

INTRODUCTION

Plaintiffs predicted in their Pre-Trial Brief that at the end of trial there would be few facts in dispute. That prediction turned out to be accurate. Both sides concede that there are racially identifiable schools in Topeka today. See infra at IA, B. Because that is the central question at this trial, plaintiffs are entitled to judgment.

There were differences between the parties, of course, but those differences were of emphasis, interpretation, and of values. 76% of plaintiffs' case was directed at establishing that there are racially identifiable schools.* By contrast, the vast majority of defendants' case was an attempt to establish either that the courts should abandon the efforts to desegregate (Brown I was wrongly decided) Dr. Walberg, Tr. 1986-2088, or that Topeka's schools were not unequal (Topeka's separate schools are all right because they are equal. See Plessy v. Ferguson, 163 US 537 (1896)). Testimony on the latter argument came from Dr. Henson, Tr. 1477-1502; Dr. Livingston, Tr. 1542-1643; Mr. Wehmeier, Tr. 1644-1667; Ms. Buckley, Tr. 1667-1689; Mr. Kellogg, Tr. 1689-1702; Ms. Stanley, Tr. 1702-1723; Ms. Counts, Tr. 1724-1740; Ms. Pressman, Tr. 1745-1761; Mr. Berry, Tr. 1761-1769; Ms. Muxlow, Tr. 1770-1779; Mr. Fernkopf, Tr. 1780-1789; Dr. Poggio, Tr. 1792-1979 and 2922-2934; Mr. Rundell, Tr. 2099-2146; Dr. Edwards, Tr. 2498-2551.** Except for the limited purpose of showing that the Supreme Court has been correct when it repeatedly ruled that integration is required by the Constitution in part because it harms students Brown v. Board of Education, 347 U.S. 483 (1954), (See section II infra) plaintiffs do not intend to respond to this testimony. It is simply too late in the day to argue that school desegregation is irrelevant or that separate but equal schools are acceptable.

The precise question in this case is whether Topeka has met its affirmative duty to eliminate segregation root and branch. Topeka was held liable and ordered to desegregate. Brown v. Bd. of Ed., 347 U.S. 483 (1954). This case is thus neither liability nor remedy. It partakes of both. Plaintiffs do not seek to establish segregation. The Supreme Court has so held. Plaintiffs seek to establish that there has not been

* Plaintiffs' case took 8 days and consumed 1386 transcript pages on the affirmative case and 143 on rebuttal. Defendants' case took 9 days and consumed 1390 pages in their main case and 15 pages on surrebuttal. However, plaintiffs used only 2 witnesses for 372 pages or 24% of their case to argue the harmful effects of segregation.

** Defendants presented only 3 witnesses who testified to racial identifiability: Drs. Henson, Clark, and Armor, and this constituted only 305 pages or 21% of their case. (An additional 4 witnesses -- over 87 pages -- denied the intent to discriminate, an irrelevant issue).

desegregation. Plaintiffs do not seek to show intentional segregation. The Supreme Court has so held. Plaintiffs seek to show that the effects of School Board actions have not been desegregative.*

Schools such as Topeka have an affirmative duty to end segregation. In 1955, the school board was charged with the duty to "effectuate a transition to a racially nondiscriminatory school system" Brown II 349 U.S. 294, 299 (1955). In 1968, the Supreme Court held that in order to establish a unitary system, discrimination had to be "eliminated root and branch" Green v. County School Board, 391 U.S. 430, 437, (1968). Columbus [CITE] 443 U.S. 449 (1979). The Green Court held that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." In Columbus, Bd. of Ed. v. Penick, 443 U.S. 449, 458-459 (1979). The court described Green as a response to the lingering consequences of the dual system, "in which the Court determined that the Board had not done enough." This root and branch standard was not a departure or a change in the standard. In Columbus, the Court reiterated the Brown II mandate to "effectuate a transition to a racially nondiscriminatory system" and cited Green in spelling out that "Brown II was a call for the dismantling of well-entrenched dual system . . . and school board's were clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system where discrimination would be eliminated root and branch." 443 U.S. at 458. See also Keyes v. School District No. 1 413 U.S. 189, at 213 (1973).

The defendants' attempted to argue that the "root and branch" standard was a radical departure from what Boards understood their duty to be. In reiterating the constitutional duty described by the Court in Green, and in emphasizing again that the defendants were "clearly charged" by Brown II, the Court in Columbus makes it clear that "root and branch" is not to be seen as a radical departure or change in standard.

In Dayton Bd. of Ed. v. Brinkman [CHECK CITE] 43 U.S. 526, (1979) the Court spelled out "the affirmative responsibility" of the Board and stated that the "measure of post Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose of the actions in decreasing the segregation cause by the dual system." Dayton at 538. [CHECK CITE]

Given that de jure segregation existed in Topeka prior to 1954, the burden of proving that it has met its affirmative duty

* An effect's standard should also be applied pursuant to Title VI. [INSERT CITE]

rests with the school board. In earlier consideration of this case the Court held that plaintiffs would have the burden of proof to show "(1) that segregated schooling exists, that it was brought about or maintained by intentional state action". Once the plaintiffs had met this burden as to "a meaningful portion of a school district" the burden would shift to the school board.

As the Court stated, it may take judicial notice of the fact of the dual system in Topeka. Therefore, the plaintiffs "initial burden is to show that Brown I and Brown II [have] not been met. If they show segregation in fact, then the burden will shift to the school board . . . " Brown v. Bd. of Ed 84 F.R.D. 399 (Kansas, 1979)

The burden shifting principle is strongly supported by the Supreme Court. In 1973, the Court held that, "after past intentional actions resulting in segregation have been established . . . the burden becomes the school authorities' to show that current segregation is in no way the result of those past segregative actions" Keyes v. School District No. 1, 413 U.S. 189, 211 n. 17 (1977). The Court also stated that where a statutory dual system existed "the existence of subsequent or other segregated schooling within the same system justifies . . . imposing the burden . . . on the authorities to show that current segregation is in no way the result of those past segregative actions." Id. 413 at 210, 212 n. 17. In Swann v. Charlotte Mecklenberg, 402 U.S. 1, 26 (1971) the Court explained that "a history of segregation" together with present segregation "thrusts upon the school board the burden of justifying its conduct by clear and convincing evidence." In Dayton Board of Education v. Brinkman 443 U.S. 526, 537 (1979) the Supreme Court stated that

"Given intentionally segregation schools in 1954 . . . the system-wide nature of the violation furnished prima facie proof that current segregation . . . was caused at least in part by prior intentionally segregative acts. Thus judgment for the plaintiffs was authorized and required absent countervailing evidence defendant school officials."

Circuit Courts agree in U.S. v. Gadsen City School District, 572 F.2d 1049, 1050 (5th Cir. 1978) the Fifth Circuit held that it was the defendants "burden of showing that the assignment method was not based on the present results of past segregation." In Brinkman v. Gilligan, 583 F.2d 243, 249 (6th Cir. 1978), the Sixth Circuit emphasized the Supreme Court mandate in Keyes, ordering that the defendant's have the burden of proving that the effects of any past intentional actions have become attenuated." [BEGIN QUOTE] The Court held that the existence of pre-Brown I violations placed the burden on defendants" [BEGIN QUOTE]

The District Court . . . failed to attribute the proper legal significance to the evidence that at the time of Brown I . . . schools were deliberately segregated due to the actions of defendants. These facts were sufficient to constitute a prima facie violation of the fourteenth Amendment . . . and to shift the burden of proof to the defendants. 583 F.2d at 251.

Inaction as well as action violates the constitution. Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir, 1985)

Defendants argued that Topeka is "almost" a desegregated system and that the amount of student or faculty movement necessary to bring the district into compliance is small. See, e.g., Mr. Biles cross-examination of Dr. Foster at Tr. 794-803 and Mr. McAtee's cross-examination of Dr. Foster at Tr. 746-749, 751, 766. From one perspective, this argument is simply incorrect. The number of racially identifiable schools -- whether measured by student or faculty assignment -- has remained constant. See infra at IC, D. Even if accurate, however, the argument must fail. In school segregation, close is simply not good enough. Green v. County School Bd., 391 U.S. 430 (1968) Segregation must not be "mostly" eliminated. The District, 32 years after being ordered to eliminate segregation can't be "moving in the right direction" or "making progress". Tr. 748-749 (McAtee) [CITE AND QUOTE END TO ALL DELIBERATE SPEED] It is too late to adopt desegregation policies on the eve of trial and at the insistence of the lawyers. Tr. 2480 (Ward). Segregation must be ended, "root and branch" "immediately." Id.; Green v. County School Bd. 381 U.S. 430 (1968)

Moreover, if Topeka is close to being desegregated, that leads to two inevitable conclusions. First, given the ease of achieving desegregation, it is even more reprehensible that Topeka has not done so. See, e.g. Tr. 823 (Foster); Tr. 1287 (Crain); Tr. 650-651 (Foster). Second, it seems clear that completing the process of desegregating Topeka's schools will be relatively easy.

The Court and the parties cannot ignore the fact that this is an historic case, perhaps the most historic of the Twentieth Century. Plaintiffs do not ask the Court to rule in their favor because of the case's history; to do so would be inappropriate. Perhaps it is not inappropriate, however, to note that because of this case's historic importance, a decision will be closely watched and will carry a symbolic value beyond Topeka. In the face of admitted disproportionate student and faculty assignment, the Topeka Board today -- unlike its predecessor in 1954 -- has chosen to argue fiercely and to argue for separate but equal schools. It would be unfortunate indeed if the symbol of this nation's commitment to racial equality resulted in a decision

that was perceived to mean that that commitment no longer existed.

I. There Remain Racially Identifiable Schools In Topeka Today: Summary

A. Summary

o "A condition of segregation exists in both terms of student enrollment and faculty assignment and at both the elementary and secondary level." Tr. 674 (Foster) 1/

o "In my opinion, the Topeka schools are still segregated." Tr. 546 (Foster)

o There are schools in Topeka today that are disproportionately Black and disproportionately white. Tr. 117, 298, 329, 338 (Lamson)

o There remain vestiges of segregation in Topeka. Tr. 1171 (Speer)

o There is a condition of segregation in Topeka today. Tr. 1289 (Crain)

There are racially identifiable schools in Topeka today. Tr. 2626 (Armor)

B. Measuring Racial Identifiability

1. General

The factors to be considered in measuring racial identifiability are "assignment and enrollment of pupils, faculty and staff, everything to do with school facilities . . . extracurricular activities, and transportation." Tr. 547-548 (Foster); Swann v. Charlotte-Mecklenberg, 402 U.S. 1 (1971)

2. The standard of Student assignment.

There are several methods of measuring segregation by student assignment

a. "[B]y far the most commonly used method of measuring racial identifiability in court litigation "is $\pm 15\%$ from the district-wide average. Tr. 549-550, 554, 784 (Foster), Tr. 365,

x/ Citations are to the page of the trial transcript followed by the witness's name in parentheses.

374-375 (Lamson).^{2/} This test has been used in liability and remedy. Tr. 797 (Foster), Tr. 2572 (Armor). It has been used by the Topeka School Board. P. Exh. 11E, 14. This standard is not the most generous for a school board. Tr. 550-553 (Foster) By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

b. Another standard sometime used is $\pm 20\%$ from the system average. Tr. 550 (Foster); Tr. 2572 (Armor). This standard is often, though not always used by the Justice Department. Tr. 550 (Foster) By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

c. Another standard sometimes used is $\pm 10\%$ from the system average. Tr. 2321-2323 (Clark). By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

d. Another standard uses $\pm 15\%$ or twice the system average as well as the history and geographic circumstances of a school. Tr. 365, 372-375, 377 (Lamson). By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

e. Another standard allows schools to vary from 75-125% times the mean. Tr. 551 (Foster). This standard is used by the Office of Civil Rights. Tr. 551 (Foster). This standard would be substantially tighter in Topeka than $\pm 15\%$. Tr. 552-553 (Foster). By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

f. Another standard allows schools to vary by $\pm 30\%$ times the mean. Tr. 551-552 (Foster). This standard is used by the Pennsylvania Commission on Human Rights and would be substantially tighter than $\pm 15\%$. Tr. 551-553 (Foster). By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

g. The Topeka School Board has frequently set as a goal reducing the minority percentage of all schools below 50%. P. Exh. 135, 64, 140, 39, 83, 99, 141, 134, 135, 137, 127, 38, 74, 66, 36, 242, 289; Tr. 351-352 (Lamson); Tr. 667, 669 (Foster); Tr. 1513 (Henson); Tr. 2460 (Douglas); Tr. 2494 (Stratton). By this standard, there are racially identifiable schools in Topeka today. See infra at IC, D and P. Exh. 8J.

h. Dr. Armor believes any school that is less than 20% or more than 50% minority is racially identifiable. Tr. 2576 (Armor). He would allow $\pm 10\%$ variance from this standard. Tr.

^{x/} Where the district minority average is very low, courts have applied sliding scale of $\pm 15\%$ or $\pm 10\%$. Tr. 578 (Foster)

2576 (Armor). By this standard, there are racially identifiable schools in Topeka today. Tr. 2626 (Armor). See infra at IC, D and P. Exh. 8J.

i. The indices of dissimilarity and of exposure give some measure of a system's overall segregation. Tr. 555-559 (Foster); Tr. 1266-1274 (Crain); Tr. 2331-2337 (Clark); Tr. 2581-2587 (Armor); Tr. 2900-2902 (Taeuber). The author of the dissimilarity index and defendants' and plaintiff's experts agree that these indices cannot be used alone to measure segregation; it is essential to examine other factors. Tr. 2900-2902 (Taeuber); Tr. 2655 (Armor). Neither index can be used to measure racial identifiability. Tr. 555, 557 (Foster). Although there was some dispute, see, e.g., Tr. 2602 (Armor), the indices show that segregation in Topeka today is greater than in all but one comparable city in America and greater than it would have been if either of the school board's proposed but unadopted plans had been adopted. Tr. 1275-1288 (Crain); P. Exh. 210, 211

C. By Student Assignment

Of the 26 elementary schools in Topeka today, 15 are racially identifiable, 7 as minority and 8 as white. P. Exh. 155C. Over 1000 minority students or 50% are in racially identifiable minority schools. P. Exh. 155C. If analyzed by black (as opposed to minority), 11 of the 26 schools are racially identifiable black or white (6 black, 5 white) and 49% of black students are in the 6 black schools. P. Exh. 155E. 1/ None of the seven racially identifiable minority schools are over 5% Black. P. Exh. 8J. ?

Topeka has always had elementary schools racially identifiable by student assignment. Indeed, except for two years (80-81, 82-83), "half or more" of the schools were identifiable. Tr. 592 (Foster). In 5 year segments, the identifiability was as follows:

	<u>average %</u> <u>sch. identifiable</u>	<u>no. minority</u> <u>in identifiable sch.</u>
1966-1971	56%	59%
1971-1976	60%	55%
1976-1981	58%	55%
1981-1986	48%	42%

Tr. 594-595 (Foster); P. Exh. 155C. Looking at five year intervals, the trend was as follows:

x/ There "isn't that much difference, significance between the two ways doing it" (ie. minority vs. white or black vs. white). Tr. 602 (Fost

	<u>no identifiable minority sch.</u>	<u>no. ID white</u>	<u>no. non-ID</u>
1970	7	12	15
1975	8	10	14
1980	6	6	15
1985	7	8	11

Tr. 595 (Foster); P. Exh. 155C.

In the last 3 years "there does seem to be a slight reversal of trend." Tr. 593-594 (Foster). "The gradual trend that had been taking place toward desegregation or non-racially identifiable enrollments in the elementary schools has reversed and the enrollments are becoming more racially identifiable in the last three years." Tr. 593 (Foster). The number of minority schools went from 4 in 1982 to 5 in 1983 to 6 in 1984 to 7 in 1985. Tr. 593 (Foster). The percent of minority students in those schools went from 41% to 50%. Tr. 593 (Foster).

Today, 4 of the 9 secondary schools are racially identifiable. P. Exh. 155F. One is a minority school, 3 are white and 14% of the minority students are in the one minority school. P. Exh. 155F. If analyzed by black (as opposed to minority), Eisenhower remains a racially identifiable school with 18% of all black students.

Topeka has always had racially identifiable secondary schools. In five year segments, the identifiability was as follows: x/

	<u>average % sch. identifiable</u>	<u>no. minority in identifiable sch.</u>
1966-1971	58%	53%
1971-1976	38%	25%
1976-1981	46%	20%
1981-1986	44%	14%

Tr. 605-606 (Foster); P. Exh. 155F. Looking at five year intervals, the trend was as follows:

	<u>no. ID min.</u>	<u>no. ID white</u>	<u>no. non-ID</u>	<u>% min. in ID sch.</u>
1970	4	5	6	38
1975	1	3	9	15
1980	1	3	5	12
1985	1	3	5	14

x/ As with elementary schools, no data existed 1956-1966 so as similar analysis cannot be done for that period. Tr. 174 (Lamson)

Tr. 606-607 (Foster)

The white secondary schools are "very close to becoming racially non-identifiable." Tr. 608 (Foster). This is due to demographic forces, Tr. 330-331, 338 (Lamson) and school closings. Tr. 618 (Foster). However, Eisenhower can be expected "to continue to increase in minority population." Tr. 608 (Foster).

