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.	)	No. T-316

RESPONSE OF UNIFIED SCHOOL DISTRICT NO. 501 TO PLAINTIFFS' POST-TRIAL BRIEF

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RESPONSE OF UNIFIED SCHOOL DISTRICT NO. 501 TO PLAINTIFFS' POST-TRIAL BRIEF

I. REPLY TO PLAINTIFFS' INTRODUCTION.

This is the liability phase of a school desegregation case. The precise questions for resolution are two: (1) Whether the schools operated by U.S.D. No. 501 are currently segregated; and (2) if current segregation exists, whether such segregation is a vestige of the prior de jure system or the result of intentional unconstitutional conduct by the defendants. Plaintiffs' introduction to their post-trial brief for the first time unequivocally states plaintiffs' misperceptions regarding the nature of this case and the questions presented. Plaintiffs mischaracter-

ize the issues as the single question of "whether the defendants have met their affirmative duty to eliminate segregation root and branch". Plaintiffs disavow any attempt to "establish segregation" or to establish "intentional segregation". Rather, plaintiffs assert that their sole burden is to show that the "effects" of School Board actions have not been "desegregative".[1]

Thus, the differing legal positions of the parties are clearly drawn. The position of U.S.D. No. 501 is authoritatively set forth in the District's Trial Brief and Proposed Findings of Fact and Conclusions of Law. Counsel will not burden the court by repeating those arguments. Rather, this brief is limited to specifically responding to the arguments of the plaintiffs.[2]

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[1] In footnote 4 the plaintiffs argue that the effects standard should be applied to Title VI, citing Soria v. Oxnard School District, 386 F. Supp. 539, 544-545 (C.D. Cal. 1974). As stated in the defendant District's trial brief and proposed conclusions of law, the United States Supreme Court, subsequent to 1974, has ruled that intent is an element in a Title VI claim. Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y., 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983); Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 716-717, 83 L.Ed.2d 661 (1985). (See Trial Brief § III H, pp. III-26 to III-30). Plaintiffs, with respect to their Title VI claim, also have the burden of proving intentional discrimination. Alexander v. Choate, 469 U.S. at 287.

[2] Unified School District No. 501 has not filed a specific pleading in response to the Plaintiffs' Proposed Findings of Fact and Conclusions of Law: Post-Trial. Those facts and legal arguments stated therein on which the plaintiffs principally rely are repeated in the Plaintiffs' Post-Trial Brief and are replied to herein. Defendant U.S.D. No. 501 has filed extensive proposed findings of fact, proposed conclusions of law, and other pleadings clearly stating its position. While not directly responding to the plaintiffs' proposed findings in a paragraph by paragraph analysis, the defendant's prior pleadings, together with this reply brief, constitute a response to the plaintiffs' proposals.

One other patently false characterization contained in the introduction to plaintiff's post-trial brief compels a response. Plaintiffs claim that defendant's case was an attempt to prove that "Brown I was wrongly decided" or that "Topeka's schools were not unequal". (Plaintiffs' Post-Trial Brief, pp. 1-2). No evidence was offered by defendants and not one sentence contained in any of defendant's briefs remotely suggest that Brown I was wrongly decided. Plaintiffs' statement is outrageous and irresponsible. As incredible is plaintiffs' suggestion that somehow evidence regarding the equality of the schools in this case is inappropriate. From the very beginning of this current action, with the filing of plaintiffs' motion to intervene, plaintiffs alleged inequality in the schools. Plaintiffs specifically claim that:

> 2. The facilities, equipment, curriculum and instruction provided in those schools with disproportionately high Black enrollment are substantially inferior to those provided for the schools where there is a disproportionately White enrollment.

See Brown v. Board of Ed. of Topeka, Shawnee County, 84 F.R.D. 383, 391 (D. Kan. 1979).

In every version of their complaint, including the final amended complaint dated May 22, 1986 (¶10), plaintiffs asserted inequality. The issues of fact, specifically adopted as a part of the final pretrial order, raise these issues. If plaintiffs did not intend to pursue these claims, perhaps defendants should seek reimbursement for the thousands of hours expended by School District staff in answering voluminous interrogatories directed to these very allegations. (See Pl. Ex. 8G,N-Q, 9 A-C,E,H, 10A-

B,I, and 11A,C,H,I,T, answers to various interrogatories propounded by plaintiffs).

Plaintiffs made the equality of facilities, equipment, curriculum and instruction--in short, the distribution of resources--a major issue in this case. The fact is that plaintiffs have been unable to prove this allegation in the face of defendants' evidence. Plaintiffs should simply admit that fact. They should not be permitted to wrongfully accuse defendants of turning back the clock.

II. RESPONSE TO PLAINTIFFS' ARGUMENT THAT "THE TOPEKA SCHOOL BOARD HAD A DUTY TO END SEGREGATION."

The plaintiffs' arguments regarding affirmative duty are beguiling, yet fatally simplistic. No one can doubt that under the mandate of Brown I and its progeny the defendant District had a duty to end segregation. However, this duty, like most legal duties, cannot be regarded in the abstract but must be placed in its proper context. The duty is merely the starting point of school desegregation law.

Plaintiffs cite Green, Columbus II, and Dayton II as giving rise to an affirmative duty which they allege has been breached by the defendant Board. In so contending, the plaintiffs fail to analyze the origins of this duty and its limited applicability to this litigation. As the following analysis will show, the affirmative duty of a district, as stated in Green, relates primarily to its obligation to propose a desegregation plan. Obviously, this aspect of the affirmative duty has no bearing on this liability litigation. In addition, the affirmative duty as

stated in Dayton II relates to whether or not a district has eradicated the effects of a previously dual system. If a district has failed, vestiges of such a dual system will remain. Only in this sense, as shown below, are allegations of breach of affirmative duty of significance in liability litigation.

The first case relied upon by the plaintiffs is Green v. County School Bd. of New Kent Co., Va., 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) (hereinafter Green). The Green litigation was initiated in March of 1966, when the petitioners sought injunctive relief against the respondent's continued maintenance of a segregated system. A Virginia statute, which divested local boards of authority to assign children to particular schools and placed that authority at the state level, had not been repealed until after initiation of the litigation. Five months after the suit had been brought, the district, in order to remain eligible for federal financial aid, had adopted a freedom of choice plan for the desegregation of the schools. The district court approved the freedom of choice plan, and the Fourth Circuit affirmed. The Supreme Court granted certiorari to consider, 13 years after Brown II commanded abolition of a dual system, the effectiveness of the school board's freedom of choice plan to achieve desegregation. The court held that a plan which "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system" is intolerable. Id., 391 U.S. at 438. The freedom of choice plan did not satisfy this standard, and the school was held to have failed to comply with its "affirmative duty to take whatever steps might be necessary to

convert to a unitary system. . . " Id., 391 U.S. at 438-439. The affirmative duty addressed in Green was that of adopting a desegregation plan which would accomplish the constitutionally required goal, after a finding of liability.

Plaintiff's also rely upon Columbus II, Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979). Columbus II developed the doctrine of affirmative duty first announced in Green. The appeal challenged the ordering of a system-wide remedy. The Supreme Court affirmed. When examining the legal basis for ordering such remedy, the court expanded upon the affirmative duty announced in Green. It held that the board had not fulfilled that duty, as evidenced by the fact that the dual school system had not been disestablished. Vestiges of the prior de jure dual system remained at the time of trial, in that most blacks were still going to black schools and most whites to white schools. Id., 443 U.S. at 537. The court did not hold that a violation of the affirmative duty per se resulted in liability. Rather, the court's analysis of the board's failure to fulfill its affirmative duty culminated in a finding of vestiges of the prior de jure system. Current system-wide segregation was held to be unconstitutional as resulting from recent and remote intentional segregative actions of the Columbus board. Id., 443 U.S. at 538.

The third case relied upon by the plaintiffs, Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (hereinafter Dayton II), clarifies this development of a board's affirmative duty within the context of the liability

phase of desegregation litigation. In Dayton II, the affirmative duty was identified as the duty to "eradicate the effects" of the prior dual system. Id., 443 U.S. at 437. Thus, in liability litigation, one determines whether or not the duty has been fulfilled by answering the question of whether vestiges of the dual system remain. If there are no present vestiges, the current racial composition of the schools does not reflect the system-wide impact of the board's prior discriminatory conduct, and the affirmative duty has been fulfilled. Id., 443 U.S. at 538.

This interpretation of the affirmative duty as applied to the question of liability was followed by the court in Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) (hereinafter Keyes). There, the "affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system'" is equated to the duty to "eliminate from the public schools . . . 'all vestiges of state-imposed segregation.'" Id., 413 U.S. at 200. Thus, the Keyes court links the rule of Brown II with the affirmative duty of Green.

The foregoing Supreme Court decisions relied upon the plaintiffs show that the affirmative duty of a school board has different meanings in the remedy and liability phases of school desegregation litigation. In the liability phase, such as is now before this court, the affirmative duty relates to the question of whether current segregation, if such exists, is a vestige of a prior unconstitutionally segregated system. Under this analysis,

as set forth in Columbus II and Dayton II, absent a currently segregated system, any alleged failure to fulfill the affirmative duty in the past cannot be the basis for a finding of liability. Failure to fulfill the duty is evidenced solely by a current condition of segregation shown to be a vestige of a prior de jure system.

When discussing their position that the Topeka School Board had an affirmative duty to end segregation, plaintiffs argue that the root and branch affirmative duty standard of Green was not a departure from the court's pronouncement in Brown. This position is clearly wrong. (See Trial Brief of Defendant Unified School District No. 501, hereinafter "Trial Brief", § II B, pp. II-6 to II-16). To the extent, if any, that the Board's conduct is to be measured by past desegregation standards, that standard is clearly evolving and not static. Examination of the numerous district court decisions which led to the Supreme Court's decision in Swann dramatically illustrates the change signaled by the court's Green decision. The Charlotte-Mecklenburg desegregation litigation was originally filed in 1965. Swann v. Charlotte-Mecklenburg Board of Education, 243 F. Supp. 667 (W.D.N.C. 1965). That litigation led to the approval of a plan assigning pupils by neighborhoods, with freedom of choice for both pupils and faculty to transfer to other schools without the necessity of giving any reason for the requested transfer. Although the result was many one-race schools, the plan was affirmed. Swann v. Charlotte-Mecklenburg Board of Education, 369 F.2d 29 (4th Cir. 1966). The plaintiffs filed a Motion for Further Relief with the district

court on September 6, 1968, after the Supreme Court's decision in Green. Swann v. Charlotte-Mecklenburg Board of Education, 300 F. Supp. 1358 (W.D.N.C. 1969). The court held the 1965 plan inadequate under the expanded Green doctrine and adopted the following conclusion of law:

> 1. Since 1965, the law has moved from an attitude barring discrimination to an attitude requiring active desegregation. The actions of the School Boards and district courts must now be judged under Green v. New Kent County rather than under the milder lash of Brown v. Board of Education.

Id., 300 F. Supp. at 1372 (emphasis added). The court expressly found that the board had in good faith operated for four years under a court order which reflected the general understanding of 1965 about the law regarding segregation. The court noted that the "rules of the game have changed, the difference between 1965 and 1969 being simply the difference between Brown of 1955 and Green of 1968." Id. Likewise, if this court should evaluate the conduct of those responsible for the Topeka schools on a year-by-year basis, the standard under which such conduct must be judged is an evolving standard, not current desegregation standards.

In conclusion, the defendant School Board submits that the affirmative duty to desegregate, as advocated as the standard of conduct by the plaintiffs, is an overly simplistic statement of desegregation legal principles. Under Columbus II and Dayton II, plaintiffs' allegation of breach by the defendant district of the affirmative duty is relevant only to the extent that there exists current segregation which is a vestige of prior de jure segregation.

III. THE PLAINTIFFS MISPERCEIVE THE PROPER ALLOCATION OF THE BURDEN OF PROOF WHEN ARGUING "THE TOPEKA SCHOOL BOARD HAS THE BURDEN OF SHOWING IT ENDED SEGREGATION".

Plaintiffs move from their over-simplistic discussion of the affirmative duty to the unsupported proposition that the "burden of proving that the affirmative duty has been met rests with the School Board". When so arguing, the plaintiffs fail to inform the court as to the plaintiffs' burden of proof and under what conditions the burden of rebuttal shifts to the defendants.

This court has previously ruled that the plaintiffs have the burden to prove that segregated schooling exists and that it was brought about or maintained by intentional state action. Brown v. Board of Education, 84 F.R.D. 383 (D. Kan. 1979). The defendant Board respectfully submits that the following authorities establish that plaintiffs' fulfillment of this burden is the prerequisite to any burden of proof, or burden of production, being imposed upon the defendant Board. It is only once that the plaintiffs have shown unconstitutional segregation, segregation brought about by intentional state action or as a vestige of the prior dual system, that the District has any burden of proof or burden to produce evidence. E.g., Dayton II, 443 U.S. at 537-540; Keyes, 413 U.S. at 208-211.

Plaintiffs rely primarily upon Keyes and Dayton II when arguing that the defendant Board has the burden to prove that it ended segregation. However, neither case supports their position. The burden of proof issue arises in Keyes primarily with regard to the Keyes presumption, under which a presumption of

system-wide unconstitutional segregation arises once the plaintiff has established intentionally segregative schools in a meaningful portion of a school district. Keyes, 413 U.S. at 208. Once the plaintiffs have satisfied this prerequisite, a defendant board is given the opportunity to show that their actions as to other segregated schools within the system were not also motivated by segregative intent. Id., 413 U.S. at 209. Additionally, if the school board cannot disprove segregative intent, it can rebut the presumption by a showing that its past segregative acts did not create or contribute to the current segregated conditions in the other areas of the district. Id., 413 U.S. at 211.

Although citing the Keyes burden-shifting principle on pages 5 and 6 of their brief, plaintiffs do not identify whether or in what manner they rely upon the Keyes presumption. The defendant Board has previously argued that the presumption has no applicability to the Topeka schools as they existed at the time of Brown I, no applicability to the schools added to the Topeka system, and very limited applicability to the current conditions in U.S.D. No. 501 schools. (Trial Brief, § III G, pp. III-23 to III-26). Plaintiffs fail to respond to these arguments, except for including as a proposed conclusion of law citation to the Keyes presumption as a means to establish purposeful segregation in the junior and senior highs, based upon the alleged existence of a feeder school pattern. (Plaintiffs' Proposed Conclusions of

Law, ¶28, citing Brown v. Bd. of Ed., 84 F.R.D. 383, 401 (1979).[3] As stated in the Plaintiffs' Proposed Findings of Fact, ¶51, prior to 1979 there was no feeder pattern.[4] Therefore, the factual predicate for application of the Keyes presumption to establish past purposeful or de jure segregation in the junior and senior high levels is absent.

Further, under the Keyes presumption, the burden of proof does not shift to the defendant Board until the plaintiffs have established current unconstitutional segregation in a meaningful portion of a district. Only after establishing current unconstitutional segregation does the burden shift for purposes of rebuttal. Yet plaintiffs have asserted that they do not have a burden to show current segregation and even disavow having established this necessary prerequisite. Plaintiffs have failed to show the applicability of the Keyes presumption and its attendant burden-shifting principle to this litigation.

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[3] When holding that allegations of segregation in all schools, not only the elementary schools, would be an issue before the court, this court relied upon the Keyes presumption in its 1979 decision. The defendant Board does not challenge this holding.

[4] The junior high schools were desegregated at the beginning of the 1941-42 school year. As of 1954, there was only one high school in Topeka attended by all students without regard to race. No systematic feeder pattern existed among elementary schools and the junior high schools between 1966 and 1979. Boundaries of the elementary schools were not consistently conterminous with a junior high school attendance area. In most instances, prior to 1979, no elementary school attendance area was assigned in toto to a single junior high school. In many instances, assignment was to three different junior high schools. (Derived from Pl. Ex. 8H).

Likewise, Dayton II, 443 U.S. at 526, also cited by plaintiffs, does not support their contention that the defendant Board has the initial burden to prove that it has ended segregation. In Dayton II, liability rested upon a finding of a prior de facto segregated system, coupled with the board's failure to eliminate vestiges of that dual system. Such a case on the part of the plaintiffs is denoted as a prima facie case. Under Dayton II, once such a prima facie case is made, a district can avoid a finding of liability by coming forth with evidence to deny either that the current racial composition of the school population reflects a system-wide impact of the board's prior discriminatory conduct, or by showing that actions that increase or continue the effects of the dual system "serve important and legitimate ends". Id., 443 U.S. at 538. Thus, under Dayton II, the initial burden of proof to establish a prima facie case remains upon the plaintiffs. The burden shifts to the defendant only after a prima facie case has been made. Here plaintiffs disavow any attempt to establish a prima facie case, as plaintiffs state they do not seek to show intentional segregation.

