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

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 80 C 5124 Judge Charles Kocoras
BOARD OF EDUCATION OF THE CITY OF CHICAGO, Defendant.	)	

AMICI'S RESPONSE TO PLAINTIFF'S MOTION TO ENFORCE ENGLISH LANGUAGE LEARNER PROVISIONS OF AMENDED APPENDIX C

Amici the Mexican American Legal Defense and Educational Fund, the American Civil Liberties Union of Illinois, and the Chicago Lawyers' Committee for Civil Rights Under the Law respond to the Plaintiff's Motion to Enforce English Language Learner Provisions of Amended Appendix C ("Motion to Enforce") and state as follows:

I. Introduction

In 1974 the United States Supreme Court stated that failing to provide for the needs of non-English speaking students "is to make a mockery of public education," rendering classroom experiences for these children "wholly incomprehensible and in no way meaningful." *Lau v. Nichols*, 414 U.S. 563, 566 (1974).[1] Six years after the *Lau* decision, the United States of America ("Government") and the Chicago Board of Education ("Board" or "CPS") entered into a consent decree whereby the Board agreed to remedy the present effects of past segregation of black and Hispanic students (the "Plan").

Despite the longevity of the consent decree, statistics regarding the education of both Latino and Limited English Proficient ("LEP") or English Language Learner ("ELL") students are alarming. Approximately 39.1 percent of the students enrolled in Chicago Public Schools ("CPS") for the 2007-08 School Year are Latino. *See Chicago Public Schools: CPS At A*

[1]Congress enacted the Equal Educational Opportunities Act ("EEOA") to remedy the discrimination identified by the Court in *Lau*. *See Castaneda v. Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981) ("the essential holding of *Lau* . . . has now been legislated by Congress . . . in §1703(f) [of the EEOA]").

Glance, *at* http://www.cps.k12.il.us/AtAGlance.html (Ex. A). According to a 2005 report by the Consortium on Chicago School Research at the University of Chicago, only 51.6 percent of boys and 65.9 percent of girls who started in an LEP program graduated. *See* Elaine Allensworth, *Graduation and Dropout Trends in Chicago*, Consortium on Chicago School Research at 23 (2005) (Ex. B). The graduation rates for Latinos who were not in an LEP program was even worse: only 48.6 percent of boys and 64.4 percent of girls who started in an LEP program graduated. *Id*. The same report also observed that "[g]raduation from high school is one of the most important indicators of students' success in later life, while failure to graduate from high school leads to numerous costs for both the individual and society." *Id*. at 3.

Just as troubling, a 2007 "Review and Evaluation of Chicago Public Schools' Implementation of the Bilingual Education Requirements of Amended Appendix C" reveals that non-English speaking children—most of whom are Latino—are still taught in hallways or on auditorium stages (Ex. 5 at 45)[2], are pulled from their classes in order to translate for other students (*id.* at 5), are denied sufficient reading material (*id.* at 22, 24, 44) or are provided unapproved reading material (*id.* at 46), and even lack textbooks (*id.* at 46). In addition, approximately 2,292 ELL students are being denied special education services (*id*. at 64-68) while at least 289 ELL students were provided no services for extended periods of time (Ex. 7 at 2). The actual number of students for whom CPS failed to provide ELL services may be close to 3,000. *See id*. at 33; Ex. 18 at 5. The report also reveals that some Spanish-speaking children are taught by Polish-speaking teachers (Ex. 5 at 16) while some courses identified as native language are a "combination of sheltered English methodology and translation" (*id.* at 24).[3]

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[2] *Amici's* references to numerical exhibits (Exs. 1-26) correspond to the exhibits attached to the Government's Memorandum. New exhibits attached to *amici's* response are identified as Exs. A-D.

[3] The September 6, 2007 Report identified other violations, including but not limited to:

1) the failure to compile and/or post a list of translators at 14 schools (Ex. 5 at iii);
2) the failure to ensure that vacancies for teachers in the language acquisition program are filled in a reasonable amount of time (*id*.); and,
3) the failure to ensure caseloads of TBE/TPI resource and pullout teachers are comparable to caseloads of other resources and pullout programs (*id*. at vi).