D. By Faculty and Staff Assignment

There should be no difference in the pattern of minority assignment of faculty since "teacher assignment or employee assignment is subject to the Board's good judgment and whatever they want to do." Tr. 640, 650-651 (Foster). Today in the elementary schools, 22 of the 26 are racially identifiable by staff assignment, 10 as minority schools and 12 as white schools. Tr. 652 (Foster); P. Exh. 155N. Over the 13 years for which data exists, the number of schools racially identifiable by staff assignment has remained "pretty constant". Tr. 653 (Foster). 87% of the elementary schools have been identifiable by staff assignment.

Minority staff are disproportionately assigned to minority schools. For 1985, the 13 schools with the highest minority student enrollment were assigned an average of 16% minority staff; the 13 schools with lowest minority student enrollment were assigned an average of 6%. P. Exh. 155J. The 7 minority identifiable schools (by student assignment) had an average of 21% minority staff; the 8 white identifiable schools (by student assignment) had 6.2% minority staff. P. Exh. 155K, M.

For secondary schools, 8 of the 9 are racially identifiable by staff assignment, 4 minority and 4 white. P. Exh. 155N. Over the 13 years for which data exists, the number of schools racially identifiable by staff assignment has always been only 0-3 less than the total number of schools. P. Exh. 155N.

Minority staff are disproportionately assigned to minority secondary schools. P. Exh. 155J. For 1985, the 4 schools with the highest minority student enrollment were assigned an average of 16% minority staff; the 4 with the lowest minority student enrollment were assigned an average of 9%. P. Exh. 155J. The 1 minority identifiable school (by student assignment) had 18% minority staff; the 3 white schools had an average of 6%. P. Exh. 155M.

In the one year for which faculty (as opposed to all staff) data is available, the pattern remains the same. P. Exh. 155R.

Faculty and staff hiring "is not too encouraging". Tr. 655 (Foster). Since 1973, the percentage of minority students has risen from 20% to 26% (elementary) and 18% to 25% (secondary). At the same time, the percent of minority staff has dropped in

the elementary schools from 18% to 11%. P. Exh. 155P. For all schools, the percentage minority staff dropped from 12.5% to 11.3%. P. Exh. 155P; Tr. 656 (Foster). Minority employees are "underrepresented" as elementary and secondary teachers as well as clerical and secretarial workers. They are "overrepresented" as teacher aids and service workers and managerial employees. Tr. 661-663 (Foster); P. Exh. 155P.

E. By Perception

61% of Topekans think of some schools as minority or Black schools and 61% think of some schools as white. Tr. 840 (Williams); P. Exh. 21, p. 25-27. The perceptions very closely match actual percentage of minority enrollment. Tr. 861 (Williams); P. Exh. 21, p. 1, 28. All of the schools named as Black or minority schools had minority enrollments above the district average of 26%. P. Exh. 21, p. 25, 27. All of the schools named as white had minority enrollments below the average. P. Exh. 21, p. 25, 27.

F. By Board Action

1. Action

In determining if the School Board fulfilled its constitutional duty to desegregate the schools, it is particularly important to examine the post '54 history of school site selection, opening and closing. In Swann v. Charlotte Mecklenberg Bd. of Ed., 402 U.S. 1, 21 (1971), the Supreme Court cited construction and closing of schools as decisions "which when combined with one technique or another of student assignment, will determine the racial composition of the student body," and thus considered it a "factor of great weight." Optional zones, portables, underutilization and gerrymandering of boundary lines are departures from the norm and therefore highly suspect, particularly if they contribute to the perpetuation of a dual system. In Davis v. East Baton Rouge Parish School Bd. 721 F. 2d 1425 (1983) the Fifth Circuit in examining the board's redistricting process, concluded that segregation in the schools was a result of "routinely react[ing] to overcrowding in certain of its schools, generally those serving white neighborhoods, by erecting temporary classrooms rather than redrawing district lines to send children to underused facilities in other neighborhoods", 721 F.2d at 1435. In a systematic analysis of "Gerrymandering, pupil options, discontinuous pupil assignment areas, etc." the court in Penick v. Columbus Bd. of Ed. 583 F.2d 787 (6th Cir. 1978) aff'd, Columbus Board of Education v. Penick 443 U.S. 449, (1979) characterized the board's actions as "employment of devices which allowed white students to avoid attendance at a primarily black school in place of a closer white school." The Supreme Court affirmed and stressed that the Board actions "could not reasonably be explained without reference to racial concerns." Columbus 443 U.S. at 461. The Court agreed that there could be no neutral reason for an optional zone which

allowed whites to escape predominantly black schools and called it a classic example of a segregation device." Id. at 461 n. 8. In Keyes the Court expressed concern over the use of "attendance zones . . . transfer policies, and mobile classrooms" on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition." Keyes v. School District No. 1 413 U.S. 189, 202 (1973) In addition, in Dayton Board of Education v. Brinkman, 443 U.S. 526, 540 (1979) the Court found that optional zones "at the very least . . . amounted to a perpetuation of the existing dual system."

As will be more fully explained in section III, below, the racial identifiability of Topeka's schools is a direct consequence of action by the School Board in such actions as opening and closing schools, setting boundaries and optional zones, setting attendance policies, and use of portable and temporary classrooms. Tr. 674 (Foster), 622-623 (Foster); Tr. 177 (Lamson) (One of the reasons for racially disproportionate schools in Topeka today is "the administrative action [that] was taken by the Board of Education over the last 30 years in Topeka.")

The currently racially identifiable schools are vestiges of racial segregation permitted by law prior to 1954. Id.; P. Exh. 219. "I think Mr. Lamson's report makes a very adequate analysis of the situation which moved those original four Black schools in effect to other Black schools. It became first transitionally Black . . . and then through various decisions . . . another set of racially identifiable schools enters the pattern at the elementary level . . . most of them represent the sort of situation that Mr. Lamson described in his report in which other schools became increasingly Black and took over the mantel. Four original Black schools. So I think that in that sense vestiges still continue as far as schools by pupil assignment . . ." Tr. 622-623 (Foster). For secondary schools, "I think those are the result of Board action officially since 1954." Tr. 623-624 (Foster) "Vestiges of faculty and staff . . . are still around. I don't think that's ever been changed." Tr. 624 (Foster).

Indeed, the Topeka School Board made no secret of its intent to foster segregation in Topeka. In 1955, the defendants told this Court that their plan was designed to "afford time" for whites to flee Black schools. P. Exh. 32. The Board "intended to allow time for white people to elect to move away from attendance in Black or blackened schools." Tr. 162 (Lamson)

The following are examples^{5/} of segregative action taken by the Board that led to today's racially identifiable schools:

- a. School siting: Topeka West, Quincy, Stout, French. Tr. 355 (Lamson)
- b. School construction: All of the white schools. Tr. 355-356 (Lamson)
- c. School closings: "The vestige schools." Tr. 356 (Lamson)
- d. Boundary changes: Quinton Heights/Stout Tr. 357 (Lamson)
- e. Boundaries drawn: Buchanan, Tr. 119-120, 136 (Lamson)
- f. Optional attendance zone assignment: Lowman Hill and Crane, Tr. 357 (Lamson)
- g. Open enrollment, Tr. 2597 (Armor); 2703 (Henson)*
- h. Use of portable classrooms: Topeka West, Tr. 335 (Lamson)

2. Inaction

In Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985), the court held that the constitutional duty to eliminate the dual system and "to prevent a recurrence . . . is violated when the board fails to consider or include the objective of desegregation in such decisions as whether to construct new facilities". See also Adams v. Bd. of Public Ed. 770 F.2d 1562, 1565).

Pitts was based on well-established Supreme Court precedent. The Supreme Court in Swann stated that it was the board's responsibility "to see to it that future school construction and abandonment are not used to perpetuate or reestablish the dual system" 402 U.S. 1, 21 (1971) at 21. See also Lee v. Autauga Bd. of Ed. 514 F.2d 646 (5th Cir. 1975). Although in considering the objective of desegregation the board is not required to choose the most desegregative option, [CITE]

x/ * See Section III infra for a more complete analyses of School B action.

* Defendants asserted that open enrollment was created to deal with the need to assign students to the area of their day care provider. Tr. 2441 (Douglas). That is simply wrong. A day care transfer policy existed prior to open enrollment. P. Exh. BL. In fact, it was the price White Board members extracted to approve the Long Range Facilities. Plan D. Exh. 1064, p. 89-90.

the courts have emphasized the existence of reasonable desegregative alternatives. In Columbus the Supreme Court inferred segregative intent from the board's actions and inactions "when alternatives were available which would have eliminated or lessened racial imbalance." 443 U.S. at 463, n.12. See also U.S. v. Yonkers Bd. of Public Ed. 625 F. Supp. 1276, 1395 (SDNY 1985) in which the court stated that "critical to analysis of segregative effect and intent . . . [is] the feasibility and relative desegregative effect of alternatives to the boundary changes actually made."

Every time the Topeka School Board took an action, affective student or faculty assignment, it was required to consider race. Every failure to take an action that would have had an integrative effect was a violation of the Constitution.

For most of the period 1954 - present, Topeka did not consider race as a factor in its decisions. Tr. 2418 (Payne). On innumerable occasions, the Board failed to take actions that would have had an integrative effect. Tr. 121, 122, 127, 136-137, 140, 149, 151, 156, 157, 164-174, 185, 192, 195, 230, 232, 240, 241, 258, 265, 266, 270, 272, 281, 283, 285, 289, 290, 292, 296, 313-314, 323, 325, 328, 331, 334, 336 (Lamson)

There were two specific occasions when the School Board staff developed plans that would have had an integrative effect, but the School Board refused to adopt them. The first was in 1974. The second was in 1984.

The 1974 Tentative Plan For A More Perfect Unitary School System. P. Exh. 289

This plan "would have considerably lessened the concentration of Black students." Tr. 341 (Lamson). It adopted as a goal that no school be over 50% minority and would have achieved that goal. Tr. 341-342, 351 (Lamson); Tr. 667 (Foster). At the time and today, Topeka has had and has schools over 50% minority. Tr. 341-342 (Lamson); Tr. 668 (Foster); P. Exh. 8J.

1984 Plans N and X. P. Exh. 242

Plan N "would have had a much more equitable distribution of Black and White students than is presently enjoyed in the system." Tr. 346 (Lamson). Under Plan N, no elementary school would be over 45% minority. Tr. 346 (Lamson). This was pursuant to a goal that no school be over 50% minority. Tr. 351 (Lamson); Tr. 669 (Foster). Schools in 1984 and schools today are over 45%. Tr. 347 (Lamson). P. Exh. 8J. 5 are over 45%, Tr. 347 (Lamson) and 3 over 50%, Tr. 670-671 (Foster). The index of dissimilarity would have gone from today's 37 to 24. P. Exh. 209, 211. Tr. 1274, 1285-1286 (Crain). The index of exposure would have gone from today's 15 to 10. P. Exh. 209, 211; Tr. 1274, 1285-1286.

Under Plan N, secondary schools would have gone to 17-38% minority in a system that was then 6-49% minority. Tr. 348 (Lamson). The index of dissimilarity would have gone from today's 32-30 to 24.1 and the exposure index from today's 7-11 to 10. P. Exh. 211; Tr. 1285-1286 (Crain); D. Exh. 1119.

Plan X would have made all elementary schools 3-44% minority, Tr. 350 (Lamson); Tr. 672 (Foster), also based on a goal that no school be over 50%. Tr. 351-352 (Lamson), Tr. 669 (Foster). The index of dissimilarity would have gone from 37 to 24. Tr. 1274, 1285-1286 (Crain); P. Exh. 209, 211. The index of exposure would have gone from 15 to 0.94. Tr. 1274, 1285-1286 (Crain); P. Exh. 209, 211.

For secondary schools, Plan X would have made all schools 22-27% minority. Tr. 350 (Lamson); Tr. 672-673 (Foster). The index of dissimilarity would have gone from today's 32-30 to 3.5 and the index of exposure from today's 7-11 to 0.2. P. Exh. 211, Tr. 1285-1286 (Crain); D. Exh. 1119

Both plans N and X had benefits - " to the students and the employees of the district [that] would have far outweighed" their costs. Tr. 2452 (Douglas)

The DCAC Plan, P. Exh. 30

The District Citizen's Advisory Committee developed a plan that would have made all elementary schools 4-48% minority with only 2 over 40% at a time when there were 7 schools over 40%. Tr. 352-354 (Lamson)

All Four Plans

Neither the 1974 Plan nor any of the 1984 plans were adopted by the Board. Tr. 341, 349, 352 (Lamson), Tr. 2454 (Douglas). The only reason the plans were not adopted was public pressure. Tr. 1473 (Henson), 2451 (Douglas)

3. Knowledge

Defendants were repeatedly advised that there were segregation problems in Topeka. In Section VI of the Proposed Findings of Fact attached hereto, plaintiffs list 73 instances between 1954 and the present in which there is documented evidence of complaints about segregation were directed to defendants.

Defendants' knowledge of existing segregation is relevant.
[INSERT CITES]

II. There Are Racially Identifiable Schools In Topeka Today: Individual Schools

A. The Black or minority elementary schools

1. Belvoir

a. By student assignment: Belvoir in 1986-1987 is 66% minority. Tr. 2733 (Henson). It is a racially identifiable minority school. P. Exh. 155D Since 1966~~8~~/, its minority percentage has never been less than 56% and it has always been racially identifiable. P. Exh. 8J, 155D.

b. By staff assignment: For 1985-1986, Belvoir is a racially identifiable minority school by staff assignment. P. Exh. 155-D. It has been racially identifiable minority by staff assignment for all but two years (1979-1980, 1980-1981) for which data exists. 7/ P. Exh. 155-D.

c. By perception: Belvoir was the elementary school mentioned second most often by Topekans asked an open-ended question about Black or minority schools. P. Exh. 21, p. 20. For those familiar with Belvoir, 62% perceived it as a Black or minority school. P. Exh. 21, p. 31. It was the elementary school most often mentioned as the poorest. P. Exh. 21, p. 8. For those familiar with it, it ranked lowest in the number who saw it as excellent or as excellent and good. P. Exh. 21, p. 17

d. By School Board action:

Belvoir was annexed into the Topeka schools in 1959. P. Exh. 219, p. 148; Tr. 259 (Lamson). Only a portion of the previous Belvoir area was annexed. Thus, the Topeka schools drew the new Belvoir boundaries. P. Exh. 21, p. 151. Tr. 260 (Lamson). After the Topeka Board drew its boundaries, Belvoir was 23% Black. P. Exh. 219, p. 151; Tr. 260 (Lamson). It was surrounded by Rice on the north (4% Black), Highland Park Central on the South (3% Black), and Highland Park North on the West (8% Black). P. Exh. 219, p. 152. Topeka assigned 52% of the Black children and 15% of the white children in the region to Belvoir. P. Exh. 219, p. 152.

Topeka did not have to draw the Belvoir boundaries to make it a disproportionately Black school surrounded by disproportionately white schools. Belvoir was undercapacity. P. Exh. 219, p. 153. Instead of utilizing this capacity to desegregate the region, the Topeka Board placed portable classrooms at the surrounding white schools. P. Exh. 219, p. 155.

x/ Specific race data does not exist for 1956-1966. Tr. 174 (Lamson) situation would not be significantly different if the data existed. Defendants claim no acts were taken to fulfill their duty (except the plan) until the mid-70's. Tr. 2418 (Payne); Tr. 2718-2726 (Henson). index of dissimilarity did not change from 1956-1966. D. Exh. 1119.

x/ Data does not exist prior to 1973-1974. Tr. 630 (Foster); Prior staff segregation was complete. Tr. 630 (Foster)

In 1963, Topeka school officials opened Hudson as an all white school. P. Exh. 219, p. 156, Tr. 262 (Lamson). The effect of the Hudson opening was to take "a white residential area out of Belvoir." Tr. 262 (Lamson). Thus, white students were moved from Belvoir to Hudson. Other white students were placed in an optional zone between the two schools in 1963 and then in 1964 that zone was added to Hudson. P. Exh. 219, p. 157. Hudson was very undercapacity for the first three years while in 1965 and 1966, Belvoir was overcrowded and had portable classrooms added to it. P. Exh. 219, p. 158, Tr. 264 (Lamson).

These actions "tended to isolate Black students at the Belvoir elementary school and contain white children at the schools which surrounded it from 1960 to 1966." P. Exh. 219, p. 158. As a result, by 1966, Belvoir was 49% Black and surrounded by Rice (3%), Highland Park Central (13%), Highland Park North (17%) and Hudson (6%). P. Exh. 219, p. 149. Tr. 265 (Lamson).

In 1967, Topeka built a replacement building or addition at Belvoir. P. Exh. 219, p. 166. It did so ostensibly because Belvoir was overcrowded. However, adjacent white Rice (5%) and white Hudson (6%) were then undercapacity by more than Belvoir's overcrowding. P. Exh. 219, p. 167. By building the new Belvoir, rather than utilizing Rice or Hudson, the Topeka Board guaranteed the racial identifiability of all those schools. P. Exh. 219, p. 167; Tr. 276 (Lamson). After construction, Belvoir had 87% of all the Black students in those three schools. Tr. 277 (Lamson); P. Exh. 219, p. 167.