The circuit court cases cited by the plaintiffs likewise are misapplied by plaintiffs. In U.S. v. Gadsden Cty. Sch. Dist., 572 F.2d 1049 (5th Cir. 1978), the plaintiffs challenged as segregative the district's plan to utilize ability grouping as a method of assigning students to particular classrooms in five elementary schools. The Court of Appeals affirmed the district court's finding that the ability grouping resulted in segregation by concentrating white students in upper sections and black

students in lower sections of each grade. In the Fifth Circuit, ability grouping which results in segregation is regarded as a vestige of the educational disadvantage caused by prior segregation. Thus, the practice could be court-approved as an element of a desegregation plan only if the school district could demonstrate that the assignment method was not based on present results of past segregation. Again, the shifting burden of proof provided a vehicle for the defendant to rebut the finding of intentional segregation. The plaintiffs' citation to Brinkman v. Gilligan, 583 F.2d 243, 253 (6th Cir. 1978), aff'd sub nom, Dayton II, 443 U.S. 526 (1979) is to a portion of the decision discussing the pre-Brown violations of the Ohio School District. The plaintiffs fail to show the relevancy of de facto pre-Brown I segregation to this litigation.

The legal standards regarding affirmative duty and burden of proof urged by the plaintiffs are not appropriate in this litigation. This court should adhere to its order of November 29, 1979, in which it defined the plaintiffs' dual burden of proof to show that segregated schooling exists and that it was brought about or maintained by intentional state action. Now plaintiffs are in essence seeking a redetermination of that ruling by arguing that the defendant Board has the burden to show that it has eliminated segregation without the necessity of plaintiffs' satisfying their burden to establish a prima facie case. Plaintiffs' position should be rejected.

Additionally, plaintiffs make too much of the historical fact that the Topeka elementary schools were formerly segregated

as a matter of state law, a practice held unconstitutional in Brown I. A finding of de jure segregation does not forever burden a school district. Once a system achieves unitary status, the prior finding of de jure segregation is of no legal import. Riddick by Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir.), cert. denied ___ U.S. ___ (1986). Further, assuming, for the sake of argument, the Topeka schools have never attained unitary status subsequent to 1954, the finding of de jure segregation in the elementary schools at most enables the plaintiffs to satisfy their burden to prove intentional segregation through establishing that current segregation is the causal result of the prior de jure system.

However, vestige analysis, if applicable to this litigation, must be placed in its proper perspective. The problem posed is that of establishing that current segregation is the direct result of segregation imposed as a matter of state law over 32 years ago. The elapse of time alone renders proof difficult. Bradley v. Baliles, 639 F. Supp. 680, 688-689 (E.D. Va. 1986). As discussed below, the factual record does not permit a finding that the racial composition of student assignments in the Topeka elementary schools is a vestige of the prior de jure system. Further, as a matter of law, in the Topeka schools vestige analysis is limited to student assignments in the elementary grades. The Topeka schools were never held to be de jure segregated as to race in other than student assignment elementary grade levels. The vestige theory cannot be used, therefore, for upper grade assignments or the other Green factors where there is no pre-

vious finding of de jure segregation. Further, it cannot be over-emphasized that to the extent the District has achieved unitary status subsequent to Brown II, vestige analysis is barred. (See Trial Brief, § III F 1).

IV. RESPONSE TO PLAINTIFFS' POSITION THAT "CLOSE IS NOT GOOD ENOUGH".

Plaintiffs' "close is not good enough" argument again misperceives the nature of this litigation. Plaintiffs argue a position appropriate in remedy, not liability litigation. Plaintiffs' only legal authority is Green, 391 U.S. at 430, a remedy case. Green posed the question of whether the respondent school board's adoption of a freedom of choice plan constituted adequate compliance with the board's responsibility to achieve an integrated system after the liability issue had been determined.

By urging adoption of the Green standard, plaintiffs would have this court adopt the standard for effectiveness of a desegregation plan as if it were the standard for finding an unconstitutionally segregated system. The standards are not interchangeable. (See Trial Brief, § II D 3). Further, the plaintiffs' position disregards the additional requirement in liability litigation of finding that such current segregation is the result of intentional board action or a vestige of a prior de jure system. The plaintiffs' argument misses the mark in this liability litigation.

Plaintiffs' argument that "close is not good enough" should also be rejected as urging the adoption of a rigid standard for desegregation unsupported by precedent. As the Supreme Court

stated in Swann, when evaluating the effectiveness of a desegregation plan regarding student assignments, "it should be clear that the existence of some 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, 402 U.S. at 26. Swann also expressly holds that within the context of a remedial plan, "mathematical ratios [are] no more than a starting point in the process . . . , rather than an inflexible requirement." Id., 402 U.S. at 25. With respect to student assignments, the court has not adopted the proposition that "close is not good enough" as a rule of law. Rather, the task of the courts is "to correct, by a balancing of the individual and collective interests, the condition that offends the constitution". Id., 402 U.S. at 16.

Defendants have never asserted that U.S.D. No. 501 is "'almost' a desegregated system", as argued by the plaintiffs on page 7 of their brief. Rather, it is the position of the defendant Board, as stated in its trial brief, that the responsible school authorities have "complied with all applicable legal requirements regarding desegregation from 1955 to the present." (Trial Brief, § II). The defendant Board's position regarding unitary status was further illuminated in defendant's proposed findings of fact and conclusions of law. (Proposed Findings of Fact and Conclusions of Law Submitted by Defendant Unified School District No. 501, hereinafter referred to as "Proposed Findings", § III, pp. 65-71).

As to the current status of the schools, it is the position of the defendant Board that upon implementation of the 1976 Long-Range Plan in school year 1980-81 and at the present, U.S.D. No. 501 has achieved unitary status under the expanded doctrine of integration with regard to each of the six Green factors. Even under plaintiffs' theory of this case, only a handful of schools are "racially identifiable". Deviations outside this target range, however, do not prevent a school system from attaining unitary status. Whittenburg v. School Dist. of Greenville County, 607 F. Supp. 289, 296 (D.S.C. 1985). Only two Topeka schools had a majority of black students during the 1981-82 school year. The racial statistics of U.S.D. No. 501 schools do not even come close to the "one race" or "predominantly one race" schools referred to in Swann or the racial imbalances noted in Dayton II. With respect to faculty and staff, it is the good faith effort to recruit minority faculty members, not compliance with specific ratios, which is the requirement for unitary status. Fort Bend Indep. School Dist. v. City of Stafford, 651 F.2d 1133, 1137 (5th Cir. 1981). Even the plaintiffs do not seriously contend that U.S.D. No. 501 has failed to attain unitary status with respect to facilities, transportation policies, and extracurricular activities. The Topeka schools provide an equal educational opportunity in a system in which segregation by race is neither tolerated nor practiced. The Topeka schools are unitary.

V. RESPONSE TO THE PLAINTIFFS' LEGAL ARGUMENTS INCLUDED WITHIN THEIR DISCUSSION THAT "THERE REMAIN RACIALLY IDENTIFIABLE SCHOOLS IN TOPEKA TODAY".

Plaintiffs take the position that the presence of schools which are racially identifiable by student assignment and by staff assignment per se entitles the plaintiffs to relief. This position should be rejected by this court. As shown below, the presence of schools which are racially identifiable by student and/or staff assignment does not constitute a condition of unconstitutional segregation. Further, precedent does not support strict application of Dr. Foster's plus or minus 15 percent test of racial identifiability with respect to student assignments.

Racial identifiability, as defined by the plaintiffs, cannot be equated to segregation. The presence or absence of segregation is determined by examination of the system as a whole, in light of each of the six factors adopted by the Supreme Court in Green. (Trial Brief, § II D, pp. II-16 to II-26). Definitions of integrated schools focus upon equal educational opportunity in a system free of racial isolation. E.g., Keyes v. School Dist. No. 1, Denver, Colo., 540 F. Supp. 399, 403-404 (D. Colo. 1982); Penick v. Columbus Bd. of Ed., 583 F.2d 787, 814 (6th Cir. 1978), aff'd 443 U.S. 449 (1979); Milliken v. Bradley, 433 U.S. 267, 287, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (Milliken II). Justice Powell states as follows:

> The foregoing prescription (of an integrated system) is not intended to be either definitive or all-inclusive, but rather an indication of the contour characteristics of an integrated school system in which all citizens and pupils may justifiably be confident that racial discrimination is neither prac-

> ticed nor tolerated. An integrated school system does not mean--and indeed could not mean in view of residential patterns of most of our major metropolitan areas--that every school must in fact be an integrated unit. The school which happens to be all or predominantly white or all or predominantly black is not a "segregated" school in an unconstitutional sense if the system itself is a genuinely integrated one.

Keyes, 413 U.S. at 226-227 (Powell, J., concurring). The presence of racial imbalances in student assignments does not defeat a finding of unitary status. Riddick by Riddick v. School Bd. of City of Norfolk, 784 F.2d at 521. Likewise, where the percentage of minority faculty is lower than the percentage of minority students in a system, schools may nevertheless be unitary. Fort Bend Indep. School Dist. v. City of Stafford, 651 F.2d 1133 (5th Cir. 1981). It "would be unrealistic to expect every school to be kept within the same racial balances". Whittenburg v. School Dist. of Greenville County, 607 F. Supp. 289, 299 (D.S.C. 1985). Only when racial imbalances rise to constitutional violations is the matter a proper subject of a court remedy. Id., 607 F. Supp. at 304.

The plaintiffs' position taken in this litigation is nearly identical to that rejected by the Fifth Circuit in Price v. Denison Independent School Dist., 694 F.2d 334 (5th Cir. 1982). The Price plaintiffs 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 was principally 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 had operated a school system completely segregated by race. An initial 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 that 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 that the district court had 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". Id., 694 F.2d 347-348.

The circuit court carefully examined the Supreme Court's use of mathematical ratios in Swann. It concluded that the Supreme Court's "presumption against schools that are substantially disproportionate in their racial composition" referred to schools which were all or predominantly one race and does not apply to schools which do not meet that definition. The court specifically noted that 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 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." Id., 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. Plaintiffs' burden of proof is not satisfied by statistical analysis alone.

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

Similarly, the presence of racially identifiable schools in the Knoxville school system was held not to defeat unitary status in Goss v. Board of Education of City of Knoxville, Tenn., 482 F.2d 1044 (6th Cir. 1973), cert. denied 414 U.S. 1171 (1974). The Knoxville school system, a previously de jure system under court-ordered desegregation, was held not to be in violation of the Constitution, despite the presence of a number of racially

identifiable black and white schools on the basis of pupil enrollment. The following facts regarding the Knoxville schools are set forth in Higgins v. Board of Education of City of Grand Rapids, 508 F.2d at 787. The schools had a black enrollment of 16.5 percent. Only eight out of 64 schools met the statistical standard for racial balance. The court held, "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." Goss v. Board of Education of City of Knoxville, Tenn., 482 F.2d at 1046, quoting Swann, 402 U.S. at 24.

Moreover, the analysis of racial identifiability with respect to school attendance criteria has focused upon the elimination of one-race black schools, not the elimination of one-race white schools. Ross v. Houston Independent School Dist., 699 F.2d 218 (5th Cir. 1983) held that the Houston schools were unitary, even though two elementary schools remained all white. Id., 699 F.2d at 226. "Constructing a unitary system does not require a racial balance in all of the schools." Id., 699 F.2d at 227-228. In Price v. Denison Independent School Dist., 694 F.2d at 364, the court held that the district court erred when holding that three all-white elementary schools were racially identifiable under the Foster analysis and therefore presumptively vestiges of prior segregation. School desegregation law addresses the elimination of all-black schools, not the elimination of all-white schools. Id., 694 F.2d at 365. In support of its analysis, the court cited eleven Fifth Circuit opinions in

which the court had not required the termination of all-white or virtually all-white schools. One of these was Horton v. Lawrence County Bd. of Ed., 578 F.2d 147 (5th Cir. 1978), cited for the proposition that school attendance districts were integrated despite the presence of three all-white schools in a school district having 13 schools with a 24 percent black enrollment and no all-black or virtually all-black schools. The existence of the all-white schools was attributed to residential patterns. Id., 578 F.2d at 150. Another case was Boykins v. Fairfield Board of Education, 457 F.2d 1091 (5th Cir. 1972), which addressed a court-ordered remedy. The Fifth Circuit held that the continuation of an all-black school violated the school district's responsibility to terminate the dual school systems at once. However, the circuit court did not require a change in elementary schools with over 88 percent white enrollment in a district having a 57.4 percent overall black enrollment. Similarly, the Price court cited U. S. v. Board of Ed. of Valdosta, Ga., 576 F.2d 37 (5th Cir.), cert. denied sub nom, Huch v. U.S., 439 U.S. 1007 (1978), where the court indicated that in a 56 percent black district, schools over 90 percent black were racially identifiable. The court did not, however, indicate that schools having a 92 percent white enrollment were similarly identifiable. In United States v. Texas Ed. Agency, 600 F.2d 518 (5th Cir. 1979), also relied upon in Price, the court's entire opinion regarding amendments in the court-ordered remedy focused upon predominantly minority schools, even though the reported case reveals that there were ten over 90 percent white schools in a 58 percent white district.

The foregoing cases, plus others cited in the Price opinion, support the Fifth Circuit's analysis that racial identifiability with regard to white schools in a white majority system does not give rise to an inference of vestiges of a prior de jure system. With respect to vestige analysis, as with respect to evaluation of remedies, the focus is upon the elimination of all-black schools, not all-white schools. There are no Topeka schools which are virtually all black. Of the 26 elementary schools, plaintiffs allege that 15 are racially identifiable under Dr. Foster's analysis. However, only seven of these are identifiable as minority schools. The remaining eight, identifiable as white by Dr. Foster, are, under the Fifth Circuit's analysis, entitled to less significance in the court's determination of whether or not the Topeka schools are segregated.

The plaintiffs' position in their brief that the Foster plus or minus 15 percent yardstick has been strictly followed as the measure of segregation in numerous liability cases is simply wrong. The defendant Board understands that the state defendants are thoroughly briefing the authorities cited by plaintiffs and will not belabor the point. Most cases adopting or giving lip service to the Foster plus or minus 15 percent standard are remedy cases. E.g., Clark v. Board of Educ. of Little Rock School Dist., 705 F.2d 265 (8th Cir. 1983); Kelley v. Metropolitan County Bd. of Educ., etc., 687 F.2d 814 (6th Cir. 1982). The Foster ratios, although admissible as evidence, have no particular legal significance. They do not establish unlawful segregation. Price v. Denison Independent School Dist., 694 F.2d at

334. Such statistics are merely a starting point, one bit of evidence to be evaluated by this court when determining whether or not the Topeka schools are integrated. Racial identifiability, as defined by plaintiffs, is not the factual issue before this court.

Thus, plaintiffs' position that the presence of racially identifiable schools entitles them to relief is fatally flawed. First, plaintiffs' position totally ignores their dual burden of proof to establish a currently segregated system caused by intentional Board action or remaining as a vestige of a prior de jure system. Secondly, the presence of racially identifiable schools under the Foster statistical analysis does not constitute a segregated system as a matter of law. The Supreme Court in Swann recognizes that the presence of some one-race schools does not render a desegregation plan insufficient. Further, the Supreme Court has never held that the presence of racially identifiable white schools in a system which is predominantly white constitutes segregation. See Price v. Denison Independent School Dist., 694 F.2d at 364-365. "In determining whether a dual system has been disestablished, Swann . . . mandates that matters aside from student assignments must be considered." Columbus II, 443 U.S. at 460. When all six Green factors are considered to evaluate the entire school system, the Topeka schools are an integrated system providing education without regard to race.

VI. RESPONSE TO PLAINTIFFS' LEGAL ARGUMENT REGARDING IMPACT OF HOUSING PATTERNS.

Plaintiffs, on pages 97 and 98 or their post-trial brief, argue that the defendant Board has full responsibility to eradicate all racial imbalances in schools which are brought about by housing patterns, without regard to the cause of those patterns. Again, the plaintiffs paint with too broad a brush. Schools must respond only to changes for which they can be considered responsible. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 436, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976) (hereinafter "Pasadena"); Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974).

