THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE COVINGTON COUNTY SCHOOL DISTRICT, *et al.* Defendants.	)	Civil Action No. 2148(H)

MEMORANDUM OF AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION FOR FURTHER RELIEF

INTRODUCTION

Thirty-seven years ago, this Court enjoined defendant Covington County School District ("the District") "from discriminating on the basis of race or color in the operation of the Covington County school system and from failing or refusing to take steps to eliminate the effects of racial discrimination in the operation of the system." December 23, 1966 Order at 2 (Appendix to United States' Motion for Further Relief ("App.") at 2). The United States now seeks further relief in this case because the District's desegregation efforts have not been effective, insofar as the District has continued to operate the Seminary Attendance Center ("Seminary") as a racially identifiable white school and Hopewell Elementary ("Hopewell") as a racially identifiable black school since this Court's 1966 order. In the 2002-03 school year, white students comprised 91% of the student enrollment at Seminary, while black students comprised 94% of the student enrollment at Hopewell – both in striking contrast to the District-wide 49% white student and 51% black student enrollment. The District has reinforced the racial

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identifiability of Seminary and Hopewell by following improper school construction, facilities and staff assignment practices.

The United States also seeks further relief because the District is impermissibly using race as a factor to select students for certain school extracurricular activities and awards. Various schools in the District use race as a factor to select students for homecoming queens, homecoming maids, and yearbook "class favorites."

Since the United States began reviewing (in February 1998) the extent to which the District has been meeting its desegregation responsibilities, the District has not been able to demonstrate that it has eliminated the vestiges of discrimination at Seminary or Hopewell, or the vestiges of discrimination in extracurricular activities, to the extent practicable. Given that the District has failed to take appropriate steps to eliminate the vestiges of discrimination in these areas, further relief is warranted to ensure that the District complies with its desegregation responsibilities under this Court's orders and applicable federal law.

NATURE OF THE CASE

On December 12, 1966, the United States filed suit against the District under Sections 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b). In its complaint, the United States alleged, *inter alia*, that the District was operating a segregated public school system and was violating the Fourteenth Amendment to the United States Constitution by denying equal protection of the laws to school-age black children. On December 23, 1966, this Court enjoined the District "from discriminating on the basis of race or color in the operation of the Covington County school system and from failing or refusing to take steps to eliminate the effects of racial discrimination in the operation of the system." December 23, 1966 Order at 2

(App. at 2). The Court also outlined a desegregation plan for the District. *See id.* at 2-9 (App. at 2-9).

The District currently is following a desegregation plan that the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") approved on November 7, 1969 (*see United States v. Covington County School Dist., et al.*, 423 F.2d 1264, Appendix 10 (5th Cir. 1969) (App. at 22-47)), as modified in a December 17, 1969 Order and clarified in a July 24, 1975 Order. *See* December 17, 1969 Order (App. at 48-50) (modifying desegregation plan to close Lincoln Elementary and assign all Mount Olive area students in grades 1-12 to the Mount Olive school); July 24, 1975 Order at 4-5 (App. at 54-55) (stating that the November 7, 1969 desegregation plan requires the District to follow a strict neighborhood student assignment system). On February 25, 1976, the Fifth Circuit issued an order transferring this case to this Court[1] and stating that this case could be placed on the inactive docket, subject to being reopened by the Court *sua sponte* or for good cause shown on the application of any party or intervenor.[2]

STATEMENT OF FACTS

A. Overview of the Covington County School District

Covington County, Mississippi is located approximately 63 miles southeast of Jackson, Mississippi. In the 2002-03 school year, the Covington County School District served a total of 3,508 students in six schools, which are: Collins Elementary (K-4), Collins Middle (5-8), Collins

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[1] The Fifth Circuit also stated that its orders in this case would be made the orders of this Court. February 25, 1976 Order at 3. Accordingly, in this memorandum the United States will refer to all orders in this case as this Court's orders.

[2] This case remains on the active docket. The most recent activity in this case occurred on May 28, 2002, when the Court notified the parties that the case is now assigned to Judge David Bramlette, III for all purposes.

High (9-12), Hopewell Elementary (K-6 – "Hopewell"), Mount Olive Attendance Center (K-12 – "Mount Olive") and Seminary Attendance Center (K-12 – "Seminary"). The student enrollments, by race, for each school operated by the District were as follows in the 2002-03 school year:[3]

School	White	Black	Other	Total
Collins El. (K-4)	207 (36%)	373 (64%)	1 (<1%)	581
Collins Middle (5-8)	152 (32%)	324 (67%)	5 (1%)	481
Collins High (9-12)	127 (25%)	383 (75%)	1 (<1%)	511
Hopewell El. (K-6)	17 (6%)	289 (94%)	0 (0%)	306
Mount Olive (K-12)	171 (34%)	325 (65%)	1 (<1%)	497
Seminary (K-12)	1028 (91%)	103 (9%)	1 (<1%)	1132
Total Overall	1,702 (49%)	1,797 (51%)	9 (<1%)	3,508

Under the dual system, the District operated Collins Elementary, Collins High, Mount Olive and Seminary as white schools, and Collins Middle and Hopewell as black schools.