In 1969 and 1978, Belvoir's boundaries were changed slightly, but those changes simply involved transfer to or from other Black schools. P. Exh. 219, p. 179, 182.*

In short, Belvoir is not a racially identifiable school by coincidence. It is so because of specific, deliberate acts by the Topeka School Board.**

2. Highland Park North

a. Highland Park North in 1985-1986 is 60% minority. P. Exh. 155D, 8J. It is a racially identifiable minority school and has been since 1971-1972. P. Exh. 155D. It steadily gained in percentage of minority pupils from 1971 until 1979 with a big jump of 11% in that year. P. Exh. 155D, 8J. Since 1979, its minority percentage has hovered around 60%. P. Exh. 155D, 8J

* The effect of the Rice closing in 1981 on Belvoir is discussed supra, Section IV, p. 2.

** Dr. Clark concedes that Belvoir has always been Blacker than it would have been without School Board action. D. Exh. 1114, p. 28.

b. By staff assignment: For all but two years, (1974-1976) Highland Park North has been a racially identifiable minority school by staff assignment. P. Exh. 155-0. It is a racially identifiable minority school today. P. Exh. 155-0.

c. By perception: Highland Park North was the school mentioned third most often by Topekans as a Black or minority school. P. Exh. 21, p. 20. For those familiar with it, 37% perceived it as a minority school. P. Exh. 21, p. 31. It was the school mentioned second most often as a poor school. P. Exh. 21, p. 8. For those familiar with it, only 4% perceived it as excellent and 41% as good, causing it to receive the third lowest ranking. P. Exh. 21, p. 17.

d. By School Board Action

The Highland Park North school was annexed by Topeka in 1959 as part of a larger annexation including two other elementary schools and one high school. P. Exh. 219, p. 148. Tr. 267 (Lamson). The annexed area was only 1/3 of the previous district size. Thus, the Topeka School Board drew the new Highland Park North boundaries. P. Exh. 219, p. 150-151. At the time it was annexed, Topeka assigned Highland Park North a boundary that made it 8% Black. Adjacent Belvoir was 23% Black. P. Exh. 219, p. 152.

Between 1959 and 1975, the Black and minority percentage began a slow, steady climb. From 1966-1975, the percentage of Black students went from 17% to 33% and the percent minority from 22% to 42%. P. Exh. 8J. This climb was apparently due in part to demographic forces although it was signaled by a boundary change between 1963 and 1966 that doubled the rate of increase. D. Exh. 1114, p. 29.

Having signaled in the early 60's that Highland Park North was to become a minority school, the Topeka Board made it so in 1975, with the closing of Monroe and assignment of some Monroe students to Highland Park North. P. Exh. 219, p. 173. Monroe was an 83% minority school when closed. P. Exh. 8J. The effect of the Monroe closing is discussed more fully in the discussion of Quinton Height which became the successor school to previously all-Black Monroe.

Topeka further reinforced Highland Park North's status as a minority school in 1978 when it closed Parkdale and assigned some of the students to Highland Park North. P. Exh. 219, pp. 174-179, 182-183. Parkdale was a 67% minority, 61% Black school when closed.* P. Exh. 8J. As is more fully discussed in the discussion of Lafayette, Parkdale was the successor school to previously all-Black Washington. Now, Lafayette and Highland

* These figures include Head Start. Without Head Start, it was 86% minority, 82% Black, P. Exh. 8J.

Park North succeeded Parkdale to carry on the role of the Black schools in this part of Topeka. Tr. 289 (Lamson). As a result of the reassignment of Parkdale's students, Highland Park North went from 40% to 49% Black and from 47% to 58% minority. P. Exh. 219, p. 175; P. Exh. 8J.

In short, Highland Park North is not a racially identifiable school by coincidence. It is a successor to or second-generation vestige of de jure all-Black Washington. It is so because of specific, deliberate acts by the Topeka School Board.*

3. Lafayette.

a. By student assignment: Lafayette in 1985-1986 was 57% minority and a racially identifiable minority school. P. Exh. 155D, 8J. Its minority percentage has been remarkably constant, never below 53% or above 70%. P. Exh. 155D, 8J. It has thus always been a racially identifiable minority school. P. Exh. 155D, 8J.

b. By staff assignment: Lafayette is a racially identifiable minority school by staff assignment today and it always has been so. P. Exh. 155-0

c. By perception: Lafayette is the elementary school most often perceived by Topekans on open-ended questions as a Black or minority school. P. Exh. 21, p. 20. 50% of those familiar with it perceive it as a Black or minority school. P. Exh. 21, p. 31. It is one of only 4 elementary schools named as poorest. P. Exh. 21, p. 31. For those familiar with it, only 5% perceive it as excellent and 29% as good, making it the second lowest ranked school. P. Exh. 21, p. 17

d. By School Board Action

As noted, Lafayette is a successor school to de jure all-Black Washington. P. Exh. 219, pp. 101-114, 133-139. Tr. 289, 125-126 (Lamson); Tr. 622-623 (Foster). In order to understand the process by which this occurred, it is necessary to look at the history of Washington, Parkdale, and Lafayette from 1954.

Prior to 1954, Washington was a de jure all-Black school. Tr. 118 (Lamson). In 1955, the Topeka School Board drew boundaries around Washington. Tr. 121-122 (Lamson). The new Washington boundaries were entirely within the previous boundaries of then all-white Parkdale and closely tracked the Black housing in the area. P. Exh. 121-122. After the Washington boundaries were drawn, Washington remained 100% Black. Parkdale became 22% Black. P. Exh. 219, p. 19.

* Dr. Clark concedes that Highland Park North has always been Blacker than it would have been without school board action. D. Exh. 1114, p. 29.

Lafayette had been about 3/4 of a mile from Washington and 1/4 mile from a racially mixed optional attendance zone it shared with Washington after 1955.* P. Exh. 219, p. 43. However, in 1956, Topeka built a replacement for Lafayette six blocks further east in an all-white area. P. Exh. 219, p. 43. The move guaranteed that for the time being, Lafayette would remain disproportionately white and Parkdale would be the successor to Washington. P. Exh. 181; Tr. 138 (Lamson). Topeka further tried to ensure this result between 1956 and 1958 when it transferred an all-white attendance area from Parkdale to Lafayette. P. Exh. 219, p. 102. After this change, Parkdale's Black percentage increased from 22% to 38%. P. Exh. 219, p. 103. In 1962, Topeka opened additions to both Parkdale and Lafayette even though both had been underutilized. P. Exh. 219, p. 104. It placed 2 portable classrooms at Lafayette. P. Exh. 210, p. 134. At the same time, it closed two schools in the area: Washington and Lincoln. P. Exh. 219, pp. 104-105. Tr. 188-189 (Lamson). The Washington students, all-Black, were all assigned to Parkdale, confirming its status as a successor vestige school. P. Exh. 219, p. 104. Tr. 141, 189 (Lamson). In addition, some of the Lincoln students were assigned to Parkdale. P. Exh. 219, p. 105. Most of the Lincoln children assigned to Parkdale were Black. P. Exh. 219, p. 105. The remaining Lincoln students, mostly white, were assigned to Lafayette. P. Exh. 219, p. 105. A previous optional zone between Lincoln, Lafayette and Parkdale with few Blacks was assigned to Lafayette. P. Exh. 219, p. 107. The effect of these closings was that "Parkdale went to almost 60% Black and Lafayette stayed as a predominantly white school." Tr. 191 (Lamson). Lafayette was 17% Black. P. Exh. 219, p. 107. "The assignment of 392 Black children to the Parkdale school in 1962 clearly made of that school the segregated replacement for the all-Black Washington elementary school." P. Exh. 219, p. 107.

By 1966, Parkdale was a clearly Black school at 85%. P. Exh. 219, p. 131. Despite the best efforts of the school board, Lafayette's Black population had increased slightly to 26%. It was now the better school between black Parkdale and white Lundgren (3%). P. Exh. 8J; P. Exh. 219, p. 131.

In 1966, Topeka closed Dawson. Tr. 198 (Lamson); P. Exh. 219, p. 135. Dawson had been annexed in 1960 as all-white and remained so. P. Exh. 219, p. 136-137. By use of portable classrooms and optional zones, Topeka signaled that the white Dawson students would be sent to State Street, an already overcrowded school. P. Exh. 219, p. 137. That signal became reality when the white students were sent to State Street rather

* This optional zone was between discontinuous schools and was an extreme example of Topeka's use of optional zones to segregate. P. Exh. 219, p. 24. Other options, both contiguous and non-contiguous, surrounded Washington, Parkdale, Lafayette and Lincoln. P. Exh. 219, pp. 23-25; Tr. 129 (Lamson)

than Lafayette in 1965. P. Exh. 219, p. 137-138. After the Dawson reassignment, State Street was 4% Black and Lafayette was 26% Black. P. Exh. 219, p. 130-137. This was the signal that Lafayette was to become the successor Black school to Parkdale.

Beginning in 1968, Topeka began to adjust the boundaries between Lafayette and nearby Black schools. P. Exh. 219, p. 179. *1969* *again* *again* ~~Changed then~~ *once* once in 1968, *once* once in 1969, twice in 1975, and again in 1978. P. Exh. 219, p. 179-182. There were further signals that Lafayette was now to be considered a Black school. It also placed a number of portable classrooms at Lafayette. P. Exh. 219, p. 185.

In 1978, Topeka made it official. Parkdale the successor to Washington, was closed and many of the students reassigned to Lafayette. P. Exh. 219, p. 174-175. The effect was to increase the percentage of minority students at Lafayette and make it the ultimate successor to all-Black Washington. P. Exh. 219, p. 175. By 1980, Lafayette was 49% Black and 61% minority. P. Exh. 219, p. 185; P. Exh. 8J. Its identifiability as a minority school has continued.

In short, Lafayette is not a racially identifiable school by coincidence. It is a successor or second-generation vestige of de jure all-Black Washington. It is so because of specific, deliberate acts by the Topeka School Board.*

4. Quinton Heights

a. By student assignment: In 1985-1986, Quinton Heights was 49% minority and a racially identifiable minority school. P. Exh. 155D, 8J. It has been a racially identifiable minority school every year except 1977-1978. P. Exh. 155D. The minority percentage has increased from 1966 when it was 36% to 49% today. P. Exh. 155D, 8J

b. By staff assignment: Quinton Heights is a racially identifiable minority school by staff assignment today. P. Exh. 155-D. It has been a racially identifiable minority school in all but three years (1976-1977, 1982-1984). P. Exh. 155-D

c. By perception: Quinton Heights is one of 10 elementary schools named as a Black or minority school by more than 1/2 of 1%. P. Exh. 21, p. 20. For those familiar with it, 10% perceive it as a Black or minority school. P. Exh. 21, p. 31. For those familiar, only 4% perceive it as excellent while 58% perceive it as good, for a total of 62% making it 5th of the 8 elementary schools about which questions were asked. P. Exh. 21, p. 17.

* Dr. Clark concedes Lafayette was Blacker than it would have been as a result of school board action after 1974. D. Exh. 1114, p. 27.

d. By School Board Action:

As noted, Quinton Heights is a successor school to de jure all-Black Monroe. P. Exh. 219, pp. 130-148. Tr. 147-149, 212-223, 246-258, 290-294 (Lamson). Quinton Heights presents perhaps the clearest example of deliberate, intentional segregative acts by the Topeka School Board. Tr. 257 (Lamson). "Just about everything you don't want in an elementary school district is in Quinton Heights and the zipper is what you don't want is the disproportionate containment of Blacks in Gunton Heights as well." Tr. 291-292 (Lamson). In order to understand the process by which this occurred, it is necessary to look at a constellation of schools in the center of town that includes Monroe, Van Buren, Pierce, Polk, and Stout. Even Stout.

Prior to 1954, Monroe was a de jure all-Black school. Tr. 118 (Lamson). In 1955, a boundary was drawn around Monroe closely outlining the Black population in the area. Tr. 123-124 (Lamson). The Monroe district was completely within the previously all-white Van Buren district. Tr. 123 (Lamson). Van Buren was two blocks from Monroe. Tr. 124-125 (Lamson).

Prior to 1955 and in anticipation of the Monroe boundary, Topeka created an optional zone between white Central Park and White Quinton Heights and cancelled one between Quinton Heights and Van Buren. P. Exh. 219, p. 19-20. Tr. 134-135 (Lamson). This was a signal that Topeka was going to let Van Buren become Blacker while preserving White Quinton Heights. In 1955, the District created an optional zone between Van Buren, Monroe, and Polk. P. Exh. 219, p. 26; Tr. 134-135 (Lamson). This zone was all-white and permitted whites to flee to Polk. Tr. 134-135 (Lamson). In 1955, the Board also opened Stout as all-white. P. Exh. 219, p. 139-140.

The effect of the Monroe boundary, the Stout opening and the optional zones in the area was that in 1956, Monroe was 100% Black, Lincoln 20% Black, Van Buren 21% Black, Polk 1% Black, Quinton Heights 7% Black and Stout 9% Black. P. Exh. 219, pp. 114-119. At this time, Quinton Heights "in effect is a resource of white students and one question is why it is necessary to have a Black -- all Black school with common attendance boundaries with a school that is over 90% white." Tr. 139 (Lamson).

The situation begins to change in 1957 when all-Black Pierce is annexed to Topeka. P. Exh. 219, p. 141. Now, "the Quinton Heights attendance area physically bridged the demographic distance between the all-Black Pierce and Monroe elementary schools and the substantially Black Van Buren elementary school to the east and north, and the all-white Stout and all or predominantly white Avondale East, Southwest, and West elementary schools to the west and south." P. Exh. 219, pp. 141-142. Then, in 1959, Pierce was closed and some of those Black children assigned to Quinton Heights. P. Exh. 219, p. 142-143. At the same time, optional zones were abolished and created around

Quinton Heights to begin to send white students from Quinton Heights to white Stout and other white schools. P. Exh. 219, pp. 143-144. The Pierce closing signaled the beginning of the end of Quinton Heights as a white school. P. Exh. 219, p. 142.

Between 1962 and 1964, the Topeka Board modified the boundaries of Quinton Heights 3 times "to include Black children and exclude white children." P. Exh. 219, p. 144-145; Tr. 251-252 (Lamson). In 1962, the northern boundary was expanded to include Black students. Id. In 1963 and 1964, southern optional attendance zones, all white, were cancelled and sent to Stout and other adjacent white school. Id.

In 1964, Van Buren was closed. P. Exh. 219, p. 127, 145; Tr. 254-255 (Lamson). At the time Van Buren was 40% Black. P. Exh. 219, p. 127. Many of the students were assigned to Monroe. P. Exh. 219, p. 127-128, 145-146. However, Quinton Heights again expanded its northern boundary and contracted its southern boundary. P. Exh. 219, pp. 145-146. This "necessarily meant the inclusion of ever greater numbers of Black students [and] . . . the exclusion of white students from the Quinton Heights attendance area." P. Exh. 219, pp. 146-147. The cumulative effect was to take "larger and larger portion of Black residential areas into Quinton Heights and Quinton Heights becomes increasingly recognizable as a disproportionately Black school" surrounded by white schools. Tr. 256-257 (Lamson). By 1966, Quinton Heights was 36% minority surrounded by White Polk (11%), Central Park (15%), Stout (0%), Avondale East (15%), Avondale West (1%) and Highland Park Central (17%). Only adjacent Monroe (80%) was Blacker. P. Exh. 8J.

In 1975, Monroe was closed. Tr. 284 (Lamson); P. Exh. 219, 173-174. At the same time, the Quinton Heights boundary was extended northward for the third time. Tr. 284 (Lamson). The Monroe students were assigned to Polk, Highland Park North, and Quinton Heights. P. Exh. 219, p. 173. At the time, Monroe was 83% minority, 64% Black. P. Exh. 8J. However, Polk was scheduled to be closed. P. Exh. 240. It was in fact closed in 1979 and "the Black population in Polk are included in the Quinton Heights schools area with the fourth northern extension of that area." Tr. 290 (Lamson) Quinton Heights goes from 33% Black (39% minority) to 46% Black (50% minority). P. Exh. 219, p. 176.

By today, Quinton Heights is a racially identifiable Black school with 49% minority students. P. Exh. 155D. It sits adjacent to Stout which has only 27% minority students. P. Exh. 8J. Both schools have attendance areas that are extremely large, "that conform to no Topeka Board of Education standard for elementary attendance area size; that are defined by totally irregular attendance boundaries with no sense of rhyme or reason; and that run almost totally parallel to each other very near the geographic center of the Topeka school system separated only by a common attendance boundary." P. Exh. 219, p. 177. Quinton

Handwritten: Had to
P. Exh. 219

Handwritten: Some quick
separation
progression
Polk
Stout

Heights and Stout represent in a microcosm the segregative decisions of the Topeka School Board.

