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November 29, 1982

Richard E. Jones
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Topeka, Kansas 66603

Dear Richard and Deborah:

Please find enclosed a copy of a brief on the burden question. On page one, line one the date of Judge Rogers' order needs to be filled in. Please make any changes or modifications that you deem appropriate.

Sincerely,

Jon C. Dubin

Jon C. Dubin

Enc.

/ds

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER BROWN, et al., Plaintiffs, -and- CHARLES and KIMBERLY SMITH, minor children, by their mother and next friend, LINDA BROWN SMITH, et al., Intervening Plaintiffs, v. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al., Defendants.	Case No. T-316

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL

On November , 1982, this court overruled Magistrate Crow's order which had denied the plaintiffs' motion to compel answers to interrogatories pertaining to the school district's practices from 1941 to 1951. The Magistrate had sustained the defendants' relevance and res judicata objections to those interrogatories, but declined to consider the defendants' burdensomeness objection. In reversing the magistrate, this court rejected the defendants' relevance and res judicata objections and indicated that it would consider the defendants' burdensomeness objection at the December 3, 1982 status conference.

This court should reject the defendants' burdensomeness objection and finally grant the plaintiffs' 2-1/2-year-old motion to compel. The defendant neither has sustained nor can sustain its burden of establishing that the burden of retrieving the requested information outweighs the benefit to the plaintiffs from disclosure.

ARGUMENT

THE DEFENDANT CANNOT ESTABLISH THAT THE BURDEN OF RETRIEVING THE REQUESTED INFORMATION OUTWEIGHS THE BENEFIT TO THE PLAINTIFFS FROM DISCLOSURE

It is a well established principle of civil discovery that a party objecting to interrogatories bears the burden of showing that the request should not be answered. 4A Moore's Federal Practice ¶33.27, (2d Ed. 1979); Wright & Miller, Federal Practice and Procedure: Civil, §2173 (1970). The objecting party's burden applies with equal force to objections on burdensomeness or inconvenience grounds. See eg., Wirtz v. Capitol Air Service, Inc., 42 F.R.D. 641, 643 (D.Kans. 1967); Reitmeister v. Reitmeister, 4 F.R.D. 197, 198 (S.D.N.Y. 1944).

Further, in determining whether a party has carried its burden on demonstrating that interrogatories are unduly burdensome, the Tenth Circuit requires a balancing of the burden with the benefit from disclosure. See Rich v. Marietta Corporation, 522 F.2d 333, 343 (10th Cir. 1975). "If the information sought promises to be particularly cogent to the case, the defendant must be required to shoulder the burden." Id. In the instant case, since the information sought is particularly cogent and relevant to several issues in the case, the defendant must be required to "shoulder the burden".

A. BENEFIT TO THE PLAINTIFFS

The pre-1951 evidence is essential to establishing the full extent of the defendants' violations and the nature of its duties and responsibilities. This evidence is relevant to several legal issues bearing on the nature of the defendants' violations and duties in the district's secondary schools. This material is also needed to identify the defendants' violations and duties with respect to policies and practices, in addition to discriminatory student assignments. Finally, this evidence is necessary to establish the historical development and evolution of a pattern of educational discrimination in the district and is reasonably calculated to lead to other relevant evidence.

1. SECONDARY SCHOOL SEGREGATION

In the initial Brown decision, Brown v. Board of Education, 347 U.S. 483 (1954)("Brown I"), the Supreme Court focused on the constitutionality of statutorily authorized segregation in Topeka's elementary schools. Since segregation in Topeka's secondary schools was not statutorily authorized in 1951, those schools were not a part of the original action. See Brown v. Board of Education of Topeka, 84 F.R.D. 383, 396 (D.Kans. 1979). However, later cases have established that a condition of segregation resulting from school authorities' non-statutory intentional acts is not any less unconstitutional or pernicious. See e.g. Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)(Dayton II); Columbus Board of Education v. Pennick, 443 U.S. 449, 456-57 (1979); Keyes v. School District No. 1, 413 U.S. 189, 201 (1973).

As the Court noted in Columbus:

> ...the Equal Protection Clause was aimed at all official actions not just those of state legislatures...Our decision in Keyes... plainly demonstrates that there is no magical difference between segregated schools mandated by statute and those that result from local segregative acts and policies.

443 U.S. at 456 n.5.

Where a racially discriminatory school system is found to have existed at the time Brown I was decided, school authorities are deemed to have been operating under an affirmative duty to disestablish that system since the time of the court's decision in Brown v. Board of Education, 349 U.S. 294 (1955)("Brown II"). Dayton II, 443 U.S. at 537; Columbus, 443 U.S. at 458-60. This duty applies with equal force to non-statutory intentionally segregated school systems. Columbus, 443 U.S. at 456 n.5.

The duty imposed requires school authorities to take "whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id. at 458-59; Green v. County School Board, 391 U.S. 430, 437-38 (1968). Each instance of a failure or refusal to fulfill that affirmative duty continues the violation of the Fourteenth Amendment. Columbus, 443 U.S. at 459; Wright v. Council of City

of Emporia, 407 U.S. 451, 460 (1972); United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972).

