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

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

REPLY IN SUPPORT OF UNITED STATES' MOTION FOR FURTHER RELIEF

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UNITED STATES' REPLY IN SUPPORT OF ITS MOTION FOR FURTHER RELIEF

As a school system that has not yet attained unitary status, the West Carroll Parish School District ("the District") remains under an affirmative duty "to take all steps necessary to eliminate the vestiges of [its] unconstitutional de jure system." Freeman v. Pitts, 503 U.S. 467, 485 (1992). The District attempts to shirk this duty on the grounds that the United States did not take steps to enforce this duty earlier. This argument is misplaced. Regardless of the United States' conduct, the District has always borne and continues to bear the burden of dismantling its prior de jure system and demonstrating that all practicable steps have been taken toward that end. See id. at 494; Missouri v. Jenkins, 515 U.S. 70, 150 (1995). The District mistakenly contends that it has met this burden by implementing the desegregation plan set forth in the 1969 Order, which predates Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Implementation of a plan that has left three former white schools virtually all white and two others racially identifiable does not satisfy the District's burden of eliminating these obvious vestiges of its prior dual system when alternative practicable desegregation plans exist, as they do here.

The United States attempted to assist the District in meeting its burden by suggesting plans

to reduce the number of students in virtually one race and otherwise racially identifiable schools. The District rejected these plans and insisted on continuing its ineffective pre-Swann plan. Because the District failed to show that further desegregation was impracticable, the United States appropriately moved for further relief. Despite the District's contentions, the United States' motion does not seek racial balancing; the motion seeks only to ensure that the District fulfills its legal obligations. In opposing the motion, the District neither disproved that its racially identifiable schools are vestiges nor showed that eradicating these vestiges is undoable. Accordingly, this Court should order the District to implement a workable plan.

I. Review of the 1969 Plan under Swann Is Appropriate Despite the Passage of Time

Instead of acknowledging its duty to dismantle its prior segregated system, the District focuses on the passage of time and the United States' history in this case. The passage of thirty-five years 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.").[1] The timing of the United States' motion would be relevant if the District had already established a unitary system, but the District does not even argue that it has achieved unitary status, let alone show this.[2]

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[1] See also 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 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.").

[2] The District states only that it "may move" for partial or complete unitary status "after obtaining information from the United States informally or through discovery." Opp'n at 10 n. 19. This position makes no sense because whether the District has achieved unitary status in any area

To achieve unitary status, the District must show full and good faith compliance with its orders since they were entered and that it has taken all practicable steps to eliminate the vestiges of its dual system. See Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249-50 (1991). In evaluating the District's record, "a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole." Freeman, 503 U.S. at 474. This is because "[o]ne . . . vestige, indeed the hallmark of a dual system, is schools that are markedly identifiable in terms of race." United States v. State of Ga., Meriwether County, 171 F.3d 1333, 1338 (11th Cir. 1999). While it is true that "[c]onstructing a unitary school system does not require a racial balance in all of the schools," the District ignores that "[w]hat is required is that every reasonable effort be made to eradicate segregation and its insidious residue." Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 227-28 (5th Cir. 1983).

The District cannot show that it has made every reasonable effort to eradicate its virtually single race and otherwise racially identifiable schools. The District argues that it has made sufficient efforts because it has implemented the 1969 plan and the racial enrollment percentages contemplated by that plan resemble those that exist today. See Opp'n at 6-7, Ex. K. Several Fifth Circuit cases, however, have rejected the proposition that simple compliance with a pre-Swann plan is sufficient when racially identifiable schools persist. See, e.g., Ross, 699 F.2d at 225 ("A school system is not, of course, automatically desegregated when a constitutionally acceptable plan is adopted and implemented, for the remnants of discrimination are not readily eradicated.");

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depends on what steps the District has taken, whether they were taken in good faith, and the results of such steps, and this information is already in the District's possession. Because the District clearly is not ready to move for partial or complete unitary status at this time, the United States urges this Court to resolve the student assignment issue now and not to wait for a possible motion.