In short, Quinton Heights is not a racially identifiable school by coincidence. It is a successor or second-generation vestige of de jure all-Black Monroe. It is so because of specific, deliberate acts by the Topeka School Board.*

5. Hudson

a. By student assignment: In 1985-1986, Hudson was 47% minority and a racially identifiable minority school. P. Exh. 155D, 8J. It has been racially identifiable for 3 years and was so in 1975-1976. P. Exh. 155D, 8J.

b. By staff assignment: In 1985-1986, Hudson was a racially identifiable minority school by staff assignment. P. Exh. 155-0. It has been identifiable as a minority school for 2 years and was identifiable one other year, 1975-1976, the one other year when it was also identifiable as a minority school by pupil assignment. P. Exh. 155-0

c. By perception: Hudson is one of 10 elementary schools named as Black or minority by more than 1/2 of 1%. P. Exh. 21, p. 20.

d. By School Board Action and Inaction

Hudson was opened by the Topeka School Board in 1963 as an all-white school. Its effect on Belvoir has already been discussed. From 1963 to the present, Hudson gradually increased its minority percentage, apparently as a spill-over effect of racially identifiable Belvoir and Highland Park North. Since 1980, Hudson has gone from 33% minority to 47% minority. P. Exh. 8J. This portion of the Hudson history is an example of inaction. With Hudson, the School Board has allowed an increase of 14% in its minority composition and has refused to take any action to stop that growth. Indeed, Hudson's boundaries have not been changed in that time. Tr. 1503 (Henson). Today, Hudson is a racially identifiable school as a direct result of the School Board's inaction.

6. Avondale East

a. By student assignment: Avondale East in 1985-1986 was 44% minority and a racially identifiable minority school. P. Exh. 155D, 8J. It has been identifiable for 2 years and was so

* Dr. Clark concedes that as of some time after 1974, Quinton Heights became Blacker as a result of School Board action. D. Exh. 1114, p. 24. Indeed, he concedes that School Board action took it from non-identifiable to identifiable. Id.

in 1971-1972. P. Exh. 155D, 8J. Throughout the 1970's it had a constant minority attendance of about 30%. As of 1980, the percentage began a steady climb. P. Exh. 8J

b. By staff assignment: Avondale East in 1985-1986 was a racially identifiable minority school by staff assignment with 20% more minority staff than the acceptable range. P. Exh. 155-0. It was a racially identifiable minority school all but two years (1977-78, 1979-80). D. Exh. 155-0

c. By perception: Avondale East was not named by a significant number of Topekans on any but two questions. It was named as one of 4 elementary schools perceived as poorest and one of 14 named as having poorest facilities. P. Exh. 21, p. 8, 15.

d. By School Board action and inaction

Avondale East was annexed as part of a larger annexation in 1959. P. Exh. 219, p. 141. It was all-white. Id. The Avondale East history is very similar to that of Hudson. Between 1959 and 1980, it began a gradual increase in minority percentage from 0% to 33%. An average of about 1-1/2% per year. P. Exh. 8J. This increase accelerated from 1980-1985 as Avondale East went from 33% to 44% or over 2% each year. P. Exh. 8J. There have been no changes in Avondale East's attendance areas since 1980. Tr. 1503 (Henson). This is another example of the School Board allowing a school to become racially identifiable. Avondale East is racially identifiable today as a direct result of the School Board's inaction.*

7. Lowman Hill

a. By student assignment: Lowman Hill in 1985-1986 was 42% minority and a racially identifiable minority school. P. Exh. 155D, 8J. It has been racially identifiable every year but 3 (1982-1985). P. Exh. 155D. Its minority percentage has been remarkably consistent, in the 40's all but those three years (when it was 37%, 40%, and 37%). P. Exh. 155D, 8J

b. By staff assignment: Lowman Hill is a racially identifiable minority school by staff assignment today and has been so every year except 1974-1975. P. Exh. 155-0

c. By perception: Lowman Hill was one of 10 elementary schools named by Topekans as a Black or minority school. P. Exh. 21, p. 20.

d. By School Board action

* Defendant's witness Dr. Clark argues that at least since sometime after 1964, Avondale East has become Blacker than it would have been without School Board action. D. Exh. 1114, p. 30.

Loman Hill is a successor school to de jure all-Black Buchanan. Tr. 124-125 (Lamson); Tr. 622-623 (Foster). Loman Hill, like Quinton Heights, presents an extreme example of attendance boundaries drawn in order to segregate students. There are two concentrations of Black residents in the north central part of Topeka and they are separated by an area of white residential population. Tr. 2342 (Clark) The Loman Hill boundary is and has been drawn to include both areas of Black residences while surrounding schools' boundaries are drawn to exclude Blacks and include whites. Tr. 2343 (Clark). The result is that today Loman Hill is 42% minority and racially identifiable minority, surrounded by substantially whiter Gage (9%), Randolph (15%) and Potwin (8%), P. Exh. 8J. This information alone is sufficient to establish that Topeka has not desegregated Loman Hill. However, an examination of the history of the school reveals that since 1954 the Topeka School Board has been making a determined effort to ensure segregation in north central Topeka.

In 1954, Topeka school officials realized that if they lost in the Supreme Court they would have to draw boundaries around the Black schools and move some students. All-Black Buchanan was "exactly between the Polk and Loman Hill" schools. P. Exh. 219, p. 21. In 1954, Topeka school officials sent two signals to white parents that if segregation ended, Loman Hill and not Polk would become the successor. Black school to Buchanan. First, they expanded the white optional zone between Loman Hill and Polk, allowing more whites to escape Loman Hill. P. Exh. 219, pp. 20-21. Both schools were then underutilized. So this was not a decision to ease overcrowding. Id. Second, they changed the boundary between Loman Hill and Randolph to move an all-white neighborhood out of Loman Hill. P. Exh. 219, p. 33.

In 1955, the School Board did draw boundaries around Buchanan. As noted, the Board tried to limit the effect of Buchanan by drawing its boundaries tightly around the Black residential population in the area. Tr. 119-120, 136 (Lamson). There were a number of all white optional zones in the Loman Hill-Buchanan area that were continued. Tr. 135 (Lamson). * A new optional zone was created between Buchanan, Loman Hill, and Polk. P. Exh. 219, p. 27. The result of these changes was that in 1955, the schools in this area were:

* In bi-racial or multi-racial areas, "the optional attendance area has a great potential for allowing Black children to go to Black schools and white children to go to white schools." Tr. 131 (Lamson). It is never integrative. Id. Dr. Clark's analysis, which includes or excludes optional zones from school boundaries completely, thus misses the point of optional zones. D. Exh. 1114. After 1954, Topeka used optional zones in the same way many other southern districts did, to signal a transitional school and to allow portals for whites to leave those schools before they became too Black. Tr. 132 (Lamson); P. Exh. 219.

Gage	0%	Black
Potwin	0%	Black
Randolph	0.4%	Black
Polk	0.9%	Black
Central Park	4.3%	Black
Clay	10.0%	Black
Loman Hill	16.0%	Black
Buchanan	100%	Black

P. Exh. 219, p. 21. All of the schools in the area were undercapacity and nothing required assignment of students in this way. Tr. 137. (Lamson).

In 1955, the school officials again signalled that Loman Hill was to become a minority school. They expanded two optional zones between Loman Hill, Gage, and Potwin and between Loman Hill, Potwin, and Clay. P. Exh. 219, p. 29. Both areas were increasingly Black and the optional zone expansion permitted whites to flee Loman Hill. They did so as this chart shows:

	<u>1955</u>	<u>1956</u>	<u>white or black student gain]</u>
Clay	10%	7.9%	+43 white
Potwin	0%	0%	+12 white
Gage	0%	0%	+ 4 white
Loman Hill	16%	17.4%	+ 7 black

P. Exh. 219, pp. 29-30.

In 1957 and 1958, Loman Hill and adjacent Potwin were overcrowded. In 1958, to solve that problem the school board modified the optional zones and boundaries in that area. Tr. 228 (Lamson); P. Exh. 219, pp. 89-90. The first modification expanded the Buchanan boundary to take from Loman Hill some black residents. P. Exh. 219, p. 89; Tr. 228 (Lamson). At the same time, the Loman Hill boundary was expanded to take in the only block with Blacks in the three northern optional zones. P. Exh. 219, p. 90. The Board further modified those northern optional zones, the remainder of which were all white, to eliminate Potwin from the option but to create an option among Loman Hill, Gage, and Clay. P. Exh. 219, p. 90-91; Tr. 228 (Lamson). Finally, the Board put portable classrooms at Gage. P. Exh. 219, p. 91. The effect of these moves was "to contain white pupils at Potwin; expand the containment of Blacks at Buchanan; increase the concentration of Black pupils at Loman Hill; and insure the ongoing attendance option for the white children in the thirteen city block area between Potwin and Loman Hill elementary schools." P. Exh. 219, p. 91. Those white children could now flee Loman Hill for Gage. *Id.* Tr. 229-230 (Lamson). Alternate means of solving the overcrowding at Loman Hill and Potwin would not have been as segregative. Tr. 230 (Lamson). Indeed, surrounding schools had extra capacity that could have been used

and would not have been segregative. P. Exh. 219, p. 92. Topeka chose to segregate.

In 1959, Loman Hill's status as the successor or second-generation vestige school to Buchanan became official. Buchanan was closed and all of its students, all-Black, were assigned to a new, larger Loman Hill. P. Exh. 219, p. 91-92; Tr. 231 (Lamson). At that point, Loman Hill's boundary resulted in a school that was 43% Black. P. Exh. 219, p. 94. It included every single block in the area that was over 50% Black. P. Exh. 219, p. 93. It was surrounded by white Clay (9%), Polk (3%), and Central Park (6%), the first two of which had unused capacity that could have been used when Buchanan was closed to desegregate. P. Exh. 219, p. 93. Instead, Topeka chose to make Loman Hill a racially identifiable minority successor to Buchanan surrounded, as Buchanan had been for years, by racially disproportionate white schools.

In 1962, The Board remodeled Polk, increasing its capacity to 269. P. Exh. 219, p. 94. At the time, Polk was underutilized by 40 spaces. Id. Surrounding schools were also underutilized. Id. Loman Hill had 58 spaces, Clay had 23, Central Park 83, Van Buren 107, Monroe 277. Id. and P. Exh. 219, p. 210.* Those schools had more than enough spaces to accommodate Polk's students and if Polk had been closed it would have had a very positive effect on segregation in Central Topeka. P. Exh. 219, p. 94-95, 120-121. Instead, Topeka rebuilt Polk to provide a haven for white students in the region.*

In 1963, Topeka modified the Loman Hill-Polk boundary to remove "the only two [Black] . . . city blocks in the otherwise predominantly white Polk elementary school attendance area." P. Exh. 219, p. 95. Those students went to Loman Hill. Id.

In 1964, the Topeka School Board eliminated many of the optional attendance zones. P. Exh. 219, p. 124. The way in which it did so presents one of the most extreme examples of

* Polk and Clay were between Loman Hill and Monroe and Van Buren, white school between two Black school clusters. P. Exh. 219, p. 123. The changes in the Polk school between 1962 and 1964 thus affected the Monroe/Van Buren/Quinton Heights constellation of schools as well as Loman Hill. P. Exh. 210, pp. 94-98, 120-127.

* In 1962, the Board also modified an optional attendance zone that was between Lincoln, Monroe, and Van Buren. P. Exh. 219, p. 121. When Lincoln closed, the optional zone was both modified and expanded to include white blocks. Id. It now included Polk, Monroe, and Van Buren. Id. As a result, Polk gained white students and Monroe and Van Buren lost herein. P. Exh. 219, p. 122.

deliberately segregative acts. There were six optional zones around Loman Hill. P. Exh. 219, p. 96. Tr. 235-239 (Lamson). Four were closed and two were modified in 1964. P. Exh. 219, p. 96-98; Tr. 235-239 (Lamson). All of the optional zones encompassing white areas were assigned to white schools. The only optional zone encompassing any Blacks was assigned to Loman Hill. P. Exh. 219, p. 96-98. Nothing about the capacity of the schools required this pattern. Tr. 239 (Lamson)

"The reassignment of optional zones formerly encompassing white residential areas to the attendance areas of schools which were in all probability 90 to 99% white white in 1964 coupled with the withdraw of the Loman Hill school from participation in the remaining all white optional zone signalled the identity of the Loman Hill school as other than ~~white~~. *ap*"

The reassignment of an optional zone, formerly serving a racially transitional area, into the Loman Hill attendance areas, and the maintenance of another racially mixed optional zone in conjunction with a 99% white school definitely set the racial pattern of the assignment of Black pupils to Loman Hill elementary school and white pupils to the surrounding 90 to 100% white schools."

P. Exh. 219, pp. 97-98; Tr. 239-240.*

By 1966, the number of Blacks at Loman Hill had tripled in 10 years while the number of whites decreased. Loman Hill went from 17% Black to 47% Black, 50% minority. P. Exh. 219, p. 87, P. Exh. 8J. Surrounding Loman Hill were Polk (12% minority), Clay (16% minority), Gage (1% minority), Central Park (15% minority), and Randolph (0%). P. Exh. 8J.

Central Park, like Polk, was a white school between two black school. In 1966, Central Park was 12% Black. P. Exh. 219, p. 168. Loman Hill to the north was 47% Black, P. Exh. 8J. Quinton Heights to the south was 35% Black. P. Exh. 219, p. 168. Central Park was destroyed by a tornado in 1966. Id. When that happened, Central Park was underutilized by 111 pupils and

* Optional zones were also eliminated in the sameway around Polk. P. Exh. 219, pp. 124-127. "The results of the four optional zone eliminations cited above were that children from all or 99% white residential areas were permanently assigned to schools which were 90% or more white in thei pupil racial ration while the children from a residential area that was significantly Blacker in racial composition were assigned to the Loman Hill elementary school which was about 42.9% Black in 1964." P. Exh. 219, p. 126; Tr. 217-219 (Lamson).

losing pupils. Id. Loman Hill was underutilized by an average of 43 spaces from 1957-1966 and 62 spaces from 1967-1969. Polk was underutilized 28 and 83 spaces, Monroe 190 and 246. P. Exh. 219, p. 169. In other words, there was ample capacity in the region to make Central Park's rebuilding unnecessary. Id. In addition, if Central Park were not rebuilt, its attendance area could be used to desegregate Loman Hill and Quinton Heights. However, as with Polk in 1962, Topeka chose the segregative option. It rebuilt Central Park and perpetuated segregation at Loman Hill and Quinton Heights. Tr. 277-279 (Lamson)*

In 1975, Clay was closed and in 1977, Sheldon was closed. Tr. 282-283, 288-289 (Lamson). Both closings were opportunities to desegregate that Topeka did not use. "Those attendance boundaries, they are being redrawn anyway. They can be drawn so as to again more equitably distribute the children." Tr. 283 (Lamson). The closings of Polk in 1979 and Central Park in 1980 were done carefully to exclude the possibility that they would have an integrative effect on any of the schools to which those students were reassigned. P. Exh. 219, pp. 175-176. In particular, they had little or no effect on Loman Hill. Id.; P. Exh. 8J.

In short, Loman Hill is not a racially identifiable school by coincidence. It is a successor or second generation vestige of de jure Black Buchanan. It is so because of specific, deliberate actions (boundaries, closing, optional zones), and inactions (Polk, Central Park, Clay, Sheldon) by the Topeka School Board.*

B. The White elementary schools

1. McClure

- a. By student assignment: McClure in 1985-1986 had 7%

* Dr. Henson's rebuttal on this point was confusing. He estimated that of the average of 432 spaces at Loman Hill 1957-1966, there would be six spaces per grade. Tr. 1539 (Henson). Mr. Lamson suggested six of the roughly 51 students per grade at Central Park could fill those space with the other 45 going to Polk, Quinton Heights, and Monroe. Tr. 277-279. Somehow, Dr. Henson was then asked if there were any classes of six pupils at Loman Hill. Tr. 1539 (Henson). No one suggested there should be, the rebuttal simply made no sense.

* Dr. Clark concedes Loman Hill was Blacker than it would have been without school board action, at least from 1963-1980. D. Exh. 1114, p. 23. Indeed, he concedes that School Board action took it from a non-identified to an identifiable school. Id.

minority students^{x/} (2% Black) and was a racially identifiable white school. P. Exh. 155D, 8J. McClure has always been a racially identifiable white school. P. Exh. 155D. For some years it had no minority students (1972-1973, 1973-1974) and for all but 2 years has had 16 or fewer. P. Exh. 155D, 8J. It had no Black students until 1977 and has never had more than 9. P. Exh. 8J.

b. By staff assignment: McClure currently has no minority staff and is racially identifiable white by staff assignment. P. Exh. 155-0. It has had no minority staff for all but 2 years (1978-1980). P. Exh. 155-0

c. By perception: McClure is one of 11 elementary schools named by Topekans as a white school. P. Exh. 21, p.21. Of the 26 elementary schools, it ranked 6th in the perception that it was a good school. P. Exh. 21, p. 45.

d. By School Board action:

There are two patterns of School Board action involving the white schools that are somewhat different than the Black or minority schools. With the white schools, the School Board "was providing in effect neighborhood schools for those new white students and disregarding the unused pupil spaces available in the central city." Tr. 179 (Lamson). The effect was to facilitate white flight and to contain Blacks in Black schools. "If they just open and don't pay any attention to the racial aspects at all, then I think in this day and age, maybe they are a little careless." Tr. 627 (Foster). [INSERT CITE ON OPENING SCHOOLS ALL WHITE] McClure is an example of one of the two patterns, opening and maintaining a school as all white.

