No. 87-1668

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al.,

Plaintiffs,

and

CHARLES and KIMBERLY SMITH, minor children, by their mother and next friend, LINDA BROWN SMITH, et al.

Intervening Plaintiffs/Appellants,

vs.

UNIFIED SCHOOL DISTRICT NO. 501, et al.,

Defendants/Appellees.

Appeal from the United States District Court
for the District of Kansas
The Honorable Richard D. Rogers, U. S. District Court Judge
Case No. T-316

BRIEF OF APPELLEE UNIFIED SCHOOL DISTRICT NO. 501

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al., Plaintiffs, and CHARLES and KIMBERLY SMITH, minor children, by their mother and next friend, LINDA BROWN SMITH, et al., Intervening Plaintiffs, vs. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al., Defendants.	)	No. 87-1668

STATEMENT PURSUANT TO TENTH CIRCUIT RULE 28.2(a)

The undersigned certifies that the following parties and attorneys are now or have been interested in this litigation. These representations are made to enable judges of the Court to evaluate the possible need for disqualification or recusal.

PARTIES:

Plaintiffs:
James Meldon Emmanuel, an infant, by Mrs. Sadie Emmanuel, his Mother and next friend;
Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her Mother and next friend;
Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his Mother and next friend;
Katherine Louise Carper, an infant, by Mrs. Lena Carper, her Mother and next friend;

Charles Hodison, an infant, by Mrs. Shirley Hodison, his Mother and next friend;
Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their Mother and next friend;
Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her Mother and next friend;
Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Fleming, their Mother and next friend;
Donald Andrew Henderson and Vickie Ann Henderson, infants, by Mrs. Andrew Henderson, their Mother and next friend;
Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her Mother and next friend;
Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their Mother and next friend;
Linda Carol Brown, an infant, by Oliver Brown, her Father and next friend;
Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their Mother and next friend;
Charles and Kimberly Smith, minor children, by their Mother and next friend, Linda Brown Smith;
Dnaielle Threatt, a minor child, by her Mother and next friend, Juda Gaines;
Shawn, Tanya and Tara Woods, minor children, by their Mother and next friend, Joyce Woods;
Cordellia Mitchell and Connie Maxwell, minor children, by their Mother and next friend, Barbara Mitchell;
Arlene Jackson, a minor child, by her mother and next friend, Charlene Burkes;
Carlesia and Cheryl Robinson, minor children, by their Mother and next friend, Patricia Robinson;
Rufus D. and Michelle Kelly, minor children, by their Father and next friend, Rufus Kelley;
John, Jackie, Johnny and Viola Davis, minor children, by their Mother and next friend, Ruby Davis;

Defendants:
Board of Education of Topeka, Kansas;
Unified School District No. 501;
Kenneth McFarland, Superintendent of Schools;
Frank Wilson, Principal of Sumner Elementary School;
State of Kansas;
John Carlin, Governor;
State Board of Education: Dorothy Groesbeck, Kay Groneman, Ruthann Oelsner, Floyd J. Grimes, Dale Carey, Harold H. Crist, Ann Keener, Marilyn Harwood, John Bergner, Theodore Von Fange, Jim Hieberg, Denise Apt, Evelyn Whitcomb.

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CERTIFICATE OF REASONS FOR FILING SEPARATE BRIEF PURSUANT TO TENTH CIRCUIT RULE 31.4

COMES NOW K. Gary Sebelius, counsel for Unified School District No. 501 in this appeal, and sets forth the reasons for the filing of a separate brief:

1. Unified School District No. 501 is one of three appellees in this appeal. The other two other appellees are the Governor of the State of Kansas and the State Board of Education.

2. Defendant U.S.D. No. 501, the primary defendant, is filing an appellee's brief addressing only Issues I thru III of the appellants' brief. The separate briefs of the state defendants address primarily Issue IV. That issue addresses the alleged liability of the state defendants, but not the School

District, for the alleged segregation of the Topeka schools. A conflict of interest will arise between U.S.D. No. 501 and the state defendants in the event of reversal of the finding of unitary schools and the judgment in favor of the state defendants. Separate briefs are therefore necessary because of the separate legal issues and the potential conflict.

3. The defendants have, to the extent possible, coordinated the briefs to be submitted on their side.

Respectfully submitted,

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PRIOR APPEALS

Brown v. Board of Ed., 347 U.S. 483 (1984) (Brown I)
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ATTACHMENTS

Memorandum and Order, April 8, 1977.

ISSUES PRESENTED FOR REVIEW

Appellants' statement of issues misrepresents the analysis of the trial court's findings of fact. Therefore, defendant U.S.D. No. 501 restates the issues as follows:

ISSUE I: The district court did not error with respect to issues of law concerning the allocation of the burden of proof.

ISSUE II: The district court did not error in holding that the defendant school board met its burden to dismantle the formerly de jure segregated school system.

ISSUE III: Topeka today has a desegregated, unitary system.

NATURE OF THE CASE

This school desegregation case, filed in 1951, challenged the Kansas statute which permitted, but did not require, the Board to maintain separate schools for black and white elementary school children for the first six grades. During the 1950-51 school year, Topeka Public Schools maintained 22 elementary schools, four for black children and 18 for white children. Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951). Constrained to follow Supreme Court precedent, the trial court upheld the constitutionality of the Kansas statute. Id.

On appeal, it was noted the non-elementary grade levels of the public schools were operated on a "non-segregated basis". The Supreme Court also accepted the trial court's finding the Topeka elementary schools were equal "with respect to buildings, transportation, curricula, and educational qualifications of teachers". Brown v. Board of Education of Topeka, 347 U.S. 483, 486 n. 1 (1954) (hereafter "Brown I"). The Supreme Court con-

cluded, however, "in the field of public education, the doctrine of 'separate but equal' has no place." The case was restored to the docket for the purpose of further argument regarding the question of relief. Id., 347 U.S. at 495.

On May 31, 1955, the Supreme Court in Brown v. Board of Education, 349 U.S. 294 (1955) (hereafter "Brown II") noted "substantial progress" had been made in Kansas toward the transition "to a system of public education freed of racial discrimination".[1] Id., 349 U.S. at 299. The case was remanded to the district court to carry out the mandate of Brown II and to enter such orders and decrees "as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." Id., 349 U.S. at 301.

By order dated October 28, 1955, the trial court approved the desegregation plan already adopted and partially implemented by the School District, finding the "plan adopted by the Board of Education of the City of Topeka be approved as a good faith beginning to bring about complete desegregation". Brown v. Board

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[1] Desegregation of Topeka's elementary schools started prior to the Supreme Court's decision in Brown I. (Def. Ex. 1073, Topeka School Board minutes (TSBM) 9/8/53; Def. Ex. 1074, TSBM 1/20/54). At the request of the Supreme Court in April, 1955, a map showing the establishment of the new district boundaries for the Topeka Public Schools to be effective at the beginning of the 1955-56 school year, as well as a breakdown showing a percentage of anticipated black/white enrollment for that year, was provided in advance of the court's decision in Brown II. (Def. Ex. 1128, 1129; Pl. Ex. 223; Pl. Ex. 8J, letter dated May 4, 1955 from Raymond F. Tilzey, Director of Census and Attendance for Topeka Public Schools, at p. 10 of the exhibit).

of Education of Topeka, 139 F. Supp. 468, 470 (D. Kan. 1955).[2] The plaintiffs did not appeal the trial court's order approving the neighborhood school plan.

No further action occurred in this case until 1979, when a group of black parents sought and were permitted to intervene, alleging the former board of education and its successor, Unified School District No. 501, "failed to desegregate the schools and establish a unitary and integrated school system". (Doc. No. 65, Motion of Intervening Plaintiffs, filed 8/22/79, at p. 2; also see Doc. No. 78, Order Granting Motion to Intervene, filed 11/29/79, published as Brown v. Board of Ed. of Topeka, Shawnee County, 84 F.R.D. 383 (D. Kan. 1979)).

Although the original litigation involved a class "consist[ing] of Black students attending elementary schools in the Topeka school district", Id., 84 F.R.D. at 394, upon motion by intervening plaintiffs the court permitted expansion of the original class to include "all black students enrolled now or in the future in defendant Unified School District No. 501 schools". (Doc. No. 101, Order Ruling on Class Action Motion, filed 6/13/80, pp. 1, 4). In addition, the court granted plaintiff's motion to add the Governor and the members of the State Board of Education.

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[2] The court retained jurisdiction of the cause for the purpose of entering the final decree at such time as the court felt there had been full compliance with the mandate of the Supreme Court. Id., 139 F. Supp. at 468. To bring the schools into compliance with the law, within two months of the trial court's order, the School Board adopted Step IV of its four-step desegregation plan, eliminating the Kindergarten option which had been criticized. (Def. Ex. 1078, TSBM 12/21/55).

A long discovery process ensued. Intervening plaintiffs filed an expanded complaint, including a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. (Doc. No. 238, Order Granting Plaintiff's Motion to Amend, filed 3/11/86; Doc. No. 242, Amended Complaint, filed 5/27/86).

TRIAL COURT PROCEEDINGS AND DISPOSITION

The trial lasted from October 6 to October 31, 1986, consisting of the testimony of 37 witnesses, including 11 experts, over 700 exhibits, including the deposition testimony of 12 additional witnesses, and comprised a trial transcript totaling nearly 3000 pages. Plaintiffs contended the District and the State never complied with the mandate of Brown, and failed "to establish a unitary and integrated school system". (Doc. No. 242, Amended Complaint filed 5/27/86, at ¶5). Denying plaintiffs' claims for relief, Judge Richard D. Rogers specifically found the defendants proved "by a preponderance of the evidence that U.S.D. No. 501 is a unitary school system". (Doc. No. 312, Memorandum and Order filed 4/9/87, at pp. 11, 50 [hereafter referred to as "Op. ___"]).