Lee v. Tuscaloosa City Sch. System, 576 F.2d 39, 40-41 (5th Cir. 1978) (requiring new plan to alleviate racially identifiable schools despite compliance with 1970 order); United States v. Bd. of Educ. of Valdosta, 576 F.2d 37, 38-39 (5th Cir. 1978) (requiring new plan to address virtually one race schools even though district complied with 1971 order); Gaines v. Dougherty County Bd. of Educ., 465 F.2d 363, 364 (5th Cir. 1972) (remanding with instructions to replace pre-Swann plan despite district's compliance with plan due to one-race or predominantly one-race schools).[3]

To determine if implementation of the pre-Swann 1969 plan fulfill's the District's student assignment obligations, this Court must review the plan under the standards set forth in Swann and its progeny. See Tuscaloosa, 576 F.2d at 40 ("The adequacy of the 1970 order must be evaluated in light of the current understanding in this Circuit of school desegregation law."); Tasby v. Estes, 572 F.2d 1010, 1014 (5th Cir. 1978) ("We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of [using the] techniques [outlined in Swann]."); Ellis v. Bd. of Pub. Instruction of Orange County, Fla., 465 F.2d 878, 880 (5th Cir. 1972) ("formerly segregated school districts must comply with [Swann] as a supervening decision of the Supreme Court ...."); Stout v. Jefferson County Bd. of Educ., 448 F.2d 403, 404 (5th Cir. 1971) (remanding with instructions to replace pre-Swann plan with a new plan that complies with Swann and other intervening cases). A faithful and objective application of Swann's standards, unlike the District's selective

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[3] The Fourth Circuit also has interpreted Swann and the duty to eliminate vestiges to the extent practicable as "meaning . . . that 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). In 2003, a district court in the Fourth Circuit ordered a school district to replace its pre-Swann plan with a new plan because the 1969 plan had not eliminated a racially identifiable white elementary school. See Order in United States v. Bertie County Bd. of Educ., No. 67-CV-632-BO(3), (E.D. N.C. Apr. 22, 2003) (Ex. 14).

application which focuses only on Swann's discussion of racial balancing, see Opp'n at 8 (quoting Swann, 402 U.S. at 23-24), shows that the 1969 plan must be replaced by an effective new plan.

II. The District's Implementation of the 1969 Plan Fails to Satisfy Swann's Standards

To distract attention away from its three virtually single race schools, the District attacks the use of a ± 15 percent variance to determine if a school is racially identifiable. See Opp'n at 8-15. This attack overlooks Swann's strong presumption against one race or virtually one race schools and Swann's recognition that comparing an individual school's racial composition to the district-wide racial composition is a legitimate initial tool for evaluating the effectiveness of a desegregation plan. See Swann, 402 U.S. at 25-26. Regardless of whether a ± 15 percent or a ± 20 percent variance is used, see Opp'n at 11 n. 22,[4] the stark fact remains that almost half of the District's eight former all white schools remain virtually all white. Fiske (99% white) and Goodwill (98% white) have no black students, and Forest (98% white) has five black students.

A. Fiske, Goodwill, and Forest Fail to Overcome Swann's Presumption Against One Race or Virtually One Race Schools

Swann establishes a "general presumption against the maintenance of a system with substantially one-race schools" and "places the burden squarely on the Board to demonstrate that the remaining one-race schools are not vestiges of past segregation." Davis v. East Baton Rouge

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[4] 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," Opp'n at 11 n. 23, but the cited case states only that "[s]tarting in late 1980's and early 1990's, ± 20% began to be used," not that it was the most common. See Coalition to Save our Children v. State Bd. of Educ. of State of Del., 901 F. Supp. 784, 798 n. 22 (D. Del. 1995). This case identifies ± 15% as "the most common standard of review" "[s]tarting in the late 1970's and throughout the 1980's." Id. This assertion is consistent with a study cited by the Fourth Circuit to support its view that "the plus/minus fifteen percent variance is clearly within accepted standards." Belk, 269 F.3d at 319 (citing David J. Armor, Forced Justice: School Desegregation and the Law 160 (1995) (observing that a variance of ± 15% or greater is used in over 70% of the school districts with desegregation plans in which racial balance is measured by numerical standards).

