IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

THE THOMAS COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, SHERNIKA HOLTON, GLADYS SHOTWELL, SPENCER WILSON, SANDRA MCINTYRE, MARY HILL, WILLIE MAE LEWIS, JENNIFER HIGHTOWER, EVELYN WILKERSON, SHARON BOSTICK, AUDREY LINDER, and LISA WEBB, Plaintiffs, v. CITY OF THOMASVILLE SCHOOL DISTRICT, Defendant.	)	Civil Action No. 6:98-CV63 Class Action

PLAINTIFFS' POST-TRIAL BRIEF

1. The District Completely Failed to Address The Current Racial Segregation and Inequality Throughout the System.

The District has conceded that it operated a *de jure* segregated system at least until 1965. (Defendant's Proposed Findings of Fact ["DF"] A.1, C.1; see also Plaintiffs' Proposed Findings of Fact ["PF"] 1-2). School authorities operating dual systems at the time of Brown v. Bd. of Education, 347 U.S. 483, 495 (1954), and thereafter are charged with the affirmative duty of eliminating the dual system and remedying the effects of unconstitutional practices. See Missouri v. Jenkins, 515 U.S. 70, 87 (1995). This affirmative duty continues until all vestiges and effects of the dual system are completely disestablished. "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 459 (1979) citing Dayton Bd. of Ed. v. Brinkman (Dayton I), 433 U.S. 406, 413-14 (1977)..

Given a district's continuing duty to remedy the constitutional infirmities caused by dual school systems, courts presume that racial imbalances within the schools are evidence of a continuing equal protection violation and the district's failure to comply with the constitutional mandates of Brown and its progeny. See Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526, 537, 541 (1979); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971). As stated by the Eleventh Circuit, in a school system that operated *de jure* segregated schools and which no court has declared unitary, "there is a presumption that all racial imbalances in a school system are the result of the de jure segregation." Manning v. School Bd., 244 F.3d 927, 942 (11th Cir. 2001) (citing Keyes, 413 U.S. at 208). See also Lockett v. Bd. of Educ., 111 F.3d 839, 843 (11th Cir. 1997) (Lockett II). The presumption applies to current racial disparities in the school system. NAACP v. Duval Cty. Sch., 273 F.3d 960, 966 (11th Cir. 2001) (applying the presumption against "any current racial disparities").

This Court held this presumption applicable in this case and that it applied to current disparities notwithstanding the passage of time since Brown. (January 21, 2003, Order at 3, 4). It further held that the presumption applied beyond the Green factors and that the District "should be prepared to bear the burden of showing that . . . racial imbalances that do not fit neatly into one of these six areas . . . are the result of something other than intentional discrimination and are not traceable, in a proximate way, to the previous *de jure* segregated system." (Id. at 4-5, n.3).[1]

In order to carry this burden, the District must have proved at trial that it "eliminated the

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1 The District quotes Jenkins v. Missouri, 122 F.3d 588, 594 (8th Cir. 1997), arguing that the presumption applies only to those factors identified at the liability stage. But this case is currently at the liability stage. Moreover, the court's obligation here is to look "to every facet of school operations," Dowell, 498 U.S. at 250 (citing Green, 391 U.S. at 435), and to "inquire whether other elements ought to be identified, and . . . determine whether minority students [are] being disadvantaged in ways that [require] the formulation of new and further remedies to ensure full compliance with the court's decree." Freeman, 503 U.S. at 492.

vestiges of past discrimination to the extent practicable" and "in good faith fully and satisfactorily complied with, and [has] shown a commitment to . . . desegregation." Lockett v. Bd. of Educ., 111 F.3d 839, 842 (11th Cir. 1997). The District was required to demonstrate that it has fully discharged its affirmative duty in taking "every reasonable effort . . . to eradicate segregation and it insidious residue." NAACP, Jacksonville Branch v. Duval Co. School, 273 F.3d 960, 973 (11th Cir. 2001) (quoting Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 227-28 (5th Cir. 1983)); Green, 391 U.S. at 437-38.

The District utterly failed to carry any part of this burden with respect to current racial segregation and inequality in the system. Plaintiffs presented unrebutted evidence of significant current racial segregation and disparities in nearly every facet of the District's operation, including student assignment to elementary schools, special education, the gifted program, instructional levels and classrooms, transportation, faculty and staff, facilities, activities, and discipline. The charts attached to this brief illustrate only some of the many unrebutted disparities that existed at the time Plaintiffs filed this case.

The District, however, simply ignored these and other current disparities and failed to provide any evidence that it is acting or has acted to eliminate this racial inequality. In regard to current student assignment to elementary schools, the District presented no evidence that it has taken any steps to eliminate the current racial segregation in its schools. Rather, the District continues to use a freedom of choice plan instead of taking race conscious remedies to desegregate. Indeed, when it had the opportunity to take such action after closing Douglass Elementary, the District instead deliberately reassigned all the students from one all-African American school to another. The evidence shows not only that the District has failed in its affirmative duty to eliminate continuing segregation in its schools, but that it has perpetuated and reestablished segregation and failed to demonstrate a good faith commitment to its duties.

In regard to current faculty and staff assignments, the District similarly presented no evidence that it has taken any steps to eliminate racially segregated faculty and administrator assignments, and the corresponding racial identification of the elementary schools. Indeed, the District failed even to offer an explanation or justification for these indicia of dual schools.

With respect to transportation, the District admits that the only transportation it offers is segregated: "All of the students transported are black." DF C., 7., e., iv. As well, the District openly admits that this transportation was implemented only to facilitate the mandatory reassignment of the students of one All-African American school to another. Thus, the evidence again demonstrates that the District has failed to eliminate segregation in transportation and, instead, operates transportation to facilitate segregated student assignment to its schools.

With regard to current racial disparities in extracurricular activities, discipline and student assignment to classrooms and instructional programs--including special education and gifted--, the District offered no evidence to meet its burden of demonstrating that it has "eliminated the vestiges of past discrimination to the extent practicable" and "in good faith fully and satisfactorily complied with, and shown a commitment to, . . . desegregation." Lockett v. Bd. of Educ., 111 F.3d 839, 842 (11th Cir. 1997).

Given the District's failure to offer evidence in response to the pervasive segregation and inequality within the District today, on this record, a finding that the District has failed to fulfill its affirmative constitutional duty to disestablish dual schooling is mandated. The law is clear that "a school board must prove that the imbalances are not the result of present or past discrimination on its part." Manning, 244 F.3d at 942 (quoting Lockett II, 11 F.3d at 843) (emphasis added).

The record is clear that the District has not acted to eliminate current racial disparities in the system, and that the District simply abdicated any attempt to carry its required burden of

proof regarding current racial segregation and inequality in its schools. Rather, the only evidence that the District presented with respect to its efforts to eliminate the vestiges of its *de jure* system related to student and faculty assignment to schools under compulsion of the Office for Civil Rights ("OCR") in the 1970's. There, too, the District failed even to proffer evidence as to all of the factors necessary to establish that it satisfied its affirmative duty to disestablish dual schooling. Instead, the District's evidence addressed only two of the numerous factors that must be addressed, and to which the presumption applies. Even with regard to those two factors, the evidence demonstrated that the racial identifiability of schools was perpetuated and that segregation and inequality continued and was reestablished as a result of the District's persistent refusal to take effective steps to desegregate its system.

