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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	§	
	§	
VS.	§	3:85-CV-1210-R
	§	
U.S. DEPARTMENT OF HOUSING	§	
AND URBAN DEVELOPMENT, U.S.	§	
DEPARTMENT OF JUSTICE, ET AL.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW:
HUD MOTION TO MODIFY REMEDIAL ORDER AFFECTING HUD

The most surprising thing about HUD's "motion to modify" the Court's April 16, 1996 Remedial Order Affecting HUD is this: *HUD seeks to withdraw key elements of "the Cisneros Plan" which HUD submitted for court approval and which were adopted without significant change by the Remedial Order entered by this Court.*

HUD presented several versions of "the Cisneros Plan" to this Court: (i) the 2/18/94 Cisneros Plan;[1] (ii) the somewhat modified Cisneros Plan of May 1994;[2] and (iii) the 9/27/94 Cisneros Plan.[3] Then, on December 27, 1994, in its Memorandum in Response to Plaintiffs' Motion for Partial Approval of HUD Remedial Measures (filed 12/27/94), *HUD urged this Court to adopt Secretary Cisneros' remedial plan.*[4] Although the HUD 12/27/94 memorandum did not

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[1]Declaration of Henry G. Cisneros, Exh. A to Supplemental HUD Memorandum in Support of Motion to Alter or Amend the Judgment (2/18/94); Pls. Exh. 5 (6/10/96 hearing).

[2]Pls. Exh. 6 (6/10/96 hearing).

[3]HUD Exh. 1(9/27/94 hearing); Pls. Exh. 8 and Court's Exh. A (6//10/96 hearing).

[4]The 12/27/94 proposed Cisneros remedial order (Pls. Exh. 3 at the 6/19/96 hearing) will be referred to as "*the HUD 1994 proposed order.*" The remedial order presented by HUD with its 5/28/96 motion to modify will be referred to as the HUD "*Proposed Remedial Order Affecting*

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include the proposed Cisneros' remedial order, HUD's attorney provided a copy to the Court by letter dated January 13, 1995:

> "The order to which HUD was referring is the proposed 'Consent Remedial Order Affecting HUD' ... transmitted to the parties by letter of December 9, 1994. While HUD also transmitted a copy to Special Master Louis Weber, HUD did not provide this document directly to the Court or attach the document to HUD's December 23rd filing. I am therefore attaching a copy of that document to this letter." 1/13/95 letter from Thomas J. Peebles to the Court.

HUD has offered no satisfactory explanation for its May 28, 1996 attempt to withdraw key portions of the Cisneros Plan; *nor has HUD even attempted to justify its delay of almost 1-1/2 years after December 27, 1994, when the final Cisneros Plan was submitted to this Court, in making this belated, last-minute attempt to withdraw portions of the Cisneros Plan which this Court adopted on April 16, 1996.*

HUD's Motion to Modify this Court's Remedial Order Affecting HUD (4/16/96) is DENIED. These are the findings of fact and conclusions of law that form the basis of this decision. They will address, in turn, A. HUD's liability argument, B. HUD's due process claim, and C. the specific modifications proposed by HUD to the Remedial Order.

A. HUD Liability

1. HUD erroneously claims that the Remedial Order Affecting HUD is not based upon a finding of liability against HUD.[5] HUD is certainly liable for violations of the Constitution and laws of the United States; and, this Court previously granted plaintiffs' motion for summary

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HUD." Court's Exhibit B (6/10/96 hearing).

[5]Memorandum in Support of Motion to Modify Remedial Order Affecting HUD, page 17 n. 8.

judgment[6] against HUD and DHA because, based on the uncontested facts, HUD and its federal predecessors knowingly and willingly perpetuated and maintained racial segregation in DHA's low-income housing programs.[7]

2. HUD has also admitted liability for "claims arising under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3608 et seq., insofar as those claims are based on HUD's failure to affirmatively further the goals of fair housing in its relationships with DHA and the City in the period 1968 up to January 20, 1987." HUD's attempt to limit this concession to four specific areas: tenant selections and assignment, Robin Square, Section 8 and the suburbs, and the City and CDBG is without merit. The cases cited below show that HUD's Title VIII duties also include the constitutional duty to disestablish the effects of racial segregation in HUD's programs to the extent practical.