B. Historical Background – Case Activity

1. December 23, 1966 Desegregation Order

The Covington County School District has operated under a school desegregation order since December 23, 1966. *See* December 23, 1966 Order (App. at 1-9). In that initial order, this

[3] Data from District's response to United States' September 17, 2002 information request.

Court enjoined the District "from discriminating on the basis of race or color in the operation of the Covington County school system and from failing or refusing to take steps to eliminate the effects of racial discrimination in the operation of the system." *Id.* at 2 (App. at 2). The Court also outlined the District's initial desegregation plan which, *inter alia*, prohibited the District from discriminating based on race in services, facilities, activities, programs and faculty and staff assignments, and directed the District to provide equal facilities, equipment, courses and instruction in its schools. *See id.* at 2-4 (App. at 2-4). The plan also directed the District to follow a freedom of choice plan for student assignments, under which all students would select, on a yearly basis, the school they wished to attend. *See id.* at 4-8 (App. at 4-8).

2. November 7, 1969 Desegregation Order and Desegregation Plan

On July 3, 1969, this Court determined that the District's freedom of choice plan for student assignments was not effective, and directed the District to work with the United States Department of Health, Education and Welfare ("H.E.W.") to develop a new desegregation plan. *See United States v. Covington County Sch. Dist., et al.*, 417 F.2d 852, 856, 858 (5th Cir. 1969) (App. at 10-16). Following up on that order, on November 7, 1969, this Court adopted the District's desegregation plan, which was based on H.E.W.'s recommendations. *See United States v. Covington County Sch. Dist., et al.*, 423 F.2d 1264, 1267 & Appendix 10 (5th Cir. 1969) (App. at 17-21 & 22-47) (noting that H.E.W. developed the plan).

Under the District's November 1969 desegregation plan, the District assigns students to schools based on the following attendance areas: Collins; Hopewell; Mount Olive and Seminary. *See* November 7, 1969 Desegregation Plan at 2-3 (App. at 26-27). In general, all students who live in a given attendance area are assigned to the schools in that area for all grades – thus, for

example, students in the Collins area attend schools in Collins for grades K-12.[4] *See id.*. The one exception is Hopewell – students in that area attend Hopewell for grades K-6, but then attend the Collins schools for grades 7-12.[5] *See id.*.

The November 1969 Desegregation Plan also addresses, *inter alia*, school construction, staff assignments and extracurricular activities.[6] For school construction, the Plan recognized that "[t]he size and location of new school buildings and additions to existing buildings can affect desegregation now and in the future," and accordingly stipulated that "all school construction . . . shall be done in a manner which will prevent the recurrence of the dual school structure." *Id.* at 10 (App. at 34). For staff assignments, the Plan required the District to assign staff "without regard to race, color or national origin, except as necessary to correct discrimination." *Id.* at 9 (App. at 33). Finally, for extracurricular activities, the Plan states that "student government, cheerleaders, musical organizations [and] athletic teams must be operated on a nondiscriminatory basis and should include students of both races." *Id.* at 14 (App. at 38).

Two years after this Court approved the District's desegregation plan in 1969, the Supreme Court held that district courts have broad equitable powers that they may invoke in school desegregation cases to remedy past wrongs. *See Swann v. Charlotte-Mecklenburg Bd. of*

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[4] For Seminary, H.E.W. recommended two alternatives: 1) assigning all students in the Seminary area to Seminary for grades 1-12 (and now K-12); and 2) assigning all students in the Seminary area to Seminary for grades 1-6, and then to the Collins area schools for grades 7-12. *See* November 7, 1969 Desegregation Plan at 3 (App. at 27). The District has been implementing the first of the two alternatives.

[5] A small number of students from the Hopewell area are assigned to attend Mount Olive for grades 7-12.

[6] The November 7, 1969 Desegregation Plan does not specifically address facilities.

Educ., 402 U.S. 1, 15 (1971). In response to the Supreme Court's ruling, the Fifth Circuit reviewed several cases and directed school districts to develop and implement revised desegregation plans conforming with the expanded scope of remedies outlined in *Swann*. *See, e.g.*, *Gaines v. Dougherty County Bd. of Educ.*, 465 F.2d 363, 364 (5th Cir. 1972) (remanding case to the district court to develop such a revised desegregation plan); *Stout v. Jefferson County Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) (same); *see also Stout v. Jefferson County Bd. of Educ.*, 466 F.2d 1213, 1216 (5th Cir. 1972) (approving part of school district's revised desegregation plan as consistent with *Swann*, and disapproving remainder of plan).