II. The District Failed To Eliminate Its Dual School System In The 1970s.

The District argues that it achieved unitary status in the 1970s and, therefore, that it is not answerable to this Court or the Plaintiffs for the racial segregation that continues to pervade the system today. This argument is both misguided as a matter of law and contrary to the factual record. First, the Court's Order applying the presumption to current racial disparities clearly reflects controlling precedent and is the law of the case, and the District has presented no basis for its reconsideration. Second, the District failed even to present this Court with evidence sufficient to establish the requisites of unitary status at that point in time.

A. <u>The District Failed To Proffer Evidence That It Satisfied All Requisites Of Unitary Status In The 1970s.</u>

The District presented evidence only with respect to student and faculty assignments in the 1970s. (PF 88; David Armor, Tr. At 106-07, Vol. X). However, even as to student assignment, the District only presented evidence as to a portion of that factor: student assignment to elementary school <u>buildings.</u> (David Armor, Tr. At 104-06, Vol X). It failed altogether to address student assignment to classrooms and educational programs <u>within</u> any of the elementary

or secondary schools. Id. The District likewise failed completely to address any Green or other factor of the system that requires examination to meet its burden of establishing unitary status.

Since at least Green, independent of student and faculty assignment, "existing policy and practice with regard to … staff, transportation, extracurricular activities, and facilities [are] among the most important indicia of a segregated system." Swann, 402 U.S. at 18, citing Green, 391 U.S., at 435. Moreover, the Supreme Court "ha[s] long recognized that the *Green* factors may be . . . intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the … remedy addresses other matters as well. Freeman, 503 U.S. at 497 – 498, citing Vaughns v. Bd. of Educ., 742 F. Supp. 1275, 1291 (Md. 1990) ("changes with respect to one component may impinge upon the success or failure of another").

Thus, the District not only failed to present evidence with respect to each of these factors, but failed to demonstrate that its practices in some areas did not serve to perpetuate the dual system in other areas. This can be illustrated by reference to two of the factors that the District failed to address – facilities and transportation. The District's contention that its elementary schools were not racially identifiable in the 1970s is based solely upon the percentage deviations in student enrollment or faculty assignment. But a showing of unitary status would have required that the District prove more than that the racial variations among the schools were within a wide band of tolerance. Rather, the District was required to prove that the racial disparities in the schools were not influenced by, or the product of, other policies or practices. For example, the District presented no evidence that the disproportionately African American Harper and Balfour schools were not also racially identifiable by reason of "the quality of school buildings and equipment." Swann, 402 U.S. at 18. Thus, the failure of proof blinds the Court with respect to important factors then operating in the District that must be considered in assessing actions the District did or did not take.

Similarly, the District presented no evidence regarding transportation in the 1970s, and suggests that not providing transportation to any students rendered it unitary in that respect. However, the District was required to prove more with respect to transportation to establish that it had taken all necessary steps to effectively eliminate the dual system at that time. Indeed, contemporaneous Supreme Court decisions rejected as inadequate "choice" plans, similar to the District's, that failed to provide for transportation. In Raney v. Bd. Of Educ., 391 U.S. 443, 444, 449 (1968), the Court rejected a freedom of choice plan that had no system wide transportation, but rather left the provision of transportation, if any, up to individual schools. Similarly, in Monroe v. Bd. Of Commissioners, 391 U.S. 450, 454, 459 (1968), the Court rejected a "free transfer" plan that failed to provide transportation. See also Davis v. Bd. Of Sch. Commissioners, 402 U.S. 33, 38 (1971) (plan rejected for "inadequate consideration . . . to the possible use of bus transportation"). Thus, the District's failure to provide evidence that transportation was not feasible or would not be effective, denies this Court the ability "to weigh th[e] claim [that it took all reasonable desegregative steps] in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness…. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith[] and . . . places a heavy burden upon the board to explain its preference for an apparently less effective method." Green, 391 U.S. at 439.

Thus, the District's failure to present evidence that it had achieved unitary status with respect to each and all of the Green factors has two consequences. First, that failure precludes, as a matter of law, any holding that the District proved that it attained unitary status during the 1970s. Second, the failure to offer proof as to all of the factors undermines the District's contention that it took all necessary actions with respect to the two factors on which it proffered some evidence.

Moreover, even in the areas of student and faculty building assignment, the record establishes that the District failed to take effective action to establish and maintain stable, non-racially identifiable schools over time sufficient to erase the dual system and its continuing effects, and that the District failed in its "affirmative responsibility to see that" existing and future "pupil assignment policies and [other] practices 'are not used and do not serve to perpetuate or re-establish the dual school system,'" Dayton II, 443 U.S. at 538, quoting Columbus, 443 U.S. at 460. Further, the record contains uncontested evidence of racial segregation and inequality in student assignment to classrooms and in discipline throughout the schools during that period and to the present.

B. The District's 1970 Desegregation Plan Did Not Eliminate Racial Segregation With Respect To Student Or Faculty Assignment.

The uncontradicted evidence demonstrated that the District consistently resisted OCR's efforts to force it to desegregate its school system, responded only when faced with imminent action by OCR to enforce federal law by terminating federal funding to the District and then only by proposing one after another ineffective plan that was rejected by OCR. (PF 3-21). Consequently, OCR took began enforcement action against the District in 1968 and again in 1975. (PF 10, 11, 49). In both instances, the enforcement actions were preceded by OCR findings that the District's freedom of choice plan was ineffective in eliminating the dual system and that it had "not corrected the effects of past discriminatory policies and practices in regard to teachers and other professional staff." (PF 8, 9, 12, 48). After 1975, the District increased the racial identification of the elementary schools with the result that segregated schools were reestablished.

1. The District Failed To Disestablish Its Segregated System Between 1965 And 1975.

The District contends that it desegregated its student and faculty building assignments in

the 1970s through implementation of a desegregation plan submitted to OCR in 1970. (DF C 7 (a)(i), b(i)). The evidence demonstrates that the District's assertion is wrong. First, the District submitted the plan only in response to OCR's 1968 enforcement proceedings and withholding of federal funds, not out of a good faith commitment to desegregation. (PF 11, 13, 15-18).

Second, in the plan as originally submitted and approved, the District pledged to abandon its freedom of choice plan, which OCR criticized as ineffective and rejected on three previous occassions, and use a new elementary school assignment plan to produce desegregated enrollments within a 5% variance within all of the elementary schools. However, the District later withdrew its commitment to make desegregated assignments and reinstated its freedom of choice plan. (PF 20, 22). That plan was approved only with OCR's insistence, and the District's explicit commitment that, if freedom of choice did not eliminate the racial identifiability of the elementary schools, "*alternate steps will be taken,*" and that faculty assignments "*will reflect the racial ratio of the faculty in the system as a whole*." (PF 22, 23, 24, 25).