In determining that illegal segregation does not exist in the District, the court examined 18 factors: statistical measures of student population; student transfer policy; optional attendance zones; space additions; school closings; school openings; schoolsite location; school boundary locations; history of the schools; facilities; extracurricular activities; curriculum; transportation; faculty and staff; community attitudes; equality of education; opportunities for desegregation; and other factors.

The court was "convinced that students in U.S.D. No. 501 are admitted to school and educated on a nondiscriminatory basis. There is no illegal, intentional, systematic or residual separation of the races." (Op. 45) (emphasis added).

> [A] careful review of all relevant circumstances establishes that the de jure system of segregation has been dismantled and its vestiges eliminated.
> * * *
> Students of different races attend school together in significant numbers in every part of the District. School attendance is determined by a consistent application of neighborhood school principles. There is no gerrymandering. The race-neutral intent of these principles is untainted by past segregative practices.
> * * *
> Regardless of the merits of racial balance, the imbalance perceived in this case is neither unconstitutional per se, nor unconstitutional in conjunction with other factors such as community attitudes, test scores, faculty and staff assignment, or opportunities for improvement.

(Op. 45-47).

Title VI relief was also denied. The court found "[t]he record does not establish that defendants intentionally discriminate against plaintiffs or that a policy of intentional discrimination has had effects continuing to the present." (Op. 47) (emphasis added).

STATEMENT OF FACTS

I. PLAINTIFFS MISSTATE THE FACTS.

In their appellate brief, plaintiffs claim that they are challenging "only a few, minor factual findings made by the District Court." (Brief of Plaintiffs, p. 24 n. 30; also see p. 25). This statement is provably false. On numerous occasions, plaintiffs misstate the facts, mischaracterize the court's findings, take statements out of context, and omit unfavorable facts.

Three examples illustrate plaintiffs' misleading representations. First, plaintiffs falsely assert that the district court found that gerrymandering occurred.

> "Reliance on neighborhood schools does not meet Topeka's constitutional obligation to dismantle its segregated school system--particularly when 'the neighborhoods' are gerrymandered, as the district court found here." (Brief of Plaintiffs, p. 5).

This is a blatant misstatement of the court's findings. The district court specifically found:

> "The attendance zones of schools with high minority populations are not gerrymandered to produce this result." (Op. 23).
>
> "In summary, the District's attendance zones are not segregatively gerrymandered." (Op. 25).
>
> "School attendance is determined by a consistent application of neighborhood school principles. There is no gerrymandering." (Op. 45-46).

Second, a false assertion commences at the bottom of page 34 of plaintiffs' brief:

> "The District Court in this case held that school construction 'promoted racial separation.'"

This is a gross mischaracterization of the trial court's finding. After analyzing the allegation, the court found:

> "In sum, it does not appear that the district's school construction policy has promoted segregated residential patterns or segregated schools." (Op. 22).

It is one thing for an appellant to take issue with a trial court's factual findings. It is quite another to materially misstate those findings in hopes of avoiding the burden of establishing such findings to be clearly erroneous pursuant to the requirements of Rule 52(a). As one final example of plaintiffs' mischief, at page 3 of their brief they assert:

> "The District Court found that the only action taken by the school board to comply with the Supreme Court's order after 1955 was to adopt a "neighborhood" school system and then subsequently close the four previously all-black schools. Op. 14, 30, 40."

A similar false assertion is made at page 12 of plaintiffs' brief. Nothing remotely resembling this assertion is contained on the pages of the court's opinion cited by plaintiffs. More importantly, the trial court carefully documented several desegregative actions taken by the School Board.

> "Indeed, in recent years, the student transfer policy has been used to improve racial balance of schools within the district." (Op. 17).
>
> "The school closings over 30 years in the district indicate a policy of desegregation." (Op. 20).
>
> "Indeed, the school district has taken action to modify the racial imbalance that exists at [Belvoir by closing Rice School in 1981 and combining part of its population with Belvoir]." (Op. 26).
>
> "In 1963, however, the district passed a resolution against discrimination the hiring and employment of personnel. (Op. 32).
>
> "After the Supreme Court encouraged race-conscious efforts to eliminate the vestiges of segregation and HEW challenged the progress of desegregation in the district, additional action was taken to improve the racial balance of the student bodies in the district." (Op. 43-44).
>
> "Since 1976, members of the Board of Education of U.S.D. No. 501 have been elected through a district system which improves the opportunities for a minority membership on the Board." (Op. 44).

Plaintiffs' so-called recitation of the facts is inadequate and materially misrepresents the evidence and the court's findings. To the extent practicable, defendant will identify (by way of footnotes) additional misstatements, and findings taken out of context which demonstrate that plaintiffs are, in fact, attempting to hide their disagreement with the court's findings of fact.

II. THE FOUR-STEP DESEGREGATION PLAN.

In 1951, there was only one high school in Topeka which was attended by all students without regard to race. (Tr. 2418-2419, Payne).[3] The junior high schools were desegregated at the beginning of the 1941-42 school year. (Def. Ex. 1006; Tr. 473-475, Lamson; Tr. 2458, Douglas; see also Op. 6-7, citing Graham v. Board of Education of City of Topeka, 153 Kan. 840 (1941)).

At a time when certain southern states, such as Mississippi and Virginia, were abolishing their public school systems in response to the mandate of Brown (Tr. 358-359, Lamson; Tr. 721, Foster), the Topeka School Board already had commenced desegregating its elementary schools. In September, 1953, segregation was ended in the attendance areas of two all-white elementary schools (Southwest and Randolph), known as Step I. (Def. 1073, TSBM 9/8/53). In January, 1954, segregation ended at 12 additional formerly all-white elementary schools (Step II). (Def. Ex. 1074, TSBM 1/20/54). In February, 1955, segregation was terminated at all remaining buildings, closing all-black McKinley, and assigning Buchanan, Monroe and Washington (the remaining de jure black schools) to districts within the general framework of elementary schools. (Step III). (Def. Ex. 1076, TSBM 2/7/55; Def. Ex. 1077, TSBM 2/23/55). By the beginning of the 1955-56 school year, all elementary school children attended

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[3] "Tr." references are to the reporter's transcript of the trial held in October, 1986. These references are followed by the last name of the witness whose testimony has been referenced.

their neighborhood school without regard to race,[4] resulting in black school children being present in 18 of the 23 elementary schools. Within one year of the Brown mandate, 56% of black elementary students were dispersed to the formerly all-white elementary schools. Sixty-seven percent of white elementary students attended schools with black students. (Def. Ex. 1078, TSBM 12/21/55; Def. Ex. 1008B; see also Op. 7). Buchanan was closed in 1959. Another former de jure black school, Washington, was closed in 1962. (Def. Ex. 1083, TSBM 1/21/58; Def. Ex. 1084, TSBM 2/5/62).

III. HEW AND SCHOOL DISTRICT ACTION TO ACHIEVE COMPLIANCE WITH TITLE VI.

In 1974, HEW initiated formal administrative proceedings to obtain compliance with Title VI regarding certain elementary assignments, and certain elementary and junior high school facilities. (Pl. Ex. 228; Tr. 2485-2486, Stratton; Pl. Ex. 252).[5] In response to HEW's investigation, the District developed a Short-Range Facilities Plan in 1974 (Pl. Ex. 258) and a Long-Range Facilities Plan in 1976 (Pl. Ex. 240; Tr. 1436-1437,

---

[4] Step IV, adopted December, 1955, eliminated the option of Step III which had permitted Kindergarten children to attend the same school in 1955-56 that they would have attended in 1954-55 if they had been old enough to enter school. (Def. Ex. 1078, TSBM 12/21/55).

[5] In August, 1974, the School District obtained a preliminary injunction against HEW from holding the administrative hearing based on the contention the court was the proper forum for adjudicating any claims that the School District had not met the legal requirements of Brown. (Pl. Ex. 370, TSBM 5/20/75; Tr. 2486, Stratton). U.S.D. No. 501 v. Weinberger, U.S.D.C. Kansas, No. 74-160-C5, discussed in Brown v. Board of Ed. of Topeka, 84 F.R.D. 383, 390-391 (D. Kan. 1979).

Henson). The Short-Range Plan resulted in the closing of two junior high schools (Crane and Curtis) and two elementary schools (Clay and Monroe) in 1975. Monroe was the last of the formerly all-black elementary schools to be closed. (Pl. Ex. 258; Def. Ex. 1092, TSBM 9/3/74; Def. Ex. 1093, TSBM 12/3/74; Def. Ex. 1094, TSBM 1/7/75; Tr. 1436-1438, Henson). In an effort to resolve the HEW issues, the District hired Dr. Gordon Foster, who presented alternate suggestions, including a proposal which utilized a guideline of ±20% of the district average of minority students to avoid "racial identifiability" of the schools.[6] (Pl. Ex. 370, TSBM 5/20/75; Tr. 696-697, Foster).

Shortly thereafter, the District adopted a resolution enumerating steps for closing certain school facilities to promote integration. The District created a citizens' advisory committee, adopted an affirmative action program to encourage minority employment, and established a learning center known as the Adventure Center "operated in a manner intended to encourage integration among minority and majority students". The affirmative action program, the advisory committee, and the learning center still operate today. (Def. Ex. 1095, TSBM 5/29/75; Tr. 1449, 1451, Henson; Tr. 2487-2490, Stratton).

In March, 1976, the District adopted its Long-Range Plan which required five years to be fully implemented. The Long-Range Plan contemplated the construction of new schools, the

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[6] Dr. Foster was assisted by William Lamson in 1975. Foster and Lamson testified as experts for plaintiffs in 1986, using a standard of ±15% for determining "racial identifiability". (Tr. 683, 696, Foster; Tr. 366-367, 370, 373-374, Lamson).

closing of older facilities, and the redrawing of attendance boundaries, taking into consideration the anticipated effect on the racial composition of the schools. The principle components of the plan included: elimination of all remaining optional attendance areas; closure of five junior high schools; transfer of the ninth grade to the senior high schools in the 1980-81 school year, establishing middle schools; conversion or construction of two additional middle schools; and the closure of six elementary schools. (Def. Ex. 1098, TSBM 3/2/76; Def. Ex. 1099, TSBM 3/16/76; Pl. Ex. 240, p. 2-3). In April, these matters were discussed with the U. S. Department of Justice and HEW. (Def. Ex. 1101, TSBM 5/4/76; Def. Ex. 1130).

