.11.) At the heart of this program is

training of teachers in administration of a "uniform," nondiscriminatory code of conduct in an integrated ("diverse") student body.

3) Concerning ten programs to which RSD objects generally[10], the Master recites undisputedly permissible remedial goals unaffected by PWC 1997, such as "within school integration [and] curricula and instructional reforms." (D2753 p.8) See also D2992 p.15 ("Students who were victims of the [discriminatory tracking] system continued to be students in the secondary school. [These] personnel and programs... are intended to assist these students to overcome prior discriminatory actions of the RSD and to permit them to experience the full benefits of a desegregated secondary education.")

f. Office of Evaluation -- Consultants (#7160 and 7130) (RB33)

The job (in part) of these consultants is "to provide objective evaluation of components of the CRO so that data are available... to evaluate the implementation and outcomes of education improvement and equity provisions required by the CRO." (D2753 p.3) RSD contends these consultants' accumulation and reporting of performance data for evaluative purposes is "impermissible" under PWC 1997. (RB33 citing RSD's Objections p.19.)

This contention is nonsensical. PWC 1997 didn't address the question whether outcome *information* -- as opposed to outcome *requirements* -- is permissible. Indeed, RSD

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[10] The "ten programs" RSD refers to generally but not by line-item number (RB 28,29) are 7621, 7623, 7631, 7633, 7635, 7651, 7664, 7690, 7695 and 7663.

concedes that it wants CRO funds to be used "to acquire a student management system which would allow the district to analyze some achievement issues..." (RB51). See also D2992 p.6 quoting CRO 37 (information is "critical in making the CRO... efficient and cost effective").

4. This Court's Social Engineering Language Does Not Require Elimination Of Programs To Which RSD Objects

RSD contends this Court's social engineering statement requires elimination of programs that seek to affect "climate" and "community involvement" in the school setting. (RB16.)[11] This Court's statement was:

> [T]he remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy. Violations of law must be dealt with firmly, but not used to launch the federal courts on ambitious schemes of social engineering. Cf. Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 22....

PWC 1997 534.

Accordingly, social engineering programs are those which are not tailored to any adjudicated violation. In addition, this Court's citation to Swann further distinguishes social engineering programs as those which seek to advance purposes "lying beyond the jurisdiction of school authorities." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 22 (1971).

The programs to which RSD objects have neither of these characteristics:

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[11] RSD also objects to securing "electricity" and other public or social services for minority parents. This is a non-issue. See F¶42.

Educational or school climate in general relates to attitudes and beliefs of educators and administrators which affect behavior and results. D.775 p.14 (quoting RSD's Superintendent); 2/16/96 Parish CRO T10-11. School climate is an accepted and important subject among educators and administrators, even RSD's. See, e.g., D775 p.14; 2/6/96 Parish CRO T10-11. Climate is, therefore, "within [their] jurisdiction." Further, school climate as it relates to discrimination is tied to the liability findings in this case. Throughout its liability decision the district court found that RSD's administrators and educators held discriminatory beliefs and attitudes, and thereby engaged in practices which were discriminatory. 851 F.Supp. 905, et seq. Those discriminatory beliefs and practices persist (see, e.g., Willis CRO T4514), along with staff resistance to the desegregation remedies. See exhibits cited in D2096, pp.32-38.

Likewise, community and parent involvement and support for the desegregation remedies is not "social engineering", but a proper remedial subject. Community involvement in and support for the schooling process is not only highly important to educators and administrators outside the desegregation context (see, e.g., RSD's pre-suit ECE program, containing significant parent involvement component (Plaintiffs' Liability Ex. 3, p.6) and Illinois educational policy of parent involvement in early years (105 ILCS 5/2-3.71)), it is especially important to the successful implementation of desegregation remedies. (CRO 26, noting RSD's substantial concurrence in that proposition.) The goal of community involvement and support is, therefore, tied to the liability findings to the extent it facilitates all of the remedies (CRO 28).

Finally, it is important to note that the current CRO goal of community education, involvement and support is narrower than, and reflects the Magistrate's rejection of, the Master's original, broader proposal that "RSD provide community grants and linkages with the business community, college, social services agencies, [etc.]." Id.

B. This Court Should Dismiss RSD's Non-Mandate Objections, Or Affirm Without Reaching The Merits Of The Objections.

RSD's "non-mandate" objections, boil down to the "detailed differences within agreed programs," for FY99, which represent a net $1.2-million difference. (F¶36.) These non-mandate objections supersede the FY98 ones, because FY98 is over, because RSD greatly narrowed its objections in FY99, because the budget order now in effect is the FY99 order. For these reasons, RSD's non-mandate objections to the FY98 Budget order are moot. (See PDS 22-24.)

