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., Case No. T-316

Intervening Plaintiffs,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al.,

Defendants.

REPLY BRIEF BY THE INDIVIDUALLY-NAMED DEFENDANTS ASSOCIATED WITH THE KANSAS STATE BOARD OF EDUCATION TO PLAINTIFFS' POST-TRIAL BRIEF AND PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW: POST-TRIAL

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COME NOW the individually-named defendants associated with the Kansas State Board of Education, by and through their counsel, Dan Biles of Gates & Clyde, Chartered, Overland Park, Kansas, and respectfully submit their reply brief in the above-captioned matter.

INTRODUCTION

This reply brief is divided into two sections. The first applies to those statements and legal assertions contained within the text of the document entitled "Plaintiffs' Post-Trial Brief." The primary thrust of this first section addresses plaintiffs' claim there is a substantive constitutional right to a particular degree of racial mixing of schools and plaintiffs' advocacy of the plus or minus 15 percent range of racial composition as the standard by which to gauge compliance with their position. The second section constitutes these defendants' reply to the document entitled "Plaintiffs' Proposed Findings of Fact and Conclusions of Law: Post-Trial." This section responds to certain specific allegations made by plaintiffs in this document against the individual members of the Kansas State Board of Education.

At the outset, however, two points need particular emphasis. First, contrary to the assertions of plaintiffs' counsel, no defendant or defense witness to this case has ever suggested the original Brown decision was wrongly decided, nor has any defendant advocated a return to the doctrine of separate but equal. (Plaintiffs' Post-Trial Brief, pp. 1-2). Second, plaintiffs must be held accountable in the record of this case for their baseless allegation Topeka school officials intentionally acted throughout the years since Brown to segregate Topeka schools by consciously creating "successor" Black schools.

(See Plaintiffs' Post-Trial Brief, pp. 28-78). To sustain this allegation would require this Court to find from the testimony of the witnesses it heard and the documentary evidence admitted into the record that the school administration of USD 501 was absolutely dedicated to racial bigotry and discrimination. Such an allegation, made from the sanctuary of counsel's office, is truly an insult to the witnesses who appeared under oath before this Court.[1]

SECTION I: REPLY TO PLAINTIFFS' POST-TRIAL BRIEF

Plaintiffs' post-trial arguments are an attempt to establish the proposition that in a former de jure school system Black students are constitutionally entitled to a specific degree of racial balance in their schools. This standard is plus or minus 15 percent of the Black and/or minority racial composition of the school system as a whole. It is this standard, plaintiffs argue, which defines "racially identifiable schools." This plus or minus 15 percent yardstick is what plaintiffs say determines whether a former de jure school system is desegregated. Obviously, these defendants disagree.

School desegregation/segregation analysis has never been reduced to mere mathematics. What is required of this Court is

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[1]Curiously, plaintiffs state on Page 2 of their brief that intent to discriminate is an irrelevant issue. Then, they devote several pages of their brief attempting to demonstrate "deliberate" school board actions plaintiffs claim were designed to create "racially identifiable schools."

an analysis of the Topeka school system based upon all the factors comprising the make-up of that school system. Green v. New Kent County School Board, 131 U.S. 430, 437, 88 S.Ct. 1689, 29 L.Ed. 2d, 716 (1968). It is well established there is no substantive constitutional right to a particular degree of racial balance or mixing, even in a former de jure school system. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971). The constitutional command to desegregate schools does not mean every school in every community must always reflect the racial composition of the school system as a whole. Id.

These defendants believe plaintiffs' effort to establish a specific racial balance standard in this case results from their own recognition of plaintiffs' failure to do what they must do: establish that a current condition of segregation exists today within the Topeka school system. Their counsel even concede,

> "Plaintiffs do not seek to establish segregation. The Supreme Court held that segregation existed. Plaintiffs seek to establish that there has not been desegregation."

(Plaintiffs' Post-Trial Brief, p. 2). (Emphasis supplied).

It is through the use of this rhetorical circle that plaintiffs seek to create a substantive constitutional right to racial balancing in schools. The plaintiffs state the "central fact" to be decided is whether there exists "racially identifiable schools." (Plaintiffs' Post-Trial Brief, p. 1). Plaintiffs go on to pronounce they are entitled to judgment if

they establish there are "racially identifiable schools" in Topeka. (Id). This, plaintiffs declare, is the command of Brown.

In reactivating this case, however, this Court told the plaintiffs what they must do. The Court said the plaintiffs have the burden to show: 1) segregated schooling "exists" today within the Topeka school system; and 2) it was brought about or maintained by intentional government action. Brown v. Topeka Board of Education, 84 F.R.D. 383, 399 (D. Kan. 1979), citing Columbus Board of Education v. Penick, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed. 2d 666 (1979). (Emphasis Supplied).

The fact plaintiffs cannot establish a current condition of segregation explains their dogged fascination with past history, despite this Court's repeated admonitions it is interested in the condition of the school system as it exists today. Thus, as a matter of law, it is not enough for plaintiffs to rely on the facts of the early 50's. What is paramount to this Court's decision as to whether to exercise its judicial powers today is whether there is today an unconstitutional condition of segregation existing in the Topeka schools. Plaintiffs' concession they do not seek to establish segregation entitles these defendants to judgment based upon the previous pronouncements of this Court, which are founded upon the legal precedent following and interpreting the command of the original Brown decisions.

The very cases which plaintiffs cite to the Court in its discussion of burden shifting illustrate the point. On Page Five

of Plaintiffs' Post-Trial Brief, they cite Keyes v. School District #1, Denver, Colo., 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed. 2d, 548 (1973), quoting the Court as follows:

> "After past intentional actions resulting in segregation have been established . . . the burden becomes the school authority's to show that current segregation is in no way the result of those past segregative actions."

Id. at p. 211 n. 17. (Emphasis Supplied).

Plaintiffs, then, go on to quote from the Keyes decision as follows:

> "The existence of subsequent or other segregated schooling within the same system justifies . . . imposing the burden . . . on the authorities to show that current segregation is in no way the result of those past segregative actions."

Id. 413 U.S. at 210, 212 n. 17. (Emphasis supplied).

On Page Six of the post-trial brief, plaintiffs reference Swann, stating as follows,

> "The Court explained that 'a history of segregation' together with present segregation' thrusts upon the school board the burden of justifying its conduct by clear and convincing evidence."

(Plaintiffs' Post-Trial Brief, p. 6). (Emphasis supplied).

Plaintiffs, then, go on to quote from Dayton Board of Education v. Brinkman, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed. 2d, 720 (1979), with the following passage:

> "Given intentionally segregation (sic) schools in 1954 . . . the system-wide nature of the violation furnished prima facie proof that current segregation . . . was caused at least in part by prior intentionally

> segregative acts. Thus, judgment for the plaintiffs was authorized and required absent counterveiling evidence by the defendant school officials."

443 U.S. at 537. (Plaintiffs' Post-Trial Brief, p. 6). (Emphasis supplied).

As this Court has said, and as the various decisions following Brown have required, the threshhold question in this case is whether there exists a current condition of segregation in the Topeka schools. Absent this, there is no need for this Court to exercise its judicial powers concerning the operation of the Topeka school system. Plaintiffs' rhetorical efforts to avoid this requirement should be deemed fatal to their current cause.

Plaintiffs seem to equate the affirmative duty to "effectuate a transition to a racially nondiscriminatory school system," Brown v. Board of Education, 349 U.S. 294, 299 (1955) (Brown II), to compliance with Dr. Foster's plus or minus 15 percent racial balance standard for student assignment; and Dr. Foster's so-called "Singleton ratio" for faculty/staff assignment. (See "Close is not good enough," Plaintiffs' Post-Trial Brief, pp. 7-9). No legal authority is cited by plaintiffs for the proposition that compliance with the plus or minus 15 percent range is required by Brown. Thus, the Court and these defendants are left to ponder as to just when this quantitative standard came into existence.

Clearly, this numerical standard was not born during the original Brown triology of cases in the 1950's. As repeatedly mentioned, the Topeka desegregation plan of the 1950's was

reviewed by the U.S. Supreme Court, without criticism, and with some praise from the high court. Indeed, this Court, in its affirmative review of the Topeka desegregation plan, stated:

> "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> If it is a fact as we understand it is with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

139 F. Supp. at 470.

If a specific racial balance was the plaintiffs' standard at that time, this Court never established it and plaintiffs never appealed the ruling. Indeed, plaintiffs at the time never even requested this Court to require any sort of numerical balance or even the setting of numerical goals. Since plaintiffs insist the commandments of Brown have not changed through judicial evolution since the 1950's, plaintiffs must further concede the lack of support for their notion of racial balancing by numerical standards of plus or minus 15 percent.

This is precisely why these defendants, at every opportunity, sought to pierce plaintiffs' use of ill-defined or unsubstantiated terminology, as well as the misleading use of percentages,[2] to quantify the reality of plaintiffs' contentions.

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[2]See, for example, the various percentages cited by plaintiffs in their "student assignment" section, Plaintiffs' Post-Trial Brief, pp. 14-17, where plaintiffs assert "15 of Topeka's 26 elementary schools are racially identifiable, 7 as minority and 8 as white. Over 1,000 minority students or 50% are in racially identifiable minority schools." If analyzed by Black, plaintiffs assert 11 of

This is why Dr. Foster was asked, on cross-examination, to agree with the mathematical calculations used to determine just how many students took a particular school outside of his plus or minus 15 percent Black "band" to make it a "racially identifiable school."[3] Similarly, Dr. Foster's notions of faculty/staff assignment are reduced to only 24 or 26 certificated teachers out of 911 teachers to bring USD #501 precisely to Dr. Foster's optimum standards. (Foster, pp. 764-765, 773).

Plus or Minus 15 Percent.

Plaintiffs assert the most commonly used method of measuring racial identifiability in desegregation cases is the use of a

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the 26 elementary schools are racially identifiable Black or White (Six Black, Five White), "and 49% of Black students are in six Black schools." Or see where plaintiffs assert half or more of the schools in Topeka were identifiable. Id.