Third, the freedom of choice plan was not effective in desegregating the elementary schools. Harper, although established as a *de jure* white school, had become majority African American (at 54%) even before the 1970 desegregation plan. At the same time, the other *de jure* white schools, Jerger, Scott and Balfour, were only 11%, 21% and 16% African American, respectively, while the *de jure* African American Dunlap and Douglass schools remained 100% African American. Under the 1970 plan, the *de jure* African American elementary schools were no longer used for grades K-4: Douglass was converted to a middle school; and Dunlap to a school serving all sixth grade students. As the only remaining identifiably African American grade K-4 school, in the first three years of the 1970 plan, Harper's African American enrollment increased by approximately 10% each year, from 53.5% to 63.2% in 1970-71, to 72.1% in 1971-72, to 82.5% in 1972-73. (PF 59 and table).

Whjle Harper became the school with the highest African American enrollment under the District's plan, increasing by nearly 30% from 1969-70 to 1972-73, the District average increased by only 10% during that same period. Moreover, Harper's increase in African American enrollment was from two to four times the maximum increase in the formerly majority white elementary schools and, in Jerger and Balfour, the African American enrollment actually decreased in 1972-73. Finally, during those years, Harper's African American enrollment exceeded the District elementary average by from 7.3% to 20.7%, while the formerly majority white schools deviated by only 5% or less, except for one school in one year. Thus, both in its enrollment and in comparing its enrollment to the other K-4 schools, the Harper school remained identifiably African American. By 1972-73, Harper exceeded the District elementary average by more than either 15% or 20%, while the formerly majority white schools deviated by only from 0.7% to 5%.[2]

The disparity in enrollment of African American students at Harper continued in the 1973-74 and 1974-75. In those years, African American enrollment at Harper was at 83.2% and 85.6%, while the formerly majority white schools lagged approximately 20% below Harper. By 1974-75, Harper deviated from the District elementary average African American enrollment by 22.6%, whereas the other elementary schools deviated by only between 3.1% and 7.7%. That

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[2] In Swann, the Supreme Court held that "the use . . . of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." 402 U.S. at 25. As its starting point in considering whether the District disestablished its segregated system in elementary school student assignments, this Court should use a 15% standard. (PF 60, 62-65). The District erroneously cites Manning v. School Bd. of Hillsborough County, Fla., 244 F.3d 927, 935 n.15 (11th Cir. 2001), where 20% was used only due to the parties' stipulation, rather than by a decision of the court that it was a proper standard. It also cites a May 13, 1975 letter from OCR (DF, C.7.a.(xiii)), but that involved an order in a case not involving the District, and neither that court nor OCR took the position a 20% standard applied to proceedings to determine whether any district was unitary. As for faculty assignments, this Court should use the 10% standard commonly used since Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1970), see, e.g., U.S. v. Board if Public Instruction of St. Lucie County, 977 F. Supp. 1202, 1215 (S.D. Fla. 1997), and that the District itself proposed in its January 2, 1970 desegregation plan. (PF 60, 66).

year, in a July 15, 1975, OCR pointed to the dramatic racial disparity between Harper and the District as a whole, referred to the proviso to the 1970 plan that "[i]f the freedom of choice' plan does not eliminate the racial identifiability of each of the four elementary schools, alternative steps will be taken ….," and advised the District that: "It is clear that the 'freedom of choice' plan for the four elementary schools is not achieving the goal of the desegregation plan and it will accordingly be necessary that your district devise an alternate plan which will give reasonable assurance of precluding racially identifiable schools." (PF 48). In the absence of responsive action by the District, OCR again recommended administrative action against the District because of the racial disproportion at Harper Elementary School. (PF 49).

Thus, the District was forced to submit a revised plan that included elementary school student assignment, but in that plan, the District still refused to abandon "freedom of choice," and pledged only to make certain elementary school assignments where necessary to prevent racial identifiability in those schools. (Pl. Ex. 350). OCR responded to this plan in a November 17, 1975 letter. In its Proposed Findings of Fact, the District quotes only the portion of the letter that says OCR found the District "in compliance with Title VI of the Civil Rights Act of 1964 relative to assignment of students and faculty to schools." (DF C.7.a.(xv), C.7.c.(vi)). The District ignores the proviso to OCR's approval of the plan, requiring that "the situation at Harper warrants monitoring by school officials. Should the current student assignment methods fail to stabilize the racial composition at Harper, additional desegregatory actions may be required of your district." (PF 50).

Further, the District failed to desegregate its faculty in the 1970s. As the former Fifth Circuit stated in Singleton v. Jackson Municipal Separate School District, 429 F.2d 1211 (5th Cir. 1970), "principals, teachers, teacher-aides and other staff who work directly with children at school shall be so assigned that in no case will the racial composition of a staff indicate that a

school is intended for Negro students or white students." 429 F.2d at 1217-18. The District was out of compliance with Singleton from the first day its 1970 desegregation plan was in effect and was notified of as much by OCR. (PF 72). Noting that 45% of the District's elementary school teachers were African American, OCR noted the "substantial deviation" from that ratio both at Jerger (at 31%) and at Dunlap (at 53%). (Pl. Ex. 294).

Despite this warning, the District remained out of compliance with respect to faculty assignments. During the 1973-74 school year, with a District average of 46.5% African American, the faculties at Jerger (33.3%) and Scott (35.5%) each fell outside the 10% percent standard variance and were identifiably white. (PF 73). Faculty assignment to Harper also failed the Singleton test. Harper fell outside the applicable 10% standard in both the 1972-73 and the 1974-75 school years, prompting OCR to find that: "the racial identifiability of Harper Elementary is further enhanced by the disproportionate assignment of African American teachers to the school. Indeed, the percentage of African American teachers at the school has steadily increased "from 36 percent in 1971 to 53 percent in 1974. It will be necessary that your district provide assurances that teachers will be assigned to schools in keeping with the ruling of the Federal court in Singleton v. Jackson, which provides that the racial ratio of the teachers at each school will be substantially that of the district as a whole." (PF 48).

Thus, the record clearly demonstrates that from 1965 to 1975 the District did not desegregate its elementary schools. OCR found that the District's actions were inadequate to eliminate the dual system in both 1968 and again in 1975, and consistently informed the District that its freedom of choice plan was ineffective in accomplishing that goal, including in 1975. Notwithstanding its ineffectiveness, the District refused to abandon freedom of choice and, although pledging that "*alternate steps will be taken*," the District failed ever to do so. The only K-4 school that was a majority African American school prior to the 1970 plan, Harper, became

the K-4 school with the highest African American enrollment, 85.6% in 1974-75, and deviated from the District elementary average by more than 15% from 1972-73 to 1974-75, and by more than 20% in 1972-73 and 1974-75, while the other K-4 schools generally deviated by less than 5%. (PF 54-59). In addition to maintaining a racial identifiability African American enrollment between 1972-73 and 1974-75, Harper was the only school ever to have a majority African American faculty, between 53.3% and 55%, during those same years. (PF 59-60). The District also failed to make faculty assignments in accordance with governing standards in 1970-71, 1972-73, 1973-74, and 1974-75. Finally, the District consistently refused to adopt any desegregation measures and ignored OCR directives that it do so, taking action only uponl OCR's termination of federal funding or initiation of enforcement actions, including in 1975. Accordingly, the District neither effectively desegregated its elementary schools, nor exhibited a good faith commitment to its obligation to eliminate the *de jure* system and its effects from 1965 to 1975, the period of OCR enforcement.