There is no question that the defendants have been under an affirmative duty to desegregate Topeka's elementary schools since Brown II. Under the Supreme Court's holdings in Columbus and Dayton II, proof of the existence of intentional segregation in Topeka's secondary schools in 1954 would trigger the defendants' duty to desegregate those schools since the Brown II decision as well.

Obviously essential to proving an intentional condition of segregation in 1954 is evidence detailing the defendants' acts and practices that contributed to that condition. Such evidence must necessarily focus on a period of time before 1954.[1/] Indeed the reasonableness of the instant plaintiffs' request -- prudently limited to information only back to 1940 -- becomes apparent when compared to information relied on in other non-statutory segregation cases. In Columbus, the court described the history of segregation in Columbus beginning with practices in 1871. See Columbus at 455 n.4. In Dayton, the court identified practices dating back to the 1930s. See Dayton II, at 532 n.6. See also Alexander v. Youngstown Board of Education, 675 F.2d 787, 794-802 (6th Cir. 1982) (discussing practices in Youngstown back to 1921); Reed v. Rhodes, 607 F.2d 714, 722-737 (6th Cir. 1979) (detailing practices in Cleveland back to 1940).

Moreover, information from the 1940s is of even more specific importance to the plaintiffs in the instant case since the state of Kansas statutorily authorized segregation in the Topeka junior high schools up to 1941. See Graham v. Board of Education, 153 Kan. 840 (1941). To the extent the defendants did not eliminate segregation in the junior high schools from 1941 to 1954, those defendants have clearly been under an obligation to do so since 1955.

1/ It is important to note that the defendants' segregative practices in the elementary schools in that time period are also relevant to proving intentional segregation in the secondary schools. Evidence that policies and practices in the secondary schools mirrored those in the admittedly discriminatory elementary schools is highly probative of a design to segregate the entire system. Moreover, in determining the segregative nature of the secondary schools, information on the elementary schools from which secondary school students are "fed" is relevant.

Further, in proving intentional segregation in Topeka's secondary schools in 1954, the plaintiffs are aided by the presumption of system-wide discrimination enunciated by the Supreme Court in Keyes v. School District No. 1, supra. In Keyes, the Court held that "a finding of intentional segregation in a meaningful portion of a school system creates a presumption that other segregated schooling in the system is not adventitious" 413 U.S. at 208. This court has already noted the Keyes presumption's applicability to segregation in Topeka's secondary schools since elementary schools constitute a meaningful portion of the Topeka school system. Brown v. Board of Education, 84 F.R.D. at 402.

The pre-1951 evidence will be essential to rebut the defendants' attempt to satisfy their shifted burden of proving that segregation in Topeka's secondary schools at the time of Brown I, was not the result of their intentional acts. Indeed, it is difficult to imagine how the defendants could even attempt to overcome the Keyes presumption's application in 1954 without themselves relying on information from the 1940s.

2. TOTALITY OF SEGREGATIVE PRACTICES

Further, since the time of Brown I, the Supreme Court has expanded its notion of segregated schooling to encompass practices and policies in addition to racial student assignments. As the Supreme Court stated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971):

> Where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

Accordingly, the pre-1951 materials are also necessary to establish the complete scope of the violations, throughout the school system, which the defendants have had an affirmative duty to remedy since 1955.

3. HISTORICAL DEVELOPMENT OF SEGREGATION

In addition, the pre-1951 information, together with the other information requested is relevant to establishing the historical development and evolution of a pattern and practice of educational discrimination in Topeka. Information that the defendants' post-Brown segregative policies and practices find their genesis in an acknowledged period of discriminatory schooling is probative of an intent to continue segregation in the school district.

Finally, apart from the pre-1951 information's direct relevance and importance to several issues in this case, the plaintiffs' request, limited to a ten-year time period, is also reasonably calculated to lead to other admissible evidence within the meaning of F.R.Civ.P. 26(b)(1).

B. BURDEN FROM DISCLOSURE

As mentioned previously the defendant bears the sole burden of establishing its objection to disclosure. However, the defendant has, commendably, been able to retrieve much of the information requested over the thirty-year period between 1951-1981. It is difficult to imagine that disclosure of another ten years of some of the same data, consisting of less than one-third as much materials as that already provided, would be oppressive.

CONCLUSION

For the reasons stated herein, the plaintiffs' motion to compel should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing supplemental memorandum in support of Plaintiffs' Motion to Compel, was served by depositing same in the United States mail, first class postage prepaid, the day of December, 1982, to K. Gary Sebelius, 1300 Merchants National Bank Building, Topeka, Kansas 66612, Attorney for Defendant Unified School District #501, and a copy to Leslie A. Kulick, Assistant Attorney General, Kansas Judicial Center, 2nd Floor, Topeka, Kansas 66612, Attorney for Defendants John C. Carlin and members of the state board of education.

RICHARD E. JONES