

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CHINYERE JENKINS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 77-0420-CV-W-1
)	
SCHOOL DISTRICT OF KANSAS)	
CITY, MISSOURI, et al.,)	
)	
Defendants.)	

ORDER

On November 17, 1999, the Court entered an Order that, in pertinent part, modified its previous desegregation decrees and relieved the Kansas City Missouri School District (“KCMSD”) from all further liability under those decrees. The Court based its Order on a legal standard enunciated by the United States Supreme Court and evidence gathered over more than three years. The Court found that although the KCMSD must continue to improve the overall education it provides to its pupils as a matter of state law, it had accomplished all that it practicably could under this Court’s supervision to directly remedy the effects of prior segregation that occurred more than forty years ago.

Counsel for the plaintiff schoolchildren has appealed the Court’s Order to the United States Court of Appeals for the Eighth Circuit. Plaintiffs’ counsel bases his appeal on two simple arguments. First, Plaintiffs’ counsel contends that the Court abused its discretion by failing to hold a hearing or notify him that it was considering an end to this twenty-three-year-old case. Second, Plaintiffs’ counsel argues that because the KCMSD admits that it needs to (and can) improve the overall

education of its pupils, the KCMSD cannot be deemed to have done all that it practicably could to remedy the effects of prior segregation. Plaintiffs' counsel's second argument is based on the accepted but unproven hypothesis that raising overall academic achievement will result in a corresponding reduction in the achievement gap between white and black students. In fact, this hypothesis has been central to the KCMSD's remedial efforts for over fifteen years: provide a better education to all schoolchildren and the effects of prior segregation will eventually be eliminated.¹

Plaintiffs' counsel has moved this Court for a stay of its Order pending the outcome of his appeal to the Eighth Circuit. While the merits of Plaintiffs' counsel's appeal are of primary relevance to adjudicating his motion to stay, they are not entirely dispositive. To obtain a stay from an order dissolving an equitable injunction, the moving party must prove: (1) a substantial probability of success on the merits of the appeal; (2) that the failure to grant a stay would cause irreparable injury to the moving party; (3) that a stay will cause no substantial harm to other interested parties; and (4) that a stay will cause no harm to the public interest. Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987); Dataphase Sys., Inc. v. C L Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981). The Court heard the parties' evidence and oral arguments regarding Plaintiffs' counsel's motion to stay on Friday, January 7, 2000. The Court has carefully considered the parties' positions and now enters the following Order:

¹ Although the Court does not doubt the validity of this hypothesis, the Court does wonder about the propriety of its application in this case. In 1995, the Supreme Court admonished that "[i]t may be that in education, just as it may be in economics, a 'rising tide lifts all boats,' but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior *de jure* segregation." Missouri v. Jenkins, 515 U.S. 70, 102, 115 S. Ct. 2038, 2056, 132 L. Ed. 2d 63 (1995). The hypothesis that improved education for all will ultimately reduce the black-white achievement gap is simply a reformulation of a remedial goal that the Supreme Court has already rejected.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

To find in Plaintiffs' counsel's favor on this element of his motion to stay, the Court is not required to find that it reached its decision in error. If this were the standard, almost all motions for a stay would be denied categorically. See e.g. Mamula v. Satralloy, Inc., 578 F. Supp. 563, 580 (S.D. Ohio 1983); Evans v. Buchanon, 435 F. Sup. 832, 843 (D.C. Del. 1977); Friends of the Earth v. Armstrong, 360 F. Supp. 165, 196 (D. Utah 1973), *vacated on other grounds*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974), *r'hrq denied*, 416 U.S. 952 (1974). Rather, the required showing of probability of success on the merits is satisfied where an appeal "raises serious and difficult questions of law in an area where the law is somewhat unclear." Mamula, 578 F. Supp. at 580; Goldstein v. Miller, 488 F. Supp. 156, 172-73 (D. Md. 1980), *cert. denied*, 454 U.S. 828, 102 S. Ct. 121, 70 L. Ed. 2d 104 (1981); Evans, 435 F. Supp. at 844. The Court will examine the merits of Plaintiffs' counsel's appeal under this standard.