3. HUD's Title VIII obligation is more, not less, than its constitutional obligation. Congress has charged HUD not only with the obligation to end discrimination and segregation, but also with the duty to ensure that ghettos are replaced by truly integrated and balanced living patterns. HUD's narrow view of its title VIII obligations has not been accepted by the courts. NAACP v. HUD, 817 F. 2d 149, 154-155 (1st Cir. 1987)(Judge Breyer). HUD does have the Title VIII obligation to replace the ghettos of Dallas' publicly assisted housing with truly integrated

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[6]See Order Regarding Facts Established by Class Plaintiffs' Motion For Partial Summary Judgment Against DHA and HUD (filed May 26, 1994), statement granting partial summary judgment against HUD (5/27/94 transcript, page 10), and the HUD admissions cited in the Finding and Conclusions: Vacation of the 1987 Consent Decree (filed April 16, 1996).

[7]HUD's actions included cooperating with and acquiescing in the refusals by the City of Dallas and some suburbs to allow 224 public housing units to be constructed in either the City or these suburbs. Walker v. HUD, 734 F. Supp. 1289, 1301 (N.D. Tex. 1989).

and balanced living patterns free from segregation and inequality.

4. The exhibits, depositions and responses to requests for admissions also provided an uncontested factual record of purposeful discrimination that equals or exceeds, in detail and scope, the record upon which other courts found HUD liable for its racially discriminatory purpose in HUD's funding and administration of local public housing authority programs. Young v. Pierce, 628 F. Supp. 1037 (E.D. Tex. 1985), reversed on other grounds, 822 F. 2d 1368 (5th Cir. 1987) (summary judgment); Clients' Council v. Pierce, 711 F. 2d 1406, 1410 (8th Cir. 1983) (record compelled a finding of purpose); NAACP. v. CHA, Memorandum Opinion and Order, Aug. 27, 1993 (N.D. Tex. CA 88-0154-R) (summary judgment).

5. Here, the undisputed facts show racial purpose by HUD. Gautreaux v. Romney, 448 F. 2d 731 (7th Cir. 1971); Garrett v. City of Hamtramck, 503 F. 2d 1236 (6th Cir. 1974); Resident Advisory Board v. Rizzo, 564 F. 2d 126 (3rd Cir. 1977) cert. denied 435 U.S. 908 (1978); Jaimes v. TMHA, 715 F. Supp. 835 (N.D. Ohio 1989); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).

6. HUD and its predecessor agencies violated the Fifth Amendment to the United States Constitution, Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, 42 U.S.C. 3608(e) (5), 42 U.S.C. §§ 1981 and 1982. NAACP v. CHA, Memorandum Opinion and Order, Aug. 27, 1993 (N.D. Tex. CA 88-0154-R) (summary judgment).

7. HUD and DHA acted jointly to deprive the plaintiffs and the plaintiff class of their constitutional and legal rights. HUD is also liable under 42 U.S.C. § 1983. NAACP v. CHA, Memorandum Opinion and Order, Aug. 27, 1993 (N.D. Tex. CA 88-0154-R) (summary judgment).

8. Sovereign immunity does not bar the plaintiffs' claims. NAACP v. CHA, Memorandum Opinion and Order, Aug. 27, 1993 (N.D. Tex. CA 88-0154-R) at pages 40-44, 42 n. 140.

B. Due Process in the entry of the Remedial Order

9. HUD claims that it was not given the opportunity to respond to the portions of this Courts' Remedial Order which were not in any version of "the Cisneros Plans" -- and thus argues that it was denied due process and the benefit of the adversary process. *This is simply not true.*

10. On September 27, 1994, this Court conducted a hearing on the HUD and DHA remedy proposals and on the plaintiffs' objections to those proposals. The Court elicited testimony showing that little or no negotiations on remedy had occurred before this 9/27/94 hearing.[8] After this hearing, there were subsequent negotiations between the parties, at which the Court and Special Master Louis J. Weber, Jr. were present.[9] During these negotiations, *the plaintiffs provided both HUD and the Court with versions of a proposed remedial order which contained provisions similar to those entered by the Court.*

11. After these negotiations ended, HUD's attorney advised the Court of their analysis of the plaintiffs' proposed remedial order. HUD also sent a copy of its proposed Remedial Order to the Court; and, in the transmittal letter, the HUD attorney stated:

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[8]9/27/94 Transcript, pages 38-39.

[9]The parties specifically consented to the presence of the Court at the negotiations (10/12/94 letter from Special Master Louis J. Weber, Jr. to counsel for all parties).

> "HUD believes that the information here provided *completes the record as to the position of HUD and plaintiffs on a remedial order affecting HUD.* HUD, therefore, respectfully requests that the Court act quickly to enter a remedial order and close this stage of the litigation."[10]

12. HUD made the same statement about "a complete record" -- and it made the same request for entry of a final order -- in HUD Memorandum in Response to Plaintiffs' Motion for Partial Approval of HUD Remedial Measures, filed Dec. 28, 1994.[11]

13. HUD never changed its position that the record on remedy was complete and that the case was ready for decision. Relying on the HUD representations, the Court did not schedule any further hearings, and it proceeded to enter the Remedial Order Affecting HUD on April 26, 1996. Clearly, HUD has not been denied due process.

