IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al.,

Plaintiffs
Appellants,

and

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

Intervening
Plaintiffs
Appellants,

vs.

Case No. 87-1668
(Lower docket T-316)

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

Defendants
Appellees.

BRIEF FOR INDIVIDUALLY-NAMED DEFENDANTS-APPELLEES ASSOCIATED WITH THE STATE BOARD OF EDUCATION

GATES & CLYDE, CHARTERED

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CERTIFICATION REQUIRED BY
TENTH CIRCUIT RULE 28.2(a)

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

Plaintiffs: JAMES MELDON EMMANUELA, an infant, by MRS. SADIE EMMANUEL, his Mother and next friend;

NANCY JANE TODD, an infant, by MRS. LUCINDA TODD, her Mother and next friend;

RONALD DOUGLAS RICHARDSON, an infant, by MRS. IONA RICHARDSON, his Mother and next friend;

KATHERINE LOUIS CARPER, an infant, by MRS. LENA CARPER, her Mother and next friend;

CHARLES HODISON, an infant, by MRS. SHIRLEY HODISON, his Mother and next friend;

THERONE LEWIS, MARTHA JEAN LEWIS, ARTHUR LEWIS and FRANCES LEWIS, infants, by MRS. ALMA LEWIS, their Mother and next friend;

SAUNDRIA DORSTELLA BROWN, an infant, by MRS. DARLENE BROWN, her Mother and next friend;

DUANE DEAN FLEMING and SILAS HARDRICK FLEMING, infants, by MRS. SHIRLA FLEMING, their Mother and next friend;

DONALD ANDREW HENDERSON and VICKIE ANN their Mother and next friend;

RUTH ANN SCALES, an infant, by MRS. VIVIAN SCALES, her Mother and next friend;

CLAUDE ARTHUR EMMERSON and GEORGE ROBERT EMMERSON, infants, by MRS. MARGUERITE EMMERSON, their Mother and next friend;

LINDA CAROL BROWN, an infant, by OLIVER BROWN, her Father and next friend;

VICTORIA JEAN LAWTON and CAROL KAY LAWTON, infants, by MRS. RICHARD LAWTON, their Mother and next friend;

CHARLES AND KIMBERLY SMITH, minor children, by their Mother and next friend, LINDA BROWN SMITH;

DANIELLE THREATT, a minor child, by her Mother and next friend, JUDA GAINES;

SHAWN, TANYA and TARA WOODS, minor children, by their Mother and next friend, JOYCE WOODS;

CORDELLIA MITCHELL and CONNIE MAXWELL, minor children, by their Mother and next friend, BARBARA MITCHELL;

ARLENE JACKSON, a minor child, by her Mother and next friend, CHARLENE BURKES;

CARLESIA AND CHERYL ROBINSON, minor children, by their Mother and next friend, PATRICIA ROBINSON;

RUFUS D. and MICHELLE KELLY, minor children, by their Father and next friend, RUFUS KELLEY;

JOHN, JACKIE, JOHNNY and VIOLA DAVIS, minor children, by their Mother and next friend, RUBY DAVIS;

Defendants: BOARD OF EDUCATION OF TOPEKA, KANSAS;
KENNETH McFARLAND, Superintendent of Schools;
FRANK WILSON, Principal of Sumner Elementary School;
STATE OF KANSAS;
JOHN CARLIN, Governor;
DOROTHY GROESBECK, State Board of Education;
KAY GRONEMAN, State Board of Education;
RUTHANN OELSNER, State Board of Education;
FLOYD J. GRIMES, State Board of Education;
DALE CAREY, State Board of Education;
HAROLD H. CRIST, State Board of Education;
ANN KEENER, State Board of Education;
MARILYN HARWOOD, State Board of Education;
JOHN BERGNER, State Board of Education;
THEODORE VON FANGE, State Board of Education;
JIM HIEBERG, State Board of Education;
DENISE APT, State Board of Education;
EVELYN WHITCOMB, State Board of Education;
WILLIAM W. MUSICK, State Board of Education;
ROBERT J. CLEMMONS, State Board of Education;
CONNIE HUBBELL, State Board of Education;
MARION "MICK" STEVENS, State Board of Education;
SHEILA FRAHM, State Board of Education;
KATHLEEN WHITE, State Board of Education;
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MILDRED G. McMILLON, State Board of Education;
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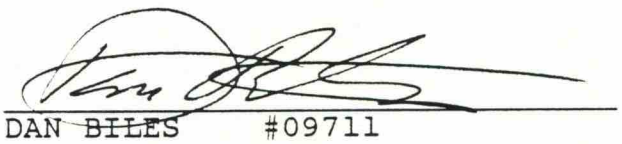
Respectfully submitted,

GATES & CLYDE, CHARTERED

BY 

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CERTIFICATE OF NECESSITY
FOR SEPARATE BRIEF PURSUANT TO RULE 31.4

COMES NOW Dan Biles, of Gates & Clyde, Chartered, counsel for the individually-named defendants, sued in their official capacity as members of the Kansas State Board of Education, and sets forth the reasons for the filing of a separate brief.

1. The action against these defendants is an official capacity action for prospective injunctive relief. The district court found that to prevail in this suit, plaintiffs were required to demonstrate the State Board is a "moving force"

behind the illegal segregation which plaintiffs allege. The court further found plaintiffs must establish that the State Board's policy or custom played a part and presence of the illegal segregation within USD #501. (Op. 48). The operation of this standard to the facts of the case necessitates separate briefing.

2. At trial, these individually-named defendants concurred with and assisted USD #501 in the presentation of the school district's argument that it had dismantled the former de jure school system in compliance with the Brown mandate. These defendants have joined the appellate brief of USD #501 as to this point, and have assisted in coordinating portions of the USD #501 brief, as contemplated by Rule 31.4. However, the legal interests of school officials associated with the local district and officials associated with the State Board of Education are in not fully in harmony as it pertains to all the issues which arise, or may arise, in the course of a school desegregation case. See, for example, Jenkins by Ageyi v. State of Mo., 807 F.2d 657 (8th Cir. 1986); Liddell v. State of Missouri, 731 F.2d 1294 (8th Cir. 1984).

3. In addition, these individually-named defendants have adopted certain portions of the brief filed by former Governor John Carlin, once again, in an effort to comply with Rule 31.4.

