UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

E.L., a minor, by LA'SHIEKA WHITE the mother, legal guardian, and next friend of E.L., Plaintiff, v. VOLUNTARY INTERDISTRICT CHOICE CORPORATION, Defendant.	**JURY TRIAL DEMANDED** Case No.: 4:16-cv-00629-RLW **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

VICC's brief in opposition to Plaintiff's Motion for a Preliminary Injunction (Opposition) is premised on two faulty bases: (1) The 1999 Settlement is "a *product* of the Equal Protection Clause," and therefore immune from a challenge by a non-party to that agreement; and, (2) E.L. lacks standing to challenge VICC's enforcement of the ban on black student transfers because Gateway Science Academy is a charter school. *See* Opposition at 1. Neither claim has merit.

VICC is incorrect on what a settlement agreement is and what this settlement agreement does. "[T]he Board's obligations regarding *Liddell* flow from the parties' final settlement in that litigation . . . . As with consent decrees, settlement agreements are creatures of private contract law. Accordingly, in performing under the *Liddell* agreement, the Board is not performing duties mandated by a federal civil rights statute." *Bauer v. Transitional Sch. Dist. of the City of St. Louis*, 255 F.3d 478, 482 (8th Cir. 2001) (citation omitted). E.L. cannot be bound by the terms of a settlement to which he was not a party. The agreement provides no shield against claims brought by non-parties alleging their equal protection rights are being violated, and VICC bears the burden of justifying its discrimination against black children under strict scrutiny. *See Martin v. Wilks*, 490 U.S. 755, 768 (1989); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991); *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 227 (6th Cir. 1993); *Ho by Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir. 1998).

VICC is also incorrect on the consequences of an injunction preventing it from discriminating against African-American children. Only VICC's ban stands in the way of E.L. enrolling at Gateway for the 2016-2017 school year. State law requires Gateway to enroll students who are eligible to enroll in St. Louis schools under an "urban voluntary transfer program." Mo. Ann. Stat. § 160.410(2). E.L. is not eligible for VICC's urban voluntary transfer program because VICC bans

African-Americans from transferring to schools in the City of St. Louis. *See* Compl., Exh. A. VICC's discriminatory policy is the only reason E.L. cannot avail himself of § 160.410(2), and as result E.L.'s injury is directly traceable to VICC's policy. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The "links that comprise the chain" are not just plausible—which would satisfy the traceability criterion—they are obvious. *See Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002).

Enjoining VICC from enforcing its black student ban would preserve the status quo, allow a nine-year old boy to attend the only school he has ever known, protect constitutional rights, and vindicate the public's interest in equality under the law. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); *Phelps-Roper v. Nixon*, 545 F.3d 685, 688 (8th Cir. 2008); *Hill v. Xyquad, Inc.*, 939 F.2d 627, 630 (8th Cir. 1991).

For the reasons that follow, the motion for preliminary injunction should be granted.

I

E.L. IS LIKELY TO SUCCEED ON HIS EQUAL PROTECTION CLAIM

VICC fails to address E.L.'s argument that its prohibition on allowing black students to transfer to schools in the City of St. Louis cannot satisfy strict scrutiny. *See* Plaintiff's Motion for Preliminary Injunction at 6-10. Nor could it. Such an unrelenting and categorical prohibition on the eligibility of black children—and only black children—for a governmental program cannot be narrowly tailored to a compelling governmental interest. Because VICC cannot justify the program under strict scrutiny, VICC argues that E.L. should have no opportunity to challenge the discriminatory program at all. Opposition at 2-7. VICC is wrong.

A. Measures Undertaken by VICC Pursuant to the 1999 Settlement Agreement Are Challengeable by Non-Parties to That Agreement

VICC argues that E.L. is unlikely to succeed on the merits of his equal protection claim, because the settlement agreement is insulated against a challenge by non-parties until a court explicitly finds St. Louis schools have achieved "unitary status." Opposition at 3 ("[T]he transfer program is an ongoing court-approved remedy for past segregation, thus foreclosing plaintiff's equal protection challenge."). VICC is wrong. "[T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates . . . the Fourteenth Amendment." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986); *see also Donaghy*, 933 F.2d at 1459 ("[T]he entry of an affirmative action consent decree does not guarantee that the decree serves a remedial purpose or is narrowly tailored.").