[3]By using the calculations subscribed to by Dr. Foster, it was shown that as few as four or five Black students took a school outside of his plus or minus 15 percent band, with the total number of students taking all of the schools outside of the band being only 190 elementary students out of a total elementary enrollment of 8,387 students. This is only 2.26 percent of the entire elementary school enrollment. Looking at the entire Topeka school system, the total number of students which caused any Topeka school to fall outside the plus or minus 15 percent Black range amounted to only 234 students out of a total district enrollment in USD #501 of 15,103 students. This is 1.54 percent of the total student enrollment. Curiously, Dr. Foster conceded that in his use of these percentages he did not take into consideration how many students in a particular school would be required to make up a school grade or provide sufficient class size for proper instruction at a particular grade level. These factors obviously must be taken into consideration in analyzing whether student assignment policies cause a current condition of segregation. Therefore, this small number of students forcing schools outside the "band" must be viewed as de minimis and of no substantive consequence.

plus or minus 15 percent standard. Plaintiffs also state this plus or minus 15 percent standard is used in both liability and remedy phases of desegregation cases. Plaintiffs, then, proceed to list a number of cases which allegedly endorse the use of strict mathematical percentages of some degree of racial balance based upon a plus or minus percentage of the district-wide average of minority enrollment. (Plaintiffs' Post-Trial Brief, pp. 10-11). A careful reading of the cases cited by plaintiffs indicates they do not support the use of a strict plus or minus standard in liability phases of desegregation cases.[4]

The first case cited is Columbus Board of Education v. Penick, 443 U.S. 449, 455, n.3 (1979). The Columbus case indicates the Supreme Court did not endorse the plus or minus 15 percent standard. The Court only said the use of some

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[4]One of the earlier lower court decisions to which plaintiffs refer states as follows,

> "The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of Brown and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable."

Kelley v. Metropolitan County Bd. of Educ., 492 F.Supp. 167, 193 (M.D. Tenn. 1980).

mathematical ratios was acceptable under the Swann case for the formulation of a Court-approved desegregation plan. Furthermore, the standard was used in a remedy phase of the trial, not the liability phase.

The case of Clark v. Board of Education of Little Rock, 705 F.2d 265 (8th Cir. 1983), involved racial balance goals only for magnet schools. The court-approved plan sought 500 students for the magnet program, selected to achieve a 50 percent White/50 percent non-White racial composition, allowing for a 10 percent deviation. 705 F.2d at 269. The Little Rock district was 65 percent Black or more and the limit of 50 percent on Black enrollment was deemed "arbitrary" by the Court. 705 F.2d at 269, n.6. Again, this case involved the remedy phase of a desegregation action. The plan, found to be constitutional in this case, retained four all-Black schools. 705 F.2d at 272.[5]

Under these circumstances, it is difficult to imagine how plaintiffs can assert this case stands for the proposition that a plus or percentage range is required by the command of the Brown decision. Indeed, the Court went on to rule, "The creation of four all-Black schools in and of itself is not a constitutional violation." 705 F.2d at 272, citing Adams v. United States, 620 F.2d 1277, 1296 (8th Cir.) cert. denied, 449 U.S. 826, 101 S.Ct. 88, 66 L. Ed. 2d 29 (1980); Lee v. Macon County Bd. of Education,

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[5]It also is interesting to note the Clark court used the phrase "racially identifiable schools" only in reference to the four elementary schools which had non-White racial compositions in excess of 96 percent. Clark v. Bd. of Educ. of Little Rock, 705 F.2d 265, 272 (1983).

616 F.2d 805, 809 (5th Cir., 1980); Armstrong v. Board of School Directors, 616 F.2d 305, 321-322 (7th Cir., 1980).

In Kelley v. Metropolitan Board of Education, 687 F.2d 814 (6th Cir. 1982), the Sixth Circuit Court, noting the State of Tennessee had a "well established" history of de jure segregation, rather than endorsing the plus or minus 15 percent range, clearly stated the district court would be in error to apply blindly such a range. 607 F.2d at 818. The appellate court directed the district court to use ratios of White to minority students only as a starting point in attempting to fashion a desegregation plan. The Court stated:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 687 F.2d at 817.

Finally, this case also was a remedy rather than a liability phase case.

In Whittenberg v. School District of Greenville County, 607 F. Supp. 289 (D.S.C. 1985), the district court again was faced with the remedy phase of a desegregation case. In Whittenberg, the Court used the plus or minus 15 percent figure as a target. The school board's implementation of a plan using this target resulted in a constitutional plan and the school district was declared unitary, even though some schools were in excess of 60 percent Black enrollment under the Court plan. Further, the Court noted the plan, which used the plus or minus 15 percent

target figure, was beyond what was required under the Constitution. 607 F. Supp. at 295-296. Finally, the Court noted:

> "In addition, it is important to emphasize that, while the Fourteenth Amendment requires that school districts abolish dual systems of state-imposed segregation, there is no constitutional requirement that schools adhere to particular racial ratios. A racially mixed community may have schools that are either predominantly White or predominantly Black, but that fact without more, of course, does not offend the Constitution." Dayton Board of Education v. Brinkman, 433 U.S. 406, 417, 97 S.Ct. 2766, 2774, 53 L. Ed. 2d 851 (1977). ". . . The Constitution requires the elimination of all vestiges of state imposed segregated dual school systems, not the perpetual imposition of racial ratios."

607 F. Supp. at 298.

In Kelley v. Metropolitan County Board of Education of Nashville, 572 F. Supp. 317 (1983), the Court again was faced with the remedy phase of a desegregation case. In this newer episode of Kelley, the district court ruled the plus or minus figure was merely to be used as a starting point in attempting to fashion a remedy. 572 F. Supp. at 319.

In United States v. South Bend Community School Corporation, 511 F. Supp. 1352 (N.D. Ind. 1981), the plaintiff and defendants entered into a consent decree where the plus or minus figure was agreed to as a goal to be attained pursuant to agreement between the parties. The district court approved the consent decree. There was no finding the plus or minus figure was the appropriate measure for determining whether there was segregation or desegregation.

In Davis v. East Baton Rouge Parrish School Board (mistakenly identified in plaintiff's brief as Davis v. Board of Education of Little Rock), 514 F. Supp. 869 (1981), the district court again was faced with the remedy phase of a desegregation plan. Interestingly, Dr. Gordon Foster testified the plus or minus 15 standard was appropriate. The Court specifically, and emphatically, rejected this proposition, stating:

> "Dr. Foster established a precise 'range' of racial balance that he considered to be acceptable, which he defined as plus or minus 15 percent of the overall 60-40 make-up of the system. His 'ranges' were from 25.4 percent black to 55.4 percent black as an acceptable desegregated school. The Court refuses to accept the proposition that it is necessary to define to the fractional percentage point an 'acceptable' range of racial mix in any particular school. The jurisprudence is plain that the Court must look to the entire system in determining whether the public schools are desegregated."

514 F. Supp. at 873.

Instead, the Court created its own plan in considering all the factors appropriate in devising a desegregation plan. Even so, the Court retained in the plan it drew some one-race schools which were in existence under the previous segregated school system. 514 F. Supp. at 883-884, Table No. 1.[6]

In Tasby v. Wright, 520 F. Supp. 683 (N.D. Tex. 1981), the district court again was involved in the remedy phase of a desegregation case. Dr. Foster, yet again, attempted to convince the Court a strict plus or minus figure was appropriate, and, yet again, his theorem was rejected. 527 F. Supp at 711. The Court

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[6]The Court also noted the desegregation plan prepared by Dr. Foster left five one-race elementary schools and one secondary school as 100 percent Black. The Foster plan was rejected.

noted the possible absurdity of applying such a system wherein a school which may have been only 50 or 60 percent White would be called a racially identifiable White school. Id.[7]

Instead, the Tasby Court determined the school district should attempt to achieve a racial mix of 75 percent to 25 percent, either Anglos to minorities or minorities to Anglos. The ratio decided upon was merely a starting point to shaping a remedy and not a rigid racial balance requirement. Id. The Court noted both sides had taken the position that having a student body that was 70 to 75 percent of any one race constituted a multi-ethnic desegregated environment. 520 F. Supp. at 712. As a result, the Court ruled its ratio was a reasonable starting point. 520 F. Supp. at 711-712.

In Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976), the district court again faced the remedy phase of a desegregation case. Again, the mathematical ratios applied by the Court in Evans were used only as a starting point in fashioning a remedy. 416 F. Supp. at 342.

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[7]In its footnote 63, the Tasby Court stated, "Dr. Foster's use of sliding tolerances was similarly rejected by then District Judge Frank M. Johnson in the Montgomery, Alabama, desegregation case as being 'highly artificial,' unnecessarily disruptive, an impingement on the educational processes of the system, and premised on a misunderstanding of the commands of Swann. Carr, supra, 377 F.Supp. at 1140-1141. The weakness of Dr. Foster's sliding scale approach can be further demonstrated, as follows. Given sufficient longterm fluctuations in district-wide demographics, it would be possible for a particular school to be classified as 'racially identifiable' in 1970, desegregated in 1975, racially identifiable again in 1980, and desegregated again in 1985, all without that school ever experiencing any change in the ethnic makeup of its own student body." (Emphasis in original).

In McPherson v. School District No. 186, 426 F. Supp. 173 (D. Ill. 1976), the district court was again in the remedy phase of a desegregation lawsuit since liability was admitted by consent decree. In McPherson, the Court ruled there was nothing magic about numbers. 428 F. Supp. at 181. The plaintiffs thought plus or minus 10 percent was the appropriate range from the district-wide average. Defendants, on the other hand, asserted plus or minus 15 percent from the district-wide average was the appropriate measure. 426 F. Supp. at 180. The Court decided to use both the proposed standards as tools to fashion a remedy, but specifically stated neither received the Court's stamp of approval, or was to be regarded as absolute or unyielding to other factors. "There is nothing magic about a set range of percentages which requires this Court to disregard all else." 426 F. Supp. at 181.

In United States v. Board of School Commissioners of the City of Indianapolis, Indiana, 419 F. Supp. 180 (S.D. Ind. 1975), the district court was faced with a desegregation case, but repeated rereading of this case fails to give a glimmer of how it supports the proposition that the court approved a plus or minus 15 percent range. This case is of no value in the mathematical ratio question.

In Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), the district court again was in the remedy phase of a desegregation case, and a plus or minus 10 percent figure was applied only to magnet schools. Magnet schools, of course, are intended to draw

from the community at large, and, therefore, should reflect, in large measure, the ethnic make-up of the community at large.

In Reed v. Rhodes, 472 F. Supp. 615 (D. Ohio 1979), the district court again was in the remedy phase of a desegregation trial, and applied a plus or minus 15 percent range to magnet schools. Again, application of this range from a case concerning magnet schools is simply not appropriate in a liability phase of a trial involving an entire school district system.