McClure was opened, all-white, in 1962. P. Exh. 219, p. 162. In 1963, it had added to it three portable classrooms. Id. In 1964-1966, it had one portable classroom each year. P. Exh. 219, pp.162-163. At the time, the seven disproportionately Black schools had an average underutilization of 668 pupils and there was a total underutilization in the district of 2600 spaces or the equivalent of seven, 12 classroom school buildings. P. Exh. 219, p.160, 163; Tr. 271 (Lamson). McClure continued to get portable classrooms thereafter. P. Exh. 219, pp. 184-186.

As a result of all of the activity in the white schools, including McClure, the "number of elementary schools set aside for the nearly perfect education of white students had nearly tripled from 7 in 1956 to 20 in 1966. Id. The number of white

x/ The school board includes special education students in its calculations. There is substantial, unrebutted testimony that if such students were not included, the percentage of minority students in white schools would be much less. Tr. 1126-1127 (Howard)

students "assigned to 99.0% to 100% white elementary schools in 1966 had increased by 43% from the 4141 in 1956 to the 5932 of 1966." P. Exh. 219, p. 159.

From 1968 to 1976, the McClure boundaries were expanded three times to include newly annexed all-white areas. P. Exh. 219, p. 178-183. McClure remained all-white from 1976 to the present, McClure has gone from 0% Black (5% minority) to 2% Black (7% minority). P. Exh. 8J. ?

In short, McClure was opened and maintained white at a time when space was available at other, Blacker schools. It is a racially identifiable white school today as a result of specific deliberate acts and inaction by the Topeka School Board.

2. Potwin

a. By student assignment: In 1985-1986, Potwin was 8% minority (2% Black) and a racially identifiable white school. P. Exh. 155D, 8J. In 1966-1967, it had no minority students. P. Exh. 155D, 8J. It has always been racially identifiable white and has never had more than 18 minority students. For many years it had no Black students. It has never had more than 6. P. Exh. 155D, 8J.

b. By staff assignment: Potwin had no minority staff until 1976-1977 and has been racially identifiable white every year but 2 (1983-1984, 1985-1986). P. Exh. 155-0

c. By perception: Potwin was one of 11 elementary schools named by Topekans as a white school. P. Exh. 21, p. 21. It ranked 11th of 26 schools in the perception that it was a good school. P. Exh. 21, p. 45

d. By School Board Action:

Potwin is an example of the second pattern of white schools. It is a clear vestige of the pre-1954 segregated schools. Potwin is near Lowman Hill and the effect of School Board action in that area is discussed above. After 1955, when the Buchanan boundaries were created, Potwin remained all white. P. Exh. 219, p. 21. The Topeka School Board kept it largely that way.

As noted, in 1958, Potwin was overcrowded and the School Board solved that overcrowding by actions designed "to contain white pupils at Potwin." P. Exh. 219, p. 91. Minor boundary changes in the following 30 years simply continued the pattern. P. Exh. 219, p. 181.

In short, Potwin was all white prior to 1954, was continued all-white during the 4 step Desegregation Plan in 1955 and has remained nearly so. It has been all-white at a time when nearby schools have been disproportionately Black. It is a pure example

1.P. Black
All Black

of a "vestige" school in Topeka -- all white before segregation and all white today. It is so as a result of specific, deliberate acts and inaction by the Topeka School Board.

3. Crestview

a. By student assignment: In 1985-1986, Crestview was 9% minority (4% Black) and was a racially identifiable white school. P. Exh. 155D, 8J. It has been racially identifiable for all but three years (1972-1975). During those years, follow through students were assigned to Crestview. When the program ended, Crestview went back to virtually all white. It has never had more than 14 Black students. P. Exh. 155D, 8J

b. By staff assignment: Crestview is a racially identifiable white school by staff assignment today. P. Exh. 155-0. It was also identifiably white from 1975-1980. P. Exh. 155-0

c. By perception: Crestview is one of eleven elementary schools named by Topekans as a white school. P. Exh. 21, p.21. For those familiar with it, 47% perceived it as a white school (compared to 3% who perceived it Black and 33% as balanced). P. Exh. 21, p.31. It ranked high on the perception that it was a good school. P. Exh. 21, p. 45. Of those familiar with it, 71% perceived it as excellent or good. P. Exh. 21, p. 17

d. By School Board Action

Crestview is another pure "vestige" of pre-1954 segregation. It was all white in 1954 and has largely remained so. P. Exh. 219, 8J.

In 1954, Topeka closed Seabrook and reassigned the students to the newly constructed Crestview. P. Exh. 219, pp. 17, 40-41, 49-50. At the same time, it expanded the Crestview attendance area to take in some of the Southwest (Whitson) area. P. Exh. 219, p. 33. All three schools, Seabrook, Crestview, and Southwest (Whitson), were all white. P. Exh. 219, pp. 17, 33, 40-41, 49-50; P. Exh. 8J. Like Polk and Central Park, there is reason to doubt the need for Crestview students. P. Exh. 219, p. 50. However, like Polk and Central Park, Topeka chose the segregative option.

In 1955 and 1956, Topeka modified the Crestview boundaries to include more white children. P. Exh. 219, p. 38-39. These changes made Crestview very overcrowded and Topeka added two portable classrooms. P. Exh. 219, p. 48. While Topeka was expanding and overcrowding Crestview, the all-Black schools had extra capacity. P. Exh. 219, p. 48. Topeka chose to keep them underutilized and all black while overcrowding all-white Crestview. Id. For the next 30 years, minor boundary changes simply continued this pattern. P. Exh. 219, p. 181.

In short, Crestview was all-white in 1954, continued all-white during the 4-Step Desegregation Plan in 1955, and has remained nearly so. It has been all white at a time when nearby schools have been disproportionately Black. It is so as a result of specific, deliberate acts and inaction by the Topeka School Board.

4. McCarter

a. By student assignment: In 1985-1986, McCarter was 9% minority (5% Black) and a racially identifiable white school. P. Exh. 155D, 8J. It has been racially identifiable as white all but 3 years (1979-1980, 1980-1981, 1982-1983) P. Exh. 155D, 8J. Until 1977, it never had more than 9 minority students or 3 Black students. P. Exh. 155D, 8J

b. By staff assignment: McCarter has been racially identifiable white by staff assignment in all but the last 4 years. P. Exh. 155-0

c. By perception: McCarter is one of 11 elementary schools named by Topekans as racially identifiable white and is among the four elementary schools named most often. P. Exh. 21, p. 21. For those familiar with it, 54% perceive it as white. P. Exh. 21, p. 31. It ranks fourth of 26 schools in the perception that it is a good school. P. Exh. 21, p. 45. For those familiar with it, 76% perceive it as excellent or good. P. Exh. 21, p. 17.

d. By School Board Action

The history of McCarter is very similar to McClure. It was opened in 1957, all-white. P. Exh. 219, p. 158. It was part of the pattern of opening schools to which white students could escape. With the exception of the closing of Sheldon in 1977 and the assignment of students from that school (which was 3% minority, 2% Black) to Gage (3% Black, McCarter (0% Black) and Whitson (2% Black), nothing of significance affected McCarter through the years. P. Exh. 219, p. 1764.

McCarter simply opened and continued as a white school. It was opened and maintained white at a time when space was available at other, Blacker schools. It is a racially identifiable white school today as a result of specific, deliberate acts and inaction by the Topeka School Board.

5. Gage

a. By student assignment: In 1985-1986, Gage was 9% minority (5% Black) and a racially identifiable white school. P. Exh. 155D, 8J. It has been a racially identifiable white school every year. P. Exh. 155D. It has never had more than 13 Black students or been more than 5% Black. P. Exh. 8J.

b. By staff assignment: Gage is a racially identifiable white school by staff assignment today. P. Exh. 155-0 It has been so all but 5 years. P. Exh. 155-0

c. By perception: Gage is one of 11 elementary schools named by Topekans as racially identifiable white and is among four elementary schools named most often. P. Exh. 21, p. 21. Of those familiar with it, 42% perceive it as a white school. P. Exh. 21, p. 31. It ranks 5th of 26 schools in the perception that it is a good school. P. Exh. 21, p. 45. For those familiar with it, 72% perceive it as excellent or good. P. Exh. 21, p. 17.

d. By School Board Action

Acceptable
Gage, like Potwin, is near Loman Hill and the effect of School Board Action in that area is discussed above. After 1955, when the Buchanan boundaries were created, Gage remained all white. P. Exh. 219, p. 21. The Topeka School Board kept it largely that way. Other than the actions discussed in the Loman Hill section above, a few minor boundary changes in 1975, P. Exh. 219, p. 181, and the closing of Sheldon discussed in the McCarter section above, nothing of significance affected Gage. However, the Loman Hill section in particular graphically illustrates how Gage was perpetuated as a white school by Board action.

Gage was all white prior to 1954, was continued all white during the 4 Step Desegregation Plan in 1955, and has remained nearly so. It has been all white at a time when nearby schools have been disproportionately Black. It is a vestige of pre-1954 segregation. It is so as a result of specific, deliberate act and inaction by the Topeka School Board.

6. Whitson

a. By student assignment: In 1985-1986, Whitson is 10% minority (6% Black) and racially identifiable white. P. Exh. 155D, 8J. It has been racially identifiable as white all but 4 years. (1979-1980, 1980-1981, 1982-1983, 1984-1985). Prior to 1980, it never had more than 10 Black students. P. Exh. 155D, 8J.

b. By staff assignment: Whitson is racially identifiable white by staff assignment. P. Exh. 155-0. It has been white every year. P. Exh. 155-0. It has never had more than one minority staff employee and for seven years had none. P. Exh. 155-0.

c. By perception: Whitson is one of 11 elementary schools named by Topekans as racially identifiable white and is among the four elementary schools named most often. P. Exh. 21, p. 21. For those familiar with it, 55% perceive it as white. P. Exh. 21, p. 31. It is perceived as one of the two best schools in Topeka. P. Exh. 21, p. 45. For those familiar with it, 76% perceive it as excellent or good. P. Exh. 21, p. 17.

d. By School Board Action

Whitson's history is like that of adjacent Crestview. Whitson ^{was} opened in 1952 and then known as Southwest. It opened all white and remained so until 1955 when minor boundary changes due to the opening of Stout made it 1% Black. P. Exh. 219, p. 19. Like Crestview, it was quickly overcrowded, in part as a result of annexations. P. Exh. 219, pp. 38-39. The overcrowding, like Crestview's, was solved, in part, by ensuring that Whitson remain white when nearby schools, including Black schools, were underutilized and remained Black. P. Exh. 219, pp. 38-40.

There were minor boundary changes at Whitson over the next 30 years, P. Exh. 219, p. 181, and it was affected by the 1977 closing of Sheldon. See McCarter, *supra*. P. Exh. 210, p. 182. It was also the ~~subject~~ ^{subject} of portable classrooms. ^{Blackness} P. Exh. 219, p. 185. Nothing however, significantly changed what Whitson was made in 1952 -- all white.

Whitson was all white prior to 1954, was continued virtually all white during the Four Step Desegregation Plan in 1955, and has remained so. It has been all white at a time when nearby schools have been disproportionately Black. It is a vestige of pre-1954 segregation. It is so as a result of specific, deliberate acts and inaction by the Topeka School Board.

7. McEachron

a. By student assignment: In 1985-1986, McEachron is 10% minority (5% Black) and racially identifiable white. P. Exh. 155D, 8J. It has been racially identifiable white for all but 4 years (1978-1979, 1979-1980, 1980-1981, 1982-1983). P. Exh. 155D, 8J. Prior to 1968, it had no minority students. P. Exh. 155D, 8J.

b. By staff assignment: In 1985-1986, McEachron is a racially identifiable white school by staff assignment. P. Exh. 155-0. It has been white every year. P. Exh. 155-0. It has never had more than one minority staff employee and for 9 years had none. P. Exh. 155-0

c. By Perception: McEachron is one of eleven elementary schools named by Topekans as a white school. P. Exh. 21, p. 21. It ranks in the top 7 in the perception that it is a good school. P. Exh. 21, p. 45.

d. By School Board Action

McEachron's history is like McClure's. It ^{was} opened, all white, in 1959 and was all white at least until 1966. P. Exh. 219, p. 162. It was so at a time when the disproportionately Black schools were underutilized. P. Exh. 219, pp. 158-162.

McEachron's boundary was changed in 1970 to take in more white students. P. Exh. 219, p. 180. It received portable classrooms. P. Exh. 219, p. 185. However, little else occurred to affect McEachron which continued as a white school.

McEachron was opened and maintained as a white school at a time when space was available at other Blacker schools. It is a racially identifiable white school today as a result of specific, deliberate acts and inaction by the Topeka School Board.

B. Bishop

a. By student assignment: In 1985-1986, Bishop is 10% minority (5% Black) and a racially identifiable white school. P. Exh. 155D, 8J. It has been a white school every year since 1972 except 2 (1979-1980, 1982-1983). P. Exh. 155D. Prior to 1976, it never had a minority percentage over 5%. P. Exh. 8J.

b. By staff assignment: Bishop is a racially identifiable white school by staff assignment and has always been so. P. Exh. 155-D. It has never had more than 2 minority staff employees, for four years had none and today has less than one. P. Exh. 155-D

c. By perception: Bishop is among the eleven elementary schools named by Topekans as white schools and among the four named most often. P. Exh. 21, p. 21. It is perceived as one of the two best schools in Topeka. P. Exh. 21, p. 45.

d. By School Board Action

Bishop is also like McClure. It was opened, all white, in 1965. P. Exh. 219, p. 162. In 1969, it received an addition to make even more space for white students. P. Exh. 219, p. 171. It received portable classrooms to make even more space for white students. P. Exh. 219, p. 185. In 1978, its boundaries are changed to make even more space for white students. P. Exh. 219, pp. 182-183, through all of these changes, Bishop remained white. During all this time other schools, underutilized, remained Black. P. Exh. 219.

Bishop was opened and maintained as a white school at a time when space was available at other Blacker schools. It is a racially identifiable white school as a result of specific, deliberate acts and inaction by the Topeka School Board.

C. The Black or Minority Secondary Schools

1. Eisenhower

a. By student assignment: In 1985-1986, Eisenhower was a racially identifiable minority school with 49% minority students. P. Exh. 155G, 8J. It has been a racially identifiable

minority school every year since the 1980 reorganization and the minority percentage has only varied from 42% to 49%. P. Exh. 155-0, 8J.

b. By staff assignment: In 1985-1986, Eisenhower was a racially identifiable minority school by staff assignment. P. Exh. 155-0. It has been identifiable as a minority school since 1980 for all but one year (1984-1985). P. Exh. 155-0.

Eisenhower presents a classic example of the parallel between student assignment and staff assignment. Between 1973 and 1978, Eisenhower's percentage of minority students went from 18-30%. P. Exh. 8J. During all these years, Eisenhower was a white school when measured by staff assignment. P. Exh. 155-0. From 1978-1979, Eisenhower went from 30-35% minority in student population and was non-identifiable by staff assignment. P. Exh. 8J, 155-0. In 1980, the minority student percentage jumped to 45% and the school became and remained a racially identifiable minority school in both student and staff assignment. P. Exh. 8J, 155-0.

c. By perception: Eisenhower is the middle school named most often as a minority school by Topekans. P. Exh. 21, p. 20. For those familiar with it, 20% perceive it as a Black or minority school. P. Exh. 21, p. 31. Eisenhower is least often mentioned as the best school and most often mentioned as the poorest. P. Exh. 21, p. 43. For those familiar with it, only 60% name it as excellent or good. P. Exh. 21, p. 17.

d. By School Board Action

Eisenhower is a successor school to disproportionately Black East Topeka Junior High School. In order to understand how this occurred, it is necessary to examine the histories of both schools.

In 1956, East Topeka was 30% Black and by far the Blackest Junior High School in Topeka. P. Exh. 219, p. 186. It ~~had~~ ^{contained} 42.5% of all of the Black students in town. P. Exh. 219, 187. Its feeder pattern ~~came from~~ ^{included} the largest all-Black school and three disproportionately Black schools.* Id.

Throughout its entire history, East Topeka was substantially underutilized. P. Exh. 219, p. 189-190, 192, 214. Throughout its history, East Topeka was never used to relieve overcrowding at white schools even when adjacent. Id. In 1956 it was 351

* This Court has already held that "the Keyes presumptions, in light of Topeka's use of "feeder" school system, provide a basis for finding that segregation in junior high and senior high schools, if any, as purposeful. Brown v. Board of Ed., 84 FRD at 401.

spaces underutilized when white, overcrowded Capper received a 12 classroom addition and when adjacent white Roosevelt was overcrowded. P. Exh. 219, p. 189-190; Tr. 311 (Lamson). In 1957, the overcrowding at adjacent white Roosevelt was solved by an addition, not by redrawing the common boundary with East Topeka. P. Exh. 219, p. 192-193.