In August, 1976, HEW agreed to dismiss its administrative enforcement proceedings, with assurances to the District that no further Title VI proceedings were contemplated on the basis of current facts and the District's commitment to implementation of the Long-Range Plan. (Tr. 1446-1447, 1453-1458, Henson; Tr. 2490-2491, Stratton; Def. Ex. 1131). In September, 1976, HEW filed its motion to dismiss the administrative proceedings premised upon the District's adoption of a plan to remedy Title VI violations. (Def. Ex. 1132). In October, 1976, the administrative law judge dismissed the proceedings, stating:

> "It appearing to the undersigned that the Respondent School District adopted a plan to remedy the violations of Title VI of the Civil Rights Act of 1964 alleged in the Notice of Opportunity for Hearing in this matter, it is therefore ordered that the above-entitled matter

be dismissed without prejudice." (Def. Ex. 1133).[7]

As a result of the 1980 conversion to middle schools, there were approximately 190 teachers needing reassignment. The District procedure reorganized staff members "to achieve a distribution of minority staff members which will comply with the requirements of the law". (Pl. Ex. 8AA). By 1981-82 school year, the Long-Range Plan was fully implemented. The plan was designed to have and did have an integrative effect.[8] (Tr. 1460-1461, 2719, Henson).

One example of the integrative effect was consolidation of the junior high attendance centers formerly occupied East Topeka (71.4% minority in 1979), Holliday and Curtis into one attendance center--Chase Middle School (38.5% minority in 1980). In addition, the former Rice attendance area (33.6% minority in 1980) was divided between Lafayette and Belvoir, reducing the minority population in those two schools. Lafayette went from 61.3% to 56% while Belvoir went from 75.6% to 62.8% minority. Also, the closing of Crane Junior High (52.9% minority in 1974) sent most

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[7] In the Spring of 1979, HEW received a patron complaint regarding the District's proposed closing of Central Park Elementary School and its conversion to Robinson Middle School pursuant to the 1976 Long-Range Plan. HEW investigated the District's implementation of the Long-Range Plan and the District's open enrollment policy. HEW found pupil assignment policies pursuant to the Long-Range Plan did not violate Title VI. Likewise, HEW concluded the open enrollment policy had not significantly affected the racial composition of schools. (Def. Ex. 1136A-C). Thereafter, the District adopted a minority to majority transfer policy to assure transfers had an integrative effect. (Tr. 2702, Henson; Tr. 2442, 2443, Douglas).

[8] The positive results of these actions as they relate to faculty and staff assignment are summarized infra.

of those students to Boswell (increased from 14.6% to 28.5% minority). In turn, Boswell (42.5% in 1979) was combined with Roosevelt in 1980, and all children were sent to new Robinson Middle School (opening 32.9% minority), which had an integrative effect. (Tr. 1460, 2721-2723, Henson; Pl. Ex. 8J).

With one extremely minor exception, no boundary changes occurred between 1981 and the end of the 1985-86 school year. All school attendance centers remained open and the grade configurations for K-6 (elementary), 7-8 (middle school), and 9-12 (senior high) remained the same. (Tr. 1503-1504, Henson).

IV. STATISTICAL MEASURES OF DESEGREGATION BY STUDENT ASSIGNMENT.

Two statistical indicies have been recognized by social scientists as reliable measurements of the overall or system-wide level of desegregation. The index of dissimilarity measures the departure of a school system from perfect racial balance. The relative exposure index measures the opportunities for interracial contact.[9] (Tr. 2581, Armor; Tr. 2332-2335, Clark; Def. Ex. 1116A & B). By both indicies, the District experienced very substantial improvement in desegregation between 1966 and 1985.[10]

---

[9] The value of these indicies range from zero (perfect racial balance or total interracial contact) to a value of 100 (total segregation or racial separation). With respect to student assignment, a value of 50 on a dissimilarity index and a value of 30 on a relative exposure index is a substantially desegregated system. (Tr. 2582-2583, 2586-2589, 2649, Armor; see also Op. 17).

[10] The dissimilarity index for elementary schools improved from 51.2 to 36.6. The junior high schools improved from 53.2 to 32.1, while the high schools improved from 34.4 to 30.1. The relative exposure index improved at the elementary level from 38.7 to 14.6; at the junior high level from 26.1 to 11.2; and at the high school level from 8.1 to 7.3. (Def. Ex. 1119A).

(Tr. 2586, Armor). Considering the 16 to 26% increase minority enrollment, had nothing been done since 1966, the indicies would either have risen or at least stayed the same. Although the District's minority student population increased, segregation decreased. This is very significant. From 1981, schools were highly integrated by the indicies. Desegregation occurred due to school closings and boundary changes. U.S.D. No. 501's 1985-86 relative exposure value of 12.1 for all schools is extremely good.[11] (Tr. 2586-2589, Armor; Def. Ex. 1119A-D).

Plaintiffs contend a school is racially identifiable or imbalanced if its percentage of minority students falls beyond ±15% of the district average of minority students.[12] Since approximately 26% of the District's elementary students are non-white, plaintiffs contend a minority enrollment of less than 11% is a "white school", and more than 41% is a "non-white" school. As a result, in 1985, plaintiffs claim only seven elementary schools out of 26 are racially identifiable non-white (Avondale East, Belvoir, Highland Park North, Hudson, Lafayette, Lowman Hill and Quinton Heights). Of the nine secondary schools, only

---

[11] Plaintiffs falsely assert the court found the School District "is more segregated than other comparable districts. (Plaintiffs' Brief at p. 5). The court actually found: "Statistical indicies . . . indicate relatively high levels of integration in U.S.D. No. 501, although the levels may be lower than other school systems with mandatory busing plans or other more aggressive racially conscious student assignment plans." (Op. 17). There was no finding of other "comparable school districts".

[12] By the standard of ±20%, an alternative proposed by Foster in 1975 when consulting with the District as a way to resolve HEW concerns, there would be no racially identifiable white schools today. (Tr. 801-802, Foster; Pl. Ex. 8J).

Eisenhower would be considered racially identifiable non-white. As the court observed, however,

> "When one totals the student populations of the eight schools plaintiffs have labeled as racially identifiable nonwhite . . . one finds that the schools are attended by more white students than black students (1,248 white students, 1,079 black students). Indeed, white students make up close to half (49.3%) of all the students that attend these allegedly nonwhite schools." (Op. 16-17).[13]

From completion of the Long-Range Plan in 1981 through 1985, racial composition has been very stable. (Tr. 478, Lamson; Pl. Ex. 8J). Only one school, Belvoir, has a majority black population (54.7% in 1985). (Pl. Ex. 8J).

V. FACULTY AND STAFF ISSUES.

In the years immediately following the Brown decisions, the District discriminated in the hiring and placement of minority staff. However, in 1963, a formal policy was adopted, requiring "no discrimination in the recruitment and selection of employees as to race, creed, color or national origin". (Def. Ex. 1135; Tr. 2428-2429, Payne; see also Op. 32). As part of its efforts to satisfy HEW, the District has had an affirmative action program. Plaintiffs' expert found no fault with the District's recruitment practices. (Tr. 758, Foster; Pl. Ex. 2; Pl. Ex. 371, TSBM 5/29/75). The affirmative action policy is administratively interpreted to require careful attention to the assignment of certified and classified individuals. (Def. Ex. 1041B; Tr. 2695-2696, 2699, Henson).

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[13] Further, plaintiffs' approach was seriously criticized as an improper standard in evaluating segregation for either liability or remedy purposes. (Tr. 2566-2573, Armor).

Although plaintiffs utilized a standard of ±15% of the district average of minority enrollment for student assignment, their standard for racial identifiability regarding faculty assignment was based upon ±15% of the minority mean--a much tighter, very strict standard. (Tr. 683, 780, Foster).[14] Upon reorganization of the faculty in 1981, the District substantially complied with plaintiffs' formula for full minority parity. The transfer of no more than 26 faculty of 911 teachers would have satisfied plaintiffs.[15] (Tr. 664-666, 773-774, Foster). Plaintiffs' expert conceded the ability to reassign teachers is limited by their certification, and those transfers may not have been possible. (Tr. 664-665, 765-766, Foster).

All the schools have been within ±10% range in the last ten years. In 1985, only six schools had minority staffs exceeding ±10% of the District average. Of those six, three were within 11% of the District average. (Pl. Ex. 155-O). By 1986, the minority administrative and certificated staff percentages for all elementary schools were within a ±8% range; all middle schools were within ±7% range; and all high schools were within ±4% range. (Def. Ex. 1122).

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[14] Plaintiffs erroneously suggest that this is "the most liberal standard used by the courts for faculty assignment". (Plaintiffs' Brief, p. 42). This extremely narrow standard permits a deviation in a 10% system-wide minority staff percentage ranging from 11.5% to 8.5%. This produces absurd results. (For numerous examples, see Doc. No. 306, Response of U.S.D. No. 501 to Plaintiffs' Post-Trial Brief filed 1/28/87, pp. 40-42).

[15] Dr. Foster called it pretty close, within "a whisker". (Tr. 766, Foster).

The District's work force was 12.1% minority for the 1985-86 school year. Minority employees were represented at all levels: managerial workers, over ~~10%~~ 15; teachers and other professional staff, nearly ~~15%~~ 10, and all other employees, nearly 16%. (Pl. Ex. 155Q, p. 2). The current superintendent is a black man, as are the principals of two of the three high schools. (Tr. 25-26, Edwards). Two current Board members are minority. (Tr. 2468, Ward).