A. Standard of Review on Appeal

Under existing Eighth Circuit precedent, "the basic responsibility for determining whether and to what extent an injunction should be dissolved or maintained in force . . . rests primarily on the shoulders of the district court that issued the injunction in the first place." Booker v. Special Sch. Dist. No. 1, 585 F.2d 347, 352 (8th Cir. 1978), *cert. denied*, 443 U.S. 915, 99 S. Ct. 3106, 61 L. Ed. 2d 878 (1979). See also Jenkins v. Missouri, 122 F.3d 588, 601 (8th Cir. 1997) (quoting Booker). The district court may vacate or modify its injunction when it determines that to continue the existing injunction in force would work an inequitable result. See Fed. R. Civ. Proc. 60(b)(5); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437, 96 S. Ct. 2697, 2705, 49 L. Ed. 2d 599 (1976) (noting

that federal equity courts have inherent jurisdiction in the exercise of their discretion to vacate or modify injunctions). “The function of the appellate court is not to make an initial decision but simply to review the action of the trial court.” Booker, 585 F.2d at 353. The appellate court’s review is limited to whether the district court applied correct legal standards, whether or not the court’s factual findings were clearly erroneous, and whether the court abused its discretion. Id.; Jenkins, 122 F.3d at 601.

B. The Applicable Legal Standards

In reaching its decision on November 17, 1999, the Court applied a simple legal standard enunciated by the United States Supreme Court: “whether the constitutional violator has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable.” Order at 5, 36-40 [Doc. # 4811] (November 17, 1999) (citing Missouri v. Jenkins, 515 U.S. 70, 89, 115 S. Ct. 2038, 2049, 132 L. Ed. 2d 63 (1995) (Jenkins III)). One of the factors involved in this inquiry is consideration of whether retention of judicial control is necessary or practicable to achieve further compliance with the desegregation decree. Order at 5, 40 (Nov. 17, 1999) (citing Jenkins III, 515 U.S. at 89, 115 S. Ct. at 2049). Such considerations should “inform the sound discretion of the court,” Jenkins III, 515 U.S. at 89, 115 S. Ct. at 2049. Based on these considerations, if the district court finds that continuation of its desegregation decree would “work an inequitable result,” the court must modify or dissolve the decree. See e.g. Booker, 585 F.2d at 352.

Plaintiffs’ counsel contends that these legal standards, which come from the Eighth Circuit and the United States Supreme Court, are incorrect. According to Plaintiffs’ counsel, because this Court ordered the KCMSD in 1997 to reduce the academic achievement gap between black and white

students by 2.6 normalized curve equivalents (NCEs), the only correct legal standard to be applied is whether the achievement gap has been reduced by the requisite number of NCEs. See Plaintiffs’ Counsel’s Hearing Memorandum at 2 (“That order, not appealed by the KCMSD, constitutes a [precise] statement of the KCMSD’s remaining remedial obligation under its desegregation decree and is the law of the case.”); Plaintiffs’ Counsel’s Motion for Stay Pending Appeal at 3 (“There is no evidence that the KCMSD has attained its student achievement goal.”).

Regardless of whether this Court’s 1997 Order directing the KCMSD to reduce the achievement gap by 2.6 NCEs is “law of the case,” this Court’s orders cannot overrule or undermine legal standards propounded by the Supreme Court. The Supreme Court clearly held that the ultimate inquiry for this Court is whether the “vestiges of past discrimination have been eliminated to the extent practicable.” Jenkins III, 515 U.S. at 89, 115 S. Ct. at 2049. In 1997, this Court found that a black-white achievement gap of approximately ten NCEs existed in the KCMSD. Jenkins, 959 F. Supp. 1151, 1158 (W.D. Mo. 1997). The Court also “found that 13% of the initial gap and 13% of the increase in the gap may be traced to the prior discrimination within the KCMSD.” Jenkins, 959 F. Supp. at 1165. Thus, the Court precisely identified the academic achievement vestige of past discrimination to be 26% of a ten-NCE gap. While the Court translated this into a “mandate to the KCMSD to reduce the achievement gap by 2.6 NCEs,” id., it is clear that the KCMSD’s constitutional obligation was to eliminate that portion (26%) of the achievement gap that was attributable to past discrimination.