Finally, in Armstrong v. O'Connell, 416 F. Supp. 1344 (E. D. Wisc. 1976), the district court was in the remedy phase of a desegregation lawsuit. This citation by the plaintiffs is more interesting than all the others. In 1976, the district court ruled it wanted the racial balances in all school to fall within a plus or minus 10 percent of the district-wide average within three years. 416 F. Supp. at 1346. Following the hearing on the plans that were presented to the court, new orders were issued. 427 F. Supp. 1377. In the new orders, the Court ruled two-thirds of the schools in the Milwaukee public schools should have a student body between 25 and 50 percent Black. This is ratio of minus 10 percent to plus 15 percent as a range. The remaining schools should have between 20 and 65 percent Black students or 15 to 75 percent Black students. These ranges are, of course, minus 15 to plus 30 percent, and minus 20 to plus 40 percent. 427 F. Supp. at 1379. This new order illustrates the problems in attempting to enforce a strict numerical formula in the remedy

phase of a desegregation case. Further, the order to which plaintiffs cited in their brief was rescinded. 427 F. Supp. at 1381.

These defendants' curiosity having been piqued after reading these two cases, the library was searched for the original case where liability was found. This case was reported as Amos v. Board of School Directors of the City of Milwaukee, et al. 408 F. Supp. 765 (E. D. Wisc. 1977). In the liability phase, the court, rather than applying a strict mathematical ratio for determining whether a school was racially identifiable, instead defined its terms in making the determination as to whether the district was segregated for purposes of determining liability. The court defined a "substantially racially balanced" school as a school whose students were not more than 70 percent non-White or Black and not more than 90 percent White. 408 F. Supp. at 779. A "substantially racially imbalanced" school, of course, would be those schools whose minority or White population exceeded the numbers set forth in the "substantially racially balanced" school definition.

As part of its analysis, the court then charted the number of schools by elementary, junior high, and senior high level and divided them according to their minority pupil population. (Please note, the court defined "Black" as all non-White pupils.) From this chart, it was determined that of 121 elementary schools, 99 fell outside the "substantially racially balanced" definition. Of 19 junior high schools, 16 fell outside the

"substantially racially balanced" definition and of 14 high schools, 11 fell outside of the "substantially racially balanced" definition. 408 F. Supp. at 811.

It would be a substantial injustice to Chief Judge Reynolds' analysis to simply state that, based upon these figures, he found the schools in Milwaukee to be segregated. In fact, the Judge did an exhaustive analysis in reaching his decision that the Milwaukee school system, in fact, was segregated. What is important concerns the Court's consideration of what constitutes racial balance in the liability phase. Obviously, the standards the Judge used to determine liability were significantly different from those used in the remedial phase.

Applying the liability standards used in Amos, Topeka USD #501 would only have five elementary schools (Crestview, Gage, McCarter, McClure and Potwin) and one junior high (French) that would fall outside the court's range.[8] If the #501 schools were charted as were the Milwaukee schools, we would find most schools fall within the court's definition of "substantially racially balanced," which gives strong evidence that #501 schools are, in fact, desegregated under this analysis.

Additionally, these defendants wish to point out to the court that, in the plaintiffs' pretrial memorandum, it was asserted the plus or minus 15 percent theory was endorsed by the

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[8]In the 1985-86 school year, Crestview was 8.94 percent minority, Gage was 9.43 percent, McCarter was 9.16 percent, McClure was 7.21 percent, Potwin was 7.73 percent and French 6.23 percent minority.

Supreme Court of the United States, and cited Swann v. Charlotte-Mecklenberg and Milliken v. Bradley. A review of both these cases indicates such an assertion is not true. Swann, of course, merely endorsed the use of mathematical ratios as a starting point in the remedy phases of school desegregation litigation. In Milliken v. Bradley, plus or minus 15 percent was simply not an issue. Tracing the history of Milliken v. Bradley, we find the district court rejected the plus or minus 15 percent rule as proposed by the plaintiffs in this case. Bradley v. Milliken, 402 F. Supp. at 1123.

Any assertion these or any cases cited by the plaintiffs to support the theory plus or minus 15 percent is the appropriate measure in a liability phase to determine whether schools are segregated is misleading, at best.

In summation, it is clear the many cases cited by the plaintiffs in their post-trial brief simply do not support their assertion plus or minus 15 percent is the appropriate measure to use in determining whether a school is racially identifiable or segregated in a liability phase at trial. Indeed, the cases support the opposite conclusion, and several even are critical of the methodology of Dr. Foster.

In addition, each case cited by plaintiffs involves the remedy phase of a desegregation case, and does not support the proposition that 15 percent is the appropriate range to determine if segregation exists. The three cases that do use a percentage standard as a remedial target are clearly distinguishable. Two cases involve magnet schools which draw students from the

community at large, and, therefore, should reflect the racial composition of the patrons of a school district. The remaining case involved a consent decree where all parties agreed the plus or minus 15 percent figure would be their goal.

Vestiges.

Plaintiffs rely principally on the testimony of Dr. Hugh Speer for the notion there remains today in Topeka vestiges of the previous dual elementary school system. (Plaintiffs' Post-Trial Brief, p. 9). At the time of trial, Dr. Speer's opinion as to this point was challenged because his credentials are in the field of education and not geography or demographics. The Court ruled the objections went to the weight and not the admissibility of the testimony. Even so, Dr. Speer's testimony was poorly explained and without detail.[9]

More importantly, Dr. Speer conceded, on cross-examination, he had personally not made any independent analysis of USD 501 whatsoever in the area of facilities, extracurricular activities, transportation, curriculum, faculty and staff assignment, or student assignments. (Speer, pp. 1181, 1182, 1203, 1204). Given

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[9]Dr. Speer's sole testimony on the vestige question is as follows:
"Q. Do you have an opinion as to whether or not there is still any vestige of segregation in existence in USD 501?
A. Well, yes I think the facts are very clear, there are some schools which are mostly Black, identifiable as minority schools up to 40, 50, 60 percent Black and then on the other end of the scale there are schools that have only a handful of Blacks in them and this certainly indicates a degree of segregation, not like it was in '51, but still very, very decisive." Parenthetically, the Court should note there are no 60 percent Black schools in Topeka. (Plaintiffs' Exhibit 8J).

the legal burden upon plaintiffs to establish vestiges by demonstrating a specific causal connection between the former dual elementary school system operated in the early 1950's and the racial composition of Topeka schools today, this unsubstantiated opinion testimony of Dr. Speer should be disregarded. Plaintiffs have not met their legal burden. (See also paragraphs 124, 125 and 126 of the Post-Trial Brief by State Board Defendants).

Likewise, none of the seven so-called "Black" or "minority" schools detailed by plaintiffs in their post-trial brief were ever even operated as Black schools under the former de jure dual elementary system. (See Plaintiffs' Post-Trial Brief, pp. 28-54). As the evidence clearly shows, Belvoir, Highland Park North, Hudson and Avondale East were not in the Topeka public school system until after the Brown decisions and never were operated as segregated schools pursuant to the state law permitting separate elementary schools in cities of the first class. (Exhibits 1009 and 8J). Lafayette, Quinton Heights and Lowman Hill were operated either as integrated or non-Black schools at the time of the Brown decision. Now, plaintiffs claim these schools are racially identifiable minority.[10] Certainly, however, they are not vestiges of the former dual school system. (See also Paragraphs 70, 71, 72, 73, 74, 75 and 76 of the Post-Trial Brief by State Board Defendants).

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[10] In school year 1955-1956, Quinton Heights was 6.9 percent Black, Lafayette was 8.4 percent Black, and Lowman Hill was 11.4 percent Black. (Exhibit 8J). The total elementary enrollment of Black student that year was 6.34 percent. Id.

Perception.

Plaintiffs persist in their use of the Central Surveys Report to allege certain schools are perceived as "Black" or inferior, despite the obvious methodological flaws in the survey. (See, generally, Cross-Examination of Charlie Williams, Hickman Report (Exhibit 1032), Hickman Testimony (Hickman, pp. 2148-2232) and Reply Brief of USD #501). Even taking the report at face value, plaintiffs must resort to the use of rhetorical maneuvers to get what they want. It is important to note, however, the Table on the top of Page 22 of the Central Surveys Report shows the total response of those answering the survey. On this basis, Mr. Williams admitted: 85 percent of the respondents did not think of Belvoir as a Black school, 95 percent did not think of Quinton Heights as a Black school, 83 percent did not think of Lafayette as a Black school, 87 percent did not think of Highland Park as a Black school, and 91 percent did not think of Eisenhower as a Black school. (See also Tr., pp. 1013-1015). On the open-ended Question 17, no one considered Avondale East as a Black or minority school and 98 percent did not think of Hudson or Lowman Hill as Black or minority schools. It is only when plaintiffs reduce the respondents to miniscule subsets that they find the results they were looking for when the survey was retained. (See Exhibit 1001).

Dr. Crain's Rebuttal Testimony.

On Page 83 of their post-trial brief, plaintiffs refer to Dr. Robert Crain's rebuttal testimony concerning the report by Dr. John Poggio. In his testimony, Dr. Crain attempted to analyze data from the Kansas Minimum Competency Test to demonstrate students in "Type I" (Black) schools are learning at a slower rate than students in the other schools. (Crain, pp. 2778-2824; Exhibits 52A-52L). Crain further concluded Type I schools in Topeka were providing an inferior quality of education. (Crain, pp. 2861-2862). This reanalysis by Dr. Crain was not only forcefully refuted by Dr. Poggio (Poggio, pp. 2922-2934) and by Dr. Herbert J. Walberg (Walberg, pp. 2935-2938), but by Dr. Crain as well.

It is important to recall that on cross-examination, Dr. Crain conceded he knew nothing about how the Kansas Minimum Competency Test was developed, what the test purports to measure, what the minimum standards are at each grade level, or how the minimum standards change from year to year. (Crain, pp. 2862-2863). Dr. Crain further conceded he did not know what the objectives were on the minimum competency test for any of the grade levels in the years which he computed on Plaintiffs' Exhibits 52A through 52L. (Crain, pp. 2864-2865). Dr. Crain further acknowledged he had never read any of the documents prepared by the Kansas Department of Education concerning the Kansas Minimum Competency Test, and never examined any trend analysis of the test results. (Crain, p. 2865).