VI. PLAINTIFFS' PUBLIC OPINION SURVEY.

Plaintiffs commissioned a public opinion survey purporting to assess the attitudes of Topeka residents for the U.S.D. No. 501 schools. 400 respondents were interviewed by telephone. The survey's principal mission was to ascertain answer to two questions. Those two questions and the desired response are described in a letter from plaintiffs' counsel to the vice-president of the survey corporation, who was a college classmate of plaintiffs' counsel:

> As I told you, I am really interested in two questions:
>
> 1. Do the citizens of Topeka perceive some schools as black (or minority) and others as white? I want the answer to be yes.
>
> 2. Do the citizens of Topeka perceive some schools as providing less adequate education than others? I want the answer to this to be yes, too, but I also would hope it's the same schools as are identified as black (or minority).

(Def. Ex. 1001) (emphasis added).[16] The survey did not conform

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[16] The letter further states plaintiffs' counsel does "not want a survey that reaches that result by biased or leading questions". However, the message was clear and this was merely a "wink of the eye". (Tr. 2275, Hickman).

to "minimum standards . . . and therefore is not valid". (Tr. 2162, Hickman; see also Tr. 2288-2289, Clark). The sample and survey design have several methodological problems. (Tr. 2162-2201, Hickman; Def. Ex. 1032).[17] Only a small number of respondents concurred with plaintiffs' racial characterizations of schools. (See §VII, which follows).

VII. THE SO-CALLED "RACIALLY IDENTIFIABLE" SCHOOLS.

None of the de jure black schools remain today. McKinley was closed in 1955; Buchanan in 1959; Washington in 1962; and Monroe in 1975. (Pl. Ex. 8J). Plaintiffs focus on schools which they assert are "racially identifiable". The facts regarding those schools follow.

A. Belvoir. Plaintiffs do not claim that Belvoir is a vestige of the former de jure system. Although by plaintiffs' definition Belvoir is a "racially identifiable" school, it currently possesses only 7.7% of the total black elementary school enrollment. (See Def. Ex. 1120B).[18] Belvoir and 90% of its former attendance area were annexed in 1960 by the City of

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[17] Harrison Hickman, a public opinion researcher, was employed by defendants to critique the survey. The court found "several well-founded objections were made. The court does not believe the survey results are important to the ultimate issues in this case." (Op. 35-36). For an extended discussion of those objections see Doc. No. 306, Response of U.S.D. No. 501 to Plaintiffs' Post-Trial Brief, filed 1/29/87, pp. 43-65).

[18] Belvoir was not 71% minority in 1986 as alleged at pages 3 and 19 n. 25 of plaintiffs' brief. The data relied upon by plaintiffs was not admitted into evidence and does not stand for the premise plaintiffs assert.

Topeka,[19] not by the School District. (Pl. Ex. 219, p. 151). Plaintiffs contend Belvoir's enrollment was 20.87% black in 1952, when Topeka Public School's black were 11% black. Belvoir was not racially identifiable by plaintiffs' standard.[20]

Demographics have been a major force in changing Belvoir's racial composition since 1960. In 1963, a federally-subsidized low income housing project known as Pine Ridge was built across the street from Belvoir. (Pl. Ex. 8R). Two years later, a similar project, Trail Ridge, was built adjacent to Belvoir. As of 1974, 198 students living in these housing projects attended Belvoir. (Pl. Ex. 289, p. 3). In mid-1977, 66% of residential units of Pine Ridge were occupied by blacks. (Pl. Ex. 8R, Vol. V, p. 4). By 1963, the area south of Belvoir was condemned for construction of Interstate 70. (Tr. 462, Lamson). The Interstate forms the southern boundary of Belvoir and the northern boundary of Hudson. Plaintiffs' expert admitted placement of the Interstate had a segregative effect. (Tr. 427, Lamson).

The closing of Rice and reassigning students to Lafayette and Belvoir ~~had a~~ was desegregative (Belvoir went from 75.6% to 62.8%

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[19] From 1950 until July 1, 1965, all additions to the boundaries of the Topeka Public Schools were solely dependent upon annexation of the city limits. Topeka Public Schools had no control. As the city boundaries expanded, the District was required to educate school age children living within the annexed areas. (Tr. 2413, Payne). From January 1, 1955 until July 1, 1963, the City through annexation, more than ~~doubling~~ doubled in size. As of July 1, 1965, pursuant to state law, the boundaries of the School District were frozen. (Tr. 2094, Abrahamson; Def. Ex. 1009; Tr. 408, Lamson; Def. Ex. 1001, p. 2; Def. Ex. 1009).

[20] Actually Belvoir's enrollment was only 14.8% black, even closer to Topeka's average. (Def. Ex. 4G).

minority; while Lafayette went from 61.3% to 56.1% minority). (Tr. 2721-2723, Henson; Pl. Ex. 8J; Def. Ex. 1114, p. 28). Plaintiffs' allegation that Belvoir is racially identifiable by staff and by perception is not supported by the evidence.[21]

B. Highland Park North. Like Belvoir, Highland Park North was not a part of the Topeka Public School system in 1954. The attendance area was annexed in 1959. It currently possesses only 9.5% of the black elementary school enrollment. (See Def. Ex. 1120B).[22] With the closing of Parkdale (86% minority, 82% black without Headstart, Pl. Ex. 8J), some of that attendance area was reassigned in 1978 to Highland Park North in accord with the HEW-approved Long-Range Plan. The Parkdale closing was desegregative. (Pl. Ex. 240, p. 18; Def. Ex. 1114, p. 19).

C. Lafayette. Prior to 1954, Lafayette was an all-white school. In 1956, 13.7% of the black elementary students attended Lafayette. (Def. Ex. 1008A). In 1985, that percentage was

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[21] Belvoir's staff is 14.8% minority, whereas the District-wide average is 11.23%. This is very similar to the percent minority staff for Potwin (13.1%)--a school plaintiffs assert is "racially identifiably" white by student assignment. (Pl. Ex. 155O). To conclude Belvoir is a racially identifiable black school by perception upon the results of the survey is ridiculous. At the very least, 85% of the respondents did not identify Belvoir as a "black or minority school". (Pl. Ex. 21, p. 20 & 22). In addition, plaintiffs attempted to show where schools are perceived as minority schools, they are stigmatized and harms, such as poor test scores, result. (Tr. 1235-1237, Crane). Plaintiffs' own evidence refutes this assertion. The test score data offered by plaintiffs demonstrates Belvoir students scored very well, with an 81% pass rate--on average scoring better than 15 other elementary schools. (Pl. Ex. 185; Tr. 1246-1247, Crane).

[22] 87% of the survey respondents did not identify Highland Park North as "black or minority school". (Pl. Ex. 21, p. 22). Percent minority staff at Highland Park at 19.2 was only 8% above the District-wide average (11.2%). (Pl. Ex. 155-O).

reduced to 9.5%. (Def. Ex. 1120B). The planned desegregative (Pl. Ex. 240, p. 18; Def. Ex. 1114, p. 19) closure of Parkdale resulted in a partial reassignment to Lafayette, increasing Lafayette's minority percentage slightly, from 62 to 66%. (Pl. Ex. 8J). The closing of Rice was also desegregative. (Tr. 2721-2723, Henson).[23] In 1969, although Lafayette was 54% minority, its black student enrollment was only 26%. The percentage of minority and black student enrollment has been decreasing steadily since 1976. (Pl. Ex. 8J).

D. Quinton Heights. Prior to 1954, Quinton Heights was an all-white school. In 1956-57, Quinton Heights possessed 7.3% of the black enrollment.[24] Plaintiffs claim that upon the closing of formerly all-black Monroe in 1975, an improper number of Monroe's black students went directly to Quinton Heights. (Plaintiffs' Brief at p. 16). But Quinton Heights increased only slightly (37% to 39%) upon the closing of 83% minority Monroe. (Pl. Ex. 8J). In 1986, 12.5% of the 22 administrative and certificated staff at Quinton Heights are minority, while the

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[23] In the 1986 school year, 14.8% of the administrative and certificated staff were minority members, while the District-wide average was 10.8%. (Def. Ex. 1122). 83% of the respondents did not identify Lafayette as a Black or minority school. (Pl. Ex. 21, p. 22).

[24] Plaintiffs falsely assert Quinton Heights is the successor school to all-black Pierce which was closed in 1959. Plaintiffs also contend that many Pierce students were assigned to Quinton Heights. (See Plaintiffs' Brief at p. 15-16). Plaintiffs' own exhibit demonstrates the Pierce attendance area was reassigned to three schools: Highland Park North, Highland Park Central and Quinton Heights. (Pl. Ex. 292). Plaintiffs' own expert admits that there is "no indication of the gain or loss of black and white students at the Quinton Heights school as a result of the Pierce closing". (Pl. Ex. 219, p. 143).

District-wide average for elementary schools is 10.8%. (Def. Ex. 1122).[25] In 1985, the racial composition of Quinton Heights was 49.4% minority. (Pl. Ex. 8J).

E. Hudson and Avondale East. ~~At no time in the history of~~ Hudson was never a racially identifiable minority school prior to 1983. There have been no boundary changes to Hudson since 1964. Changes in the racial composition of Hudson are demographic. As with Belvoir, the siting of federally-subsidized housing projects within the Hudson attendance area (i.e., Colonial Townhouses in 1965, the Highland Park Apartments in 1967 and Deer Creek in 1970), have changed the racial composition of the school. By mid-1977, over 55% of the Deer Creek units were rented by black families. (Pl. Ex. 8R, Vol. V, pp. 4-5; Pl. Ex. 8H; Def. Ex. 1009 & 1009A).[26]

Avondale East attendance area was annexed in 1959. Avondale East has been racially identifiable minority school in only two years--1971-72 and 1985-86. (Pl. Ex. 8J).[27]

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[25] 95% of the respondents in the survey did not perceive Quinton Heights as a black or minority school. This is true, even though Quinton Heights is the elementary school with which the greatest number of respondents said they were "familiar". (See Pl. Ex. 21, pp. 20 & 22).

[26] 98% of respondents did not identify Hudson as a black or minority school. (See Pl. Ex. 21, pp. 20).