14. The cases cited by HUD are not even remotely relevant to this situation -- in which the HUD attorney represented to the Court that the record was complete and that the case was ripe for decision. See Seven Elves, Inc. v. Eskanzi, 645 F. 2d 396 (5th Cir. 1981); Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F. 2d 1185 (7th Cir. 1990).

15. HUD also claims that the supposed lack of due process justifies its proposed modifications. Yet, by its motion to modify the Remedial Order, *HUD is seeking modifications of paragraphs taken almost verbatim from the Cisneros Plan and the HUD 1994 proposed Order.*

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[10]1/13/95 Peebles letter to the Court, page 3.

[11]In this memorandum, HUD also requested the entry of the HUD proposed remedial order which was sent to the Court with the Jan. 13, 1995 letter from Tom Peebles. This is the proposed order referred to in this opinion as "*the HUD 1994 proposed order.*"

For example:

> **(i) HUD seeks to modify Paragraph A.3 of the Remedial Order Affecting HUD, which *orders HUD to seek suburban cooperation agreements with DHA – even though A.3 is identical to A.2 of the HUD 1994 proposed order.***
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> **(ii) HUD seeks to delete Paragraph A.5, which orders HUD to investigate refusals by suburbs to enter into a cooperation agreement with DHA. *Yet, A.4 of the HUD 1994 proposed order states that HUD will consider any such refusal when reviewing the community's discharge of its obligation to affirmatively further fair housing.* The 9/27/94 Cisneros Plan also included a provision that HUD would investigate claims of discrimination involving information that opposition to the placement of proposed new federally assisted housing may interfere with project development. And, that 9/27/94 Cisneros Plan also provided that "All of the enforcement powers that are or will be available under the Executive Order No. 12892 (Jan. 17, 1994) *will be bought to bear by HUD* as appropriate in Dallas County and the City of Plano."**
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> **(iii) HUD seeks to delete Paragraph C.1 of the Remedial Order, which states that "HUD shall provide DHA with $300,000 per year for ten years, adjusted for inflation, for the provision of mobility services to African-American applicants for DHA's low income housing programs."[12] *Yet, this provision is substantially identical to C.1 of the HUD 1994 proposed order*, which states that "HUD will provide DHA with up to $300,00 per year for seven years to fund a housing mobility program in Dallas, *to be operated by either DHA or one or more third party nonprofit organizations (mobility counseling provider).*"**

16. In summary, this Court has given HUD all of the adversary process that the HUD lawyers wanted on the remedial issue. And, any due process that HUD believes it had been "denied" was certainly afforded to HUD at the June 10-11, 1996 hearings on the motion to modify.

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[12]**The footnote to Paragraph C.1 states "Housing mobility services shall be provided by DHA or, with the consent of the Court, by one or more third party nonprofit organizations."**

C. Specific Modifications Proposed by HUD

17. The specific modifications requested by HUD's proposed remedial order fall into three categories: 1) paragraphs of the Court's Remedial Order that are not challenged by either the HUD Memorandum or its proposed order,[13] 2) paragraphs of the Remedial Order that are not contested in the HUD Memorandum, but that are modified or deleted in the proposed HUD order, and 3) paragraphs of the Remedial Order that are contested in the HUD Memorandum and modified or deleted in the proposed HUD order. Each category will be discussed separately.

(i) Category 1 Paragraphs: Not Challenged by HUD

The fourteen category 1 paragraphs not contested by HUD are A.4, B.7, C.2, C.3, D.1, E.1, E.2, E.3 and F.3 through F.8 of this Court's Remedial Order. Obviously, these paragraphs require no discussion.

(ii) Category 2 Paragraphs: Not Contested by HUD's Memorandum

18. The four category 2 paragraphs are A.2[14], A.3[15], A.6[16] and D.2[17]. *Perhaps* they are technically challenged by HUD's proposed order since it deletes or modifies these provisions. However, the HUD Memorandum either claims that HUD is seeking to comply with or otherwise satisfy these obligations, or it makes no mention at all of the changes in the proposed order.

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[13]The HUD Motion is simple. It requests the Court to Modify the Remedial Order Affecting HUD by entering the "attached" proposed HUD remedial order, and it simply refers to the Memorandum and HUD exhibits.

[14]HUD Memorandum pages 5, 26.

[15]Not mentioned in HUD Memorandum, but deleted in proposed order.

[16]HUD Memorandum pages 5, 26.

[17]HUD Memorandum pages 37-38.