2. The District Increased The Racial Identification Of Its Schools And Reestablished Segregated Schools After 1975.

After OCR's enforcement efforts ceased, racial identifiablity in the District's schools increased and segregated schools were reestablished. Although OCR approved the District's revised plan, which pledged to make certain desegregative assignments, in 1975, that approval was conditioned upon "monitoring by school officials" of "the situation at Harper" and the prospect of "additional desegregatory actions" by the District "[s]hould the current student assignment methods fail to stabilize the racial composition at Harper." (PF 50). The District proffered no evidence that it made any desegregative assignments pursuant to the revised 1975 plan at that or any subsequent time. The evidence does show that the racial identifiability of Harper increased, patterns of racial identifibility were created among all the K-4 schools, and those patterns led to the reestablishment of segregated elementary schools.

As Dr. Armor conceded during trial, the racial composition at Harper failed to stabilize. The percentage of African Americans enrolled at Harper increased: 83.6% in 1976-77; 89.9% in 1978-79; and 96.9% in 1982-83 and was never below 99% after 1994. (PF 54). Harper failed to meet either the 15% or 20% standard for every year after 1975 for which data exists. (PF 68).

Further, shortly after OCR sought enforcement against the District in 1975, the District's elementary school assignments reflected a pattern of two identifiably African American schools and two identifiably White schools. This pattern of racially identifiable school assignments reestablished segregated schools, which have continued. In 1976-77, the African American enrollment of Harper and Balfour were 83.6% and 70.2%, respectively, while that of Jerger and Scott were only 58.9% and 47.5%, respectively. In 1978-79, the African American enrollments of Harper and Balfour were 89.9% and 71.7%, and of Jerger and Scott were only 50.2% and 57.3%. By 1982-83, the African American enrollments of Harper and Balfour increased to 96.9% and 84.4% while Jerger and Scott remained in the 50% range. In 1993-94, the year Douglass replaced Balfour as an elementary school, Harper and Douglass were both 100% African American, while Jerger dropped to 33.6% and Scott was at 63.0%. This pattern continued to exist when this action was filed: in the 1998-99 school year, Harper and Douglass were 100% African American; Jerger was a majority White school (at 38.9%), and Scott generally reflected the District average (at 83.1%) (PF 54-59).

The District imposed a similar pattern of racial identifiability through faculty assignments. Although data on faculty assignments also is often incomplete, by 1988-89, the District again assigned a majority African American faculty to Harper, at 53.3%, while faculty assignments to Jerger and Scott were less that one-half that, at 27.3% and 23.1%. Between 1990-91 and 1994-95, the faculty of Harper ranged between 52.3% and 63.2% African American, while the faculty at Jerger fell drastically from 27.3% to a mere 7.1%, and Scott

remained between 23.1% and17.9%. Indeed, by 1994-95, Douglass and Harper had not only 100% African American enrollments, but majority African American faculties, at 53.6% and 55.6%, respectively. (PF59-60).

3. The District's Actions And Failure To Act Are Responsible For The Racial Identification Of The Schools, And The District Cannot Claim That They Are Attributable To Demographics.

Thus, the record evidence clearly demonstrates that the District failed to desegregate its elementary school student and faculty assignments both before and after 1975, and after 1975, reestablished segregated elementary schools through both student and faculty assignment. The District responds makes two arguments regarding demographics, each of which is without merit.

First, the District attempts to make much of OCR's statement in the November 17, 1975, letter, and Dr. Gordon's statement at trial, that the District was in compliance with Title VI in the month of November 1975. (See, e.g., DF C.7.a.(xvi), C.7.c.(vii)). Neither statement establishes that the District was unitary on that date. As an initial matter, only a court has the authority to determine unitary status. See Board of Education of Oklahoma City v. Dowell, 498 U.S. 237 (1991). Moreover, compliance with Title VI at a particular point in time does not constitute unitary status. For a district to achieve unitary status, it must sustain a fully integrated status for a sufficiently lengthy period, covering "several years." See Georgia State Conference of Branches of NAACP, 775 F.2d at 1413 n.12. As the Eleventh Circuit has noted, a previously segregated school system does not achieve unitary status "simply by implementing a desegregation plan . . . . Rather, the district court must retain jurisdiction for a period of time after the school has implemented a desegregation plan to ensure proper implementation of the plan, to guard against the possibility of recurring constitutional violations, and to ensure the achievement of the ultimate goal--a unitary public school system in which the state does not discriminate between children on the basis of race." Lee v. Etowah County, 963 F.2d 1416, 1422

(11th Cir. 1992). Thus, a district court may only make a finding of unitary status where a district has implemented a plan to fully eliminate all vestiges of segregation and "after a period of time sufficient to achieve these objectives has elapsed." Id.[3] The record establishes that the District failed effectively desegregate its schools for any significant period of time, and certainly not for any period sufficient to eliminate the *de jure* system and its effects. Rather, the District resisted refused to take effective action, perpetuated the racial identification of schools, and reestablished segregated schools.

Second, the District claims, through Dr. Armor, that an increase in the number of African Americans living near Harper, combined with decreasing white enrollment in the schools, resulted in Harper becoming almost entirely black. (DF C.7.a.(ix-xi)). These arguments are contradicted by the evidence and by the law regarding the District's affirmative constitutional duty to disestablish the *de jure* system. Dr. Armor's demographic argument, focusing on the southwestern sector of the city, claims that, in 1970, Harper was surrounded by predominantly white communities, but that by 1980, that area had become almost entirely black. (DF C.7.a.(x)). This assertion is flawed. First, Dr. Armor improperly compared blocks from the 1970 and 1980 census that had different geographic boundaries, leading to erroneous testimony that the area around Harper increased from only 38% African American in 1970 to 82% African American in 1980. A comparison of similar geographic areas from both censuses shows only a minor increase in the African American population during those years. (PF 83). Dr. Armor's demographic analysis is also flawed because he has no way of knowing when even this minor increase occurred. His data do not reveal the status of the African American population

[3] Both expert witnesses agreed that for a desegregation plan to result in unitary status, it needed to eliminate the racial identifiability of schools for a substantial period of time: Dr. Gordon stated five to seven years; and, Dr. Armor, five years. (PF 79).

surrounding Harper in the time period of the early to mid-1970s. (PF 84). Nor did Dr. Armor account for the fact that student enrollments were not determined by the geographic location of their residence under freedom of choice, or identify where students then attending Harper lived so as to establish any causal connection between the composition of the area he examined and Harper enrollment.

Dr. Armor also argued that the increased African American student population at Harper in the 1970s was a result of "white flight." This contention too is fatally flawed. The District implies that "white flight" gripped all District schools following implementation of the 1970 plan. Yet that explanation does not fit the facts. Between 1970 and 1974, the percentage of African American students increased by only 0.4 percent at Scott, by just 6.7 percent at Jerger, and by just 8.9 percent for the District as a whole. At Harper, in contrast, during this same time period, the percentage of African American students increased by 22.4 percent. (PF 86).