As a threshold matter, this Court does not have jurisdiction to even review the FY99 non-mandate objections. (See PDS §III.)

Even if *jurisdiction* to review the non-mandate objection is found, issue preclusion principles and the standards governing modification of judicial decrees teach that this Court should not consider the non-mandate objections on the merits. This is because the 22 FY99 programs objected to on non-mandate grounds were part of the FY97 Budget Order reviewed in PWC 1997. RSD did not, however, challenge any of the 22 programs on that appeal, and none were reversed. (F¶¶24-25.)

Accordingly, PWC 1997 represented a final adjudication, not only of the CRO, but of the specific implementing remedial programs, delineated in FY97 and continued in FY98 and FY99. (F¶¶21, 27, 31.)

The usual vehicle for challenging a final injunction is a Rule 60(b)(5) motion to modify the prior judgment based on a substantial change of law or fact. See §I.A, supra; Agostini v. Felton, 117 S.Ct. 1997, 2006-7 (1997). However, RSD did not present below, *in any form*, much less a Rule 60 motion, *any* changes in fact or law (in support of its non-mandate objections) that even RSD characterized as significant ones warranting CRO modification. (See D3015; D3028 p.2) (summarizing prior objections as based on contention that positions "are not in the best interests of RSD or its students"; no specific reference to significant changes in fact or law); (D3098, passim; D3099, passim.)

To the contrary, RSD expressly recognized that the only CRO-modification issues it had raised were its mandate objection and its #7120 Motion to Modify (D2454) and that its remaining non-mandate objections were "fine tuning," not requests to modify the CRO:

> The Court: "There are three alternatives here: Either the Seventh Circuit threw out the program in its mandate. Either the District or the Plaintiff comes forward as you have done in other areas and files a motion to modify the CRO, which sets up a separate process and hearing, or in fact... fine tuning is done in the budgetary process.
>
> Mr. Lester: We have approached the fine tuning to the budgetary process in the first section of our brief. We have filed the motion to modify the CRO back in March as it relates to the ASEE." (D3034, T24-25.)

Furthermore, RSD acknowledged that these non-mandate objections were "not significant." (F¶37.)

This Court should not be obliged to rummage through the district court record, searching out objections for RSD based on significant changes in fact or law, when RSD itself did not (and does not even in this Court) press such objections. See Favia v. Indiana Univ. of Pa, 7 F.3d 332 (3rd Cir. 1993) at 337-38 & n.8 (motion or other paper seeking modification must itself "assert[ ] the change of circumstances that is necessary to our appellate jurisdiction"). See also Cohen v. Bucci, 905 F.2d 1111, 1112 (7th Cir. 1990).

Accordingly, this Court should reject RSD's non-mandate objections, without reaching their merits, as attempts to re-litigate questions about the approved remedial programs that the CRO and the FY97 Budget Order had previously, and finally, resolved. See Avitia, 924 F.2d at 690-92, Cohen, 905 F.2d at 1112-13.

If this Court were to review the merits of RSD's non-mandate objections, it would conclude the court did not abuse its discretion denying them. For example:

a. Despite the salad bowl of numbers tossed around in RSD's brief, the non-mandate objections involve nothing but 6% internal-detail differences within agreed remedial programs. (F¶36.)

b. There were strong reasons for choosing the Master's expenditure detail over RSD's "alternative budget." These included that RSD's budget was incomplete (lacking any narrative presentation) and inconsistent, and that RSD proposed cutting costs by violating the "supplement-not-supplant" prohibitions of ESEA Title I. (F¶41).

c. There is no reason for this Court to be reviewing whether to reduce, e.g., one Evaluation Office research analyst; one Ellis Academy student support specialist; four Reading Recovery teachers (while many others are retained); and 12.5 paraprofessionals in #7400 (while numerous others are retained). (D3015, pp. 6-9.)

d. RSD has the burden of proof to establish its objections, and did not carry it.

Finally, it is important to relate RSD's appeal concerning non-mandate objections to this Court's concerns about the avalanche of appeals in this case, and about how many more there will be in the future. (PWC 1998.) If every "fine-tuning" budget objection is appealable and must be reviewed on its merits, this Court will have committed itself to the annual review of innumerable detailed disputes.

Disputes of minor magnitude are properly and best committed to the sound discretion of the district court. The legitimate interests of this Court -- both in providing review of the remedial process, and also in managing its docket and preventing inappropriate appeals -- are best served if this Court refrains from micro-review of the remedy at that level.

C. The FY98 And FY99 Hearing Procedures Were Fair, And In Any Event RSD Agreed To Or Waived Procedural Objections It Now Raises.

