IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

OLIVER BROWN, et al.,
Plaintiffs,

and

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

Intervening Plaintiffs,

vs.

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

Defendants.

Case No. T-316

O R D E R

This case is now before the court upon plaintiffs' motion to amend and plaintiffs' informal request for the establishment of deadlines for the progress of this case.

The motion to amend the complaint seeks leave to broaden the scope of the complaint to challenge more than just the open enrollment policy and long-range facilities plan of the school district. Plaintiffs seek leave to amend the complaint to put the court and defendants on formal notice that they are contesting the pattern of all transfers and other attendance policies, as well as the pattern of school construction, school sites, school remodeling, use of portable or temporary classrooms, and annexations and deannexations. Plaintiffs further seek the court's permission to allege a cause of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and to amend the legal basis for plaintiffs' attorney's fees request.

Defendants' major objection to granting plaintiffs leave to expand the factual component of the complaint is that plaintiffs have waited too long to suggest the amendment. Plaintiffs have responded that defendants have not been prejudiced by the delay and, in fact, have long been aware of plaintiffs' intentions and discovery in this area. Of course, delay, by itself, is not sufficient reason to deny amendment of a complaint. Although it may have been better for plaintiffs to have earlier sought to amend the complaint, we agree with plaintiffs that defendants are not unduly prejudiced by the passage of time. Defendants have been made aware of plaintiffs' discovery and still have the opportunity to respond with their own discovery. Defendants have been served with plaintiffs' expert witness reports and proposed findings of fact and conclusions of law. We believe defendants have had some prior warning and will have adequate time to react to the new factual contentions to be added to the complaint. Finally, as a practical matter in this old and important litigation, the court believes that everything should be put out on the table for consideration, rather than having another case filed or a third trial over matters not considered in the upcoming trial. Therefore, the court finds that the delay in offering the amendment is not unduly prejudicial to defendants and that it does not warrant rejection of the proposed amendment.

Defendants have objected to the proposed addition of a cause of action under Title VI on the grounds of delay and the alleged futility of any action under Title VI. Once again, the court shall reject delay as a reason to deny the amendments to add a claim under Title VI. Defendants have not detailed their reasons for believing

that the addition of a claim under Title VI will require so much additional discovery or such a new approach to this litigation that plaintiffs' lateness in offering the amendment will be prejudicial to defendants. It is not evident to the court that the addition of the cause of action under Title VI (which may or may not have different elements than the other legal theories for plaintiffs' case) will seriously alter defendants' efforts to prepare for the trial of this case. Accordingly, the court shall not deny the proposed amendment on the grounds of delay.

Defendants claim that any Title VI action is legally futile because plaintiffs have failed to exhaust administrative remedies which are a prerequisite for suing under Title VI. The court disagrees that such exhaustion is necessary when private persons are suing non-federal entities for declaratory or injunctive relief other than the termination of federal funds. See Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir. 1983) (and cases cited therein); see also, University of California Regents v. Bakke, 438 U.S. 265, 419 n.26 (1978) (Stevens, J.); but see, Wrenn v. State of Kansas, 561 F.Supp. 1216 (D.Kan. 1983).

Defendants also argue that any Title VI action is flawed because plaintiffs have not or cannot pinpoint a program receiving federal assistance which practices discrimination. In response, plaintiffs contend that the school district receives so much federal aid that the entire district should be considered a program receiving federal aid. Defendants believe that a more pinpointed view of a program receiving federal aid is required after the decision in Grove City College v. Bell, 465 U.S. 555 (1984). The court finds that defendants' objection contains a factual element

pertaining to the type, purpose and effect of federal aid, which is better considered upon a motion for summary judgment than at this stage of the proceedings. Therefore, and for the other reasons aforestated, the court shall deny defendants' objection to plaintiffs' amendment adding a cause of action under Title VI.

The last element of plaintiffs' proposed amendment concerns the prayer for attorney's fees. No substantial objection to this portion of the amendment has been offered. Thus, given the discussion as to the other parts of the proposed amendment to the complaint, the court shall grant plaintiffs' motion to amend in full.

The court shall now discuss the further scheduling of this case. After receiving a letter from plaintiffs' counsel with regard to setting further deadlines in this case, the court held a telephone status conference with counsel from all sides of this dispute. From the discussion at the conference, it is clear that plaintiffs want this case to go to trial on May 5, 1986 in the hopes that a remedy to any violations can be imposed prior to the 1986-87 school year. Counsel for defendants school district and State Board of Education, on the other hand, believe that more time is needed to prepare for trial, and that in any case a remedy, if needed, could not be formulated prior to the next school year, even if trial started on May 5, 1986.

In considering whether to delay the trial of this case one more time, the following points appear relevant. First, it does not appear that there is sufficient time before May 5, 1986 for counsel to complete the discovery that needs to occur and be prepared for trial. Second, the court is not convinced that counsel have been dilatory. Both counsel and the court have been at the mercy of

expert witnesses who, understandably, have had a time-consuming task in sifting through over 30 years of facts. Third, even if counsel or the expert witnesses had been dilatory, the court would be reluctant in this case to hamper the complete presentation of each side's views by imposing sanctions or enforcing a schedule that prevented a full recitation of evidence and argument. Fourth, the court is in some agreement with defendants in their claim that a remedy might not be capable of formulation and execution prior to the next school year, even if the trial was held on May 5, 1986. Finally, the court has just indicated its intention to allow plaintiffs to amend the complaint. This provides some justification for permitting defendants additional time to prepare for the trial of this matter.

Accordingly, the court shall reschedule the trial of this case for October 6, 1986. A deadline for pretrial dispositive motions is hereby set for August 4, 1986. Finally, the court shall direct that counsel for each party submit to the court by March 25, 1986, proposed schedules for the identification of fact witnesses, the completion of expert witness depositions and fact witness depositions, a deadline for discovery and any other deadlines counsel believe are necessary. These submissions may be by letter. The court shall compare the submissions before scheduling further deadlines in this case.

In conclusion, plaintiffs' motion to amend is granted; the trial is rescheduled for October 6, 1986; pretrial dispositive motions shall be on file by August 4, 1986; and counsel are directed to submit proposed schedules for the further progress of this case by March 25, 1986.

IT IS SO ORDERED.

Dated this 11th day of March, 1986 at Topeka, Kansas.

Richard D. Rogers
United States District Judge