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

COREY H., LATRICIA H., ANDREW B., and JASON E., by their parents and next friends, SHIRLEY P., BEVERLY HL, SHARON B., and STEPHEN E., on behalf of a class of similarly situated persons,	)	
Plaintiff,	)	No. 92 C 3409
v.	)	Judge Robert W. Gettleman
THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, and THE ILLINOIS STATE BOARD OF EDUCATION,	)	
Defendants.	)	

ORDER REGARDING CHICAGO BOARD OF EDUCATIONS'S APPEAL OF MONITOR'S DECISION ON ILLINOIS STATE BOARD OF EDUCATION'S DISTRICT-WIDE FINDINGS DATE NOVEMBER 1, 2005

This matter comes before the court on an "appeal" by the Chicago Board of Education of the City of Chicago ("CBE," or "CPS") of the court-appointed Monitor's November 1, 2005, decision on the Illinois State Board of Education's ("ISBE") Fifth District-Wide Findings for the 2003-2204 school year (the "District-Wide Findings"), dated March 9, 2005. The CBE's appeal is based in large part on its objection to the methodology employed by ISBE in its District-Wide Findings, the lack of relationship between the Findings and the August 1999 ISBE Settlement Agreement (the "Settlement Agreement") establishing "benchmarks" and "indicators" (¶¶ 18 and 19, respectively), and CBE's view that ISBE's monitoring protocol is flawed, among other matters. The Monitor rejected these arguments and, for the reasons discussed below, this court rejects them as well and affirms the Monitor's decision.

The first issue that must be addressed is the propriety and timeliness of this appeal. Plaintiffs claim that the ISBE Settlement Agreement does not specifically authorize an appeal of

the ISBE District-Wide Findings. Although this may literally be true, on May 10, 2005, the Monitor corresponded with the parties, noting that pursuant to ¶ 20(c) of the ISBE Settlement Agreement, "If any party disagrees with ISBE's determination regarding a requested justification, that party may appeal to the Corey H. Monitor." The Monitor construed this provision to allow an appeal of the District-Wide Findings, but further noted that the Settlement Agreement did not specify any date for such an appeal. The Monitor, as was within her power, directed that any such appeal be submitted by May 19, 2005. The court therefore rejects plaintiff's argument that CBE had no right to appeal the District-Wide Findings.

The next threshold issue is the timeliness of this appeal. ISBE issued its Fifth District-Wide Findings for the 2003-2004 school year on March 9, 2005. Although § 20(b) provides that CBE had 14 days of receipt of the ISBE report to submit an objection to any finding, CBE did not submit any objections until April 8, 2005. On April 22, 2005, ISBE sent a response to CBE's April 8, 2005, objections to CBE. On May 10, 2005, the Monitor sent an e-mail to CBE and the other parties stating that any appeal with respect to the objections to the District-Wide Findings be filed by May 19, 2005. On that date, May 19, 2005, CBE sent a letter to the Monitor that CBE designated an appeal of the District-Wide Findings. There followed a number of meetings and written communications between the parties, including a second "appeal" by CBE to the District-Wide Findings dated July 13, 2005. The Monitor's final decision with respect to the ISBE's Fifth District-Wide Findings was issued on November 1, 2005, in which the Monitor rejected CBE's objections and indicated that, "Any appeal to federal court shall be filed within 30 days of the date of this decision." On December 1, 2005, CBE filed the instant appeal to the court.

Based on this course of events, and the recognition by the Monitor that CBE retained its right to appeal the Monitor's final decision regarding the ISBE's Fifth District-Wide Findings, the court concludes that the instant appeal is proper and timely. That being said, however, as discussed more fully below, the basis for many of CBE's objections to the District-Wide Findings is precluded by CBE's failure to have appealed these matters in the past.[1]

With respect to the merits of CBE's appeal, the court agrees with plaintiffs that the correct standard of review of any Monitor's decision is abuse of discretion, as has been in place from the beginning of this court's role as reviewer of such decisions. Indeed, no party has ever objected to the application of this standard of review.

The 85% Standard. There was some dispute among the parties as to the 85% compliance rate required by ¶ 18 benchmarks issued by the Monitor in November 1999, and subsequently approved by the court. In her November 1, 2005, decision, the Monitor made the "final decision that the 85% standard is not necessarily met if 85 or 100 children meet a certain Benchmark. Rather, the Benchmark will be met if 85% of the questions, file reviews and observations, etc., developed in an accepted protocol have been found to be in compliance." The court has reviewed the parties' position on this issue and the Monitor's reasoning, and finds that reasoning to be sound. Certainly, her "final decision" on this point was not an abuse of

[1]Notwithstanding the court's conclusion about the timeliness about this particular appeal, the court agrees with plaintiffs that avoidable delays in any appeals of District-Wide Findings, or other findings or rulings by the Monitor that affect the education of children with disabilities at CPS, should be avoided at all costs. Because ¶ 20 of the ISBE Settlement Agreement does not provide for specific times to appeal such decisions, the court directs the parties to meet and confer with the purpose of agreeing to a suitable timetable for appeals. The court notes that CBE's objections to the District-Wide Findings at issue herein were first raised in April 2005 and that the final brief in connection with the instant appeal was not filed until February 6, 2006. This type of delay is inexcusable and does not serve the interests of the parties or, more importantly, children with disabilities in Chicago.

discretion; indeed, it was the only reasonable conclusion that could have been reached. The court affirms that decision.