Accordingly, after 1997, the KCMSD became entitled to a declaration of unitary status with respect to the academic achievement vestige if the Court concluded any one of three different inquiries in its favor. First, the Court is required to declare unitary status with respect to the

academic achievement vestige if it finds that the KCMSD has reduced the academic achievement gap by 2.6 NCEs. The Court would be required to examine student achievement data disaggregated by race before it could reach such a conclusion. Second, the Court is required to declare unitary status if it finds that past discrimination no longer contributes to any portion of the current gap between black and white students. To reach this conclusion, the Court would need to take evidence in a form similar to the statistical evidence presented in January 1997. Third, the Court is required to declare unitary status if it concludes that the KCMSD has done everything that it practicably could to eliminate the vestiges of prior discrimination. The Court reached this conclusion on November 17, 1999. Plaintiffs' counsel's argument that the KCMSD cannot attain unitary status until the achievement gap is actually closed by 2.6 NCEs is without merit and poses no "serious or difficult questions of law" to merit a stay.

C. Relevant Factual Findings

The Court made several findings of fact relevant to its determination that the KCMSD was entitled to a declaration of unitary status. Those findings can be enumerated as follows:

- (1) The KCMSD has established a stable racial balance in light of its concentrated minority student population. Order at 36;
- (2) The KCMSD has substantially completed the capital improvement plan ordered by the Court prior to 1997. Id.;
- (3) The KCMSD has developed quality instructional plans, including a new Core Curriculum, a professional development plan, and assessment and accountability plans. Id.;
- (4) The KCMSD is now working to implement its instructional plans. Id.;
- (5) The KCMSD has faced significant hurdles during its transition phase to unitary status, including:
 - (a) a major budget reduction necessitated by the Supreme Court's decision that this Court exceeded the scope of its constitutional authority;
 - (b) a poorly qualified and unstable administration;
 - (c) an overly political school board;
 - (d) repeated litigation over educational decisions normally within the sole purview of

- the KCMSD;
- (e) large budget manipulations to fund the KCMSD's legal department and pay Plaintiffs' counsel's attorneys fees;
 - (f) warped lines of communication involving the KCMSD's legal department that consistently undermined the Superintendent's ability to govern the KCMSD;
 - (g) multiple chains of authority that made administrative stability and effective decision-making unlikely;
 - (h) a sense of being shielded by Court oversight from authority and responsibility; and
 - (i) intensified media scrutiny and abnormal politicization of administrative issues as a result of this case. Id. at 36-38;
- (6) The hurdles that the KCMSD has faced are not the result of past discrimination but do partially result from prolonged judicial involvement in this case. Id. at 36-39;
 - (7) The hurdles that the KCMSD has faced have impeded the KCMSD's progress in attempting to eliminate the vestiges of prior segregation. Id.
 - (8) In light of the many hurdles that have impeded the KCMSD's transition progress, the KCMSD has done everything that it practicably could to eliminate the vestiges of prior segregation. Id. at 40.

All of the Court's findings are drawn from record evidence in this case and official reports from the Court's Desegregation Monitoring Committee.

