THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 14428
	)	Judge James
WEST CARROLL PARISH SCHOOL BOARD, *et al.*	)	
	)	
	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DONALD W. WASHINGTON
United States Attorney
Western District of Louisiana

Katherine W. Vincent
Assistant United States Attorney

WAN J. KIM
Assistant Attorney General
Civil Rights Division

JEREMIAH GLASSMAN
EMILY H. MCCARTHY (D.C. Bar No. 463447)
Attorneys for the Plaintiff
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., NW
Educational Opportunities Section
Patrick Henry Building, Suite 4300
Washington, D.C. 20530
Phone: (202) 514-4092
Fax: (202) 514-8337

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UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

This Court should deny the summary judgment motion of the Defendant West Carroll Parish School District ("District") because the District cannot prove that it has eliminated the vestiges of its former dual system to the extent practicable. The District's motion does not even dispute, let alone disprove, that its three single race schools are vestiges or that eliminating these vestiges is feasible. The District argues only that its implementation of the 1969 Plan, which predates Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), entitles the District to a declaration of unitary status in the area of student assignment to schools. This argument ignores the Supreme Court's directive that a school district must comply fully and good faith with its orders and eliminate the vestiges of its prior de jure system to the extent practicable to achieve unitary status. The District cannot meet this burden because the undisputed facts establish feasible ways of desegregating its vestigial one-race schools. This Court therefore should deny the District's summary judgment motion and its motion for unitary status.

II. Statement Of Counter Material Facts

In accordance with Local Rule 56.1, the United States has responded to the District's statement of undisputed facts by submitting a separate statement of material facts to which the United States contends there is a dispute. U.S. Statement of Disputed Facts (hereinafter "Counter Facts"). Each statement of counter material fact is supported by citations to the record. A review of the Counter Facts shows that the parties essentially agree about the material facts but disagree about the legal implications of those facts. Consequently, this Court need not hold a hearing to establish the facts. If this Court decides to hold a hearing on February 26, 2007, the hearing should be limited to the issue of which desegregation plan the District will implement.

III. Argument

The District's twenty-nine page summary judgment memorandum can be distilled to one argument: the District has no legal duty to take further steps to desegregate its schools because it implemented the 1969 Plan. In moving for summary judgment, however, the District neither argues nor establishes that its racially identifiable schools are not vestiges or that desegregating them is impracticable. The District's utter failure to meet its burden of showing that the United States' seventeen plans are undoable and that no alternative plans are feasible is fatal to its summary judgment motion and its motion for a declaration of unitary status in the area of student assignment to schools.

The District's duty to eliminate vestiges to the extent practicable remains imperative despite the passage of time. The District cannot evade this duty by faulting the United States for not seeking further relief sooner. In a unitary status inquiry, the burden is on the District, not the United States, to prove that vestiges have been eradicated to the extent practicable. When the

United States began reviewing the District's operations to determine if they were unitary, the United States discovered violations of the desegregation orders and determined that alternative plans could reduce the number of one-race schools. To help the District achieve unitary status, the United States addressed these violations and offered seventeen practicable desegregation plans. The District has rejected all of these offers by mistakenly assuming that its schools are already unitary and by relying on inapposite cases in which unitary systems had been achieved.

As evidenced by the seventeen plans, many of which leave one or two schools racially identifiable under a ± 15% variance, the United States' motion does not seek racial balance in all schools. The United States' motion seeks only to ensure that the District complies with Swann's directive to "make every effort to achieve the greatest possible degree of actual desegregation." 402 U.S. at 26. The United States' plans faithfully implement Swann's directive by eliminating or reducing the number of "one-race schools" in the District. Id. Dr. Gordon's use of a ± 15% variance as "a starting point" for devising these plans is entirely consistent with Swann, and his plans show that this variance was not "an inflexible requirement." Id. at 25.

Moreover, the District's critique of this variance is a red herring. The United States does not insist and has never insisted that all schools fall within a ± 15% variance. Instead, a ± 15% variance represents a starting point for the analysis. Even if Dr. Gordon had use different criteria to identify racially identifiable schools in the District, he still would have reached the inescapable conclusion that almost half of the District's schools remain one race – with zero or only a handful of black students in the "white schools."

The District unpersuasively tries to justify its three one-race schools by citing several distinguishable cases involving large metropolitan districts. Unlike these massive urban districts,

West Carroll Parish is a rural district with only 2,300 students and eight schools. While certain cases have condoned a limited number of one-race schools in large urban districts where all feasible desegregation had occurred and subsequent demographic changes outside the districts' control had caused some schools to become racially identifiable, the undisputed facts in this case establish that the District's one-race schools have never been desegregated and that the District's demographics have not changed. Given the District's very different circumstances, the Court should deny the District's summary judgment motion, grant that of the United States, and order the District to implement an effective plan.