4. These individually-named defendants will coordinate a joint appendix with USD 501 of all referenced trial exhibits.

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BY 

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NATURE OF THE CASE

This is a school desegregation case. As against the individual members of the State Board of Education (SBE), this is an official capacity action. These particular defendants are being sued in their official capacities for prospective injunctive relief. (Op. 48). Plaintiffs assert SBE caused, and was responsible for, the alleged illegal racial conditions within USD 501. (Op. 47-48). The District Court determined, after reviewing all of the evidence and testimony, that, "There has been no showing that the conduct of SBE has deprived plaintiffs of their constitutional rights." (Op. 49).

STATEMENT OF FACTS

When the original case was filed, the State Board of Education did not exist. (Op. 48). At that time, Kansas had a Superintendent of Public Instruction, but this officer did not have general supervisory powers over local public schools. (Op. 48). The involvement of the State of Kansas, as intervenor, in the original Brown case was limited to defending the constitutionality of the statute which permitted, but did not command, segregation in grades K-6 in elementary schools of cities of the first class, which included Topeka. (See Carlin Brief, 2-4).

When the constitutionality of the Kansas permissive statute, along with all other mandatory or permissive statutes across the

United States, were declared unconstitutional in Brown I, the Kansas statute was repealed during the next full session of the Kansas Legislature after the Supreme Court's rulings. Civil and criminal laws against racial discrimination were enacted. (Op. 49). (Kan. Stat. Ann. 44-1001, et seq., and 21-4003). Those few school districts in Kansas which operated de jure elementary schools pursuant to the statute abolished those dual school systems and admitted students on a race-neutral basis. (SBE Exh. F-2 through F-9).

In addition, the three-judge panel reconvened in Topeka and approved the Topeka school's proposed desegregation plan. Brown v. Board of Education, 139 F. Supp. 468, 469 (D. Kan. 1955). The District Court, on remand, found the Topeka plan to be "good faith effort to bring about full desegregation in the Topeka schools and full compliance with the mandate of the Supreme Court." 139 F. Supp. at 470. No action by the state or any state official was ordered by the Court. Plaintiffs did not appeal the court's order. However, the federal court retained its jurisdiction over the controversy.

These actions of the court, local school officials, state officials, and even plaintiffs' counsel in not appealing, all were in accord with court decisions of that day. See Cooper v. Aaron, 558 U.S. 1 (1958); Griffin v. County, 77 U.S. 218 (1964); Alexander v. Holmes County Board of Education, 396 U.S. 1990 (1969); Downs v. Board of Education of Kansas City, 336 F. 2d 988

(10th Cir. 1964); Northcross v. Board of Education of City of Memphis, 302 F. 2d 818 (6th Cir. 1962); Bell v. School City of Gary, Indiana, 324 F. 2d 209 (7th Cir. 1963) cert. denied, 377 U.S. 924 (1963); Board of Education of Oklahoma City Pub. Sch. v. Dowell, 375 F. 2d 158 (10th Cir. 1967) cert. denied 409 U.S. 1041 (1967); Keyes v. School District #1 Denver, Colorado, 445 F. 2d 990 (10th Cir. 1971).

In 1966, the Kansas Constitution was amended. For the first time, local public schools were constitutionally recognized. (Kan. Const., Article 6, Sec. 5). This constitutional article, among other matters, was to provide "constitutional guarantees of local control of local schools." (Kansas Legislative Council, "The Education Amendment to the Kansas Constitution," December, 1965 p. iii). The State Board of Education was constitutionally created as an elected body to provide general supervision of the educational interests of the State, and to perform such other duties as mandated by the Legislature. (Kan. Const., Article 6, Sec. 2(a)). (Op. 48). Prior to the 1966 amendment, the State Board was advisory only to the then-Superintendent of Public Instruction. The duties of the superintendent primarily were certification of teachers and administrators, administration of laws concerning building standards, courses of study and curriculum, and school libraries and textbooks. (SBE Exh. A-19) (Op. 48).

The 1966 changes to the Constitution relating to education provide the Legislature's duty is to establish local public schools, the State Board of Education is to have general

supervision, and the local school boards are actually to maintain and operate the local schools. (Op. 48). This constitutional framework requires control of the local schools to be vested in locally-elected boards of education. NEA-Ft. Scott v. U.S.D. #234, 225 Kan. 607, 592 P.2d 463 (1979); State ex rel. Miller v. Board of Education of U.S.D. #368, 212 Kan. 482, 511 P.2d 705 (1973). The State Board's general supervisory authority means "something more than to advise, but something less than to control." 212 Kan. at 492.

SBE's contentions in this case are summarized as follows: (a) The Topeka public schools were unitary and contained no vestiges of the previous illegal segregation; (b) SBE took no affirmative action since its creation which could be alleged or shown to have obstructed or discouraged racial integration in Topeka schools, or even impact upon the racial composition of Topeka schools; (c) SBE did not receive any complaints from anyone alleging Topeka schools were segregated, or requesting SBE intervention; (d) The constitutional authority of SBE was limited to "general supervision" of all public schools, and did not confer onto SBE the "hands on" power to control local school district operations in the areas of student and faculty/staff assignment, internal school boundaries, or building openings and closings; (d) The federal court retained jurisdiction of the case, and a federal agency (HEW) statutorily charged with investigating discrimination complaints, on several occasions investigated USD #501, and reported to SBE either dismissal of the complaint as baseless, or reported a successful resolution.

There is no evidence of any complaint from any citizens concerning segregated schools or racial discrimination within USD #501 made to SBE or the Kansas State Department of Education. The State Board has maintained, since July, 1977, a regular monthly citizen's open forum at its meetings in Topeka, during which any person may address the Board on any subject. (SBE Exhibits A-4, A-40, A-41). No citizen ever appeared at this open forum to complain about alleged segregated schools or racial discrimination in Topeka schools, nor has any citizen ever requested at these forums the State Board take any action concerning the racial composition of Topeka schools, enrollment policies, attendance boundaries, use of portable classrooms, or any of the complaints made by plaintiffs in the reactivated Brown litigation.

There is no evidence SBE abused its authority pertaining to school building accreditation, teacher certification, or any other area within its jurisdiction to assist the Topeka school system to operate an inferior educational program or school facility for black school children. Similarly, there is no evidence SBE affirmatively acted in any manner to obstruct or discourage racial integration of schools since creation of the State Board in the late 1960's.