Plaintiffs' counsel argues that the Court's factual findings are clearly erroneous because the KCMSD does not itself believe that it has done everything practicable to attain unitary status. Plaintiffs' counsel notes that on November 2, 1999, the KCMSD's general counsel informed the Court that the School Board had "voted unanimously to seek a continuance in the Court, and they also have authorized counsel to entertain that they would agree to a continuation of the monitoring committee in its current configuration." See Comments of Kathy Walter-Mack, Transcript at 479 (November 2, 1999). Plaintiffs' counsel argues that, from this request by the School Board, "it is reasonable to infer that the KCMSD itself did not believe it could marshal the evidence necessary to prove its entitlement to unitary status." Plaintiffs' Counsel's Motion for Stay Pending Appeal at 3 [Doc. # 4814] (December 15, 1999). The Court believes that it is more reasonable to infer from the School Board's request that they were willing to remain under Court and DMC monitoring if that

would stave off removal of their accredited status by the State Board of Education.

Plaintiffs' counsel also notes that members of the KCMSD's own administration believe that they can do more to implement the KCMSD's instructional plans. To support this position, Plaintiff's counsel introduces the deposition testimony of Chief Instructional Officer Cheryl Shannon and Program Monitoring and Compliance Officer Jack Goddard, as well as the hearing testimony of Superintendent Benjamin Demps. All three of these individuals testify to the fact that the KCMSD has not implemented all of the steps contemplated in its instructional plans and that the KCMSD still intends to more fully implement these plans. See e.g. Plaintiffs' Exhibit 9, Deposition of Cheryl Lynn Shannon at 12 (Jan. 5, 2000) ("Its my understanding that the strategy that's being used [to reduce the achievement gap between white and black students] are the court-approved plans that were created and approved prior to my beginning work here with regard to professional development, accountability assessment as well as the implementation of the Core Curriculum."), at 23 ("Curriculum implementation will be an ongoing, never ending process within the district."); Plaintiffs' Exhibit 10, Deposition of Jack Ellison Goddard at 8-9 ("The Accountability Plan is a dynamic document. There still remains planning related to the teacher evaluation process, the principal evaluation process, and the school evaluation process."); Testimony of Superintendent Demps, November 1, 1999, at 202 ("And so they all (tasks related to accountability, assessment, professional development, classroom practices, and curriculum implementation) must be accomplished, induced in a rather quick time at this point . . .").²

² See also Testimony of Superintendent Demps, Transcript of Hearing on Plaintiffs' Counsel's Motion to Stay at 41 (January 7, 2000):

Question: "It has been stated here by Mr. Benson by reference to your deposition, that it is, in fact, the District's intention to continue implementation of

The Court clearly understands Plaintiffs’ counsel’s argument: the Court erred in finding that the KCMSD had done all that it practicably could to eliminate the 2.6-NCE achievement gap because the KCMSD itself believes that it can do more to implement its Court-approved instructional plans and that implementation of those plans will improve overall achievement and thereby reduce the achievement gap. Though Plaintiffs’ counsel’s argument is creative, it would render the Supreme Court’s remedial standard self-perpetuating and effectively meaningless. According to the position taken by Plaintiffs’ counsel, the phrase “to the extent practicable” means that as long as the KCMSD believes that it can provide a better education for its schoolchildren (and thereby reduce the achievement gap), it must remain under Court supervision. Unitary status could be attained only by eliminating the vestiges of prior segregation “root and branch” – a standard that the Supreme Court has rejected, or by simply surrendering and admitting that the KCMSD can do no more for the benefit of its students – an event that is unlikely to occur. Cf. Plaintiffs’ Counsel’s Hearing Memorandum at 3 (“Surely this Court cannot mean to have concluded without evidentiary basis that there was no hope that the KCMSD could comply with the directive to reduce the gap by 2.6 NCEs.”). Thus, the very fact that the KCMSD intends to improve the education it provides to its pupils would serve to perpetuate the Court’s desegregation decree.