Parish Sch. Bd., 721 F.2d 1425, 1434 (5th Cir. 1983) (citing Swann, 402 U.S. at 26).[5] Swann's presumption applies here because three of the District's schools are virtually all white.[6] See Harrington v. Colquitt County Bd. of Educ., 460 F.2d 193, 195 (5th Cir. 1972) (schools that "are predominately of one race (white) . . . come under the Supreme Court's proscription in Swann"). The District cannot meet its burden of showing that Fiske, Goodwill, and Forest are not vestiges because all three are former white schools, and none has ever been desegregated. See Ellis, 465 F.2d at 880 (affirming order granting further relief to desegregate three virtually one race schools that "have never been desegregated and were a part of the dual school system which existed prior to our 1970 decision"); 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).

The District quotes selectively from Swann to argue that it may have a small number of

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[5] Swann's discussion of the presumption is as follows: "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

[6] The presumption is not limited to one race schools. "[O]nce a plaintiff shows de jure segregation . . . , a presumption arises that all racial imbalances in a school district are the result of the de jure segregation[,]" and "[t]o rebut this presumption, 'a school board must prove that the imbalances are not the result of present or past discrimination on its part.'" Manning v. Sch. Bd. of Hillsborough County, Fla., 244 F.3d 927, 942 (11th Cir. 2001) (citation omitted).

virtually one race schools and nonetheless satisfy its desegregation obligations. See Opp'n at 14 (quoting Swann, 402 U.S. at 26). Put in context, the District's quotation shows plainly that Swann was referring to the existence of one race schools in large metropolitan areas.

> 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. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation. In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.

Id. Swann involved the huge urban district of Charlotte-Mecklenburg, and many other cases cited by the District also involved large urban school districts with one race schools that either could not be desegregated or were not attributable to any past or present discrimination.[7] These cases are inapposite because West Carroll is a rural district with only eight schools and 2,400 students.[8]

B. Residential Patterns and Demographic Changes Do Not Justify the District's One Race Schools

The District also attempts to justify the continuation of Fiske, Goodwill, and Forest as all white schools on the basis of four unsupported assertions about residential patterns and demographic changes. First, purporting to know what Judge Dawkins was thinking when he

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[7] See Ross, 699 F.2d at 220 (226 schools in Houston); Davis, 721 F.2d at 1429 (110 schools in East Baton Rouge Parish); Calhoun v. Cook, 522 F.2d 717, 719 (5th Cir. 1975) (148 schools in Atlanta school district); Kelley v. Metro. County Bd. of Educ. of Nashville and Davidson County, Tenn., 492 F. Supp. 167 (D.C. Tenn. 1980); Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123 (M.D. Ala. 1974), aff'd, 511 F.2d 1374 (5th Cir. 1975), cert. denied, 423 U.S. 986 (1975) (36,016 students in 54 schools).

[8] 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.").

approved the 1969 plan, the District asserts that "he knew that, because of residential living patterns, it would be difficult (if not impossible) to keep Fiske . . . and Goodwill . . . from remaining as predominately white . . . schools." Opp'n at 16. Second, the District asserts that "no black students . . . lived within miles of" Fiske and Goodwill in 1969 and that "there has been little change in those residential living patterns since that time." Id. Third, the Court and parties knew that Fiske and Goodwill would remain single race schools. Id. at 16-17. Fourth, the 1969 order established Forest as a "borderline racially identifiable" school under the ± 15% variance, and the increase in its white percentage from 87% white to 98% white "has been caused primarily by the decline in the number of black students living in the Forest High School zone and attending that school (from 55 in 1970 to 5 in 2005)," not by any action of the District. Id. at 19.

Arguments premised on residential patterns and demographic changes are, however, unavailing to school districts that have yet to eliminate vestiges in school assignments.

> Until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system. That duty includes the responsibility to adjust for demographic patterns and changes that predate the advent of a unitary system. The racial isolation of some schools, whether existing before or developing during the desegregation effort, may render disestablishment of certain one-race schools difficult or even impossible. 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. Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied . . . . But until it can show that all reasonable steps have been taken to eliminate remaining one-race schools, the Board must in its pursuit of a unitary system respond as much as reasonably possible to patterns and changes in the demography of the parish.