Because HUD has given the Court no grounds upon which these "objections" could be considered, Fed. R. Civ. P. 7(b) (1), the HUD modifications to these paragraphs merit little discussion.

Paragraph A.2

19. HUD states that it wants to comply with A.2 (creation of comparable units in white areas) by making available 320 Section 8 units per year for 10 years pursuant to Paragraph A.6. The HUD Memorandum would impose three conditions on HUD's proposed method of compliance: 1) the Remedial Order "is clarified" to permit the units to be Section 8 units provided at the rate of about 320 per year for 10 years; 2) this obligation is conditioned upon the availability of funding; and 3) the reference to 42 U.S.C. § 1439(d) is eliminated "so that HUD will have discretion to determine the precise source for the units."

20. *There is no need for the Court to consider HUD's proposed A.2 conditions at this time.* When HUD submits its proposal to comply with Paragraph A.2, in the form of a plan submitted pursuant to A.6, these three conditions can, *and will*, be considered[18] -- along with the several objections the plaintiffs have to the plan. For example, plaintiffs contest the particulars of HUD's Regional Mobility Counseling Entity proposal, the requested waiver of the Section 8 participants' freedom of choice, and the definition of "white areas." *The Court will consider all objections by HUD and by the Plaintiffs once the HUD A.6 plan is submitted.*

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[18]**Plaintiffs have indicated that they do not object to these conditions, and the Court sees no problem with them.**

21. Finally, HUD's proposed version of A.2 does not even create an enforceable obligation. The statement *"HUD has consented* to provide 3205 Section 8 units to a Regional Mobility Counseling Entity ("RCME"), at a rate of about 320 per year" cannot be violated by any action of HUD. This sentence is a statement of fact (HUD's "consent"), not an obligation ("HUD is ordered"). If HUD should choose not to provide the Section 8 units, there is no provision for this Court to enforce -- *and HUD offers no explanation of why it did not submit language creating an enforceable obligation.*

Paragraph A.3

22. HUD's Memorandum does not mention any changes in A.3, the paragraph requiring HUD to seek suburban cooperation agreements with DHA for a reasonable number of units. Nevertheless, the proposed HUD order revises this obligation so that it would only apply to future allocations which replace Section 8 allocations. However, *the language in A.3 is identical to the language which was in paragraph A.2 of the HUD 1994 proposed order*, and HUD has provided no reasons for this change. Indeed, HUD expresses its opinion that it "has every reason to expect that [Dallas County and the suburbs] will cooperate; *and HUD states that it will continue to seek that cooperation.*[19] Paragraph A.3 requires nothing more.

Paragraph A.6

23. HUD's proposed deletion of A.6, which would remove the standards by which HUD's Section 8 plan would be evaluated, is clearly without merit and it is rejected.

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[19]HUD Memorandum pages 24-25.

Paragraph D.2

24. D.2 requires HUD to take the need to eliminate the vestige of unequal conditions in the Section 8 program into account "in its administration of the Federal programs for housing and community developments throughout Dallas County...and the adjoining areas." The HUD Memorandum does not contest this paragraph; indeed, it even identifies programs which HUD claims are examples of compliance. However, the proposed HUD order eliminates this provision, substituting only a declaration that HUD's actions under the Regional Mobility Counseling program and other existing programs "aid" in the elimination of vestige D. There is absolutely no reason to modify D.2.

(iii) Category 3 Paragraphs: Challenged by HUD's Memorandum and Proposed Order:

25. The fifteen category 3 modifications are all of the remaining paragraphs of this Court's Remedial Order.[20] The requested mofidications to these paragraphs range from minor word changes to very substantial additions and deletions. These proposed modifications will receive individual consideration following a discussion of the legal principles applicable to HUD's request to modify this Court's Remedial Order.

a. Legal grounds for modification of the remedial order

26. Alberti v. Klevenhagen, 46 F. 3d 1347 (5th Cir. 1995), sets out the standards for modification of a judgment under Fed. R. Civ. P. 60(b) (5) or (6). Sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or if new ones have since arisen. In

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[20]The category 3 paragraphs are A.1, A.5, A.7, A.8, B.1, B.2, B.3, B.4, B.5, B.6, B.8, B.9, C.1, F.1 and F.2.

addition, when the modification relates to the vindications of a constitutional right, the modification must be suitably tailored to the changed circumstance. Id. at 1365.