3. December 1974 Motion for Supplemental Relief

On December 14, 1974, the United States filed a motion for supplemental relief. In its motion, the United States argued that the District was violating federal law and the Fourteenth Amendment to the United States Constitution by continuing to operate one-race or virtually one-race schools. *See* December 1974 Motion for Supplemental Relief at 5. In support of its argument, the United States advised the Court that Hopewell had maintained a 100% black student enrollment and Seminary had maintained an 85% white student enrollment since the District implemented its desegregation plan. *See id.* at 3. The United States also advised the Court that the District refused to implement practicable alternative measures that would further desegregation in its schools. *See id.* at 3-4. To address these areas of noncompliance, the United States asked the Court to require the District to develop a new desegregation plan incorporating the desegregation remedies approved in *Swann*. *See* December 1974 Memorandum in Support of Motion for Further Relief at 4-5; December 1974 Motion for Further Relief at 6.

On April 29, 1975, this Court ordered the District to show cause why it could not

desegregate Hopewell by the 1975-76 school year. After a period of discovery, this Court concluded in a July 24, 1975 order that the District had been permitting white students who resided in the Hopewell attendance zone to attend other schools. July 24, 1975 Order at 3 (App. at 53). To address that issue, this Court held that "the plan of desegregation contained in our November 7, 1969 order for the Covington County School District was intended to require a strict neighborhood assignment system," and ordered the District to implement such a system. *Id.* at 4 (App. at 54). This Court did not order the District to implement other remedies to further desegregation in its schools, and did not address whether the District's November 7, 1969 desegregation plan was consistent with the Supreme Court's decision in *Swann*.

4. February 1998 Compliance Review

On February 13, 1998, the United States sent a letter to the District regarding a complaint that the District engages in racially discriminatory practices and has denied equal educational opportunities to black students. To investigate that and other complaints, and to determine whether the District was complying with this Court's desegregation orders and applicable federal law, the United States reviewed publicly available reports and data about the District, requested and reviewed documents provided by the District in response to the United States' inquiries, and spoke with community members. The United States also conducted site visits to the District in 1999 and 2002, during which it toured several schools and met with various District officials.

On July 10, 2003, the United States sent a letter to the District advising it of several areas where the United States believes the District needs to take steps to comply with this Court's desegregation orders and applicable federal law. The United States, *inter alia*, raised specific concerns about the following areas: 1) student assignments to Seminary and to Hopewell, insofar

as those schools have racially identifiable student enrollments; 2) school construction and the District's efforts, if any, to ensure that its school construction projects further, rather than hinder, desegregation; 3) facilities at Seminary, insofar as that school appears to have facilities that are superior to those of other schools in the District; 4) staff assignments to Seminary, which may contribute to that school being racially identifiable as a white school; and 5) extracurricular activities and the District's ongoing use of race to select participants for activities and awards such as homecoming queen, homecoming maid, most beautiful and most handsome.[7] The United States concluded its letter by inviting the District to discuss the steps that the District might take to address these issues. The parties, however, have not been able to resolve these issues.

5. Current Status – Request for Further Relief

The United States asks this Court to grant its motion for further relief because the District's desegregation efforts have not been effective in eliminating the vestiges of discrimination in the District's schools to the extent practicable. The United States principally seeks further relief on the following issues: 1) Seminary's continued identifiability as a school for white students and Hopewell's continued identifiability as a school for black students (facilitated by the District's student assignment, school construction, facilities and staff assignment practices); and 2) extracurricular activities. The United States summarizes the current status of

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[7] The United States also raised concerns about: student transfers; transportation; hiring, promotion and retention of faculty and staff; academic course offerings at each school and whether those offerings are comparable; the operation of the gifted/talented program at Collins Elementary and Collins Middle insofar as low numbers of black students are placed in the program; the operation of the special education program at Collins High and at Seminary insofar as high numbers of black students are classified as educable mentally retarded or as having a specific learning disability; and student discipline. The United States raised similar concerns in a March 29, 2001 letter to the District. The United States continues to monitor the District's desegregation efforts in these and other areas.

each of those issues below.

a. Racial identifiability of Seminary and Hopewell

The District's desegregation efforts have not been effective in eliminating the vestiges of discrimination at Seminary and Hopewell. In its December 23, 1966 Order, this Court enjoined the District from "discriminating on the basis of race or color in the operation of the Covington County school system and from failing or refusing to take steps to eliminate the effects of racial discrimination in the operation of the system." December 23, 1966 Order at 2 (App. at 2). Over the thirty-seven years since that Order, however, the District has maintained Seminary as a racially identifiable white school, and Hopewell as a racially identifiable black school. First, the District, through its student assignment practices, has maintained an identifiably white student enrollment at Seminary and an identifiably black student enrollment at Hopewell, as indicated by the following data:[8]