CPS's continuing violation of the consent decree with respect to the education of ELL children is inexcusable and demands immediate attention. The violations identified by the Government are not mere procedural or "reporting" violations but are substantive violations of the decree, which deny thousands of children the right to an educational opportunity to which they are entitled pursuant to the consent decree and under the Constitution. In correspondence preceding the Government's motion, CPS attempted to discredit the Government's expert's report by attacking the expert's experience (or lack thereof) in districts of similar size and complexity to CPS. *See* Ex. 7. Yet her conclusions regarding the basic services withheld from ELL students and the red flags within CPS's own reports, *e.g.*, that 30% of the entire special education ELL population has no identified special education service delivery model, or that one school purportedly resolved its failure to serve 132 ELL students in a mere 11 days (*see* Ex. 5 at 65-66), do not require CPS-specific experience but an understanding of the services to which all students are entitled. Nor is district-specific expertise required to recognize the impropriety of children taught in hallways, on auditorium stages or used to translate for others. *Amici* therefore implore CPS to respond by providing ELL children an appropriate education rather than denying that significant problems exist or hindering the Government's efforts to monitor compliance, which will only impose further burdens on our children.

For these reasons, *amici* respectfully concur with the Government's reasonable request to require CPS to address its failure to adhere to the consent decree by requiring principals to provide affidavits addressing the provision of services to ELL students and by providing certain information during forthcoming site visits. *See* Ex. 1.

II. ELL Education a Component of Original and Each Subsequent Consent Decree

On September 24, 1980, the Government filed a complaint against the Board of Education of the City of Chicago alleging, among other things, discrimination in the assignment of black and Hispanic students. *See United States v. Bd. of Educ. of the City of Chicago*, 554 F.Supp. 912 at n. 1 (N.D. Ill 1983). The same day, the Government and the Board submitted to

this Court[4] a proposed consent decree requiring the Board to remedy the present effects of past segregation of black and Hispanic students and to develop and submit a Plan. *See id*. On January 3, 1983, Judge Shadur noted that "[e]qual and non-separate education for *all* our children *is* the issue" and recognized that under the consent decree the obligation was "placed squarely where it should be in a representative form of government: on the Board of Education." *Id*. at 912 (emphasis in original). On February 11, 1983, the Court approved the Plan and entered final judgment. *See United States v. Bd. of Educ. of the City of Chicago*, No. 80 C 5124, slip. op., (N.D. Ill Feb. 11, 1983) (Ex. C).[5]

A. Bilingual Programs Were a Critical Component of the 1983 Plan

From the beginning, the Plan sought to ensure educational opportunities for limited and non-English speaking students. The Plan was divided into three broad sections, including: I) Student Desegregation; II) Additional Programs and Parties; and III) Other Matters. *Id*. Student Desegregation had two primary objectives. The first was to provide for the greatest number of stably desegregated schools and the second was to provide compensatory programs in order to "provide educational and related programs for any Black or Hispanic schools remaining segregated." *Id*. at 4. "Bilingual Programs," a paragraph within Section III included the following language:

> The Board will promptly implement a plan to ensure that non-and limited English speaking students are provided with the instructional services necessary to assure their effective participation in the educational programs of the Chicago School District.

Id. at 17. Requiring CPS to provide instructional services to students with limited English proficiency was a means of ensuring that Hispanic students could participate in educational programs, thereby meeting the second goal of desegregation.

[4]United States District Court Judge Milton I. Shadur initially presided over this matter which was ultimately reassigned to this Honorable Court.

[5] The consent decree is attached to Exhibit C, the order entering final judgment.

B. Unfulfilled Compliance Regarding ELL Students Drives the Modified Consent Decree

In 2001, the parties reviewed the Board's compliance with the Plan. *See* Docket # 1106 at 3-4. Expert reports conducted both by the Board (*see* Ex. 2) and the Government (*see* Ex. 3) revealed that the Board had not been in compliance with the Plan's program for ELL students. After finding that remaining areas of noncompliance necessitated additional remedies, the Court approved a modified Plan and entered a Modified Consent Decree ("MCD"). *See id*. at 3-4; *see also* Docket #1105. Similar to the Plan, the MCD was divided into various sections, including Section VI entitled English Language Learner Programs, which obligated CPS to provide language acquisition programs to all eligible students "in a timely and educationally appropriate manner . . ." and which incorporated by reference Appendix C. Docket #1106 at 16.