Dr. Crain further contradicted his own deposition testimony, in which he indicated he could not use the minimum competency test to compare the performance of schools without knowing something about the nature of the test, what the test purports to measure, more about prior test scores, or some other measure of the ability of the students in order to understand whether their score is particularly high or particularly low, given a particular student body. (Crain, p. 2867). In addition, Dr. Crain did not know some schools changed building configurations (Type I, Type II or Type III) over the period of time covered by Plaintiffs' Exhibits 52A through 52L. (Crain, pp. 2870-2871). Most importantly, Dr. Crain conceded he is not an expert in the area of testing and has never even taught the subject of testing. (Crain, p. 2871). These defendants are particularly sensitive to this point, since Dr. Crain attempted to use results from the Kansas Minimum Competency Test which is administered under the auspices of the State Board to attempt to support his testimony. For the reasons outlined in the cross-examination of Dr. Crain, his testimony on rebuttal should be disregarded completely.

Liability of State Defendants.

The bulk of the response to the allegations made by plaintiffs against the individual defendants associated with the State Board of Education will be contained in the second section of this reply brief.

However, a brief comment is appropriate here, even though plaintiffs devote hardly any attention to the State Board defendants. (Plaintiffs' Post-Trial Brief, pp. 104-107). What must be corrected at the outset is the assertion by plaintiffs, on page 104 of the post-trial brief, that, "More importantly, the SBE was a defendant in the original case and therefore has been under continuing affirmative duty to desegregate." Obviously, the plaintiffs misspoke when they alleged the State Board of Education was a defendant in the original case. The State Board of Education did not even become a constitutional body until the amendments to the Kansas Constitution in 1966, and the subsequent election of the board members in 1968 and their swearing-in in January, 1969.

As to the various conclusions made by the plaintiffs as to the legal authority of the State Board of Education, the Court is referred to the trial brief filed by these defendants and the conclusions of law in the post-trial brief by these defendants, specifically paragraphs 128 through 138 and the re...aining specific comments infra.

SECTION II: SPECIFIC RESPONSES TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW: POST-TRIAL

Introduction.

Not all of the allegations contained in plaintiffs' proposed findings require a response from these individually-named defendants. Several of the allegations directed against these defendants are repeated three or four times in the 146-page submission by plaintiffs, still others are modest variations. What follows are responses, cited to the evidentiary record, of those assertions which appear to comprise the thrust of plaintiffs' claims against the State Board defendants. Since plaintiffs did not number their proposed findings, it was necessary, for the sake of clarity, to repeat the allegation, and, then, follow it with the response. Page references to the left are to the document entitled "Plaintiffs' Proposed Findings of Fact and Conclusions of Law: Post-Trial."

Page

4 ALLEGATION: Kansas Attorney General Harold R. Fatzer told the Supreme Court of the United States that "redistricting" was necessary in Topeka because "the Negro schools always have been treated differently from those for the whites."

P. Exh. 291, "High Court told state complying," Topeka Capital, April 12, 1955.

RESPONSE: P. Exh. 291 demonstrates the willingness of state officials to comply with the Court's order. The referenced newspaper statement goes on to explain the former all-Black schools did not have defined districts because children were taken to the schools by buses from all sections of the city. These defendants see no relevance to this case in the referenced statement. The Attorney General's support for the Brown decision is well documented in the record. (See SBE Exhibits F-2 through F-9). Plaintiffs today seem oblivious to the tenor of the times immediately following the high court's 1954 ruling. As previously stated, the actions of Kansas state officials stand sharply in contrast to efforts in other states to circumvent and openly defy the Supreme Court's ruling in Brown. (See paragraphs 60, 61 and 62, SBE Proposed Findings, pp. 18-19). Plaintiffs' evidence fails to identify any action or inaction by any state official to obviate or thwart the Topeka desegregation plan.

5 **ALLEGATION:** The SBE knew the Pierce School was all Black, not in a city of the first class and therefore illegally segregated.

P. Exh. 3, Annual Reports to Kansas State Board of Education, 1940's to 1952-1953.

RESPONSE: P. Exh. 3 deals only with one period of time from 1948-1949 to 1952-1953. SBE Exhibits G-4, G-4A, G-4B, G-4C, G-4D and G-4E provide enrollment data for Pierce from 1940 to 1957. Race data is shown up to 1952-1953. Within these exhibits, integrated enrollment is shown for 1941, 1942, 1943, 1945 and 1949.

There is no evidence Pierce was an illegally segregated school. The attendance boundaries for Pierce were set by the County Superintendent in 1855 (Exhibits 292, G-1). Over the years, the one-school Pierce district served both Black and White students. (Exhibit G-4). The Pierce school district had only one school within its district, an elementary school serving grades one through eight. (Exhibit G-4). Thus, Pierce never operated as a de jure dual school system.

5 **ALLEGATION:** The SBE not only knew Pierce was segregated, they accredited the school and provided state funds.

P. Exh. 3, Annual Reports to Kansas State Board of Education, 1940's to 1952-1953.

RESPONSE: P. Exh. 3 does not show Pierce ever was accredited by the State. Indeed, there is no evidence in the record that Pierce was accredited by the State. Also, there is no evidence Pierce received State funds, and certainly no evidence the State Board knew of "segregation" at Pierce. This Court, in 1955, said an all-Black school was not a constitutional violation, even in a previous de jure dual school system, so long as children were attending the district in which they live. Brown, 139 F. Supp. at 470. Therefore, under the legal standards as they existed at that time, it cannot be said Pierce was illegally segregated. Its attendance boundaries were set in 1855 by the County Superintendent. (P. Exh. 292, G-1). We know from the record, its enrollment included White students at least in 1941, 1942, 1943, 1945 and 1949. (Exhibit G-4). Clearly, children living within the one-school Pierce attendance boundaries attended the school. This is in contrast to the all-Black enrollments of Monroe, Buchanan, Washington and McKinley in Topeka Public School District #23, operated under the de jure school system. Finally, Pierce was closed in 1959 and has virtually no relevance to the issues in today's case.

5 **ALLEGATION:** Although the Kansas Supreme Court held in 1881 that it was illegal to segregate schools in cities of the second class or smaller and although SBE knew there were segregated schools in such cities, they continued to accredit schools and provide state aid.

Bd. of Ed. v. Tinnon, 26 Kan. 1 (1881); SBE Annual Rpts; See, e.g., Cartwright v. Bd. of Ed., 73 Kan. 32 (1906).

RESPONSE: The record in this case does not show the SBE knew, accredited or financed any illegally segregated schools in cities of the second class, or smaller, or anywhere in Kansas.

5 **ALLEGATION:** The SBE accredited segregated secondary schools.

P. Exh. 3, Annual Reports to Kansas State Board of Education, 1940's to 1952-1953.

RESPONSE: P. Exh. 3 makes no reference whatsoever to accreditation. In addition, P. Exh. 3 does not establish the existence of any segregated secondary schools. Further, the exhibit makes absolutely no mention of any action by the State Board of Education, or its predecessors.

5 **ALLEGATION:** In 1955, the Attorney General, on behalf of the State of Kansas, told the Supreme Court that school segregation had caused housing segregation in Topeka.

P. Exh. 223, Letter Fatzer to Willey, May 10, 1955; Tr. 162-164 (Lamson).

RESPONSE: Plaintiffs inaccurately characterize the Attorney General's statements. Indeed, Mr. Lamson conceded during cross-examination he was aware of no demographic study which supported this characterization of the Fatzer letter. (Lamson, p. 382).

6 **ALLEGATION:** "Cities that desegregated their schools, Wichita being an example . . . showed after sharp increase in housing integration . . . [there is a] very striking tendency for those [cities] that have desegregated their schools to have more integrated housing."

Tr. 1263, 1264 (Crane).

RESPONSE: Wichita was never authorized to segregate its schools under the permissive state law at issue in the Brown case. See Rowles v. Board of Education, 76 Kan. 361, 91 Pac. 88 (1907).

8,
9,
10,
11 **ALLEGATION:** Deposition statements of Warren Bell and Gary Livingston.

RESPONSE: The discovery depositon statements of Mr. Warren Bell and Dr. Livingston are not a part of the evidentiary record of the trial of this case. Their

statements must be disregarded. (F.R. Civ. P. 32). Had plaintiffs wished to use these deposition pages or elicit such testimony at trial, they were required to do so.

12 **ALLEGATION:** Recipients of federal funds may not take actions that have the effect of segregating schools.

(42 USC 2000d, See Conclusions of Law infra).

RESPONSE: Plaintiffs have not demonstrated even one action by the State Board of Education which had the effect of segregating schools at any time, let alone since federal funds have been received.

12 **ALLEGATION:** The SBE has recognized that schools must operate in accordance wit' civil rights laws. The Board has stated, "it is necessary to adhere to the regulations outlined in the Civil Rights Act of 1964 as they apply to such projects."

P. Exh. 183, SBE Minutes of April 6, 1971.

RESPONSE: P. Exh. 183 refers to federal projects under sponsorship of state colleges and universities, and the use of federal funds in the allocation of "indirect costs," and that colleges may not use federal funds to pay for students' food or lodging. This exhibit has no relevance to this case.

12 **ALLEGATION:** Defendants had a duty under relevant state law.

Graham v. Bd. of Educ. of Topeka, 153 Kan. 810 (1941). Kan. Gen. Stats. Ch. 18, Art. 5[75] (1968) (1979); Kan. Session Laws 269 (1905_; Kan. Session Laws Ch. 414.

RESPONSE: As to any assertion these defendants failed to enforce or obey a state law, under the Eleventh Amendment, this Court cannot order a state officer to obey state law. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Brown v. Board of Education, Case No. T-316 (D. Kan.), Sept. 29, 1986, p. 5.

13 **ALLEGATION:** The State Board has opposed any change in its authority.

P. Exh. 205, SBE Minutes of February 9, 1982.

RESPONSE: P. Exh. 205 refers to a legislative proposal to make the State Board appointive by the governor, rather than elected, and to require legislative approval of all State Board regulations. The reference is to preserving existing authority, and opposing efforts to greatly restrict that existing authority. The exhibit has no relevance.

13 **ALLEGATION:** The State Board has never requested additional authority concerning school segregation.

P. Exh. 6, Set 2 the State Board, 6-7; State Board of Education Minutes.

RESPONSE: The reference to P. Exh. 6 is to Interrogatory No. 6, which asked whether the State Board had ever "requested additional authority concerning public education in Kansas and/or USD 501?" The response was "Yes." Plaintiffs' statement also is misleading in that the State Board did request approval for federally funded race/sex equity technical assistance projects beginning in 1970. These projects were designed to serve the state as a whole by providing informational services to requesting school districts. (See paragraphs 96 and 97, SBE Proposed Findings, pp. 28-29).