After undertaking actions to desegregate, a school district is not required to adjust school attendance patterns to reflect demographic changes which are not under the control of the school district. Pasadena, 427 U.S. at 435-436. Where resegregation of a particular school is due to "urban renewal, voluntary housing preferences of residents, and apparent discriminatory housing practices of federal agencies, local public housing bodies, . . . and conventional loan institutions, the district is not required to respond to such changes." United States of America v. Unified School District No. 500, Kansas City (Wyandotte County), Kansas, et al., Memorandum and Order, p. 70 (D. Kan., Civil Action No. KAC-3738, March 18, 1981).

In Topeka, some racial imbalances have resulted from changed residential patterns beyond the control of the District, such as federally funded low income housing projects. This is

particularly true with respect to some elementary schools. For example, the black enrollment at Belvoir was significantly increased as a result of federally funded housing projects. Prior to such projects, when Belvoir was added to the Topeka schools in 1960, Belvoir was not a racially identifiable school under the Foster-type analysis. By 1966, after the construction of Pine Ridge and Trail Ridge, two federally funded housing projects, in the Belvoir attendance area, Belvoir had become 66 percent black, and thus racially identifiable according to the plaintiffs. Contrary to plaintiffs' assertions, the evidence shows that the racial balances of other Topeka schools were also adversely affected by such projects.

Moreover, the law is absolutely clear that a school district has no duty to adjust school attendance patterns to correct racial imbalances brought about by demographic changes after the schools have become unitary. Swann, 402 U.S. at 31-32; Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1435 (5th Cir. 1983). "Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied." Davis, 721 F.2d at 1435. The defendant District contends that it became unitary upon full implementation of the 1976 Long-Range Facilities Plan. If this court should hold in favor of the District on this issue, such unitary status is a defense to the District's failure, if any, to adjust school attendance districts in response to recent demographic changes.

The defendant Board acknowledges the general principle, relied upon by plaintiffs, that school board actions "may have a

profound reciprocal effect on the racial composition of residential neighborhoods." Keyes, 413 U.S. at 202 (emphasis added). However, whether such reciprocal effect exists is a question of fact for determination by the court. The defendant Board submits that the existing racial housing patterns in the City of Topeka have not been a response to segregative actions taken by the defendant Board. Plaintiffs offered no competent evidence regarding Topeka to support their argument. "[R]esidential patterns are typically beyond the control of school authorities." Austin Independent School District v. United States, 429 U.S. 990, 994, 97 S.Ct. 517, 50 L.Ed.2d 603 (1976) (Powell, J., concurring).

VI. RESPONSE TO THE TESTIMONY OF PLAINTIFFS' EXPERTS AND THE REASONS THEIR TESTIMONY SHOULD NOT BE CREDITED.

A myriad of reasons exist for rejecting the testimony of plaintiffs' experts relied upon by plaintiffs in their post-trial brief. As shown below, the existence of personal bias, financial gain, long-term friendship, and the lengths to which plaintiffs' counsel went to direct and fashion the experts' testimony were demonstrated at trial. Further, important inconsistencies within the testimony of some of plaintiffs' experts demonstrated the length to which they were willing to go in an effort to assist the plaintiffs. Not only was the partiality of plaintiffs' experts exposed, but also the unreliability, unscientific and arbitrary approaches taken by these experts was demonstrated. For these reasons, as described at length herein, the testimony of plaintiffs' experts should not be credited.

A. William Lamson.

William Lamson, a self-styled demographic analyst since 1970, last testified in a school desegregation case over four years ago in 1982. (Tr. 361-363). Mr. Lamson admitted that he has worked with Dr. Gordon Foster on "numerous occasions" in desegregation cases. While he thought 60 occasions was a "little high", somewhere between 50 and 90 percent of his time he has worked with Dr. Foster. (Tr. 367).

To determine racial identifiability of schools within the Topeka Public School system, first Lamson applied to each school his rule of thumb--plus or minus 15 percent variance from the system-wide average of black enrollment. He then identified the schools that fell outside the 15 percent and looked at them. (Tr. 373-374). When the system-wide average of black students is under 15 percent, Lamson uses a standard of plus or minus the district-wide average to determine racial identifiability.[5] For example, if a school system was 12 percent black, an individual school becomes racially identifiable black at 24 percent and would become racially identifiable white at "zero, or less than one" percent black. (Tr. 375, 420). Under Lamson's analysis, at no time were any of the high schools in Topeka racially identifiable. (Tr. 376-378).

It was not until August, 1984, that Mr. Lamson actually started writing a draft of his report analyzing the Topeka Public

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[5] As demonstrated previously (supra, § V), this formalistic and mechanical approach in determining racial identifiability is arbitrary and has been rejected by a number of courts.

Schools. (Tr. 398). Mr. Lamson was still receiving information from plaintiffs' counsel in August and September of 1984. (Tr. 399).

At the time Mr. Lamson was in the process of writing his report, he received a copy of the August 22, 1984 letter addressed to Robert Longman of Central Surveys from plaintiffs' counsel, Chris Hansen. (Def. Ex. 1001). At page 2, plaintiffs' counsel states:

> We will be presenting expert testimony that will show that many or even most of the conscious decisions the school board has made since '54 in these areas have contributed to the continued segregation of Topeka schools.

Mr. Lamson admitted that was the main part of what he was supposed to do in this case. (Tr. 408).

Likewise, while writing his report Mr. Lamson received a copy of a memorandum dated September 7, 1984, from Chris Hansen addressed to co-counsel regarding case status (Def. Ex. 1002), in which Mr. Lamson is identified by name in 12 different places and which outlined the "holes" in plaintiffs' case. (Tr. 413-415). No explanation was offered for Lamson receiving the lengthy memorandum. None is necessary.

Between October, 1982 and January, 1985, Mr. Lamson had billed the ACLU in total fees and expenses $51,993.17. (Tr. 441; Def. Ex. 1004A-C). During this time period, Mr. Lamson was paid $19,782. Since the end of December, 1984, Mr. Lamson has been carrying unpaid fees and expenses totaling $32,210. Considering the time which Mr. Lamson spent between January, 1985 and the commencement of this trial, he intends to bill the ACLU an

additional $18,000 in fees and expenses. In short, prior to taking the witness stand, Mr. Lamson had not yet been compensated for at least $50,000 worth of effort in this case. Since December of 1984, Mr. Lamson's fees and expenses for which he has billed the ACLU and which remain unpaid, total more than $32,000. He claimed part of the reason he has not pressed the ACLU for payment is to benefit him "personally relative to my tax position". (Tr. 441-442). This is an incredible explanation in view of the fact that the claimed principal source of Mr. Lamson's income is fee applications from school desegregation cases. Although he has a bookstore, it presently is losing money. (Tr. 372).

Lamson wrote his report in longhand. Every handwritten page of Lamson's report was submitted to the ACLU in whose New York office the report was typed on a word processor. It was then sent back to Mr. Lamson for further editing and for corrections. It was not written all at one time, but was provided to the ACLU in segments or chapters. (Tr. 400, 401).

In the Fall of 1984, after Mr. Lamson had completed approximately the first 100 pages, a discussion was held with plaintiffs' counsel, ACLU attorney Chris Hansen, who suggested that the report was getting too lengthy. (Tr. 401-402, 417). In the latter part of November, around Thanksgiving, 1984, Lamson began the rewrite of the first 100 pages and sent those off to Mr. Hansen and then continued with the mode established in the rewrite. Near the end of December, by Christmas of 1984, the second part of the report was submitted to Mr. Hansen--"I gave Mr. Hansen something to do over Christmas." (Tr. 403).

Thereafter, until completion of the report, a succession of sections was submitted to the ACLU office in New York, where it was typed and sent back to Lamson for editing. This occurred throughout January and February of 1985, except for the last week of February. The last week, Mr. Lamson went to New York for a final editing session with plaintiffs' counsel, Mr. Hansen, his staff, his secretary, and the people who were working on it. (Tr. 404).

In cross-examination, Mr. Lamson first asserted that other than taking out charts, he did not change the concept of his report in any material way and that there was only one draft of the report which he edited and was finalized in what is known as Plaintiff's Exhibit No. 219. (Tr. 403). This is absolutely false.

For example, Lamson initially testified that he did not ever express an opinion regarding whether the junior high schools of Topeka were desegregation--that he never made such a statement. (Tr. 435). Contrary to Mr. Lamson's testimony, a page from his draft of October 23, 1984--a typed version of what he got back from the ACLU after he submitted his handwritten portion--(Def. Ex. 1006), Mr. Lamson wrote, "The junior high schools had been desegregated in 1941 as a result of the litigation styled Graham v. Topeka. (Tr. 471). When confronted with this contradictory statement, Mr. Lamson attempted to explain by suggesting that it was left out "because I elected not to go back that far in considering this situation." (Tr. 471). Although his handwritten note to himself suggested that he should reword the statement, he took it out altogether. (Tr. 472).

Subsequently, Lamson tried to explain this difference, claiming that he and Mr. Hansen agreed that what he was doing was becoming too massive and that he was to cut it down "to a real succinct, concise area of analysis". He stated that he eliminated only the chart information. (Tr. 474).

Lamson finally admitted that when he told the court that he did not make any substantive changes--that all he did was take out the charts--that was not a completely true statement. The portion he excised regarding junior high schools being desegregated in 1941 made no reference to any chart. (Tr. 475).

Lamson maintained that there was only one draft of his report. When he received the typed version of his handwritten segments he would sometimes cut and paste certain portions together which resulted in the final report or he would, in some instances, rephrase them. But, he claimed there was only one draft. (Tr. 491-492). However, when confronted with several different pages of a prior draft, Lamson could not explain the differences in the pagination and format. (Compare Def. Ex. 1007B with 1007E). Clearly, there was more than one draft of Lamson's report.

Lamson also claimed that he never attempted to utilize a rule of thumb other than plus or minus the district-wide average up to 15 percent black, thereafter plus or minus 15 percent black of the district-wide average. (Tr. 492-494). He testified that he never used a different standard or guideline in attempting to analyze the School District. (Tr. 427). This falsehood was also exposed.

In his own handwriting, Mr. Lamson makes the following footnote, "Get explanation of racial identifiability from Chris [Hansen]. This is the first time in 14 years that I have ever used this sliding scale and I can find no statistical justification for it." (Def. Ex. 1007B; Tr. 497-499).

Finally, Lamson conceded that his attempted use of the sliding scale was a different definition of racial identifiability and that he attempted to use it. (Tr. 500-501). Although Lamson attempted to claim that his footnote was a "note of frustration to the typist"--she was to take the draft to Mr. Hansen and show him the difficulty he was having with the sliding scale (Tr. 500)--the next typed draft of that page still contains the footnote referring to racial identifiability. (See Def. Ex. 1007F; Tr. 505). In the margin of this typed version (Def. Ex. 1007F), in Mr. Lamson's handwriting is the following notation, "Be very careful to omit this from the machine on all copies." Mr. Lamson's incredible explanation for the reason it was omitted from all copies was "because it was not used". (Tr. 505). Based upon the numbers in his report, Lamson conceded that he could not find any statistical justification for the sliding scale. (Tr. 508).

Lamson testified he did not leave out any analysis in his final report that he had done in a prior draft. (Tr. 515). However, he failed to include an analysis he performed, which demonstrated a wide dispersion of blacks as early as the 1956-57 school year. (Tr. 518-520; Def. Ex. 1008A-B, draft pages of Lamson report showing black and white elementary student distribution in 1956-57 school year).

Perhaps one of the most telling points regarding Lamson's bias or perspective on what was appropriate in this case came about somewhat voluntarily when he claimed that professionally, even though schools were perfectly balanced today, if they had a history of being out of balance he would still have complaints. He believes that the schools should over-compensate, regardless of whether the law would require it or not. (Tr. 476-477). This explains Lamson's incredible testimony that Robinson Middle School is racially disproportionate when its racial composition really mirror-images the district-wide average every year since its opening to the present. (Tr. 486-488).

In conclusion, there are overwhelming reasons to reject the testimony of William Lamson. His testimony should be discredited for any and all of the following circumstances: the fact plaintiffs' counsel sent Lamson a copy of the memorandum discussing the "holes" in plaintiffs' case (Def. Ex. 1002) at a time when Lamson was in the early stages of writing the report; Lamson was still owed over $50,000 in fees and expenses for his report at the time he testified; every page of Lamson's report was typed and reviewed in the offices of plaintiiffs' counsel before it was finalized; and Lamson also changed his report and removed material which would have been favorable to defendants and tried to hide that fact from this court. These circumstances compel the rejection of Mr. Lamson's testimony.

B. Dr. Gordon Foster.

Although the extreme motivations and circumstances attendant to the testimony of William Lamson were not present in the testimony of Dr. Gordon Foster, good and sufficient reasons exist to doubt his formalistic approach and reject his testimony. In the opinion of Dr. David Armor, the racial balance concept utilized by Dr. Gordon Foster in this case was not the proper standard to utilize in assessing or evaluating the level of segregation in school desegregation cases today. First, on the liability side, racial balance is not the proper basis for evaluating a constitutional violation because it was fashioned originally to deal with a remedy once a violation has been shown. However, it is well established that in determining a violation you have to look at the causes and the explanation of how a school came to be a particular racial composition. "Merely looking at its racial balance or its deviation from the district-wide average I don't think has a great deal of bearing on the liability aspect whether school is in violation of the Constitution." (Tr. 2566-2567).

Dr. Gordon Foster's standard is not a good standard with respect to the remedy phase of a desegregation case as well. Indeed, the concept has had a very negative impact on attempts to attain integrated school districts. (Tr. 2567). What we have learned today is that mandatory programs such as busing have led to such a substantial degree of white departure, white flight. (Tr. 2568). The white flight problem has been so severe in most central city school districts that in those districts pursuing integration we have had resegregation because of the loss of the

of students, not the attainment of some statistical or mathematical distribution of school percentage--but a meaningful opportunity for contact among black and white students. "That kind of contact can be attained in a whole variety of different configurations other than a system that is strictly racially balanced." (Tr. 2570-2571).

In this particular case, there are at least two problems with Dr. Foster's approach using racial identifiability. Using his fairly narrow definition of racial balance, you fail to look at the causes of how a school came to be a particular racial composition. We know that demographic changes are a major cause of unequal distribution of students and races among schools. (Tr. 2571). Reviewing Dr. Foster's approach in recent cases, it is clear that the plus or minus 15 percent has not been utilized. There are cases where predominantly one race or mostly segregated schools are permitted. (Tr. 2572-2573; also see supra, § V).

At one time, Dr. Foster was a consultant to U.S.D. No. 501. One of the recommendations he had regarding the School District's racial composition was to utilize a formula of plus or minus 20 percent and bring all schools within that guideline. (Tr. 696-697). By utilizing a plus or minus 20 percent variance, Dr. Foster conceded that all of the "racially identifiable white" schools would become racially non-identifiable and two of Dr. Foster's seven "racially identifiable minority" schools would no longer be racially identifiable at the elementary level. (Tr. 801-802).

In addition, the formal report prepared by Dr. Foster analyzed student enrollment on the basis of minority versus white enrollment. However, at trial, after the taking of Dr. Foster's deposition in September, he conducted a separate analysis of black versus white. (Tr. 750). Plaintiffs never attempted to introduce into evidence Dr. Foster's report.

In Dr. Foster's analysis, he also utilized a "sliding scale" of plus or minus five percent for one period of time, plus or minus ten percent for another period of time, and plus or minus 15 percent for another period of time. (Tr. 704-706).[6] Although plaintiffs suggest in their post-trial brief that this case is not a liability case (see Plaintiffs' Post-Trial Brief at p. 2), Dr. Gordon Foster, who used the sliding scale in this case, has used the sliding scale in northern liability cases. (Tr. 743).

Dr. Foster specifically recommended to plaintiffs' counsel that, if they really wanted a study regarding facilities, he could do it because he had a great deal of experience in that regard. (Tr. 723-724; Def. Ex. 1012). Yet, Dr. Foster claims he did not analyze the facilities and resources of the District and was never requested to do so. (Tr. 684).

In the memo of plaintiffs' counsel (Def. Ex. 1002), at page 5, paragraph c.5., entitled "teacher/administrator segregation", it is stated that "this is not a Foster/Lamson issue, and we have very little." (Tr. 425). Further in the paragraph it is

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[6] William Lamson, in his own handwriting, stated that he could find no statistical justification for the use of the sliding scale. (See Def. Ex. 1007B & 1007E).

stated, "If we're going to pursue this, we need to get statisticians." (Def. Ex. 1002). Nevertheless, Dr. Foster, admittedly not a statistician, attempted an analysis of racial identifiability as it relates to staff assignment. (Tr. 716).

