No. 87-1668

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLIVER BROWN, et al.
Plaintiffs

and

CHARLES and KIMBERLY SMITH,
Minor Children, By Their Mother
And Next Friend,
LINDA BROWN SMITH, et al.
Intervening Plaintiffs/Appellants

v.

BOARD OF EDUCATION OF TOPEKA,
SHAWNEE COUNTY, KANSAS, et al.
Defendants/Appellees

BRIEF OF APPELLEE JOHN CARLIN

Appeal From United States District Court
For The District Of Kansas
Hon. Richard D. Rogers, Judge

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IN THE UNITED STATES COURT OF APPEALS

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

CERTIFICATION REQUIRED BY
TENTH CIRCUIT RULE 28.2(a)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Defendants: BOARD OF EDUCATION OF TOPEKA, KANSAS;
KENNETH McFARLAND, Superintendent of Schools;
FRANK WILSON, Principal of Sumner Elementary School;
STATE OF KANSAS;
JOHN CARLIN, Governor;
DOROTHY GROESBECK, State Board of Education;
KAY GRONEMAN, State Board of Education;
RUTHANN OELSNER, State Board of Education;
FLOYD J. GRIMES, State Board of Education;
DALE CAREY, State Board of Education;
HAROLD H. CRIST, State Board of Education;
ANN KEENER, State Board of Education;
MARILYN HARWOOD, State Board of Education;
JOHN BERGNER, State Board of Education;
THEODORE VON FANGE, State Board of Education;
JIM HIEBERG, State Board of Education;
DENISE APT, State Board of Education;
EVELYN WHITCOMB, State Board of Education;

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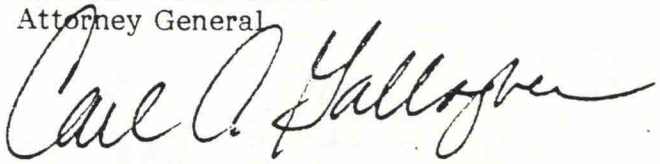
ROBERT T. STEPHAN
Attorney General



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CERTIFICATE OF NECESSITY FOR SEPARATE BRIEF PURSUANT TO RULE 31.4

COMES NOW Carl A. Gallagher, Assistant Attorney General, counsel for former Governor John Carlin in the captioned case, and sets forth the reasons for the filing of a separate brief.

1. The district court granted former Governor Carlin summary judgment two weeks before trial on the civil rights claims, and on the morning of trial, prior to opening statements, on the Title VI claims.

2. The scope of review on an appeal from an order granting summary judgment differs from an order granting judgment based upon findings gleaned from a trial on the merits.

3. Unlike the case concerning the other defendants, the claims against former Governor Carlin concerned questions of state constitutional law.

4. As a result, the former governor is not, as a matter of fact or law, on the same "side" as the other defendants. (See, Rule 31.4.) A separate brief is necessary.

Respectfully submitted,

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Attorneys for John Carlin

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Certificate was served by depositing same in the United States Mail, first class postage prepaid, this 19th day of August, 1987, to: CHRIS HANSEN, National Staff Counsel, American Civil Liberties Union, 132 West 43d Street, New York, New York, 10036, and RICHARD E. JONES, 605 S.E. Quincy, Suite 1, Topeka, Kansas, 66603, Attorneys for Plaintiffs/Appellants; K. GARY SEBELIUS and ANNE L. BAKER, 1300 Merchants National Bank Building, Topeka, Kansas, 66612, Attorneys for Unified School District No. 501; and DAN BILES, 6800 College Boulevard, Suite 700, Overland Park, Kansas, 66211, Attorney for State Board of Education.

Carl A. Gallagher

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2. Statutes and Other Authority

No. 87-1668

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BRIEF OF APPELLEE JOHN CARLIN

I. STATEMENT OF ISSUES

Appellants have stated the issue concerning both former Governor Carlin and the State Board of Education as follows:

Did the District Court err in holding that the members of the State Board of Education and former Governor John Carlin met their

constitutional duties to take affirmative steps to desegregate the schools even after concluding that neither took any action to desegregate Topeka's schools?

In fact, the district court made no such finding concerning former Governor Carlin. The Court granted former Governor Carlin summary judgment on both the civil rights and Title VI claims because he was not in a position to implement prospective injunctive relief. Whether the trial court erred in this ruling is the sole issue regarding former Governor John Carlin.