Davis, 721 F.2d at 1435 (citations omitted); see Lee v. Macon County Bd. of Educ., 616 F.2d 805, 810 (5th Cir. 1980) ("Not until all vestiges of the dual system are eradicated can demographic

changes constitute legal cause for racial imbalance in the schools").

In this respect, the District's case is distinguishable from several cases in which racially identifiable schools had been desegregated but subsequently became resegregated due to demographic changes and residential patterns beyond the school districts' control. See Freeman, 503 U.S. at 494-95; Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976); Holten 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; Manning, 244 F.3d at 945. These cases focused on whether racially identifiable schools were traceable to the districts' past or current discriminatory conduct or independent factors beyond the districts' control such as private residential choices and demographic changes. Because independent factors caused the schools to become racially identifiable after the districts had implemented a desegregation school assignment plan successfully and in good faith for a reasonable period of time, the courts held that the districts had no further obligation with respect to school assignments.[9] Unlike the districts in these cases, West

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[9] In Freeman, the plaintiffs "conceded that the 1969 order assigning all students to their neighborhood schools 'effectively desegregated the DCSS for a period of time.'" 503 U.S. at 477 (citation omitted). The lower court and Supreme Court agreed and found that independent demographic changes explained the racially imbalanced schools. Id. at 478-79, 493-95. In Pasadena, "[n]o one dispute[d] that the initial implementation of th[e] plan accomplished [its] objective[,]" and therefore the district court could not order the school district "to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity." 427 U.S. at 436. In Holten, the schools deviating by more than 20 percentage points from the district-wide racial ratio had been within this range from 1970 to 1976 and major demographic changes had taken place since then. 425 F.3d at 1330-31. In Duval, the court found that the "vestiges of de jure segregation have been eliminated . . . under the Mims injunction, [and] any re-emergence of racially identifiable schools resulting from demographic changes . . . cannot be attributed to the Board's former de jure segregative policies." 273 F.3d at 969 n. 26. In Belk, "[t]he dual system of student assignment . . . ha[d] been eradicated 'to the extent practicable,'" and "[t]he imbalance existing in some schools [wa]s not traceable to the former dual system or to renewed discriminatory actions, but rather [wa]s a result of growth and shifting demographics." 269 F.3d at 326 (citation omitted). In Manning, the district was unitary in student assignments because the "demographic shifts were a 'substantial' . . . reason for the racial imbalances" and

Carroll cannot point to a period of time in which its schools were desegregated.

Even assuming the District's assertions about housing and demographic patterns were true, these assertions do not justify continuing Forest as a grade K-12 white school or continuing Fiske and Goodwill as grade K-8 white schools because reasonable means of desegregating grades 6-12 at these schools exist. "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." Davis, 721 F.2d at 1434 (quoting Swann, 402 U.S. at 31). While the District has criticized the desegregation plans proposed by the United States, see Opp'n at 17-18, the District has not shown that further school desegregation is impracticable, nor has it developed an alternative plan.

III. The District Cannot Show That Further Desegregation Is Impracticable

As Swann and its progeny make clear, the District bears the burden of showing that further desegregation is infeasible. See Swann, 402 U.S. at 26 (requiring "every effort to achieve the greatest possible degree of actual desegregation"); Davis, 721 F.2d at 1434. The District's Opposition utterly fails to do this. The District notes distances between certain schools that are not at issue in any of the proposed plans, see Opp'n at 2, and makes no showing that distances in the plans are unworkable. The District asserts that "transportation times, distances, and expenses will be increased" under the United States' plans, id. at 28, but submits no time-and-distance studies to show that the United States' plans or any other plans for that matter are impracticable. See Davis, 721 F.2d at 1438 ("The Board has submitted no adequate time-and-distance studies to show that the student transfers contemplated by the court's plan are unduly burdensome, nor has it

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"the district judge never found that the racial imbalances at the 17 challenged schools were caused by the past de jure segregation or other discriminatory acts." 244 F.3d at 945 (citation omitted).

even come forward with facts demonstrating a correlation between the distance a student must travel under the plan and the likelihood that the student will transfer from that system.") (citations omitted). The District speculates that its test scores may fall if the current school assignments are changed, see Opp'n at 28, but this unsupported conjecture does not demonstrate impracticability.[10]