13 **ALLEGATION:** Recently the Kansas Department of Education changed the description of the SBE's relationship to local school districts from "general supervision" to "direction."

P. Exh. 269, State Dept. of Ed. Plan for Implementing the Goals of the St. Bd. of Ed., Aug. 10, 1982; see all previous reports listed infra.

RESPONSE: This is not a substantive change.

13 **ALLEGATION:** Both state and federal officials have asserted that the SBE has more authority in the area of education then it uses.

P. Exh. 172, 189, 216, See e.g., SBE Minutes of 12/11/68, 7/10/73, 1/11/84.

RESPONSE: P. Exhs. 172 and 189 are in reference to Title V of the Federal Elementary and Secondary Education which was designed to provide federal funds for the strengthening of operations within state boards of education. The State Board applied for and received those funds. None of plaintiffs' exhibits refer to a failure to exercise any authority in the area of school segregation.

14 **ALLEGATION:** The SBE would not accredit schools unless they were in "substantial compliance with all other legal requirements."

P. Exh. 163, SBE Minutes, June 6, 1952.

RESPONSE: These Minutes refer only to recommendations for future elementary school accreditation standards. Plaintiffs do not cite the Court to the actual regulations adopted for use several years later when elementary school accreditation began. This exhibit has no relevance.

14 **ALLEGATION:** The supervisory powers of the SBE, which have been deemed "more than to advise but less than to control, "include drafting regulations respecting the administration of public education which have the effect of law.

State ex rel Miller Bd. of Ed., 212 Kan. 482 (1973); KSA 72-7514.

RESPONSE: The authority of the State Board is limited to general supervision. Control of the local schools is vested in locally-elected boards of education. See NEA-Ft. Scott v. USD #234, 225 Kan. 607, 592 P.2d 463 (1979).

14 **ALLEGATION:** The SBE has stated that "education is a state responsibility . . . the Legislature has delegated many decisions to the department . . ."

P. Exh. 165, KSBE Minutes 12/19/57.

RESPONSE: However, control of local schools is constitutionally vested in locally elected boards of education. NEA-Ft. Scott v. USD 234, supra. See above responses.

14 **ALLEGATION:** The SBE must by law define by regulation those matters relating to the administration, staffing, courses of study, and instruction in Kansas schools. Regulations ultimately have the force of law.

P. Exh. 1, Accreditation Regulations Applicable to Kansas Elementary and Secondary Schools and School Districts, May 1, 1984.

RESPONSE: If plaintiffs are implying the State Board of Education should use its accreditation authority to establish specific standards of racial balance in Kansas schools, they have no authority for this proposition and it is contrary to the constitutional limitations on the State Board.

14 **ALLEGATION:** Local school districts have been characterized as "agents" of the State in operating local schools.

P. Exh. 165, SBE Minutes of 12/19/57.

RESPONSE: This is absolutely contrary to Article 6, Section 5 of the Kansas Constitution, which was adopted by reference. Plaintiffs imply a legal position which is contrary to law.

14 **ALLEGATION:** The Board has said that education is a state responsibility, that the Board exercises supervision and control through laws enacted by the legislature and through the Dept. of Public Instruction (now the Dept. of Education).

P. Exh. 165, SBE Minutes of 12/19/57.

RESPONSE: There is every indication in the record the constitutional mission of the State Board has been met. Also, note this exhibit predates the constitutional amendment of 1966.

14-15 **ALLEGATION:** The Commissioner and the SBE pass regulations that have the force of law on local school districts, including standards affecting teacher training and hiring.

P. Exh. 285, Set 1, 15-16 (Supplemental Responses).

RESPONSE: There is no issue as to the adequacy of teacher training or certification standards, even as applied to USD #501 or the so-called racially identifiable schools.

15 **ALLEGATION:** State officials by law have the authority to scrutinize school districts' records, books and papers. That power would be exercised if the school district were in "flat violation of the law."

P. Exh. 45, Dep. of Merle Bolton at 86-87.

RESPONSE: The reference by the witness is out of context and not related to any authority to inspect records of a local school district.

15 **ALLEGATION:** SBE believes it is unclear whether the SBE can require a change of an [illegal] policy by a school district: ("there is a gray area in my mind as to whether the State Board would have that authority").

P. Exh. 49, Dep. of Merle Bolton at 101.

RESPONSE: The authority of the State Board is a question of law. The witness' remarks are out of context. The full response was as follows: "I think there's a question of whether the State Board would have the authority to make a school district change their policy. A court might have, but there's a gray area in my mind as to whether the State Board would have that authority."

15 **ALLEGATION:** In 1970, the SBE wrote that "Publicized unrest, protest, some rioting and violence in Kansas cities has drawn the attention of the general public to school problems and has caused questions to be raised about the role and responsibility of the State Education Agency in solving them."

P. Exh. 157, Kansas: A Proposal for a Technical Assistance Program, July 8, 1970, p. 6.

RESPONSE: The State Department of Education's requests for federal funding under Title IV, Section 403, P.L. 88-352, The Civil Rights Act of 1964, for a Technical Assistance Program were designed to provide information to requesting school districts for situtations incident to implementation of busing and other techniques attendant to desegregation. The request was to fund two staff persons and clerical help to provide this information. The request was seen as another effort to promote equal educational opportunities in Kansas. (P. Exh. 157, p. 7). Plaintiffs allege no causal connection between the inability to implement this program until 1984 and the current racial composition of Topeka schools. Indeed, this Court already has noted that no anticipated remedy would involve this program. Brown, Case No. T-316, Sept. 29, 1986, p. 4.

15 **ALLEGATION:** The Dept. of Education's duties have been described as including giving legal opinions and reviewing of matters relating to school law.

P. Exh. 264, State Plan and Projections for Fiscal Years 1977-1981, p. 11.

RESPONSE: The report specifically says, "Legal assistance will be provided upon request." There is no allegation these defendants failed to provide USD 501 with requested legal assistance.

15 **ALLEGATION:** The Dept. of Education's duties have been described as "determining basic administrative duties have been performed by local institutions in compliance with state and federal laws."

P. Exh. 264, State Plan and Projections for Fiscal years 1977-1981, p. 25.

RESPONSE: Plaintiffs cite no authority these regulations require the State Department to launch an exhaustive investigation as to whether each of the 304 school districts in Kansas might be considered "segregated" under some unspecified standard of racial balance.

16 **ALLEGATION:** In 1970, the SBE wrote that "[W]hile . . . alleged noncompliance in segregated urban areas are the responsibility of local school districts, such problems do exist beyond the ability of the districts to solve them quickly." SBE should act.

P. Exh. 157, Kansas: A Proposal for a Technical Assistance Program, July 8, 1970, p. 7.

RESPONSE: This quotation deletes a material portion of the quotation and a full sentence of the paragraph. The entire quote is as follows:

> "While problems of bussing and alleged noncompliance in segregated urban areas are the responsibility of local school districts, such problems do exist beyond the ability of the districts to solve them quickly. The State agency should make highly competent personnel available to assist requesting schools with information, suggestions, materials, and contacts."
>
> (P. Exh. 157, p. 7).

16 **ALLEGATION:** The Board has described the regulatory needs of the Dept. of Education as including "[e]nsuring that minimum educational opportunities be provided regardless of race, sex, color, national origin, or handicapping condition."

P. Exh. 268, Policy Plan for Kansas Department of Education, Fiscal Year 1981, p. 44.

RESPONSE: In early 1970, the State Board of Education adopted as Policy #1300 its dedication to the coordination and promotion of a statewide system which ensures educational opportunities for all persons regardless of race. (Exhibit A Series). Implementation of these goals and statewide programs is demonstrated by various portions of the evidentiary record. (Exhibits A-5, A-12, A-13, A-14, A-15, A-16, A-17, A-18, 264-279).

16 **ALLEGATION:** Proposals devised by the Department of Education and approved by the SBE which have sought federal funding for desegregation matters have supported the applications for such funds with statements of knowledge as to duty to assist in desegregation efforts.

P. Exh. 157, 178, Kansas, A Proposal for A Technical Assistance Program, July 8, 1970; SBE Minutes, June 2, 1970.

RESPONSE: These projects were designed to provide information. As to USD #501, over the years the Office of Civil Rights, HEW, notified the State Department of Education of each instance in which it investigated complaints against USD #501 of alleged discrimination, and in each instance, OCR notified the department of the successful resolution and/or dismissal of each complaint. (Exhibits C-1 through C-10, D-1 through D-12).

16 **ALLEGATION:** The Kansas Department of Education articulated in a proposal a need for technical assistance to local school districts because "[t]here is a growing realization that the Kansas education agency has a role in helping schools deal with problems incident to desegregation."

P. Exh. 157, Kansas, A Proposal for Technical Assistance, July 8, 1970, p. 5.

RESPONSE: See above explanations of the Technical Assistance Programs.

16 **ALLEGATION:** "Respect for laws and institutions" has been translated into a statewide goal.

P. Exh. 264, State Plan and Projections for Fiscal Years 1977-1981, p. 31.

RESPONSE: Do plaintiffs imply it should be any other way?

16 **ALLEGATION:** The Kansas legislature has encouraged the SBE to develop curriculum aimed at race relations and racial, cultural and ethnic pride.

1969 Substitute for Concurrent House Resolution No. 1015.

RESPONSE: A guideline was developed in 1970. (P. Exh. 156).

17 **ALLEGATION:** The SBE has said that the Civil Rights Act of 1964 must be adhered to.

P. Exh. 183, SBE Minutes 4/6/71.

RESPONSE: This repeats the same allegation made earlier on pg. 12 of plaintiffs' proposed findings and the exhibit refers to federal projects sponsored by state colleges and universities.

17 **ALLEGATION:** Under Kansas law, the SBE publishes school laws, rules and regulations under which USD 501 must operate, and a local school district can lose its accreditation for failure to comply with a regulation which has the force of law.

P. Exh. 1, 47, KSA 72-120 Accreditation Regulations Applicable to Kansas Elementary and Secondary Schools and School Districts, May 1, 1984; Dep. of bolton, 93-95.

RESPONSE: All State Board regulations must be within the confines of the Kansas Constitution and applicable state law. Again, there is no authority the State Board is constitutionally required to adopt standards of racial balance applicable to all the school districts of Kansas.