Although Dr. Foster utilized a standard of plus or minus 15 percent off the district-wide average for student assignment, for ascertaining racial identifiability as it relates to faculty assignment, he utilized plus or minus 15 percent of the minority mean--a much tighter standard. (Tr. 683).

In applying the his ratio (Singleton) to faculty and staff assignment, Dr. Foster determined that by the 1981-82 school year the School District was very close to being on target. (Tr. 751). Although Dr. Foster used a mathematical formula of plus or minus 15 off the district mean of a percent minority faculty for development of his standard for racial identifiability of schools based upon faculty assignment. The Singleton ratio really does not involve this extremely precise formula of Dr. Foster. (Tr. 752-753). Indeed, Dr. Foster admitted that he does not use a computer to make these calculations, but simply by "eyeballing". (Tr. 754).

As demonstrated at trial, a school system's faculty is ten percent black, an individual school possesses 30 faculty members to avoid being racially identifiable, the individual school must employ exactly three black faculty members. To employ only two or as many as four black faculty members out of 30 would make the

school racially identifiable by faculty assignment.[7] Obviously, where the size of an individual school's faculty is smaller than 30, as in the case with most elementary schools, problems of fitting within Dr. Foster's formula are even more greatly compounded. For example, in Dr. Foster's analysis of faculty assignments for Sumner School, 1981-82 school year, the total elementary faculty ratio was 10.7 percent black. Sumner was 6.7 percent black, possessing one black faculty member out of a total of 15. The application of Dr. Foster's formula would have required Sumner to have more than one black faculty member but would not have permitted two black faculty members, as the range of plus or minus 15 percent of 10.7 percent equaled 9.1 percent to 12.3 percent black, or with a faculty complement of 15, to avoid being racially identifiable Sumner would have needed to employ 1.3 to 1.8 black faculty members. (See Pl. Ex. 155R). This absurd result is not an aberration. Oftentimes Dr. Foster's formula will result in a school being denominated as racially identifiable by faculty assignment. For example, during the same school year, 1981-82, Highland Park South had two black faculty members out of a total of 23 or 8.7 percent of its faculty as black. Again, the district-wide elementary school average was 10.7 percent minority (Pl. Ex. 155R) within the range of tolerance (9.1 percent to 12.3 percent), no whole number

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[7] This is so because with a district-wide ratio of ten percent faculty members an individual school must possess black faculty members within the range of 8.5 to 11.5 percent. Two black employees out of 30 equals 6.7 percent black. Four blacks out of 30 employees totals 13.3 percent black.

satisfies Dr. Foster's formula. Dr. Foster's formula requires no less than 2.1 and up to 2.8 black faculty members to avoid Highland Park South from being denominated racially identifiable by faculty assignment. The incredibility of this result is even more obvious when you consider the fact that in the 1981-82 school year the percentage of black student enrollment for the District's elementary schools was 18.9 percent and Highland Park South was 20.8 percent black. Dr. Foster's formula for determining racial identifiability by faculty and staff assignment should be rejected by this Court. (See also supra, § V).

In preparation for his testimony, Dr. Foster reviewed the deposition of School District employee Dr. Frank Ybarra and found no fault with the School District's recruitment policies in attempting to recruit minority faculty. (Tr. 758).[8]

Dr. Foster admitted that in analyzing statistics of faculty and staff assignment, he did not avail himself of the Topeka standard metropolitan statistical area data to ascertain the relevant labor pool. (Tr. 767-768). Likewise, he did not determine what the relevant labor pool was for attempting to recruit faculty members. (Tr. 768). For the reasons stated herein, as well as those set forth at length in defendant's trial brief, pp. II-33 and II-34, and its proposed findings of fact and conlusions of law, pp. 68-70, the analysis of Dr. Foster should be rejected.

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8 The affirmative policies of the District also prohibit discrimination in staff assignment. (Pl. Ex. 11R, Answer to Interrogatory No. 55, Fourth Set; Ex. 1041A; Tr. 2692-2694).

C. Central Surveys.

1. Harrison Hickman's criticisms of Central Surveys.

Harrison Hickman is a public opinion researcher and political consultant who evaluated the actions of Central Surveys in connection with this case. He is well qualified by education and experience and for the past six years he has been engaged in designing and interpreting public opinion surveys. Many of his clients include political office holders or candidates and he has done special studies about attitudes toward education for a number of governors. Within the last year, his company has conducted surveys in Kansas, Nebraska, Missouri, Illinois, Oklahoma, the Dakotas, and Wisconsin, as well as other parts of the country. The surveys conducted oftentimes involve the assessment of issues regarding education and the assessment of issues regarding racial attitudes. (Tr. 2148-2152).

Plaintiffs in their post-trial brief attempt to call into question Mr. Hickman's experience. (See Plaintiff's Post-Trial Brief at pp. 99-101). Mr. Hickman's experience in assessing racial attitudes was well documented at trial. Even a partial listing of the organizations and individuals for whom he has conducted public opinion research, including black politicians Julian Bond, Chicago Mayor Harold Washington, Philadelphia Mayor Wilson Goode, and Martin Luther King, III, should have suggested to plaintiffs the importance of assessing racial attitudes in the work conducted by Hickman. (Tr. 2153-2154; Def. Ex. 1032A, biographical sketch of Harrison Hickman). It should have been apparent to plaintiffs that Mr. Hickman is highly experienced in

the assessment of attitudes involving very sensitive social issues, including racial issues. The firm has conduct since July of 1986 approximately 70,000 interviews, for a variety of political candidates who are involved in situations where race and race issues are of prime importance. (Tr. 2154).

As a public opinion research expert, Mr. Hickman upon evaluating the survey commissioned by the ACLU and conducted by Central Surveys held the unequivocal opinion that the survey did not conform even to "minimum standards in our profession and therefore is not valid." (Tr. 2162). An extensive report was prepared, evaluating the survey, utilizing the materials provided by Central Surveys and the depositions of their personnel. (Tr. 2163; see report, Def. Ex. 1032).

There were substantial errors in the survey. The most serious methodological flaws are set forth below.

At the outset, it is not clear from the survey who it was they intended to interview--there is a problem of them not knowing what their universe was and of making sure that the people they included in the sample were within the universe. (Tr. 2165-2166). Several criticisms were leveled regarding the imprecision of the screening questions utilized by Central Surveys. (Tr. 2166-2169).

Several serious methodological problems exist with the sample design and survey design. First, by selecting a sample of respondents from a telephone directory, those with unlisted numbers and persons with newly listed numbers were excluded. (Tr. 2173-2174; Def. Ex. 1032, Hickman analysis at pp. 6-10).

Second, the screening questions designed to exclude persons working for U.S.D. No. 501 were so broad that they may have excluded persons who should have been included. For example, the meaning of "member of your family"; use of the term "education field" is an extraordinarily vague term; the word "anywhere" has a double meaning and should not be used. (Tr. 2166-2169; Def. Ex. 1032, Hickman analysis, pp. 10-12).

Third, Central Surveys made no systematic attempt to exclude respondents who did not even live within U.S.D. No. 501's boundaries. Likewise, it is not an acceptable professional procedure to rely upon ad hoc questioning by interviewers to screen out unqualified respondents as Mr. Williams suggested. (Tr. 2175-2176, 2179; Def. Ex. 1032, Hickman analysis, p. 12-14; also see Zone A of Southwestern Bell Telephone Service Area depicted on Def. Ex. 1009).

Central Surveys' methods of administering the poll also deviated in several ways from standard survey methodology, seriously undermining further the reliability of the survey's findings. First, the poll was conducted over a short period of time during the late summer (over Labor Day), a time in which it is difficult to contact respondents. (Tr. 2181; Def. Ex. 1032, Hickman analysis, pp. 15-16).

Second, Central Surveys employed no systematic procedures for call backs, so the sample under-represented people less likely to be at home. The response rate for the Central Surveys poll was approximately 35 percent. This rate is well below the accepted response rate for telephone surveys of about 70 percent.

Central Surveys deviated from the standard accepted survey procedures. (Tr. 2181-2192; Def. Ex. 1032, Hickman analysis, pp. 16-19).[9]

Third, the sample did not adjust for household size, so persons living in large households had a lower probability of being included in the sample than persons from small households. Likewise, respondents were not randomly chosen from within each household, so persons more likely to answer the phone are over-represented. Central Surveys could have used quotas in an attempt to compensate for the problems caused by not randomly selecting respondents. This procedure was not followed. (Tr. 2192-2196; Def. Ex. 1032, Hickman analysis, pp. 19-22).

A final problem with the administration of the survey was that the interviewers were told explicitly the results that were desired. The instructions identified the ACLU as Central Surveys' client and then described the conclusions the ACLU wished to find. The standard practice in survey research is not to inform interviewers of the purpose of the survey because they might, consciously or subconsciously, read the questions in a manner that elicit the desired responses. (Tr. 2198-2201; Def. Ex. 1017, interviewer instructions; Def. Ex. 1032, Hickman analysis, p. 24).

In addition, Central Surveys did conduct a pretest of the survey, but they included the results of the pretest with the rest of the sample even though the pretest had different ques-

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9 Even Dr. Robert Crain expressed concern with a 35 percent response rate. (Tr. 1317-1318).

tions and the respondents were selected without using any call backs. The survey results obtained cannot be presumed to be a representative sample of Topeka residents, or even Topeka residents with children in school. (Tr. 865; Def. Ex. 1032, Hickman analysis, p. 24-25).

Very serious problems also resulted from design of the questionnaire, which are set forth below:

First, since Central Surveys did not test the meaning of the key words used in the questionnaire, such as "racially balanced", it is difficult to interpret the meaning the respondents assigned to such words. In addition, key questions also presented a one-sided argument. (Tr. 2204-2207; Def. Ex. 1032, Hickman analysis, pp. 26-29). Another serious problem involved the order of the list of schools which may have inflated the perception that some schools were "mainly white" and others "black or minority". (Def. Ex. 1032, Hickman analysis, pp. 29-32).

Finally, a very serious error involves the fact that the report based its conclusions on differences that are within the range of sampling error. Throughout the discussion of the results, no statistical tests were conducted to measure the significance of the findings. Indeed, Williams admits that he did not perform any test of statistical significance, many of the responses were not statistically significantly different. (Tr. 977; Def. Ex. 1032, Hickman analysis, pp. 33-39).

In short, the Central Surveys report is not a valid representation of public opinion. (Tr. 2231-2232). It should be rejected by this court.

2. **Dr. William Clark's criticisms of Central Surveys.**

In addition to his experience, training and qualification as Professor of Geography at UCLA, Dr. William Clark was the associate director for the Institute for Social Science Research, where he conducted opinion surveys. (Tr. 2280-2281). Indeed, he prepared a two volume report to the National Center on Health Statistics regarding the use of television surveys. (Tr. 2282). He has also conducted public opinion surveys in connection with desegregation cases. (Tr. 2287-2288).

Dr. Clark reviewed the report of Central Surveys prepared for the plaintiffs in this case. In his professional opinion, the survey was fatally flawed on two counts: There was an inadequate response rate. Calculated properly, the response rate was about 35 percent; this was a fatal flaw, indicating that you should not even go beyond that particular decision. If one goes beyond that, the second most fatal flaw involved the fact that the coverage of the area that was included was not coincident with the population of the School District which Central Surveys and their client wanted to survey. (Tr. 2288-2289; Def. Ex. 1009, map with zone A).

Apart from this sampling problem, the survey excluded certain people who should have been included and others were excluded who should have been included. These problems "so fatally flaw the survey that I don't think you can rely on anything that you've accomplished by interviewing these people." (Tr. 2289). Plaintiffs did not even attempt to cross-examine Dr. Clark with regard to his opinion. Without question the survey should be rejected.

3. Charles Williams.

Central Surveys is a public opinion polling company located in Shenandoah, Iowa. (Tr. 825). Primarily, Central Surveys is engaged in the business of conducting attitude surveys for banks, utility and insurance companies. Apparently, their particular expertise lies in conducting studies for electric and gas utility companies. (Tr. 825-826). The initial contact regarding the poll conducted by Central Surveys in this case was made by Mr. Hansen contacting Bob Longman, a salesman with the Central Surveys firm. (Tr. 827). Bob Longman's father is President of Central Surveys. (Tr. 903-904). Plaintiffs' counsel, Chris Hansen, and Bob Longman, attended Carlton College together. They are not only college chums, but they continue to retain a social relationship to this very day. (Tr. 904; Def. Ex. 1001).

Charles Williams, the only witness called by plaintiffs to testify in connection with the Central Surveys poll, had, as his sole responsibility, writing the report. (Pl. Ex. 21). Although Williams does not have a college degree, he has attended three colleges. However, at no time while he attended any of those three colleges did he ever take any courses in testing or measurement. He never took any courses in statistical analysis. He has never taken any courses in survey research methods.

Williams did not have any contact with establishing the methodology to be used in conducting the survey. (Tr. 828). With respect to Central Surveys report (Pl. Ex. 21), he did not design the survey questionnaire which was utilized for the purposes of the survey; he did not supervise its design; he was not

involved in reviewing in any way the design of the questionnaire; he did not see the questionnaire before it was used by interviewers. (Tr. 830). At no time in the preparation of the survey instrument--the questionnaire--which assessed educational opinions from people and racial attitudes, was any reference material consulted in the formulation of the questions used in the project. (Tr. 832; Def. Ex. 1015, Interrogatory No. 4). Williams did not design the sampling procedures; he did not supervise design of the sampling procedures; he did not design the screening questions that were utilized for the purpose of drawing the sample. (Tr. 833).

Charles Williams admitted that he did very little analysis in writing his report. (Tr. 884). Apart from a survey conducted 20 years ago in Omaha involving housing issues, Central Surveys has not been involved in surveys assessing racial attitudes.[10]

Williams has never attended any seminar regarding measuring or assessing racial attitudes. He has never received any special training regarding measuring or assessing racial attitudes. Likewise, to Mr. Williams' knowledge, no one at Central Surveys has ever received such special training regarding racial attitudes. In writing his report, Williams did not consult any textbooks or articles regarding racial attitudes, education, or educational services in his analysis of the information which

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10 During Williams' deposition he could not recall Central Surveys ever conducting any other surveys involving racial attitudes, but at trial he attempted to claim that occasionally they had done surveys for political candidates "years ago when civil rights legislation was much in the news". (Tr. 885-886).

resulted in his writing the Central Surveys report. Williams did not make any mathematical calculations regarding the results obtained in the survey. (Tr. 887-888).

The definition of the universe which Central Surveys was attempting to sample was, in Williams' words, a peculiar universe. (Tr. 888). Although several times in the report Williams refers to "most Topekans", he is really talking about this peculiar universe, not a survey of residents of Topeka generally. (Tr. 889). To be a part of this peculiar universe, first a person who answered the phone had to say they were the head of the household; they had to say they didn't work or have any family member working in the educational field; although school janitors and teachers quite possibly could have had children in U.S.D. No. 501, they were excluded from the survey. (Tr. 890). The screening questions asked by Central Surveys were so imprecise that an otherwise qualified respondent would be disqualified if his or her daughter (family member) were teaching school in Albuquerque, New Mexico. (Tr. 892).

Respondents also had to have children in school "anywhere" from kindergarten through 12th grade. Williams conceded that anywhere was imprecise. One possible meaning is it might mean anywhere in the United States. (Tr. 894). It is entirely possible that a parent living in Topeka who doesn't happen to have custody of their child who is residing in California might be able to pass this screen. (Tr. 894). Those people would not have any specific interest in what's going on in U.S.D. No. 501. (Tr. 894). In addition, respondents who had children who com-

pleted high school in Topeka in the last five years would qualify. This is true, although only three of the seven high schools in Topeka are under the responsibility of U.S.D. No. 501. (Tr. 897, 898). Although several questions were given in the singular, Central Surveys permitted respondents to give multiple answers. (Tr. 897). In short, the universe which Central Surveys claimed to be a sampling was easily contaminated. (Tr. 897).

The letter dated August 22, 1984 (Def. Ex. 1001) addressed to Bob Longman of Central Surveys, from Chris Hansen, plaintiffs' attorney, was reviewed by Williams before he wrote the Central Surveys report. (Tr. 903). On page 1 of Defendant's Exhibit No. 1001, Mr. Hansen states:

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

(emphasis supplied).[11] These two questions, in very similar form, were included in the survey. (Tr. 905).