[27] Using plaintiffs' racial identifiability standard by virtue of staff assignment, Avondale East had too many minority staff members in 1976-77; too many whites in 1977-78; too many minorities in 1978-79; too many whites in 1979-80; and too many minorities in 1980-81. (See Pl. Ex. 155-O). It is this kind of result which caused Judge Frank Johnson to describe Dr. Foster's formulas as "arbitrary" and "highly artificial" in Carr v. Montgomery County Board of Education, 377 F. Supp. 1123, 1140-1141 (N.D. Ala. 1974).

F. Lowman Hill. Lowman Hill was an all-white school prior to 1954. By 1956 it had a black population of 17.4% (District average 10.7% black). In 1959, Buchanan, a former de jure black school, was closed. Its attendance area was assigned to nearby Lowman Hill. In 1979, Lowman Hill was 43% minority. Pursuant to the Long-Range Plan, after the partial reassignment of the Central Park area to Lowman Hill, minority enrollment had decreased to 36.7% in 1982. This was an integrative action. (See Def. Ex. 1114, p. 23; compare Def. Ex. 1115I, with Def. Ex. 1115H, overlaying Def. Ex. 1115C; Pl. Ex. 8J). In 1985, Lowman Hill was not a racially identifiable "black" school; it was approximately 1/3 black (33.8%). At no time since 1982 and the present has Lowman Hill been a racially identifiable black school.[28] For the last five years, Lowman Hill's minority student population has fluctuated between 36 and 41%. Lowman Hill was "racially identifiable" minority by 53/100ths of a percentage point in 1985. It was not racially identifiable minority in 1982, 1983 or 1984. (Pl. Ex. 8J). The segregative effects of the former de jure Buchanan School boundaries have attenuated entirely. (Pl. Ex. 8J; Op. 23).

G. McClure, McCarter, McEachron and Bishop. These four schools form the outer ring of the southwest portion of the District. They were constructed when people were migrating out of the center city to the suburbs. This was not unique to

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[28] Plaintiffs assert Lowman Hill is a "black school". This is simply another misrepresentation. (Plaintiffs' Brief at p. 14; also see footnote 21, where plaintiffs mistakenly state that Lowman Hill is 42% black).

Topeka. (Tr. 465, Lamson). These schools are not vestiges of the former dual school system. Good reasons exist to under-utilize inner city schools when the district is losing school age population in the inner city. (Def.Ex. 1114, pp. 9-11; Def. Ex. 1114A). A school district may permit a school to become under-utilized because closure is foreseeable. Portable classrooms can be used to solve what would appear to be temporary overcrowding in the areas to which people are migrating. (Tr. 466-468, Lamson). All four of these schools were opened before the 1965 Kansas Legislature locked the boundaries of school districts. Otherwise, even greater growth would have been experienced by the School District in southwest Topeka. Today, all four schools have at least one minority administrative or certificated staff member.[29] (Def. Ex. 1122).

H. Potwin, Crestview, Gage and Whitson. Gage and Potwin were white schools prior to 1954.[30] Today, both Whitson and Gage are within plaintiffs' acceptable range for black enrollment. Crestview is outside the range by 1% and Potwin by 2.3%. (Pl. Ex. 8J). The boundaries for both Potwin and Gage are based upon nondiscriminatory reasons. (See Pl. Ex. 8L, Appendix B; Tr.

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[29] In 1986, 10.8% was the District-wide minority average. No school was more than 6% off the District-wide average, Bishop (5.6%), McCarter (9.1%), McEachron (5%), and McClure (5.3%). (Def. Ex. 1122). 95% or more of the respondents did not identify these schools as white schools. (Pl. Ex. 21, p. 21).

[30] Plaintiffs misrepresent Gage and Potwin as being "immediately adjacent to all-black Buchanan". (Plaintiffs' Brief at p. 8, 35-36 n. 33). In 1958, the year before Buchanan was closed, it was adjacent to Lowman Hill. Its boundaries have never been in common with either Gage or Potwin. (Pl. Ex. 8H).

2410, 2417, Payne).[31] 95 to 99% of respondents in the plaintiffs' survey did not identify these schools as white schools. (Pl. Ex. 20, p. 21). Crestview and Whitson (formerly known as Southwest) were established by the Topeka Public Schools when Topeka was growing to the southwest. The same reasons which justified the District's siting of the other southwest schools are applicable to Crestview and Whitson.

I. Eisenhower Middle School. The black ~~population~~ residents in the Eisenhower attendance area increased from approximately 1% in 1963 to 14.2% in the 1979-80 school year. Demographics explain these changes.[32] (Def. Ex. 1114, pp. 20-22). By plaintiffs' standards, Eisenhower became racially identifiable as non-white for the first time in 1980, when, pursuant to the Long-Range Plan, five junior high schools were closed and the District converted from junior highs to middle schools. The HEW-approved plan projected an increased minority enrollment to 36.2%.[33] Eisenhower's staff assignments have never substantially deviated

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[31] Plaintiffs also mislead by suggesting the District "conceded" it did not utilize opportunities to desegregate, citing the testimony of former School Board member Dennis Payne at Tr. 2418. Mr. Payne served on the Board from 1957 to 1965 (Tr. 2410)--the period subsequent to the adoption of the four-step desegregation plan and prior to the 1968 Green decision . As the trial court observed, during this period, the law did not require implementation of a race-conscious student assignment plan. (Op. 41).

[32] The spatial extent of the population is such by 1980 there are black households throughout the City. In 1960 and 1970 there were greater concentrations. The number of blocks with some black population increased from 250 to 540, an increase of 116%. (Def. Ex. 1114, p. 10; Def. Ex. 1115B-C, H-I).

[33] It actually became 45% minority--slightly less than 20% beyond the District-wide average. (Pl. Ex. 8J).

from plaintiffs' narrow range. The deviations have been slightly above, within, and slightly below the plaintiffs' acceptable range. Certainly no pattern of racial identifiability has ever existed. (Pl. Ex. 155-O). In 1986, the District minority percentage for administrative and certificated staff was 13.2%, with Eisenhower's staff at 15.6%--less than 3% from the average. (Def. Ex. 1122).[34]

J. Landon and French Middle Schools. In 1985, Landon (9.3%) and French (6.4%) were within 20% of the District average for minority students. (Pl. Ex. 8J). Plaintiffs' expert admitted these schools would become racially non-identifiable within the next two years. (Tr. 608, Foster). The 1985 closing of Landon and reassignment of students to French increased the percentage minority enrollment at French. Currently, administrative and certificated staff at French is 13.9% minority, slightly above the District average of 13.2%. (Def. Ex. 1122).[35]

K. Topeka West High School. There are no vestige high schools in Topeka. At no time have any of the high schools in Topeka been racially identifiable black. (Tr. 376-378, 384, 395-396, Lamson). Topeka West was built because Topeka High was exceeding its capacity. The central part of Topeka was served by Topeka High and the eastern area by Highland Park. (Tr. 1432-1434, Henson). The placement of Topeka West was a reasonable and

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[34] 91 to 94% of the respondents polled did not identify Eisenhower as a black or minority school. (Pl. Ex. 20, p. 20, 22).

[35] 88% of the respondents did <u>not</u> identify Landon or French as white schools. (Pl. Ex. 21, p. 21).

thoughtful decision, given the growth occurring in the western part of the City. (Tr. 2296-2297, Clark).

VIII. PROPOSALS NOT ADOPTED.

A. 1974 Tentative Plan. In response to HEW action, the District's staff prepared a "Tentative Plan for a More Perfect Unitary School System" in 1974. (Pl. Ex. 289). Instead of adopting this tentative plan, the District developed and implemented the 1974 Short-Range Plan and the 1976 Long-Range Plan which satisfied HEW. Many of the proposals contained in the Tentative Plan were included within the adopted plans. All optional attendance zones were eliminated. Four of the five elementary schools proposed for closure were closed (i.e. Clay, Monroe, Parkdale and Rice). The construction projects in the adopted plans were more beneficial to the middle schools than the proposals for junior highs contained in the Tentative Plan. (Def. Ex. 1090, TSBM 4/30/74; Def. Ex. 1091, TSBM 5/7/74; compare Pl. Ex. 289 with Pl. Ex. 258 & Pl. Ex. 240).

B. 1984 Plans N & X. Three years after completion of the Long-Range Plan, the Board developed "Plans N & X" which departed from the small neighborhood school concept. The plans contained several goals unrelated to school desegregation, but one of the plans' assumptions was that all majority/minority schools would be eliminated. These plans were to cost between 13 and 15 million dollars. One plan required closing two middle schools and 16 elementary schools, construction of two new elementary schools and conversion of one middle school to an elementary school. (Plan N). The other plan required closing four middle schools

and 17 elementary schools, building one middle school and one elementary school and converting four middle schools to elementary schools. (Plan X). (Pl. Ex. 242). Public hearings were held, and the proposals were universally opposed by the community, including the local chapter of NAACP. Opposition to the plans was not racially motivated. (Tr. 2465-2467, Ward; Tr. 2447-2453, Douglas; Tr. 1464-1473, Henson).

IX. INFERIOR ACHIEVEMENT ELIMINATED AS A VESTIGE.

Dr. John Poggio, Center for Educational Testing and Evaluation, the University of Kansas, analyzed the achievement of students in the District for the school years 1980, 1982, 1983, 1985 and 1986. Approximately 13,000 reading test scores and 13,000 mathematics test scores were examined. The results were grouped as to the school's racial composition: less than 10% minority; 10-40% minority; and over 40% minority. The effect of students' ability and income level were controlled. A questionnaire was completed in 1986 by sixth, eighth and tenth grade students concerning many factors: parent's expectations; student's expectations; parent's education student's self-concept; student habits; school climate; and teacher behavior. The analysis also tracked the test scores of students who transferred from schools of differing racial mix. The study[36] concluded that the racial composition of school buildings attended is not related to student achievement and proficiency levels are not affected if a

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[36] This study was "one of the most comprehensive, largest and most scientifically sound studies" that has ever been made on these issues. (Tr. 2396, Walberg).

student moves from one building to another having a different racial composition. Many other factors were identified as more important to achievement than the racial composition of the schools. (Def. Ex. 1109). Inferior achievement, as a vestige of segregation, has been eliminated. (Def. Ex. 1109; Op. 40).