27. *HUD does not even attempt to argue that this standard applies to any of its proposed changes except Paragraph A.5* -- which requires HUD to initiate an investigation if a suburb refuses to enter into a cooperation agreement with DHA. HUD argues that its new promise to provide Section 8 units -- instead of public housing units -- for the creation of additional units in white areas means that the situation is unlikely to arise.[21] Although the promise of 3,200 Section 8 units in the future is a new circumstance, *it is only a promise.* At least 10 years, several HUD and Presidential administrations, many appropriation and authorization statutes, and other unforeseen circumstances stand between the making and the fulfillment of this promise. Therefore, HUD's promise is not *a changed circumstance* authorizing a modification of the Remedial Order.

28. Moreover, this promise alone does not solve the problem of suburban locations for the allocation of public housing units that have already been provided to DHA or that will be provided in the future. Half of these units should have been in the suburbs. See Remedial Order Affecting DHA ¶ 4.5, page 4.

29. HUD and DHA now have the obligation to make every effort to employ all reasonable methods to formulate a remedy and to achieve the greatest possible degree of relief taking into account the practicalities of the situation. Hills v. Gautreaux, 425 U.S. 284, 297 (1976). The Court must require relief that is structured to assure that the violations do not occur

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[21]HUD Memorandum page 24.

again and that any lingering effects of past discrimination are removed to the extent practical. Young v. Pierce, 685 F. Supp. 975, 979 (E.D. Tex. 1988).

30. As a past HUD Secretary, Mr. Samuel R. Pierce, accurately described the obligatons of HUD and public housing authorities to remedy the effects of past racial segregation:

> "The duty to disestablish a dual public housing system and to effect a transition to a unitary system is in most significant respects, similar to, and is no less than, the duty to disestablish dual school systems."[22]

31. The Supreme Court has explicitly approved the application of the root and branch eradication principles of school desegregation to public housing desegregation. Hills v. Gautreaux, 425 U.S. 284, 297 (1976). The other courts considering remedy issues in cases of purposeful segregation in publicly assisted housing programs have followed this principle. Young v. Pierce, 685 F. Supp. 975, 979 (E.D. Tex. 1988); U.S. v. Yonkers Board of Education, 837 F. 2d 1181, 1235-1236 (2d Cir. 1987), cert. denied 486 U.S. 1055 (1986); Jaimes v. Toledo MHA, 833 F. 2d 1203, 1207-1208 (6th Cir. 1987).

32. The Court's Remedial Order Affecting HUD meets these legal standards. HUD's objections to this order do not even mention, and thus do not contest, these legal standards. Indeed, HUD does not contest the Court's findings on the remaining vestiges or its obligation to eradicate those vestiges to the extent practical.

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[22]Plaintiffs' 12/12/88 exhibit # 29(2/28/84 Memorandum from Pierce to Eudaly, Subject Public Housing Desegregation).

b. Analysis of HUD's proposed modifications

For the following reasons, the Court rejects the fifteen category 3 modifications proposed by HUD.[23]

Paragraph A.1

33. HUD's requested modification of A.1 is minor, the elimination of the sentence referring to the 42 U.S.C. § 1437p prohibition against the use of vouchers as replacement units. However, so long as this prohibition remains suspended by Congress,[24] *it will have no effect in the Remedial Order – so its deletion is not necessary.*

Paragraph A.5

34. HUD wants to eliminate A.5 -- which requires HUD to investigate refusals by suburbs to enter into cooperation agreements with DHA. HUD first argues that there is no need for such investigations: since HUD is offering to use vouchers instead of public housing units, supposedly the suburbs will willingly cooperate. HUD also claims that its discretion to investigate for civil rights violations is judicially unreviewable.

35. With respect to HUD's first argument, the use of vouchers *does not* eliminate the need to secure suburban locations for half the present allocation of public housing units. No suburb has willingly cooperated since the City of Dallas began making requests in 1990.

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[23]The category 3 paragraphs are A.1, A.5, A.7, A.8, B.1, B.2, B.3, B.4, B.5, B.6, B.8, B.9, C.1, F.1 and F.2.

[24]HUD Memorandum pages 25-26 n. 13.

36. Moreover, A.5 *is very similar to provisions in both the HUD 1994 proposed order and the 9/27/94 Cisneros Plan.* Paragraph A.4 of the 1994 HUD proposed order stated that, if any suburb or Dallas County refused to enter into cooperation agreements, "*HUD shall take such refusal into consideration when reviewing the community's discharge of HUD obligations to affirmatively further fair housing.*" The 9/27/94 Cisneros Plan, pages 10-12, also included various provisions committing HUD to preliminary investigations of matters possibly involving adverse effects on the remedial process: the Secretary would investigate claims of discrimination involving information that opposition to the placement of proposed new federally-assisted housing may interfere with project development; and "*All of the enforcement powers that are or will be available under the Executive Order No. 12892 (Jan. 17, 1994) will be brought to bear by HUD as appropriate in Dallas County and the City of Plano.*"