School Year (reports not available for all years)	**Seminary Attendance Center – % White Student Enrollment**	**Hopewell Elementary – % White Student Enrollment**	**District-Wide – % White Student School Enrollment**
1967-68	92% (664/718) * grades 1-12	0% (0/458) * grades 1-9	55% (2047/3755) * grades 1-12
1968-69	91% (643/707) * grades 1-12	0% (0/419) * grades 1-9	55% (2029/3704) * grades 1-12

[8] The student enrollment data is drawn from the following sources: 1) District's reports to the United States Department of Education, Office for Civil Rights (1967-68, 1968-69, 1970-71, 1972-73, 1976-77, 1978-79, 2000-01); 2) District's reports to the Mississippi Department of Education (1998-99); 3) District's response to United States's October 12, 2001 information request (2001-02); 4) District's response to United States's September 17, 2002 information request (2002-03); and 5) District's reports to United States (1990-91; 1991-92; 1992-93).

1970-71	82% (644/783) * grades (not avail.)	0% (0/316) * grades (not avail.)	53% (1818/3460) * grades 1-12
1972-73	84% (672/800) * grades (not avail.)	0% (0/315) * grades (not avail.)	54% (1837/3428) * grades 1-12
1976-77	89% (713/804) *grades 1-12	3% (9/280) *grades 1-6	53% (1765/3329) * grades 1-12
1978-79	88% (707/800) *grades 1-12	6% (16/272) *grades 1-6	53% (1889/3538) * grades 1-12
1990-91	91% (866/952) * grades K-12	8% (32/415) * grades K-6	51% (1898/3709) * grades K-12
1991-92	89% (878/984) * grades K-12	9% (35/410) * grades K-6	49% (1834/3741) * grades K-12
1992-93	90% (922/1025) * grades K-12	5% (18/400) * grades K-6	48% (1789/3712) * grades K-12
1998-99	92% (1053/1150) * grades K-12	3% (10/353) * grades K-6	49% (1750/3565) * grades K-12
2000-01	91% (1018/1122) * grades K-12	3% (10/336) * grades K-6	48% (1688/3520) * grades K-12
2001-02	91% (1018/1123) * grades K-12	3% (9/310) * grades K-6	48% (1713/3547) * grades K-12
2002-03	91% (1028/1132) * grades K-12	6% (17/306) * grades K-6	48% (1702/3508) * grades K-12

The District has not advised the United States of any period of time since this Court's December 23, 1966 Order when Seminary and Hopewell have not had racially identifiable student enrollments.[9]

Second, the District has maintained Seminary's and Hopewell's racial identifiability by

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[9] The United States does not have student enrollment data for every school year since this Court's 1966 order. The District, however, has not provided any evidence that the District desegregated its student assignments to Seminary or Hopewell to the extent practicable during any of the years (including the years for which the United States lacks data) since this Court's order.

completing school construction projects at those schools and other schools that hinder, rather than further, desegregation. In the 2002-03 school year, the District built a seven classroom addition at Seminary, to serve approximately 161 students. That same school year, the District built a six classroom addition at Collins Elementary, to serve approximately 46 students in general education classes, as well as an additional number of special education students. Similarly, in 1992-93, the District built a nine classroom addition at Hopewell, to serve 200 students, and built a similar sized classroom addition at Mount Olive, to serve 200 students. Upon information and belief, the District did not consider whether these construction projects would further or hinder desegregation. *See* November 7, 1969 Desegregation Plan at 10 (App. at 34) (explaining that the District must ensure that school construction projects do not lead to the recurrence of the dual system).

Third, the District has reinforced Seminary's status as a racially identifiable white school by maintaining superior facilities at that school, in comparison to the other schools in the District, all of which have majority black student enrollments (*i.e.*, the schools in the Collins, Hopewell and Mount Olive areas). In its December 23, 1966 Order, this Court directed the District to "take all possible steps necessary to provide equal physical facilities, equipment and courses, and instruction of equal quality in all of the schools in the Covington County School District." December 23, 1966 Order at 3 (App. at 3). Notwithstanding that directive, the following facilities at Seminary are superior to facilities that serve similar functions at other schools in the District: athletic field house; band hall; high school gymnasium; baseball field; and elementary school gymnasium. Seminary, along with Collins High, also has the best science laboratory in the District.