In 1959-1960, Topeka annexed a number of schools. White Dawson children were placed in a feeder pattern that sent them to white Holliday, while Black Belvoir children were sent to East Topeka. P. Exh. 219, p. 193-194; Tr. 310 (Lamson). East Topeka was still underutilized and could have taken the white Dawson students. Id.

Eisenhower was opened in 1961, disproportionately if not entirely all white to solve overcrowding at disproportionately white Highland Park. P. Exh. 219, p. 191, 194-196. It was underutilized and opened with 371 students at a time when adjacent East Topeka was underutilized by almost 300 students. Id. Tr. 312 (Lamson). If Topeka had used East Topeka to accommodate those students, it would have been 24% Black rather than 36% and adjacent to virtually all white Eisenhower. P. Exh. 219, p. 196.

In 1964, the School Board cancelled an optional attendance zone between Crane and East Topeka. P. Exh. 219, p. 217. This cancellation was part of a process of cancelling optional zones in the mid-1960's. The pattern of cancelling Crane's optional zones was identical to that of Loman Hill. All of the seven optional zones around Crane were white. P. Exh. 219, p. 197-199. All but one were assigned to virtually all white schools around Crane. Id. The sixth, the one between Crane and East Topeka was assigned to Crane which "had less than half the Black students assigned to it than to the East Topeka J.H.S." P. Exh. 219, p. 199. In other words, the white children in those seven optional zones were sent to the whitest school all seven times. Tr. 315-319 (Lamson)

By 1966, East Topeka had increased its percentage of Black students by 83% and was 48% Black (62% minority). P. Exh. 219, p. 191; p. Exh. 8J. Eisenhower was 4% Black (6% minority). P. Exh. 219, p. 199; P. Exh. 8J. East Topeka was still substantially underutilized and although construction had slowed, Topeka began placing substantial number of portable classrooms at the white schools. P. Exh. 219, p. 214, 221-221. Indeed, from 1967-1980, 94% of the portable classrooms were placed at schools 98-100% white at a time when East Topeka continued underutilized. Id. Tr. 320 (Lamson).

In 1970, Topeka redrew the boundary between Eisenhower and Highland Park to include more white students at Eisenhower. P. Exh. 219, pp. 216-217. The percentage of Blacks at Eisenhower had doubled since 1966. P. Exh. 8J. This was a last ditch effort to keep Eisenhower white while East Topeka (50% Black, 63%

minority in 1970) and Highland Park (22% Black, 27% minority) remained the Black schools in the region. P. Exh. 8J.

In 1975, Crane (53% minority) and Curtis (27% minority) were closed. P. Exh. 210, p. 206-209; D. Exh. 8J. As a result of the attendant boundary changes, East Topeka got even Blacker.* P. Exh. 8J.

By 1979, despite the best efforts of the School Board, Eisenhower's percentage of Black students had risen from 8% in 1970 to 29% (12% minority to 35%). P. Exh. 8J. In 1980, the School Board closed five junior high schools as it moved to the middle school concept. P. Exh. 219, pp. 22-224. Eisenhower, which was the Blackest of the schools to remain, received many of the Black children from East Topeka (61% Black) and Highland Park (38% Black) schools when they were closed and went from 29% Black (35% minority) to 40% Black (45% minority). P. Exh. 219, p. 222; P. Exh. 8J. The biggest effects of the 1980 reorganization were to confirm Eisenhower as the Black successor to East Topeka and to continue the vertical attendance area pattern begun in 1975 with the closing of Crane and Curtis. Tr. 327-328 (Lamson). No further changes affected Eisenhower.

In short, Eisenhower is the successor Black school to Black East Topeka. It is so as a result of specific, deliberate acts and inaction of the Topeka School Board.

D. The White Secondary Schools

1. Topeka West High School

a. By student assignment: Topeka West was 8% minority in 1985-1986 and racially identifiable white. P. Exh. 155G, 8J. It opened all-white in 1961, Tr. 1512 (Henson), and has been racially identifiable white every year since. P. Exh. 155G, 8J.

b. By staff assignment: Topeka West is a racially identifiable white school today by staff assignment and has always been so. P. Exh. 155-O.

* The Crane and Curtis closings also created "a strip of land approximately three miles wide from north to south, and ten miles long running east to west from the eastern school system boundary to about two-thirds of the way west through the school system. That strip of land contained 55.7% of all Black J.H.S. students but only 15.1% of the J.H.S. students in the system in 1975. The remaining 84.9% of the system's white students were assigned to the eight junior high schools which surrounded the Boswell J.H.S. and East Topeka J.H.S. on three sides." P. Exh. 219, p. 208. These closings thus fully established the vertical pattern of junior high middle-school assignments that leads to segregation.

c. By perception: Topeka West is named by 44% as a white school in response to an open-ended question -- by far the highest response. P. Exh. 21, p. 21. For those familiar with it, 72% perceive it as a white school. P. Exh. 21, p. 31. It is consistently ranked as the best school in Topeka. P. Exh. 21, p. 42. For those familiar with it, 87% perceive it as excellent or good.

d. By School Board Action

Prior to 1959, Topeka had only one High School, Topeka High. Tr. 332 (Lamson). It gained a second with the Highland Park annexation in 1959-1960 and a third with the opening of Topeka West in 1961. Tr. 334 (Lamson); P. Exh. 219, p. 225. Topeka West opened all white and has remained so.

In 1959, when Highland Park was annexed, it was 5% Black and Topeka High was 11% Black. P. Exh. 219, p. 229. The latter school had 87% of the Black students. Highland Park was undercapacity and there were Black students on the border, but Topeka did not use them to equalize the assignment pattern. P. Exh. 219, pp. 229-230.

In 1961, Topeka West opened all white. P. Exh. 219, p. 230. The site for Topeka West was the site "most distant from any Black population in the city." Tr. 334 (Lamson). The School Board knew that. TV 1512 (Henson). The siting of Topeka West is a classic example of an siting action, taking ^{EX} after a finding of de jure segregation. That is unconstitutional. [INSERT CITE]. "Topeka West was placed and opened for the use of white student." Tr. 344 (Lamson). After 1954, that was not acceptable in Topeka Id.

? Topeka West's new boundaries included a portion of Topeka High's boundaries of about 500 blocks, all but 6 of which were over 95% white. P. Exh. 219, p. 230. Topeka High's remaining boundary was an inverted pyramid. It excluded from Topeka West the Quinton Heights school, then becoming Black. P. Exh. 219, pp. 231-232. Topeka High became 15% Black. Id. With the creation of an optional zone in 1963, Topeka High had cumulatively lost 39% of its white children, P. Exh. 219, p. 233, and by 1966 had increased the number of Black children by 42%. Id. The number of white children assigned to Topeka West went up by 77% since its opening. P. Exh. 219, p. 234.

From 1966 to 1976, the School Board annexed white areas to Topeka West and adjusted boundaries among the three schools to keep Topeka West white but to shift increasing numbers of Black students from Topeka High to Highland Park. P. Exh. 219, pp. 234-238. They also built new classrooms, 80% of which were built at Topeka West. P. Exh. 219, p. 239. They also installed portable classrooms, 97% of which were placed at Topeka West. Id. The result was that by 1977, Topeka West remained virtually all white while Highland Park was becoming Blacker. P. Exh. 219, p. 238.

Finally, in 1980, the junior high-middle school reorganization moved students to the High Schools. P. Exh. 219, p. 238.

Finally, in 1980, the junior high-middle school reorganization moved students to the High Schools. P. Exh. 219, p. 239. This was done in a way to perpetuate Topeka West as white and Highland Park got even blacker. P. Exh. 219, p. 239.

In short, Topeka West was opened all white and has largely remained so. This has occurred as a result of specific, deliberate acts and inaction by the Topeka School Board.

2. French *Je. Marie School*

a. By Student Assignment: French is 6% minority in 1985-1986 and racially identifiable white. P. Exh. 155G, 82. It has always been a racially identifiable white school and has never had more than 6% minority students. P. Exh. 155G, 8J.

b. By staff assignment: French is a racially identifiable white school by staff assignment and has always been so. P. Exh. 155-O. It had no minority staff until 1976, has never had more than 4.5 and currently has 2.4. P. Exh. 155-O.

c. By perception: French is the second most often named middle school as white. P. Exh. 21, p. 21. Of those familiar with it, 68% perceive it as a white school. P. Exh. 21, p. 31. It is perceived as the best middle school in Topeka. P. Exh. 21, p. 43. Of those familiar with it, 83% rate it as excellent or good. P. Exh. 21, p. 17.

d. By School Board Action

? The history of white French is virtually identical to Landon's. It, too, is a successor to white Capper.

ONE PART SITE
In 1967, in anticipation of French's construction, Topeka annexed an all-white area to Jardine. P. Exh. 219, p. 213. Then, in 1970, French was opened, all-white. *Id.* It was underutilized at least until 1980 at a time when adjacent white Capper and Jardine as well as Blacker Crane and East Topeka had spaces available. P. Exh. 219, p. 215-216.

In 1975, Topeka changed the Capper boundary, in anticipation of its closing, to give white students to French. P. Exh. 219, p. 218. Then, as discussed in the Landon Section, in 1976, white Capper was closed, and students sent to white French and white Landon. And, in 1985, white Landon was closed and the students sent to white French. P. Exh. 219.

In short, French is a successor school to white Capper. It was opened and maintained virtually all white. It was so as a result of specific, deliberate acts and inaction by the Topeka School Board.

3. Landon*

a. By student assignment: In 1985-1986, Landon was 9% minority and racially identifiable white. P. Exh. 155G, 8J. It was a white school every year of its existence. P. Exh. 155G, 8J

b. By staff assignment: Landon was racially identifiable by staff assignment in 1985-1986 and for every prior year but 2 (1981-1983). P. Exh. 155-0

c. By perception: Landon was named as a white school by more Topekans than any other middle school. P. Exh. 21, p. 21. For those familiar with it, 68% perceive it as a white school. P. Exh. 21, p. 31. Landon is perceived as the second best middle school in Topeka. P. Exh. 21, p. 43. Of those familiar with it, 78% perceive it as excellent or good. P. Exh. 21, p. 17.

d. By School Board Action

? Landon (like French discussed infra) is a successor school to White Capper. It is also (like McClure, McCarter, and McEachon) a school that opened white and has remained white.

McClure? In 1956, Capper had 1 Black student out of a student body of 408. P. Exh. 219, p. 186. Capper had been annexed and an addition built to it in 1954. P. Exh. 219, p. 188. At the time this occurred, East Topeka was under capacity. P. Exh. 219, p. 189.

There continued to be growth in the Capper part of town and Topeka continued to deal with that growth by any method other than sending more whites to East Topeka. From 1960-1963, Capper received four portable classrooms per year. P. Exh. 219, p. 194. Then in 1963, Landon was built and opened, undercapacity largely all white. P. Exh. 219, p. 191, 195-196.

By 1966, Landon was 1.5% Black and Capper was 100% white. P. Exh. 219, p. 191, P. Exh. 8J. In 1966, Landon's attendance area was expanded "with a very unusual procedure." P. Exh. 219, p. 211. A Jardine/Capper optional attendance zone was cancelled and assigned to Landon. To accomplish this, "the Topeka Board of Education had to create an attendance corridor which was only one mile wide, extending down the system's western perimeter taking in portions of the Capper attendance zone and an optional attendance area formerly serving Capper and Jardine but not Landon and which at its farthest point ran nearly three miles from the Landon J.H.S." P. Exh. 219, p. 211-212. Substantially Baicker Crane (32%) was closer than Landon to this area and underutilized. Id. But these were white children and so the

* Landon was closed in 1986-1987. The students were all reassigned to French. Tr. 328 (Lamson)

area was gerrymandered to send them to white Landon. By 1967, Landon was crowded and it too received portable classrooms. P. Exh. 219, p. 214. Crane was 24%. P. Exh. 8J.

As noted, in 1975, Crane and Curtis were closed. At the same time, the Landon boundaries were expanded to take in some of Boswell's white students.* P. Exh. 219, p. 206. The same thing happened again in 1976. P. Exh. 219, p. 209. Also in 1976, Capper was closed. P. Exh. 219, pp. 219-220. It was 2% Black. P. Exh. 8J. Its students were assigned to Landon (2% Black) and French (3% Black), Landon and French got whiter and required portable classrooms at a time when adjacent Blacker Boswell (27% Black) had extra capacity. P. Exh. 219, p. 219-220, 221-223.

In 1985, Landon was closed. Tr. 328 (Lamson). Its children were reassigned to French. Id. This meant that French "continues to serve the white one-third portion of the city." Id. It reinforced the strong vertical middle school boundaries. Id. Prior to this closing, Landon was 2% Black, French was 3% Black and adjacent Robinson was 21% and adjacent Chase was 14% (33% minority). P. Exh. 8J. After, it can be estimated that French is 4% Black, while Chase and Robinson remain much Blacker. P. Exh. 8J.

In short, Landon is a successor school to white Capper. It was opened and maintained virtually all white. It was so as a result of specific, deliberate acts and inaction by the Topeka School Board.

III. The Consequences of Segregation In Topeka Today

A. Evidence is clear that segregation harms children.

The original plaintiffs in this case did not seek neighborhood schools but an end to the harms of segregation. See generally Tr. 159-1160 (Speer). Those harms still exist. In 1954, the Supreme Court held that segregation harms children. That decision was based in part on a social statement. With one exception, the group that signed the social science statement appended to the appellants' Brown brief to the Supreme Court in 1952 re-endorsed it in 1967. Tr. 1177 (Speer)

Today the evidence is stronger that segregation harms children. Tr. 1174-1175 (Speer) Segregated Black schools will cause students to have lower expectations that will result in lower self-esteem and lower achievement. Tr. 1172-1174 (Speer) Black children in disproportionately white schools won't have a

* One effect of the Crane and Curtis closings was to make Boswell, and then in 1980 when Boswell is closed, Robinson, Blacker. P. Exh. 219, p. 202-208, 222-224.

necessary "group association and identity." Tr. 1172 (Speer)
 Good, quality education cannot take place in an all-black school
 because it cannot provide the total objectives of education
 including personal and social development. Tr. 1188 (Speer)
 Integration doesn't automatically improve student performance
 "but under good educational practices it does." Tr. 1181, 1193-
 1195 (Speer)

Dr. Crain listed many of the negative effects of
 segregation. During school, "Black students who attend
 segregated schools are more likely to drop out of high school."
 Tr. 1251 (Crain)

In addition, Segregation perpetuates itself through life.
 Tr. 1251 (Crain) "Black students who go to segregated schools
 will choose to go to a black college." and major in traditionally
 black majors whereas Black students in desegregated schools will
 go to white schools and major in non-traditional subjects. Tr.
 1251 (Crain) Black students from segregated schools attending
 white colleges are "more likely to complain about racism, more
 likely to say they have few friends at school, more likely to
 quit school." Tr. 1251-1252 (Crain) "Black students from
 segregated schools are more likely to choose a career for
 themselves of going into jobs that are - that have traditionally
 been open to blacks." Tr. 1253 (Crain) Black students from
 segregated schools have more unrealistic aspirations. Tr. 1254
 (Crain)

Segregated schools also affect future employment. Black
 students from segregated schools are less likely to be able to
 get white jobs because they lack a network of job contacts and
 because employers do not trust their ability to deal with
 whites. Tr. 1255-1256 (Crain) Black students from segregated
 schools are less able to get along with white supervisors and
 other whites. Tr. 1256-1257, 1259 (Crain) Black students from
 segregated schools change jobs more often. Tr. 1257-1258 (Crain)

Segregated schools affect students in other ways. Black
 students from segregated schools have a higher rate of
 delinquency, more teenage pregnancy, and are less likely to have
 a bank account. Tr. 1258-1259 (Crain) Black students from
 segregated schools are unhappier. Tr. 1259 (Crain) "Black
 graduates of segregated schools will avoid living in integrated
 areas," which affects net wealth. Tr. 1261-1262 (Crain) Blacks
 and whites are more likely to be prejudiced if they attended
 segregated schools. Tr. 1262 (Crain)

Segregated schools in Topeka harm Topeka's Blacks.
 Attending disproportionately Black schools gave Linda Brown
 Smith's children a feeling of inferiority and made it harder for
 them to relate to white children. Tr. 1057 (Smith) The
 segregated white school is harming Ms. Howard's Black son. Tr.
 1127-1129 (Howard)

The literature that establishes the harm of segregated schools is applicable to Topeka. Tr. 1264 (Crain) "I think that the fact that the east side schools are seen as black schools in Topeka means that almost all of these harms that I've talked about apply." Tr. 1265, 1369 (Crain)

No witness called by the defendants attempted to demonstrate that these harms did not occur. Dr. Walberg, the witness called to rebut Drs. Speer and Crain, did not even refer to most of these harms. At most, he argued that the research on these questions were inconclusive. Tr. 2075 (Walberg)