For seven pages, and indeed throughout its brief, RSD rants about asserted procedural unfairness of the FY98 and FY99 budget hearing procedures. (RB20-27).

Despite the rhetoric, in the end RSD only contends that it was entitled to the following procedures: (1) that the district court "hold hearings", including "swearing witnesses, identifying and filing all exhibits, and making findings"; and (2) that the master "cease, or at a minimum, disclose the source of his information before the hearing, including ex parte information from plaintiffs." With such disclosure, RSD states, it "can then effectively cross-examine the master and call the source as a witness." (RB27.)

1. For FY99 RSD Got What It Now Says It Wants

For FY99, RSD was afforded exactly those procedures. The court held a full evidentiary hearing, on three dates over six weeks, aggregating 325 transcript pages. Witnesses testified and were cross-examined (the Master three times), exhibits identified and filed, and transcripts prepared. (F¶¶45-50.) The court's 19-page order adopted detailed findings. (A167-186.)

As staunchly as RSD now argues that it was denied due process, it did not raise any "fair hearing" objections in the district court budget hearings, thus waiving them. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1333 (7th Cir.), cert. denied, 434 U.S. 975 (1977). RSD first voices disclosure complaints here about materials it knew about but never asked to see. (RB27.) RSD does not cite a single instance where the court below denied it access to any information requested.

Long before his testimony, the Master disclosed his information sources in writing -- essentially each District's executive with program/expenditure responsibility. (F¶59.) He

also reported that for each proposed expenditure, a written expenditure plan had been developed by responsible RSD personnel and the Master. (F¶60.) RSD made no request, at any time during the six-week span of three cross-examinations of the Master, for more specific identification of his sources, or for a copy of the expenditure plans. Even when Plaintiffs invited RSD in open court to make the expenditure plans an exhibit, RSD declined.[12] (F¶60(b).)

The Master's testimony volunteered he had one budget discussion with Plaintiffs' counsel several months earlier "in which [Plaintiffs' counsel] were arguing for certain programs which I didn't adopt." On cross-examination RSD counsel asked one question about the content of that meeting and pursued it no further. (D3098, T74, 106.)

Although all these disclosures were made in writing beforehand and in hearing testimony, RSD's brief contrives to depict these as the Master's "unidentified sources" and "unidentified documents" to which it was "denied access." (RB24, 27.) Not even an ostrich could equal such acquired ignorance.

RSD further waived its newfound objections to "hearsay" testimony (RB13, 27) and "ex parte" investigations (RB23). RSD raised no hearsay objection to any testimony or materials during the budget hearings, nor could it have since the statements were by RSD officials and only offered to show bases for Master opinions (see Fed. Rules Evid. Rules

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[12] In the midst of discussing 6/16/98 access to the expenditure plans, RB23-24 throws in a reference to the Court giving RSD five minutes to examine "the documents." However, that concerned different documents on a different hearing date one month earlier, when RSD received more time than it requested to examine two letters the Master referred to. (F¶61.)

801(d)(2) and 801(c)). Finally, RSD never complained during the budget proceedings that the Master's communications with RSD and Plaintiffs were improper or unfairly prejudiced the hearings. (E.g., D3034, T3-4, D3098, T78.) Maurice, 21 F.3d at 771.

2. The FY99 Hearing Moots FY98 Fair Hearing Issues, Which Are Meritless And Waived Anyway

FY98 procedural issues are moot at this point, because after a full FY99 hearing the district court approved the same programs it had approved for FY98.

In any event, there were no procedural irregularities. For FY98 the Master disclosed his sources in writing six weeks before the hearing, and at the all-day hearing the court offered both parties "the opportunity to make any record you think is necessary." (F¶¶42-43; D2805, T94:10, A109.)

In addition, RSD waived any right to an *evidentiary* hearing for FY98 because it made no such request before or during the 9/9/97 hearing.[13] Only thereafter did RSD raise the hearing issue, and then only in alternative form -- that the court not enter any further written findings, or alternatively hold a testimonial hearing. The court *granted* RSD's first alternative in the 1/27/98 Order. (F¶44; A7-11.)

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[13] RSD falsely asserts it objected at the hearing "to the procedure for resolving the dispute over the budget..." (A135, T120.) (RB10, 15.) Even a quick transcript review shows RSD's counsel was not making a general objection to informality of the entire proceedings, but was addressing only the substantive sufficiency of the evidence on the line-item under consideration, not any procedural issue. (A135, T120.)

Under this Court's decision in Gautreaux v. Chicago Housing Authority, 436 F.2d 306, 311 (7th Cir. 1970), a party participating in informal procedures without objection cannot complain on appeal it was denied due process by the informality.