Finally, upon information and belief, the District consistently has maintained an identifiably white staff at Seminary and an identifiably black staff at Hopewell, notwithstanding this Court's directive that the District "take steps to assign and reassign teachers and other professional staff members to eliminate past discriminatory patterns." December 23, 1966 Order at 4 (App. at 4); *see also* November 7, 1969 Desegregation Plan at 9, 13 (App. at 33, 37) (noting the importance of having integrated staff at all levels). Data from the 2002-03 school year show that on-site staff positions at Seminary (*e.g.*, secretaries, cafeteria workers, teacher assistants, custodians, etc.) are mostly held by white personnel. Specifically, white personnel comprised 83% (20/24) of the on-site staff members at Seminary in the 2002-03 school year, while comprising only 54% (69/128) of the staff holding those positions in the District's schools as a whole.[10] By contrast, on-site staff positions at Hopewell are mostly held by black personnel, as in the 2002-03 school year, black personnel comprised 85% (17/20) of the on-site staff members at that school, but only 46% (59/128) of the staff in those positions District-wide.[11] The

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[10] Data from other school years reflect a similar pattern: 1) in the 1998-99 school year, white personnel comprised **83%** (29/35) of the on-site staff at Seminary but **60%** (85/142) District-wide; 2) in the 1992-93 school year, white personnel comprised **86%** (25/29) of the on-site staff at Seminary but **61%** (80/132) District-wide; and 3) in the 1989-90 school year, white personnel comprised **85%** (29/34) of the on-site staff at Seminary but **65%** (71/110) District-wide. Staff assignment data are drawn from the following sources: 1) District's reports to the Mississippi Department of Education (1998-99); and 2) District's reports to United States (1989-90; 1992-93; 2002-03).

[11] Data from other school years reflect a similar pattern: 1) in the 1998-99 school year, black personnel comprised **82%** (18/22) of the on-site staff at Hopewell but **40%** (57/142) District-wide; 2) in the 1992-93 school year, black personnel comprised **73%** (14/19) of the on-site staff at Hopewell but **39%** (52/132) District-wide and 3) in the 1989-90 school year, black personnel comprised **78%** (18/23) of the on-site staff at Hopewell but **35%** (39/110) District-wide. Staff assignment data are drawn from the following sources: 1) District's reports to the Mississippi Department of Education (1998-99); and 2) District's reports to United States (1989-90; 1992-93; 2002-03).

District's assignment of bus drivers to Seminary and Hopewell reflect these patterns – in the 2002-03 school year, white personnel comprised 55% (28/51) of all bus drivers in the District, but 100% (12/12) of Seminary's bus drivers and 33% (2/6) of Hopewell's bus drivers.[12]

b. Use of race in extracurricular activities and awards

This Court's December 23, 1966 Order stated that "[n]o student shall be segregated or discriminated against on account of race or color in any service, facility, activity or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by, or affiliated with, the school in which he is enrolled." December 23, 1966 Order at 2 (App. at 2); *see also* November 7, 1969 Desegregation Plan at 14 (App. at 38). Despite that directive, the District impermissibly is using race as a factor to select students who will participate in certain extracurricular activities or receive certain awards. Specifically, at Collins High and Mount Olive, students must elect a black homecoming queen and a white homecoming queen. At Seminary, students must elect a black homecoming maid and a white homecoming maid for each grade. Many schools in the District also use race as a factor when students select "class favorites" for the student yearbook in categories such as "most beautiful" and "most handsome."

The United States seeks further relief in this case to ensure that the District fulfills its responsibility to eliminate the vestiges of discrimination in the areas discussed above to the extent practicable.

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[12] Some bus drivers also hold staff or faculty positions at the schools they serve. Other bus drivers do not hold other positions with the District.

APPLICABLE LEGAL STANDARDS

As a school system that was previously segregated by law and has not yet achieved unitary status, the Covington County School District has an affirmative duty to eliminate all vestiges of past discrimination to the extent practicable. *See Board of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991) (outlining the standard that courts should apply when considering whether to dissolve a desegregation decree); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-59 (1979) (explaining that school boards that operated dual systems were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch") (*quoting Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 437-38 (1968)); *see also United States v. Pittman*, 808 F.2d 385, 390 (5th Cir. 1987) (*citing Green*). The affirmative duty to desegregate is a continuing responsibility, and "[p]art of the affirmative duty . . . is the obligation not to take any action that would impede the progress of disestablishing the dual system and its effects." *Dayton Bd. of Education v. Brinkman*, 443 U.S. 526, 537-38 (1979). "Each instance of a failure or refusal to fulfill this duty continues the violation of the Fourteenth Amendment." *Columbus*, 443 U.S. at 458-59.

Where a party (the United States, in this case) alleges that racial disparities remain in a school district's schools, policies and/or practices, the school district bears the burden of showing that any current racial disparities "[are] not traceable, in a proximate way, to the prior violation." *Freeman v. Pitts*, 503 U.S 467, 494 (1992); *see also Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1454 (5th Cir. 1993) (*citing Freeman*). In meeting its burden, a school district often must go beyond demonstrating mere compliance with its original desegregation plan or the court's

orders, because "in some desegregation cases simple compliance with the court's orders is not enough for meaningful desegregation to take place." *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 334 (4th Cir. 2001) (*en banc*) (explaining that a desegregation order or plan "entered in the 1960s or 1970s could have underestimated the extent of the remedy required, or changes in the school district could have rendered the decree obsolete"); *see also Columbus*, 443 U.S. at 459-460 (noting that, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the school district implemented a court-approved desegregation plan in 1965, but, in connection with its affirmative duty to desegregate, was required to develop a more effective plan in 1969).[13] Instead, a school district must show, beyond mere compliance with the original decree, that the vestiges of the dual system have been eliminated to the extent practicable. *See Davis v. Bd. of Sch. Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness."); *Green*, 391 U.S. at 439 (explaining that a district court should assess a desegregation plan by examining the effectiveness of the plan in achieving desegregation).