Appendix C ("AC") of the MCD related solely to ELL students and was divided into sections including: *Registration, Identification and Placement of ELLs*; *Instruction of ELL Students*; *Special Education*; *Systemic Monitoring*; and *Reporting*, among others. *Id*. at AC ¶¶ 1, 2, 6, 8 and 9. Pursuant to Appendix C, CPS was required to identify by school, grade and native language the number of ELL students who participated in a language acquisition program (*id.* at AC ¶ 9.a.) and identify the number of ELL students who were eligible to receive special education services and specify the "model number or models by which those ELLs are receiving special education services" (*id.* at AC ¶ 9.o). The ultimate goal, of course, was not simply the submission of reports but that CPS provide ELL students the educational services necessary for their effective participation in CPS's educational programs, as envisioned by the original Plan.

C. ELL Programs One of Five Components of the Second Amended Consent Decree

In 2006 the Government and the Board sought once again to modify the Plan and thereby filed a joint motion for approval of a Second Amended Consent Decree ("SACD"). *See* Docket # 1224. As with the Plan and the MCD, the proposed SACD was also divided into various sections, including one entitled English Language Learners (Section IV), which again obligated

CPS to provide "language acquisition programs to all eligible students in a timely and educationally appropriate manner." *Id*. The proposed revision incorporated by reference an Appendix C which had been amended and differed slightly from Appendix C of the MCD. *Id*. On August 10, 2006, after providing the parties and *amici* the opportunity to file position papers, this Court ruled on the motion to vacate the MCD and entered the SACD. *See* Docket # 1239.[6]

Both the MCD and the SACD require that CPS provide language acquisition programs to all eligible students in a timely and educationally appropriate manner consistent with Appendix C. The MCD's Appendix C ("AC") and the SACD's Amended Appendix C ("AAC") detail how CPS will fulfill this obligation. Both impose mandatory obligations on CPS; however, in the AAC, some of the mandatory provisions changed to require CPS to take "reasonable steps" or work "to the extent practicable" to ensure the appropriate provision of services.

The obligation to implement ELL instruction consistent with the policies and guidelines set forth in the *Framework for Success* ("*Framework*") remains obligatory (*see* AC and AAC ¶2.a). Moreover, both the AC and AAC mandate that CPS provide instruction pursuant to the TBE model where there are 20 or more ELLs of the same language background in a given school (*see* AC and AAC ¶2.b), which includes native language requirements.[7] However, the AAC now requires only that CPS "take reasonable steps" to ensure that the amount of instruction in the native language and English in the TBE program varies according to the student's language proficiency. AAC ¶2.b. So, too, CPS must take "reasonable steps" to ensure appropriate services become available when it learns that an ELL student is not receiving the services to which that student is entitled under the *Framework* (AAC ¶2.d) and take reasonable steps with respect to resources for ELL's, including the allocation of sufficient funds for "educationally sound textbooks and instructional materials" (AAC ¶3.c). *See also* AAC ¶1.d(1) (requiring CPS to take "reasonable steps" to ensure that each ELL is identified and placed in a timely and

[6] The Court rejected proposed Section VI of the SACD, which allowed the decree to expire automatically.
[7] CPS's obligation to provide instruction pursuant to the TPI model where 19 or fewer ELLs of the same language background are in a given school (*see* AAC ¶2.c) remains roughly the same.

appropriate manner in an English language acquisition program consistent with CPS policies). Additionally, for special education students CPS must take "reasonable steps" to ensure that these students receive sufficient services to address both their language acquisition and special education needs.[8]

CPS again agreed to comply with obligatory, systemic monitoring and reporting requirements so that the Government and this Court could ensure CPS was complying with the ELL provisions of the SACD.