3. The Master's Communication And Reporting Procedures Are Proper Under Unappealed Final Orders, RSD's Stipulations And Rule 53 Precedent.

RSD's central theme -- that the Master's informal communications and reporting procedures rendered the budget proceedings "inadequate" (RB23) and a "violation of due process" (RB62) -- is contrary to the express terms of the 1991 Master Order authorizing such procedures, which RSD did not appeal either in 1991 or when the Order was finalized as part of the CRO in 1996. RSD is able to advance this theme only by mischaracterizing court orders and by ignoring its own agreements and conduct under the orders. (RB4, 57.)

Judge Roszkowski entered the initial Master Order in 1991. (D308.) The Master Order tracked almost verbatim one this Court approved in Williams v. Lane, 851 F.2d at 884. It allows the Master to "conduct... interviews with persons who he believes have information that will assist him in performing his duties, *including Defendant's employees, agents and staff... and counsel for the parties, Plaintiffs, parents and the students*" (emphasis added). (F¶¶1-4.) RSD omits the italicized language of the Order from its brief to manufacture ambiguity, when there is none. (RB4, 57.)

The Master's informal communication and reporting procedures were reauthorized with RSD's consent in an order entered 5/5/93. (F¶6.) The propriety of informal Master communications with both RSD and Plaintiff representatives was then reaffirmed in the 1996

CRO governance hearing, where RSD acknowledged "the Master has the ability to bring in anyone he wants, either individually or in groups, to discuss any issues he wants relative to the order." (F¶7.)

All the previous Master Orders were incorporated in the CRO, a Rule 54 final judgment. (PA49-53.) While RSD certainly recognized its opportunity to appeal, appealing numerous CRO provisions (including some related to the *powers* of the Master), it "deliberately delayed in seeking authoritative resolution" of the Master communication and reporting provisions. Amcast Industrial Corp. v. Detrex Corp., 45 F.3d 155, 159 (7th Cir. 1995).

Because RSD failed to appeal, it is precluded from now challenging the communication and reporting procedures expressly authorized by those Orders. (See §I.A, supra, first principle.) Furthermore, RSD is estopped to challenge those procedures by its prior agreements to them -- and by its prior and continuing participation in those communication procedures. (See F¶¶6-7, 9, 62 and §I.A, supra, second principle.) RSD does not even claim (or try to prove) a single change in any law or fact, much less a significant one, to support its attempt to re-litigate the Master's procedures. (See §I.A, third principle.)

Moreover, during the CRO hearings, RSD explicitly conceded the Master's authority to communicate separately with the parties, in order to persuade the court that elimination of "PIC," a remedial governance committee in which Plaintiffs' counsel were full participants, would not impair Plaintiffs' access to the remedy-formulation and

implementation process. (F¶7.) The court accepted RSD's representations and deleted PIC from the CRO, while continuing the Master's responsibilities under the prior Master orders. (CRO 204-05, PA52-53.) As this Court's decision in Continental Illinois Corp., 998 F.2d at 518 teaches, RSD may not repudiate its stipulation to private Master-party communications, undermining the basis for its previous district court victory, to obtain a second victory here. (See §I.A., supra.)

RSD's hearing procedure objections are untimely attempts to unravel the CRO and destabilize the remedial process. The Master's communication and reporting methods form a significant underpinning of the court's supervision over the CRO. The ability to conduct private interviews is part of the Master's investigatory function, and is essential to monitoring remedial implementation. Stripping the Master of authority to communicate with the parties (other than in a formal hearing setting) would accomplish RSD's true goal -- to defeat the Master's ability to monitor the implementation of court-ordered remedies.

Unfettered access to persons and their information is particularly important since the Master's function arises not only from RSD's consent and judicial efficiency, but from RSD's continuing pattern of noncompliance with remedial orders. (PA49, 65-67.) Williams, 851 F.2d at 884 ("Certainly [the judge] cannot be expected to neglect his busy docket to ensure that recalcitrant defendants no longer violate basic rights of this class.").

Moreover, ex parte communications are an everyday occurrence in federal cases, where Masters (and other agents of the court, e.g., experts and probation officers) perform investigative or monitoring functions. See Thompson v. Enomoto, 815 F.2d 1323, 1326 (9th

Cir. 1990); Nat'l Organization for Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 544-45 (9th Cir. 1987); Ruiz v. Estelle, 679 F.2d 1115, 1162, amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 741 (6th Cir. 1979). See also 9 Moores Federal Practice 3D §53.14[3][a](ex parte communications between masters and parties generally considered appropriate).[14]

Certainly the district court did not "abdicate his role" when, as RSD admits, the Master did not hold any hearings or make findings subject only to "clearly erroneous" review. (RB23, 61) The Master first investigated, then presented his opinions in an evidentiary hearing where RSD had a full opportunity to cross examine him and object to his recommendations. The district court, not the Master, made findings.