The Court declines to accept the self-perpetuating meaning that Plaintiffs’ counsel assigns to the Supreme Court’s “to the extent practicable” standard. In fact, the Supreme Court has stated

these plans and the core curriculum; can you affirm that here?”
Answer: Yes. Absolutely
Question: And does that intention of the District, is that the District’s intention, irrespective of whether or not there is continued DMC or Court oversight?
Answer: Yes.

unequivocally that the desegregation remedy may not be self-perpetuating. Jenkins III, 515 U.S. at 99, 115 S. Ct. at 2054 (“a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.”). The relevant inquiry in determining whether the KCMSD has eliminated the vestiges of prior segregation “to the extent practicable” is not whether the KCMSD believes that it can do more in the future, but whether, in light of the KCMSD’s circumstances to the date of the determination, the Court finds that the KCMSD has done everything that it practicably could. The Court’s findings in this regard are not clearly erroneous, and Plaintiffs’ counsel’s efforts to treat them as such do not pose “serious or difficult questions of law” that merit a stay.

D. The Court’s Exercise of its Discretion

Plaintiffs’ counsel contends that the Court abused its discretion when it decided to dissolve its desegregation decree without first holding an evidentiary hearing. The Court made its determination without a unitary status hearing for several reasons. First, the Court has an affirmative obligation to return the KCMSD to local control when it has attained unitary status – not simply when the parties stop collaborating to keep the KCMSD under judicial supervision.³ Second, all of the relevant facts were already part of the evidentiary record, including the academic failures and professed intentions on which Plaintiffs’ counsel relies for his appeal. Third, the Court reasoned that,

³ “Collaboration” has been a key element throughout this case. In 1977, the KCMSD joined the plaintiff schoolchildren in bringing this desegregation lawsuit. See Jenkins, 959 F. Supp. 1151, 1153 (W.D. Mo. 1997). In 1997, after it had been realigned as Defendant, it sided with the plaintiff schoolchildren to argue that it was an ineffective school district so that it might retain funding levels ensured by the Court’s supervision. See id. at 1154, 1162. In 1999, Plaintiffs’ counsel joined with the KCMSD to argue that judicial supervision should prevent the State Board of Education from removing the KCMSD’s accreditation. See Order [Doc. # 4810] (November 17, 1999).

in light of the legal standards and existing facts, a hearing could not offer the Court any material evidence as to other steps that the KCMSD could practicably have taken in the past three years. The Court is confident of its decision in this regard.

Plaintiffs' counsel's present argument that unitary status cannot be attained without an evidentiary hearing is striking when contrasted with his previous suggestion that this case could 'go out with a whimper instead of a bang.' See Comments of Arthur Benson, Transcript at 15 (August 24, 1999).⁴ As late as August 1999, Plaintiffs' counsel was suggesting that a hearing might be unnecessary to end this case. Id. Considering the contrast between Plaintiffs' counsel's positions on this matter, the Court concludes that his objection is geared more toward the substance of the Court's decision than to the fact it made the decision without an evidentiary hearing.

Although the Court questions the motive behind Plaintiffs' counsel's newly formed demand for a unitary status hearing, the Court recognizes that its decision not to hold a hearing presents a serious and difficult question of law that might justify a stay. The due process clause of the Fifth Amendment guarantees the right of notice and an opportunity for a fair hearing. See U.S. CONST. amend. V. The right of due process applies to judicial orders of dismissal. See Link v. Wabash R. Co., 370 U.S. 626, 632, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734 (1962). Not every order entered without notice and an adversary hearing offends due process, however. See id. The due process analysis depends on the circumstances of each particular case Id. It is simply meant to ensure that

⁴ "And it may be that, to paraphrase T.S. Elliot, that the desegregation case doesn't end up with a bang, it will end with a whimper. Instead of having a big unitary status hearing and the district declared unitary, bang, that the more likely, I think what will happen, would be over the period of the next year or however long it takes, that very slowly the Court's involvement, the monitoring committee's involvement, and the plaintiffs' involvement, would sort of wiggle down to almost nothing. And at some point that somebody is going to say, I think we have done everything we can that is practicable."

parties have a “meaningful opportunity to present their case.” Mathews v. Eldridge, 424 U.S. 319, 349, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18 (1976). In that respect, the Court doubts whether Plaintiffs’ counsel can seriously argue he had no meaningful opportunity to present his case after twenty-three years of litigation. Under the circumstances, however, the Eighth Circuit Court of Appeals might determine that this Court abused its discretion in choosing to enter its determination without providing notice or holding an evidentiary hearing. On these grounds, Plaintiffs’ counsel has satisfied his burden on the first element of his motion to stay.