More importantly, all of Dr. Armor's assertions are meritless because the District had the affirmative responsibility to take all reasonable steps to eliminate racial segregation and identifiability from the schools and failed to do so. Specifically, the District refused ever to abandon freedom of choice, including in the face of OCR's constant findings that it was ineffective. Indeed, the District committed in 1970 to take "*alternate steps*" where necessary to avoid racial identifiablity in the schools, but refused ever to do so. Moreover, its 1975 revised plan pledged to OCR that certain school assignments would be made to address the situation at Harper, and approval of that plan was conditioned on "further desegregatory action," if Harper did not stabilize. Yet Dr. Armor and the District presented no evidence that such actions were ever taken. It is clear, however, that during this same period the District marked Harper as an African American school by disproportionately enrolling African American students and assigning to it the only majority African American faculty. The District cannot be heard to argue

that other factors caused racial identification of the schools, where its own actions served to accomplish that result.

At all times, the District controlled the racial enrollment of the schools and the racial character of their faculties. The racial identity of the schools was thus a function of the District's decision-making, and both the actions it took and refused to take. Neither changing demographics nor white flight can excuse the District for its failure to take effective action to eliminate the racial identity of the schools. (PF 86). It is only "once the racial imbalance due to the *de jure* violation has been remedied [that] the school district is under no duty to remedy imbalance that is caused by" external factors beyond the District's control. Freeman v. Pitts, 503 U.S. 467, 494 (1992) (citing Swann, 402 U.S. at 31-32). Thus, in order for the District's demographic arguments even to be considered the District would have to have proved that it had acted effectively to eliminate any racial identification of the schools and, with respect to subsequently-occurring racial disparities, "show[n] that some external force, which is not the result of segregation and is beyond the school board's control, substantially caused the racial imbalances." Manning, 244 F.3d at 944 (citing Lockett II, 111 F.3d at 843). The evidence establishes the contrary: the District's own actions and failures to act perpetuated the racial identity of the schools and, therefore, there was no effective desegregation to be overcome by an external force beyond the control of the District.

C. The District's 1970 Desegregation Plan Did Not Eliminate Racial Segregation In Other Respects.

In addition to failing to establish and maintain effective desegregated student and faculty elementary school assignments for any length of time, the record also demonstrates that unremedied discriminatory and segregative practices were evident in student discipline and classroom segregation in the 1970s. However, the District failed to present any evidence that it eliminated segregation and inequality in the areas of discipline and student instructional

assignments, both of which were explicitly cited by OCR during that period. (PF 87). This, as well, is an independently sufficient reason to apply the presumption to current racial disparities.

In a June 7, 1972 letter, OCR informed the District that it was concerned about the unequal application of discipline within the District and requested that the District respond with plans to prevent the recurrence of possible discriminatory treatment of African American students. No record has been found that the District ever responded to the matters raised in this letter, and the District proffered no evidence that this discrimination did not exist or was remedied. (PF 46-47).

As for classroom segregation, the District and its expert, Dr. Armor, state in conclusory fashion that "[s]tudents in grades five through twelve were desegregated by the [1970 plan] because the School District used only one school to serve each of these grades." (DF C.7.a.(ii)). Dr. Armor, however, performed no analysis to determine whether, within those schools, the District was segregating children by classroom. (PF 44). In fact, that was what was happening.

It has been long understood that "[s]chool officials may not perpetuate a dual educational system by maintaining segregated classes within a single building." Boykins v. Fairfield Bd. of Ed., 457 F.2d 1091, 1096 (5th Cir. 1972) citing Johnson v. Jackson Parish, 423 F.2d 1055 (5th Cir. 1970). "[N]or may a school district use differential course offerings for certain groups of students to segregate students." Boykins, 457 F.2d at 1096 citing George v. O'Kelly, 448 F.2d 148 (5th Cir. 1971). See also Clark v. Board of Ed. of Little Rock Sch. Dist., 465 F.2d 1044, 1047 (8th Cir. 1972). In fact, the former Fifth Circuit has gone so far as to state that a constitutional violation, "of course, is not to be ameliorated by such practices as segregation by race in the classroom." Acree v. County Bd. of Ed. of Richmond County, Georgia, 458 F.2d 486, 488 n.3 (5th Cir. 1970) cert. denied 409 U.S. 1006 (1972). This Court therefore must consider segregation by classroom in determining whether the District ever achieved unitary

status. See Manning v. School Bd. of Hillsborough County, 244 F.3d 927, 942 (2001) ("The defendant school board has the burden of showing that any racial imbalance in the school system is not traceable, in a proximate way, to the prior de jure system.") (emphasis added). As stated by the Eleventh Circuit in Manning, "[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 system." Id. (citing Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 208 (1973)).

The evidence establishes, without contradiction, that the District engaged in extensive segregation by classrooms throughout the 1970s. OCR first cited this unlawful behavior in a December 2, 1970, letter to the District, criticizing the racial isolation that existed in classes in the Thomasville Middle and Jerger Elementary Schools. (PF 29). Ignoring the OCR, the District continued segregating students by classrooms in later years. This occurred at all levels – from the elementary schools through the High School. For example, in the 1971-72 school year, one-race African American classrooms existed at Jerger and the high school, and classrooms that were racially identifiable as White and African American in the middle school and high school. Indeed, in the high school, the racial composition of only five of 50 classes came within 10% of the District's overall racial composition, and only 17 of the classes came within 20%, and 12 classes were from 80 percent to 90 percent African American. (PF 31). Likewise, in the 1972-73 school year, there were one-race African American classrooms in Jerger and Dunlap (PF 30, 33), racially identifiable African American classrooms in Balfour (PF 30), racially identifiable White and African American classrooms in the middle school (PF 32), and high school classes reflecting the same disparities as the year before. (PF 31).

The uncontradicted testimony of witnesses who attended and taught in the District's schools at the time also established that instruction was provided on a segregated basis, and that African Americans were provided unequal and inferior instruction. For example, Ms. Linder

testified that in the 1970's some higher level courses were predominately White and that African American students were discouraged from taking higher level courses. Similarly, Ms. Brown testified that segregated academic and non-academic levels of instruction characterized the high school and that African American students were not made aware of the need for college preparatory courses or college entrance requirements. (PF 34)

Ms. Jones observed that during the 1969-70 academic year, the District segregated African American students into separate and academically inferior classes at Scott without notice to parents and without regard to their ability. (PF 35-38). In addition, Mrs. Jones testified that when she taught in both the Dunlap School, from 1970 to 1976, and the MacIntyre Park Middle School, from 1976 to 1999, students were placed into both completely segregated and racially identifiable and unequal levels of classes. (PF 40).

As noted at the outset of Section II of this brief, the District failed even to proffer evidence either contradicting this evidence or demonstrating that the District ended these segregative practices and remedied their effects. Accordingly, in this respect, as well, the District failed to carry its burden of proof that it attained unitary status in the 1970s. Finally, this evidence also demonstrates that the segregated and unequal instruction in the District today is a vestige of the District's dual system and efforts to avoid its disestablishment.