In the Longman letter, which Mr. Williams reviewed before writing his report, in two places Hansen uses the word "stigma-

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[11] The letter continues to state that Mr. Hansen does "not want a survey that reaches that result by biased or leading questions". However, the message was clear and this was merely a "wink of the eye". (Tr. 2275, Hickman).

tized"--page 2 and page 5. Not surprisingly, the word "stigmatized" appears on page 31 of Williams report and it appears in quotes. (Tr. 908-909).

The letter also states that plaintiffs would like to use the "survey to argue that, for example, even though Belvoir is only 60 percent minority, the people of Topeka perceive it as a minority school". (Def. Ex. 1001, p. 4; Tr. 909). Not surprisingly, Williams reaches that conclusion. (Tr. 909-910). Question 17 of the survey asks: "Are there any schools in Topeka that of as black or minority schools?" If yes, question 17a asks, "Which ones?" Forty-eight people out of 400 identified Belvoir, or 12 percent. These were the open-ended responses. When respondents were given the opportunity to comment regarding one of the 13 schools which were specifically named in the questionnaire (the low or high minority enrollment schools), Belvoir was identified only 15 percent of the time. (See Pl. Ex. 21, p. 22, which sets forth the responses to question 19). Based upon either 12 or 15 percent of the sample identifying Belvoir as a "black or minority school", Williams concludes that Belvoir is perceived by "most Topekans" as a black or minority school. (Tr. 913-914). Williams' conclusion, he says, is based upon common sense. It clearly is not statistically significant. Defendant submits you wouldn't sell antacid tablets to the buying public by suggesting that a particular brand was recommended by 15 out of 100 patients. It is respectfully submitted that no one is buying what Williams is attempting to sell in his report.

In response as to why no racially balanced schools were included in the list of schools to which responses were given in question 19--only those schools with the higher minority and the lower minority enrollments were listed--he claimed, "We weren't trying to determine whether people thought of any schools as racially balanced." He was then asked:

> Q. That being the case sir, why did you include in the questionnaire whether or not people thought schools were racially balanced?
>
> A. We had to give them an alternative. They might not think they were mostly white or mostly black. You can't say, which do you think they are, mostly white or mostly black.

These responses are incredible, particularly when Williams concedes that Central Surveys did not list any racially balances school for respondents to respond to. (Tr. 915).

Williams believes Don Athen and Bob Longman prepared the questionnaire. (Tr. 916). It is also Williams' understanding that Bob Longman is the one who had primary responsibility for writing the questionnaire. (Tr. 917).

A pretest of the survey questionnaire is conducted primarily to find out if the questionnaire seems to work. (Tr. 917). Williams conceded that dropping questions from a questionnaire might change the content or affect in some way the responses of individuals, so you would not want to use the pretest results along with the results of the final questionnaire. (Tr. 919). Three questions were dropped between the pretest and the final questionnaire. (Tr. 919). Obviously, those three questions were dropped because plaintiffs were not getting the responses regard-

ing the quality of teachers that they had hoped to get. (Tr. 919-926). Indeed, in the pretest questionnaire, people were naming non-U.S.D. No. 501 schools and yet nothing was done to correct the situation. (Tr. 925-927).

The first draft of the questionnaire, consisting of one page (Def. Ex. 1016A), was written by Don Athen, who spent approximately two hours writing it. (Tr. 933-934; see Deposition of Don Athen at p. 16, which is Def. Ex. 1021). The final version of the questionnaire (Def. Ex. 1016B) was primarily authored by Bob Longman. (Tr. 934-935).

Williams conceded it would be unusual for Central Surveys to tell the interviewer what the client wanted the answer to the survey to be. (Tr. 944). Williams conceded it is not a good practice to tell the interviewer what the client wants the answer to be. (Tr. 945). However, in the interviewing instructions for this survey (Def. Ex. 1017), interviewers were told the Central Surveys' client was the American Civil Liberties Union; what the ACLU contended; what the purpose of the survey was; and what the ACLU was seeking to obtain. The interviewers were also told that Highland Park High School was "mostly black". Mr. Williams knows that statement is false. (Tr. 950-951).

Williams conceded that the term "racially balanced" might have more than one meaning. (Tr. 952-953). In providing respondents the opportunity to select "black or minority school" as one of their choices, it provided an individual with two ways in which the information could be reported the way the ACLU would like to have found it. (Tr. 953-954).

Three of the top four schools getting rating of excellent or good happen to be the three schools which people said they were the most familiar with. (Tr. 972-973). Topeka West, which was rated highest in Williams' opinion, was also the school that people said they were most familiar with. (Tr. 973). The pattern holds true with people rating the schools the highest based upon their familiarity. (Tr. 972-975). The ratings of excellent or good are a function of how many said they were familiar with the school. (Tr. 975). In preparing his report, Williams did not perform any test of statistical significance. (Tr. 977). The smaller the sample, the greater the margin of error in making assumptions about the universe based upon the sample. (Tr. 978). Although Williams could have determined, at the standard 95 percent confidence level, whether the responses given by respondents could have been given by chance alone as opposed to being statistically significant, he did not do that. (Tr. 977-980). The reasons for his not doing so are obvious.

Of all the elementary schools, Quinton Heights was the one that people were most familiar with in the Central Surveys sample. (Tr. 1014). Sixty-two percent of those people said they thought Quinton Heights was racially balanced. Nevertheless, plaintiffs complain of the racial composition of Quinton Heights. (Tr. 1015; Pl. Ex. 21, p. 31).

Through question 17 (open-ended) and question 19 (selected schools identified), the questionnaire sought to determine whether respondents perceived schools to be "black or minority schools". Set forth below is a summary of some of the responses given:

(a) With respect to Highland Park North, 90 percent did not volunteer (question 17) the school as a black school; 87 percent did not identify (question 19) it as a black school. (Tr. 1017).

(b) With respect to Eisenhower Middle School, 94 percent did not volunteer it as a black school (question 17) and 91 percent did not identify it as a black school (question 19). (Tr. 1017).

(c) With respect to Lowman Hill, 98 percent of the respondents did not volunteer Lowman Hill as a black or minority school. (Tr. 1018).

(d) With respect to Hudson Elementary School, 98 percent of the respondents did not volunteer Hudson as a black or minority school. (Tr. 1018).

Comparisons can be made for all schools by looking at page 20 (Q. 17) and page 22 (Q. 19) of the Central Surveys report. (Pl. Ex. 21).

In conclusion, the letter authored by plaintiffs' counsel to his college friend, Robert Longman, set in motion all that Central Surveys, and in particular, Charles Williams needed to complete the task. Plaintiffs wanted a predetermined result and Central Surveys delivered. It is respectfully urged that the testimony related to the Central Surveys' poll be rejected.

Plaintiffs failed to lay a proper foundation for Mr. Williams' testimony. He was not properly qualified as an expert. No foundation was laid regarding the specific methodology that was utilized. He was not involved in developing the question-

naire. He was not involved in drawing the sample. He was not involved in any process prior to writing the report. No one was called on behalf of plaintiffs who could provide the foundation to assure the court that the information that Williams testified to meets all the standard procedures for such survey instruments to be utilized in assessing public opinions. The report should not have been admitted into evidence and objection was so lodged. (Tr. 835).

4. Robert "Bob" Longman.

At the time of the taking of his deposition, Robert Longman was Vice-President of Central Surveys. (Def. Ex. 1020A, Longman Depo., p. 4). Longman graduated from Carleton College in 1969. While in college, he did not take any courses in testing or measurement or in statistical analysis. He majored in economics. (Def. Ex. 1020A, Longman Depo., pp. 5-6). The particular emphasis of Central Surveys' efforts today involve public opinion research for utility companies and for banking and financial services. (Def. Ex. 1020A, Longman Depo., pp. 12-13). Longman could not recall any type of survey in which he had been involved while at Central Surveys involving assessment of racial attitudes. He wasn't sure whether any other member of the staff at Central Surveys had ever been involved in surveying attitudes regarding racial issues. (Def. Ex. 1020A, Longman Depo., pp. 14-15).

Longman does not know whether the Central Surveys' library contains any material regarding testing for or measuring racial attitudes, or whether it has any material which generally refers

to racial attitudes. Longman could not recall any material that he had specifically read regarding racial attitudes. (Def. Ex. 1020A, Longman Depo., p. 17). Apart from a survey involving employee attitudes for a public utility company, prior to the survey commissioned by the ACLU, Longman is not aware of any studies conducted by Central Surveys regarding racial attitudes. (Def. Ex. 1020A, Longman Depo., pp. 17-18). As freshmen, Mr. Hansen and Mr. Longman lived in the same dormitory at Carleton College. They have known each other since September of 1965, and have maintained correspondence since leaving college in 1969. (Def. Ex. 1020A, Longman Depo., pp. 21-22). Prior to the ACLU-commissioned project, Longman has had opportunity since college to socialize with Mr. Hansen and they have been guests in each others homes. (Def. Ex. 1020A, Longman Depo., p. 23).

In handwritten notes taken by Mr. Longman regarding an early conversation he had with Mr. Hansen regarding the ACLU project, below the notation "Brown v. Board of Education" in a box is the word "prove" and then under that notation "some of schools are better than other". (Def. Ex. 1020A, Longman Depo., pp. 25-26; Exhibit No. 2 to Central Surveys depositions which are collectively referred to as Def. Ex. 1020B).

In his deposition, Mr. Longman attempted to minimize his involvement with the survey:

> Don Athen developed the first draft questionnaire. My father, Bill Longman, would have probably reviewed the questionnaire, also, I had some input and I reviewed it and had some input.

(Def. Ex. 1020A, Longman Depo., p.71).

Although Mr. Athen and Mr. Williams, under oath, disavowed any involvement, Mr. Longman attempted to claim that they were involved in establishing the criteria for the screening procedure, as well as himself. (Def. Ex. 1020A, Longman Depo., pp. 78-79). When asked who would be principally involved in development of the questionnaire, Longman responded:

> I would say Don Athen, of course, was instrumental. And I would say Bill Longman and myself, Bob Longman were also involved in reviewing and discussing the questionnaire development.

(Def. Ex. 1020A, Longman Depo., p. 82).

Because of he and his father's personal acquaintance with Mr. Hansen, a question was asked of Mr. Longman regarding his objectivity in conducting the survey, and Longman responded: ". . . And so to eliminate that problem, I asked others who had no relationship or knowledge of Chris Hansen or the ACLU to take principal role. (Def. Ex. 1020A, Longman Depo., pp. 91-92).

Nevertheless, Longman was involved in the decision to do a pretest on the base of 36 interviews. (Def. Ex. 1020A, Longman Depo., p. 110). Bob Longman conducted all briefing sessions with interviewers who actually conducted the interviewers for the ACLU survey. (Def. Ex. 1020A, Longman Depo., p. 58).

Longman prepared the second draft of the questionnaire. (Def. Ex. 1020A, Longman Depo., p. 137). Longman reviewed the pretest questionnaire results. But, Longman claimed he couldn't recall who made the recommendation that the three questions regarding teachers that were in the pretest questionnaire be dropped from the questionnaire that was submitted to the rest of

the respondents. (Def. Ex. 1020A, Longman Depo., pp. 140-141). Longman was the supervisor during the time the interviewers conducted the pretest interviews. (Def. Ex. 1020A, Longman Depo., p. 142).

Longman conducted the partial hand tally of the pretest results and it appears that the tally to question 19 was conducted first as opposed to questions 1 or 2. (Def. Ex. 1020A, Longman Depo., p. 151; Def. Ex. 1016, partial hand tally of pretest results). When asked how it is that only certain schools were selected with respect to the familiarity question (e.g. question 19), instead of listing all 35 schools of U.S.D. No. 501, Longman stated at first that, "We at Central Surveys basically selected a group of schools to represent middle schools, elementary schools and high schools and randomly picked which schools, because we had no specific knowledge that would suggest one school rather than another." Later he added, "Arbitrarily picked may be a better word." (Def. Ex. 1020A, Longman Depo., p. 157). Sometime later, in a discussion regarding the list of schools selected, Longman stated, "I would have probably in my memory selected schools that fell in the extreme end of that." (Def. Ex. 1020A, Longman Depo., p. 162).

By using the listing of these schools, Longman stated, "We were trying to find out whether any of the schools in Topeka are perceived to be racially out of balance." (Def. Ex. 1020A, Longman Depo., p. 169). When asked regarding his definition of "racially balanced", Longman stated that:

> The only definition I have to go on is a school that is plus or minus more than 15

> percent of what the population in the overall district would be in the schools and I believe I have that definition from Chris' [Hansen's] literature.

(Def. Ex. 1020A, Longman Depo., p. 164).

Longman also prepared the interviewing instructions. (Def. Ex. 1017). (See Def. Ex. 1020A, Longman Depo., p. 170). Longman conceded that by reading the interviewing instructions, the interviewers would have been able to deduce the answers which at least the client wanted to secure. (Def. Ex. 1020A, Longman Depo., p. 172).

A draft of the questionnaire was sent to Chris Hansen, accompanied by a letter dated August 24, 1984, from Mr. Longman to Mr. Hansen. (Def. Ex. 1020A, Longman Depo., p. 201). Subsequently, Longman had a conversation with Hansen regarding his opinion of the draft questionnaire. On August 27, 1984, Longman received approval of the draft questionnaire by Hansen over the phone. (Def. Ex. 1020A, Longman Depo., pp. 201-202). After the first computer run of the results of the entire survey, Hansen visited Shenandoah, Iowa on the weekend of September 15. (Def. Ex. 1020A, Longman Depo., p. 204). After Hansen's trip, another computer run was made on September 17. (Def. Ex. 1020A, Longman Depo., p. 205).

It is clear that Longman had primary responsibility for drafting the questionnaire. (Def. Ex. 1020A, Longman Depo., pp. 223-224). He did not consult any text or other materials regarding education or attitudes regarding race. He did not consult any text in the library at Central Surveys regarding the design of the survey questionnaire. (Def. Ex. 1020A, Longman Depo., pp.

227-228). His actions do not constitute a proper foundation for submission of the survey into evidence. Moreover, substantial evidence demonstrates his bias and the Central Surveys' poll should be rejected.

5. Don Athen.

Don Athen at the time of his deposition was Executive Vice-President of Central Surveys. (Def. Ex. 1021, Athen Depo. at p. 4). Although Mr. Athen attended college for two years, he has never taken any courses in testing and measurement for public opinion research. He has never taken any courses in statistical analysis or survey research. (Def. Ex. 1021, Athen Depo. at p. 6). Athen has never attended seminars or conferences as a participant where the principal focus was survey public opinion research. Athen's experience and training regarding the area of public opinion research primarily comes from the founder of Central Surveys, Charles Parker. (Def. Ex. 1021, Athen Depo at pp. 7-8).

To Mr. Athen's knowledge, the library of Central Surveys does not contain any materials or texts regarding testing for or measuring racial attitudes. Likewise, he could not recall any material that he had read regarding racial attitudes. Specifically, with respect to his involvement in the project commissioned by the ACLU, he did not review any material regarding racial attitudes. Prior to the ACLU commissioned study, he had never participated in any study regarding racial attitudes. (Def. Ex. 1021, Athen Depo. at pp. 8-9). In the time that Mr. Athen has been with Central Surveys, since 1957, to his knowl-

edge, no one at Central Surveys had, prior to the ACLU study, any experience in studies regarding racial attitudes, religious attitudes, or social tolerance. (Def. Ex. 1021, Athen Depo. at pp. 8-10). Likewise, Athen could not recall any studies or surveys in which he had personally been involved regarding educational issues. (Def. Ex. 1021, Athen Depo. at p. 10).

At the request of Bob Longman, Athen prepared the first draft of the questionnaire for the survey commissioned by the ACLU. Before Athen wrote anything in relation to the project, he reviewed Mr. Hansen's letter to Bob Longman (Def. Ex. 1001; see Def. Ex. 1021, Athen Depo., pp. 10-12).

Bob Longman advised Don Athen he wanted him to "become involved in the design of the questionnaire in order to be entirely objective and have him not involved with it because of his association personally with Mr. Hansen". (Def. Ex. 1021, Athen Depo. at p. 14). Although Athen prepared the first draft of the questionnaire (Def. Ex. 1016A) for the ACLU-commissioned project (see Def. Ex. 1021, Athen Depo. at p. 15), Athen spent less than two hours developing the document. (Def. Ex. 1021, Athen Depo., p. 16).