The District's only direct criticism of the United States' proposed plans is that they will leave either Fiske or Goodwill, or both schools in some instances, virtually all white. See Opp'n at 17. This criticism does not speak to the plans' practicability and overlooks the reduction in the number of racially identifiable schools and students attending such schools achieved by each of the plans. While it is true that Fiske and/or Goodwill would remain virtually all white under each plan, they would remain so only as grade K-5 or grade K-6 schools, not as grade K-8 schools as they are now. Thus, all five plans ensure that their roughly 110 (grade 6-8) or 70 (grade 7-8) students would attend a desegregated middle or junior high school as well as a desegregated high school. In this respect, the United States' plans are consistent with court-approved plans that permitted small numbers of students in one race or virtually one race elementary schools because all of the students in the upper grade levels were desegregated.[11]

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[10] The District also faults the United States for "not alleg[ing] or argu[ing] that the quality of education services . . . will improve if schools . . . are closed/consolidated/reconfigured" under the plans. Id. at 6. While there is no requirement that desegregation plans improve the quality of education services, the proposed plans should improve the quality of instruction at the middle and high school levels through increased course offerings and greater articulation among teachers. Middle and high school course options are presently limited in certain schools because there is only one class of each grade due to low enrollment. For example, only one of the four high schools offers business math, only two offer calculus, only one offers biology II, and only one offers physics. Having more than one teacher at each grade level should expand course offerings and be beneficial to teacher planning and development. Consolidating schools also should enhance guidance counseling opportunities and save operating costs.

[11] See, e.g., Stout v. Jefferson County Bd. of Educ., 537 F.2d 800, 803 (5th Cir. 1976) (approving plan that left three one race elementary schools because this resulted from "geography

The District's additional criticism of Plan 5 is unfounded. The District asserts that Goodwill cannot house the 346 PreK-6 students currently attending Goodwill and Forest because Goodwill has "a capacity of less than 250 students." Opp'n at 17. The District's own capacity data, however, show that Goodwill's capacity is 350 students. See Ex. 13 to U.S. Mot. for Further Relief. The District also faults Plan 5 for "having more white students in one single race school than there are currently at Fiske Union and Goodwill together." Opp'n at 17. This statement ignores that Plan 5 eliminates two of the three single race schools and reduces the total number of students in single race schools from 797 to 346. As for the District's contention that KHS would become an 89% white "borderline 'racially identifiable'" school if Fiske were closed, id. at 17-18, this incorrectly assumes that Fiske's students must be split evenly between KHS and OGES, and once again ignores the reduced number of racially identifiable schools achieved by Plan 5.

In short, the District has not shown that it has taken all practicable steps to eliminate vestiges in student assignments. Because the District has yet to remedy the racial imbalances in its schools caused by its de jure violation, it remains under a duty to remedy those imbalances through a new assignment plan. Cf. Freeman, 503 U.S. at 494 ("Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors."). While it is true that "[r]acial balance is not to be achieved for its own sake[,] [i]t is to be pursued when racial imbalance has been caused by a constitutional

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and demography alone," the schools served only a relatively small number of students, and all students attended desegregated high schools); Carr, 377 F. Supp. at 1132 (approving plan with small number of predominantly black elementary schools because residential patterns caused imbalance, no effective desegregation alternatives existed, and every black student would attend a desegregated high school); cf. United States v. Desoto Parish Sch. Bd., 574 F.2d 804, 815 (5th Cir. 1978) (rejecting plan with all black elementary schools due to high percentage of students attending them and the students' never being exposed to a desegregated high school).

violation. " Id. (emphasis added). Here, the District has never remedied the racial imbalance in its three former all white schools because they have remained white schools for over thirty-five years. Under these circumstances, devising a new remedial plan that uses the district-wide racial composition and a plus/minus 15 percent variance as "a starting point" is entirely appropriate.[12] Swann, 402 U.S. at 25; see also Belk, 269 F.3d at 319 ("the plus/minus fifteen percent variance is clearly within accepted standards"); cf. Kelley, 492 F. Supp. at 193 (remanding with instructions to cluster middle schools to achieve at least 15% of each race in the minority in each school).