Substantial Compliance. The next general issue about which the parties have disagreed is the definition of "substantial compliance" as applied in determining compliance with ¶¶ 19(a) and (b) of the ISBE Settlement Agreement. In a Monitor's decision dated December 18, 2002, which was not appealed by any party, the Monitor determined that standard to be as follows:

> The examination of Paragraph 19(a) and (b) indicators will also be derived from record reviews, staff interviews and classroom observations. Substantial compliance with Paragraph 19(a) and (b) indicators shall be found where the school [has] not wilfully avoided the indicator and that variance from the strict and literal performance of each indicator consists of technical or unimportant omissions or defects.

CBE has argued, both in its appeal to the Monitor and to this court, that it should be found in substantial compliance unless ISBE has found a willful violation. Such an interpretation is clearly incorrect, since the Monitor's 2002 decision, under which the parties have been operating since that date, requires that substantial compliance "shall be found" not only where a school has "not wilfully avoided the indicator," but also that "variance from the strict and literal performance of each indicator consists of technical or unimportant omissions or defects." Thus, even a good faith variance from an indicator can result in a finding of a failure of substantial compliance if that variance is not merely "technical or unimportant." As the Monitor found in her November 1, 2005, decision, CBE has "ignored the latter half of this definition in its response to the District-Wide Findings 2003-2004 and all two year report appeals filed since the CBE began filing such appeals recently. That is not acceptable and will not be allowed by the Monitor." The court agrees.

Standards Employed by ISBE in the District-Wide Findings. CBE appears to complain about inconsistent or unarticulated standards employed by the ISBE in making certain of its District-Wide Findings of noncompliance, including the use of "anecdotal information" consisting of teacher interviews, self surveys and ISBE Monitor's opinions "rather than objective data." The Monitor's rejection of this argument is fully supported by common sense and the course of dealings between the parties over the years of the ISBE Settlement Agreement. Paragraph 19 of the Settlement Agreement specifically provides that the LRE procedures contemplated by ¶ 18 requires ISBE to collect information that includes a wide variety of sources and criteria. In addition, the ISBE's LRE procedures announced in January 2003 – and never appealed – specifically call for examination of the ¶¶ 19(a) and (b) indicators to be derived "from record review, staff interviews and classroom observations." The Monitor's decision is this regard is reasonable and will not be disturbed.

No Child Left Behind Act and Amendments to IDEA. CBE appears to argue that the No Child Left Behind Act ("NCLB") 20 U.S.C. §§ 6301 et seq. and the 2004 amendments to the IDEA somehow conflict with its obligations in this case. However, the court finds, as did the Monitor, that CBE has failed to identify any such conflict. As the Monitor noted, "When the requirements of NCLB coincide with Corey H., the requirements of Corey H. must be meet. The CBE did not specify a single instance where the requirements are not aligned."

Relationship of District-Wide Findings to Paragraphs 18 and 19. The District-Wide Findings are authorized by ¶ 20 of the ISBE Settlement Agreement, entitled "School-Based and District Wide Monitoring Procedures and Policies – Reports and Corrective Action Plans." Subparagraph 20(a) provides, "The LRE procedures shall require that, in instances where the monitoring identifies violations of the LRE mandate or failure to meet any of the provisions of

paragraphs 18 and 19(a) and (b), ISBE shall issue a report . . .." CBE complains that the 19 findings from which it appeals are defective because they do not "align" with ¶ 18 benchmarks and ¶ 19(b) LRE indicators. There is nothing in the Settlement Agreement that requires such strict "alignment,"[2] although the court agrees with CBE that reference to particular benchmarks and subparagraphs of the ISBE Settlement Agreement would be helpful in guiding CBE in formulating the corrective action plans that result from the District-Wide Findings. Accordingly, the court rejects CBE's appeal on this ground, but directs ISBE in the future to specify which benchmarks and Settlement Agreement provisions or specific violations of the LRE mandate relate to future District-Wide Findings.

Failure to Appeal Prior Benchmark Determinations. It must be noted that the methodologies and practices by ISBE about which CBE now complains were in place in previous District-Wide Findings and the LRE procedures instituted by ISBE long before the Fifth District-Wide Findings that are now the subject of appeal. The court agrees with plaintiffs, the ISBE and the Monitor that CBE is estopped from complaining at this time about those methodologies and procedures, which were appealable long before the instant proceeding. CBE's explanation about why it did not appeal earlier is that the earlier District-Wide Findings involved only a small number of schools. That reasoning, however, cuts against CBE. If in fact there were problems with ISBE's procedures and methodology, it would have been best to deal with them before ISBE's monitoring activities reached high gear. It is still not too late to fine-tune those procedures and activities, but it is too late for CBE to base an appeal on matters that could have and should have been appealed years ago.

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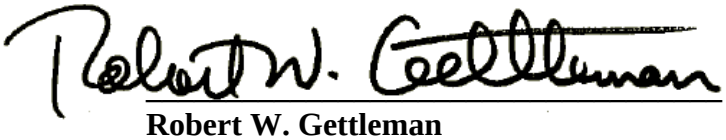
[2]The language of ¶ 20(a) is in the disjunctive; District-Wide Findings are appropriate when ISBE's monitoring identifies violations of the LRE mandate of the IDEA or when it finds violations of ¶¶ 18 and 19.

CONCLUSION

The rulings above address most if not all of CBE's objections to the specific District-Wide Findings. To the extend they do not, the court has thoroughly reviewed the Monitor's decision on the ISBE District-Wide Findings dated November 1, 2005, and find that they are consistent with this court's rulings and the ISBE Settlement Agreement. Fo these reasons, CBE's appeal of the Monitor's decision is denied.

ENTER: February 28, 2006



Robert W. Gettleman
United States District Judge