ARGUMENT

I. This Court Should Grant the United States' Motion for Further Relief Because the District Has Failed to Eliminate the Vestiges of Discrimination at Seminary and at Hopewell to the Extent Practicable.

As the Supreme Court has explained, the true measure of any school desegregation plan is whether the plan is effective in eliminating the vestiges of discrimination to the extent practicable. *See supra* at 16. The following analysis will demonstrate that the District's

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[13] As previously noted, the desegregation plan in this case was drafted and approved in 1969 (before the Supreme Court's decision in *Swann*), and has not been modified or reviewed by the Court since the mid-1970s.

desegregation efforts (including the District's desegregation plans) have not been effective, and that the District in fact has reinforced vestiges of discrimination in its schools through its improper handling of student assignments, school construction, facilities and staff assignments.

> A. *The District, through its student assignments, school construction, facilities, and staff assignments, is continuing to operate Seminary as a racially identifiable white school and Hopewell as a racially identifiable black school.*

Under the dual system, the District operated Seminary as a school for white students, and operated Hopewell as a school for black students. Today, both Seminary and Hopewell remain racially identifiable as a white and a black school, respectively, because the District simply has failed to fulfill its desegregation responsibilities. As previously noted, the District has an affirmative and ongoing responsibility to further desegregation in its schools to the extent practicable. Notwithstanding that responsibility, the District has held fast to an ineffective desegregation plan that has maintained Seminary as a racially identifiable white school and Hopewell as a racially identifiable black school, and further has taken steps that have reinforced the racial identifiability of those schools.

First, the District has been implementing an ineffective plan for desegregating its student assignments. As explained above, the District assigns students to schools based on geographic attendance zone lines that the Court approved in November 1969. *See supra* at 5-6. Desegregation plans that rely on attendance zones, however, "[are not] *per se* adequate to meet the remedial responsibilities of local [school] boards." *See Davis*, 402 U.S. at 37. Instead, "[t]he measure of any desegregation plan is its effectiveness." *Id.* The District's desegregation plan has not been effective in furthering desegregation at Seminary and Hopewell. In the District as a whole, white students have comprised between 48% and 55% of the overall student enrollment

since this Court first ordered the District to desegregate its schools. In contrast to those enrollment figures, year after year Seminary has remained a racially identifiable white school, with a white student enrollment of 82% or higher (up to 92% in the 1998-99 school year), and Hopewell has remained a racially identifiable black school, with a white student enrollment that has never exceeded 9% (and more recently has been as low as 3%). *See Swann*, 402 U.S. at 25-26 (explaining that there is a presumption against schools that are identifiably one race); *see also Belk*, 269 F.3d at 319 (endorsing the district court's use of a plus/minus 15% variance from the district-wide ratio to determine whether a school was racially imbalanced).

Thus, although the District might argue that it has followed the court-ordered desegregation plan and thus has fulfilled its desegregation responsibilities, that argument fails on two counts. As shown below, the District has reinforced the ongoing vestiges of the dual system by ignoring key parts of its November 1969 desegregation plan – in particular, the parts of the plan that address school construction and staff assignments. Further, even if the District has followed its desegregation plan with respect to student assignments, that plan has been ineffective – Seminary and Hopewell continue to have student enrollments that are almost as segregated today as they were thirty-seven years ago.[14]

Second, the District has perpetuated Seminary's and Hopewell's racial identifiability by approving school construction projects that have reinforced segregation in the District. The

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[14] In some ways, the District is more segregated than it was after this Court's initial desegregation orders. In the 1967-68 school year, Seminary served **32%** (664/2047) of the District's white students. By contrast, in the 2002-03 school year, Seminary served **60%** (1028/1702) of the District's white students. The District has facilitated Seminary's continued status (and growth) as a white school through its improper student assignment, school construction, facilities and staff assignment practices.

Supreme Court has explained that school districts under desegregation orders must "see to it that future school construction and abandonment . . . do not serve to perpetuate or re-establish the dual system." *Swann*, 402 U.S. at 21; *see also Anderson v. Canton Mun. Separate Sch. Dist.*, 232 F.3d 450, 453 (5th Cir. 2000) ("In considering proposals for the construction or renovation of schools in a system still subject to a desegregation order, '[w]e cannot tolerate resegregation of a former dual school system, and the School Board of such a system must demonstrate that the new construction will not promote such a relapse.'"). Notwithstanding those requirements, the District has completed substantial construction projects at its schools (including constructing additional classroom facilities), without regard to whether those projects or alternative ones would further or hinder desegregation. For example, by completing the 2002-03 classroom addition at Seminary, the District reinforced that school's ability to serve students in a predominantly one-race (white) setting.