II. STATEMENT OF THE CASE

Because former Governor John Carlin disagrees with some statements in appellant's brief, and because the history of this case is not adequately presented concerning the State's involvement, the following statement of the case is presented.

The case at bar was originally heard by a three-judge federal district court in 1951, Brown, et al. v. Board of Education, et al., 98 F.Supp. 797 (D. Kan. 1951). Plaintiffs named the Board of Education and two individuals as defendants in the original suit. The State of Kansas later intervened solely for the purpose of defending the constitutionality of Chapter 72-1724, General Statutes of Kansas, 1949. See Document 16, Record on Appeal (ROA). The three-judge panel held the statute was constitutional based upon Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and its progeny, 98

F.Supp. at 800. The Court also found the segregated Topeka schools were substantially equal, 98 F.Supp. at 798. On appeal, the Supreme Court overruled Plessy v. Ferguson, holding "separate but equal was not proper in public education." Brown, et al. v. Board of Education, et al., 347 U.S. 483, 494-495, 74 S.Ct. 686, 98 L.Ed. 873, 881 (1953) (Brown I). The Court then ordered reargument concerning the relief that should be granted, 347 U.S. at 495-496, 98 L.Ed. at 881. After reargument, the Court remanded the case to the district court to oversee "provident and reasonable" implementation of desegregation. Brown, et al. v. Board of Education, et al., 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1954) (Brown II). Upon remand, the three-judge panel found the school district was making a good faith effort through a plan toward desegregation of schools. Jurisdiction was retained to assure complete compliance with the Supreme Court mandate. Brown, et al. v. Board of Education, et al., 139 F.Supp. 468, 470 (D. Kan. 1955). The school board plan was fully implemented by September, 1961, but the Court made no finding of complete compliance. Brown, et al. v. Board of Education, et al., 84 F.R.D. 383, 389 (D. Kan. 1979). In 1979, new parties moved to intervene as plaintiffs; their motion was granted; and the case again became active. 84 F.R.D. at 405.

On October 10, 1979, the State was dismissed as a party to the action. ROA, Document 70. In May, 1980, plaintiffs requested the Governor and the members of the State Board of Education be added as parties defendant for purposes of granting prospective injunctive relief. ROA, Document 79. This

motion was granted in the Memorandum Opinion filed June 13, 1980. ROA, Document 101.

Governor John Carlin was the duly elected and serving governor of the State of Kansas, holding office under the Constitution of the State of Kansas and, thus, a state official. (Stipulated by parties.) (ROA, Documents 227, 230.)

Governor John Carlin was unaware that segregation existed in U.S.D. 501. (Defendant Carlin's answer to plaintiffs' interrogatories No. 40, 42, Ex. A attached.) (ROA, Document 230.)

Governor John Carlin took no action regarding desegregating schools in U.S.D. 501. (Defendant Carlin's answer to plaintiffs' interrogatories No. 44-48, Ex. A attached.) (ROA, Document 230.)

For purposes of plaintiffs' Title VI claim, it is undisputed that the only federal funding over which the former governor had direct control was the Job Training Partnership Act (JTPA). (ROA, Document 289.) Of the participants in JTPA from October 1, 1983, through June 30, 1986, twenty-four (24) were black, four (4) were Hispanic, two (2) were American Indian, and two (2) were white. (ROA, Document 289, Ex. B.)

Former Governor Carlin also disputes several of plaintiffs' "factual" statements. There is absolutely no factual foundation for the assertion that former Governor Carlin did nothing to promote desegregation in Topeka. (Appellants' Brief at 22.) In fact, there was no evidence that Governor Carlin was aware segregation existed and the Court found there was no evidence of

intentional discriminatory conduct. (ROA, Doc. 286 at 4.) Likewise, the district court did not hold that both the governor and the state board "had insufficient authority to end segregation;". (Appellants' Brief at 45.) The Court held the governor could not provide injunctive relief. (ROA, Doc. 268, at 5-6.)

The Court made no finding that Governor Carlin blocked any efforts regarding desegregation of U.S.D. 501. (Appellants' Brief at 47.) The Court found that the governor's actions regarding the Technical Assistance Programs were not intentional discriminatory conduct. (ROA, Doc. 286 at 4.)