As a threshold matter—and as explained more fully in Plaintiff's opposition to VICC's motion to dismiss—VICC's argument is foreclosed by *Wilks*, 490 U.S. 755. *See* Plaintiff's Opposition to VICC's Mtn. to Dismiss at Arg. I.B. "A voluntary settlement in the form of a consent decree . . . cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group . . . who do not join in the agreement." *Wilks*, 490 U.S. 768. Thus, even if VICC is correct that a "unitary status" declaration is needed before St. Louis schools are relieved of their obligation to remedy the vestiges of past discrimination, E.L. is not estopped from challenging the means undertaken by VICC—pursuant to the settlement—to eliminate those vestiges. *See Donaghy*, 933 F.2d at 1459; *United States v. Brennan*, 650 F.3d 65, 118 (2d Cir. 2011); *Ho by Ho*, 147 F.3d at 865; *Young*, 989 F.2d at 227 (6th Cir. 1993); *United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990); *Martinez v. City of St. Louis*, 327 F. Supp. 2d 1002 (E.D. Mo. 2003), *aff'd*, 539 F.3d 857 (8th Cir. 2008).

VICC does not rebut this well-known tenet of Anglo-American jurisprudence, and fails to elaborate on the arguments raised in its motion to dismiss. Instead, the bulk of VICC's argument focuses on picking nits—often to VICC's own detriment—with language used in Plaintiff's motion. For example, VICC correctly notes that there was no consent decree in the *Liddell* litigation, only a settlement. *See* Opposition at 4 n.3. This only strengthens Plaintiff's case. Settlements contain *less* judicial imprimatur than consent decrees. *See Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003); *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Consent decrees are enforceable through a court's contempt power; settlement agreements must be brought as breach of contract. *See Bloomberg*, 315 F.3d at 993-94; *Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999). Of course, even if VICC was enforcing a consent decree, E.L.'s challenge would not be barred. *Bauer*, 255 F.3d at 482.

VICC also faults E.L. for "materially misstat[ing]" the Supreme Court's decision in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 716 (2007). Opposition at 3. But Plaintiff's point is incontrovertible. Once an adjudicated violator of the Equal Protection Clause remedies the underlying violation, the continued use of race must be justified on a different basis. *Id. Parents Involved* does not hold—as VICC argues—that an explicit unitary status declaration is the only mechanism available to halt a violator's ongoing use of racial classifications.[1] *Ho by Ho*, 147 F.3d at 865 (unitary status not required to challenge race-based provisions in a consent decree).

[1] Such a position would lead to absurd results. Racial discrimination would have no end. Government would be *required* to discriminate indefinitely until an aggrieved party mustered the courage and expense to litigate a "unitary status" case. In any event, even VICC agrees that it can halt its discrimination against black children at issue in this litigation prior to a unitary status declaration. It is "phasing out" the pernicious racial classification despite no "unitary status" finding. Motion to Dismiss at 5-6. And VICC has chosen to "exercise its option" to extend the racial classifications—an option it should not have if the 1999 settlement did not vest VICC with the discretion it disavows. *Id.* at 7.

Again, however, VICC misses the forest for the trees. Even if the absence of a "unitary status" declaration means VICC has a continuing obligation to remedy the vestiges of discrimination from 30-plus years ago, it must justify its use of race based on contemporary findings tied to that compelling interest, and the means it uses must be narrowly tailored to that purpose. *See Ho by Ho*, 147 F.3d at 865 ("The 'vestiges' to be proved by it must be tied to the discriminating practices and policies that justified the consent decree fifteen years ago."); *Young*, 989 F.2d at 227 (measures required by consent decree entered into nineteen years hence must satisfy strict scrutiny based on contemporary evidence).