III. IRREPARABLE HARM

Plaintiffs’ counsel must show that the KCMSD’s present and future pupils will be irreparably harmed if the Court does not enter a stay in this case. The requirement of irreparable injury puts Plaintiffs’ counsel in a peculiar position. To satisfy the element of likelihood of success on the merits, Plaintiffs’ counsel contends that the KCMSD has not done everything practicable because it remains intent on implementing its Court-approved instructional plans. But if the KCMSD fully intends to implement the instructional plans for which Plaintiffs’ counsel has so fervently pushed, wherein lies the irreparable harm to the schoolchildren from the Court’s withdrawal?

The KCMSD has focused on this peculiar question in opposing Plaintiffs’ counsel’s motion to stay. The KCMSD argues that Plaintiffs’ counsel cannot establish irreparable harm to his clients from the loss of Court and DMC monitoring because the KCMSD is working to implement the Court-approved instructional plans and neither the Court nor the DMC can materially assist in that process. Moreover, the KCMSD argues that DMC and Court oversight are now unnecessary to

motivate the KCMSD. The KCMSD acknowledges that implementation of its instructional plans offers its only hope of survival under the increased competition from charter schools and the threat of statutory lapse in two years.⁵ Under these impending threats, the plaintiff schoolchildren are in no danger of the KCMSD changing its course in the absence of Court or DMC oversight.

In response, Plaintiffs' counsel notes that the "KCMSD is working to implement a Professional Development Plan. . . and an Accountability Plan . . . that may or may not have been submitted to the Court." Plaintiffs' Counsel' Hearing Memorandum at 5-6. From this statement, the Court must infer Plaintiffs' counsels concern that, absent DMC or Court oversight, the KCMSD may alter the details of its instructional plans without anyone else's approval. Changes to the KCMSD's instructional plans cannot constitute irreparable harm to Plaintiffs, however, because the Court has already recognized that the KCMSD's instructional "plans may [] be modified under new leadership." Order at 2 [Doc. # 4768] (May 27, 1999). Moreover, Plaintiffs have no constitutional right to have their attorney involved in the detailed aspects of the KCMSD's remedial plans. Plaintiffs' counsel's objections to minor details in those plans, if any, do not constitute the type of irreparable harm contemplated in the standard for a motion to stay.

Plaintiffs' counsel has acknowledged that loss of DMC monitoring would not irreparably or even substantially harm Plaintiffs because the DMC had

⁵ Mo. Rev. Stat. ¶ 162.081 (Supp. 1999) governs the potential statutory lapse of the KCMSD. That statute provides, in pertinent part: "Whenever any school district in this state . . . is classified unaccredited for two successive school years by the state board of education, its corporate organization shall lapse." Mo. Rev. Stat. § 162.081.1. If the KCMSD fails to regain accredited status by June 30, 1992, it will lapse, and the state board of education may: (1) dissolve the Kansas City Board of Education and appoint a state administrative board to operate the KCMSD; (2) attach the territory of the KCMSD to other districts; or (3) subdivide the KCMSD into smaller districts. See id. at ¶ 4. No entity that might arise from the lapsed ashes of the KCMSD would retain any liability currently held by the KCMSD. See id. at ¶ 7.

lightened up its monitoring and had adopted a policy of great deference without any explicit Order from the Court. And the Court could confirm that by an Order, if it wanted to And if the deference that the monitoring committee has shown to the School District or that it did show to the School District between the time that Mr. Demps took office after November 17 was not sufficiently deferential, the Court could alter that as well.