Consistent with Swann, the United States' proposed plans do not require every school to reflect the district-wide racial percentages. See 402 U.S. at 24. The plans merely require taking reasonable steps to reduce the number of students in single race and otherwise racially identifiable schools. These steps include redrawing zone lines, reconfiguring schools, and closing a school under two of the plans, all steps that have been sanctioned by many courts. See, eg., id. at 27-29 (discussing remedial altering of attendance zones); Desoto Parish, 574 F.2d at 818 ("The zones should be redesigned to discharge this affirmative duty."); United States v. Hinds County Sch. Bd., 560 F.2d 1188, 1191 (5th Cir. 1977) ("The process of desegregation . . . is often one of trial and error; if one set of zones proves ineffective, then another must be drawn and, if necessary, another, or some yet different approach be tried."). The United States' motion asks only that the District implement one of these five plans or an alternative plan that effectively desegregates grades 6-12 and reduces the number of single race and otherwise racially identifiable schools.

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[12] The District objects to the use of a ± 15 percent deviation for determining which schools are racially identifiable and argues that EHS and PES are racially balanced schools. See Opp'n at 18-19. All five schools deviate by 20 or more percentage points from the district-wide average, see U.S. Mem. at 4, and even were this Court to agree with the District that EHS and PES are not racially identifiable schools, desegregating the three all white schools would necessarily involve changes to the racial composition of EHS and PES where most of the black students are assigned.

IV. The District's Conduct Regarding Student Transfers, Facilities, and Extracurricular Activities Is Relevant Evidence of Its Failure to Eradicate Vestiges

In assessing whether the District has acted in good faith and taken all practicable steps to eliminate the vestiges of its dual system, it is appropriate to consider the District's past non-compliance with its orders. The United States raised the District's past segregative transfer practices because they not only contributed to the District's maintenance of single race and otherwise racially identifiable schools, but also violated the orders in this case. The United States would not have negotiated the 1991 and 2003 Consent Orders were it not for these violations. See Opp'n at 20 (wrongly assuming that the United States did not think the discriminatory transfers violated the District's orders). It is true that the District's history of violative transfers is not the subject of this motion and that the United States is monitoring transfers under the 2003 Order,[13] but this does not relieve the District of its duty to eradicate vestiges. See Opp'n at 22 (incorrectly arguing that this monitoring "supports maintenance of the school system as it currently exists").

The United States pointed out the eight portables added to Forest and Fiske as further evidence of the District's failure to take all practicable and good faith efforts to eliminate vestiges. The District argues that the portables were "not constructed to accommodate additional white students but were instead, [sic] constructed to provide better teaching situations for the students assigned to that school." Opp'n at 23. If, however, additional space was needed to accommodate the regular and special education needs of the students at Forest, the District could have furthered desegregation by reassigning some number of grade K-8 students from Forest to nearby PES or the OGES/OGHS facility, which had capacity. Likewise, if the District needed more classroom space

[13] Although the 2003 Order is not the subject of this motion, the United States has voiced many concerns about the District's implementation of the 2003 Order as demonstrated by Exhibits G and H and intends to continue working with the District to achieve compliance therewith.

at Fiske, it could have reassigned seventh and/or eighth grade students to a desegregated environment at OGHS, thereby freeing up one or two classrooms at Fiske. To save operating costs and to avoid having to pay for a portable, the District also could have closed Fiske. In lieu of taking steps to reduce the number of students in single race schools, as the District was legally required to do, it added eight portables to maintain, if not increase, enrollments at these schools.

These decisions, like the use of race-based homecoming practices, bear on whether the District has been complying with its obligation to eliminate the vestiges of its dual system in good faith. That the District continued to use race-based homecoming elections until the 2003-04 school year at one of the schools that is at issue in this motion shows the lengths to which the District was willing to go to maintain a segregated system in a roughly 50-50 school. The District's suggestion that it was unaware of this practice is untenable given how public homecoming events are, and its suggestion that this practice existed for only two years noticeably lacks support. See Opp'n at 26.

For the foregoing reasons, the United States respectfully requests that its motion be granted.

Respectfully submitted,

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This the 11th day of January 2006.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2006, I served a copy of the United States' Reply in Support of Its Motion for Further Relief by Federal Express to counsel of record at this address:

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