Through programs administered by the State Board, or made known to the State Board, USD 501 has received numerous state and national awards for excellence in various educational programs, including projects to assist educationally-disadvantaged students. Many of these recognized programs benefit students in

schools targeted by plaintiffs as "inferior" black schools. (SBE Exh. E-1 through E-7). The number of awards received by the district in recent years demonstrates USD #501 is an educationally-outstanding school system. (Walberg, Trial, 2049).

More importantly, however, the federal Office for Civil Rights (OCR) of the U.S. Department of Health, Education and Welfare (now the U.S. Department of Education), since its creation, is charged with responsibility for investigating complaints of discrimination against school districts receiving federal funds. (Civil Rights Act of 1964, Pub. L. 88-352; 78 Stat. 241 (1964)). USD #501 is such a district. In each instance in which OCR investigated an alleged complaint of discrimination against USD #501, the fact of the investigation and the ultimate conclusions were relayed to the State Commissioner of Education. (SBE Exh. C-1 through C-10, D-1 through D-12). In <u>each</u> instance, OCR advised SBE of either a satisfactory resolution to the complaint, with the school district's cooperation, or that the complaint was meritless. (<u>Id</u>).

In 1974, based upon its conclusions of violations of Title VI of the Civil Rights Act of 1964, OCR began significant administrative proceedings against USD 501 directly related to allegations of residual segregation lingering from the dual school system of the 1950's. (SBE Exh. D-1 through D-12). As part of these proceedings, the State Department of Education was directed by OCR to disallow approval to USD #501 for federal funding. (SBE Exh. D-6). Ultimately, HEW resolved its complaint

against USD #501 in 1976, and dismissed its administrative proceedings, stating specifically that, "The respondent school district adopted a plan to remedy the violations of Title VI of the Civil Rights Act of 1964 alleged in the notice of opportunity for hearing in this matter." (SBE Exh. D-11).

The State Commissioner of Education and the State Board of Education were notified by HEW of this resolution of the complaint and dismissal of the litigation. (SBE Exh. D-11 and D-12). The original HEW complaint concerned student assignment policies of the district, quality of school facilities, and allegations of racial segregation. The plan referenced by OCR was the 1976 Long Range Facilities Plan, adopted by USD #501 and fully implemented by 1981. (Henson, Tr., 1436-1461; and P. Exh. 240).

Over the years, there were a variety of final OCR conclusions concerning allegations of discrimination against USD #501. (SBE Exh. C-1 through C-10). Various OCR conclusions provided to SBE regarding race relations within USD #501 were as follows:

a. In 1976, a review of data did not reveal any evidence the Topeka public schools discriminated against complaintant's son on the basis of race, and the district's assessment of discipline. It was suggested the school district implement a study concerning disciplinary practices. (SBE Exh. C-2).

b. In 1976, Topeka public schools were found to be in compliance with the requirements of Lau v. Nichols, 414 U.S. 563 (1974), relative to equal educational opportunity for national origin students. The OCR analysis was based upon an on-site review and revealed no evidence the school district was discriminating against children in the district's programs and services upon the basis of national origin. (SBE Exh. C-3).

c. In 1979, OCR investigated a complaint filed against USD #501, alleging racial discrimination in pupil assignment practices, specifically alleging the implementation of the 1976 Long Range Facilities Plan resulted in resegregation of students and that the planned closing of Central Park Elementary School would result in racially imbalanced student enrollment in schools within the district. OCR further determined the open enrollment policy had not significantly affected the racial composition of Topeka schools. OCR stated it would continue to monitor the effects of the open enrollment policy in future years. (SBE Exh. C-5, C-4).

d. In 1982, OCR completed its investigation of a complaint filed against USD #501 concerning disciplinary suspensions of a minority student and the failure to place the minority student in regular education classes. OCR concluded the district did not violate federal law relative to the allegations in the complaint. USD #501 agreed to develop a plan to correct some other concerns developed by OCR during its investigation, and OCR agreed to close the case. (SBE Exh. C-6).

e. In 1985, OCR investigation of a complaint alleging discrimination on the basis of race and sex concerning salaries paid to minority teachers was found to be without merit. The investigation concerned alleged racial discrimination in the following areas: teacher salaries, selection of head coaches, reassignment of learning disability teachers, selection of school administrators, and assignment of kindergarten teachers. OCR found no basis for the complaints and closed the investigation. (SBE Exh. C-10).

Plaintiffs' counsel seriously misrepresents this case when suggesting the District Court found SBE "blocked" technical assistance programs to assist in race and sex equity programs. (Plaintiffs' brief, 47, citing the Court's Memorandum Order, Doc. 286 at 4). The District Court never made a finding SBE "blocked" any such efforts. Indeed, the District Court's findings, as it pertains to the State Board, are contained in its opinion, which forcefully recites, "There has been no showing that the conduct of SBE has deprived plaintiffs of their constitutional rights." (Op. 49). Indeed, plaintiffs' attempt to significantly distort efforts by the Kansas Department of Education to obtain technical assistance grants for these race and sex equity projects. Therefore, a word about them is in order.

The State Department of Education's requests for federal funding under Title IV, Section 403, Pub. L. 88-352, the Civil Rights Act of 1964, for a technical assistance program were designed to provide information only to requesting school districts for situations incident to implementation of busing and

other techniques attendant to desegregation. The grant proposal was to assist with two staff to provide this information. The request was seen as an effort to promote equal educational opportunities in Kansas by the SBE. (P. Exh. 157, p. 7). Grant proposals were submitted several times beginning in 1970. (P. Exh. 157, 244, 256, 288; SBE Exh. A-9, A-10, A-11). Plaintiffs allege no causal connection between the inability to implement this program due to failure to receive legislative approval for funding until 1984, and the current racial composition of Topeka schools. Indeed, the District Court indicated it did not consider the technical assistance programs to be necessarily attendant to any remedy involved in dismantling a former de jure system. (Doc. 286, p. 4).

Plaintiffs further mislead this Court by claiming SBE "blocked" desegregation efforts in Topeka. The only cited exhibit references an SBE vote in March, 1981, to delay further submission of technical assistance program grant requests, due to the failure to get approval of those requests in the legislative budgeting process. (P. Exh. 210). This cannot be considered seriously as efforts to "block" the desegregation process as claimed by plaintiffs' counsel. Indeed, SBE later submitted and received approval for the same technical assistance program in race and sex equity, begining in 1984. (SBE Exh. A-9, A-10, A-11).