Finally, plaintiffs reasserts the governor took no action to "promote desegregation." (Appellants' Brief at 48.) The nub of the governor's motion for summary judgment was the governor lacked state constitutional authority to exercise control over education in Kansas. (ROA, Document 227 at 5-8.) The district court properly found that "the allocation of governmental responsibilities" in a state is not the function of a federal court. (ROA, Document 286 at 5.)

III. ARGUMENT

A. Applicable Law

Former Governor Carlin was a party to this lawsuit solely for purposes of granting prospective equitable relief. Governor Carlin requested summary judgment for failure to state a claim for which relief can be granted. Under the Constitution of the State of Kansas, Governor Carlin was unable to

implement any prospective equitable relief that plaintiffs' may request. As a result, Governor Carlin was not a proper party to this action, and plaintiffs failed to state a cause of action for which relief could be granted as to the governor.

A party may obtain summary judgment when there is no genuine issue of material fact. McClelland v. Facteau, 610 F.2d 693, 696-697 (10th Cir. 1979). The moving party also has the burden of proving there is no genuine issue of material fact. Id. However, the absence of proof of an essential element to the case may also provide grounds for summary judgment. Celotex Corp. v. Catrett, ___ U.S. ___, 106 S.Ct. 2548, 91 L.Ed.2d 265, 273-274 (1986). The nonmoving party is required to show the existence of a genuine issue of material fact. McClelland v. Facteau, 610 F.2d at 696-697. Finally, the evidence must be viewed in a light most favorable to the party opposing the motion. Id. at 697.

State officials are proper parties to the instant suit only for the purposes of prospective equitable relief. (Brown, et al. v. Board of Education, et al., No. T-316, Order filed 6/13/80, p. 4.) Accord, Lee v. McManus, 589 F.Supp. 633, 638 (D. Kan. 1984). To be a proper party for such relief, the state official must have authority to control, act, or otherwise implement the relief sought. Cf. San Francisco NAACP v. San Francisco Unified Sch., 484 F.Supp. 657, 665 (N.D. Cal. 1979) (governor not a proper party, it is administration, not existence of law, that is prohibited); Powers v. Mitchell, 463 F.2d 212 (9th Cir. 1972) (United States Attorney General and Service Director do not have power to order

local draft board to rescind an order, therefore, presence of Attorney General and Director as nominal defendants does not cure jurisdictional defect); McCrimmon v Daly, 418 F.2d 366, 368 (7th Cir. 1969) (for state officer to be a party, he must have connection with enforcement of the act); Mann v. Cox, 487 F.Supp. 147, 155 (S.D. Ga. 1979) (in an action to enjoin discrimination and selection of jury pool where judge only appoints jury commissioners or removes them for cause, the judge is not a proper party); Koehler v. Ogilvie, 53 F.R.D. 98, 101-102 (N.D. Ill. 1971) aff'd. 405 U.S. 906 (1972) (where members of the executive branch have no control over judge and did not participate in discrimination, they are not subject to injunctive relief); Coon v. Tingle, 277 F.Supp. 304, 306-307 (N.D. Ga. 1967) (where revenue commissioner has sole responsibility for enforcing liquor acts, governor and attorney general not proper parties). In school desegregation cases, the state must have knowledge of segregation, and intentionally act, or fail to act, to remedy the segregation. Brinkman v. Gilligan, 610 F.2d 1288, 1292 (S.D. Ohio 1985).

Article 1, section 3 of the Kansas Constitution vests "supreme executive power" with the "governor who shall be responsible for the enforcement of the laws of this state." Implementation of this executive power occurs, in pertinent part, through Article 1, section 6 of the Kansas Constitution, which permits the governor to reorganize all state agencies, except "agencies and functions of the legislative and judicial branches and the constitutionally-delegated functions of state officers and state boards shall be exempt from executive reorganization orders."

Article 6, section 1 of the Kansas Constitution requires the legislature to establish and maintain public schools. Article 6, section 2, however, creates the State Board of Education to generally supervise all education, except those powers delegated to the State Board of Regents. Board of Education members are elected (Kansas Const., Art. 6, §3); a commissioner serves as the executive officer (Kansas Const., Art. 6, §4); and the board has general supervisory authority over local school boards (Kansas Const., Art. 6, §5). Although the legislature in Chapter 72-1724, General Statutes of Kanas, 1949, authorized segregated schools in Kansas cities of the first class, this statute was repealed in 1957 (1957 Kan.Sess.Laws, Ch. 389).