37. With respect to HUD's second argument concerning A.5, under Heckler v. Chaney, 470 U.S. 821, 832 (1985), enforcement decisions are presumptively unreviewable. However, this Court's Remedial Order *does not* provide for judicial review of the decisions which HUD may make as a result of its investigations. In addition, the civil rights laws and regulations -- as well as HUD's request that this Court order implementation of the Cisneros Plan -- are sufficient to overcome any presumption that HUD cannot be ordered to conduct an investigation. In fact, HUD's own Title VI regulations require an investigation whenever any information indicates a possible failure to comply with Title VI [25] -- and, *it was HUD who asked this Court to approve and order aggressive enforcement of the civil rights laws* in the 9/27/94 Cisneros Plan and the 1994 HUD proposed order. Finally, the Fair Housing Act requires HUD to investigate any and all

[25] 24 CFR 1.7(c).

complaints filed with the agency[26] -- *including the Title VIII complaint which was filed with HUD on June 5, 1996, on behalf of Walker class members against suburbs who refuse the City and DHA's requests for cooperation agreements.*[27]

Paragraph A.7

38. HUD proposes two changes to A.7, which provides for the use of HUD assisted projects in predominantly white areas to create desegregated housing opportunities for class members. *The first, the proposed inclusion of the Regional Mobility Counseling Entity into the process, can wait until the Court rules on this proposal.* The second change is HUD's request for a stay of implementation until it can develop a new preference plan since Congress has suspended the use of all federal preferences.[28] However, as the plaintiffs point out, the only reason for the preference requirement is to create "a level playing field" for class members by giving desegregation the same preference as paying excess amounts of rent, etc. With no federal preferences being applied to anyone, there is no need to give class members a preference. Accordingly, there is no reason to either modify or stay the operation of paragraph A.7.

Paragraph A.8

39. HUD seeks to eliminate A.8, which requires HUD to submit an assessment of the feasibility of the "Clearinghouse" program. First, HUD argues that A.8 should be deleted because HUD developed the concept for this type of assessment in the East Texas housing litigation. However, while HUD may have developed the concept in connection with the need to

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[26]42 U.S.C. 3610(a) (1) (B) (iv).

[27]Pls. Exh. 12(6/10/96 hearing).

[28]HUD Memorandum pages 33-34.

desegregate East Texas, its terms show that it is also suitable for use in metropolitan areas such as Dallas. Second, HUD argues that no assessment is necessary because all of the functions of the Clearinghouse are being performed by some other entity. *This is not true.* For example, the Clearinghouse is to "secure the cooperation of other important actors whose impact upon fair housing is substantial, including employers, schools, transportation providers and social service agencies." There is no entity performing this function under either the HUD or DHA Remedial Orders. *While the Court does recognize that this concept may or may not be workable,* HUD's "reasons" for eliminating the requirement *that it assess the concept for use in this case* do not justify the elimination of A.8.

Paragraphs B.1 and B.8

40. HUD is ordered in B.1 to *prepare and submit a schedule* for funding and achieving the unit and project conditions necessary for substantial equality. B.8 requires HUD to *submit a plan* for achieving and maintaining substantial equality of conditions in and around DHA's existing and future projects. Contrary to HUD's concerns, these *paragraphs do not order HUD to fund or achieve any item listed in B.1.* They require only the *submission* of a schedule for court approval. *As this Court made clear at the June 10-11, 1996 hearings, no order will be entered concerning any item of the B.1 list until i) the plaintiffs file a motion for an order requiring funding and achievement of specific items, and (ii) HUD has the opportunity to object to the funding or achievement or any item listed in B.1*

41. HUD's proposal to eliminate these planning and scheduling requirements, on the gounds that DHA has already made such plans, is also rejected. Unless HUD endorses DHA's plans and accepts those plans as its own, there is no duplication. Each source of available funds

for DHA's plans requires HUD approval for those funds.[29] Moreover, the coordination of any funding made available under other HUD programs -- such as the Drug Elimination Grant program or the CDBG program and any non-HUD funding made available through the Fair Housing Council efforts -- will require a HUD plan and schedule to avoid duplication or omissions.

42. This Court's Remedial Order properly defers to the discretion of the administrative agency by allowing HUD to propose a detailed plan for the eradication of the vestiges of discrimination . These plans are central to the desegregation process. Freeman v. Pitts, 503 U.S. 467, 472 (1992), cases collected; Columbus Board of Education v. Penick, 443 U.S. 449, 458 (1979). If HUD does not do this planning, then the Court must do so. HUD should at least attempt to conduct its own planning.