A. The District Failed To Disprove That Its One-Race Schools Are Vestiges And That They Can Practicably Be Desegregated

In moving for summary judgment, the District failed to meet its "burden" of proving that its "remaining one-race schools are not vestiges of past segregation." Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1434 (5th Cir. 1983) (citing Swann, 402 U.S. at 26). The District cannot prove that Fiske, Goodwill, and Forest are not vestiges because all three schools are former de jure white schools, and none has ever been desegregated. Facts 9-12; United States v. State of Ga., Meriwether County, 171 F.3d 1333, 1338 (11th Cir. 1999) ("One . . . vestige, indeed the hallmark of a dual system, is schools that are markedly identifiable in terms of race."); Ellis v. Bd. of Pub. Instruction of Orange County, Fla., 465 F.2d 878, 880 (5th Cir. 1972) (three virtually one-race schools were vestiges because they "have never been desegregated and were a part of the dual school system"); cf. N.A.A.C.P., Jacksonville Branch v. Duval County Sch., 273 F.3d 960, 969 (11th Cir. 2001) (finding racially identifiable schools were not vestiges in part because "[t]he Board had broken the pattern of [one-race] enrollment at the schools it formerly

operated" as one-race schools). Their vestigial status is confirmed by community perceptions of these schools as "white schools" and their virtually all white faculties and administrators. Fact 12. Goodwill has no black teachers, Forest and Fiske have only one, and all three schools have white principals. Dist.'s Resp. to U.S.' Second Set of Interrogs. No. 3 (Tab 35).[1]

The District also failed to meet its second burden of demonstrating that it has taken all practicable steps to eradicate these vestiges. See Missouri v. Jenkins, 515 U.S. 70, 149-150 (1995); Freeman v. Pitts, 503 U.S. 467, 492 (1992); Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249-50 (1991). To fulfill this burden, the District would have to show that all seventeen plans proposed by the United States are unworkable and that there is no feasible way to reduce the number of one-race schools in the District or the number of students in these schools. The District, however, does not challenge the practicability of the seventeen plans in its statement of facts or its brief.[2] Although the brief cites Freeman, 503 U.S. at 493 and Hull v. Quitman, 1 F.3d 1450, 1455 (5th Cir. 1993) for the proposition that a school district need not engage in "awkward, inconvenient, or bizarre" measures, the District never establishes that the United States' plans require such measures. Def.'s Mem. Supp. Summ. J. at 12. Furthermore, the District has conceded the feasibility of desegregating its schools. Id. at 28 ("Anyone with a

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[1] Tabs 1-39 are attached to the United States' summary judgment motion and Tabs 40-43 are attached to this opposition to the District's summary judgment motion.

[2] While the District notes the distances between certain schools, Def.'s Mem. Supp. Summ. J. at 3, the District neither argues nor establishes that the seventeen plans proposed by the United States require impracticable bus routes or times, presumably because the superintendent and board members admitted their feasibility. Facts 28-32, 35, 41-45; see also Davis, 721 F.2d at 1438 ("The Board has submitted no adequate time-and-distance studies to show that the student transfers . . . are unduly burdensome."); cf. Stout v. Jefferson County Bd. of Educ., 537 F.2d 800, 801 (5th Cir. 1976) (desegregating one-race schools was "infeasible" due to a mountain that served as "a geographical barrier" between zones and rendered bus routes "dangerous").

map and a marker can draw new student assignment zones . . . ."); Dosher Dep. at 88:11-12, 91:12-14, 95:23-96:15 (Tab 5); Facts 25-28, 31-32.

The United States' seventeen plans have given the District every opportunity to fulfill its desegregation obligations. Some plans leave all schools open, while other plans close one or two schools. Fact 28. Some plans change the existing zone lines, while others use the existing lines with new grade configurations. Id. To minimize travel times, the plans make efficient use of the fact that six of the District's eight schools are located on or near State Route 17, Ex. 9 at 1 (Tab 23), on which buses can travel at 50 mph during transfer routes. Simms Dep. at 130:25-131:14 (Tab 24). Given the District's failure to prove the infeasibility of eliminating its vestiges through these plans or alternative plans, this Court must deny its summary judgment motion. Davis, 721 F.2d at 1434 ("If further desegregation is 'reasonable, feasible, and workable,' then it must be undertaken, for the continued existence of one-race schools is constitutionally unacceptable when reasonable alternatives exist.") (quoting Swann, 402 U.S. at 31); Lee v. Macon County Bd. of Educ., 616 F.2d 805, 811 (5th Cir. 1980) ("The law orders eradication of all vestiges of the dual system, if some feasible plan can be devised.") (citing Swann, 402 U.S. at 31).