Two additional misstatements in plaintiffs' brief deserve mention. First, plaintiffs suggest SBE responsibilities include withholding accreditation until schools are in substantial

compliance with all legal requirements. (Plaintiffs' brief, 46, citing P. Exh. 163). The exhibit referred to by plaintiffs is dated 1952 -- 14 years before SBE was even created, and does not suggest accreditation can be tied to the racial composition of schools. Throughout this case, plaintiffs continually have misrepresented the accreditation process. (Dennis, Tr., 2767). Second, plaintiffs declared, "State officials were defendants in Brown I." (Plaintiffs' brief, 45). This obviously is false, since the State of Kansas was the only intervening party. (See Carlin brief).

ARGUMENT AND AUTHORITIES

ISSUE: The District Court did not err in holding the State Board of Education did not deprive the plaintiffs of their constitutional rights.

SCOPE OF REVIEW

The scope of appellate review of the District Court's decision in this case is governed by the general rule that issues of fact may be reversed only if clearly erroneous under Rule 52(a) and issues of law are subject to de novo review. Pullman-Standard v. Swint, 456 U.S. 273, (1982); Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 535, n. 8, (1979) (Dayton II). The individual members of SBE further adopt the legal arguments and

authorities cited in the "Scope of Review" portion of the brief of U.S.D. 501.

The District Court's factual findings are devastating to plaintiffs' efforts to reverse the trial court's ruling in favor of the individual members of the SBE. As more fully detailed below, the District Court found, as a matter of fact, that "any residue of segregation traceable" to the old statute permitting segregated elementary schools "has been eradicated." (Op. 49).

Indeed, the District Court left no room for distortion of its opinion as to this point by declaring, "[T]he de jure system of segregation has been dismantled and its vestiges eliminated." (Op. 45). Under any theory, a factual finding of the effective dismantling of the old de jure school system in Topeka and the elimination of its vestiges ends this historic litigation unless found by this Court to be clearly erroneous.

The Court's Ruling

The District Court correctly found that, in order for plaintiffs to prevail, they must demonstrate SBE was a "moving force" behind the illegal segregation which plaintiffs allege to exist. (Op. 48). The District Court noted, "It must be established that SBE's policy or custom played a part in the presence of illegal segregation within U.S.D. #501," citing Kentucky v. Graham, 473 U.S. 159 (1985) and Rizzo v. Goode, 423 U.S. 362 (1976). (Op. 48).

Plaintiffs attempted to establish liability of the members of SBE by showing the board failed to "police" the desegregation process in U.S.D. #501. However, the District Court found no factual basis upon which to maintain liability of the individual members of the State Board for purposes of this official capacity action. The court's specific factual findings relevant to the State Board are as follows:

> -- "Any residue of segregation traceable to the repeal statute has been eradicated in the court's opinion." (Op. 49).
>
> -- "There has been no showing that the conduct of SBE has deprived plaintiffs of their constitutional rights." (Op. 49).
>
> -- "[P]laintiffs have failed to demonstrate that any policy or custom of SBE is a root cause or moving force behind the racial conditions which currently exist in the district." (Op. 49).
>
> -- "There is no illegal, intentional, systematic or residual separation of the races [in the Topeka school system]." (Op. 45). (Emphasis added).
>
> -- "[T]he de jure system of segregation has been dismantled and its vestiges eliminated." (Op. 45).

The court, then, went on to find the responsibility for student and staff assignment, as well as for the equalization of educational opportunity within the Topeka school district rests with the local school board. (Op. 49). This, of course, is consistent with the lines of legal authority flowing from the education article of the Kansas Constitution. It also is fully consistent with the various factual determinations made by the District Court throughout its opinion, based upon the evidence submitted at trial.

Comparison of some of the statutory responsibilities of the local district and the District Court's factual findings relative to the school district's exercise of that authority in the context of school desegregation well illustrate the point. They are as follows:

-- Local control over internal school attendance boundaries and enrollment policies is left by statute with the local boards. K.S.A. 72-8212(c). The District Court found, "A review of the school boundaries as they have developed over thirty years does not reveal a segregative pattern that remains today." (Op. 23). Examining the boundaries of the former de jure Topeka school system, the court further found, "The segregative effects of those boundaries have attenuated entirely." (Op. 23). Finally, the District Court concluded, "In summary, the district's attendance zones are not segregatively gerrymandered. The district has consistently applied race-neutral, neighborhood school principles to the demarcation of attendance zones." (Op. 25).

-- Faculty/staff assignments are covered generally by K.S.A. 72-8202, et seq. The District Court, after carefully analyzing plaintiffs' claims, stated, "In sum, the record before the court with regard to the district's approach to faculty and staff is not indicative of a dual system of education." (Op. 35). Earlier, the court noted, "Perhaps as important as the racial percentages of the faculty and staff is the fair assignment of qualified and dedicated faculty throughout the district." (Op. 34).

-- Transportation policies fall under K.S.A. 72-8301, et seq. The District Court found, "There is no discrimination in the provision of transportation in the school district." (Op. 31-32).

-- Education facilities and buildings and closing of schools are controlled specifically by the local boards of education, pursuant to K.S.A. 72-8212(d) and 72-8213. The District Court found, "There is no significant disparity in the quality of facilities available in schools throughout the district." (Op. 31). As to school closings, the District Court found, "The school closings over thirty years in the district indicate a policy of desegregation." (Op. 20). The court went on to state, "[T]here is no pattern of closing schools to avoid racial mixing. Indeed, on the

whole, the closing of schools appears to have been an integrative device." (Op. 20).

-- Extracurricular activities clearly fall within the control of local boards under their general powers. K.S.A. 72-8212(d). The District Court found, "There is no discrimination in the conduct of extracurricular activities in the district. Indeed, multiracial participation is guaranteed in certain activities such as cheerleading and student government." (Op. 48).

-- Local control over curriculum is provided to elected boards of education pursuant to 72-8205. The District Court found, "There is no significant disparity in the curriculum and progress of study in the schools throughout the district. In recent years, the district has taken diligent and meticulous steps with the development and use of curriculum guides to assure that all schools and all grades work consistently toward specific and uniform academic goals." (Op. 31).