VICC next turns its ire to Plaintiff's characterization of this Court's decision in *Liddell v. Bd. of Educ. of the City of St. Louis*, No. 4:72CV100 SNL, 1999 WL 33314210 (E.D. Mo. Mar. 12, 1999). In particular, VICC places value in the court "expressly incorporat[ing]" the settlement into its order. Although difficult to discern from an argument void of authority, VICC appears to believe that the court's "incorporation" means that it adjudicated the race-based means and determined they satisfy strict scrutiny. Opposition at 4. Incorporating a settlement into an order dismissing a case only gives a court jurisdiction to enforce the terms of the contract. *Buckhannon*, 532 U.S. at 604 n.7. It does not endow the settlement with any special sanction. *See Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1189 (8th Cir. 1984) (settlement agreements are contracts between parties). At most, this Court's approval of the settlement makes the agreement more akin to a consent decree—something VICC has taken pains to rebut. *See* Opposition at 4 n.3; *see also Bauer*, 255 F.3d at 482.

To be clear, the Eighth Circuit has explained that there is no federal imprimatur through approval of the settlement *in this case*. "[I]n performing under the *Liddell* agreement, the Board is not performing duties mandated by a federal civil rights statute." *Id.* In any event, however VICC

wants to characterize the settlement agreement, E.L was not born when it was entered into, he cannot be bound by its terms, and his claims are not "barred to the extent they [are] inconsistent with [it]." *Wilks*, 490 U.S. at 768-69. Even under a court-approved settlement or consent decree, "[i]f the effects of past discrimination no longer exist[] . . . the City no longer ha[s] a compelling interest to justify a race-conscious remedy." *Dean v. City of Shreveport*, 438 F.3d 448, 456-57 (5th Cir. 2006).

VICC makes a similar error when it faults Plaintiff for describing the race-based transfer program as "unnecessary." VICC must *prove* the program's necessity in order to continue discriminating against black children. VICC's claim that the Eighth Circuit's decision 32 years ago "squarely held" that the program was necessary has no merit—for multiple reasons. Opposition at 4. First, the Eighth Circuit was ruling on the propriety of the settlement, not applying strict scrutiny to the means adopted. *Liddell v. State of Mo.*, 731 F.2d 1294, 1297 (8th Cir. 1984). Ascribing more to the court's approval of the settlement would be error. *See Local No. 93*, 478 U.S. at 528 (federal court can approve in a consent decree what it "might be barred from ordering" if the court itself was issuing the remedy). Second, even if those means were narrowly tailored when the Eighth Circuit approved the settlement in 1984, that does not make them constitutional in 2016. *See Ho by Ho*, 147 F.3d at 865 (defendant must prove the underlying violation permitting the race-based relief still exists); *Dean*, 438 F.3d at 456-57 (same); *Young*, 989 F.2d at 227 (same). Third, the means approved in a settlement do not bar non-parties to the settlement from challenging the constitutionality of those means. *See Wilks*, 490 U.S. at 768-69 (non-parties not bound to the terms agreed to in a consent decree); *Young*, 989 F.2d at 227 (means undertaken to remedy a 19-year old violation must be narrowly tailored today).

VICC also finds fault with Plaintiff's assertion that the program is not narrowly tailored because VICC did not consider adequate race-neutral alternatives. Opposition at 5. VICC argues

that it does not have the power to consider race-neutral alternatives. *Id.* That may very well be true, but it is no defense to the constitutionality of the program VICC administers. Exhausting race-neutral alternatives before resorting to race-based measures is a constitutional imperative. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419-22 (2013). As the party administering the race-based plan, VICC is the proper defendant. "[W]hen a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it." *New Hampshire Right to Life v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). That VICC is unaware of *any* race-neutral alternatives considered by the parties to the consent decree only means that the program it administers—which discriminates against black children because they are black—is likely unconstitutional.