43. HUD also contests the inclusion of various items in the B.1 list -- such as utility allowances for air conditioning -- on the grounds that the expenses are not eligible for HUD funding. Again, *it is obvious from the plain language of this Court's Remedial Order that neither B.1 nor B.8 requires HUD to fund or achieve any item on the B.1 list.* In addition, nothing in B.1 or B.8 *requires* HUD to use its own funds. Indeed, the purpose of B.4 and B.5 is to identify and use *other funding programs* in the equalization process. If other funds cannot be used for the contested items, them presumably the plaintiffs will request the Court to order the use of HUD funds. *But, until such a request is made, HUD's objections are premature because there is no issue concerning the use of HUD funding for the Court to determine.*

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[29]See 42 U.S.C. 14371(e)-modernization funds; 24 CFR 990.112-operating subsidy.

Paragraph B.2

44. HUD wants to modify B.2 with language pointing out that funding for improvements is also available from DHA's operating subsidy and stating that DHA has already received the CIAP funding. Neither change is substantive. Indeed, the next paragraph, B.3, makes it clear that the DHA operating subsidy can be used for those improvements.

Paragraph B.3

45. B.3 states that HUD has authority to increase DHA's operating subsidy -- and that if the subsidy provided to DHA, in combination with other funding, does not allow DHA to meet its obligations -- *then DHA or the plaintiffs may apply to the Court for relief.* HUD proposes the deletion of this paragraph, arguing that B.3's discussion of the law and regulations concerning DHA's operating subsidy is wrong. *Again, HUD's arguments are premature and there is no need to delete B.3. HUD is not being ordered to do anything by this paragraph;* the dispute between the plaintiffs and HUD about HUD's authority to increase DHA's operating subsidy will not be presented for decision until the plaintiffs or DHA apply to this Court for some specific relief that requires the Court to resolve this dispute concerning possible increases in DHA's operating subsidy. There is no reason to delete B.3.

Paragraph B.4, B.5 and B.9

46. HUD seeks minor modifications to B.4, B.5 and B.9. While plaintiffs do not oppose the requested modifications, the Court is not convinced that the modifications are either necessary or appropriate. Alberti, 46 F.3d at 1365.

Paragraph B.6

47. **HUD wants to replace the general requirement in B.6 -- that it enforce the obligations of the City of Dallas to affirmatively further fair housing -- with a specific requirement that the City should spend 25% of its CDBG money on equalization measures. As the HUD Memorandum argues (on behalf of HUD), the City is entitled to due process before any such condition is imposed upon it.[30] City of Kansas City, Mo. v. HUD, 861 F. 2d 739, 744 (D.C. Cir. 1988). Moreover, the Remedial Order does not state or even assume that the City is not currently complying with its obligations. If HUD should later decide that the City, for whatever reason, should set aside 25% of its CDBG funds to equalize conditions, then the City will have the opportunity to contest any such determination by HUD. The attempt by HUD to deny due process to the City is rejected, as is HUD's proposed replacement for B.6.**

Paragraph C.1

48. **C.1 is *substantially identical to paragraph C.1 of the HUD 1994 proposed order* which states "HUD will provide DHA with up to $300,000 per year for seven years to fund a housing mobility program in Dallas, *to be operated by either DHA or one or more third party nonprofit organizations* (mobility counseling provider)." The Court added to the HUD version of C.1 the requirement for Court approval of the use of any third party nonprofit organization. Now, HUD wants to eliminate C.1 and replace it with a proposal that would only fund a "Regional Mobility Counseling Entity." And, *HUD's proposed order would, without explanation, eliminate any court approval of the provider and any court control over this entity*; it would also**

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[30]**HUD Memorandum page 15.**

drastically limit the DHA housing mobility program.[31] HUD's proposed changes are rejected for the reasons discussed in the next four paragraphs.

49. Obviously, the purpose of the mobility program is to eliminate vestiges of racial segregation in DHA's programs. DHA remains subject to this Court's orders and control in the implementation of this remedy. Yet, the proposal to eliminate court approval and oversight of DHA or the Regional Mobility Counseling Entity (RMCE) is not even addressed by the HUD Memorandum.[32]

50. Moreover, the HUD proposal does not identify the entity that will operate the mobility program; and, quite surprisingly, *the HUD witnesses at the June 10-11, 1996 hearings could not identify a single third party nonprofit organization* that could (or would) replace DHA as the operator of the mobility program. In fact, the credible testimony presented at this hearing established that: (i) there was no other entity in this area that could provide the mobility services besides DHA;[33] (ii) that DHA was doing an excellent job in its operation of the mobility program;[34] and (iii) that if the mobility program is suddenly removed from DHA (as provided

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[31]*HUD's proposal order would appear to completely terminate the DHA housing mobility program*, substituting the Regional Mobility Counseling Entity. However, at the June 10-11, 1996 hearings, the HUD attorney "explained" that HUD "merely" intended to remove the "mobility counseling" from DHA, and leave DHA with certain "administrative responsibilities" concerning the mobility program.