The Court should note the full recitation of facts supporting each of the District Court's findings are stated in the brief of USD 501. These SBE defendants join in those factual statements in support of the argument the District Court's findings are not clearly erroneous.

Additionally, SBE would note the Court's factual findings demonstrate no room for any additional action required of SBE, even assuming there was some act within SBE's authority which could have been performed. It is interesting plaintiffs never specified any particular action of the SBE, which plaintiffs argue was required, which was within SBE's power, which failure of SBE to perform somehow impacted upon the racial conditions plaintiffs claim to be illegal.

In terms of any affirmative actions to obstruct integration or hinder compliance with the Brown mandate, plaintiffs offer no

evidence of any kind against these defendants.[1] Indeed, the actions of Kansas State officials stand in sharp contrast to efforts in other states to circumvent and openly defy the Supreme Court's ruling in Brown. Unlike other states, there were no efforts by Kansas state officials, for example, to close public schools, or provide tuition grants for white students to attend private schools. There were no efforts to preserve unconstitutional provisions promoting or mandating segregation, nor did the Kansas Legislature enact or preserve statutes authorizing the withholding of state funds from local school boards which voluntarily adopted busing plans for desegregation.

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[1] At trial, plaintiffs unsuccessfully attempted to allege that Pierce School was an illegally segregated school which state officials accredited and provided state funds to. Plaintiffs' evidence, however, failed to substantiate these claims. Although closed in 1959, the Pierce School was brought into the Topeka school district in 1957, by virtue of annexation by the city of Topeka. (USD 501 Exh. 1009). The Pierce school district had only one school within its district, an elementary school serving first through eighth grades. (SBE Exh. G-4). The Pierce School, thus, never operated as a de jure dual school system. The attendance boundaries for the Pierce School District were established by the county in 1855. (P. Exh. 292). Over the years, the one-school Pierce District served both black and white school children. (SBE Exh. G-4). The enrollment data for Pierce covers the period of time from 1940 to 1957. Race data is shown up to 1952-53. Within the exhibits, integrated enrollment is shown for 1941, 1942, 1943, 1945, and 1949. There is absolutely no evidence in the record Pierce was accredited by the State. Also, there is no evidence Pierce received State funds, and certainly no evidence SBE knew of "segregation" at Pierce. Clearly, children living within the one-school Pierce attendance boundaries attended the school. This is in contrast to the all-black enrollments at Monroe, Buchanan, Washington, and McKinley in Topeka Public School District No. 23, which did operate under the de jure school system. Even so, Pierce was closed in 1959, and had no relevance to the issues in today's case as evidenced by the District Court's ruling.

See Bradley v. School Board, 338 F. Supp. 67 (D. Va. 1976), (Virginia General Assembly enacted laws to close public schools where white and black children were enrolled, to cut off state financial aid to integrated schools, to provide tuition grants for white students to attend private schools, and to extend state retirement benefits to teachers in newly-created public schools); Griffin v. School Board, 377 U.S. 218, 221, (1964); Little Rock School District v. Pulaski County Special School District No. 1, 778 F.2d 404, 417 (8th Cir. 1985), (Arkansas officials, as recently as 1980, approved racially segregative school sitings, in violation of district court decrees, and took the position state law did not permit the state to assist local school boards in their desegregation efforts); Liddell v. State of Missouri, 731 F.2d 1294 (8th Cir. 1984), (State Constitution, until 1976, continued to mandate segregated schools at all grade levels); Kelley v. Metropolitan County Board of Education, 615 F.2d 1139, 1149 (M.D. Tenn. 1985), (Tennessee Constitution continued to mandate segregation until 1978, and as late as 1985, state law authorized the governor to withhold all state funds from local school boards which voluntarily adopted busing plans to achieve desegregation). (See also Lamson, Tr. 359).

Plaintiffs have not shown any involvement by the State Board of Education in waiving state-imposed state-wide educational standards for Topeka schools, ignoring or resisting pleas for substantial assistance in desegregating Topeka schools or in directly manipulating the authority of the State Board to create or maintain segregation or deny equal educational opportunity to

Topeka school children. (See Reed v. Rhodes, 662 F.2d 1219, 1226 (6th Cir. 1981).

From of all of this, the overwhelming conclusion is that the District Court correctly analyzed the statutory and constitutional power of the State Board of Education, placed that authority within the proper context of plaintiffs' claims during the trial of the Brown case, and rendered, correctly, the conclusion that, "There has been no showing that the conduct of SBE has deprived plaintiffs of their constitutional rights." (Op. 49).

PLUS OR MINUS FIFTEEN PERCENT

Plaintiffs ask for reversal and remand for further hearings on "additional steps necessary to complete the desegregation of Topeka schools." (Plaintiffs' brief, p. 6). Inherent in the plaintiffs' argument is that racial balancing must be ordered because only by achieving racial balance within a percentage range may a school be considered desegregated under plaintiffs' argument. This must be so because plaintiffs disavow any challenge to the District Court's findings of fact except for "a few minor factual findings" made by the District Court. (Plaintiffs' brief, 24, n. 30).

The District Court exhaustively analyzed and ruled on eighteen separate factors in its ultimate determination the former de jure system of segregation in Topeka schools "has been dismantled and its vestiges eliminated." (Op. 45). To

challenge, as plaintiffs do, the court's factual analysis as a "question of law" requires giving constitutional significance to plaintiffs' standards of racial balancing as a substantive right.

As to these defendants, the argument of plaintiffs seemingly translates into the notion SBE somehow should have mandated racial balancing in Topeka schools by adopting plaintiffs' percentage standards. (Plaintiffs' brief, 46).[2] The District Court summarized plaintiffs' argument as follows:

> "Plaintiffs appear to be arguing for a judicial fine-tuning of the desegregation process in U.S.D. #501. As compared with many desegregation cases, relatively small changes in student and staff assignment would create the balance which plaintiffs define as desegregation. Blind reliance upon statistical measures of balance, at least with regard to student assignment, was persuasively rejected by the Fifth Circuit in Price. Although plaintiffs assert other factors in corroboration of their thesis, a careful review of all relevant circumstances establishes that the de jure system of segregation has been dismantled and its vestiges eliminated. (Op., 45). (Emphasis added).