See Closing Argument of Arthur Benson, Transcript of Hearing on Plaintiffs’ Counsel’s Motion to Stay at 61 (January 7, 2000). Indeed, Plaintiffs’ counsel has admitted that daily monitoring by the DMC is no longer necessary. See id. at 63 (“That does not mean that everyday monitoring is necessary until that time. It simply means that the case should remain open and there should be some form of occasional monitoring and reporting to make sure the KCMSD remains on track.”). In contrast, the Court heard evidence that the DMC had lately begun to hinder the KCMSD’s ability to implement its Court-approved instructional plans. Superintendent Benjamin Demps testified that although his interactions with the DMC had been “amicable” and “vigorous,” and that he “welcomed” its advice, he opposed “resumption of [its] day-to-day oversight” of the KCMSD. See Testimony of Benjamin Demps, Transcript at 37-42 (January 7, 2000). Superintendent Demps testified that the DMC’s broad oversight “penetrated in every aspect of the District’s operation.” See Transcript at 42. He also testified that the DMC’s oversight adversely impacted his ability to manage the KCMSD, made it difficult for him to hold his staff accountable, and frustrated the association between him and his Board. See Transcript at 43. Superintendent Demps also emphasized the amount of interaction currently required between the KCMSD and the State Department of Elementary and Secondary Education (“DESE”). He confessed to his concern that if the Court reinstated the DMC’s oversight while the KCMSD was attempting to follow DESE’s guidance, there would be “mass confusion as to who is steering the ship.” See Transcript at 45.

Having abandoned his contention that loss of DMC monitoring would irreparably harm his clients, Plaintiffs' counsel argues that every day the KCMSD operates its "schools without having taken effective steps to eliminate the vestiges of prior unlawful segregation," the schoolchildren suffer irreparable injury. The Court has two problems with Plaintiffs' counsel's argument. First, the argument does not recognize the proper standard for a finding of unitary status. The Court need only find that all practicable steps have been taken to eliminate the vestiges of prior segregation, not that the steps taken have been "effective." In this regard, Plaintiffs' counsel's argument betrays his misconception of the applicable desegregation law and weakens the merits of his appeal. Second, Plaintiffs' counsel's argument collapses the first two elements of his motion to stay into one single standard. The question of irreparable harm becomes meaningless. The Court is reluctant to apply a standard that would render the irreparable harm inquiry meaningless in the absence of adequate case law to support it.

To support the standard for which he advocates, Plaintiffs' counsel cites Goldie's Bookstore v. Superior Court, 739 F.2d 466 (9th Cir. 1984) and Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). In Goldie's, the Ninth Circuit reversed the district court's issuance of a preliminary injunction against enforcement of a state statute on grounds that there was no evidence of irreparable harm in the absence of such an injunction. Id. at 471-72. Although the Ninth Circuit concluded that the district court erred in finding irreparable harm, the appellate court assumed without analysis that the alleged deprivation of equal protection would constitute irreparable harm. Id. at 472. This passing assumption by the Ninth Circuit does not constitute adequate precedent for Plaintiffs' counsel's argument on his motion to stay.

In Elrod v. Burns, the Supreme Court found that the "loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury.” 427 U.S. at 373, 96 S. Ct. at 2690. This case does not implicate the First Amendment, which is the only area “of constitutional jurisprudence where [courts] have said that an on-going violation [automatically] constitutes irreparable injury.” Northeastern Florida Chapter v. City of Jacksonville, 896 F.2d 1283, 1286 (11th Cir. 1990) (holding that irreparable injury cannot properly be presumed from a “substantially likely equal protection violation”). Moreover, the Supreme Court’s holding in Elrod has since been clarified. The assertion of First Amendment rights does not automatically require a finding of irreparable harm; a plaintiff seeking to establish irreparable harm must also show “a chilling effect on free expression,” or “direct penalization, as opposed to incidental inhibition, of First Amendment rights.” Hohe v. Casey, 868 F.2d 69, 72-73 (3rd Cir. 1989) (quoting Dombrowski v. Pfister, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965) and Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983)). If any analogy can be drawn from First Amendment cases, therefore, it is that plaintiffs must show that denial of a stay would result in purposeful discrimination by defendants, and that mere allegations of unremedied harm will not suffice.