[32]At the June 10-11, 1996 hearings, the HUD attorney suggested that HUD *"may"* agree to "give" the Court "a veto" over the RMCE selected by HUD. However, the HUD proposal to isolate the RMCE from control of this Court was not withdrawn.

[33]And, *perhaps* to a much lesser extent, the Walker Project.

[34]Indeed, Secretary Cisneros has, within the past several weeks, complimented DHA's Alphonso Jackson for the excellent job DHA was doing with its mobility program.

in the HUD proposal), it would be at least 5-6 months, and *probably well in excess of a year*, before anyone received the benefits of the phantom RMCE proposed by HUD.

51. The HUD proposal, as written, could result in the provision of services to as many suburban housing program participants as to DHA class members. Attachment A to the Pearl Declaration submitted with HUD's motion to modify states:

> **"The responsibilities of the RMC under the terms of this Order shall be:**
>
> **a) *making all offers to applicants,* deemed eligible by PHAs, on the merged waiting list for Dallas and adjacent areas public housing, §8 certificates, and assisted housing, and counseling, encouraging, and assisting all tenants and applicants of PHAs in Dallas and adjacent areas to make desegregative moves by:**
>
> **(i) providing counseling and support services respecting housing and economic development opportunities, including home visits, escorting to units, post-move support services, and counseling on educational and employment opportunities. life skills and personal development, health and legal issue;"**

The meaning of the quoted section seems clear: *HUD's proposed mobility program could be spending the funds provided for class members on others* -- including white persons on the suburban program waiting lists who do not need help finding housing in white areas.

52. *Finally, the Court remains open to any future proposal by HUD concerning a Regional Mobility Counseling Entity.* This requires no modification of Paragraph C.1, which already allows the operation of the housing mobility program "by either DHA or one or more third party nonprofit organizations" approved by the Court. HUD's proposed changes to C.1 are denied.

Paragraph F.1

53. F.1 contains the unremarkable statement that this Court retains jurisdiction to enforce and modify the injunction according to general equitable principles. HUD's order would eliminate this provision and inset a 10 year limit on jurisdiction. HUD's memorandum claims this is necessary to eliminate "the open-ended nature" of the Court's order, citing Oklahoma City Board of Education v. Dowell, 498 U.S. 237, 248 (1991).

54. The Court has the responsibility to maintain jurisdiction to enforce and modify the injunction according to general equitable principales. Alberti v. Klevenhagen, 46 F. 3d 1347, 1365 (5th Cir. 1995). Dowell does not support a different rule. The Supreme Court in Dowell held that federal jurisdiction in a desegregation case should end only when the defendant can show compliance with the desegregation order and that the vestiges of past discrimination had been eliminated to the extent practicable. Dowell 498 U.S. at 249-250. The Supreme Court does not mention a fixed number of years in Dowell. HUD's proposed elimination of F.1 is denied.

Paragraph F.2

55. HUD proposes to modify F.2 even though *this paragraph closely tracks a similar provision in the HUD 1994 proposed order* and sets the standards for the Court's own determination of whether to extend its jurisdiction after 10 years. *Paragraph F. 3 allows HUD to seek such a determination at any time before the end of 10 years.* HUD's proposed order would eliminate F.2 even though F.2 and F.3 set out the exact test approved in Dowell; this Court's jurisdiction will end if HUD has complied with the Remedial Order and DHA's low income housing programs have been desegregated to the extent practical. If HUD has complied with the Remedial Order and DHA's programs have been desegregated to the extent practical *before 10*

years, then the jurisdiction of this Court will end whenever HUD successfully moves for that relief. HUD's modification of F.2 is rejected.

CONCLUSION

In summary, the primary objections raised by HUD's motion to modify are premature because they relate to provisions that do not order HUD to do anything -- matters that will require (i) a motion for specific relief by the plaintiffs and DHA, and (ii) a hearing giving HUD the opportunity to object to any such specific relief.[35] In addition, the HUD motion to modify unfortunately seeks to withdraw provisions of the Cisneros Plan submitted to the Court for approval and which were adopted in the Remedial Order Affecting HUD. Accordingly, the HUD Motion to Modify the April 16, 1996 Remedial Order is DENIED.

ENTERED: JUNE 12, 1996

JERRY BUCHMEYER, CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

[35]See, e.g., paragraphs 20, 36, 38, 40, 43, 45 and 52 of these findings and conclusions.