> At least once each school year, CPS shall monitor the implementation of its language acquisition programs and the ELL-related requirements set forth in this Amended Appendix C . . . to assess each school's compliance with the *Framework* and the terms of Section IV of the Second Amended Consent Decree. Consistent with the *Framework*, CPS also shall identify schools for technical assistance visits and shall conduct compliance review visits for schools that fail to implement technical assistance recommendations. CPS shall keep a record of each finding of non-compliance with the terms of the *Framework* and Section IV of the Second Amended Consent Decree and shall document steps taken to achieve compliance. Such records and documentation shall be made available for review by the United States, upon request.

Id. at ¶ 8.a. These mandatory reporting requirements were not included solely to "document compliance visits and follow up visits pursuant to the normal custom and practice of OLCE"[9] (*see* Ex. 7 at 4) but to assess a school's compliance with the SACD. Moreover, the framework for providing services to ELL students remains the same: CPS shall provide language acquisition programs to all eligible students in a timely and educationally appropriate manner. *See* MCD at § VI, Docket #1106; *and* SACD at § IV, Docket #1239.

As set forth above, when a school is not in compliance with the SACD, CPS is required to document steps taken to achieve compliance and have records available for review by the Government. CPS does not satisfy its obligations under SACD by simply stating or acknowledging that students are not receiving services. Rather, CPS bears an affirmative duty to

[8] The AAC also added an obligation to take reasonable steps to ensure that approximately 1,576 special education ELLs without a special education model receive one of the six models. *See* AAC ¶6.b.
[9] CPS's Office of Language and Cultural Education, which oversees CPS's bilingual program is often referred to as OLCE.

identify the students denied services, take steps to provide the students with services, and document the steps taken to achieve compliance.

III. The Government's Motion To Enforce ELL Provisions

On February 16, 2008, the Government filed its Motion to Enforce. In its Memorandum in Support of its Motion (the "Memo") the Government identified three areas in which CPS failed to comply with the SACD's requirement to provide timely and appropriate instruction and materials and to document the steps taken to achieve compliance in the following manner:

1) CPS had not demonstrated that 30% (2,292) of its ELL students in need of special education services were appropriately served;
2) CPS failed to provide services or provided untimely services to thousands of ELL students; and,
3) CPS failed to provide native language instruction materials for many of its bilingual programs.

The Government's motion was based in part upon the September 6, 2007 report of its expert Barbara Marler. *See* Ex. 5. However, the Memo demonstrated that certain matters identified in the 2007 report were not new developments but date back to at least 2002, when they were documented by CPS's own expert (*see* Ex. 2).

In the Memo, the Government explained that the SACD's reporting requirements, particularly ¶ 8.a, allow it to determine (at least on paper) whether or not students are receiving appropriate services. The Government further explained that it attempted to resolve this matter without inviting this Court's intervention by requesting that CPS provide a "corrective plan," a request CPS rebuffed on the basis that it would "inevitably lead to bigger burden on CPS, more disputes and litigation, with no corresponding benefit to CPS students." *See* Ex. 7. In its filing the Government submitted a Proposed Order requiring CPS to comply with the SACD by requiring principals from non-compliant schools to provide affidavits that would document the "reasonable steps" taken to ensure students received services and requiring schools to provide

ELL-related information during April and May 2008 expert site visits.

IV. CPS's Failure to Serve ELL Students Merits the Limited Relief the Government Seeks

The violations at the heart of the Government's motion are not just "reporting" violations. Rather, they are substantive violations that reflect CPS's failure to provide children the educational services they are due under the law. In citing CPS's numerous violations of the SACD, the Government appropriately questions: how students in 149 schools that do not have either a TBE or TPI program could have received appropriate services when CPS reported that all ELL students received services (*see* Memo at 4); how CPS was able to provide approximately 731 students appropriate services at five schools when only 1, 7, 20, 11, or 16 days before site visits those same schools had not been in compliance (*see* Memo at 8); and why approximately 99 out of 307 schools with more than 100 students in need of services did not have a compliance review even though the SACD requires CPS to conduct compliance reviews on each school that reports ELL students. *See* Memo at 9 (citing to AAC at ¶8.a). The problems identified in the Government's Memo merit this Court's immediate intervention.