In addition to reviewing the letter written by Mr. Hansen to Bob Longman, in writing the first draft, Don Athen did not consult any other materials or text to assist him. (Def. Ex. 1021,

Athen Depo., p. 16).[12] After the preparation of the first draft of the questionnaire (Def. Ex. 1016A), which took less than two hours, Athen gave the document to Bob Longman. That was the extent of Athen's involvement in the ACLU-commissioned project. (Def. Ex. 1021, Athen Depo., p. 18).

Athen was not involved in the decision to change any of the questions that he had originally prepared. (Def. Ex. 1021, Athen Depo., p. 52). After he expended less than two hours preparing the first draft, Athen's interest in the survey was, in his words, "quite minimal. I had other things to do. It wasn't my project." It was Bob Longman's project. (Def. Ex. 1021, Athen Depo., p. 51, 55).

D. Dr. Robert Crain.

For a number of reasons, the testimony of Dr. Robert Crain should not be credited in this case. In direct examination, Dr. Crain testified that:

> When you have a perception of unequal racial composition, that these schools are white schools and those schools are not white schools, then you've got a segregated system.

(Tr. 1289). When asked whether that condition exists in Topeka today, Dr. Crain claimed that according to the survey which Mr. Hansen shared with him, there was a clear labeling of east-side schools as black schools and west-side schools as white schools.

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12 Athen thought he might have scanned one questionnaire that they had used in a survey for the Iowa Education Association, but it was not productive and did not contribute at all in the preparation of the draft. (Def. Ex. 1021, Athen Depo., pp. 16-18).

(Tr. 1289). On cross examination at trial, Dr. Crain claimed that at the taking of his deposition in June, 1986, he had read the report of Central Surveys at that time. (Tr. 1292). This statement is directly contradicted by his sworn deposition testimony in which deposition he stated, "I've never seen that survey, know nothing about it." (Tr. 1292).

Dr. Robert Crain considered himself an expert in opinion polling research, having done it for a number of years. (Tr. 1292). He has personally conducted a survey; designed survey questionnaires; has handled the interviews of respondents. (Tr. 1293). Based upon his experience and expertise in public opinion polling, Dr. Crain felt it was important as to how interviews are conducted over the telephone. (Tr. 1293). Professionally, interviewers are not allowed to change a word of text in conducting a survey. (Tr. 1294). Although he initially attempted to avoid answering the question, when presented with his sworn deposition testimony, Dr. Crain admitted that in public opinion research, "It is in fact very common not to tell the interviewer what a study is about lest they be biased by the result of the research." (Tr. 1294-1295).

The only harmful effects Dr. Crain claimed to have any evidence on regarding the Topeka Public Schools were the Sixth Grade test score data, based upon one year's test scores. (Tr. 1297). With respect to every potential harm that he claimed or alleged school segregation caused, he did not have any evidence regarding Topeka to support such statements. (Tr. 1297). For example, no data regarding teen pregnancy in U.S.D. No. 501 (Tr.

1297); no data regarding high school dropout rates (Tr. 1298); no data regarding college dropout rates (Tr. 1298); no data regarding the claim that blacks who attended segregated schools tend to change jobs more frequently in adult life (Tr. 1298); no evidence regarding blacks possession negative attitudes having attended schools in Topeka (Tr. 1298-1299); no data regarding the frequency with which blacks in Topeka have bank accounts (Tr. 1299); no evidence regarding prejudice among whites (Tr. 1299-1300); no data regarding his claim that segregated schools resulted in segregated housing in Topeka (Tr. 1300); no data in Topeka regarding black graduates of "segregated schools" prefer to live in segregated areas (Tr. 1300); no data regarding adult blacks in Topeka who attended "segregated schools" being less happy (Tr. 1300); no data indicating that blacks in Topeka were not comfortable with white supervisors (Tr. 1300-1301); no evidence regarding blacks in Topeka not having a network to assist them in getting jobs through informal contacts (Tr. 1301); no evidence regarding blacks in Topeka being less consistent in their occupational aspirations (Tr. 1301); no Topeka data to support his claim that blacks who attended segregated schools were more likely to choose a job that was more traditional for blacks such as government or blue collar jobs (Tr. 1301-1302); and no Topeka data indicating that blacks who attended segregated schools were more likely to go to black colleges (Tr. 1302).

Dr. Crain was aware of desegregated school districts in which black students were achieving in terms of test scores at lower levels than white students. This was something that was

widely recognized in the social science research. (Tr. 1303-1304). Dr. Crain could not account for the difference between the average test scores of blacks and whites. (Tr. 1304).

Notwithstanding his assertions, Dr. Crain conceded that the primary determinants of adult success were many and varied. (Tr. 1309). He also admitted that there are many factors beyond the normal reach of schools that are determinants of adult success. (Tr. 1309-1310). Among the many factors beyond the normal reach of schools which are determinants of adult success include: parental support of a child's school work; a child's own abilities; a child's motivation; a child's own efforts; and luck. (Tr. 1310). Dr. Crain also testified that another determinant of adult success is "how much money you can borrow from your father at any particular critical point in your life" (Tr. 1310-1311), as well as who you know who knows where a job is; how many years of college education you have; whether a large population of people are coming along in the labor market after you so that you can teach them; and a community's characteristics, for it's easy to get a job in a town where they have jobs. (Tr. 1311).

Dr. Crain admitted that socio-economic status has an effect on learning. (Tr. 1313-1314). With regard to the potential harms caused by school segregation, a great deal of Dr. Crain's conclusions were based upon his own research. In particular, he based his conclusions on his Hartford study. (Tr. 1314).

This study was fraught with numerous flaws, including conclusions attempted by Dr. Crain from statistically insignificant results. The study has never been scientifically published.

As stated by a well respected desegregation expert called upon to review Dr. Crain's study after it had already been through many reviews and had been extensively revised by the authors, Dr. Tony Pascal stated in his review:

> The authors still seem to eager to assert the benefits of Hartford's Project Concern. Wherever possible they point to the fact or make the interpretation favorable to such a position. They tend to ignore inconvenient findings. I do believe that very generally, their study does show that Project Concern benefited its participants, although the evidence is often weak in a statistical sense.

(Def. Ex. 1025). Dr. Crain admits that Dr. Pascal is a reputable scholar and he has testified in a number of school desegregation cases. (Tr. 1338).

Dr. Crain even admitted that he agreed with Dr. Pascal's statement that the authors of the Hartford Project Concern "tend to ignore inconvenient findings". (Tr. 1343). Dr. Crain agrees with the statement that "none of [the evidence] is very strong when considered alone". (Tr. 1344).

Dr. Crain's Hartford study attempted to compare the adult outcomes of children who were left in the inner city schools of Hartford (control group) with those who had the benefit of an education by being transported by Project Concern to the suburban schools of Hartford. (Tr. 1318). There were extreme problems in making this comparison. (Tr. 1318). Weaknesses of Dr. Crain's study include the following:

(a) The inner city schools were not comparable to the suburban schools in their curriculum or what the children were studying. (Tr. 1319).

(b) The Project Concern participants not only had the benefit of a suburban school teacher, but they also had the benefit of their inner city school teacher going with them--in effect having two teachers instead of one. These teachers served as tutors and counselors to the children having the suburban experience. (Tr. 1319-1320).

(c) Dr. Crain was not able to construct a random sample for the inner city children. Children included in the group remaining in the inner city were poorer than the kids who were selected to go to the suburbs. (Tr. 1322).

(d) Conclusions of Dr. Crain's study are based upon a voluntary program where those who went to the suburbs elected to go voluntarily. (Tr. 1324).

(e) The racial composition of the schools to which the inner city black students were transported in the suburbs was very low percent minority in most schools--never more than ten percent minority. (Tr. 1324). Minority enrollment in the inner city elementary schools at the time he conducted his study was 100 percent black and the high schools ranged from 95 percent to probably 70 percent black. (Tr. 1326-1327).

(f) The Project Concern study demonstrated that most of the results in comparing the two groups (the inner city versus the suburban group) were not

statistically significantly different. (Tr. 1326).

(g) Dr. Crain said that in Project Concern he did six separate studies and usually "the sample size in any one of the studies was too small . . . what I looked for was consistency across the six, and it was the case that lots of these differences were not significant by themselves, but had to worry about whether I could get all six of them looking like a consistent pattern."

(h) When comparing the control group with the Project Concern group regarding their entry into the private sector in white collar or service occupations, there was no statistically significant difference. (Tr. 1327-1328).

Most of the social science researchers who have done research in the area of achievement desegregation use the two-tailed test of statistical significance for the basis of their research. Indeed, Dr. Crain has used the two-tailed test of statistical significance in research he has done. (tr. 1306-1307).

In the Project Concern study, Dr. Crain exclusively used the one-tailed test of statistical significance. Even using the one-tailed test, results were reported that were not statistically significant. (Tr. 1333). When attempting to explain that consistency was important and that the one-tailed test was adequate from which to draw conclusions, Dr. Crain had to concede that

with respect to the 56 comparisons that he reported on the table regarding "present and high school aspirations of Project Concern participants and control group members by sex", 52 of the 56 results were not statistically significant. (Tr. 1334-1335). The Project Concern study has not been published anywhere. (Tr. 1335).

Dr. Crain's feeble attempt to show that harms exist in the Topeka schools because of their racial composition should be rejected. The careful and thorough analysis of student achievement in U.S.D. No. 501 was conducted by Dr. John Poggio. It is he, and not Dr. Crain, whose testimony should be accepted by this court.

E. Dr. Hugh Speer.

In 1951, Dr. Speer was called as a witness in this case. He testified regarding a comparison between the all black elementary schools and the non-black schools, regarding their facilities, teachers and curriculum. (Tr. 1162-1163, 1181). Although he testified regarding these items in 1951, he was not asked by the current plaintiffs to study and review the facilities of Topeka Public Schools or Unified School District No. 501 at any time thereafter. Likewise, he was not asked to review the curriculum. (Tr. 1181, 1182).

Dr. Speer was last on the teaching faculty in 1976. (Tr. 1185). He claimed to have kept up with the research and literature as it pertains to the effect of segregation and the process of education in public schools (Tr. 1167), but when asked specifically about the literature which existed in the last 20 years,

he could not recall very much at all. He did claim to rely primarily on summaries of the research articles, particularly work done by Dr. Dan Levine, which has recently been published. (Tr. 1169).

Although Dr. Speer claimed that achievement was negatively affected when the racial composition of a school reached "30 to 35, 40 percent", he could not name any study that has found that to be the case. (Tr. 1189-1190).

Dr. Speer, based upon reading the report prepared by William Lamson, the report prepared by Dr. Gordon Foster [which was never introduced into evidence by plaintiffs], and the results of the opinion poll prepared by Central Surveys, offered, over vigorous objection, his opinion that vestiges of segregation still existed in U.S.D. No. 501. Dr. Speer stated: "I think the facts are very clear, there are some schools which are mostly black, identifiable as minority schools up to 40, 50, 60 percent black, and then on the other end of the scale there are schools that have only a handful of blacks in them and this certainly indicates a degree of segregation, not like it was in '51, but still very, very decisive." (Tr. 1171-1172). Dr. Speer admitted he made no independent analysis of any aspect of the operation of Unified School District No. 501. While Dr. Speer clearly lacked qualifications to express an opinion regarding this subject, plaintiffs' counsel never attempted to elicit from Dr. Speer any specifics regarding his statement.

Apart from the historical interest of having an original witness testify in this part of the case, Dr. Speer's testimony,

very general in nature, should not be given any weight in resolving the specific issues presented by this trial.

F. Karl Taeuber.

Little need be said regarding the testimony of Karl Taeuber offered on behalf of plaintiffs. He claims the first time he was contacted by anyone concerning this case was late September, 1986. The first time he read anything regarding this case was shortly before October 22, 1986 (Tr. 2879-2880). His testimony was primarily directed at attempting to criticize the analysis and study performed by Dr. William Clark regarding demographic change in the Topeka School District dated August, 1986. (Def. Ex. No. 1114). Although Dr. Taeuber attempted to make certain criticisms, he admitted that Dr. Clark was a reputable geographer and a noted scholar in the field in which he writes. (Tr. 2903). Dr. Taeuber indicated that he had expended approximately 20 hours in his study of Topeka. (Tr. 2908). Although Dr. Taeuber read Dr. Clark's report, he did not study the maps prepared by Dr. Clark. (Tr. 2910).

Dr. Taeuber admitted that he has been a member of the ACLU for quite some time. He pays money to the ACLU every year.

Dr. Taeuber's testimony in this case was not the first time that he had been called upon to be critical of the work of Dr. Clark in a courtroom situation. He has criticized Dr. Clark's work on more than one occasion. When asked whether he has ever praised or agreed with Dr. Clark's evaluation or conclusions in a case, Dr. Taeuber replied, "In school segregation cases, I don't recall what parts of his analysis I may have agreed with because

testimony is typically asked about those points of disagreement." (Tr. 2913). In view of Dr. Taeuber's affiliation with the ACLU and predisposition regarding Dr. Clark, his attempt to criticize Dr. Clark's analysis comes as no surprise. However, his lack of knowledge regarding the facts surrounding this case compel the conclusion that his testimony is of no value.

VIII. RESPONSE TO PLAINTIFFS' ARGUMENTS RELATED TO THE SO-CALLED "RACIALLY IDENTIFIABLE" SCHOOLS.

In their post-trial brief plaintiffs identify and discuss 19 specific schools which they claim are "racially identifiable" by student assignment, by faculty and staff assignment, by perception and by School Board action. To support these claims, they rely principally upon Dr. Foster regarding student and faculty assignment; Central Surveys regarding perception; and Mr. Lamson regarding School Board action. The reasons for rejecting the approach taken by these experts and discrediting their testimony have been demonstrated earlier in this response (supra, § VII).

As stated previously herein, (supra, § VII B, Foster), as well as demonstrated through proof at trial (Tr. 2566-2573, Armor), this Court should reject the formalistic and mechanical application of Dr. Foster's mathematical ratios for determining that various schools were "racially identifiable". Several courts, particularly within the Fifth Circuit, have specifically rejected Dr. Foster's mathematical formula for determining racial identifiability. See, e.g., Carr v. Montgomery County Board of Education, 377 F. Supp. 1123, 1141 (N.D. Ala. 1974), aff'd 511 F.2d 1374, reh'g en banc denied 511 F.2d 1390 (5th Cir.), cert.

denied 423 U.S. 986, 96 S.Ct. 394 (1975); Tasby v. Wright, 520 F. Supp. 683, 711 n. 63 (N.D. Tex. 1981); Price v. Denison Independent School Dist., 694 F.2d 334, 362-364 (5th Cir. 1982). As will be seen hereafter, in many instances the student ratios vary from the district-wide ratio by only a slight amount in excess of that permitted by the Foster formula.

With respect to faculty and staff assignment, the range Dr. Foster would permit is extremely narrow, allowing a variance from the district-wide mean of only plus or minus 15 percent of the mean. To establish the range one does not add or subtract 15 percent from the district-wide average. Instead, the product of 15 percent times the mean is added or subtracted. The application of Dr. Foster's mathematical ratio for determining that various schools are "racially identifiable" produces absurd results. Further, Dr. Foster's approach does not conform to the legal standards to be applied in proving intentional employment discrimination, including discriminatory staff assignments.

Plaintiffs also suggest that certain schools are racially identifiable by "perception", relying upon the fatally flawed telephone survey conducted by Central Surveys as interpreted by Charles Williams. For the reasons stated previously (supra, § VII C, Central Surveys), the analysis by Central Surveys should be totally disregarded.

Finally, plaintiffs apparently suggest that by Board action/inaction, certain schools are racially identifiable, relying principally, if not exclusively, upon the report of William Lamson. However, Lamson specifically disavowed in his

report that his analysis involved a search for segregative intent on the part of the Board. He admitted that his report was a description of the effects of administrative decisions and a discussion of alternatives to those decisions (e.g. busing) which he believed were available. (Tr. 381-382, 443-448). Plaintiffs also disavow the need to show intent. At the very outset of their post-trial brief they state: "Plaintiffs do not seek to show intentional segregation". (Plaintiffs' Post-Trial Brief at p. 2).

Notwithstanding plaintiffs' position, as well as the existence of substantial, competent evidence and well-reasoned legal authority to reject plaintiffs' analysis based upon "racial identifiability", set forth below is a discussion of the evidence as it relates to the schools identified in plaintiffs' post-trial brief.

A. Belvoir.

Plaintiffs do not claim that Belvoir Elementary School is a vestige of the former dual elementary school system which existed prior to 1954. And, although by plaintiffs' definition Belvoir is a racially identifiable school, it currently possesses only 7.7 percent of the total black elementary school enrollment. (See Def. Ex. 1120B).