III. The Largely Uncontradicted Record Evidence Establishes That Current Racial Segregation and Inequality Are the Result of Past and Continuing Discrimination.

The record evidence produced at trial, most of it from the District's own documents and administrators and, with few exceptions, uncontradicted, establishes that current segregation and inequality is, first, a result of the District's failure to take all practicable steps to disestablish the vestiges of discrimination in its schools, second, a continuation of its *de jure* system and its effects and of the means used to avoid desegregation, third, is not the result of factors beyond the control or reach of the District, as the District has yet to exercise its control over various aspects

of the system in a way that would effectively desegregate its system, (PF 129), and, fourth, is the product of purposeful, deliberate and intentional actions of the District to accommodate the desires of its White community to have substantially separate and superior educational and school-related opportunities and experiences. A summary of the detailed evidence set forth in Plaintiffs' Proposed Findings of Fact and Conclusions of Law is set forth below.

A. **Student Assignment To Elementary Schools**

As discussed in Section I of this brief, the District does not, cannot, dispute the substantial segregation among the elementary schools. Nor does or can the District claim that it acts to eliminate the segregation and inequality among its elementary schools. The District has no policy and makes no effort to assign students to eliminate or even ameliorate its segregated and racially identifiable schools. The District has consistently refused to adopt such policies, throughout the period of OCR's enforcement efforts in the 1970s, and despite a variety of proposed remedies offered by African American parents and Board members on the 1994 Task Force.[4] Rather, the District claims to operate under a race-neutral freedom of choice plan. The evidence reveals, however, that the District assigns students in a manner that offers little, if any, choice to African American parents and students, but accommodates the assignment of most White students to a single, majority White school with an accelerated educational program, superior resources and a vastly White faculty that also has the highest educational qualifications. Any question whether the District truly operates a choice program or offers African Americans choice was put to rest with the closing of Douglass, when no choice was afforded and its entire

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[4] The District's argument that its failure to take such action can be excused by the purported consensus reached by the Task Force (CF C.7.a.(xxii-xxv)) must fail. First, the District cannot avoid its affirmative duty by delegating the issue to another body. Second, Task Force members denied that any consensus was reached and the District did not call any witnesses to contradict them. (PF 211). Third, to the extent there was a consensus, it was only to matters on which all members could agree, which precluded all of the remedial proposals offered by African American members, which were uniformly opposed by District administrators and White Task Force members. (PF 195, 199, 210, 212).

African American student population was assigned to the overcrowded African American Harper School.

The record demonstrates that the District makes student assignments to perpetuate segregation in a variety of ways. First, the District was unable to explain or demonstrate that its assignments are made in any objective or legitimate manner. The inability to do so begins with the fact that, despite the recommendation of the Task Force, the District has no written or published statement of its purported assignment policy. (PF 109, 110, 149). Thus, neither the Court nor parents can determine what the policy is or how it is to operate. (PF 106, 109, 110, 115). In addition, the District maintains no records of the manner in which it applies the various purported criteria to actual assignments, so that neither the Court nor parents can understand how or why students were assigned where they were. Indeed, even the administrator responsible for making assignments was unable to explain at trial the basis on which "space" as a criteria was disproportionately used to assign White students to the Jerger school as reflected in her own Kindergarten assignment database. (PF 104, 128). Thus, the administration of the District's assignment practices is not transparent, verifiable or measurable, except that they produce racially segregated schools.

Second, to the extent that criteria for assignments were identified, careful examination reveals that they are structured to accommodate the assignment of White students to the Jerger School. For example, "space" is a criterion for placement, yet of those students assigned to Jerger because space was available, 19 were White, but only eight were African American and indeed, 95% of the White students assigned for reasons of space were assigned to Jerger, as compared to 29.6% of the African Americans who were assigned to a school for that reason. (PF 128). Also, from 5 to 10 seats per grade in the schools are set aside for students newly enrolling in the school district, including students enrolling from the County, and the evidence shows that,

between 1997-98 and 2003-04, White County students have annually enrolled in Jerger in numbers between 76 and 47, accounting for a significant percentage of that school's student population. (PF 145-147, 148, 187, 188, 192). As well, the District admitted that before trial it had given a preference in school assignment to pre-Kindergarten students of the Balfour school, at a time when Balfour's enrollment was disproportionately White. (PF 147). Further, the District admitted that it afforded District employees an unstated preference in school assignment, and the evidence shows that that preference also disproportionately enrolls White students. (PF 148).

Further, one criterion for assignment is a student's proximity to a school, and the District has suggested, in part, that the current racial identification of the schools is attributable to this criterion. However, analysis of census data and the location of students' residences revealed that proximity was not uniformly applied and was not a factor that contributed to the racial identity of the schools, because the area more proximate to Scott had a higher White school-aged population than the area proximate to Jerger (PF 131-134) and because many White students assigned to Jerger actually lived closer to Scott (PF 136), and a dense population of African Americans reside between Jerger and White County students assigned to Jerger. (PF 137).

Third, the District admitted that it does not consistently apply and deviates from its purported assignment criteria. For example, Ms. Boykins-Everett testified that before she assumed responsibility for student assignment, she observed: 1) that the District did not use a very standard process for making those assignments; 2) that the District's policies with respect to student assignments were arbitrary, not systematic, and not fair; and 3) the District deviated from its written assignment procedures from time to time through unstated preferences and procedures that were arbitrary and unfair. (PF 138-140). Although Ms. Boykins-Everett testified that upon assuming responsibility for student assignment, she corrected these inequities, she also admitted

that she complied with directives of Superintendent Cable to assign White students to Jerger. (PF 143). And there was an admission that she was instructed by the previous Superintendent to hold slots at Jerger for County students, who are predominately White. (PF 144). The record also reflects evidence that, although the District makes exceptions to permit Whites to attend Jerger, it makes no such exceptions for African Americans (PF 219), that the District has denied African Americans students the opportunity to attend Jerger even when they live in close proximity to the school and attending another facility would be inconvenient, (PF 220), and that the preference to keep siblings together was not applied to African American students. (PF 221).

Fourth, the evidence also proves that, although the District claims to permit transfers in lieu of the annual opportunity to choose a school, African American students are denied appropriate transfer requests (PF 221), and that examination of the District's transfer database revealed that so few transfer requests were granted that there has been no choice system for African Americans. (PF 126-127). Moreover, Ms. Boykins-Everett admitted that, during the 2000-01 and 2001-02 school years, as a policy, the District declined all transfer requests other than for special education and medical needs, and the Superintendent admitted that no public announcement of this policy was ever made. (PF 150).

Finally, the evidence also demonstrates that the District has manipulated its assignment practices to ensure that its elementary schools remain segregated. For example, the District has manipulated and exceeded the capacity of Jerger in order to accommodate the enrollment of White students, by consistently assigning to it the largest student enrollments, even though it is the second smallest school in terms of the number of classrooms. (PF 155). Moreover, the District has established average class sizes at Jerger far exceeding those at the other elementary schools, even though this has led to overcrowding. (PF 157).