Third, the District has perpetuated Seminary's racial identifiability as a white school by providing that school with the best facilities in the District. School facilities are "among the most important indicia" of a segregated school system, and where it is possible to identify the race of a school by the quality of its facilities, that fact is sufficient to demonstrate a prima facie case that the school district has violated the equal protection clause of the Fourteenth Amendment. *Swann*, 402 U.S. at 18. Here, the District is violating the Constitution because Seminary continues to be identifiable as a white school by virtue of its facilities that are superior to those of the other schools in the District, each of which has a majority black student enrollment. *See supra* at 12 (explaining that Seminary has a superior athletic field house; band hall; high school gymnasium; baseball field; elementary school gymnasium and science

laboratory). Given that "normal administrative practice should produce schools of like quality [and] facilities," *see Swann*, 402 U.S. at 18-19, the District's failure to maintain comparable facilities in its schools is particularly egregious.

Finally, the District has exacerbated Seminary's and Hopewell's racial identifiability by failing to take appropriate steps to desegregate the staff assigned to those schools. Staff assignments also "are among the most important indicia of a segregated system," *see Swann*, 402 U.S. at 18. Because staff assignments are exclusively within a school district's control, a school district's "failure to achieve compliance with regard to faculty/staff assignment is particularly disturbing." *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 978 F.2d 585, 590 (10th Cir. 1992); *see also Swann*, 402 U.S. at 18-19 (noting that a school district need only to follow normal administrative practices to produce schools with similar staffs).

As previously noted, in its December 23, 1966 order, this Court directed the District to assign staff without regard to race except as needed to correct the effects of past discriminatory assignments. December 23, 1966 Order at 3-4 (App. at 3-4).[15] The available data suggest, however, that contrary to this Court's orders and established federal law, the District has not taken effective steps to desegregate its staff assignments to Seminary and Hopewell. The District employs both white and black on-site staff and bus drivers in its schools. In the 2002-03 school

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[15] The Supreme Court has rejected the proposition that, in the context of school desegregation, personnel may only be assigned on a "color blind" basis. *Swann*, 402 U.S. at 19. To the contrary, the Supreme Court has endorsed the use of mathematical ratios (*e.g.*, comparing the racial composition of the faculty at each school to the racial composition of the faculty in the district as a whole) as a benchmark that district courts may use to assess whether a school district has sufficiently desegregated its faculty and staff assignments. *See Freeman*, 503 U.S. at 481-82, 497-98 (upholding a district court's finding, based on mathematical ratios, that a school district had not fully desegregated its faculty and staff assignments).

year, white personnel comprised 54% of all on-site staff and 55% of all bus drivers in the District, while black personnel comprised 46% and 45%, respectively. Nevertheless, the District appears to be still following discriminatory staff assignment practices, as Seminary's on-site staff and bus drivers continue to be identifiably white (83% and 100%, respectively, in the 2002-03 school year) while Hopewell's on-site staff and bus drivers continue to be identifiably black (85% and 67%, respectively, in the 2002-03 school year). *See supra* at 13-14 & nn. 10-11 (outlining additional data showing racially identifiable staff assignments).

B. *Further relief is warranted because the District, in violation of this Court's orders and federal law, has failed to implement practicable measures that will further eliminate the vestiges of discrimination in the District's student assignments, school construction, facilities and staff assignments.*

The Supreme Court has held that a school district's "continuing 'affirmative duty to disestablish the dual school system' is . . . beyond question." *Columbus*, 443 U.S. at 460-61 (*quoting McDaniel v. Barresi*, 402 U.S. 39, 41 (1971)). To fulfill that affirmative duty, a school district must "do more than abandon its prior discriminatory purpose." *Dayton Bd. of Education*, 443 U.S. at 538. Instead, a school district once segregated by law must "take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Freeman*, 503 U.S at 485; *see also Dowell*, 498 U.S. at 249-50 (courts must determine whether the vestiges of *de jure* segregation in a school district have been eliminated as far as practicable).

Further relief is appropriate in this case because the District has failed to implement practicable measures to eliminate the vestiges of discrimination at Seminary and Hopewell. There are at least two practicable measures that the District could take to further desegregation in student assignments to Seminary and Hopewell: 1) the District could consolidate schools at the

middle school (grades 6-8) and high school levels (grades 9-12);[16] and 2) the District could re-draw its attendance zone lines.[17] As for furthering desegregation in school construction and facilities, the District could upgrade any inferior facilities and adopt and follow procedures that will ensure that future school construction and facilities projects further desegregation. Finally, to desegregate staff assignments to Seminary and Hopewell, the District could simply reassign certain staff members to and from those schools to ensure that the racial composition of each school's staff reasonably approximates the racial composition of the staff in the District as a whole. *See Freeman*, 503 U.S. at 482, 497-98 (indicating that a district court may require a school district to reassign personnel to address vestiges of discrimination in staff assignments). After having taken that step, the District could also implement measures to ensure that it hires and assigns staff to each individual school on a non-discriminatory basis. The District's failure to implement these and other practicable measures for eliminating the vestiges of discrimination at Seminary and Hopewell must be addressed.