The absurdity of plaintiffs' mathematical formula for racial identifiability by staff assignment is apparent in Dr. Foster's analysis of Belvoir's staff for the 1985-86 school year. Plaintiffs claim Belvoir is racially identifiable by staff assignment. It is so by half (.50) an employee. According to Dr. Foster's analysis, Belvoir's staff is 14.8 percent minority,

whereas the district-wide average is 11.23. (See Pl. Ex. 155-O). It defies logic and common sense to suggest that an elementary school in Topeka which is 14.8 percent minority is a racially identifiable minority school when the district-wide average is 11.23 percent.

Plaintiffs also contend that by "perception" Belvoir is a racially identifiable minority school. As demonstrated at trial and outlined previously herein, the Central Surveys' opinion poll is fatally flawed and should be rejected in its totality. Even if the survey had conformed to the minimum standards, which it did not (Tr. 2162), to conclude that Belvoir is a racially identifiable school based upon the results of the survey is ridiculous. Question 17 of the survey asked, "Are there any schools in Topeka that you think of as black or minority schools?" If yes, question 17a asked, "Which ones?" In response, only 48 people out of 400 identified Belvoir--12 percent. These were the open-ended responses. When respondents were given the opportunity to comment regarding one of the 13 schools which were specifically named in the questionnaire (the low or high minority enrollment schools), Belvoir was identified only 15 percent of the time. (See Pl. Ex. 21, p. 20 & 22, which sets forth the responses to questions 17 & 19, respectively). At the very least, 85 percent of the respondents did <u>not</u> identify Belvoir as "black or minority school". Plaintiffs' own evidence demonstrates that Belvoir was not "perceived" by Topekans as a racially identifiable school.

In addition, plaintiffs attempted to show that where schools are perceived as minority schools, they are stigmatized and harms, such as poorer test scores, result. (Tr. 1235-1237, Crain). Yet, plaintiffs' own evidence refutes this assertion. The test score data offered by plaintiffs demonstrates that Belvoir students scored very well, with an 81 percent pass rate, on average scoring better than 15 other elementary schools. (Pl. Ex. 185; Tr. 1246-1247).

The site of the Belvoir School annexed by the City of Topeka first became a part of the Topeka Public Schools in 1960 with, according to plaintiffs' expert, nearly 90 percent of its former autonomous attendance zone. (Pl. Ex. 219, p. 151). Plaintiffs estimated that the student population of Belvoir in 1960 was approximately 22.7 percent, based upon records from the Shawnee County Clerk's office. (Pl. Ex. 219, p. 151). Lamson claimed that the annual report from the Shawnee County Superintendent showed that in the 1952 school year, Belvoir was 20.8 percent black. (Tr. 455-456). Lamson did not produce the annual report. However, it was introduced into evidence by the defendants. The annual report for the 1952-53 school year demonstrates that there were 66 black students at Belvoir out of a total enrollment of 455. Black students comprised only 14.8 percent of the student enrollment, not 20.8 percent. (Def. Ex. 4G). Even if Lamson's calculation were correct, since the Topeka Public Schools exceeded 11 percent black at the time, by plaintiffs' own mathematical ratios Belvoir was not racially identifiable when it became a part of the Topeka Public School system.

The evidence graphically demonstrated that the major force dictating the racial composition of Belvoir since 1960 has been demographic. In 1963, the federally subsidized low income housing project known as Pine Ridge, with 210 family units, was built across the street from Belvoir Elementary School at 2701 East Tenth Street. (Pl. Ex. 8R). While the precise racial composition of Pine Ridge is not known because the records of the Topeka Housing Authority regarding federal subsidized housing were destroyed, minutes of the Topeka Housing Authority meetings show that as early as October 26, 1961, complaints were registered regarding the location of Pine Ridge, including the fact that the site "will create Negro ghetto". (See Pl. Ex. 8R, minutes of Housing Authority of City of Topeka, Vol. I, pp. 2-3). The minutes of the Housing Authority also reflect that by mid-1977, over 66 percent of its residential units were occupied by blacks. (Pl. Ex. 8R, Vol. V, minutes of Housing Authority of City of Topeka, p. 4). Two years later, another federally subsidized low income housing project, Trail Ridge, 2000 East 12th Street, consisting of 148 family units, was built adjacent to the Belvoir School. In addition, by 1963, the area just south of Belvoir School was condemned where Interstate 70 was to be constructed. (Tr. 462, Lamson).[13] Lamson also admitted that placement of the interstate highway had a segregative effect. (Tr. 427, Lamson). The interstate forms the southern boundary of

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[13] Mr. Lamson conceded that he did not consider the impact upon the Belvoir area when federally subsidized housing projects were constructed in 1963 and 1965 near the Belvoir School. (Tr. 463-464, Lamson).

Belvoir Elementary School and the northern boundary of Hudson Elementary School.

Finally, plaintiffs refuse to acknowledge that pursuant to the 1976 Long-Range Facilities Plan, the closing of Rice Elementary School (which had a relatively low minority enrollment), and dividing that attendance area between Lafayette and Belvoir attendance centers, reduced the minority population in those two schools. (Tr. 2721-2723, Henson; Def. Ex. 1114, Clark Rept. at p. 28).

B. Highland Park North.

Like Belvoir Elementary School, Highland Park North was not a part of the Topeka Public School system in 1954. In 1959, after annexation by the City of Topeka, Highland Park North became a part of the Topeka Public Schools. Highland Park North was 51 percent black in the 1985-86 school year. (Pl. Ex. 8J). With Belvoir (54.7 percent black in 1985-86), these two schools are the only schools which are majority black in U.S.D. No. 501, and only slightly so at that.

Plaintiffs erroneously state that there was an 11 percent increase in the percentage of minority pupils at Highland Park North in 1979. (See Plaintiffs' Post-Trial Brief, p. 31). The 11 point increase actually occurred in 1978 with the closing of Parkdale Elementary School, which was the second highest minority enrollment school in 1977.[14] (Pl. Ex. 8J). Plaintiffs' discus-

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14 As plaintiffs correctly point out, this figure includes the Head Start program. Without Head Start, Parkdale was 86 percent minority, 82 percent black. (Pl. Ex. 8J).

sion fails to recognize that this 11 percent increase was anticipated in the 1976 Long-Range Facilities Plan (Pl. Ex. 240, p. 18), it was a desegregative action in closing Parkdale, and received the approval of HEW. (Also see Def. Ex. 1114, Clark Report at p. 19).

Utilizing Dr. Foster's mathematical ratio, Highland Park North's staff, which was 19.2 percent minority, was 6.3 percent outside of the "acceptable" range (Pl. Ex. 155-O), possessing more than one but less than two minority staff members in excess of Dr. Foster's ideal range. Without belaboring the point, plaintiffs offered no evidence to demonstrate that this deviation was statistically significant, a standard which has been utilized in school desegregation cases. See, e.g., Bell v. Board of Ed., Akron Public Schools, 491 F. Supp. 916, 938 (N.D. Ohio 1980), aff'd 683 F.2d 963 (6th Cir. 1982).

By plaintiffs' own evidence, only 10-13 percent of the Zone A residents interviewed by Central Surveys "perceived" Highland Park North as a minority school. Stated another way, 87-90 percent did not identify Highland Park North as a minority school. (Pl. Ex. 21, pp. 20, 22).

Plaintiffs concede that between 1959 and 1975 the increase in minority enrollment at Highland Park North is attributable to demographic forces. (See Plaintiffs' Post-Trial Brief, p. 32). Plaintiffs attempt to suggest that the closing of Monroe Elementary School at the end of the 1974-75 school year (Monroe was an 83 percent minority school, Pl. Ex. 8J) negatively impacted on the racial composition of Highland Park North. (See Plaintiffs'

Post-Trial Brief at pp. 32-33). Plaintiffs' suggestion is erroneous. Both the minority and the black percent enrollment at Highland Park North decreased the year following the closure of Monroe Elementary School. Its closure clearly had no effect on the racial composition of Highland Park North and this is simply a weak attempt by plaintiffs to label Highland Park North as a vestige school.

C. Lafayette.

In the 1985-86 school year, Lafayette Elementary School possessed a 41 percent black student enrollment. (Pl. Ex. 8J). In the first year of full implementation of the four-step plan, the 1956-57 school year, 13.7 percent of the total black elementary student enrollment attended Lafayette Elementary School. (Def. Ex. 1008A). In the 1985-86 school year, only 9.5 percent of the total black elementary student enrollment attended Lafayette.

Plaintiffs claim that Lafayette is a successor or second-generation vestige of formerly all-black Washington Elementary School, which was closed in 1959. (Plaintiffs' Post-Trial Brief, p. 37). Plaintiffs claim this is the case because many of the students who attended Parkdale in 1977 (the successor to Washington, according to plaintiffs) were reassigned to Lafayette in the 1978-79 school year. Plaintiffs' own evidence refutes this allegation.

Although compared to 1977-78 there was a slight increase in total minority enrollment at Lafayette for the 1978-79 school year (less than one percent), the black percent enrollment

actually decreased. (Pl. Ex. 8J). In short, the evidence does not even support the claim of a segregative effect.

It is also interesting to note that in 1969, although Lafayette Elementary School was 54 percent total minority, its black student enrollment was only 26 percent. (Pl. Ex. 8J).[15] Indeed, it would appear that the percentage of minority and black student enrollment at Lafayette has been decreasing steadily since 1976. Among other things, the evidence showed that as a part of the implementation of the 1976 Long-Range Facilities Plan the effect of closing Rice Elementary School with part of its attendance area reassigned to Lafayette was integrative, and intentionally so. (Tr. 2721-2723, Henson).

Since the 1981-82 school year, in terms of staff assignments, Lafayette Elementary School has never deviated from the acceptable minority percentage range by more than 7.7 percent. In 1985-86 school year, by Dr. Foster's mathematical ratios, the racial composition of the Lafayette staff deviated 4.4 percent from the acceptable range, or approximately one minority employee too many to fit Dr. Foster's formula. (Pl. Ex. 155-O). In the 1986-87 school year, 14.8 percent of the administrative and certificated staff assigned to Lafayette Elementary School were minority, four minority employees of a total of 27 employees. The district-wide average was 10.8 percent. (Def. Ex. 1122). Again, plaintiffs have failed to establish that such a result is statistically significant.

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15 Even by plaintiffs' mathematical ratio, Lafayette is only slightly outside the acceptable range (district-wide average was 12 percent black in 1969). (Pl. Ex. 8J).

Apart from plaintiffs' failure to demonstrate that the racial composition of Lafayette Elementary School was the result of segregative intent, plaintiffs' own evidence shows that 83 percent of those sampled from the Zone A residents did not identify Lafayette as a black or minority school. (Pl. Ex. 21, p. 22).

D. Quinton Heights.

Prior to 1954, Quinton Heights was an all-white elementary school. In the first full year of implementation of the four-step plan, in 1956-57, Quinton Heights possessed 7.3 percent of the total black elementary student enrollment. This was at a time that the system-wide average was 10.7 percent black. Clearly, Quinton Heights was not racially identifiable and fully desegregated by the first year of full implementation of the four-step plan. (Def. Ex. 1008A).

Although plaintiffs assert that the closing of Pierce School in 1959 had a negative impact on the racial composition of Quinton Heights (see Plaintiffs' Post-Trial Brief at p. 40), William Lamson, plaintiffs' own expert, admits that there is "no indication of the gain or loss of black and white students at the Quinton Heights School as a result of the Pierce closing." He simply speculates that Quinton Heights "in all probability" lost white school children. (Pl. Ex. 219, p. 143).

Plaintiffs' primary allegation is that Quinton Heights is a successor school to formerly all-black Monroe. (See Plaintiffs' Post-Trial Brief at p. 38). In an attempt to persuade that Quinton Heights is the successor to formerly all-black Monroe,

plaintiffs marry their discussion of Monroe to the scheduled closing of Polk. (See Plaintiffs' Post-Trial Brief, p. 42). Plaintiffs' statement that Quinton Heights is the "clearest example of deliberate, intentional segregative acts by the Topeka School Board" (Plaintiffs' Post-Trial Brief, p. 38) is without merit. The 1976 Long-Range Facilities Plan, reviewed and approved by HEW, specifically envisioned the closure of Polk in 1979. However, the minority percent enrollment of Quinton Heights prior to the closing of Polk was indicated in the plan as 39.1 percent, the plan envisioned that upon the closure of Polk, the minority enrollment would only slightly increase to 42 percent minority. (See Pl. Ex. 240, p. 18). Assuming arguendo, that the closing of Polk alone was responsible for the increase at Quinton Heights, it certainly wasn't the intent of the School District to have this effect.

Again, without conceding the validity of Dr. Foster's formalistic and mechanical application of a very narrow range of acceptable deviation from the district-wide minority staff average, in the 1985-86 school year period, Quinton Heights deviated 8.7 percent from Dr. Foster's acceptable range. Similar to Highland Park North, this translates into Quinton Heights possessing more than one but less than two minority staff members in excess of Dr. Foster's ideal range. Without producing evidence of statistical significance, this analysis is of no value. Indeed, when viewing the racial composition of the administrative and certificated staff of Quinton Heights, it appears that the results would be acceptable. 12.5 percent of the administrative

and certificated staff of Quinton Heights are minorities. The district-wide average of elementary schools in the 1986-87 school year is 10.78 percent. (Def. Ex. 1122).

Likewise, the results of the Central Surveys poll (which defendants do not suggest is valid) show that 95 to 98 percent of the respondents did not perceive Quinton Heights as a black or minority school. This is true, even though Quinton Heights is the elementary school with which the greatest number of respondents said they were "familiar". (See Pl. Ex. 21, pp. 20 & 22).

Apart from what already has been said about the failure of plaintiffs to establish that Quinton Heights is either a vestige of formerly all-black Monroe, or that its racial composition is the result of segregative intent, perhaps a further word should be said about the comments made by plaintiffs regarding Stout. (See Plaintiffs' Post-Trial Brief at pp. 42-43). Plaintiffs' attempt to establish that a "parallel development" was taking place at adjacent "white Stout". (Plaintiffs' Post-Trial Brief at p. 42). Stout's racial composition virtually mirror-images the district-wide average today. The geographic extensions of Stout to the north, paralleling the extensions of Quinton Heights, at first glance appear to involve large attendance areas. However, these areas possess very few residents. The areas encompassed by the Stout attendance area include not only Washburn University, but also the grounds of Veterans' Administration Hospital. The territory of Quinton Heights includes not only the School District administration building, the Kansas National Guard, and the Topeka Country Club, but also

the old Topeka fairgrounds. These attendance areas simply include land involved in non-residential use. They certainly don't suggest that the School District has been engaged in intentional discrimination.

E. Hudson.

Plaintiffs' inclusion of Hudson Elementary School within the group of so-called "racially identifiable" schools clearly demonstrates the impropriety of adopting Dr. Foster's formalistic and mechanical approach to addressing questions of segregation. Plaintiffs do not claim that Hudson is a vestige of any formerly all-black school. Nevertheless, because it became "racially identifiable" pursuant to Dr. Foster's mathematical ratio in the 1983-84 school year--four years after the current action was filed--plaintiffs suggest to this court that a violation of law exists. At no time in the history of Hudson Elementary School prior to the 1983-84 school year was it ever a racially identifiable minority school. Likewise, at no time prior to the 1983-84 school year was Hudson a racially identifiable black school pursuant to Dr. Foster's formula. (See Pl. Ex. 8J). There does not appear to have been a boundary change with respect to the Hudson Elementary School attendance area since the 1964-65 school year. (See Pl. Ex. 8H, Hudson). Obviously, the changes in the racial composition of the schools of the Hudson attendance area are demographic in nature.

Again, as with Belvoir, the siting of federally subsidized housing projects within the Hudson attendance area (i.e., the Colonial Townhouses in 1965, the Highland Park Apartments in

1967, and Deer Creek in 1970) have contributed to the racial composition of the school attendance area. While the destruction of Topeka Housing Authority records has made it difficult to accurately identify the racial composition of this housing projects, evidence does show that by mid-1977, over 55 percent of the Deer Creek units were rented by black families. (Pl. Ex. 8R, Vol. 5, minutes of Housing Authority, p. 4-5).