B. E.L. Has Standing

Plaintiff has standing to challenge Defendant's unconstitutional transfer policy. Plaintiff has suffered an injury, fairly traceable to the Defendant's actions, that will likely be redressed by a favorable court decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing requires injury, causation, and redressability). Plaintiff's injury—despite VICC's attempt to miscast it—is the unequal treatment required by VICC's transfer policy banning black students from transferring to (or enrolling in) schools in the City. As a consequence of that policy, Plaintiff is prohibited from transferring to city magnet schools *and* from attending city charter schools such as Gateway Science Academy. Either consequence, on its own, plainly suffices for standing to sue in federal court. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

In its opposition, VICC does not dispute that its discriminatory policy it administers prevents E.L. from transferring to city magnet schools. Yet it is clear that, if Defendant's discriminatory

transfer policy were invalidated, E.L. would be able to attend those magnet schools on the same basis as his white neighbors. This alone satisfies Article III.

E.L. is *also* injured by the effect that Defendant's discriminatory policy has on his ability to attend Gateway Science Academy. Because E.L is African-American, he is denied the opportunity to remain at the school he has attended his entire life, while his white neighbors who have never attended the school can enroll as a matter of right. That black students might be able to enroll in city charter schools by going through additional hurdles only underscores the inequality of treatment on the basis of race. *Id.*

The clear denial of Plaintiff's equal protection rights is more than "fairly traceable" to Defendant's transfer policy. As described in Plaintiff's opposition to Defendant's motion to dismiss, state law requires charter schools to enroll students who are eligible to transfer under VICC's program. *See* Opp. to Defs' Mot. to Dismiss at 10 (citing Mo. Ann. Stat. § 160.410). That a racially neutral state law serves as a conduit for Defendant's racially discriminatory policy does not make E.L.'s injury any less traceable to Defendant. *See, e.g.*, *Davis*, 307 F.3d at 849 ("[W]hat matters is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain." (quotations omitted)). Similarly, a court order enjoining Defendant from enforcing its discriminatory policy would also allow E.L. to attend Gateway on the same basis as his white neighbors. Plaintiff's injury would be "redressed if [he] were granted the remedy they seek." *Wieland v. Dep't of Health & Human Servs.*, 793 F.3d 949, 956 (8th Cir. 2015).

VICC's arguments to the contrary are unpersuasive. It suggests that the unequal treatment of black students required by its policy is equal because black students *might* still be permitted to enroll in a charter school by applying for a waiver or suing in state court. It is the imposition of racially discriminatory barriers, not the ultimate denial of the benefit, that gives rise to an equal

protection injury. *Ne. Fla.*, 508 U.S. at 666. E.L.'s white neighbors do not have to apply for a waiver or sue in state court before they are able to enroll in Gateway Science Academy. E.L. should not be forced to do so just because he is black.

VICC's "conflicting state statutes" argument is equally puzzling. Constitutional avoidance is not a standing doctrine. *See Bond v. United States*, 134 S. Ct. 2077, 2085 (2014). Moreover, it is well-settled that plaintiffs are not required to exhaust state remedies before bringing their constitutional challenge in federal court under Section 1983. *See Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 502 (1982); *see also Bressman v. Farrier*, 900 F.2d 1305, 1310 (8th Cir. 1990) ("A 1983 plaintiff may sue for damages and is not required to exhaust state judicial or administrative remedies before proceeding in federal court.").

VICC's arguments on standing should not deny E.L. his day in court. VICC's discriminatory transfer policy imposes prohibitive hurdles on black students who seek to enroll in charter schools and bans them from transferring to magnet schools. Either way, Defendant's discriminatory transfer policy causes E.L.'s injury: unequal treatment on the basis of race. Policies that impose such racially discriminatory treatment are subject to strict scrutiny, "the most exacting" standard of review. *Parents Involved*, 551 U.S. at 742. VICC has not and cannot show that its transfer policy meets this burden, and E.L. is thus likely to succeed on the merits of his equal protection claim.