The Kansas Constitution, as a charter, "limits rather than confers power and any power and authority not limited by the constitution remains with the people and their legislators." NEA-Fort Scott v. U.S.D. #234, 225 Kan. 607, 608-609, 592 P.2d 463 (1979) (hereinafter NEA-Fort Scott). The Kansas Supreme Court held that the mission of the State Board of Education is to "equalize and promote the quality of education for the citizens of the state." NEA-Fort Scott, 225 Kan. at 610-611. The provisions of Article 6 creating the State Board of Education are self-executing, and legislation affecting education "must be in harmony with [and not in derogation of] the provisions of the constitution." State, ex rel. Miller v. Board of Education USD 398, 212 Kan. 482, 488, 511 P.2d 705 (1973) (hereinafter State, ex rel. Miller). The Kansas Supreme Court has interpreted Article 6 to mean, "The people of this state, by constitutional fiat,

have placed the maintenance, development and operation of local public schools with locally elected school boards, subject to the general supervision of the state board of education." State, ex rel. Miller, 212 Kan. 492-493.

Under 28 U.S.C §1652, federal courts must apply the laws of the state in civil actions unless federal law requires otherwise. Thus, federal courts are bound by the construction of a state constitution by the highest courts of each state. North Carolina v. Butler, 441 U.S. 369, 376, n. 7, 99 S.Ct. 1755, 60 L.Ed.2d 286, 294, n. 7 (1979); Highland Farms Dairy v. Agnew, 308 U.S. 608, 613, 57 S.Ct. 549, 81 L.Ed. 835, 840 (1935).

Plaintiffs sought injunctive relief from Governor Carlin. Injunction is ". . . a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience." 43 C.J.S. Injunction, §2 (1978).

B. Analysis Of Civil Rights Claim

Under the Constitution of the State of Kansas, local school boards control "the maintenance, development and operation of local public schools." State, ex rel. Miller, 212 Kan. at 493-493.

General supervision or executive authority lies with the State Board of Education, and the legislature has no constitutional authority to enact laws in conflict or derogation of the state board's constitutional authority. Id. at 488. Likewise, the Governor is prohibited from usurping power constitutionally

delegated to the State Board of Education by the people of Kansas. Because the Constitution of the State of Kansas limits rather than confers powers, powers not limited are reserved to the people and their legislators, not the governor or another constitutional entity. Cf., NEA-Fort Scott, 225 Kan. at 609 (legislature cannot act in derogation of State Board of Education authority).

Thus, the governor's powers, which are necessarily limited to those found in the Kansas Constitution, are twofold: (1) "the supreme executive power to enforce the laws of this state," and (2) the power to reorganize state agencies. The Court must have determined whether the governor, under either of these powers, has the ability to provide prospective injunctive relief if so ordered by the Court. In other words, does the governor have the power to compel compliance with any order the Court might issue regarding desegreation in U.S.D. #501 schools? The district court properly found the governor did not.

The governor does not have power to implement prospective injunctive relief under the "supreme executive power clause" of the Kansas Constitution. Article 1, Section 3 of the Kansas Constitution requires the governor to enforce all the laws "of this state." In plaintiffs' amended complaint, as well as Brown, et al. v. Board of Education, et al., 98 F.Supp. 797, 798 (D. Kan. 1951), relief is sought pursuant to the Fourteenth Amendment to the United States Constitution. No state laws are at issue. The governor is without state constitutional authority to enforce federal law in his capacity as governor.

In addition, Article 1, section 6 of the Kansas Constitution allows the governor to transfer, abolish, consolidate, or coordinate "the whole or any part of the state government when the governor considers the same necessary for efficient administration . . . ." Unquestionably, this power is subject to constitutional check by the legislature, but it does give the governor a method of coercing implementation if an agency is unresponsive. His power does not apply to the legislative and judicial branches or to "constitutionally delegated functions of state . . . boards . . . ." Kan. Const., Art. 1, §6.

The State Board of Education is a state board with "constitutionally delegated functions." Kan. Const. 1972, Art. 6, §2(a). The state board's constitutional mission to equalize and promote "the quality of education for the students of the state," NEA-Fort Scott, 225 Kan. at 488, cannot be derogated by legislative act, State, ex rel. Miller, 212 Kan. at 488, or a priori, by the governor. As a result, the State Board is not subject to gubernatorial reorganizational powers.