Because RSD got in FY99 precisely the hearing procedures that it now requests, RSD clearly fails to meet this Court's requirement that any purported Master procedural "irregularity" must have prejudiced the outcome of the hearing in question. PWC 1997 541.

D. The District Court Properly Allocated Capital Expenses And FY98 Carryovers

RSD manufactures disputes about allocation of capital expenses and FY98 unspent funds ("carryovers").

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[14] "Masters... have not been held to the same strict standards of impartiality...applied to judges." Morgan v. Kerrigan, 530 F.2d 401, 426 (1st Cir.), cert. denied, 426 U.S. 935 (1976).

RB36 says undisputed capital costs ($1,972,906) should go to the Construction Fund, not Fund 12. The court *granted* 84% of that request, so RSD has no complaint. (PA199, F¶51.)

RB36 opposes air conditioning Haskell Year-Round Magnet, as not budgeted FY98 and not justified by liability findings. In reality, magnet development funds were approved FY98. RSD approved a 12-month magnet; the Master and Superintendent agreed air conditioning is essential. Furthermore, air conditioning only white schools was one facilities discrimination violation. (F¶52.)

Finally, RB37 seeks all unexpended remedial funds-including the Construction Fund held for incomplete capital projects -- as an FY99 revenue credit. (The unstated point: that would lower the FY99 tax levy.) However, RSD's trial counsel stipulated "any carryovers from other than FY98 will not be at issue" at the 9/17/98 revenue hearing. (PA144.) RSD's post-hearing submission reiterated that. (D3133, pp. 1-5.)

RB37 imprudently suggests determination of carryover revenue credits should ignore operation of Illinois' tax cap statute. Excessive credit one year would limit ability to fund future years within state law. (A199.) The court was doing exactly what this Court directed -- making sure Missouri v. Jenkins, 495 U.S. 33 (1990) authority is only a last resort. PWC 1997, 539-40.

E. The District Court Gave Appropriate Consideration To The Financial Condition Of The RSD

RSD complains vaguely the court "failed to give sufficient weight to RSD's financial limits," and to consider actions "which would cut costs while implementing the CRO." (RB52-54.)

The reality is completely the opposite. The CRO projected annual costs *increasing* from $25 million in FY97 to $27.4 million in FY99, and higher in future years, generated by a flat $1.66 tax rate. RSD did not appeal in PWC 1997 either the estimated cost or the tax rate. (F¶33-34.)

In actuality, the annual cost has *declined* each year, and for FY99 is $21.9 million, $5.4 million less than projected. (Id.) That decline dwarfs the $1.2-million difference RSD is seeking to appeal for FY99.

Even more important -- since RSD is overwhelmingly focused on local real estate tax rates -- the CRO tax rate has plummeted from the $1.66 projected in the CRO to only $1.01 for FY99. (F¶34.) That results from the court reducing CRO expenditures, and allowing RSD to use unspent carryover dollars as revenue, and from property values increasing.

Another measure demonstrating the court's financial prudence is that annual CRO expenditure now comprises only 10% of RSD's total operating expense. That also is substantially less than the 15% projected in the CRO. (F¶35.)

RSD likes to play the game of adding up all remedial costs since the beginning of this case, which exceed $150 million. (RB53.) But that still constitutes only 10% of RSD's $1.5-billion aggregate expenditure over those years. (F¶36.)

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING THE EARLY CHILDHOOD EDUCATION ORDER

RSD appeals an ECE remedy much narrower than it has repeatedly agreed to, and contrives to appeal an order that resolved current issues in the manner proposed by RSD.

A. The ECE Order Respected The Local Control Objective

The ECE order is a model of judicial restraint.

Having found that ECE is properly within the scope of the remedy, the court incorporated ECE as part of the CRO. The only substantive change required by the order was one RSD had already proposed: expanding the program by 80 students. Indeed, RSD pursued and obtained on its own initiative state funding for an even larger expansion of the program -- to 120 additional students. (F¶¶70, 72.)[15]

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[15] The ECE order notes that the "ECE program is funded by the State of Illinois." It provided "up to $200,000" from the FY98 contingency fund as a backup source if state funding were not received for the 80-student increase. (A147-48.)