In summary, the Court cannot presume that the KCMSD’s schoolchildren will suffer irreparable injury simply because they are plaintiffs in a desegregation case and their attorney disagrees with the final decision of the Court. The Court also cannot find any sufficient basis for irreparable injury through loss of the DMC’s or the Court’s oversight. The presence of the DMC and the Court have not resulted in improved academic performance in the KCMSD in over fifteen years. The DMC and the Court were not directly involved in assisting the KCMSD’s implementation process. The KCMSD now has greater incentives – in the form of charter school competition, unaccredited status, and ultimately, the threat of statutory lapse under Mo. Rev. Stat. § 162.081 –

to implement its instructional plans than it ever had under the Court's direct supervision. Accordingly, the Court finds no basis for concluding that the plaintiff schoolchildren (as opposed to Plaintiffs' counsel) will suffer irreparable injury.

IV. HARM TO THE PARTIES AND THE PUBLIC INTEREST

The Court notified the parties that, unless it was informed otherwise, it would assume the KCMSD and American Federation of Teachers, Local 691 would not be substantially harmed by entry of a stay. The KCMSD informed the Court through Superintendent Demps that entry of a stay would substantially harm the KCMSD in the form of continued oversight by the DMC. See supra at 12-13. Plaintiffs' counsel contested the KCMSD's position only to the extent that he suggested that the Court could discontinue the DMC's daily monitoring activities. Accordingly, this factor weighs slightly in favor of the KCMSD.

With respect to the question of whether a stay will harm the public interest, the Court has noted that this inquiry necessarily relates to the merits of Plaintiffs' counsel's appeal. On one hand, the public interest is furthered by return of the KCMSD to state and local control, and granting a stay will harm that interest. See Missouri v. Jenkins, 515 U.S. 70, 98, 115 S. Ct. 2038, 2054, 132 L. Ed. 2d 63 (1995) (Jenkins III) ("federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."). On the other hand, the public has no interest in the operation of a school system that is not complying with the United States Constitution. Id. In the context of desegregation, a school is not operating in compliance with the Constitution when it has not done everything it practicably can to eliminate the vestiges of prior *de jure* segregation. Id. at 89, 115 S. Ct. at 2049 ("The ultimate inquiry is

whether the constitutional violator has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable.” (internal edits omitted)). Presumably, therefore, the public interest would not be harmed by a stay if Plaintiffs’ counsel succeeds in establishing on appeal that this Court did not properly find that the KCMSD has done all it practicably could as of November 17, 1999 to eliminate the vestiges of prior segregation. Because the public interest inquiry necessarily depends on the likelihood of Plaintiffs’ counsel’s success on appeal, it does not weigh heavily for or against Plaintiffs’ counsel’s motion for a stay.

V. CONCLUSION

The balance of factors weigh heavily against Plaintiffs’ counsel’s motion for a stay pending appeal. Although Plaintiffs’ counsel will argue a substantial issue on appeal regarding the Court’s exercise of discretion, he has failed to show that any irreparable harm would result from the Court’s denial of a stay. Moreover, the KCMSD has shown that it might suffer substantial harm if the Court grants a stay and reinstates the DMC’s monitoring authority. For these reasons, the Court finds that a stay of its November 17th Order is not warranted. Plaintiffs’ counsel’s motion for a stay pending appeal is DENIED.

IT IS SO ORDERED.

Dean Whipple
United States District Judge

Date _____