Brown I held that segregation in public schools deprived children of equal educational opportunities. 347 U.S. at 493, 98 L.Ed. at 880. That denial deprived black children of equal protection under the Fourteenth Amendment to the United States Constitution, 347 U.S. at 495, 98 L.Ed. at 881. The school district was ordered to desegregate "with all deliberate speed." Brown II, 349 U.S. at 301, 99 L.Ed. at 1106. If the school district has failed to comply with the mandate of Brown I and Brown II, it has violated federal law, and has deprived

some young citizens of equal educational opportunity. Brown I, 347 U.S. at 495. Under the Kansas Constitution, the State Board of Education has the duty to promote equal education. If power of the State exists to coerce desegregation by a local school district, it must lie with the State Board of Education. State, ex rel. Miller, 212 Kan. at 490-492.

If the district court granted prospective relief for plaintiffs against the governor, it would violate the Kansas Constitution. While states are guaranteed "a republican form of government" under Article IV, section 4 of the United States Constitution, organization of state governments is left to the states. Kansas has elected to grant supervisory executive power over the schools to the State Board of Education with some measure of autonomy for the local school boards. Kansas Const., 1972, Art. 6, §5; State, ex rel. Miller, 212 Kan. at 490-492. The governor, in his official capacity, lacks constitutional authority to enforce federal law. Further, the governor has not been granted the authority to ensure equal education.

If the district court found segregation, the organizational structure of the State required that prospective equitable relief be granted against the local school board itseslf, or, perhaps, the State Board of Education. In any event, the governor could not implement any such order without exceeding his constitutional authority. He would have been forced either to exercise authority he does not have in complying with the order of federal court, thus subjecting himself to possible ouster under K.S.A. 60-1201, et seq., or to act within his

state constitutional authority, thereby failing to implement the relief granted in contempt of federal court.

C. Analysis of Title VI Claim

Grove City College v. Bell, 465 U.S. 555, 572, 573, 104 S.Ct. 1211, 79 L.Ed.2d 516, 531 (1984), prohibits the termination of federal funds to a program where there is no allegation of racial discrimination in the program where federal funds are used. In the case at bar, there is no allegation U.S.D. #501 has discriminated on the basis of race in the JTPA program. Further, nothing could have been more preposterous than to have enjoined the governor from distributing funds to a program that assists minorities. The district court properly granted summary judgment on the Title VI claim.

IV. CONCLUSION

The executive branch of the State of Kansas has never advocated segregation since this case was filed in 1951. Indeed, briefs filed by the Attorney General in Brown I emphatically limited its argument to whether Chapter 72-1724, General Statutes of Kansas, 1949, was within the power of the legislature to enact under the existing law. See, Brief of the Appellees, at 3-4, filed October Term, 1952; Brief of the Appellees, at 11-12, 14, filed October Term, 1953.

By this brief, former Governor John Carlin reiterates the State's position stated in the briefs originally filed in this case--segregation is not advocated. To the contrary, since Brown I, the State has made racial discrimination actionable as both criminal (K.S.A. 21-4003) and civil (K.S.A. 44-1001, et seq.) offenses.

Former Governor John Carlin is not asserting, however, that the State Board of Education has the power over a local board that he lacked. Indeed, the Kansas Supreme Court has indicated the State Board of Education's constitutional and statutory general supervisory powers over local schools districts is "something more than to advise, but something less than to control." State, ex rel. Miller, 212 Kan. at 492. Perhaps only U.S.D. #501 is a proper party defendant in this case for purposes of prospective equitable relief. Further, former Governor Carlin does not assert U.S.D. #501 failed to follow the mandates of Brown I and Brown II. The history of this case confirms desegregation of Topeka schools began prior to the issuance of Brown II, 349 U.S. at 299. Furthermore, the Board submitted a plan the United States District Court approved as a good faith beginning toward full compliance with the Brown II mandate. Brown, et al. v. Board of Education, et al., 139 F.Supp. at 470. Given the local board's record, former Governor Carlin cannot assume the local board acted other than properly. Furthermore, the district court has found the school district to be unitary.

At the same time, former Governor Carlin could only use those powers available to him as governor to remedy the odium of racial discrimination. Ours is a government of laws, and they must be followed. Under the laws of the State of Kansas, however, former Governor Carlin could not force local school board compliance. Because prospective equitable relief cannot be obtained from former Governor Carlin, he was properly granted summary judgment.

Respectfully submitted,

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Attorneys for John Carlin

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