A. Approximately 2,292 ELL students are in need of special education services and are not being appropriately served

CPS's Bilingual Special Education Manual states that ELL students with disabilities "must participate to the maximum extent possible in transitional bilingual education programs and other programs available for non-disabled peers." *See* CPS Office of Specialized Services Resource Network, *Bilingual Special Educational Manual* at 49 (Ex. D). To determine how ELL students with disabilities receive services, CPS developed a "hierarchical order" for delivering services to students through one of six models. *Id*. at 48. The models are ranked from best to worst with Model 1 considered "best practice" and Model 6 listed as a "last resort." *Id*.

As of March 27, 2006, approximately 1,576 CPS students did not have a special education model noted in their records, thus they were not receiving appropriate services. In light of this fact, the SACD included specific language requiring CPS to take "reasonable steps"

to ensure students received one of the six approved models. *See* SACD at AAC ¶6.b. However, rather than reduce the number of students not receiving services (those without a model number) the number of students not receiving services actually increased: by an astounding 45 percent. *See* Ex. 16. Today approximately 2,292 students lack a model number and must be presumed to be lacking appropriate services.

Requiring CPS principals from non-compliant schools to provide an affidavit describing how students are served through one of the six models is consistent with CPS's agreement that it "keep a record of each finding of non-compliance with the terms of the *Framework for Success* and Section IV of the Second Amended Consent Decree and . . . document steps taken to achieve compliance." *See* SACD at ¶ 8.a. It is also a necessary intervention given that the number of children without a model number increased since the SACD was signed. The most effective way to determine that students are receiving services and to document CPS's steps to achieve compliance is to ask school principals to provide this information. The Government's request is not intended to create unnecessary work or aggravation for CPS but to ensure all children receive services, a request that is completely reasonable under the circumstances.[10]

B. Thousands of ELL students did not receive services or received untimely services

Provisions related to bilingual programs have been included in each consent decree because Latino and other students have been denied ELL services since the beginning of this case. Today hundreds and possibly thousands of children continue to attend schools where they are denied access to programs to which they are entitled. *Amici* will not repeat all of the evidence regarding the failure to provide services, but highlight below data which suggest that the relief sought by the Government in its Proposed Order is entirely reasonable.

[10] Any contention that such a requirement would be too burdensome or even impossible is contradicted by Ms. Marler's report, in which it is clear that school principals have access to data regarding the services provided (or not provided) to ELL students. *See, e.g.*, Ex. 5 at 22 (reporting that the Falconer principal addressed during an on-site visit how ELL students are placed and served at the school).

CPS's March 1, 2007 report suggested that no student had been denied services. *See* Ex. 8. Yet in a September 6, 2007 report, the Government's expert noted that CPS's own compliance and technical assistance reports identified 2,021 students who had not received services in a timely and appropriate manner. *See* Ex. 5 at 7-10. The same report revealed that CPS not only failed to document "the steps taken to achieve compliance" but that students at 17 schools may not have received any services the entire year.[11] *Id.*

In a letter dated January 7, 2008, CPS does not dispute that children were denied services and acknowledges that "at most between 45 and 117 days,[12] all but 289 eligible students were placed in a program."[13] *See* Ex. 7. Despite admitting that 289 students were denied ELL services, CPS commends itself for having served "99.5 percent of eligible students, speaking more than 100 languages and attending nearly 300 schools."[14] Yet for each of the 289 children denied educational services, self-congratulatory praise is meaningless. More alarming is evidence that the actual number of students denied services is probably closer to 3,000. *See* Memo at 7-9 (noting that 2,021 students did not receive timely services and that 149 schools reported having ELL students but did not offer TPI or TBE programs, which would yield an additional 887 children denied services).