Likewise, attempting to establish that Hudson Elementary School is a racially identifiable minority school by the application of Dr. Foster's mathematical ratio to the staff assignments points out the unreliability of such an approach. Plaintiffs tell the court that Hudson was a racially identifiable minority school by staff assignment in the 1985-86 school year. As with Quinton Heights, this appears to be by something in excess of one minority employee but less than two. Plaintiffs identify the 1975-76 school year as the only other year in which Hudson was identifiable as a minority school by staff assignment. (Pl. Ex. 155-O; Plaintiffs' Post-Trial Brief, p. 43). What plaintiffs fail to tell the court is that by a strict application of the Foster mathematical ratio, Hudson has been a racially identifiable white school every year from 1974-75 to the 1982-83 school year, when it was racially non-identifiable by the formula, and again racially identifiable white school by staff assignment during the 1983-84 school year. (See Pl. Ex. 155-O).

According to the Central Surveys poll, 98 percent of the respondents did not identify Hudson Elementary School as a black or minority school. This is the same percentage that failed to

identify Sumner and Quinton Heights Elementary Schools as black or minority schools. (See Pl. Ex. 21, p. 20). Suffice it to say, substantial, competent evidence compels rejection of the mathematical ratios of Dr. Foster, as well as the result-oriented conclusions of Central Surveys.

F. Avondale East

Plaintiffs' extremely feeble attempts to convince this court that a violation of the law exists with respect to the treatment of Avondale East Elementary School is very similar to the attempt made with respect to Hudson. With the exception of the 1971-72 school year, even by Dr. Foster's mathematical ratios, Avondale East Elementary School was never a racially identifiable minority school prior to the filing of this case. Indeed, under Dr. Foster's formula, it first became racially identifiable in the 1985-86 school year. (Pl. Ex. 8J).

Today, Avondale East has no more certificated and administrative staff employees who are black (or other minority) than Highland Park South, a school about which plaintiffs make no complaint. (Def. Ex. 1122). The use of Dr. Foster's mathematical ratio regarding racial identifiability by virtue of staff assignments produces the result that in the 1976-77 school year, Avondale East had too many minorities; in 1977-78, too many whites; in 1978-79, too many minorities; in 1979-80, too many whites; and in 1980-81, too many minorities. (See Pl. Ex. 155-O). It is this kind of result which caused Judge Frank Johnson to describe Dr. Foster's formulas as "arbitrary" and "highly artificial" in Carr v. Montgomery County Board of Education, 377

F. Supp. 1123, 1140-1141 (N.D. Ala. 1974), aff'd 511 F.2d 1374, reh'g en banc denied 511 F.2d 1390 (5th Cir.), cert. denied, 423 U.S. 986, 96 S.Ct. 394 (1975).

Again, notwithstanding the invalidity of the Central Surveys poll, its own results show that less than one-half of one percent of the respondents identified Avondale East as a black or minority school. (Pl. Ex. 21, p. 20).

G. Lowman Hill.

Contrary to plaintiffs' statement, Lowman Hill in 1985-86 was not a racially identifiable minority school. That is also true for every year since the 1981-82 school year. (See Pl. Ex. 8J). If analyzed on the basis of black enrollment, at no time beginning with the 1982-83 school year to the present has Lowman Hill been a racially identifiable black school. (Pl. Ex. 8J).

Plaintiffs suggest that the closing of Central Park in 1980 was done to exclude the possibility that it would have an integrative effect on Lowman Hill. (See Plaintiffs' Post-Trial Brief, p. 54). However, the evidence shows that pursuant to the Long-Range Facilities Plan, with the reassignment of some of the Central Park attendance area to Lowman Hill, by 1982 the minority enrollment had decreased at Lowman Hill by nearly seven percent, making it non-racially identifiable by plaintiffs' own standard.[16]

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16 Indeed, it was virtually so by the 1981-82 school year, exceeding Dr. Foster's formula by 77/100th's of one percent. (Pl. Ex. 8J).

Again, the impropriety of plaintiffs' adherence to Dr. Foster's mathematical ratio with respect to staff assignment is clearly demonstrated in reviewing his evaluation of staff assignment for Lowman Hill in the 1980-81 through 1982-83 school years. Although in each year Dr. Foster would have us believe that Lowman Hill was racially identifiable by staff assignment, at no time did it deviate from the standard by more than one employee. (Pl. Ex. 155-O). In the 1986-87 school year, administrative and certificated staff at Lowman Hill were 13 percent minority, while the district-white average was 10.8 percent. (Def. Ex. 1122). Plaintiffs' reliance upon the very strict remedial standard of Dr. Foster is misplaced.

Again, as with every school for which plaintiffs suggest that Topeka residents perceive the school as a black or minority school, the evidence, such as it is based upon its deficiencies, shows that Lowman Hill Elementary School was not identified as a black or minority school by 98 percent of the respondents to the poll. (Pl. Ex. 20, p. 20).

Finally, based upon the foregoing, as well as the careful analysis conducted by Dr. Clark (Def. Ex. 1114, p. 23), it is clear that Lowman Hill is not a vestige of the former dual elementary school system. The gyrations that plaintiffs go through in attempting to suggest it is a successor which possesses vestiges of the old Buchanan School are amazing. The relationship between the formerly all-black Buchanan School and the present racial composition of Lowman Hill are so attenuated as to be incapable of supporting a finding of a vestige. Even by plain-

tiffs' standards, Lowman Hill is not a racially identifiable school today.

H. McClure, McCarter, McEachron & Bishop.

As explained previously, the analysis of racial identifiability with respect to school attendance criteria has focused upon the elimination of one-race black schools, not the elimination of one-race white schools. The existence of racially identifiable white schools in a white majority system does not give rise to an inference of vestiges of a prior de jure system. (supra, § V; and see particularly Price v. Denison Independent School Dist., 694 F.2d 334, 364 (5th Cir. 1982). Nevertheless, plaintiffs' arguments with respect to the so-called "racially identifiable" white schools are discussed hereafter.

Plaintiffs' suggest that the history of these four schools are very similar. (See Plaintiffs' Post-Trial Brief, pp. 54-57, 60-61, 64-67). As a result, they will be treated collectively, although differences exist. These four schools form the outer ring of the southwest portion of Unified School District No. 501. Plaintiffs criticize each of these schools for being constructed when the central city schools were "under-utilized". Plaintiffs' criticism fails to recognize an important fact conceded by plaintiffs' expert. Mr. Lamson acknowledged that usually under-utilized schools are not at the cutting edge of population growth. They are usually found in an area away from which people are migrating. People were migrating out of the center city of Topeka to the suburbs and the unincorporated areas of the metropolitan area in the 1950s and 1960s. This was not unique to Topeka, it was occurring nationally. (Tr. 465).

Mr. Lamson also recognized that good reasons exist to under-utilize these inner city schools where a school district is actually losing school age population in the inner city area as Topeka was. (Also see Def. Ex. 1114, pp. 9-11; and Def. Ex. 1114A). As a result, a school district may permit a school to become under-utilized because it is foreseen that the school will be closed in the near future. At the same time, Lamson conceded that portable classrooms could be used in order to solve what would appear to be a temporary overcrowding in the areas to which people were migrating. (Tr. 466). In his analysis, Lamson tried to determine whether the placement of portable classrooms was related to growth patterns or the loss of school age population in each attendance area. He admitted that when enrollment increases there is a greater tendency to have portable classrooms there, and if enrollment continues to increase, there is a greater tendency to have permanent additions, and beyond that possibly a new school. (Tr. 467-468).

Plaintiffs do not claim that any of these schools are vestiges of the former dual elementary school system, rather they ignore the important and legitimate factors which Lamson had to concede. As a result, plaintiffs are left to simply argue that these schools are "racially identifiable" by virtue of Dr. Foster's mathematical ratios. In 1985-86 school year, when comparing the percentage of black student enrollment for the School District, only McClure is "racially identifiable" by more than 23/100ths of one percentage point; McClure falls outside Mr. Lamson's acceptable range by 2.4 percent. It should also be

recognized that all four of these schools were opened before the Kansas Legislature locked the geographic boundaries of the Topeka Public Schools through the Kansas Unification Acts. Otherwise, even greater growth would have been experienced by the Topeka Public Schools in the southwest part of U.S.D. No. 501. When compared on the basis of percent minority student enrollment, only McClure falls outside of Dr. Foster's acceptable range by more than three percentage points; McClure is less than five percent outside the "acceptable" band. (Pl. Ex. 8J).

Today, all four schools have at least one minority administrative or certificated staff member. (Def. Ex. 1122). Under Dr. Foster's very strict formula, McCarter has not been racially identifiable in any of the last five years. (Pl. Ex. 155-O). During the same time period the others have not fared as well, although Dr. Foster's formula would be virtually satisfied by no more than the addition of two minority staff members to each of those schools. In any event, plaintiffs' evidence did not demonstrate that the deviations from the district-wide average could not have happened by chance alone.

Plaintiffs' so-called perception evidence is weaker still. When respondents were asked whether there were any schools in Topeka thought of as "white schools", 95 percent or more of the respondents did not identify these schools as white schools. (Pl. Ex. 21, p. 21).

I. Potwin, Crestview, Gage & Whitson.

Plaintiffs' arguments regarding these four schools are very similar and, as a result, will be treated collectively here.

Under Dr. Foster's mathematical ratios, on the basis of percentage black student enrollment, both Whitson and Gage were within plaintiffs' acceptable range by student assignment in the 1985-86 school year. Crestview was outside the range by one percent and Potwin by 2.3 percent. (Pl. Ex. 8J). Once again, this points out the arbitrariness of the application of Dr. Foster's mathematical ratios. Presumably, had the black enrollments at these schools been slightly larger than they are, plaintiffs would not consider them racially identifiable today. Plaintiffs concede that Crestview and Whitson (formerly known as Southwest) were established by the Topeka Public Schools at a time when the City of Topeka was experienced growth to the southwest, experiencing temporary overcrowding. The same reasons which justified the School District's siting of the other southwest schools (at the time of their establishment, Crestview and Whitson were on the west side of Topeka) are applicable here. How elementary school buildings are located and the graphic depiction of the drawing of boundaries for both Potwin and Gage are based upon nondiscriminatory reasons. (See Pl. Ex. 8L, Appendix B; Tr. 2410, 2417).

Plaintiffs' survey is of no help to plaintiffs either. Ninety-five to 99 percent of the respondents did not identify these schools as white schools. (Pl. Ex. 20, p. 21).

J. Eisenhower Middle School.

Very little need be said about any of the secondary schools. Lamson admitted that there are no vestige high schools. (Tr. 384). In addition, during his testimony, he attempted to hide

the fact that he removed from the final draft of his report the statement "the junior high schools had been desegregated in 1941 as a result of the litigation styled Graham v. Topeka". (Tr. 471). Since the vestige argument is unavailable to plaintiffs, they must show that the racial composition of Eisenhower Middle School was the result of intentional segregation.

It appears that plaintiffs are not sure what to argue. First, they claim that Eisenhower was intended to be a white school. Over time, the evidence shows that Eisenhower became a well integrated school. (Pl. Ex. 8J). Subsequently, plaintiffs claim that Eisenhower became a black school. (Plaintiffs' Post-Trial Brief, p. 71). The percent black for the Eisenhower attendance area increased from approximately one percent in the 1963-64 school year to 14.2 percent in the 1979-80 school year. These changes are explainable totally in terms of population composition change--demographic changes. (Def. Ex. 1114, Clark Rept., pp. 20-22).

Plaintiffs further contend that Eisenhower became racially identifiable as a minority school, for the first time, in 1980, when five junior high schools were closed and the School District converted its junior highs to the middle school concept. (Plaintiffs' Post-Trial Brief, p. 67). The evidence demonstrated there were several valid reasons for conversion to the middle school concept and closure of the junior highs. Indeed, the evidence shows HEW not only approved closure but also had previously voiced concern. (Pl. Ex. 228). The overall system-wide effect of this provision of the Long-Range Facilities Plan was clearly

desegregative. There is no evidence of segregative intent on the part of the School District. Plaintiffs' reliance on Dr. Foster's mathematical ratio in an attempt to prove segregation is arbitrary and should be rejected.

In addition, Dr. Foster's own mathematical formula for racial identifiability by virtue of staff assignments shows that Eisenhower has never deviated very much from the narrow range found acceptable to Dr. Foster. In some years, the deviation is within acceptable limits. At times Dr. Foster's calculation shows that minority percentage was slightly under the acceptable range and at other times slightly over the acceptable range. (Pl. Ex. 155-O). Certainly no pattern of racial identifiability has ever existed. Likewise, 91 to 94 percent of the respondents polled by Central Surveys did not identify Eisenhower as a black or minority school. (Pl. Ex. 20, pp. 20, 22).

K. Landon & French Middle Schools.

Plaintiffs treat Landon and French similarly, claiming that both are a successor schools to Capper Junior High. They suggest that Capper should not have been utilized since at the time East Topeka Junior High was under capacity. (Plaintiffs' Post-Trial Brief, pp. 75, 78). Plaintiffs' argument ignores at least two realities. First of all, the Capper school building (old Washburn Rural High School) was annexed by the City of Topeka. (Pl. Ex. 8D). Even plaintiffs' expert Lamson conceded that because of the massive cost of constructing schools, there were good reasons why Topeka Public Schools would continue to use those annexed by the City when they came into the system. (Tr.

467-468). Second, the suggestion that the site of Capper Junior High should not have be used because East Topeka Junior High was under-utilized ignores the reality that those schools were on opposite sides of town. The location of the schools clearly was in response to anticipated growth in the west.

Moreover, even Dr. Foster admitted that the so-called white secondary schools were close to becoming racially non-identifiable. This would occur as a matter of trend within the next two years. (Tr. 608).

Further, between 1976 and 1985, when viewed in terms of black enrollment, French was not racially identifiable in any year except 1980 (by 0.2 percent outside plaintiffs' range) and 1985 (by 1.2 percent). At the time of its closing at the end of the 1985-86 school year, Landon was over nine percent minority, making it 2.6 percent outside Dr. Foster's acceptable range. By closing the school and assigning the attendance area to French which possessed a lower minority percentage, it would have the effect, albeit a slight one, of increasing the minority enrollment at French Middle School. Currently, administrative and certificated staff of French Middle School is 13.89 percent minority. This is slightly more than the district-wide average of 13.22 percent. (Def. Ex. 1122).

Although the results of the Central Surveys study are invalid as demonstrated previously (supra, § VII C, Central Surveys), in answer to which schools in Topeka do "you think of as white schools", 88 and 89 percent of the respondents did not identify as white schools Landon or French, respectively. (Pl. Ex. 21, p. 21).

L. Topeka West High School.

There are no vestige high schools in Topeka. (Tr. 384, Lamson). Indeed, pursuant to Lamson's formula or rule of thumb, at no time have any of the high schools in Topeka--Topeka High, Highland Park, or Topeka West--been racially identifiable. (Tr. 376-378, 395-396). Using Dr. Foster's mathematical ratio on the basis of total minority enrollment, Topeka West High School is outside his acceptable range by less than one percent. (Pl. Ex. 8J). As the evidence demonstrates, the decision to build Topeka West High School was prompted by the fact that Topeka High School was exceeding its capacity. As of that time, the central part of Topeka was served by Topeka High School, and the eastern area was served by Highland Park High School. (Tr. 1432-1434, Henson). The placement of Topeka West High School in the western part of the District was a reasonable and thoughtful decision, given the growth occurring in the western part of the City. (Tr. 2296-2297, Clark). There is no evidence of segregative intent.

IX. CONCLUSION

Defendant Unified School District No. 501 respectfully submits that the plaintiffs have failed to provide evidence or a theory of the case upon which a finding of liability can be premised. Plaintiffs' post-trial brief, as well as their post-trial proposed findings of fact and conclusions of law, misperceive the nature of this litigation, their burden of proof, and the proper legal import of the evidentiary record. For the reasons stated in the defendant Board's trial brief and proposed

findings of fact and conclusions of law, judgment should be entered in favor of the defendant Board.

The defendant Board has responded to the evolving constitutional standards of desegregation law. The most significant response was the adoption and implementation of the 1976 Long-Range Facilities Plan. At least by the date of full implementation of that plan, the 1981-82 school year, if not sooner, the schools were fully desegregated. Having attained unitary status at least by the beginning of 1981-82 school year, and having remained unitary thereafter, the defendant Unified School District No. 501 respectfully submits that it is entitled to a finding by this court that the School District has attained unitary status. The defendant, therefore, respectfully urges that this Court now relinquish its jurisdiction over Unified School District No. 501.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **Response of Unified School District No. 501 to Plaintiffs' Post-Trial Brief** was served by placing same in the United States mail, first class postage prepaid, on this 28th day of January, 1987, addressed to:

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