Plaintiffs' own experts concede compliance with the plus or minus 15 percent standard they advocate does not mean there is segregation. (Foster, pp. 792-793, and paragraphs 13 and 14 of SBE Proposed Findings, pp. 4-5).

17 **ALLEGATION:** If a school district is found in violation of the law, and if the school district refuses to correct such policy at the request of the state, the State can take away the USD's accreditation.

P. Exh. 45, Dep. of Bolton at 108.

RESPONSE: See above.

18 **ALLEGATION:** The State has the practice of giving a school district one year to correct a policy or practice which may be in violation of a rule or regulation which conditions accreditation.

P. Exh. 5A, 162, Set 1, 5; SBE Minutes, 4/16/45.

RESPONSE: This exhibit does not say this.

ALLEGATION: A policy prohibiting discrimination by local school districts has become a regulation issued by the Kansas Department of Education which could be used by the State in assuring USD 501's compliance with Brown II.

P. Exh. 47, 1, Dep. of Merle Boltion at 95; Accreditation Regulations applicable to Kansas elementary and secondary schools and school districts, May 1, 1984.

RESPONSE: See above, accreditation standards cannot be used to impose standards of racial balancing.

18 **ALLEGATION:** The SBE approves consolidation or annexations of school districts.

KSA - 72-8703; 72-7108. P. Exh. 183, SBE Minutes of 4/6/71.

RESPONSE: There is absolutely no evidence SBE has refused to cooperate in any efforts to merge or consolidate school district territory. Clark v. Bd. of Educ. of Little Rock, 705 F.2d 265, 267 (1983).

18 **ALLEGATION:** The SBE approves territorial transfers between districts and certifies geographical boundaries between districts.

P. Exh. 169, 173, 175, 176, 187, 193, 43. SBE Minutes of 2/16/67; 6/2/67; 5/5/59; 11/12/69; 1/6/70; 7/10/73; 5/2/72; 5/26/75;4/6/77. See also Dep. of Bolton at 83, plus all rpts.

RESPONSE: K.S.A. 72-7108, et seq., limits the authority to make transfers. There is no evidence of an abuse of that authority.

18 **ALLEGATION:** The State Superintendent makes final decisions on many issues respecting school district organization and boundary changes.

P. Exh. 159. Id. p. 57.

RESPONSE: Because plaintiffs cite an old publication, they misstate completely statutory authority concerning school district organization and boundary changes. It is important to recall school districts by statute retain local control over internal school attendance boundaries and enrollment policies. (K.S.A. 72-8212(c)). This is as it must be under the constitutionally-recognized existence of local school districts. (Kan. Const. Art. 6, Section Five).

18 **ALLEGATION:** The SBE selects matters within the fields of instruction set by the Legislature.

P. Exh. 172, KSA - 72-1101, SBE Minutes of 12/11/68.

RESPONSE: There is no allegation the State Board has excercised its authority in a racially discriminatory fashion concerning programs of instruction within Kansas school districts. The Legislature vests general

curriculum policies under the State Board. (K.S.A. 72-1101). However, local control over curriculum is provided to locally-elected boards of education. (K.S.A. 72-8205).

18 **ALLEGATION:** The State surveys existing school facilities and determines the needs of a school district.

P. Exh. 264, State Plan and Projections for Fiscal Years 1977-1981, p. 33.

RESPONSE: The State Board does not perform this function for individual school districts. P. Exh. 264 makes reference to a statewide report done once in 1974-1975 and not localized to a particular school district.

19 **ALLEGATION:** The State administers uniform education and skills testing.

P. Exh. 179, 200 SBE Minutes of 7/8/70; 5/2/72; 11/13/80.

RESPONSE: Testing is administered uniformly, statewide, and pursuant to statute.

19 **ALLEGATION:** State officials supervise union elections in local school districts.

P. Exh. 188, SBE Minutes of 5/2/73.

RESPONSE: This is false. See NEA-Ft. Scott v. USD #234, supra.

19 **ALLEGATION:** State officials supervise school board elections.

P. Exh. 191, SBE Minutes of 8/6/74.

RESPONSE: This is false.

19 **ALLEGATION**: The State Board has the authority to "waive the [teacher] certification standard or [to] issue an emergency certificate."

P. Exh. 6, Set 2 to St. Bd., 65; KSA 72-1381.

RESPONSE: There is no allegation the State Board has ever abused any authority in the field of teacher certification, either to constitute racial discrimination or to retard efforts by USD 501 to recruit minority teachers. Indeed, plaintiffs' expert witness Dr. Foster finds USD 501 affirmative recruitment policies to be adequate. (Foster, p. 769).

19 **ALLEGATION**: The State imposes graduation requirements.

P. Exh. 161, 162, SBE Minutes of 2/9/45; 4/16/45.

RESPONSE: Although plaintiffs' references are to 1945, today graduation requirements are applicable uniformly across the state. (See Exhibit G-6). There is no allegation graduation requirements are discriminatory, or in any way relevant to this case..

19 **ALLEGATION**: The State approves textbooks for use by local school districts.

P. Exh. 166, SBE Minutes of 5/11/61.

RESPONSE: This is false. See K.S.A. 72-7513.

19 **ALLEGATION**: The State handles appeals from budget decisions and makes approval of capital funds.

P. Exh. 174, 198, 199. See, e.g. KSBE Minutes of 6/3/69; 4/8/80; 7/8/80.

RESPONSE: Plaintiffs make no allegation concerning any appeals by any school district, and make no specific claim concerning any appeals which may have been requested by USD 501.

19 **ALLEGATION:** The State Board approves bonds issued by USD 501.

P. Exh. 6, 166, 187, 44, Set 2 to State Bd., 49; K.S.A. 1983 Supp. 72-6761 and predecessors; SBE Minutes of 5/11/61; 5/2/72; Dep. of Bolton at 83-84.

RESPONSE: State law requires local elections for bonds over $20,000. The State Board may approve bonds only if under $20,000. There is no allegation the State Board ever approved such a bond for USD 501.

19 **ALLEGATION:** The SBE approves the standards by which Kansas teacher education programs are evaluated and approved.

P. Exh. 285, Set 1 to State Bd., 15 (Supplemental Responses).

RESPONSE: There is no allegation any teacher education program operates in a racially discriminatory fashion, or in a manner which restricts minority teacher hiring in Kansas.

22 **ALLEGATION:** The State Board requires 501 to submit the names of nonpublic schools and the number of students.

P. Exh. 6, Set 2 State Bd., 60.

RESPONSE: This is a statutory requirement.

22 **ALLEGATION:** The SBE determines state aid entitlement to local school districts and has done so since 1949.

P. Exh. 5A, C, K.S.A. 72-7043; Set 1 to State Bd., 20, 21.

RESPONSE: This determination is pursuant to state law.

23 **ALLEGATION**: USD 501 receives aid from the state for school safety, special education, adult basis education, school food assistance, vocational education, bilingual education, and funds to operate the district under the State Equalization Act and from income taxes.

P. Exh. 5A, C, Set 1 to State Bd., 21b.

RESPONSE: All state aid is distributed pursuant to statute.

23 **ALLEGATION**: The State grants aid for transportation costs.

P. Exh. 5A, C, Set 1 to State Bd., 26, 27; KSA 72-8302.

RESPONSE: See above. Transportation policies fall under K.S.A. 72-8301, et seq.

23 **ALLEGATION**: SBE grants state aid for many purposes.

Tr. 2745-2778. (Dennis).

RESPONSE: All state aid is pursuant to statute.

23 **ALLEGATION**: State Board officials review special education decisions.

P. Exh. 197, SBE Minutes of 7/13/77.

RESPONSE: There is no allegation USD 501 administers any special education program in a racially discriminatory manner. There is no allegation the State Board reviewed any special education decisions of USD 501 to which plaintiffs object.

23 **ALLEGATION**: Kansas law empowers the state to ask for and administer the use of federal financial assistance or to seek compliance with laws (such as Title VI of the Civil Rights Act of 1964) which condition the use of such funds on compliance with anti-discrimination laws.

KSA 72-127, 72-6202.

RESPONSE: In order to participate in federal programs, USD 501, through its appointed representatives, executes under oath, various assurances of compliance with federal laws, including prohibitions against racial discrimination. (Exhibit B-8).

29 **ALLEGATION:** In 1955, the Attorney General, on behalf of the State of Kansas, told the Supreme Court that 501's 4-Step desegregation plan was designed to give white parents a year's opportunity to move out of neighborhoods that would mean their children would go to Black schools.

P. Exh. 223, Letter, Fatzer to Willey, May 10, 1955.

RESPONSE: The U. S. Supreme Court specifically was apprised of the Four-Step plan and this court approved it. The intentions of the Attorney General to fully comply with the Brown decision have been previously referenced. The only plaintiffs' witness to refer to this letter was Mr. Lamson. (P. Exh. 219, p. 69). Mr. Lamson admitted, under cross-examination, he made no investigation into the issue of "white flight," (Lamson, p. 527), that me made no investigation into state officials' involvement or passive reaction to any "white flight" issue. (Id). Indeed, Mr. Lamson testified he made no factual investigation at all concerning state officials or state action in this case. (Id). Likewise, Dr. Foster made no factual investigation concerning state officials. (Foster, pp. 809-810).

35 **ALLEGATION:** There was an annexation/deannexation in 1984 that potentially resulted in the loss of 8 white students.

P. Exh. 282, USD 501's Supp. Resp. Set 2, 6, 21.

RESPONSE: See Kansas statutes referenced above. Also note the only annexations alleged by plaintiffs to contribute to school segregation were city annexations from 1957 to 1966, prior to creation of the State Board. (See below).

35 **ALLEGATION:** From 1957 to 1966, annexations contributed to school segregation.

P. Exh. 219, Lamson, William, "Race and Schools in Topeka," p. 79.

RESPONSE: These were city annexations for which none of these defendants had control. Indeed, the State Board had no constitutional authority at this time.

88 **ALLEGATION:** The State has supported the concept that "all Americans should have equal access to free, quality public schools," but never mentions race as a factor in achieving such a goal.

Kansas: The State of Education, p. 2.

RESPONSE: This is false. See earlier responses.

91 **ALLEGATION:** Defendants admit that no "research" or "technical assistance" on desegregation matters has ever been provided to local school districts on matters of desegregation.