Unable to show the infeasibility of further desegregation, the District mistakenly argues that the Court should address whether a new plan "must be prepared under the law," not whether "alternative student assignment plans can be prepared." Def.'s Mem. Supp. Summ. J. at 28. The Court must ask the latter question to answer the former, and the answer to both questions is yes. The undisputed facts establish that alternative plans can be implemented, Facts 25-45, and the law requires replacing an ineffective pre-Swann plan in the face of such facts. See, e.g., Lee v. Tuscaloosa City Sch. Sys., 576 F.2d 39, 40-41 (5th Cir. 1978) (requiring a new plan to address

racially identifiable schools despite compliance with order); United States v. Bd. of Educ. of Valdosta, 576 F.2d 37, 38-39 (5th Cir. 1978) (same); Tasby v. Estes, 572 F.2d 1010, 1014-15 (5th Cir. 1978) (remanding a second time with instructions to devise a desegregation plan that considers the techniques outlined in Swann); United States v. Desoto Parish Sch. Bd., 574 F.2d 804, 807 (5th Cir. 1978) (remanding with instructions to replace pre-Swann plan); Ellis, 465 F.2d at 879-80 (5th Cir. 1972) (remanding with instructions to replace pre-Swann plan despite district's compliance with plan); Gaines v. Dougherty County Bd. of Educ., 465 F.2d 363, 364 (5th Cir. 1972) (same); Stout v. Jefferson County Bd. of Educ., 448 F.2d 403, 404 (5th Cir. 1971) (same); Flax v. Potts, 450 F.2d 1118, 1118-1119 (5th Cir. 1971) (same); Order in United States v. Bertie County Bd. of Educ., No. 67-CV-632-BO(3), (E.D. N.C. Apr. 22, 2003) (Tab 39).

The District argues that it need not implement a new plan because it has complied with the 1969 Plan and its orders. Once again, the facts and the law refute this argument. The District violated its residency verification and transfer obligations, added eight portables to two white schools, and used race-based homecoming practices. Facts 48-50.[3] Even if the District had complied fully with its orders, the law mandates a replacement of its ineffective pre-Swann plan because its one-race schools can feasibly be desegregated, as Tuscaloosa, Valdosta, Ellis, Gaines, Stout, and Flax make clear. See also Dowell, 498 U.S. at 249-50 (a district must not only comply with its orders but must also take all practicable steps to eliminate vestiges); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459-60 (1979) (noting that the district in Swann implemented a court-ordered plan in 1965, but was required to develop a more effective plan in 1969); Belk v.

[3] The District mistakenly asserts that the United States has not challenged the adequacy of the 1969 Plan or the District's compliance with this Court's orders. Def.'s Mem. Supp. Summ. J. at 10.

Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 334 (4th Cir. 2001) (a desegregation order "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"); Dandridge v. Jefferson Parish School Bd., 332 F. Supp. 590, 593 (E.D. La. 1971) (board's compliance with 1969 order did not preclude further relief requiring the replacement of the pre-Swann plan with a new plan that would desegregate 15 all white schools and 4 all black schools in a district that was 80% white and 20% black), aff'd, 456 F.2d 552 (5th Cir. 1972), cert. denied, 409 U.S. 978 (1972).

B. Replacing The Ineffective Pre-Swann Plan Is Proper Despite The Passage of Time

To distract the Court from the relevant legal questions and facts, the District's summary judgment motion dwells on the passage of time and the United States' history in this case.[4] The passage of time does not render the United States' motion untimely, nor does it excuse the District from its legal obligations. See Freeman, 503 U.S. at 518 (Blackmun, J., concurring) ("[A]n integrated school system is no less desirable because it is difficult to achieve, and it is no less a constitutional imperative because that imperative has gone unmet for 38 years."); Dowell v. Bd. of Educ., 8 F.3d 1501, 1516 (10th Cir. 1993) ("The passage of time alone does not erase racial imbalance as a vestige of prior de jure discrimination."); Brown v. Bd. of Educ., 978 F.2d 585, 590 (10th Cir. 1992) (The "lingering effects" of segregation do not "magically dissolve" without affirmative efforts by the board, and "[t]he Constitution does not permit the courts to

[4] The District inaccurately asserts that the United States filed nothing between 1970 and July 2003 except for its consent to the board's motions in 1976 and 1991. Def.'s Mem. Supp. Summ. J. at 3 n. 2. On August 4, 1970, the United States moved to modify the 1969 order and the court granted the modifications. Order of Aug. 4, 1970 (Tab 40). On April 25, 1991, the United States filed a proposed consent order that required the district to recruit minority faculty and to enforce its zoned plan by monitoring transfers and verifying residences. Def.'s Ex. A.

ignore today's reality because it is temporally distant from the initial finding that the school system was operated in violation of the constitutional rights of its students."); Davis, 721 F.2d at 1428 (ordering district to create new plan in 1983 in a case that began 27 years earlier in 1956).