B. Assignment Of Students To Classrooms

The unrebutted evidence demonstrates: 1) that the District began segregating students into separate classrooms when it reassigned students to desegregate the schools during the 1970s (see Section II. C., above); 2) that the District was still using race to group students during the 1980s (PF 29-41, 355; Pl. Ex. 1263 at 43); 3) that the District continues to segregate its students by race into separate and unequal schools, classrooms, Levels, courses and course sequences, among and within in the elementary schools (PF 256-344), within the middle school(PF 345-581), and within the high school (PF 582-618, 632-673); 4) that race, rather than achievement or performance, determines the placement of the District's African American students into segregated and unequal lower-levels of instruction, while their White peers at comparable levels of achievement are placed into higher-levels and enriched academic classes (PF 429-441, 519-553); and 5) that the District's treatment of students on the basis of race, including the effects of race on prior achievement and level placement, explains the depressed academic achievement of African American students in comparison to their White peers, as opposed to the District's unsubstantiated suggestion that such differences are attributable to socio-economic status. (PF 554-581). This evidence was uncontradicted by the District and, in fact, was supported by District admissions. To the extent the District even attempted to suggest any justifications for its actions, they were unsubstantiated or contradicted by objective, empirical and other evidence. There is simply no evidence that the District has eliminated these vestiges of dual schooling in student assignment and educational opportunities and outcomes, or that the District has acted in good faith to afford desegregated and equal instruction to its African American students.

The District's own data, the analysis of Plaintiffs' expert witnesses and Defendant's admissions all demonstrate classrooms at the elementary, middle and high schools are racially segregated and that race is a factor in the District's assignment decisions. (PF 329-339, 349-353,

362, 388-454, 519-537, 643-666). The District's only attempt at an explanation for this segregation is that it groups students by "levels of performance." (DF p 20-21). That suggestion is contradicted by unrebutted evidence demonstrating, with respect to the only objective measure of individual student performance available, achievement test scores, that students are not grouped by measurable levels of achievement or performance. (PF 519-577). The District also suggests that reference to the number of assignments a student completes in elementary school serves as an indicator of performance, but the evidence establishes that the number of assignments demanded of, or completed by, students is a function of the concerted effort of teachers to accelerate predominately White classrooms, as compared to the repetitious and slowed pace of instruction afforded to predominately African American schools and classes in the elementary (PF 263-66, 284-92, 301), and middle schools (PF 378-89), and that District administrators are aware of and foster and condone these racial inequalities. (PF 301-325). Uncontradicted empirical analysis demonstrates that racial bias, not achievement, explains the District's segregated classes, and that the adverse effects of unequal elementary instruction are an important factor in subsequent unequal assignments. (PF 519-577) Moreover, District administrators admitted that the District takes race into account in assigning students to classrooms and Levels. (PF 429-441).

Indeed, although the District attempted to argue that its segregation of students for instruction reflected some instructional purpose, the uncontradicted evidence establishes that the District's school handbooks and policies makes no reference to any such instructional policies and, instead that the District hides it grouping practices from parents. (PF 258, 349-353). Further, when some African American parents learn of the grouping and wish to change their children's level or class placement, the evidence shows the District rejects and resists these requests. (See, e.g., PF 334-339, 442-459, 588-93). In the High School, the District claims that

students can choose and change their classes if they so wish. (DF 21). Yet unrebutted evidence, including the District's own handbooks and former teachers, prove students are not allowed to choose their classes. (PF 582-593). Finally, the unrebutted evidence shows that the District has resisted all efforts to integrate their classrooms (PF 460-513), including by dismissing administrators who pointed out the unjustifiable discriminatory educational effects of those practices and took action or expressed an intention to alter the practices. (PF 460-513).

Finally, the District offered no meaningful expert rebuttal to all of this evidence. The District's educational expert accepted the findings of Plaintiffs' experts with regard to disparities in classroom instruction (PF 620), and, although he agreed with the District's assertion that the purpose segregating students for instruction, he admitted that he had no evidence to support this claim. (PF 624). Moreover, although the District makes a generalized assertion that its grouping practices are consistent with professional literature and educational practice (DF. p. 22), its expert lacked even basic knowledge of the District's grouping practices (PF 621-24), and admitted that he did not "have any conclusive educational research to support" his contention that the District's grouping practices were appropriate. (Carvin Brown, Tr. at 143-44, 186, Vol. XII). Thus, the District could not rebut Plaintiffs' evidence that no legitimate educational theory justified the District's placement of students and that its grouping and instructional practices were inconsistent with sound educational practices. (PF 545-53).

C. Faculty

The unrebutted evidence shows rigid segregation at the elementary schools. (See table at p. 17-18 of PF). As set forth in Section II. above, while the number of African American faculty members has declined, the District has concentrated the remaining African American faculty in its identifiably African American elementary schools. (See table at p. 17-18 of PF) The District, offers no explanation for why its faculties are segregated, and does not address the current

disparities in faculty other than to assert that they are not a vestige of discrimination and that race is not a factor in faculty assignment. (DF p. 17).

D. Transportation

As noted in Section I above, the District currently operates segregated transportation, and it misses the point by arguing that Georgia law does not require that it transport students. The legal principals at issue in this case are whether transportation is free of segregation and whether effective desegregation can be achieved without transportation. Swann, 402 U.S. at 30; Brown v. Bd. of Educ., 464 F.2d 382, 384 (5th Cir. 1972). If it cannot, a school District has an obligation to provide it. Swann, 402 U.S. at 30; Brown v. Bd. of Educ., 464 F.2d 382, 384 (5th Cir. 1972). The evidence is clear: the District has segregated transportation and made no showing that transportation would not be effective and feasible in desegregating its schools.

E. Activities

The District ignores entirely the uncontradicted evidence that significant racial disparities exist in activities and that not all activities are open to all students. (PF 812-14, 821-30, 860). Instead, the District offers only its unsupported assertion that activities are open to all students. (DF p. 20). Thus, the District failed to carry its burden of proof, and the record proves that this vestige remains.

F. Discipline

Plaintiffs proferred substantial evidence of racial discrimination and bias, through empirical analysis and both expert and lay testimony, that went entirely unrebutted with the exception the very limited and general testimony of two District principals. Plaintiff's presented unrebutted expert testimony that the District's discipline policies are vague and fail to explicitly proscribe prohibited activity and lend themselves to racially discriminatory application and that the District delegates wide authority and discretion to teachers, yet fails to train them or establish

standards for the appropriate exercise of that discretion. (PF 735-765). Plaintiffs presented expert testimony that these policies and teacher discretion, in fact, result in the disparate and disproportionate discipline of African American students (PF765-774), in all schools and with regard to all types of student behavior. (PF765-774). Unrebutted expert testimony showed that, the more severe the penalty, the more disproportionate the discipline of African American students. (PF 775-779). Finally, unrebutted empirical analysis showed that racial bias is the only explanation for the disparities in the District's discipline. (PF 780-84).