P. Exh. 7, SBE Minutes; Set 3 to State, 2.

RESPONSE: This is false. The Technical Assistance Program was implemented immediately upon its funding in 1984. The program currently is in operation. (Exhibits A-9, A-10 and A-11). Yet, plaintiffs have offered no evidence concerning the activities of this program nor have they attempted to show earlier failures to secure funding for the project are linked to the current racial composition of Topeka schools.

91 **ALLEGATION:** Funding for a Department of Education program to provide technical assistance on matters relating to race and national origin has been in existence only one year, although the need for such a program was first acknowledged by State education officials more than fifteen years ago. In June, 1970, the SBE submitted a draft proposal to apply for funds under Title IV of the Civil Rights Act of 1964 to "additional study."

P. Exh. 178, SBE Minutes of June 2, 1970.

RESPONSE: Earlier above, plaintiffs alleged no such program was initiated.

91 **ALLEGATION:** A July 8, 1970 version of this proposal recognized that the Department of Education has a duty to assist in desegregation matters based in state and federal law and that there is a lack of data and publications or education conferences or workshops to help identify needs in the desegregation area.

P. Exh. 157, State Board of Educ. Desegregation Proposal dated 7/8/70, pp. 3-7.

RESPONSE: This repeats an earlier allegation. See responses above.

91 **ALLEGATION:** In August, 1970, the State Finance Council deferred action on the establishment of a fund in the Kansas budget for technical assistance on equal education opportunity matters.

P. Exh. 225, Letter of Brandt, Sec. of State Finance Council to Comm. of Educ. Whittier.

RESPONSE: This program was not "deferred" by the State Board.

92 **ALLEGATION:** There is no evidence that the State Finance Council ever approved the fund, that education officials pursued the matter of desegregation funding, that another application for funds was made, or that Title IV funds ever became a part of the FY 1972 education budget.

Communication from Biles.

RESPONSE: There is no stipulation in the record as to this fact and it is false. The evidence clearly shows "education officials pursued the matter of desegregation funding" since several applications were made in subsequent years according to plaintiffs' own evidence. See allegations below.

92 **ALLEGATION:** Five (5) years later, in 1975, the Kansas Board of Education again considered a Department of Education proposal for technical assistance funds under Title IV. This proposal expressed similar needs to the

1970 proposal, including: assessment of desegregation on the basis of sex, color, race, national origin, etc., consultation regarding student and/or faculty assignments in multi-racial situations, and staff training and instructional improvement with respect to race and sex.

P. Exh. 256, Proposal of Dept. of Ed. dated June 9, 1975.

RESPONSE: See above.

92 **ALLEGATION:** In October, 1975, the Department of Education submitted a proposal to the State Finance Council to approve a grant received under Title IV for $58,000 to be included in the fiscal year 1976 education budget.

P. Exh. 232, Letter of Bolton dated 10/24/75 to Sec. of Admin.

RESPONSE: See above.

92 **ALLEGATION:** Another five (5) years later, and ten years (10) after the first proposal, in December, 1980, the SBE authorized the Department of Education to develop a Title IV technical assistance proposal.

P. Exh. 244, Memo of Asst. Comm. Crouch to Bolton dated 3/10/81.

RESPONSE: See above.

92 **ALLEGATION:** In March, 1981 the Department of Education submitted another Title IV proposal to the SBE at one of its regular meetings. The proposal articulated similar problems and similar needs in the desegregation area and knowledge by state officials of race-related compliants. The SBE rejected the proposal to seek Title IV funds.

P. Exh. 201, 244, SBE Minutes of 3/11/81; Proposal of March 10, 1981.

RESPONSE: See above.

93 **ALLEGATION:** In 1981, SBE staff proposed submitting a proposal for "technical assistance and training to local school districts in race desegregation. . ."

P. Exh. 244, Memo, Crouch to Bolton, March 10, 1981.

RESPONSE: See above.

93 **ALLEGATION:** The 1981 technical assistance proposal was not approved by SBE or the Governor.

Communication from Biles.

RESPONSE: There is no stipulation on record as to this.

93 **ALLEGATION:** In 1983, the SBE again approved of a proposal to apply for Title IV funds.

P. Exh. 208, SBE Minutes 3/9/83.

RESPONSE: See above.

93 **ALLEGATION:** Concurrent with increased activity in this litigation, the defendants state that a technical assistance project is finally in its first year of existence.

P. Exh. 7, Set 3 to State, 2.

RESPONSE: The evidence shows the program was put into effect in 1984 and is today in effect. If plaintiffs wanted to attempt the establishment of a link between this litigation and the Technical Assistance Program first sought in 1970, they had a month-long trial to try.

94 **ALLEGATION:** State officials have never investigated, or instituted a procedure for determining whether a local school district is in compliance with SBE regulations which prohibit discriminatory staffing and pupil assignment decisions.

SBE Minutes; P. Exh. 5, 6, 7; Set 1, 2, 3 to State Board.

RESPONSE: The referenced exhibits do not state this.

95 **ALLEGATION:** The SBE took no action to desegregate the Pierce School.

SBE Minutes; P. Exh. 5A, C, 6, 7. Set 1, 2, 3 to State Board.

RESPONSE: The Pierce school was closed in 1959. The State Board had no authority at this time. Plaintiffs have offered no evidence Pierce was illegally segregated. See earlier responses above.

95 **ALLEGATION:** Most of the recent reports issued by the Department of Education state that there is a need for minimum educational opportunities regardless of sex, race, color, yet the same report never articulates a specific program or objective directed at achieving this goal.

P. Exh. 267, State Plan & Objectives for FY 1980, p. 36.

RESPONSE: These defendants have offered various records of programs intended to promote equal educational opportunity.

95 **ALLEGATION:** In 1983 the SBE's "Mission Statement" asserted the same goal and again the report stated no specific plan directed at achieving racial integration.

P. Exh. 274, Report 9/14/83, p. 1.

RESPONSE: See above.

96 **ALLEGATION:** In 1983 Progress reports assert the same need of "equal educational opportunities" with no mention of any program, policy or objective having been implemented toward this goal.

P. Exh. 275, e.g. State Department of Education's Plans for Implementing the Goals of the State Board of Education, Progress Report, Nov. 8, 1983.

RESPONSE: See above.

96 **ALLEGATION:** The SBE has articulated only once the idea of creating a program or office dedicated to civil rights issues in education and never followed up on the proposal.

P. Exh. 177, SBE Minutes of 3/3/70.

RESPONSE: This is false. A civil right liaison officer was appointed by the State Board in 1970 to work with the federal Department of Health, Education and Welfare and the Commission on Civil Rights. (Exhibit A-28).

96 **ALLEGATION:** The defendants "efforts" at devising any program which would address integration issues demonstrate apathy towards improving race relations. A "guideline" for introducing minority studies into the general curriculum which was produced in response to the Kansas Legislature's mandate for a comprehensive educational program on race relations, assures local school districts that minority studies will not be made a state requirement. Rather, the decision to include minority studies is deemed subject to local "self-determination."

P. Exh. 156, Guidelines for Integrating Minority Studies, p. 1.

RESPONSE: Although it is hard to see any relevance to P. Exh. 156, plaintiffs so completely mischaracterize the exhibit as to require a response. The exhibit does not assure local districts that "minority studies" will not be required. It does state that in light of the 1957 law which makes local districts responsible for selection of textbooks, the guide is to assist local schools to incorporate minority studies into their educational programs. The guide specifically states as one of its purposes, "To bring to the attention of the schools of Kansas the need to include significant American minorities in the study of all facets of the history and culture of the United States." (P. Exh. 156, p.2). Under the section "Policy Statement," the guide states:

"The State Department of Education believes that the elementary and secondary curriculum should deal realistically with the persistent issues of American society. Consequently, the department believes that an open, rational examination of information about minority groups and human relations, conducted in a spirit of free exchange of ideas, is a valuable experience for students and an essential one if they are to be prepared to assume their role as participating members of a democracy. The primary purpose of such an examination should be to provide students with an increasing degree of skill in the analysis of issues involving human relations."

That plaintiffs would conclude this document demonstrates "apathy" toward minorities studies seems intentionally misleading. For the Court's information, institutions of higher education which seek to have a state-approved teacher education program are required to provide their students with multicultural educational instruction. There are 23 approved teacher education programs in Kansas. (K.A.R. 91-1-80(d)).

97 **ALLEGATION:** The State does not require actual proof of compliance with Title VI of the Civil Rights Act of 1964 which prohibits discrimination by any recipient of federal funds. In fact State officials generally "assumed" that local school districts were in compliance by merely accepting on a routine basis applicable forms without further investigation.

P. Exh. 46, Deposition of Bolton at 91.

RESPONSE: Plaintiffs misstate the witnesses' testimony. Officials of USD 501 have stated under oath their compliance with federal laws. (Exhibit B-2).

93 **ALLEGATION:** In 1976, the federal Office of Civil Rights (HEW) suggested by letter to the Commissioner of Education that UDS 501 was in violation of anti-discrimination laws. The State never conducted an inquiry as to whether the HEW statements regarding disproportionate minority representation in disciplinary decisions were illegally based. The 1981 proposal for technical assistance

referred to this matter but the SBE rejected the application for Title IV funds that were supposed to address this problem.

P. Exh. 48, 201, Dep. of Bolton at 97, 98 and Exhibit 1; SBE Minutes of 3/11/81.

RESPONSE: OCR has informed the State Department on several occasions USD 501 is in compliance with federal anti-discrimination laws. For example, OCR dismissed its administrative proceedings in 1976 saying USD #501 adopted a plan to remedy alleged violations of Title VI. (Exhibit D-11). In 1979, OCR determined as baseless allegations the 1976 long-range facilities plan resulted in "resegregation." OCR also said it would continue to monitor the effects of enrollment policies in future years. (Exhibits C-5, C-4). (See also Paragraphs 98, 99, 100 and 101 of these defendants' post-trial brief).

94 **ALLEGATION:** The State has never instituted any procedure to investigate a school district's compliance with Brown II or any other alleged violation of race discriminatin laws.

P. Exh. 5A, C, Set 1 to State, 12; Depo of Bolton; see all stipulations regarding the Governors.

RESPONSE: See above.

94 **ALLEGATION:** The State has never recommended desegregation of students and faculty as a means of improving public education. The SBE has never required such a study.

P. Exh. 5, Set 1 to State, 13.

RESPONSE: This is contrary to the Attorney General's comments. (Exhibits F-1 through F-9). The State Board has always promoted non-discriminatory equal educational opportunities. (See, generally, Series "A" Exhibits).