The District argues that this Court may not consider United States' motion for further relief because the United States did not appeal the 1969 Order. Def.'s Mem. Supp. Summ. J. at 12. This is a baseless argument. See, e.g., Davis, 721 F.2d at 1429 (affirming grant of plaintiffs' fifth motion for further relief challenging a 1970 plan that they had not appealed); Desoto Parish Sch. Bd., 574 F.2d at 807, 809 n.10 (remanding with instructions to replace the 1970 plan even though the United States had not appealed the pre-Swann plan when it moved for further relief); Order in United States v. Bertie County Bd. of Educ., No. 67-CV-632-BO(3), (E.D. N.C. Apr. 22, 2003) (granting United States' motion for further relief despite no earlier appeal) (Tab 39).

The District also faults the United States for not moving for further relief sooner, but the United States' motion simply seeks to have the District fulfill obligations that are prerequisites for a declaration of unitary status. The United States began reviewing the District's operations in late 2001 to determine if they were unitary. The United States first discovered violations of the 1991 Order's transfer and residency verification provisions. Fact 48. These violations, like those that gave rise to the 1991 Order, establish that the District was not complying fully with the 1969 Plan because its lax transfer and residency policies allowed zone jumping. Fact 48; Counter Fact 15. The District also added eight portables to two of its white schools and used segregative homecoming practices in at least the 2002-03 and 2003-04 school years in violation of its orders. Facts 49-50; Order of Aug. 4, 1970, ¶¶ IV, VI (Tab 40); see also Davis, 721 F.2d at 1435 (finding district's decision to add "temporary classrooms" at white schools "rather than [to] redraw[]

district lines" perpetuated the "racial isolation" of schools). These violations refute the District's assertions that it has complied fully with its orders and done nothing to reinforce the racial identifiability of its schools. Def.'s Mem. Supp. Summ. J. at 25, 26, 27.

Once the United States had addressed these violations, the United States visited the District with a desegregation expert to assess whether the three one-race schools could be feasibly desegregated. Gordon Dep. of May 2, 2006, at 186:8-11 (Tab 41). The expert concluded that alternative plans were feasible,[5] and the United States has since proposed seventeen plans to help the District achieve unitary status. Facts 18, 23, 24. Although the United States has proposed numerous plans to enable the District to fulfill its legal duty in the manner it deems best, the District has rejected all of them and has refused to propose any alternative. Facts 15-18, 24. When it became clear that the District would not take the steps needed for unitary status, the United States had no choice but to move for further relief.

C. The District's Arguments About Demographic Changes And Residential Patterns Are Unavailing

The District relies on several cases in which the school districts established unitary systems but subsequently had certain schools become racially identifiable due to demographic changes beyond the districts' control. See, e.g., Freeman, 503 U.S. at 494-95; Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976); Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1330-31 (11th Cir. 2005); Duval, 273 F.3d at 969-72; Belk, 269 F.3d at 325-26;

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[5] When Dr. Gordon devised his first five plans, he had in his possession and was familiar with the current assignment plan. Gordon Dep. at 187:11-188:22 (Tab 41). Because the current plan is the same as the one in the 1969 Order except for the 1976 and 1991 modifications, it matters not that Dr. Gordon did not rely on the 1969 Order when he prepared his plans. See Def.'s Mem. Supp. Summ. J. at 26.

Manning v. Sch. Bd. of Hillsborough County, Fla., 244 F.3d 927, 945 (11th Cir. 2001). Unlike the districts in these cases, West Carroll cannot point to a period of time in which its schools were desegregated or to subsequent demographic changes. The undisputed facts show that the District's demographics have barely changed since 1969, Fact 14, and that the 1969 Plan left three former de jure white schools virtually all white and two others racially identifiable. Facts 6-13.

The District attempts to defend these five racially identifiable schools by arguing that the racial enrollment percentages contemplated by the 1969 Plan resemble those that exist today. Def.'s Mem. Supp. Summ. J. at 11, 19.[6] The District does not cite a single case to support this argument, id., and ignores the many Fifth Circuit cases that required districts to devise a new plan even when they had implemented their pre-Swann plans. See supra at 6-7. Furthermore, the District's 1969 Plan never achieved a unitary system for at least a three-year period, as the Fifth Circuit requires prior to dismissing a desegregation case. Flax v. Potts, 915 F.2d 155, 158 (5th Cir. 1990). By the third year of the Plan's implementation, only four of the nine schools were within 15 percentage points of the district-wide percentage of black students. Fact 8. Today,

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[6] The District mistakenly argues that the parties' 1970-71 plans established Epps as a racially imbalanced school and Pioneer as a "borderline racially identifiable" school. Def.'s Mem. Supp. Summ. J. at 23-24. The District's five-high-school Plan would have rendered Pioneer Elementary within 3 percentage points, Pioneer High within 12 percentage points, and Epps High School within 16 percentage points of the district-wide black percentage. Def.'s Facts No. 7; Def.'s Ex. C. The United States' two-high school plan would have rendered Pioneer Elementary within 2 percentage points, Pioneer High (a.k.a. the Southern High School) within 7 percentage points, and Epps Elementary within 13 percentage points of the district-wide black average. Def.'s Facts No. 5; Def.'s Ex. B; Counter Facts No. 5. That the United States' 1970-71 plan and many of the seventeen recent plans leave Fiske and/or Goodwill as small white elementary schools illustrates that the United States has never sought racial balance in all schools.

three schools remain virtually one race and two others exceed the district-wide black percentage by 31 and 29 percentage points respectively, Fact 9, far outside Dr. Gordon's ± 15% variance or the ± 20% variance espoused by the District. Def.'s Mem. Supp. Summ. J. at 17 n. 17.