State funding for 120 students was received in August 1998, and RSD staff then informed the Board that this "eliminates the need to access tort funds to serve an additional 80 children as allowed by the Court." (D3173, PA152-153.) RSD's statement in its brief (RB54) that the ECE order mandates "tort funding, not state funding" is therefore plainly wrong in terms of the Order's directive and as a matter of fact.

Having made the expanded ECE part of the CRO, the court went no further in assuming control of it. "The court will not disturb the current ECE program. The State of Illinois and the RSD have a good ECE program in place." (A147). The court also held that "ECE will remain under the control of the RSD in its current administrative structure." (A147).

The court, by its ECE order, dealt deftly with the dual (and sometimes conflicting) remedial goals of providing an effective remedy for victims of discrimination and striving for greatest amount of local control.

B. The ECE Remedy Is Within The Scope Of Permissible Remedies And Is Narrowly Tailored

ECE is fully within the scope of permissible remedies.

First, ECE as a compensatory program serves the remedial function of ameliorating the effects of RSD's discrimination in educational opportunity and quality (see §II.A.2, supra). It also "enhances the chances of success" for minority students "in other remedial programs established by the CRO." (A146). Likewise, it represents an efficient use of taxpayer money, for it reduces the need in later years for compensatory and remedial programs in the higher grades. See Little Rock School District v. Pulaski County Special School District, 716 F.Supp. 1162 (E.D. Ark. 1989), rev'd on other grounds, 921 F.2d 1371 (8th Cir. 1990).

Second, ECE's undisputed success in preparing students for school (RB54), facilitates successful and meaningful integration of students between schools and within classrooms. As the district court recognized, "The more real academic choices the minority students have, the easier to implement controlled choice. The higher the academic performance by the minority students, the easier to implement the within-school desegregation guidelines." (A146-147.)

Third, RSD does not dispute that ECE facilitates controlled choice student assignment and within-school integration. RSD's contention is that the standard of "facilitat[ing] the implementation of the student assignment plan" is akin to the standard, struck down in Jenkins III, of "desegregative attractiveness." (RB55.) RSD's contention is without merit since the Supreme Court has approved a facilitation standard: remedial authority in one school operational area may be based upon the need to "achieve compliance in other facets of the school system". Freeman, 503 U.S. at 497.

RSD also contends that the ECE order required expansion by 80 students "regardless of eligibility" (RB10), and without "evidence as to [their] racial makeup" (RB55). Both contentions are wrong.

First, RSD in 1995 proposed serving all 3 and 4 year-old children in the C.8 attendance areas, coverage well beyond what the district court ordered for FY99. (F¶63.)

Secondly, the ECE order expressly refers to "80 youngsters... who have qualified..." (A147) (emphasis added). It also considers the racial makeup of unserved students who will benefit remedially from ECE expansion and notes the high percentage of minority children

considered to be "at risk" (the eligibility criterion for state funding) (A146-47). Further, in ordering expansion by 80 students, the order notes that "there are many more minority students who could be recruited... for next year." (emphasis added).

IV. RSD's PROCEDURAL MASTER APPEALS ARE WITHOUT MERIT

A. RSD Is Barred From Re-Litigating The Master's Procedural Methods Conclusively Established In The CRO

RSD seeks to re-litigate Master procedural issues long determined both by final orders and consent: propriety of separate Master-party communications and his assistance of counsel. (RB56-57.) RSD does not challenge the Master's substantive authority or any specific exercise of that authority.

RSD uses these stale issues to launch a groundless, disrespectful assault on the integrity of the Master and court. Its inflammatory rhetoric is calculated to suggest taint and new irregularities. However, RSD has participated and consented in informal Master-party communications for eight years, and stipulated when it first raised the "communication" issue that "the case law clearly allows for [discussions] between the Master and the Magistrate." (See §II.C.3 and PA155-56.)

RSD resurrected the communication issue through a motion to bar "ex parte" Master-Plaintiff communications. (D2682.) RSD's 5/30/97 motion (divorced from any substantive hearing) is disrespectful to this Court, given its admonition just a month earlier that such

Master procedural orders are not appealable. (PWC 1997 540-1.) The district court appropriately declined, recognizing the conclusive nature of prior orders and RSD's waivers. (A159.)

As shown in MD 98-1056, this Court should dismiss for lack of jurisdiction. In addition to these reasons, this Court should dismiss, or affirm without reaching the merits, for all the reasons stated in §§I.A and II.C.3, supra.

Were the merits reached, informal Master-party communications are appropriate. §II.C.3, supra.

B. The District Court Did Not Abuse Its Discretion In Allowing The Master Continued Assistance Of Counsel

There is no jurisdiction over this issue. (See MD 98-1056.)