This evidence was corroborated by evidence from two former administrators that teachers disciplined African American students differently than White students (PF 498-501; 794-97), including by referrals for minor behavior that should have been handled in class and, conversely, by handling discipline issues with white students in the classroom even when they should have referred them to the office, and that this unequal treatment of behavior created unequal discipline records that led to more severe punishment of African American students. (PF 796). The record also reveals evidence from former students, parents and teachers of instances where African American students were disciplined for behavior for which White students received no discipline, and such practices have occurred for decades. (PF 798-80). Finally, admissions by the District establish that racial disparities exist, that teachers inappropriately refer African American students for discipline, and that there has been a need for change in the District's discipline policies and practices. (PF 785-93).

The District's response to all of this evidence consisted only of brief testimony of the personal experience of two principals, Mr. Christie and Mr. Smith. Mr.Christie testified only that he was unaware of discriminatory treatment at the high school or during his single year at the middle school regarding suspensions (Gene Christie, Vol. XI at 173-75), and lacks credibility. (PF 809-10). Mr. Smith's testimony was even more limited, and consisted solely of

a statement that he was unaware of an occasion at the high school where an African American student was disciplined differently than a White student. (Bobby Smith, Vol. XII at 108). This testimony does not address, much less rebut, the extensive evidence of racial discrimination in every aspect of discipline in the District.

G. Special Education And The Gifted Program

The District does not dispute that racial imbalances exist in its gifted program (see, e.g., PF 736), or that the vast majority of students in the gifted program are White. (PF 735, 737-38). The District failed to meet its burden of proving that these racial imbalances not related to the dual system and its continuing practices of segregating students for instruction. The District offers no more purported explanation for these disparities than that it follows the Georgia Department of Education's regulations and criteria for the selection of students for gifted programs. (DF C.8.b.). This argument fails both because the District cannot shift its burden to the state, and because the state regulations are specifically aimed at reducing racial bias in admission to gifted programs. The regulations require that the tests and procedures used for the referral of students "meet standards of validity and reliability for the purpose of identifying gifted students, and shall be non-discriminatory with respect to race, religion, national origin, sex, disabilities or economic background." Ga. Comp. R. & Regs. R. 160-4-2-.38 at 2 (b) 2 (ii). Also, the test used for creativity assessment "shall have been reviewed for bias and normed on a nationally representative sample that included minority representation." Id. at 2(e)1(III). Moreover, if test data is "gathered and analyzed by a source outside the student's . . . school system" and used "to help establish students' eligibility, the [District] shall collect and maintain statistical data which will allow the Department of Education to evaluate the impact of this practice on the identification of gifted students from all ethnic and socioeconomic groups." Id. at 2 (e) 2. Indeed, the District has ignored the significant discretion it is given in selecting the

means to measure each of the four prongs of the eligibility criteria in a manner that prevents bias. (PF 724-28). Specifically, with respect to the creativity eligibility criterion, the District ignored the State's specific recommendation that it use more than one evaluation method, and relied exclusively on a single creativity test when it served to exclude African American students from the program. (PF 726-27).

Further, the evidence shows that high performing African-American students are excluded from the gifted program, while White students are admitted without reference to their performance. (PF 729-730, 734). The District has failed to test African-American students for the gifted program and has refused to substantiate its exclusion of those few who are tested. (PF 729-31, 734). On one occasion, a teacher told a parent that her daughter had passed the gifted exam, but was denied admission because she was African-American. (PF 731). In short, the undisputed record evidence established a basis to infer that racial imbalances in the District's gifted program are the result of discrimination.

The District also does not dispute that racial imbalances exist in special education. The uncontradicted evidence establishes that African-American students are overrepresented in the categories "mild intellectual disability" ("MID") and "emotional/behavioral disorder" ("EBD"), and underrepresented in the category "specific learning disability."(PF 741-65). Furthermore, African-American students identified with a disability are separated from their regular classrooms more often than Whites with the same disabilities. (PF 766-68).

Again, the District failed to meet its burden of proving that the racial imbalances in special education are not vestiges of its dual schooling. Here too, the District contends that it simply follows the state regulations that establish the criteria for the identification and placement of students with disabilities. The facts do not support this. For example, the Georgia Department of Education cited the District as being noncompliant in its identification of students

with MID and EBD and in its placement procedures. (PF 749, 757, 771). The facts concerning the administration of the program demonstrate that the District did not sufficiently monitor the identification and placement of students. (PF 779-82). On the basis of all of the evidence, the only expert testimony in the record reflects the conclusion that racial discrimination is the only possible explanation for the racial imbalances in the District's special education program. (PF 750-51, 758-59, 765).

CONCLUSION

The Supreme Court has again stressed the importance of equal educational opportunity, noting that because "education . . . is the very foundation of good citizenship …. the diffusion of knowledge and opportunity through [institutions of education] must be accessible to all individuals regardless of race or ethnicity." Grutter v. Bollinger, 123 S.Ct. 2325, 2340 (2003). In order "to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." Id. at 2341. The District denies to its African American community accessibility to knowledge and opportunity, paths to leadership and confidence in its openness and integrity as an educational institution. In order to that it can be made to serve its important role in the community, judgment should be entered in favor of Plaintiffs and against the Defendant District in this action.

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Respectfully submitted,

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ATTACHMENT

Elementary School Racial Disparities 1998-99

	Douglass	Harper	Scott	Jerger	District
Student Enrollment	100% AA	100% AA	83% AA	61% W 38.9% AA	74.1% AA
Faculty	--	62.5% AA	25% AA	6.7% AA	--
3rd Grade ITBS Reading Score	36	37	40	68	48
3rd Grade ITBS Math Score	35	47	46	78	55
Gifted Participation 1994 (1998 Data unavailable)	0	1	--	26 (25W/ 1AA)	

Plaintiffs' Findings of Fact 54, 59, 688-89, 343

Middle School 1998-99

8th Grade Courses	AA	W
Level 1 Courses	92%	6%
Level 2 Courses	79%	20%
Level 3 Courses	67%	31%
Level 4 Courses	38.4%	58.6%
Overall Racial Composition of Courses	75.8%	22.6%
Incidences of Reported Discipline 1997-98 (98-99 data unavailable)	91.3%	8.5%
Gifted 1994 (1998 unavailable)	12.5%	87.5%

Pl. Ex. 1204, 1190o; PF 688

Special Education 1998

	AA	W
Identification of Mild Intellectual Disability	92%	8%
Identification of Emotional/ Behavioral Disorder	87%	13%

(PF 694, 705)

High School 1998-99

	AA	W
English Lit. and Comp. Level 1	95%	5%
English Lit. and Comp. Level 2	75%	24%
English Lit. and Comp. Level3	45%	52%
Physical Science Level 1	86%	9%
Physical Science Level 2	86%	12%
Physical Science Level 3	38%	61%
Economics Level 1	100%	0%
Economics Level 2	88%	12%
Economics Level 3	37%	61%
Incidences of Reported Discipline[5]	86.9%	12%
Student Honors Awarded	5%	12%

Percentage of Student Activities Outside 10% Variance	97%

PL. Ex. 1209, 1190o, 1190a, 1190b, 1190c, 1190d

[5] Data from 1997-98. Pl. Ex. 1190o. Data for 1998-99 not available.