Plaintiffs' contentions are an unabashed attempt to establish, for the first time, that in a former de jure school system, black students are constitutionally entitled to a specific degree of racial balance in their schools. This standard is plus or minus 15 percent of the black and/or minority racial composition within the school system. It is this standard, plaintiffs argue, which defines "racially identifiable"

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[2] SBE does not believe its accreditation power goes so far as to permit such sweeping dictates onto local school districts. See State ex rel. Miller v. Board of Education of USD #368, supra.

schools. This plus or minus 15 percent yardstick is what plaintiffs say determines whether a former de jure school system is desegregated. (Op. 45). Reduced to its essence, plaintiffs equate the affirmative duty to "effectuate a transition to a racially nondiscriminatory school system," Brown v. Board of Education, 349 U.S. 294, 299 (1955) (Brown II), to compliance with their plus or minus 15 percent racial balance standard for student assignment, and the so-called "Singleton Ratio" for faculty/staff assignment. (Plaintiffs' Brief, 41-42).

School desegregation/segregation analysis never has been reduced to mere mathematics. What was required of the District Court was a factual analysis of the Topeka school system based upon all the factors comprising the make-up of that school system. Green v. New Kent County School Board, 131 U.S. 430, 437, (1968). This multi-faceted analysis is precisely what the District Court did.

It is well established there is no substantive constitutional right to a particular degree of racial balance or mixing, even in a former de jure school system. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971). The constitutional command to desegregate schools does not mean every school in every community must always reflect the racial composition of the school system as a whole. Id. "[D]esegregation, in the sense of dismantling a dual school

system, does not require any particular racial balance in each 'school, grade or classroom.'" Milliken v. Bradley, 418 U.S. 717, 740-41 (1974) (Milliken I).

Despite clear authority to the contrary, plaintiffs assert the most commonly used method of measuring "racial identifiability" in desegregation cases is the use of a plus or minus 15 percent standard. Plaintiffs also state this plus or minus 15 percent standard is used in both liability and remedy phases of desegregation cases. Plaintiffs, then, proceed to list a string of cases which allegedly endorse the use of strict mathematical percentages of some degree of racial balance based upon a plus or minus percentage of the district-wide average of minority enrollment. (Plaintiffs' Brief, 40-41). A careful reading of the cases relied upon by plaintiffs indicate these decisions do not support the use of a strict plus or minus percentage standard in desegregation cases. Indeed, the cases listed by plaintiffs are directly contrary to the proposition for which plaintiffs cite them to this court.

For example, one of the earlier lower court decisions to which plaintiffs refer states as follows:

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

> diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired but socially undesirable."

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

Among the other cases cited by plaintiffs is the case of Clark v. Board of Education of Little Rock, 705 F.2d 265 (8th Cir. 1983), which plaintiffs incorrectly claim embraced a plus or minus 15 percent standard. A review of this case, however, shows the racial balance goals used by the court were only for magnet schools. The court-approved plan sought 500 students for the magnet program, selected to achieve a 50 percent white/50 percent non-white racial composition, allowing for a ten percent deviation. 705 F.2d at 269. The Little Rock district was 65 percent black or more, and the limit of 50 percent on black enrollment was deemed "arbitrary" by the court. 705 F.2d at 269, n. 6. This case involved the remedy phase of a desegregation action and not liability. The plan approved by the court, and found to be constitutional in this case, retained four all-black or virtually all-black schools. 705 F.2d at 272. It also is interesting to note the Clark court used the phrase "racially identifiable schools" only in reference to the four elementary schools which had non-white racial compositions in excess of ninety-six percent. 705 F.2d at 272.

Under these circumstances, it is difficult to imagine how plaintiffs can assert this case stands for the proposition that a plus or minus percentage range is required by the command of the Brown decisions "to effectuate a transition to a racially

nondiscriminatory school system." Indeed, the Clark court went on to rule, "The creation of four all-black schools in and of itself is not a constitutional violation." 705 F.2d at 292, citing Adams v. United States, 620 F.2d 1277, 1296 (8th Cir. 1980) cert. denied, 449 U.S. 826 (1980); Lee v. Macon County Bd. of Education, 616 F.2d 805, 809 (5th Cir. 1980); and Armstrong v. Board of School Directors, 616 F.2d 305, 321-322 (7th Cir. 1980).

Plaintiffs also reference the appellate level decision of Kelley v. Metropolitan Board of Education, 687 F.2d 814 (6th Cir. 1982), in which the Sixth Circuit noted the state of Tennessee had a "well established" history of de jure segregation, but, even so, refused to endorse the plus or minus 15 percent range, stating the district court would have been in error to apply blindly such a range. 687 F.2d at 818. The Sixth Circuit ruled the district court could use ratios of white to minority students only as a starting point in attempting to fashion a desegregation plan. The court further stated:

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

Finally, the Kelley case was a remedy, rather than a liability, phase case.

Plaintiffs next cite Whittenberg v. School District of Greenville County, 607 F. Supp. 289 (D.C.S.C 1985), in which the district court again was faced with the remedy phase of a desegregation case. In Whittenberg, the court used the plus or minus 15 percent figure only as a target. The school board's

implementation of a plan using this target resulted in the constitutional plan and the district was declared unitary, even though some schools were in excess of 60 percent black enrollment under the court plan. Further, the court noted the plan, which used the plus or minus 15 percent target figure, was beyond what was required under the Constitution. 607 F. Supp. at 295-296.

Finally, the Whittenberg court noted:

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

607 F. Supp. at 298.

In Davis v. East Baton Rouge Parish School Board (mistakenly identified in plaintiffs' brief as "Davis v. Board of Education of Little Rock"), 514 F. Supp. 869 (1981), the district court again was faced with the remedy phase of a desegregation plan. Interestingly, Dr. Gordon Foster, one of the Brown plaintiffs' expert witnesses, also testified in the Davis case the plus or minus 15 percent standard was appropriate. However, the Davis court specifically, and emphatically, rejected this proposition, stating:

> "Dr. Foster established a precise 'range' of racial balance that he considered to be acceptable, which he defined as plus or minus 15 percent of the overall 60-40 makeup of the system. His 'ranges' were from

> 25.4 percent black to 55.4 percent black as an acceptable desegregated school. The court refuses to accept the proposition that it is necessary to define to the fractional percentage point an 'acceptable' range of racial mix in any particular school. The jurisprudence is plain. The court must look to the entire system in determining whether the public schools are desegregated." 514 F. Supp. at 873. (Emphasis added).