RSD consented to the 9/26/95 Order appointing the Master's counsel. RSD thereby waived arguments against such assistance. Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988).

On the merits, Master counsel is appropriate for the reasons stated in the order appealed (A159-60), and the later 7/15/98 order (not appealed). (F¶12(b).) The federal courts, including the Supreme Court, have authorized legal assistants for masters and allowed reimbursement of legal expenditures. Kansas v. Colorado, 484 U.S. 910 (1987); Texas v. New Mexico, 475 U.S. 1004 (1986); Jackson v. Nassau County Bd., 157 F.R.D. 612, 615

(E.D.N.Y. 1994); Morales Feliciano v. Romero Barcelo, 672 F.Supp. 591, 624 (D. Puerto Rico 1986).

Furthermore, heeding this Court's comments in PWC 1997, since then neither the Master's counsel nor the Master have engaged in litigant-type activities. The role of the Master's counsel's role has sharply diminished, to providing almost exclusively out-of-court consultation on legal issues. (F¶12(c).)

C. RSD's Appeal From The Interim Fee Order Should Be Dismissed

As shown in MD 98-1065, there is no jurisdiction. On the merits, Plaintiffs withhold comment. Plaintiffs are not the real parties to a dispute over the reasonableness of fees RSD owes to the Master's attorney.

V. CIRCUIT RULE 36 REASSIGNMENT OF THIS CASE ON REMAND IS WHOLLY UNWARRANTED

In the end, the reason emerges for RSD's *ad hominem* rhetoric and creation of spurious issues. RSD concludes with a one-sentence request that this case be reassigned under Circuit Rule 36. It makes no supporting argument.

Rule 36 reassignment is wholly unwarranted. First, because this case is beyond the stage of remand for new trial, this appeal is not subject to Rule 36 "by its terms." (Circuit Rule 36.) This Court may nonetheless, in its discretion, direct a Rule 36 remand. (Id., second sentence.) The decisions of this Court, however, teach that to win reassignment

under the Rule's second sentence, the party requesting reassignment must make some showing there is justification for it, and a showing only that the district court erred will not carry the day. See e.g., Kovilic Construction Co. v. Missbrenner, 106 F.3d 768, 774 (7th Cir. 1997).

In this consent referral case, moreover, this Court is obliged to require that there be at least "good cause," if not even "extraordinary circumstances," justifying any Rule 36 reassignment. That is because RSD's request under Rule 36 is, in effect, a request to vacate the order of reference, to which it consented under 28 U.S.C. §636(c)(4). Both requests seek precisely the same result, a new judge. But §636(c)(4) establishes a much higher standard: consent references to magistrate judges may not be vacated except upon "good cause shown on... [the court's] own motion, or under extraordinary circumstances shown by any party." RSD makes no attempt to demonstrate "good cause," much less "extraordinary circumstances." Reassignment under Rule 36 without such a showing would permit RSD to make an end-run around the Judicial Code standard of §636(c)(4). Only holding RSD to the §636(c)(4) standard for purposes of adjudging its Rule 36 request will square the Rule with the Judicial Code, as F.R.A.P. Rule 47(a)(1) specifically requires.

Even if the Rule 36 standard were a relaxed one, RSD's unadorned reassignment request does not meet it. Indeed, the only "showing" RSD makes is that it is unhappy with rulings that -- on virtually all issues -- merely uphold RSD's own prior stipulations and waivers, or previous final adjudications. In many instances, RSD is even objecting to orders

granting its requests or proposals. In many others, RSD is objecting for the first time on appeal to points not even raised below.

A party's dissatisfaction with a Magistrate Judge's rulings is not justification for reassignment. See Carter v. Sea Land Services, 816 F.2d 1018, 1020-21 (5th Cir. 1987) ("[a]ny rule that would allow the party... to strike the reference should the magistrate issue a ruling not quite to the party"s liking... would [require the court] to countenance... [a] fast and loose toying with the judicial system").

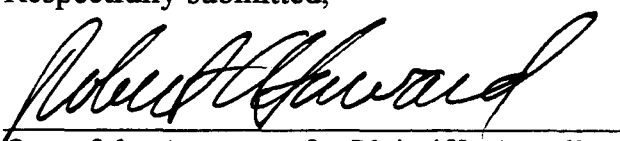
This case should stay where it is -- with the experienced, knowledgeable and able Magistrate Judge (sitting by consent of RSD) who tried the case and has presided over the entire remedial phase of the litigation since 1993. See Kindred v. Duckworth, 9 F.3d 638, 641 (7th Cir. 1993) ("we are mindful of the special deference owed to trial judges who have had years of experience with a particular matter").

