

January 25, 1996

SUBJECT: Preliminary Thoughts re Consent Decree Problem

The new School Board members should be briefed thoroughly on the consent decree in Civil Action No. 92-0016. There are the following general points that might be made:

1) The consent decree contains many familiar provisions, found in almost all such decrees entered into with the Department of Justice. It takes a good deal of effort to comply with such decrees and typically companies or institutions subject to such decrees assign that responsibility to one of more competent people with a good deal of consistent and informed legal advice.

2) The Board should focus on the expiration of the consent decree in September 1997. Paragraph 20 on page 31 provides that the United States may seek an extension "for just cause". The Board should ensure that such just cause does not exist and that the consent decree cannot be extended. The Board can do this by receiving a "legal audit" of performance under the decree and focusing on any areas where additional work on compliance is needed. Some of the decree's provisions require one-time actions, and it would be useful to know that these actions have been completed. Other provisions require policies to be in place, and it is important that this have been accomplished.

3) There are consultation provisions in the decree. The Board should have both formal and informal consultations with the United States Attorney, the Commonwealth Attorney General and others in a position to make recommendations or provide views about the extension of the decree.

2) The basic thrust of the decree is that the Board of Education and the Public School System shall not in the future discriminate against any teacher (or teacher applicant) based on his or her national origin. There are requirements to establish policies in various areas to achieve this objective and various record-keeping requirements to document what is being done to implement those policies. There are a number of standard requirements, such as graduation from an accredited program or accumulation of credits from an accredited institution, that are used by school boards in the U.S. to ensure that they get quality teachers without discriminating. School boards in the U.S. are not required to accept credentials from nonaccredited foreign institutions or to provide equal pay and benefits for persons who do not have U.S.-certified credentials. This issue has come up with respect to Mexican-origin applicants in California and the Southwest. To the extent that the School Board can build upon accepted practices in the U.S., it would be helpful with respect to ensuring compliance with the decree. There are a number of very experienced School Board members and chairs in highly successful school districts in the U.S. who could be called upon to volunteer assistance in this regard.

3) When a specific case arises where a claim of discrimination is made by a teacher, the

burden falls on the Board to demonstrate that the particular action was taken on objective, non-discriminatory criteria. (Because of the decree, the burden for practical purposes falls on the Board; in the absence of the decree, the burden would be on the allegedly aggrieved teacher.)

4) Let us assume, for example, that four teachers of Filipino national origin applied for specialized training in Hawaii and only two of the four were selected. A question arises whether the decision with respect to the two rejected applicants was based on their national origin and therefore violates the decree. If the Board wishes to defend that decision as non-discriminatory, it has to construct a defense as follows:

a) First, it needs to have a record by the decision-maker of the basis for the decision to reject the two applicants. It should be written, contemporaneously prepared if possible, and indicate that the same criteria were applied to all four applicants.

b) Second, the criteria relied upon by the decision-maker should have their basis in some previously established policy directive of the Board. The principal problem here is that it is very difficult to defend ad hoc decisions that cannot be related to some overall Board policy. The Board policy should be written, although in some instances the Board's policies can be inferred from its past practices.

5) It is perfectly reasonable for the Board to make such decisions on objective, non-discriminatory criteria even if a Filipino teacher ends up being denied some privilege. For example, the Board may legitimately consider whether specialized training should be given to someone whose contract is near its conclusion, whether the absence of such applicants from their school will adversely affect the educational mission of the school, whether teachers at various levels in the system are given comparable opportunities, etc. These are only illustrative considerations; there may be many others that might have figured in the decision, assumed here to be non-discriminatory, to permit only two of the four applicants to participate in the program. Past practice, in particular whether Filipino teachers have on a percentage basis been able to participate equally in such programs, may also be persuasive.

6) The basic point, however, is that the defense is best presented if there is a written statement of the reasons for the decision, that the criteria indicated are objective and reasonable, and that there was some pre-existing policy or established practice with the system that gives legitimacy to those criteria. The Board should not be intimidated by such challenges. If it has a good basis for the decision, it should defend it as non-discriminatory.