CPS has therefore failed to "monitor the implementation of its language acquisition programs and the ELL-related requirements set forth in this Amended Appendix C . . . [and] to assess each school's compliance with the *Framework* and the terms of Section IV of the Second Amended Consent Decree" despite its agreement to do so in to AAC ¶ 8.a. In light of CPS's

[11] Schools where students may have been denied ELL services for the entire year include Gage Park, Clinton, Kelvyn Park, Shields, Hearst, Bright and Galileo. *See* Ex. 5 at 7-10.
[12] The Illinois School Code requires school districts to prepare a school calendar consisting of 176 days of attendance. *See* ILCS 5/10-19.
[13] In the most egregious situations, Clemente, Amundsen and Edwards did not resolve their failures to serve ELL students until April 2007 of the 2006-07 school year. *See* Ex. 5 at 7-10.
[14] Despite the breadth of cultures and languages found among CPS students, OLCE's June 2007 figures reflect that the 12 largest ELL language groups account for approximately 96% of the total ELL population (55,414 of 57,483 ELL students). *See* Ex. 12. Of those 12 groups, Spanish language students accounted for approximately 85.2% of the total ELL population; the other 88 languages are represented by .6% of the total ELL population. *Id.*

responses to the Government's recent inquiries (*see, e.g.*, Exs. 7, 10, 15, 20) a reasonable way to ensure students are receiving services is to ask the school principals whose schools may not be in compliance to document what the schools have done to provide children with services.

C. CPS has failed to provide native language instruction and materials for many of its bilingual programs

The SACD states that "CPS *shall* provide language acquisition programs to all students in a timely and educationally appropriate manner, consistent with Amended Appendix C and CPS's written policies as set forth in its August 1999 version of the *Framework for Success . . ..*" SACD at § IV, Docket # 1239 (emphasis added). The *Framework* specifically defines the Transitional Bilingual Education ("TBE") model. *See* Ex. 23. The TBE model recognizes that English as Second Language is an essential component of the daily program of instruction but requires, in schools where there are 20 or more ELLs of the same language, that the student's first language is used as a "medium of instruction" to bridge academic success in CPS's core curriculum. *Id*. The AAC requires CPS to take "reasonable steps" to ensure that: a) each ELL student is identified and placed in an appropriate program (*see* AAC at 1.d(1)); and b) the amount of instruction in the native language varies according to a students English language proficiency (*see id*. at 2.b). Nevertheless, the requirement that CPS provide students with the agreed upon TBE model is mandatory and explicit.

In its Memo, the Government sets forth instances of CPS's failure to provide adequate TBE instruction. *See* Memo at 12 (noting that the expert's report revealed that 31 schools failed to provide an adequate TBE model and could not determine whether the violations were resolved). In correspondence preceding the instant motion, CPS argued that it is only required to provide language *support* as opposed to language *instruction*. *See* Ex. 7. The Government correctly points out that this argument flies in the face of the *Framework*. In addition, the Government correctly notes that CPS's argument that it is only required to take "*reasonable steps* to implement its ELL Program" (*id.* at 3) is also misplaced. Pursuant to Section IV of the

SACD, CPS is required to ("shall") provide instruction consistent with the AAC. The "reasonable" language cited by CPS relates to specific provisions within the AAC including the identification, placement and the amount of instruction provided ELL students and does not obviate the requirement that CPS fully comply with the AAC and the *Framework*. Once again, requiring CPS principals to provide affidavits setting forth what, if any, instruction the students are receiving is an appropriate and reasonable request.

V. CPS Cannot Rely on a "Reasonableness" Argument to Avoid Enforcement

The Government engaged in extended correspondence with CPS to secure the information it now seeks in its motion and has asked for nothing to which it is not entitled in order to ensure that ELL students, like other students, receive the services they are due. CPS, however, appears to have made a unilateral determination that it is no longer obligated to comply with all of the SACD's requirements and improperly suggests that the Government's concerns regarding ELL education expands the scope of this case.