Perhaps because the case law does not justify the continuation of 830 students at the white schools of Fiske, Goodwill, and Forest, see Ex. 59 at 2 (Tab 9), the District attempts to rely on assertions about residential patterns in West Carroll Parish for which it provides no evidentiary support. Def.'s Mem. Supp. Summ. J. at 22, 25. Even if the District had supported these assertions, arguments premised on residential patterns and demographic changes do not excuse the District from its duty to desegregate because it has yet to eradicate vestiges in school assignments. Davis, 721 F.2d at 1435 ("Until all reasonable steps have been taken to eliminate remaining one-race schools, however, ethnic housing patterns are but an important factor to be considered in determining what further desegregation can reasonably be achieved; they do not work to relieve the Board of its constitutional responsibilities."); Macon, 616 F.2d at 810 ("Not until all vestiges of the dual system are eradicated can demographic changes constitute legal cause for racial imbalance in the schools"); Tasby, 572 F.2d at 1013 (requiring formulation of new student assignment plan despite "substantial changes" in "residential patterns").

D. The United States' Plans Aim To Eliminate Vestiges, Not to Attain Racial Balance

The District's summary judgment memorandum needlessly cites numerous cases for the proposition that racial balance in all schools is not required. See, e.g., Def.'s Mem. Supp. Summ. J. at 20 (citing cases). The United States does not dispute this proposition, and its proposed plans do not seek to attain racial balance in all schools. These plans simply seek to reduce the number of vestigial one-race schools in practicable ways, as Swann and its progeny require. Swann, 402

U.S. at 26 (requiring "every effort to achieve the greatest possible degree of actual desegregation"); Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 227-28 (5th Cir. 1983) ("Constructing a unitary school system does not require a racial balance in all of the schools," but "[w]hat is required is that every reasonable effort be made to eradicate segregation and its insidious residue.").

Although the District does not challenge the practicability of the United States' seventeen plans, the District does attack Dr. Gordon's use of a ± 15 percent variance to determine if a school is racially identifiable. Def.'s Mem. Supp. Summ. J. at 10, 13-14, 17, 19, 21, 23-28. The District asserts that the ± 15 percent variance is "the only criterion" used by the United States to identify racially identifiable schools. Id. at 13. This attack overlooks the United States' focus on the District's three virtually all white schools, which remain one-race regardless of the variance or criteria used. This criticism also ignores Swann's strong presumption against such one-race or virtually one-race schools, Swann, 402 U.S. at 26, and the fact that these three schools are former de jure white schools that have never been desegregated. Facts 9-12.

No matter what variance is used to determine if a school is racially identifiable, the stark fact remains that almost half of the District's eight former de jure white schools remain virtually all white. In the 2006-07 school year, Fiske and Goodwill have no black students, and Forest has only seven black students. Fact 12. A faithful application of Swann's standards, unlike the District's selective application which focuses only on Swann's discussion of racial balancing, Def.'s Mem. Supp. Summ. J. at 13 (quoting Swann, 402 U.S. at 23-24), shows that the 1969 Plan must be replaced because there are feasible ways to desegregate these one-race schools. See Davis, 721 F.2d at 1437 ("the continued existence of one-race schools . . . is unacceptable where

reasonable alternative exist"). This conclusion was conceded by the superintendent, Facts 25-28, 31-32, and reached by Dr. Gordon, a desegregation expert with forty years of experience. Exs. 9 (Tab 23), 59 (Tab 9); Gordon Dep. at 178:12-181:15, 185:3-186:3, 189:7-25 (explaining that he considers if one-race or virtually one-race schools can be desegregated and he concluded that they could be) (Tab 41).

The District faults certain proposed plans for leaving Goodwill and/or Fiske as virtually all white grade K-5 or grade K-6 schools. Def.'s Mem. Supp. Summ. J. at 23. This criticism is odd because this aspect of the plans demonstrates that their aim is not racial balance in all schools. This criticism also ignores that these plans assign grade 6-8 or grade 7-8 students residing in the Fiske zone and grade 6-12 or grade 7-12 students residing in the Goodwill zone to a desegregated school in lieu of a one-race school.