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

The plaintiffs next boldly cite Tasby v. Wright, 520 F. Supp. 683 (N.D. Tex. 1981), in which the district court once again was involved in the remedy phase of a desegregation case. Dr. Foster, yet again, attempted to convince the lower court a strict plus or minus figure was appropriate, and, yet again, his theorem was rejected. 527 F. Supp. at 711. The Tasby court noted the possible absurdity of applying a racial balancing approach wherein a school which may have been only 50 or 60 percent white would be called a "racially identifiable" white school. Id. In its footnote 63, the Tasby court stated:

> "Dr. Foster's use of sliding tolerances was similarly rejected by then-District Judge Frank M. Johnson in the Montgomery, Alabama desegregation case as being 'highly artificial,' unnecessarily disruptive, an impingement on the educational processes of the system, and premised on a misunderstanding of the commands of Swann. Carr, supra, 377 F. Supp. at 1140-1141. The weakness of Dr. Foster's sliding scale approach can be further demonstrated, as follows. Given sufficient long term fluctuations in district wide demographics, it would be possible for a particular school to be classified as 'racially identifiable' in 1970, desegregated in '75, racially identifiable again in

> 1980, and desegregated again in 1985, all without that school ever experiencing any change in the ethnic makeup of its own student body." (Emphasis in original).

520 F. Supp. at 711.

The Tasby court determined the school district should attempt to achieve a racial mix of 75 percent to 25 percent, either Anglos to minorities or minorities to Anglos. The ratio decided upon was merely a starting point to shaping a remedy and not a rigid racial balance requirement. 527 F. Supp. at 711. The court noted both sides had taken the position that having a student body that was 70 to 75 percent of any one race constituted a multi-ethnic desegregated environment. 520 F. Supp. at 712. As a result, the court ruled its ratio was a reasonable starting point. 520 F. Supp. at 711-712.

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

range of percentages which requires this court to disregard all else." 426 F. Supp. at 181.

Finally, plaintiffs cite Armstrong v. O'Connell, 416 F. Supp. 1344 (E.D. Wisc. 1976), which is a remedy phase of a desegregation lawsuit. The Armstrong court ruled it wanted the racial balances in all schools to fall within a plus or minus ten percent of the district-wide average within three years. 416 F. Supp. at 1346. Following the hearing on the plans that were presented to the court, new orders were issued. See Armstrong v. O'Connell, 427 F. Supp. 1377 (E.D. Wisc. 1977). In the new orders, the court ruled two-thirds of the schools in the Milwaukee public schools should have a student body between 25 and 50 percent black. This is a ratio of minus ten percent to plus 15 percent as a range. The remaining schools were to have been between 20 and 65 percent black or 15 to 75 percent black. These ranges are, of course, minus 15 percent to 30 percent, and minus 20 to plus 40 percent. 427 F. Supp. at 1379.

This newer case certainly illustrates the problems in attempting to enforce a strict numerical formula in the remedy phase of a desegregation case. However, most importantly, it demonstrates the order which plaintiffs cite to this court in their brief was rescinded. 427 F. Supp. at 1381. Thus, it offers no authority to the proposition for which plaintiffs offer it. The remaining cases cited by plaintiffs in support of their racial balancing standard are inapplicable due to their being remedial targets of a court-approved plan, or simply don't apply to the argument and should not be cited.

"Racial identifiability," as defined by the plaintiffs, cannot be equated to segregation as a matter of law. The presence or absence of segregation is determined by examination of the system as a whole, in light of each of the factors adopted by the Supreme Court in Green. The District Court, in its analysis of the Topeka school system, correctly noted that "blind reliance upon statistical measures of balance in regard to student assignment properly should be rejected," (Op. 45) citing Price v. Denison Independent School Dist., 694 F. 2d 334 (5th Cir. 1982). Indeed, the plaintiffs' position taken in the Brown litigation is nearly identical to that rejected by the Fifth Circuit in Price.

The plaintiffs in Price relied upon a contention of racial identifiability of school assignments under the Foster analysis as establishing an unconstitutional system. The Denison district in Texas provided education to 5,200 students, of whom approximately 12 percent were black. The residential patterns were such that the black population principally was concentrated in a compact segment of the city, while the western half of the city, which contained the newer areas, was almost exclusively white.

Until the Spring of 1963, Denison operated a school system completely segregated by race. A court-approved desegregation plan was entered in 1965. The district, between that time and 1979, had taken numerous actions affecting the attendance scheme. When the case was reopened in 1979, the plaintiffs contended a 1979-80 attendance plan continued vestiges of the prior dual

system. The District Court found the system to be segregated, and a desegregation plan was approved. On appeal, the school district challenged the District Court's finding of constitutional violations. The Circuit Court reversed, finding the district court erroneously treated the "question of racial identifiability essentially as a question of law, to be determined strictly on the basis of a generally applicable statistical formula." 694 F. 2d 347-348.

The Circuit Court carefully examined the Supreme Court's use of mathematical ratios in Swann. It concluded the Supreme Court's "presumption against schools are substantially disproportionate in the racial composition" referred to schools which were all or predominantly one race and did not apply to schools which did not meet that definition. The court specifically noted Swann did not adopt a rule that racial imbalances give rise to a presumption of intentional segregative conduct. Rather, mathematical ratios are to be used merely as a starting point in the process of shaping a remedy. This analysis was found to be consistent with various Supreme Court cases. The Fifth Circuit concluded, "We are aware of no decisions of this court approving a mathematical formula for determining racial identifiability such as Dr. Foster's." 694 F. 2d at 362. The presence of racially identifiable schools under Dr. Foster's analysis is insufficient as a matter of law to support a finding of unconstitutional segregation.

The Price court cited Higgins v. Board of Education of City of Grand Rapids, 508 F. 2d 779 (6th Cir. 1974) in support of its

proposition the presence of some "racially identifiable" schools under the Foster analysis did not render a school system unconstitutionally segregated. The Grand Rapids schools, where students were 26.7% black, adhered to a neighborhood school system comprised of 43 elementary schools. Only 11 of those schools had black enrollment which was within the plus or minus 15 percent range advocated by Dr. Foster. Nine schools, while beyond the range, had black enrollments from 5 to 11.7 percent. Ten elementary schools had majority black enrollment. The student assignments to schools were held not to be unconstitutional, despite these figures.