CPS has suggested that notwithstanding the Government's detailed accounts of a failure to provide services as required by the SACD, CPS had made efforts that were "reasonable" and "sufficient" under the SACD and that the Government's requests for information exceeded or improperly extended the SACD. *See, e.g.*, Ex. 7 at 3 (suggesting that CPS cannot be faulted for "alleged shortcomings, at a particular point in time, at isolated schools" given the size of the ELL population).[15] CPS further suggests that documenting steps taken to correct issues identified by CPS's own compliance facilitators "would remove the 'reasonable steps' and 'to the extent

[15] CPS's repeated emphasis on its size is a red herring. Though the size of the district may be unparalleled in this region, so too is its administration and budget; at the very least it benefits from economies of scale unavailable to other districts. Small or rural districts might argue that educating ELL students is just as challenging, if not more so, than within CPS. Nevertheless, neither CPS nor other districts may rely on such self-serving arguments to avoid their obligations under federal law, state law and regulations, or in this case, a mutually agreed-upon consent decree. Problems involving hundreds–if not thousands–of students are not "isolated," particularly when they involve students within the largest ELL subgroup. Nor is the failure to provide particular services at a particular point in time, *e.g.*, failing to provide model numbers to special education ELL students or failing to provide appropriate ELL services to thousands of students for months, a minor aberration this Court should overlook.

practicable' language" of AAC. *See* Ex. 7 at 3-4. Yet the documentation requirement to which CPS refers (contained within AAC ¶ 8.a.) does not contain "reasonableness" or "to the extent practicable" language but instead *mandates* documentation of "the steps taken to achieve compliance." CPS cannot selectively ignore this requirement by determining that some instances of noncompliance are insignificant.

While CPS may argue that certain measures it implemented with respect to ELL students are "reasonable," it is quite clear that what is *not* reasonable is CPS's failure to provide model numbers to special education ELL students while permitting the number of special education ELL students without a number to increase; that what is *not* reasonable is CPS's failure to provide any service to hundreds of students entitled to these services under the very terms of the consent decree and under federal law; and that what is *not* reasonable is CPS's suggestion that the SACD does not require native language instruction. In sum, what cannot be viewed as reasonable is CPS's failure to act and subsequent argument that in so doing it satisfied a reasonableness requirement.

This Court carefully reviewed the terms of both the MDC and SACD before approving and entering both decrees. Pursuant to *Fed. R. Civ. P.* 65, the terms contained within both were neither vague nor unenforceable, and provide standards that can be ascertained and enforced through reasonable measures such as those in the Government's Proposed Order. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders"). CPS's failure to address the three issues raised by the Government in its Motion to enforce prevents the Government and this Court from gauging whether CPS is making reasonable efforts to implement the substantive provisions of the SACD. CPS's actions do not reflect the serious and substantial obligations it agreed to undertake pursuant to the SACD, nor does it reflect a best effort or even a reasonable effort to comply with the SACD's terms. As a result, children are paying the price.

The Government has proposed a discrete, reasonable method for enforcing the terms of the SACD by requiring affidavits from principals who may be in the best position to quickly and effectively capture the necessary data and by permitting its expert to seek and receive information during planned site visits.[16] Unlike previous efforts to enforce the consent decree, the Motion does not seek relief that might involve the mid-year transfer of thousands of students or the mid-year re-allocation of significant funds. Rather, the Government is relying on specific, reported instances of non-compliance and asking school officials closest to the data to provide this Court with verified responses and to make available information during on-site visits, which comports with ¶8.a and other provisions of the SACD.

VI. Conclusion

CPS has not fulfilled its obligation to provide all children appropriate educational services. While CPS objects to the burdens of the Motion to Enforce, its burden cannot be compared to the life-long burden thousands of ELL students have suffered as a result of not receiving equal educational opportunities. The time has come for CPS to fully comply with *all* of the terms of the SACD, including those related to ELL students.

Respectfully submitted,

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[16] The latter request is not unlike the discovery authorized in *K.L. v. Edgar*, 945 F. Supp. 167, 168 (N.D. Ill. 1976), in which Judge Alesia permitted plaintiffs' experts to question state agency staff during on-site interviews in the presence of defense counsel, noting that the experts' questioning was both "necessary, and cannot be accomplished effectively in any other way . . .."

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March 2008, I served a copy of *Amici's* Response to Plaintiff's Motion to Enforce English Language Learner Provisions of Amended Appendix C by this Court's Electronic Filing System upon the following:

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