The District also criticizes the United States' expert for labeling EHS and PES "racially identifiable." Id. at 13-14, 19 n. 22. While EHS and PES are racially identifiable even under the District's suggested ± 20 percent variance[7] because their black percentages exceed the district-wide black percentage by approximately 30 percentage points, Fact 9, the primary reason the United States' plans include changes to EHS and PES is because their black students are needed to desegregate the virtually all white schools of Goodwill and Forest. Almost half of the black students in the District and all but 7 of the black students in the Southern Portion attend EHS or

[7] The District asserts that "since the mid-1980's, the most commonly used 'starting point' in school desegregation cases has been ± 20% of the minority student percentage." Def.'s Mem. Supp. Summ. J. at 17 n. 17. The case cited for this assertion, however, does not identify ± 20% as the most common standard. Coalition to Save our Children v. State Bd. of Educ. of State of Del., 901 F. Supp. 784, 798 n. 22 (D. Del. 1995). The case merely states that "[s]tarting in the late 1980's and early 1990's, ± 20% began to be used" and identifies ± 15% as "the most common standard of review" "[s]tarting in the late 1970's and throughout the 1980's." Id.

PES, Ex. 59 at 2 (Tab 9), even though the virtually all white school of Forest is only 6.5 miles from PES and OGHS. Ex. 21 (Tab 32). The United States' plans simply acknowledge that 495 students need not attend Forest, Ex. 59 at 2 (Tab 9), when this virtually all white school is sandwiched between two concentrations of black students in the District. Ex. 57 (Tab 4).

E. The District's Reliance On Cases Involving Large Urban Districts Is Misplaced

Ignoring Swann's presumption against one-race schools, the District quotes selectively from Swann to argue that its system is desegregated despite the presence of one-race schools. Def.'s Mem. Supp. Summ. J. at 30 (quoting Swann, 402 U.S. at 26). The selective quotation, however, offers no support when viewed in its full context because the Supreme Court was referring to the existence of one-race schools in large metropolitan areas. Swann, 402 U.S. at 26 ("The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city."). Swann involved the large urban district of Charlotte-Mecklenburg. By contrast, West Carroll is a rural district of only 2,300 students, Ex. 59 at 2 (Tab 9), where there is simply no excuse for leaving three of its mere eight schools one race. See Boykins v. Fairfield Bd. of Educ., 457 F.2d 1091, 1095 (5th Cir. 1972) ("A school system with fewer than two thousand elementary school students . . . is not the type of 'metropolitan area' the Supreme Court envisioned when, in Swann, it said that one-race schools may, in some circumstances, be acceptable because of segregated housing patterns.").

Several other Fifth Circuit cases cited by the District also involved sizeable urban school districts with racially identifiable schools that either could not be desegregated or were not attributable to any past or present discrimination. See Flax, 915 F.2d at 160-62 (the fact that 14 of 98 schools in Forth Worth, Texas were more than 80% black did not require further

desegregation efforts given dramatic residential changes);[8] Davis, 721 F.2d at 1429 (110 schools in East Baton Rouge Parish); Ross, 699 F.2d at 220 (226 schools in Houston); Calhoun v. Cook, 522 F.2d 717, 719 (5th Cir. 1975) (148 schools in Atlanta school district); Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123 (M.D. Ala. 1974), aff'd, 511 F.2d 1374 (5th Cir. 1975) (36,016 students in 54 schools). For example, in Carr, the court found that the plan achieved all practicable desegregation in Montgomery because the city's size and housing patterns precluded feasible desegregation of a limited number of predominantly black *elementary* schools and grades 7-12 would be desegregated. Id. at 1135-38. The District did not, and cannot, identify any factors in West Carroll Parish that are comparable to "the immutable geographic factors" that precluded further desegregation in Montgomery and these other urban districts. Def.'s Mem. Supp. Summ. J. at 20.

These Fifth Circuit cases upon which the District relies are further distinguishable because the desegregation efforts made therein far exceeded those taken by the District. For example, in Flax, the Forth Worth "district initiated massive, cross-town busing; paired certain elementary schools for cluster busing; closed some schools; . . . instituted a 'pyramid feeder system' to 'feed' students from elementary schools into designated middle schools, and from middle schools into designated high schools[;] . . . adopted a majority-to-minority transfer policy[;] redrew attendance zones[;] and implemented multi-age grouping when busing or other remedial tools could not alter circumstantial incidents of racial isolation." Flax, 915 F.2d at 161. Given Forth Worth's "intensive efforts to eliminate one-race schools," id. at 163, the Fifth

[8] The Court declared the Forth Worth district unitary in part because "residential living patterns . . . ha[d] changed dramatically" with "more than 33,000 fewer white students . . . enrolled in the district in 1984 than in 1968." Id. at 161.

Circuit upheld the lower court's finding "that these exhaustive measures have succeeded in removing the vestiges of the dual system." Id. at 161; see also Ross, 699 F.2d at 227 (Houston used "rezoning, pairing, and clustering" to desegregate its schools).