In finding the Topeka school system unitary, the District Court correctly held as follows:

> "The mixing of students of different races in the schools is probably the most important factor in determining unitariness. (After all, separate but equal schools violate the Constitution.) But, complete racial balance is not required by the Constitution. Swann, supra 402 U.S. at 24; Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 and 417 (1977) ('Dayton I'). Even the existence of a small number of one race or virtually one race schools within a district is not in and of itself the mark of a system that still practices segregation by law. Swann, supra, 402 U.S. at 26. Many other factors should be considered as well. Green, supra, 391 U.S. at 435 (faculty, staff, transportation, extracurricular activities and facilities); Keyes, supra, 413 U.S. at 96, 213-14 (school site location, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, community and school administration attitudes)." (Op. 6).

The District Court, then, followed with an analysis of all of these various factors, including statistical measures of student population, and unequivocally determined, "defendants

have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system." (Op. 11).

The District Court, then, went on to state:

> "Therefore, although the issue in this case is whether additional remedial action is appropriate, it is inappropriate to use racial balance (a remedial target) as the determining factor of whether remedial action is necessary because: 1) racial balance is not a per se measure of an unconstitutional level of segregation; and 2) after thirty years, one cannot assume that the racial imbalance which remains is a vestige of the de jure system or other legal segregation. The court concludes that statistical measures of racial mixing are an important factor in determining whether vestiges of segregation remain in U.S.D. #501. But, the issue is not decided by whether the schools are racially balanced.
>
> The statistics indicate that students in U.S.D. #501 are not separated by race." (Op. 15-16).

The court went on to analyze the various statistical measures of student assignment and found from the facts as follows:

> "The student attendance figures for U.S.D. #501 reflect an enduring, integrated, nondiscriminatory system of education. Although racial balance has not been achieved, students are not separated on the basis of race. Thus, a vestige of segregation has been eliminated." (Op. 17).

Finally, the district court correctly noted that even a blind reliance on the plus or minus 15 percent standard would require only "relatively small changes in student and staff assignment [which] would create the balance which plaintiffs define as desegregation." (Op. 45). These relatively small numbers of students demonstrate the absurdity of plaintiffs' position.

By using the calculations subscribed to by Dr. Foster, plaintiffs' own witness, it was shown that as few as 4 or 5 black students took some schools outside the plus or minus 15 percent range. Curiously, Dr. Foster even conceded his use of these percentages did not take into consideration how many students in a particular school would be required to make up a school grade or provide sufficient class size for proper instruction at a particular grade level. However, these factors obviously must be taken into consideration in analyzing whether student assignment policies cause a current condition of segregation. This especially is true since only a relatively few number of students affect the results. (Foster, Tr. 794-803).

Even using a plus or minus 15 percent off the district-wide average of black enrollment for purposes of determining "racially identifiable" schools, none of the high schools in Topeka are "racially identifiable" black during the 1985-86 school year. (Exhibit 8J). The three Topeka high schools have never been "racially identifiable" black, using plus or minus 15 percent black. (Lamson, Tr. 376-378; Exh. 8J).

Of the six middle schools in operation in school year 1985-86, only French (2.72 percent black) and Eisenhower (42.86 percent black) would fall outside the plus or minus 15 percent black range advocated by plaintiffs' witnesses. (P. Exh. 8J). Using this plus or minus 15 percent black standard, only 44 middle school students out of the total middle school enrollment in 1985-86 of 1,978 students took these two schools outside the band. This amounts to only 2.22 percent of the entire middle

school enrollment in U.S.D. #501 in the 1985-86 school year. (P. Exh. 8J).

Of the 26 elementary schools in operation during school year 1985-86, the total number of elementary students which caused 13 of these 26 schools to fall outside the plus or minus 15 percent black band was only 190 students out of a total elementary enrollment of 8,387 students. This is only 2.26 percent of the entire elementary school population. (P. Exh. 8J).

System-wide, in the 1985-86 school year, the total number of students which cause any Topeka school to fall outside the plus or minus 15 percent black range amounts to only 234 students out of a total district enrollment in U.S.D. #501 of 15,103 students. This is 1.54 percent of the total enrollment. (P. Exh. 8J).

The same situation is true of the alleged disparities in faculty/staff assignments, a shift of only 24 or 26 certificated teachers out of 911 teachers system-wide would bring U.S.D. #501 precisely to plaintiffs' optimum standards. (Foster, Tr. 764-765, 773). However, plaintiffs conceded these calculations of the 24 to 26 teachers did <u>not</u> take into consideration whether teachers simply can be shifted to other educational programs in light of their education certifications. In addition, plaintiffs admitted they did not consider the relevant labor pool data for Topeka. (Foster, trial, p. 768). Plaintiffs' witnesses even conceded the school district's affirmative recruitment policies toward minority teachers were quite adequate. (Foster, Tr. 769). The District Court specifically found the recruitment policies to be acceptable. (Op. 32).

Therefore, these "relatively small" numbers of students and faculty, as noted by the District Court, which forced schools outside of plaintiffs' range of tolerance, must be viewed as de minimis and of no substantive consequence in the multi-faceted analysis required in school desegregation litigation. With so few numbers of students and faculty involved in taking schools outside of plaintiffs' range of racial balance, it is ludicrous for plaintiffs to allege there are racially-separate sets of schools in Topeka. The District Court correctly found from an examination of all relevant factors, including student and faculty/staff assignment, that defendants demonstrated USD #501 was unitary.

The District Court clearly included the statistical measures of student and faculty/staff assignment in its overall consideration of the school district as a whole. Plaintiffs simply contend that, as a matter of law, these statistical measures control the result of this case in their favor. As shown above, this is not the state of current desegregation law and never has been. The District Court's findings should be affirmed.

CONCLUSION

For all of the above-stated reasons, the Court's rulings in favor of the individual members of the State Board of Education in their official capacity action should be affirmed.

NECESSITY OF ORAL ARGUMENT

This Court already has set this case for argument on October 1, 1987. Due to the complexity of this action, counsel for these defendants-appellees believes oral argument is appropriate.

GATES & CLYDE, CHARTERED

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CERTIFICATE OF MAILING

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_____
Dan Biles