B. Harm to Childrens' Test Scores

"Segregated schools seem to depress the performance of Black students on standard achievement tests. Tr. 1231 (Crain) Approximately 1/2 of all studies show that desegregation helps black students' achievement. The other studies show no effect. Tr. 1232 (Crain) The best studies show the negative effect of segregation on achievement. Tr. 1233 (Crain) Desegregation benefits come most strongly from elementary school desegregation. Tr. 1233 (Crain) Students in schools 10-35 or 40% Black score 3 tenths of a standard deviation higher on standardized tests than students in segregated schools. Tr. 1234 (Crain) Standardized tests "understate the effects of segregation by only measuring minimum, core curricula." Tr. 1239 (Crain) Segregated schools hurt students because such schools have poor reputations, lower expectations, lower aspirations, and poorer discipline. Tr. 1234-1237 (Crain) The harms of segregation are not correctable by compensatory education. Tr. 1238 (Crain) Desegregation doesn't hurt white achievement. Tr. 1240 (Crain)

The School Board has known that the harmful effects of segregation occurred in Topeka. As of 1976, test scores in Black schools were about 1/3 that in white schools. P. Exh. 8Q, 9H. Students in Black schools score lower than students in white schools. P. Exh. 27. School officials admitted that there is a difference between test scores of black schools and those of white schools. Tr. 1664 (Wehmeier) However, Topeka has never looked at test scores by race. Tr. 1640 (Livingston)

The harms of segregated schools affect Topeka's test scores. Tr. 1265 (Crain) In Topeka, "schools with large minority populations have a much higher failure rate" on the 1985, 6th grade, Reading, State Minimum Competency Test. The difference is almost a "full standard deviation" which is "too large" to be explained by lower Black scores. It can only be explained by segregation. P. Exh. 184, Tr. 1243-1245 (Crain) The same conclusions can be drawn from 1985, 6th Grade Math scores. The differences are not as strong but they are still strong. P. Exh. 185; Tr. 1246 (Crain) "[s]tudents in Type I schools [Black] are learning at a slower rate than students in Type 2 [integrated] and 3 [white] schools, which would often be

read as evidence that Type 2 and Type 3 schools, Type 1 school is providing an inferior quality of education." Tr. 2862 (Crain) Factors such as teacher expectation, tutoring, cooperative learning, and remedial work are affected by segregation. Tr. 1370 (Crain)

Dr. Poggio attempted to show that no harm flowed from the racial composition of schools in Topeka. However, his unadjusted results confirm the conclusion that harm does occur. Tr. 1919-1923 (Poggio); D. Exh. 1109. Before "adjustment", Dr. Poggio's results show that Black students score lower than white students and students in Black schools lower than students in white schools. Blacks scored lower 40 of 40 times, and students in black schools scored lower 35 of 40 times and never scored higher. These results are statistically significant. Tr. 1920-1922 (Poggio)

Dr. Poggio did "adjust" scores. His "adjustment" seeks to hold constant a child's IQ at the time of the test. Tr. 2788-2799 (Crain). However, it is not possible to measure IQ and this method of "adjustment" is no longer used. Tr. 2791 (Crain). Moreover, Dr. Poggio noted that Blacks score lower on IQ tests. His "adjustment" simply consists of giving Blacks extra points until their scores equal that of whites. To borrow his analogy, he put Blacks on the 40 yard line so they could finish the dash with whites. Tr. 1842 (Poggio). To make this "adjustment" first and then to compare groups simply makes no sense. Tr. 2779-2824 (Crain).

The key dispute over Dr. Poggio's adjustment concerned his use of the CAT test, as the means of "adjusting" scores. Dr. Crain cogently explained why using a test administered close in time was incorrect. Tr. 2803-2804 (Crain). What is needed is a pre-test, post-test adjustment. Id. Proper analysis of Dr. Poggio's data show that students in Black schools score lower over time than students in white or non-identifiable schools. 5 of 8 analyses support this conclusion. This conclusion exists in reading and math and when done by mean scores or percent passing. Tr. 2805-2816, 2820-2824 (Crain); P. Exh. 52, Crain charts. "[W]ith a proper analysis of Dr. Poggio's data, the evidence there is quite the contrary of what his report argued [it] was. I think the evidence is that the schools of Building Type I [Black] are providing inferior education to black students." Tr. 2824 (Crain)

In rebuttal, Drs. Poggio and Walberg apparently conceded the accuracy of this method of analysis. However, they argued that the CAT test was not administered close in time to the achievement test and thus was a valid pre-test. Tr. 2924-2926 (Crain). This was obviously a last minute effort to rehabilitate a flawed analysis. In his report, Dr. Poggio bragged proudly that the CAT test was administered as close as possible to the achievement test, implying that it was not a pretest. D. Exh. 1109, p. 12. Unfortunately, Dr. Poggio's own report condemns his attempt at rehabilitation.

Finally, even if Dr. Poggio's results are accepted, Blacks still score lower. After "adjustment", Blacks scored lower 26 of 40 times and children in Black schools lower 13 times, the middle 18 times and highest once. White schools were highest 26 times, middle 7 times, lowest 7 times. Tr. 1956-1959 (Poggio) Even accepting Dr. Poggio's conclusions, the most that can be said is that Topeka has separate but equal schools. As the Supreme Court has held, that is legally unacceptable.

C. Black Schools are Perceived as Poor and White Schools as Good.

Questions about which schools are the best, the poorest, which have the best teachers, buildings, facilities, which high schools offer the best preparation for college, and which schools people would most highly recommend to friends planning to move to Topeka elicited replies in a survey of Topekans that closely paralleled answers about which schools are minority or Black and which are white. P. Exh. 21, p. 2, 39-42 "We found very close parallel between all the answers about the quality of the school and the answers about minority enrollment. Parallel was that people who thought of certain schools as mostly white also tended -- those were also the schools often most named as the best schools; and schools regarded as Black or minority are very consistently named as the least desirable, poorest schools." Tr. 841 (Williams) There is a statistically significant correlation between people who perceive schools as Minority or black and those who perceive them as poor. Tr. 875 (Williams)

Looking specifically at the High Schools, Topeka West High School is the school named most often as white; it is also most often named as the best high school (best teachers, best facilities). This result is statistically significant. P. Exh. 21, pp. 2-3, 41; Tr. 847-848, 899 (Williams) Highland Park High is never said to be a white school and consistently ranked third behind Topeka West and Topeka High. The 1983 per cent minority enrollment was Topeka West: 7%; Topeka High: 32%; Highland Park: 40%. P. Exh. 21, p. 3, 36, 38, 41; Tr. 843, 847-848 (Williams). 22% of the respondents named Highland Park as the high school having the poorest facilities; 18% named Topeka High; 1% named Topeka West. More than half had no opinion. P. Exh. 21, p. 42; Tr. 851 (Williams) Ratings of the quality of middle and elementary schools paralleled answers about which schools are minority or Black and which are white. P. Exh. 21, p. 3, 33; Tr. 843-844 (Williams) Respondents are more likely to express no opinions when asked about middle schools than when asked about high schools, but replies about middle schools appear to be related to minority enrollment. P. Exh. 21, p. 43; Tr. 852 (Williams) Schools rated most favorably are French and Landon Middle Schools. In 1983 minority enrollment at each school was 6%. P. Exh. 21, CS Survey, p. 3, 4, 33; Tr. 848-849 (Williams) Chase and Eisenhower Middle Schools are usually rated at the bottom of the middle schools. In 1983, Chase had 33% minority

enrollment and Eisenhower 42%. P. Exh. 21, p. 3, 4, 33, 37, 43 Chase (33% minority enrollment) and Robinson (29% minority enrollment) are named a little more often than Jardine (14% minority enrollment) or Landon (6% minority enrollment) for having modern facilities. P. Exh. 21, p. 43 7% of the respondents name Eisenhower (42% minority enrollment) as having the poorest facilities. P. Exh. 21, CS Survey, p. 43

14% of the respondents mention elementary schools with very low minority enrollments as better than others (e.g., Bishop, Crestview, Gage, McCarter, McClure, McEachron, Potwin and Whitson). P. Exh. 21, p. 37; Tr. 845 (Williams). Most respondents favorably refer to elementary schools that had 1983 minority enrollments below the district-wide average of 26%. P. Exh. 21, p. 44, 45, 46. Only 1% of the respondents mention elementary schools with large minority enrollments as better than others (e.g., Belvoir, Highland Park North, Hudson, Lafayette, Quinton Heights). P. Exh. 21, p. 37; Tr. 845 (Williams)

"The schools that were rated excellent or good by more than 70%, all of them were well under 10% in enrollment . . . schools that were rated as excellent or good by 62% ranging down to 33% had minority enrollments ranging from 40% up to 62%. Tr. 856 (Williams) With several exceptions, the schools regarded as having the poorest facilities tend to be those with large enrollments of minority students. P. Exh. 21, p. 46 Most of the schools with only a small minority enrollment (e.g., Potwin, McClure, McCarter, Whitson) are seldom or never mentioned as having poor facilities. P. Exh. 21, p. 46 "All of the schools named [as poor] by 1% or more were above the median of 26% minority enrollment." Tr. 847 (Williams)

IV. None of Defendants' Defenses Have Merit

Plaintiffs have already commented on defendants' positions that Brown I was wrongly decided or is irrelevant to today. See Introduction. Only four additional arguments deserve mention.

A. Defendants Never Met Their Affirmative Duty to Eliminate Segregation Root and Branch

Prior to 1976, defendants undertook the 4 step desegregation plan. All other Actions, they assert, were not intended to and did not have the effect of desegregation.

1. The 4-Step Plan

From 1953-1955 defendants implemented a 4-step Desegregation Plan. Tr. 547 (Foster). That Plan consisted simply of drawing boundaries around previously city-wide all Black schools. Tr. 119 (Lamson). The plaintiffs presented un rebutted testimony that the boundaries were drawn to ensure that the Black schools remained all-Black and that few Blacks

attended white schools. Tr. 119-120, 121-122, 123-124 (Lamson)
P. Exh. 159.

The most extreme example was the boundary drawn around Buchanan which encompassed all of the blocks within the Loman Hill district that were over 25% Black and excluded all the blocks that were less than 25% Black. Tr. 119-120 (Lamson). There was nothing about the capacities of Buchanan or its surrounding schools that required the boundaries be drawn in this way. Tr. 120-121 (Lamson). A simple visual examination of the 1955 Buchanan boundary makes clear the intent of the Board to continue segregation. P. Exh. 218A, 217E.

From 1953-1956, the three all-Black schools that remained open, remained all-Black. P. Exh. 155B, 8J; Tr. 120, 124 (Lamson). 80% of all Black students remained in all-Black schools. P. Exh. 155A, 8J; Many schools remained all white. P. Exh. 219, 8J. There was no faculty desegregation. Tr. 630 (Foster); P. Exh. 303-304, 306-312, 315. Indeed, Topeka initially intended to fire all of the Black teachers. P. Exh. 221; Tr. 1179-1180 (Speer).

The Four-Step Plan was "for the most part what might be considered the epitome of a dual school system." Tr. 124-125 (Lamson). All Black schools existed a few short blocks from disproportionately white schools. Id. "Upon organizational integration of the Black schools into the white schools at the elementary level, the attendance boundary lines are drawn so as to maintain the Black schools as Black schools." Tr. 125 (Lamson)

2. 1955-1976

From 1955-1976, defendants assert they took no actions designed to desegregate the schools. Tr. 2418 (Payne). From 1956-1966, the defendants own indices of segregation did not change. Tr. 2594 (Armor); D. Exh. 1119. Defendants' principal witness admitted there were disproportionately Black schools at least as of 1963. Tr. 2363 (Clark). Although some defense witnesses denied intentionally segregative acts, Tr. 2455 (Douglas), Tr. 2470 (Ward), Tr. 2491 (Stratton); Tr. 2573 (Edwards), none of them identified a single act taken prior to 1976 that either was intended to or had the effect of

desegregation.*

3. Dr. Henson's desegregation acts

Defendants' only witness alleging specific desegregative by the Board was Dr. Henson.** He was called to the stand twice to list every desegregative act taken by the Board. He identified only the following:***

(a) Desegregative acts, student assignment, elementary schools: Dr. Henson listed only 2 elementary schools whose closing had a desegregative effect: the closing of Parkdale in 1978 and the closing of Rice in 1981. Tr. 1530, 2720, 1535, 2721 (Henson). Since 1955, the Topeka Board has closed at least 14 elementary schools (Buchanan - 1959, Central Park - 1980, Clay - 1975, Dawson - 1966, Grant - 1977, Lincoln - 1962, McKinley - 1955, Monroe - 1975, Parkdale - 1978, Pierce - 1959, Polk - 1979, Sheldon - 1977, Van Buren - 1964, Washington - 1962). P. Exh. 219. It has opened at least 13 elementary schools (Bishop - 1965, Crestview - 1954, Hudson - 1963, Lafayette - 1957, Linn - 1964, McCarter - 1957, McClure - 1962, McEachron - 1959, new Polk - 1962, new Central Park - 1967, new Quincy - 1962, Sheldon - 1957, Stout - 1955). P. Exh. 219. It has annexed at least 11 elementary schools (Avondale East, Avondale SW, Avondale West, Belvoir, Dawson, Highland Park Central, Highland Park North, Highland Park South, Lyman, Pierce, Rice). P. Exh. 219. It made hundreds if not thousands of boundary changes. P. Exh. 219. It utilized school additions, portable classrooms, and optional attendance areas. P. Exh. 219. With all of these action, Dr.

* Defendants did elicit some general testimony that between 1954 and the present there must have been some intentionally desegregative acts by the school board. Tr. 2586-2590 (Armor); Tr. 2338 (Clark). They failed to identify those acts. Moreover, the conclusions were challenged by Dr. Clark himself who testified that most of the change in the District was due to demographic change. D. Exh. 1114. See also Tr. 304 (Lamson); Tr. 790 (Foster) ("I don't see any evidence that the way in which those things came about was primarily an effort by the Board to desegregate.")

** Dr. Clark also gave some testimony concerning desegregation. His testimony is discussed infra.

*** Dr. Henson also identified the Short and Long Range Facilities Plans as desegregative. Tr. 1461 (Henson). He emphasized that desegregation was only one of many purposes of these plans. Tr. 1439 (Henson). Indeed, the Plans were facilities plans, not desegregation plans. Tr. 789 (Foster). If they had been desegregation plans, they would not have led to today's segregation. Tr. 789-790 (Foster). Even HEW felt the plans were not sufficient. D. Exh. 1131, Tr. 1518 (Henson). The only arguably desegregative facility or staff actions in the plans are the school closings discussed above. Dr. Henson also refers to Board election procedures. Tr. 2717-2718 (Henson)

Henson - even after being given two tries -- could only identify two that he believed were desegregative.

Parkdale was closed in 1978. The students were sent to Lafayette and Highland Park North. P. Exh. 219, p. 174-175. Students were not sent to adjacent Sumner or Polk which had space. P. Exh. 219, p. 175. The racial composition of those schools and the adjacent schools was as follows:

	<u>1977</u>	<u>1978</u>
Parkdale	61% Black	--
Lafayette	48% Black	52% Black
Highland Park North	40% Black	49% Black
Sumner		7% Black
Polk		35% Black
system-wide		17% Black

P. Exh. 219, p. 175. The Parkdale closing eliminated a 61% Black school, but the students were reassigned to already disproportionately Black schools making them blacker. They were not assigned to adjacent white schools. The effect was "to increase their disproportionate status." Tr. 289 (Lamson). As Mr. Lamson testified several times, "you can't have desegregated schools at the cost of segregated schools." Tr. 287 (Lamson)

When Rice was closed in 1981, it was a racially non-identifiable school. P. Exh. 155D. Students were reassigned to Belvoir, Lafayette and State Street. Tr. 1535 (Henson). The District could have used the Rice closing to improve the racial composition of Sumner and Highland Park North and further improve Lafayette and State Street, but "that was not what we did." Tr. 1535 - 1536 (Henson).

(b) Desegregative acts, student assignment, secondary schools: Dr. Henson argued that two middle school consolidations were desegregative: Curtis/Holliday/East Topeka and Crain/Boswell/Roosevelt. Tr. 1461, 2722 (Henson). The story of the junior high school closings of Curtis in 1975 and Crane in 1975 plus the reorganization in 1980 that resulted in the closing of Holliday, East Topeka, Boswell and Roosevelt, is a complicated one discussed above and in P. Exh. 219, pp. 203-210, 222-224. The result of those changes was summarized at P. Exh. 219, p. 224:

<u>West Topeka % B</u>	<u>East Topeka % B</u>
Landon 2.5%	Eisenhower 39.8%
French 3.1%	Robinson 23.1%
Jardine 9.7%	Chase 20.6%

System = 18.4% B

As Mr. Lamson noted, the effect was to create a system of middle schools defined by vertical (North-South) boundaries. Tr. 327 (Lamson). This effect was heightened by the closing of Landon last year. Tr. 328 (Lamson). The effect of vertical boundaries

is that 3 of the 6 or 50% ^{of the} middle schools are racially identifiable. P. Exh. 155F. This compares with 6 of 9 or 67% junior highs prior to reorganization that were racially identifiable. P. Exh. 155F. Although a slight improvement, the middle schools were certainly not desegregated.