The District also relies heavily on non-binding cases that include large urban districts. See Def.'s Mem. Supp. Summ. J. at 7 (citing Morgan v. Nucci, 831 F.2d 313, 315 (1st Cir. 1987) (involving the Boston schools); Def.'s Mem. Supp. Summ. J. at 8 (citing Capacchione v. Charlotte-Mecklenburg Schs., 57 F. Supp.2d 228 (W.D. N.C. 1999); Def.'s Mem. Supp. Summ. J. at 9 (citing Coalition to Save Our Children v. State Bd. of Educ. Of Del., 90 F.3d 752, 760 (3rd Cir. 1996) (state-wide case in Delaware involving urban districts); at 9 (citing Stell v. Bd. of Pub. Educ. for Savannah, 860 F. Supp. 1563 (S.D. Ga. 1994); Def.'s Mem. Supp. Summ. J. at 15 (citing Kelley v. Metropolitan County Bd. of Educ. of Nashville & Davidson County, Tenn., 492 F. Supp. 167 (M.D. Tenn. 1980); Def.'s Mem. Supp. Summ. J. at 16 (citing Bradley v. Milliken, 402 F. Supp. 1096 (E.D. Mich. 1975) (involving the 70% black school district in Detroit). Of these cases, Kelley's discussion of when one-race schools are permitted under Swann most clearly establishes why small rural school districts, like West Carroll Parish, were not what the Supreme Court had in mind. As the court in Kelley explains, Swann's language regarding "schools that may remain all or largely of one race" stemmed from the Supreme Court having "observed the 'familiar' metropolitan phenomenon (present in Nashville [and Charlotte]) of concentrations of black population in one part of the city." 492 F. Supp. at 188.

Each of the above urban cases is distinguishable from the case before this Court, but it is worth noting that the Third Circuit embraced the same approach as Dr. Gordon to evaluate whether vestiges had been eliminated to the extent practicable in the Delaware case. Coalition to

Save Our Children, 90 F.3d at 760. The Third Circuit determined that "[a] critical starting point in identifying vestiges of discrimination is the degree of racial imbalance in the school districts." Id.; accord Freeman, 503 U.S. at 474. Experts for both sides of the Delaware case examined the racial balance of schools within certain variances, including a ± 10% variance, and the Third Circuit upheld the lower court's finding that the schools were racially balanced. Id. at 761-62.

While the racial balance inquiry led to a conclusion of no vestiges in the Delaware case and continuing vestiges requiring a remedial plan in West Carroll Parish's case, these distinct conclusions reflect factual differences between the two cases. The Delaware case required "the consolidation of urban and suburban school districts" and "[t]he State Board and districts not only ha[d] adhered to the requirements of [the] student assignment order, but also ha[d] attempted to maintain a racial balance by consolidating districts, redrawing attendance zones, and instituting the busing of thousands of students." Id. at 761. In the present case, where the District has made no comparable attempts to desegregate its one-race schools, Dr. Gordon's use of a ± 15% variance as "a starting point" for devising new plans was entirely appropriate. Swann, 402 U.S. at 25; Belk, 269 F.3d at 319 ("the plus/minus fifteen percent variance is clearly within accepted standards"); Davis, 721 F.2d at 1439 (approving lower court's use of the system's "overall racial balance" and "mathematical ratios" in devising its plan); DeSoto, 574 F.2d at 819 ("the[] effectiveness of [strict mathematical ratios] as a starting point in eliminating the vestiges of segregation in both student and faculty assignments is beyond question").

F. The United States' Plans Either Eliminate Or Significantly Reduce The Number Of Students In One-Race Schools

The District's summary judgment memorandum incorrectly describes Dr. Gordon's first

five plans and completely ignores the additional twelve plans proposed by the United States. Def.'s Mem. Supp. Summ. J. at 22-23. Although the District does not challenge the feasibility of any of these plans, the District asserts that the plans "do not decrease the number of students attending one-race white student schools." Id. at 23. Nothing could be further from the truth.

Dr. Gordon's first expert report provides five plans that would desegregate all students in grades 6-12 or 7-12 and reduce the number of students in all white schools by a half to two-thirds. Ex. 9 (Tab 23). Table 1 of Dr. Gordon's first report shows that 813 students attended the all white schools of Fiske (181, PreK-8), Forest (467, PreK-12), and Goodwill (165, PreK-8) in the 2005-06 school year. Id. at 2. In Dr. Gordon's suggested plan, only 130 students would remain in an all white PreK-6 school at Goodwill. Id. at 7. In the Alternative 1 plan, only 288 students would remain in an all white PreK-6 school at Goodwill. Id. at 10. Only 323 students would remain in an all white PreK-5 school at Forest in the Alternative 2 plan. Id. at 13. In the Alternative 3 plan, only 365 students would remain in an all white PreK-6 school at Forest. Id. at 15. Lastly, in the Alternative 4 plan, only 395 students would remain at an all white PreK-6 schools at Goodwill and Fiske. Id. at 16.