CONCLUSION

This Court should dismiss Nos. 98-1056 & 98-1105 for want of appellate jurisdiction. Similarly, it should dismiss, for want of appellate jurisdiction, RSD's appeals in Nos.98-1231, 98-1449, 98-3340 & 98-3858 insofar as they raise (a) "non-mandate objections" to remedial programs approved in the FY98 and FY99 Budget Orders; and (b) procedural objections to the FY98 Budget proceedings.

To the extent that this Court exercises jurisdiction over these consolidated appeals, the Court should affirm the FY98 and FY99 Budget Orders, the ECE Order, and the Master Orders.

Respectfully submitted,



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Attachment I

RSD's Appeal From The Budget Orders Approving Remedial Programs: Plaintiffs' Responses

Introductory Note

Plaintiffs have identified the programs RSD appeals by examining RSD's consolidated brief at 15-19, 27-35, 41-52 (denominating programs objected to by program numbers or descriptive or record reference). Plaintiffs divide the appealed programs into two categories.

Cat. 1: FY98 and FY99 programs as to which RSD raises, on appeal, a Mandate objection based on this Court's decision in PWC 1997. (RB15-19, 29-31, 41-52.) Responses are as follows.

a. Appellate jurisdiction to consider this objection exists under 28 U.S.C. §1292(a)(1). See PDS 15-16, 20-22. But see n.9, supra (contending that RSD has waived the objection as to all such programs except #7160).

b. On its merits, the Mandate objection is insubstantial as to all programs in this category. While PWC 1997 invalidated certain remedial requirements, the programs RSD challenges are also supported by other legitimate goals not invalidated by this Court's decision. See §II.A, supra.

Cat. 2: FY98 and FY99 Programs as to which RSD raises, on appeal, one or more "non-mandate objections." Responses are as follows.

a. Appellate jurisdiction is wanting to consider any of these objections. See PDS 8-25.

b. Even if there were jurisdiction, under issue preclusion principles and the standard governing modification of injunctive decrees under Fed.R.Civ.P. 60(b)(5) this Court should not review these objections on their merits. No non-mandate objection RSD raised in the district court can fairly be read as even *presenting* a significant change in fact or law. See §II.B, supra.

c. On their merits, the non-mandate objections are insubstantial as to all programs in this category, because the record establishes that RSD did not meet its burden of *showing*, in the district court, that a significant change in fact or law supported these objections. See §II.B, supra.

Line Items			Cat. 1	Cat. 2
7130	Director of Desegregation (consultants)		1	2
7137	Student Assignment Services			2
7138	Public Information			2
7160	Evaluation Office (consultants)		1	2
7199	Master's Counsel			2
7200	Magnet Schools:	Site-Based Allocations/Staff		2
7212		Montessori Magnet		2
7215		Magnet Planning		2
7220		Curriculum Implementors	1	2
7230		Parent Liaisons	1	2
7261		All-day Kindergarten		2
7300	Community Academies:	Site-Based Allocation		2
7330		Success for All	1	2
7340		Reading Recovery	1	2
7350		Parent Liaisons	1	
7381		Higher Order Thinking Skills	1	
7400	Community Schools (C.9.):	Site-Based Allocations		2
7411		Human Relations Specialists	1	
7412		Curriculum Implementers	1	
7415		Parent Liaisons	1	
7510	Middle Schools:	Assistant Principals	1	

Line Items		Cat. 1	Cat. 2
7520	Curriculum Developers	1	
7531	Discipline Alternatives	1	
7533	Tutoring Programs	1	
7537	Parent Liaison	1	
7561	Saturday Academy	1	2
7590	Summer School	1	
7595	Transportation Services	1	
7621 High Schools:	Associate Principals	1	
7623	Assistant Principals	1	
7631	Discipline Alternatives	1	
7633	Tutorial Programs	1	
7635	Counselor Training	1	2
7651	Attendance Specialists	1	2
7652	Parent Liaisons	1	2
7664	9th Grade Transition Program	1	
7690	Summer School	1	
7695	Transportation Services	1	
7800 Family Support Services			2
7921 Curriculum Inservice			2
7935 Discipline, Climate, Diversity Inservice		1	2
ALL "SUPPLIES" (No specific line items identified by RSD)			2

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32(d)(3)

Robert C. Howard hereby certifies that he is one of the attorneys for the Plaintiffs-Appellees and that this brief complies with the type volume limitations set by this Court's Order of December 3, 1998. Specifically, according to the word counter of the word processing program used to prepare this brief (WordPerfect 5.1), the brief, excluding those portions that may be excluded from the word count under Circuit Rule 32(d), contains 15,748 words.

One of the Attorneys for
Plaintiffs-Appellees

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