Dr. Henson also cites one high school boundary change as desegregative, but concedes it was done to deal with overcrowding, not to desegregate. Tr. 1434 (Henson). In addition, this boundary change was atypical. The usual method used by Topeka to respond to overcrowding at Topeka West was to place portable classrooms there to accommodate white students. Tr. 1520 - 1522 (Henson); Tr. 335 (Lamson); P. Exh. 219.

(c) Desegregative acts, faculty assignment: Dr. Henson touted the 1980 faculty reorganization, asserting that one of the effects was to desegregate the faculty. Tr. 1445 (Henson). Unfortunately, Dr. Henson's recollection of the effects of the 1980 faculty reassignment is contradicted by Dr. Ybarra, Director of Personnel who testified in his deposition that race never affected teacher transfers in 1980. D. Exh. 1069. It is also contradicted by the facts. P. Exh. 155N. The number of schools racially identifiable by staff assignment went from 8 of 9 in 1979 - 1980 to 5 of 6 in 1980. P. Exh. 155-O.

4. Dr. Clark

Dr. Clark, who was the witness intended to rebut Mr. Lamson's analysis, utilized a methodology that was so flawed that it caused obvious error. Moreover, even his analysis shows that the Topeka schools are today more segregated than they would have been if there had been no school board action.

There were four flaws in Dr. Clark's methodology. First, he looked at no actions prior to 1963, assuming that because the four-step plan was then completed, the system was desegregated. Tr. 2306 (Clark). As shown, supra, this assumption was incorrect. Second, he looked at residential data not school data. Tr. 2312 (Clark). There is no reason to use residential data when school data exists. Tr. 355 (Lamson). The problem is that [Dr. Clark assumed that school decisions don't affect housing decisions. This assumption is false. Tr. 2886-2893 (Taeuber)] residential data does not correspond to school data. See, e.g. Tr. 2378, 2382, 2383, 2388 (Clark). Moreover, in attempting to hold school boundaries constant and then look at housing patterns. Third, Dr. Clark looked only at 11 schools. D. Exh. 1114. This method excluded most of Topeka's students. Tr. 2894 (Taeuber). Finally, Dr. Clark only looked at a few widely separated years. D. Exh. 1114.

The combination of these latter two elements of Dr. Clark's methodology led to obvious and simple errors. He concluded that the closing of Monroe caused an increase in the minority percentage of Quinton Heights. Tr. 2389 (Clark); D. Exh. 1114.

As was demonstrated at trial, that conclusion is simply false. Tr. 2393-2395 (Clark). The increase in Black percentages in Quinton Heights was due to the closing of Polk. Id. Because Dr. Clark compared 1974 and 1979 -- ignoring years in between -- and because he looked at Monroe and Quinton Heights but not at Polk, Dr. Clark misunderstood what happened in Topeka. That error was inevitable given his methodology.

Finally, even assuming Dr. Clark's methodology was correct, he concedes that most of the schools he looked at were blacker -- more racially identifiable -- as a result of School Board action than they would have been if there had been no action. Tr. 2368, 2373-2375 (Clark). In short, even Dr. Clark believes this school district has engaged in segregative acts.

B. Housing

Defendants placed substantial emphasis on the effect of federal subsidized housing. Their key map showed the location of some of those projects. D. Exh. 1009, Tr. 2089-2098 (Abramson). However, substantial testimony was presented by both parties that the School Board was closely involved in the decisions to site those projects in those places. Tr. 2705-2716 (Henson); D. Exh. 1152, 1152A, 1152B; Tr. 530-531 (Lamson).

In addition, defendants admitted that school siting and boundary changes caused some housing segregation. In 1955, the Board told the Supreme Court, in this case, that "After the schools were built the Negro people who could do so tended to move nearer to the Negro schools where the children were required to attend." P. Exh. 223, Tr. 162-164 (Lamson), Tr. 2423 (Payne). Plaintiffs' experts concurred. Tr. 163-164 (Lamson); Tr. 1263-1264 (Crain), Tr. 2882 (Taeuber).

More importantly, the Supreme Court and other courts have often agreed and so held. In Keyes v. School District No. 1 413 U.S. 1189 (1973) the Supreme Court concluded that a school board's actions in construction and assignment "may have a profound reciprocal effect on the racial composition of residential neighborhoods". In Swann v. Charlotte - Mecklenberg Bd. of Ed 402 U.S. 1, 20-21 (1971) the Supreme Court explained specifically that "[P]eople gravitate towards school facilities, just as schools are located in response to the needs of people." The Court in Swann expressed concern over the danger that the segregated racial patterns "when combined with 'neighborhood zoning' further lock the school system into the mold of separation of the races." See also Penick v. Columbus Bd. of Ed 583 F.2d 787 (1978) aff'd Col. Bd. of Ed. 443 U.S. 449 (1979). As the Fifth Circuit stated in Davis v. East Baton Rouge Parish School Bd. 721 F.2d 1425, (1983) "reliance on housing patterns as justification . . . is not only factually but legally unsound." In response to the school board's contention that it bore no responsibility, the court defined the Board's duty as including "the responsibility to adjust for demographics patterns and changes."

Perhaps most significantly, defendants presented no evidence as to the racial composition of the subsidized housing projects. Even if defendants were not involved in those projects -- and they were -- and even its school decisions didn't affect housing -- and they did -- defendants certainly can't argue that housing projects, whose racial composition is unknown, affected school racial composition.

C. Mr. Hickman

Defendants' expert Harrison Hickman argued that plaintiff's survey, P. Exh. 21, ought not to be considered because it was methodologically flawed. The most striking fact is that defendants did not ask Mr. Hickman or anyone else to do a survey of their own. Tr. 2232 (Hickman). Why? Because they knew it would confirm Mr. Williams' results. Tr. 2731 (Henson).

In addition, in evaluating his criticisms, it is worth noting that, Mr. Hickman has been a pollster only 6 years and half of his experience has been in the last 2 years. Tr. 2232 (Hickman). He has no experience doing surveys like that done for plaintiffs. Tr. 2233 (Hickman) Mr. Williams has been a pollster for almost 30 years. Tr. 826 (Williams). He and Central Surveys have done similar surveys. Tr. 885-886 (Williams).

Mr. Hickman made five major criticisms of the survey. First, he argued that Central Surveys should have used the boundaries of USD 501 rather than Area A. See e.g. Tr. 2179 (Hickman). He failed to explain why this made a difference and could not disagree with Mr. Williams who said the use of Area A did not affect the results of the survey. Tr. 864 (Williams)

Second, Mr. Hickman objected to the screening questions. Tr. 2166-2171 (Hickman). Mr. Williams conceded that the screening questions were not perfect, Tr. 863 (Williams), but testified, without real challenge by Mr. Hickman, that the questions did not affect the results "very much". Tr. 863 (Williams).

Third, Mr. Hickman argued that the Survey should have not been done by phone or by numbers drawn from the phone book. Tr. 2173-2174 (Hickman). He conceded, however, that there were significant benefits to phone surveys. Tr. 2235-2236 (Hickman). He further conceded that the leading authorities preferred use of phone surveys, Tr. 2239-2242 (Hickman) and that the results would be the same if done in person. Tr. 2241 (Hickman). He also conceded significant advantages to use of the phone book. Tr. 2244-2247 (Hickman).

Fourth, Mr. Hickman described the response rate as 35% and very low. Tr. 2185-2187 (Hickman). In fact, the response rate was around 60-63%. Tr. 865-866 (Williams). By one method of calculation, it was over 70%. Tr. 2252-2259 (Hickman); Tr. 865-866 (Williams). By these measures, even Mr. Hickman concedes the response rate was adequate. Tr. 2260 (Hickman).

Finally, Mr. Hickman argued that polls are best done when their drafter and interviewer know neither the clients or the desired results. Tr. 2200, 2273 (Hickman). Mr. Hickman asked this Court to believe that as a pollster for political candidates who are running for office, he has no idea what result his clients want. Tr. 2273-2275 (Hickman). Mr. Hickman did not know whether his candidates wanted to be ahead in the polls or behind. This position -- as ridiculous as Mr. Hickman's attempt to read one of Central Survey's questions with a biased intonation, Tr. 2264 (Hickman) -- suggests that Mr. Hickman was perhaps the one witness at trial guilty of the accusation he hurled at Central Surveys. Mr. Hickman was hired to criticize the plaintiffs' survey and he would do so beyond reason or logic, and even at the expense of his own credibility. His critiques simply have no merit.

D. Miscellaneous Irrelevancies

Defendants have raised a flurry of factors that they have implied were relevant to this case. Most of those factors were raised but no proof was presented.

For example, defendants suggested that natural boundaries limited school boundaries. See e.g. Tr. 445, 483, 491 (Sebelius)* 1536-1537 (Henson). They presented no testimony that such boundaries affected any school boundaries and admitted that natural boundaries were never consistently honored by the Board in drawing school boundaries. Tr. 1537 (Henson), Tr. 428 (Lamson).

The defendants suggested that Mr. Lamson should have considered grade levels, Tr. 449 (Sebelius), special education classes, gifted classes, psychologists, Chapter 1 assignments, national trends, birth rates, ages, regional migration, regional population, fertility, migration, birth and death rates and employment rates and projections. Tr. 508-513 (Sebelius), Tr. 690-691 (McAtee). Defendants presented no evidence on any of these factors nor any evidence that they were relevant to Mr. Lamson's analysis. Indeed, as Mr. Lamson noted, many of the factors apply to all schools. Tr. 510 (Lamson). The only data on school capacity was presented by Mr. Lamson based on USD 501 interrogatory answers. Tr. 529-530 (Lamson).

Defendants argued that Mr. Lamson needed block data by race and density data. Tr. 463, 469, 485 (Sebelius). They presented no such evidence and their experts did not use it. Tr. 2279-2338 (Clark); Tr. 2555-2605 (Armor).

* Citations to counsel reflect questions raised to which the witness did not respond or where the witness did not support the implication of the question.

Defendants argued that Dr. Foster failed to consider teacher rights in advocating desegregation of staff, Tr. 766 (McAtee), teacher salaries in commenting on hiring, Tr. 759 (McAtee), or area of certification of teachers on transfers. Tr. 766 (McAtee) Tr. 803 (Biles). They presented no evidence that any of these areas would preclude desegregation of faculty. Indeed, D. Exh. 1041C makes clear that teacher rights would not preclude desegregation.

Finally, the defendants devoted a great deal of court time describing the Adventure Center. While it appears to be an innovative educational tool it is totally irrelevant to this case. A similar project, Enrichment Center, was designed as a result of the Keyes litigation as part of a remedial plan. Like the Adventure Center children were to be bused to the center for a few weeks each semester. The court held that the center could "not pretend to be a desegregation plan . . . It impressed us, on the contrary as a plan which is more designed to avoid adoption of a desegregation plan." Keyes v. Sch. Dist. No. 1, 380 F.Supp. 673 (1974). The Tenth Circuit held that "although we do not affirm the judgment of the trial court in its entirety we do recognize . . . the complete necessity of the court's rejection of the various plans."

It was unclear at the trial whether the defendants offered the Adventure Center as an integration plan. If it was to be considered a remedial effort at integration, the Board must be reminded as the 5th Circuit pointed out in U.S. v. Texas Ed. Agency 564 F.2d (1977) "part time desegregation for some was constitutionally insufficient . . . the partial desegregation of a single grade has no basis in logic or in equity . . ." Busing fifth graders to a center for three weeks cannot be considered desegregation or integration. In the context of the Board's affirmative duty the Adventure Center, while a wonderful project, appears to be an effort to avoid integration.

If, on the other hand, the defendants presented information on the Adventure center to establish the quality of the schools the presentation belongs in the separate but equal defense category and is totally unacceptable.

V. The State Defendants Are Liable

The State Board of Education ("SBE") should be held liable for the failure to fulfill the Supreme Court mandate to desegregate the schools in Topeka. Primary responsibility for education in Kansas rests with the defendants SBE. Kansas Const. Art. 6, §2. More importantly, the SBE was a defendant in the original case and therefore has been under a continuing affirmative duty to desegregate. "Each instance of a failure to fulfill this affirmative duty continues the violation of the Fourteenth Amendment. Columbus Board of Education v. Perick 443 U.S. 449, 459, (1979).

Defendant SBE argues that it is the local board that really controls the school districts. The situation is analogous to a parent child relationship. While a sixteen year old child may in many respects "control" his or her own life, surely a parent would seek to exercise existing authority if the child chose to break the law. The fact that the SBE typically does not exercise its existing control over local districts does not excuse the SBE from its ultimate responsibility for overseeing the lawful administration of education in Kansas.

The SBE's control over local districts is extensive. The SBE has been deemed responsible for the "general supervision" of the public schools. Kansas Const., Art 6, § 2. The SBE would not accredit schools unless they were in "substantial compliance with all other legal requirements." P. Exh. 163. The supervisory powers include drafting regulations respecting the administration of public education which have the effect of law. State ex rel. Miller Bd. of Ed. 212 Kan. 482 (1973); KSA 72-7514. State officials have authority to scrutinize records, books and papers. That power would be exercised if the school district was in "flat violation of the law" P. Exh. 45. Both state and local officials have asserted that the SBE has more authority in the area of education than it uses. In particular the state superintendent makes final decisions on many issues respecting school district organization and boundary changes. P. Exh. 159. The SBE approves consolidations and annexations. P. Exh. 183. In Brown I the defendants argued that "education falls within the state's police power and therefore the state is ultimately responsible. P. Exh. 254. The Board has described the regulatory role of the Dept. of Education as including "ensuring that minimum educational opportunities be provided regardless of race" P. Exh. 268. The SBE has approved proposals for funds with statements of knowledge as to its duty to assist in desegregation efforts. P. Exh. 157, 178. "Respect for laws and instructions" has been translated into a statewide goal. P. Exh. 264. The Department of Education's duties have been described as including reviewing of matters relating to school law and "determining that basic administrative duties have been performed by local institutions in compliance with state and federal law." P. Exh. 264. The local school boards have been characterized as agents of the State in operating local schools. P. Exh. 168. Kansas law requires the SBE to "administer the laws" of the state relevant to public education and all other matters relating to the general supervision of the public schools. KSA 72-7513 (1980). The state surveys existing facilities and determine the needs of a district which include providing research and technical assistance. This authority could be used to assist in desegregation. P. Exh. 264-279.

The SBE has authority over the local districts to ensure that the schools are operated within the law. The SBE cannot avoid its responsibility for the unfulfilled constitutional duty to desegregate by claiming that it traditionally does not exercise its available authority.

Surely being primarily responsible for the education in Kansas (Kansas Const. Art. 6 § 2) requires an agency to ensure that the administration of education does not violate constitutional principles. The BSE cannot avoid responsibility for the violations by arguing that claiming responsibility would have required the Board to exercise authority which was seldom asserted.

The SBE was aware that vestiges of segregation existed in Topeka and took no action. P. Exh. 110, 6, 288, 157, 227, 231, 256, 171, 244, 204.

In addition to its derivative violation is a supervisor of USD 501, the SBE is liable for actions that perpetuated segregation. Although SBE received approval for federal funds to assist USD 501 on racial isolation and desegregation, it took no action. P. Exh. 232. No school desegregation cases or laws were circulated by the state board to local school districts. P. Exh. 7. In fact, no "research" or technical assistance on desegregation has ever been provided. P. Exh. 7. Not until ten years after the first proposal did the Department of Education develop a Title IV technical assistance proposal. P. Exh. 244. Concurrent with the increased activity in the litigation of Brown III, the defendants stated that a technical assistance project is in its first year of existence. P. Exh. 7. The state generally "assumed" that local districts were in compliance by merely accepting on a routine basis applicable forms without further investigation. P. Exh. 46.

Even after HEW suggested by letter than USD 501 was in violation of anti-discrimination laws the state never conducted an inquiry. The 1981 proposal for technical assistance referred to this matter, but the SBE rejected the application for Title IV funds that were supposed to address this problem. No advisory committee has ever been set up to report or give recommendations on pupil assignment optional zones, transfers, boundary changes, sitings, and closings although it had the authority to do so. P. Exh. 53, 54.

The Supreme Court made it clear in Columbus Board of Education v. Perick, 443 U.S. 449, 459 (1979) that "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." The SBE's role since its inception can be characterized only as an abysmal failure and refusal to ensure that the affirmative duty to desegregate had been met.

In addition to a history of omissions, the State had a history of actions which served to protect the segregation in Topeka. The most stark example is the Pierce school which was segregated by assignment and faculty, had inferior facilities and a principal which served discontinuous areas [CITE]. The SBE was made aware than the Pierce school which operated from at least 1952-58 until its annexation and closing in 1958 (Tr. 70-77), was

all black, and was not in a city of the first class, and was therefore illegally segregated. The SBE not only knew of the segregation at Pierce but accredited the school and provided state funds. In fact, the SBE knew there were examples of illegal segregation in cities of the second class and also illegally segregated secondary schools but continued to accredit and provide aid for the schools. P. Exh. 3.

[INSERT MORE]

The SBE is therefore primarily and derivatively responsible for the vestiges of segregation in Topeka, therefore for the failure to fulfill the affirmative duty mandated by the Supreme Court.