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[16] As one consolidation option, the District could serve all high school students at facilities located in Collins, and could serve all middle school students at facilities located in Seminary. Such a remedy would address vestiges of discrimination not only in student assignments but also in facilities and staff assignments. The H.E.W. suggested a similar school consolidation measure in the November 7, 1969 desegregation plan, but the District did not implement that measure. *See supra* at 6 n.4 (proposing that the District serve all Collins, Hopewell and Seminary students in grades 7-12 together at a grade 7-9 facility and a grade 10-12 facility); *see also* November 7, 1969 Desegregation Plan at 2-3 (App. at 26-27).

[17] There are other practicable measures that the district could implement to further desegregation in student assignments, including implementing an effective "majority-to-minority" transfer program that would allow students in schools where their racial group exceeds the District's overall racial composition to elect to transfer to schools where their racial group's representation is below the District's overall racial composition. *See Swann*, 402 U.S. at 26 (observing that "[a]n optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan"). The District currently has such a program, but has not been implementing that program effectively.

II. This Court Should Grant the United States' Motion for Further Relief Because the District Has Failed to Eliminate the Vestiges of Discrimination in Extracurricular Activities to the Extent Practicable.

A. *The District is continuing to discriminate based on race in extracurricular activities by improperly using race to select students for certain extracurricular activities and awards.*

Thirty-seven years ago, this Court mandated that "[n]o student shall be segregated or discriminated against on account of race or color in any service, facility, activity or program (including transportation, athletics, or other extracurricular activity)" conducted or sponsored by the District in its schools. December 23, 1966 Order at 2 (App. at 2); *see also* November 7, 1969 Desegregation Plan at 14 (App. at 38). The Supreme Court issued a similar mandate in *Swann*, when it explained that when a school system has been dual in extracurricular activities, "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions." *Swann*, 402 U.S. at 18. Despite this Court's and the Supreme Court's clear directives, the District improperly has been (and is) using race to select students for extracurricular activities and awards such as homecoming queen, homecoming maid, and class favorite. Specifically, white students compete only against other white students for homecoming honors and other awards designated for white students, while black students compete only against other black students for parallel honors and awards designated for black students.

The District's use of race for these activities and awards is facially discriminatory, and cannot be reconciled with this Court's desegregation orders or with federal law. Simply put, the District improperly uses race to restrict or deny students' opportunities to compete for certain activities or awards. Indeed, under the District's system, black students are barred from being selected for "white" homecoming and class favorite positions; white students are barred from

being selected for "black" positions; and Asian, Latino and Native American students presumably are barred from being selected altogether.[18]

B. *Further relief is warranted because the District, in violation of this Court's orders and federal law, has failed to implement practicable measures that will further eliminate the vestiges of discrimination in the District's extracurricular activities.*

This Court should grant the United States' motion for further relief and order the District to cease its practice of using race to select students for extracurricular activities and awards. As demonstrated above, the District continues to follow discriminatory practices in these areas despite this Court's directives and applicable federal law. Further desegregation is practicable, because the District need only to adopt race-neutral criteria for its extracurricular activities and awards. Its failure to take such a simple step to comply with the law cannot stand.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court grant the United States' Motion for Further Relief, and order the District to: 1) formulate, adopt and implement a plan approved by this Court that promises realistically to work now to eliminate the vestiges of discrimination, to the extent practicable, in student assignments, school construction, facilities, staff assignments and extracurricular activities; and 2) provide, after this Court approves such a desegregation plan, periodic reports to this Court and to the United States

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[18] The District cannot defend its use of race in this area by arguing that its use of race is narrowly tailored to serve a compelling governmental interest. *See Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003) (explaining that racial classifications made by the government are subject to strict scrutiny, but do not violate the Constitution if the classifications are narrowly tailored to further a compelling governmental interest). The District has not proffered a compelling interest that would support its use of race in the context of extracurricular activities and awards, and to the extent that the District might refer to a general interest in providing opportunities for students of all races to participate in such activities and awards, its use of race is not narrowly tailored to serve that interest.

about the District's progress in desegregating its schools to the extent practicable.[19]

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This the 24th day of November 2003.

[19] After the District files its response to the United States' Motion for Further Relief, and the United States files any reply thereto, this Court may wish to convene a status conference to discuss the appropriate way to set this matter for discovery, consideration and resolution.