Dr. Gordon's second report offers three plans for the Northern Portion and three plans for the Southern Portion for a total of nine district-wide plans, each of which substantially reduce the number of students in the all white schools. Ex. 59 at 5-11 (Tab 9). Table 1 of Dr. Gordon's second report shows that 830 students attend the all white schools of Fiske (175, PreK-8), Forest (495, PreK-12), and Goodwill (160, PreK-8). Id. at 2. Under Plans 1 and 2 for the Northern Portion and Plan 3 for the Southern Portion, no students would be in all white schools. Id. at 5, 6, 11. Under Plan 3 for the Northern Portion, only 147 students would be in an all white PreK-6

school at Fiske. Id. at 7. Under Plan 1 for the Southern Portion, only 155 students would be in an all-white PreK-8 school at Goodwill. Id. at 9. Under Plan 2 for the Southern Portion, only 118 students would be in an all-white PreK-6 school at Goodwill. Thus, the second report offers plans in which no students attend all white schools, and other plans in which at most 302 students would remain in all white elementary schools. Id. at 7 (147 in Plan 3), 9 (155 in Plan 1).

The final three plans proposed by the United States also would significant decrease the number of students in all white schools from its current figure of 830, which is more than one third of the District's 2,332 students. Id. at 2, Table 1. Plan A uses the revised attendance zones in Exhibit 58; creates four desegregated high schools (KHS, OGHS, Forest, and EHS) and one desegregated elementary school (OGES); closes PES and Fiske; and leaves only 155 students in an all white PreK-8 school at Goodwill. Plan B uses the existing zone lines; creates three desegregated high schools (KHS, OGHS, and EHS) and two desegregated elementary schools (Forest and OGES); closes Fiske and divides its PreK-6 students between KHS and Goodwill; and leaves only 228 students in an all white school at Goodwill. Plan C uses the revised zone lines in Exhibit 58; keeps all eight schools open while desegregating seven of them; and leaves only 109 students in an all white PreK-5 school at Goodwill.

The above summary establishes that all seventeen plans either eliminate the number of students in all white schools or significantly reduces that number by half or more. The Superintendent has admitted that he is "capable of doing all [of] these plans." Dosher Dep. at 57:17-18 (Tab 5); Fact 30; see also Facts 29-32, 34-35. Given these undisputed facts, the District clearly cannot meet its burden of proving that it has eliminated the vestiges of its dual system to the extent practicable. Consequently, this Court should deny its summary judgment motion.

G. The United States' Plans Should Enhance Educational Services In The District

The District defends its rejection of the United States' plans on the basis of its "fear that changes in the schools would negatively effect [sic] the high quality of education provided to students of all races." Def.'s Mem. Supp. Summ. J. at 5. The District cites no evidence to substantiate its baseless speculation. In addition, the District incorrectly asserts that "[t]he Government does not allege or argue that the quality of educational services . . . will improve if schools" are altered under the United States' plans. Def.'s Mem. Supp. Summ. J. at 11. Although the case law does not require that desegregation plans improve test scores or educational services,[9] Dr. Gordon has explained how the plans should enhance educational services. Ex. 59 at 12-18 (Tab 9). Specifically, the plans should enable the District to increase course offerings and extracurricular activities. Id. at 14-16, 18. The Plans also should reduce the number of non-highly qualified teachers in the District and the number of subjects that teachers need to prepare each day. Id. at 12-13, 18; Facts 46-47 (17 teachers are not highly qualified, and some teachers have to prepare five to six different subjects a day).

IV. Conclusion

For all of the above reasons, this Court should deny the District's summary judgment motion and its motion for a declaration of unitary status in the area of student assignment to schools. Because the undisputed facts show that the District is not yet unitary and that feasible desegregation plans can be implemented, the United States urges this Court to enter summary judgment against the District and to order the District to implement one of the plans proposed by

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[9] The District suggests that the United States must guarantee that student test scores will not decline under its plans, but cites no support for this argument, id. at 27, presumably because it could not find any support in the case law.

the United States or an effective alternative plan by the start of the 2007-08 school year.

Respectfully submitted,

DONALD W. WASHINGTON
United States Attorney
Western District of Louisiana

Katherine W. Vincent
Assistant United States Attorney

WAN J. KIM
Assistant Attorney General
Civil Rights Division

JEREMIAH GLASSMAN
EMILY H. MCCARTHY (D.C. Bar No. 463447)
Attorneys for the Plaintiff
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., NW
Educational Opportunities Section
Patrick Henry Building, Suite 4300
Washington, D.C. 20530
Phone: (202) 514-4092
Fax: (202) 514-8337

This the 11th day of January 2007.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2007, I served a copy of the foregoing *United States' Opposition to Defendant's Motion for Summary Judgment* and *Statement of Disputed Facts* by Federal Express to counsel of record at this address:

Robert L. Hammonds, Esq.
Hammonds & Sills
Quad One, Suite C
1111 South Foster Drive
Baton Rouge, LA 70806

Emily H. McCarthy
Counsel for the United States