II

E.L. WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION

It is unsurprising that VICC's explicitly discriminatory transfer policy imposes significant irreparable harm on E.L. VICC's policy violates his constitutional right to equal protection, denigrates him as a second-class citizen, imposes significant (and likely prohibitive) barriers on his right to attend Gateway Science Academy (and other city charter schools), and flat out bans him from

attending any magnet schools on account of his skin color. *See* Plaintiff's Motion for Preliminary Injunction at 10-11.

Defendant's primary response—that Plaintiff should "repair" these injuries by seeking a waiver or suing in state court for an order allowing E.L. to attend Gateway on statutory grounds—badly misconstrues Plaintiff's constitutional claim. E.L. is not asserting a constitutional right to attend Gateway, just a constitutional right to attend Gateway (and any other school) on the same basis as "non-African-Americans." Compl., Exh. B, at 4 (magnet school application). Accordingly, neither asking for a waiver nor suing for a different interpretation of the governing state law will remedy Plaintiff's injury—because those are precisely the sort of bureaucratic barriers that the policy only imposes on black kids.

The fact that E.L. is suing to vindicate his constitutional right to equal protection makes it all the more apparent that VICC's arguments are just red herrings. It is simply irrelevant that families who move "ordinarily expect their school district to change." Opposition at 7. What shocked E.L.'s mother was that VICC's policy employed explicit racial classifications to create an outright ban on county-to-city transfer for black students, even though such transfers are permitted for every other "non-African-American" student. Compl., Exh. B, at 4 (magnet school application).

Nor is the discriminatory transfer policy saved by a statement that Plaintiff currently resides in a "good school district." Opposition at 7 n.5 (quoting Plaintiff's mother). Whether E.L. can attend a good school does not absolve VICC for denying him equal protection of the laws. That is why the *Wall Street Journal* article that Defendant has brought to the Court's attention explains that E.L.'s mother initially decided "to let it go, since [E.L.] would still be in a good school district." *A*

St. Louis Desegregation Policy That Segregates, Wall St. J., May 10, 2016.[2] But then she realized that "[t]here's no way this is right. [She] just broke down crying and thinking, how am I going to tell my 9-year-old that he can't go back to the school, not because we moved but because of his skin color." *Id.*

III

THE BALANCE OF EQUITIES AND PUBLIC INTEREST SUPPORT PRELIMINARY RELIEF

In its attempt to balance the equities, VICC does not mention the harm that would befall E.L. if its discriminatory transfer policy were not enjoined pending a decision on the merits. *See* Opposition at 8-9. That is perhaps because, on its side of the ledger, Defendant cannot "reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepada v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).

Nor can VICC rebut the fact that the public interest is best served by the "preservation of constitutional rights." *Nixon*, 545 F.3d at 688. Whatever public support existed for the settlement agreement in 1999 does not immunize the program in 2016, and certainly does not exempt the program from the need to comply with the Constitution. Here, the program serves to prohibit E.L., a black student, from enrolling in a predominantly white school—the same one he has attended his entire life. The response from the public was outrage, and public support, to the extent it matters in the public interest analysis, is firmly with E.L. *See* La'Shieka White, *Don't Let Race Determine My Son's Enrollment*, Change.org (online Petition by Plaintiff's mother has generated over 135,000 signatures).[3]

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[2] Http://www.wsj.com/articles/a-st-louis-desegregation-policy-that-segregates-1462919325.

[3] Https://www.change.org/p/dese-don-t-let-race-determine-my-son-s-enrollment.

In sum, the public interest weighs in favor of terminating VICC's racially discriminatory program, and the irreparable harm to E.L. outweighs any purported loss to VICC from the discontinuance of an unconstitutional transfer policy that it is "phasing out."

CONCLUSION

Plaintiff's Motion for a Preliminary Injunction should be granted. This Court should enjoin VICC from enforcing the provision in its transfer program that prohibits black students residing in St. Louis County from transferring to schools in the City of St. Louis.

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Respectfully submitted,

s/ Joshua P. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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