ARGUMENT AND AUTHORITIES

SCOPE OF REVIEW.

Appellate review of this school desegregation case is governed by the general rule: Issues of law are reviewed de novo; and issues of fact may be reversed only if clearly erroneous under Rule 52(a). Pullman-Standard v. Swint, 456 U.S. 273 (1982); Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526, 535 n. 8 (1979) (Dayton II). A finding is "clearly erroneous" only "when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed". United States v. United States Gypsum Co., 333 U.S. 364 (1948). The same rule applies "when the district court's findings do not rest on credibility determinations, but . . . instead on physical or documentary evidence or inferences from other facts." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

The federal district courts play crucial roles in desegregation litigation. Brown II, 349 U.S. at 299; Dayton II, 433 U.S. at 409-410. As stated by Justice Stewart, "[T]he elimination of the more conspicuous forms of governmentally ordained racial segregation over the last 25 years counsels undiminished deference to the factual adjudications of the federal trial judges."

Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 470 (1979) (Columbus II). Factual findings by a district court in school desegregation cases are entitled to great deference, especially where the presiding judge has lived with the case for many years. Jenkins v. State of Mo., 807 F.2d 657, 666-667 (8th Cir. 1986); Vaughns v. Board Educ. of Prince George's County, 758 F.2d 983, 990 (4th Cir. 1985).

The plaintiffs' appellate brief addresses the scope of review only in footnote 30 on page 24. Their presentation is erroneous in two respects. First, plaintiffs erroneously assert this court should review the trial court's holdings de novo because of the alleged presence of mixed questions of law and fact. The issues presented, with the possible exception of Issue I concerning the burden of proof, challenge the district court's findings of fact and not its conclusions of law. Issue II addresses the district court's factual finding that U.S.D. No. 501 has since the ruling in Brown I fulfilled its affirmative duty to convert a formerly de jure segregated school system into an integrated school system. Issue III challenges the district court's factual finding that Topeka schools are currently desegregated. These issues do not concern mixed questions of law and fact as defined by the Supreme Court in Pullman-Standard v. Swint, 456 U.S. at 289 n. 19. See also 5A Moore's Federal Practice ¶52.05[1] (1986). The plaintiffs have not demonstrated, and cannot demonstrate, that Issues II and III are subject to

enhanced review under the mixed question of law and fact rule.[37]

Plaintiffs' second error regards their assertion that appellate "judges must exercise [independent review] in order to preserve the precious liberties established and ordained by the Constitution", citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) and City of Houston v. Hill, ___ U.S. ____, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). Bose concerns the rule of independent appellate review applicable to libel cases announced in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Bose Corp., 466 U.S. at 510-511. Houston likewise concerns the First Amendment. The rule of enhanced review where activity is arguably protected by the First Amendment has not been expanded by the Supreme Court to include review of factual determinations in school desegregation cases.

The plaintiffs' analysis of the scope of review, as well as their issues on appeal, totally ignore the finding that U.S.D. No. 501 schools are unitary. The finding of unitariness is a finding of fact reviewed under the clearly erroneous standard. Riddick v. School Bd. of City of Norfolk, 784 F.2d 521, 533 (4th Cir.), cert. denied ___ U.S. ___ (1986); see also United States v. Texas Ed. Agcy., 647 F.2d 504, 506-507 (5th Cir. 1981), cert. denied 454 U.S. 1143 (1982). Here, plaintiffs do not directly challenge the finding of unitariness and argue that only a "few, minor factual findings made by the district court" are clearly erroneous.

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37 The scope of review applicable to Issue IV concerning the judgment in favor of the state defendants is separately addressed in the brief submitted by the State Board of Education.

(Plaintiffs' Brief, p. 24, n. 30). The district court made careful and detailed findings that the School District had achieved unitary status. Such findings are not clearly erroneous. Affirmance of unitary status is determinative of plaintiffs' claims.

ISSUE I: THE DISTRICT COURT DID NOT ERR WITH RESPECT TO ISSUES OF LAW CONCERNING THE ALLOCATION OF BURDEN OF PROOF.

The placement of the burden of proof is determined by the issues before the court. Here, the plaintiffs prayed for an order "commanding Unified School District No. 501 of Topeka, Kansas to desegregate its schools and establish a racially integrated and unitary school system as was ordered by the United States Supreme Court" in Brown II. (Doc. No. 242, filed 5/27/86, Amended Complaint, p. 1). The plaintiffs' allegations, coupled with the history of this litigation, complicate the burden of proof.[38] Plaintiffs have the burden to establish a current condition of segregation brought about by intentional state action, evidenced either by the presence of vestiges of the prior de jure segregated system or intentional conduct of the defendants. Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 198 (1973) (Keyes); Milliken v. Bradley, 418 U.S. 717, 744-745 (1974) (Milliken I); Dayton Board of Education v. Brinkman, 433 U.S. 406, 419 (1977) (Dayton I). The relief sought

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[38] The plaintiffs do not allege that the District failed to comply with a court-imposed desegregation plan or proposed district action which would cause resegregation of the schools. Whether plaintiffs pressed their claims as intervenors in this reopened case or as plaintiffs in new litigation, their burden would be to show "(1) that segregated schooling exists, and (2) that it was brought about or maintained by intentional state action." (Doc. 78, filed 11/29/79, Memorandum and Order, p. 26).

a court-ordered desegregation remedy must be predicated upon a constitutional violation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 17-18 (1971) (Swann); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434 (1976) (Pasadena); Dayton I, 433 U.S. at 419. No remedy may be imposed upon an integrated, unitary system. Id.; Vaughns v. Board of Education of Prince George's County, 758 F.2d 983, 988 (4th Cir. 1985). Plaintiffs argue that the District has the burden to prove the absence of current segregation because of the historic fact of de jure segregation. (Brief of Plaintiffs, p. 24). This is erroneous. Under any rational reading of desegregation caselaw, plaintiffs have the burden to prove current segregation in the Topeka schools. The trial court so found. (Op. 10-11).[39] The trial court, however, held for the defendants, not because the plaintiffs failed to fulfill their burden of proof, but because defendants established unitariness. The trial court held "defendants have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system". (Op. 11).

Plaintiffs contend the trial court erred because "the burden is on the school officials to show they took actions that had the effect of desegregating the schools 'root and branch'." (Brief

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[39] The trial court found plaintiffs have the burden to show current illegal segregation. (Op. 10-11). The district court did not resolve the legal disagreements between plaintiffs and defendants relating to the relevancy of intentional segregative conduct and whether upon a prima facie showing of segregation the burden of proof shifts to the defendants. The trial court, when finding for the defendant Board on its factual position that U.S.D. No. 501 is currently a unitary school system, rendered these legal disagreements irrelevant.

of Plaintiffs, p. 24). The district court, when holding that the Topeka schools are unitary, effectively found that the District had fulfilled that burden. The trial court defined a unitary school system as "one that has reversed the segregation caused by the school board's dual system in 1954" (Op. 5), a system where schools are desegregated root and branch.

The trial court did not, as argued by the plaintiffs, hold for defendants because it placed the burden of proof on plaintiffs to show intentional discrimination. Rather, the district court, when considering whether defendants had proven unitariness, analyzed the evidence to determine whether vestiges of the prior de jure system remained or whether the District since 1954 intentionally acted to promote segregation. (Op. 44-46). "Evidence of segregative motive or the absence of such intent is relevant but not controlling in determining unitariness." (Op. 6) (emphasis added). The factual determination that the District had not intentionally reestablished segregated schools is an element in the court's finding of unitariness. The defendants established absence of intentional segregative actions by a preponderance of the evidence. The fact the court examined intent does not, contrary to the plaintiffs' position, indicate the district court imposed the burden upon the plaintiffs to show intentional segregation.

With respect to the plaintiffs' Title VI claim, the trial court applied the effects standard as urged by the plaintiffs.

The court held that 34 C.F.R. §100.3(b)(2)[40] was not violated because the "district's student and staff assignment criteria do not have the effect of discriminating against students because of their race or impairing the education of minority students." (Op. 47) (emphasis added). No error was committed.

The plaintiffs also assert that in light of the district court's factual findings, its legal conclusions were wrong. (Brief of Plaintiffs, p. 28). This assertion is based upon a misleading and highly selective review of the factual findings which ignores most findings essential to the district court's conclusion. For example, the district court, although finding that the "boundaries set around the former de jure black elementary schools after [remand] . . . appear to have perpetuated the racial identity of those schools" (Op. 23), also held those "schools have long been closed and the segregative effects of those boundaries have attenuated entirely." (Id.) As to the construction of new schools since 1955, the district court made the factual finding that the policy has not "promoted segregated residential patterns or segregated schools." (Op. 22). As to the reassignment of minority students from highly imbalanced schools, the district court concluded that "[o]n the whole, the closing of the highly imbalanced schools had a desegregative effect upon the district's operation, although it aggravated the

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[40] In their brief to this Court, the plaintiffs for the first time alleged violations of 34 C.F.R. §100.3(b)(3) and §100.3(b)(6)(i). These regulations were not cited to the trial court as a basis for relief. Their alleged violation cannot be raised for the first time on appeal.

imbalance of nearby schools." (Op. 30). As to faculty assignment, the court found that the district's assignment policies do not serve to identify schools as intended for whites or blacks and that in sum "the record before the court with regard to the district's approach to faculty and staff is not indicative of a dual system of education." (Op. 35). The district court's detailed examination of 18 factors overwhelmingly supports its conclusion that there is "no illegal, intentional, systematic or residual separation of the races." (Op. 45) (emphasis added).

ISSUE II: THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE DEFENDANT SCHOOL BOARD MET ITS BURDEN TO DISMANTLE THE FORMERLY DE JURE SEGREGATED SCHOOL SYSTEM.