95 **ALLEGATION:** The State has never attempted to review any plans or proposals for desegregation of teachers, staff or students within USD 501.

P. Exh. 5, Set 1 to State, 53.

RESPONSE: No such review has ever been requested.

95 **ALLEGATION:** The State has never refused to approve bonds for construction on grounds that it might perpetuate segregation. The SBE has never required such a showing prior to approving the issuance of bonds.

P. Exh. 5, Set 1 to State, 35-42.

RESPONSE: Plaintiffs point to no bonds for construction ever approved by the State Board which led to perpetuation of alleged segregation.

93 **ALLEGATION:** In 1985, the SBE sought approval for a technical assistance program "to assist local schools with problems arising relative to minority groups . . ." SBE added in all capital letters "IT IS NOT TO ADVOCATE FOR BUSING OR ANY OTHER SPECIFIC APPROACH."

P. Exh. 256, Memo to SBE from Budd, May 20, 1975.

RESPONSE: Date is obviously incorrect. Otherwise, see responses above.

91 **ALLEGATION:** No school desegregation cases or laws were circulated by the State Board to local school districts.

P. Exh. 7, Set 3 to State Board, 1; SBE Minutes.

RESPONSE: This repeats earlier allegations.

93 **ALLEGATION:** In response to the June 1974 notice from HEW that Topeka had segregated schools, SBE did nothing.

P. Exh. 5, 6, 7, Answers to All State Interrogatories.

RESPONSE: As the Court is aware, OCR pursued vigorously, then dismissed, its complaint with a finding this alleged violation had been remedied.

93 **ALLEGATION:** In response to the allegations in Johnson v. Whittier that Topeka's segregated school harmed Black students, SBE did nothing.

P. Exh. 5, 6, 7, Answers to All State Interrogatories.

RESPONSE: The complaint was dismissed.

94 **ALLEGATION:** The State Board has never conducted any "surveys, investigations, or inquiries" pertaining to school segregation in USD 501.

P. Exh. 6, Set 2 to State Bd., 10.

RESPONSE: This repeats earlier allegations.

94 **ALLEGATION:** The State Board has never issued any "reports, recommendations or plans" pertaining to school segregation in USD 501.

P. Exh. 6, Set 2 to State Bd., 12; State Bd. of Ed. Minutes.

RESPONSE: This repeats earlier allegations.

94 **ALLEGATION:** The State Board never requested any law providing for the permissible or mandatory segregation of schools be repealed nor did it take any position on or, comment on such repeal.

P. Exh. 6, Set 2 to State Bd., 20-23; State Bd. of Ed. Minutes.

RESPONSE: The offensive law was repealed in 1957.

94-95 **ALLEGATION:** The State Board has never issued any public statements or documents concerning school segregation in Kansas or USD 501.

P. Exh. 6, Set 2 to State Bd., 31; State Bd. of Ed Minutes.

RESPONSE: The State Board regularly has promoted equal educational opportunity.

95 **ALLEGATION:** The State Board has never "received, reviewed, sent, approved, or objected to any correspondence with USD 501 concerning segregation" except for a few letters to and from HEW.

P. Exh. 6, Set 2 to State Bd., 29; State Bd. of Ed. Minutes.

RESPONSE: This misstates the interrogatory response. The referenced letters and reports specifically found USD 501 in compliance with federal anti-discrimination laws.

95 **ALLEGATION:** The State Board took all authorized actions to approve city school board actions. It accredited schools, certified teachers, approved annexations, approved bonds, etc.

(No citations to record).

RESPONSE: Plaintiffs have failed to demonstrate even one instance in which the State Board manipulated its authority to create or maintain segregation or deny equal educational opportunity to Topeka school children. See Reed v. Rhodes, 662 F.2d 1219, 1226 (6th Cir. 1981). Plaintiffs cite no action by the State Board which it claims perpetuated segregation. Indeed, as noted above, plaintiffs' experts never even investigated the issue of state involvement.

98 **ALLEGATION:** The State Board claims to have no documents indicating there was ever segregation in any Kansas schools.

P. Exh. 6, Set 2 to State Bd., 24.

RESPONSE: This simply is not a true statement.

98-99 **ALLEGATION:** In 1970, SBE staff developed a proposal for Title IV funds to "establish an office of equal educational opportunity within the department to provide technical assistance to schools having desegregation problems." The proposal included offering assistance, gathering information, and coordinating efforts for 3-5 years "or until the desegregation problems are stabilized. The proposal noted the following problems:

Publicized unrest, protest, some rioting and violence in Kansas cities, . . . Topeka . . .

Problems of . . . noncompliance in segregated urban areas.

Reports of some de facto School segregation not publicized.

Some purported local staff segregation.

Lack of full-time personnel in The State Department of Education to work with these matters.

Lack of information, such as racial census.

Lack of preservice and in-service training for school personnel regarding desegregation and providing for racial and ethnic differences. . .

Lack of available state leadership and money for this purpose."

P. Exh. 288, Technical Assistance Proposal, June 2-3, 1970, pp. 1-2.

RESPONSE: This repeats, yet again, earlier allegations.

99 **ALLEGATION:** 1970, the SBE wrote that the result of school segregation in Kansas "has been either de facto segregation or forced desegregation" and that "many problems remain."

P. Exh. 157, Kansas, A Proposal for A Technical Assistance Program, July 8, 1970, p. 3.

RESPONSE: See above.

99 **ALLEGATION:** In 1970, the SBE wrote that they had done nothing to "deal with the problems incident to school desegregation" other than curriculum guides.

P. Exh. 157, Kansas, A Proposal for A Technical Assistance Program, July 8, 1970, p. 4.

RESPONSE: See above.

99 **ALLEGATION:** In 1970, the SBE wrote that "Publicized unrest, protest, some rioting and violence in Kansas cities has drawn the attention of the general public to school problems and has caused questions to be raised about the role and responsibility of the State Education Agency in solving them."

P. Exh. 157, Kansas A Proposal for a Technical Assistance Program, July 8, 1970, p. 6.

RESPONSE: Plaintiffs repeat this allegation made earlier on pg. 15 of plaintiffs' proposed findings.

99 **ALLEGATION:** In 1970, the SBE wrote that "While . . . alleged noncompliance in segregated urban areas are the responsibility of local school districts, such problems do exist beyond the ability of the districts to solve them quickly." SBE should act.

P. Exh. 157, Kansas A Proposal for Tech Assistance Prog., July 8, 1970, p. 6.

RESPONSE: Plaintiffs repeat this allegation made earlier on pg. 16 of plaintiffs' proposed findings.

99 **ALLEGATION:** The State Board resubmitted the July 8, 1970 Technical Assistance Program on May 12, 1971 saying that the request was "imperative."

P. Exh. 227, Letter, Whittier to Brandt, May 12, 1971.

RESPONSE: See above.

99 **ALLEGATION:** On June 7, 1974, SBE was notified that Topeka had been found by HEW to have segregated schools. HEW asked SBE to refrain from committing federal funds to Topeka.

P. Exh. 231, Letter Henderson to Whittier, June 10, 1974.

RESPONSE: There is no evidence of any failure by the State Board to comply with HEW requests.

99-100 **ALLEGATION:** In 1975, SBE saw a need "to determine what problems have been caused by isolation of minority groups and to eliminate or reduce problems and needs wherever possible."

P. Exh. 256, Recommendation of Commissioner, June 9, 75, p. 9.

RESPONSE: See above.

100 **ALLEGATION:** In 1975, SBE saw a need "to provide consultative services regarding student and faculty assignments in multi-racial situations."

P. Exh. 256, Recommendation of Commissioner, June 9, '75, p. 12.

RESPONSE: See above.

100 **ALLEGATION:** In 1981, SBE staff wrote that "the department is aware of the complaints and reviews in relation to race . . . Race desegregation efforts are underway in . . . Topeka [which has in 1975] experienced the need for technical assistance in relation to racial desegregation."

P. Exh. 244, Memo Crouch to Bolton, March 3, 1981, Proposal Under Title IV of the Civil Rights Act: Race Desegregation, p. 10.

RESPONSE: See above.

100 **ALLEGATION:** On October 13, 1981, the SBE's lawyer advised the Board that the Department of Justice was planning litigation over unequal education in Black schools. SBE took no action.

P. Exh. 204, SBE Minutes, Oct. 13, 1981.

RESPONSE: P. Exh. 204 states the Justice Department was "considering" litigation in unspecified locations "across the country" and nothing was mentioned about any Kansas school district. Plaintiffs fail to suggest what action was required to such a statement by the Justice Department.

107 **ALLEGATION:** In 1975, the Topeka Board of Education sought Technical Assistance from SBE in desegregation.

P. Exh. 256, Memo to SBE from Budd, May 20, 1975 Letter, Oct. 24, 85, Bolton to Weltmer.

RESPONSE: This is false. Topeka and several other school districts indicated an interest in the technical assistance program. The State Department solicited the interest of all school districts. (See Exhibit 256).

CONCLUSION

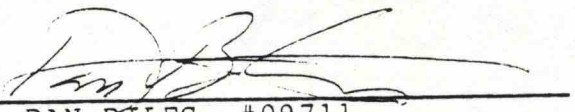
Perhaps the most frustrating aspect of plaintiffs' case against these defendants is their failure to bring forward one expert or even one fact witness to testify against them. This, after all, is what the presentation of evidence at trial is all about. This, at least, would have provided these defendants an opportunity to directly confront the evidence plaintiffs submit against them. Instead, plaintiffs are content to proceed against

these defendants based entirely upon plaintiffs' interpretation or misinterpretation of selected passages from selected documents. In the view of these defendants, plaintiffs presentation of the evidence against them underscores the fact plaintiffs' case is founded upon rhetoric only and not hard facts. Plaintiffs fail to meet the burden placed upon them by this Court back in 1979, despite six years of discovery, the expenditure of countless man-hours, and a month of trial.

This Court should rule against the plaintiffs, and in favor of these defendants. Further, this Court should take the additional step requested by USD #501 and declare the district unitary, so precious educational resources may be placed where they belong -- in the educational programs which are benefitting all Kansas students regardless of their race.

Respectfully Submitted,

GATES & CLYDE, CHARTERED

By 

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CERTIFICATE OF MAILING

I HEREBY CERTIFY I forwarded a copy of the above and foregoing to:

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by U.S. Mail, postage prepaid, this 27th day of January, 1987.

Dan Biles