By virtue of Brown I, Brown II, and subsequent Supreme Court decisions, the Topeka School Board was charged with the duty to establish a unitary school system. When fulfilling that duty, complete racial balance in every school is not required. Swann, 402 U.S. at 24; Milliken I, 418 U.S. at 740-741; Clark v. Board of Educ. of Little Rock School Dist., 705 F.2d 265 (8th Cir. 1983); Price v. Denison Indep. School Dist., 694 F.2d 334 (5th Cir. 1982). There is no duty upon the governing body of a former de jure system to always take that action which will most fully desegregate the schools. Ga. State Conf. of Br. of NAACP v. State of Ga., 775 F.2d 1403, 1414 (11th Cir. 1985). A school district has no constitutional duty to remedy changes in the racial mix of schools brought about by factors out of the school district's control. Pasadena, 427 U.S. at 434. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." City of Mobile, Ala. v. Bolden, 446 U.S. 55, 74 (1980).

Contrary to plaintiffs' assertions on page 29 of their brief, the "heart" of the district court's decision is not that the District met its affirmative duty to desegregate when it adopted a neighborhood school attendance plan in 1955. The desegregative activities as found by the court included not only the adoption and good faith implementation of the 1955 four-step plan, but also subsequent actions, including the adoption and implementation of the 1974 short-range plan and the 1976 long-range plan. The District's neighborhood attendance plan plays a central role in the district court's analysis for two reasons: (1) First, it was the desegregation plan approved by the district court in immediate response to the mandate of Brown II; and (2) second, the court scrutinized the race-neutral neighborhood school policy to assure that it was not a guise for perpetuation or institution of segregation.

The neighborhood school plan was adopted to fulfill the mandate of Brown II. The district court approved the plan, Brown v. Board of Education, 139 F. Supp. 468 (D. Kan. 1955), and no appeal was taken. In 1955, a racially neutral neighborhood school plan satisfied the constitutional requirement to desegregate, even though it resulted in some all-black schools. (See Doc. No. 290, Trial Brief of Defendant Unified School District No. 501, pp. II-1 to II-14). Brown I merely prohibited the establishment of a dual system based upon race. (Id.) Not until the Supreme Court's decisions in Green v. School County Bd. of New Kent Co., Va., 391 U.S. 430 (1968) (Green), Swann and Keyes were school districts charged with the affirmative duty to take

whatever steps might be necessary to convert to a fully integrated system. The district court did not hold, and U.S.D. No. 501 does not contend, that the four-step plan when fully implemented satisfied this enhanced affirmative duty.

The current neighborhood school attendance policy, as it has evolved since adoption of the four-step plan was held to satisfy current constitutional standards. (Op. 17). The United States Congress states that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. §1701(a). "A neighborhood school policy in itself does not offend the Fourteenth Amendment." Crawford v. Board of Educ., etc., 458 U.S. 527, 537 n. 15 (1982). The benefits of neighborhood schooling are racially neutral. Id., 458 U.S. at 544. It is neighborhood school plans which are used to perpetuate segregation or which are not maintained free from manipulation which offend the Constitution. E.g., Keyes, 413 U.S. at 212; Oliver v. Michigan State Board of Education, 508 F.2d 178 (6th Cir. 1974); Adams v. United States, 620 F.2d 1277 (8th Cir. 1980), cert. denied 449 U.S. 826 (1980). In contrast, the Topeka neighborhood school policy has been consistently applied in a race-neutral manner without gerrymandering. (Op. 23, 25, 46). The Topeka neighborhood policy does not evidence "covert intentional segregative conduct." (Op. 49).

The plaintiffs' reliance upon Adams v. United States, 620 F.2d 1277, is totally misplaced. The plaintiffs would apply the law of that 1980 decision to the Topeka schools in 1956, ignoring integration in the Topeka schools since implementation of the

1955 four-step plan and the expansion of desegregation obligations between 1956 and 1980. The plaintiffs also ignore factual findings of the district court which show the dissimilarities between the Topeka schools in the 1980s and the St. Louis schools at issue in Adams. In Topeka the "segregative effects of [the 1955] boundaries have attenuated entirely". (Op. 23). The Topeka district's "approach to faculty and staff is not indicative of a dual system of education". (Op. 35). In Topeka, student transfer policies have been used to improve racial balance, and optional attendance zones in existence until 1976 have not caused a current segregative effect. (Op. 17-18). Topeka's "student attendance figures for the 1985-86 school year bear little resemblance to the figures for 1954." (Op. 8). "The student attendance figures for U.S.D. #501 reflect an enduring integrated nondiscriminatory system of education." (Op. 17). Since 1956 Topeka has acted to integrate the schools (Op. 43-44, 49-50), whereas St. Louis sought to perpetuate segregation. The Topeka schools today bear no resemblance to those of St. Louis which were condemned in Adams. In Topeka, but not St. Louis, after the Green and Swann decisions, when it became clear that the 1954 race-neutral neighborhood school policy would not satisfy the District's enhanced legal duty, the defendant Board initiated short-range and long-range proposals, consistent with the neighborhood school concept, to integrate the schools in compliance with the standards of HEW. (Op. 41-42). Implementation of the plans had an integrative effect, and the trend in Topeka schools today is toward further integration. (Op. 16, 31).

The district court's factual findings support unitariness, not unlawful segregation, as argued by the plaintiffs. (See Brief of Plaintiffs, Issue II(C), pp. 32-39). Lowman Hill has never had a majority minority population and has been within 15% of the district average in recent years. (Op. 24). Lowman Hill is not a vestige school reminiscent of Dunbar High School in Dayton, as contended by plaintiffs on pages 33 and 34 of their brief. Lowman Hill, unlike Dunbar, is not and never was a school with virtually all black students and faculty.[41] The relationship between formerly all-black Buchanan and the present racial composition of Lowman Hill is so attenuated as to be incapable of supporting a finding of a vestige. See Keyes, 413 U.S. at 211; and Swann, 402 U.S. at 31-32. The trial court found Lowman Hill was not a vestige school. (Op. 24).

Throughout the last 30 years, the formerly all-white schools "have experienced increasing minority student populations" and these populations are growing without opposition by the School District. (Op. 31). Eighteen white elementary schools were operating in 1954. (Op. 25). At the time of trial, seven of these schools had been closed; three had minority population between five and ten percent;[42] three had minority populations between 40 and 50 percent; and the remaining five schools had minority populations near the district average. (Op. 25-26). School closings over 30 years indicate a policy of desegregation.

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[41] See Statement of Facts, supra.

[42] Actually, the school with the lowest minority population in 1985 was Potwin at 7.7%. (Pl. Ex. 8J).

(Op. 20). School openings were in response to increased student enrollment. (Op. 21). New schools were also built in areas of residential integration. (Op. 22). Unlike school construction condemned in Swann and Columbus II, the Topeka school construction policy did not promote segregated residential patterns or perpetuate the former dual system. There has been increasing racial integration in the areas where the formerly all-white schools were constructed. (Op. 22) "Students of different races attend school together in significant numbers in every part of the district." (Op. 45).

Plaintiffs' assertion that "the only desegregative acts by the school board described by the District Court involved the closing of the de jure all Black schools and establishment of a neighborhood schools policy" is clearly and unequivocally incorrect. (Brief of Plaintiffs, p. 35) (emphasis added). The primary desegrgative action ignored by plaintiffs is the District's adoption and initiation of short-range and long-range plans in response to the 1974 administrative complaint of HEW. (Op. 41-42). The plans, although consistent with neighborhood schools, satisfied HEW. (Op. 42). The district court also found that the District's student transfer policy (Op. 17) and school closing policy (Op. 20) were used to improve racial balance of the schools.[43]

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[43] The facts regarding reassignment of students from the formerly de jure schools are discussed in Statement of Facts, supra. The court found that "[o]n the whole, the closing of the highly imbalanced schools had a desegregative effect." (Op. 30).

"[I]t begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday." (Op. 44). Furthermore, a school district is not required to do the most desegregative action. Ga. State Conf. of Br. of NAACP v. State of Ga., 775 F.2d 1403, 1414 (11th Cir. 1985). The district court carefully examined the District's choices over school boundaries, facilities actions, and desegregation proposals, and rejected plaintiffs' allegations. The court concluded that the action of the District did not evidence intent to "perpetuate segregation by foregoing opportunities to desegregate schools". (Op. 43). "The district's history of action or inaction toward racial conditions in the district does not suggest that the racial imbalance of the schools derives from the de jure system or a foot-dragging segregationist policy." (Op. 44). As urged by the plaintiffs, the district court considered the possibility that rejection of alternatives which would have achieved greater desegregation may indicate lack of good faith. (Op. 40). Upon examination of the record, the district court found that the plaintiffs' allegations were not supported by the evidence. (Op. 40-44).

Plaintiffs submit to this Court that the District violated constitutional standards by not taking remedial action with regard to the minority populations at Belvoir, Hudson, and Avondale East. None of these schools were part of the Topeka District at the time of Brown I and Brown II. (Op. 26-27). The schools are not vestiges of the prior de jure system. Each of the three schools is in annexed areas which have experienced in-

creased minority populations by virtue of the building of public housing projects. (Op. 26-27). Changes in racial composition of the schools caused by demographic factors outside the control of the District are not constitutional violations. See Swann, 402 U.S. at 23, 25-26; Pasadena, 427 U.S. at 436-437. Further, the Constitution does not establish as a matter of substantive constitutional right, any particular degree of racial balance or mixing. Swann, 402 U.S. at 24. Overall, "[t]he student attendance figures for U.S.D. #501 reflect an enduring integrated nondiscriminatory system of education." (Op. 17).

Plaintiffs also attack the district court's finding of fact that the assignment of faculty and staff does not indicate a segregated system. The district court in response to this contention noted the following. "[T]he district's hiring policies in recent times [have not] been shown to be discriminatory". (Op. 32). The evidence did not establish a monolithic trend showing the assignment of minority staff to schools having an above average minority student population. (Op. 33-35). "[T]he difference between having a greater than average number of minority staff and having a less than average number of minority staff [was] very small in most cases." (Op. 34). The fair assignment of qualified and dedicated faculty to all schools within the District was found more important than the racial percentage of the faculty and staff. (Id.) Upon examining the system as a whole, the court held that the District's assignment policies do not

serve to "identify schools as intended for white or black students".[44] (Op. 35).

ISSUE III: TOPEKA TODAY HAS A DESEGREGATED, UNITARY SYSTEM.

The district court defined a unitary school system as "one that has reversed the segregation caused by the school board's dual system in 1954", citing Dayton II. (Op. 5). When examining the Topeka schools for unitariness, the court considered numerous factors, including but not limited to those identified in Green and Keyes. (Op. 6, 11-45). Student assignment was recognized as probably the most important single factor. (Op. 5). The court correctly held that the existing racial imbalance was neither unconstitutional per se nor unconstitutional when considered in conjunction with other factors relied upon by the plaintiffs, such as community attitudes, test scores, faculty and staff assignment or opportunities for improvement of the racial balance. (Op. 46-47). When examined as a whole, the court held that the system reveals that it is integrated and "free of the characteristics of de jure segregation." (Op. 47).

Definitions of integrated schools focus upon equal educational opportunity and a system free of racial isolation, not upon racial balance in student attendance centers and staff assignments. E.g., Keyes v. School Dist. No. 1, Denver, Colo., 540 F. Supp. 399, 403-404 (D. Colo. 1982); Penick v. Columbus Bd. of Ed., 583 F.2d 787, 814 (6th Cir. 1978), aff'd 443 U.S. 449 (1979); Milliken v. Bradley, 433 U.S. 267, 287 (1977) (Milliken

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[44] See Statement of Facts, supra.

II); Keyes, 413 U.S. at 226-227. (Powell, J., concurring). "[D]esegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.'" Milliken I, 418 U.S. at 740-741; see also Swann, 402 U.S. at 24. The presence of racial imbalances in student assignments does not defeat a finding of unitary status. Price v. Denison Independent School Dist., 694 F.2d at 350-368. Further, school attendance criteria has focused upon the elimination of one-race black schools, not the elimination of one-race white schools. Ross v. Houston Independent School Dist., 699 F.2d 218 (5th Cir. 1983); Price v. Denison Independent School Dist., 694 F.2d at 365; Horton v. Lawrence County Bd. of Ed., 578 F.2d 147 (5th Cir. 1978).

Many of the leading school desegregation cases considering student assignment address remedy, not substantive constitutional standards. E.g., Green, 391 U.S. at 430; Swann, 402 U.S. at 1; Milliken I, 418 U.S. at 717; Pasadena, 427 U.S. at 424; Milliken II, 433 U.S. at 267. The remedy cases must be carefully analyzed when considering the characteristics of a unitary system. Columbus II, 443 U.S. at 490-491, Rehnquist, J., dissenting; Fort Bend Indep. School Dist. v. City of Stafford, 651 F.2d 1131, 1133 (5th Cir. 1981). Most cases recognizing a ±15% standard are remedy cases. E.g., Clark v. Board of Educ. of Little Rock School Dist., 705 F.2d 265 (8th Cir. 1983); Kelley v. Metropolitan County Bd. of Educ., etc., 687 F.2d 814 (6th Cir. 1982), cert. denied 459 U.S. 1183 (1983). These standards, although admissible in evidence, have no particular legal significance and

do not establish unlawful segregation. Price v. Denison Independent School Dist., 694 F.2d at 353.

Racial components of faculty and staff must not operate to identify schools as intended for white or black students. Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211, 1218 (5th Cir. 1969), cert. denied 396 U.S. 1032 (1970). The faculty and staff factors which indicate desegregation of a previously de jure system are: (1) nondiscrimination employment practices; and (2) faculty and staff assignments which do not identify schools as intended for black students or white students. Id. Racial balance in the assignment of faculty and staff, like racial balance of student bodies, is a remedial goal. There is no statistical measure of balance which has been adopted as a substantive constitutional standard. With respect to court-imposed remedies, substantial variation exists. E.g., Board of Education of Oklahoma City Pub. Sch. v. Dowell, 375 F.2d 158 (10th Cir. 1967), cert. denied 387 U.S. 931 (1967) (reasonable tolerance of approximately ten percent); Keyes v. School District No. 1, Denver, Colo., 521 F.2d 465, 484 (10th Cir. 1975), cert. denied 423 U.S. 1066 (1976) (each school must be within 50 percent of the ratio of minority to anglo staff in the entire system); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 898 (3rd Cir. 1984), cert. denied 469 U.S. 1107 (1985) (±25% of the district-wide mean). In Fort Bend Independent Sch. Dist. v. City of Stafford, 507 F. Supp. 211 (D.S.D. Tex. 1980), aff'd 651 F.2d 1131 (5th Cir. 1981), the court found a school system unitary when the distribution of minority teachers varied

between 4.44 percent and 16.4 percent in a system which had 12.14 minority staff.

Under the foregoing legal standards, the Topeka schools are unitary. There are no virtually all-black schools in Topeka. There are no pure vestige black schools; all former de jure black elementary schools have been closed. There are no secondary vestige schools; no schools which are currently racially identifiable as black or minority under plaintiffs' statistical criteria have been so throughout their history. Of the 26 elementary schools, only one elementary school, Belvoir, had a majority black student population in 1985. Only eight percent of black elementary students attended a majority black school. The school attendance statistics as a whole indicated that students in U.S.D. No. 501 are not separated by race. (Op. 17). Topeka schools do not resemble those condemned in Swann, Dayton I, Keyes or other Supreme Court decisions. The racial balances are similar to those of the schools found unitary in Price v. Dennison Independent School Dist., 694 F.2d at 334. Residence, rather than race, determines school attendance. (Op. 14). There is no gerrymandering. (Op. 23, 25, 46). Current attendance patterns do not reflect residential choice caused by the prior de jure school segregation. (Op. 15). The District's school construction policy has not promoted residential segregation or segregated schools. (Op. 22). School transfer policy is used to improve racial balance. (Op. 17). Any segregative effect of optional attendance zones in existence until 1976 does not remain today. (Op. 18). Space additions

were not intentionally used to promote segregation, and the schools are not racially imbalanced today because of space additions constructed in the past. (Op. 19). School boundary locations are determined by consistently applied race-neutral neighborhood school principles without gerrymandering. (Op. 23, 25, 46). School closings over 30 years indicate a policy of desegregation. (Op. 20). All students of U.S.D. No. 501 receive an equal education opportunity; "the racial composition of the district's schools has an insignificant impact on student achievement". (Op. 40). "The schools with high or low minority percentages . . . are not the product of de jure segregation or covert intentional segregation." (Op. 46).

The District's hiring policies are nondiscriminatory. (Op. 32). The trend alleged by plaintiffs of the assignment of a high proportion of minority staff to high minority schools was found not to be consistent. (Op. 33-34). All schools have been within the ±10% of the District average at some time within the last ten years. (Op. 34). Further, the difference between having a greater than average number of minority staff and having a less than average number of minority staff is very small in most cases. (Op. 34). In some instances, because of the number of faculty in the smaller schools, it would be impossible for the District to satisfy the standard advocated by plaintiffs. (See. Doc. No. 306, filed 1/29/87, Response of Unified School District No. 501 to Plaintiffs' Post-Trial Brief, pp. 40-42). When the school system is examined a whole, "the district's assignment policies" do not "serve to identify schools as intended for white or black students". (Op. 35). The District satisfies Singleton.

The court upon careful analysis rejected the plaintiffs' community attitude survey as producing results which were not important to the ultimate issue in the case. (Op. 36-38). As previously discussed, the court found that "[t]he District's history of action or inaction towards racial conditions in the district does not suggest that the racial imbalance of the schools derives from the de jure system or a foot-dragging segregationalist policy." (Op. 44). Many other factors, including the racial composition of the Board of Education, and special programs encouraging interracial conduct and ethnic awareness, evidence unitariness. (Op. 11-45).

Before this Court, the plaintiffs seek to avoid the full record evidence and the court's detailed and careful analysis of eighteen relevant factors by arguing that when only three factors, attendance figures, staff assignment figures, and the results of community attitude poll, are considered together, the trial court erred in finding the schools unitary. Plaintiffs characterize the alleged error as one of improper application of legal standards, but to do so they are forced to misrepresent both the trial court's legal analysis and findings of fact. Contrary to the contentions of the plaintiffs on page 43 of their brief, the district court did not confuse rigid quotas with racial identifiability. The court carefully examined the statistical factors, but expressly held that the issue of unconstitutional segregation is not decided by whether the schools are outside the statistical measures urged by the plaintiffs. (Op. 16). Also, contrary to the plaintiffs' assertion, the district

court did consider the cumulative impact of all factors relevant to the presence or absence of segregation. The court stated:

> "Regardless of the merits of racial balance, the imbalance perceived in this case is neither unconstitutional per se, nor unconstitutional in conjunction with the other factors such as community attitudes, test scores, faculty and staff assignment or opportunities for improvement." (Op. 46-47) (emphasis added).

The trial court considered the cumulative effect of these factors and found the schools to be unitary. Likewise, all effects of segregation prohibited by the Title VI regulations have been eliminated. (Op. 15, 18, 19, 23, 40, 47).

CONCLUSION

U.S.D. No. 501, respectfully submits this Court should affirm the district court's ruling that the Topeka School System today is a desegregated, unitary system. The trial court made no errors of law regarding the allocation of the burden of proof or the definition of unitary schools. The district court's detailed and careful examination of 18 relevant factors is amply supported by the record evidence. Indeed, the plaintiffs challenge "only a few, minor factual findings made by the district court." (Brief of Appellants, p 24 n. 30). The district court's finding that the schools are unitary is a factual determination, entitled to great deference. Affirmance of unitariness is dispositive of the plaintiffs' appeal.

Respectfully submitted,

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