

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CHINYERE JENKINS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 77-0420-CV-W-1-ECF
)	
STATE OF MISSOURI, et al.,)	
)	
Defendants.)	

ORDER

On March 1, 2001, the Court held a hearing for the Kansas City Missouri School District (“KCMSD”) to present evidence in support of its motion for unitary status on the vestiges of racial balance,¹ facilities, budget, and transportation.² According to the briefing schedule established, the KCMSD has submitted a memorandum in support of its motion for unitary status. Plaintiffs (hereinafter the “Jenkins Class”) have filed a memorandum in opposition to which the KCMSD filed a reply. The Court has considered carefully the arguments presented by the parties. For the following reasons, the Court hereby GRANTS the KCMSD’s motion for unitary status on the discriminatory vestiges of racial balance, facilities, budget, and transportation.

¹ The “racial balance” vestige also has been referred to as “racial isolation” and “student assignment.” For purposes of this motion, the Court will refer to the vestige of discrimination as “racial balance.”

² The KCMSD also sought unitary status on the vestige of the student achievement gap. The Court allowed the KCMSD, however, to withdraw its motion with regard to the achievement gap for the time being.

I. BACKGROUND

Numerous other orders have provided detailed factual backgrounds into this long-running desegregation case. See Jenkins v. Missouri, 515 U.S. 70, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995); Jenkins v. Missouri, 216 F.3d 720 (8th Cir. 2000); Jenkins v. Missouri, 959 F. Supp. 1151 (W.D. Mo. 1997). Consequently, the Court will only provide a more recent, procedural history of the case.

In January 1997, the Court held a unitary status hearing to determine whether the KCMSD should be declared unitary. See Jenkins v. Missouri, 959 F. Supp. 1151 (W.D. Mo. 1997). The Court found that the KCMSD had not yet achieved unitary status but believed it could reach that goal within three years. See id. at 1167. To accomplish unitary status within the three-year time period, the Court ordered the parties to file a plan for its transition to unitary status. See id. at 1179. The KCMSD filed its Transition Plan on August 15, 1997. The Transition Plan set forth KCMSD's planned methods to eliminate the remaining racial balance, facilities, budget, and transportation vestiges of *de jure* segregation and established a framework through which the KCMSD could achieve economic self-sufficiency. The Court approved the Transition Plan at a hearing on February 12, 1998. Relevant to the foregoing vestiges, the parties entered into two stipulations that supplemented the Transition Plan—the Stipulation and Agreement Regarding KCMSD School Closings, School Assignment Boundaries, and Magnet Theme and Transportation Modifications (“School Closing Stipulation”) and the Stipulation and Agreement Regarding the KCMSD's Operating Budgets for Fiscal Years 1999 and 2000 (“1998 Budget Stipulation”). The Court approved those stipulations on April 21, 1998, and July 15, 1998, respectively.

On September 1, 2000, the KCMSD filed its motion for unitary status on all remaining issues in this case. The parties and the Court agreed that the question whether the KCMSD had achieved

unitary status in the areas of racial balance, facilities, budget, and transportation should be heard separately from issues remaining in the area of academic achievement. On December 22, 2000, the parties filed their Stipulations of Fact as to Student Assignment and Racial Isolation, Facilities, Capital Improvements, Budget, and Transportation (“Unitary Status Stipulation”). In that Stipulation, the Jenkins Class agreed that “the KCMSD has complied with and implemented in all material respects the steps set forth in the Transition Plan with regards to student assignment, transportation, budget, and capital improvements.” Unitary Status Stipulation, ¶ 11.a. In addition, the Jenkins Class agreed that “the KCMSD has complied with and implemented in all material respects the steps set forth in the School Closing Stipulation approved by the Court on April 21, 1998, and the 1998 Budget Stipulation approved by the Court on July 15, 1998.” Unitary Status Stipulation, ¶ 11.b.

A hearing was held on the non-achievement issues on March 1, 2001.³ After the close of the hearing, the KCMSD sought and was granted permission to withdraw its motion for unitary status on the student achievement issue for the time being. During a telephone status conference held with the Court on March 7, 2001, the parties agreed that, notwithstanding the KCMSD’s withdrawal of its unitary status motion as to academic achievement, the Court should consider and rule on the evidence submitted on the racial balance, budget, facilities, and transportation vestiges. Therefore, the KCMSD’s motion is deemed a motion for partial unitary status on the above named issues.

II. STANDARD FOR PARTIAL UNITARY STATUS

³ The KCMSD repeatedly refers to the date of the hearing as February 27, 2001. The hearing, however, took place on March 1, 2001.

In the well-known case of Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (Brown I), the United States Supreme Court held that *de jure* racial segregation caused by school districts violates the Fourteenth Amendment. See Brown I, 347 U.S. at 495, 74 S. Ct. at 692. “Generally, once there has been a finding that a defendant established an unlawful dual school system in the past, there is a presumption that current disparities are the result of the defendant’s unconstitutional conduct.” Jenkins v. Missouri, 122 F.3d 588, 593 (8th Cir. 1997). “To 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. School Bd. of Hillsborough County, Florida, 244 F.3d 927, 942 (11th Cir. 2001) (citing Lockett v. Board of Educ. of Muscogee County Sch. Dist., 111 F.3d 839, 843 (11th Cir. 1997)(Lockett II)).

“[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination.” Jenkins v. Missouri, 515 U.S. 70, 88, 115 S. Ct. 2038, 2549, 100 L. Ed. 2d 63 (1995) (Jenkins III) (quoting Board of Ed. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237, 247, 111 S. Ct. 630, 637, 112 L. Ed. 2d 715 (1991)). In order for a district court to relinquish control over a defendant school district, the court must consider “whether the [school district] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.” Board of Ed. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237, 249, 111 S. Ct. 630, 638, 112 L. Ed. 2d 715 (1991). When full unitary status cannot be granted, district courts may consider whether partial withdrawal of judicial control may be possible. The district court must consider the following factors to determine if partial withdrawal should occur:

[1] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn;

[2] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and

[3] whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the courts' decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Jenkins III, 515 U.S. at 89, 115 S. Ct. at 2049 (citing Freeman v. Pitts, 503 U.S. 467, 491, 112 S. Ct. 1430, 1446, 118 L. Ed. 2d 108 (1992)). As the KCMSD has withdrawn its attempt to prove unitary status on the academic achievement gap vestige, the Court can only grant partial unitary status. Therefore, the Court must follow the factors outlined in Freeman and determine whether the KCMSD has eliminated the facilities, budget, transportation, and racial balance vestiges to the extent practicable.

III. VESTIGES OF DISCRIMINATION: FACILITIES, BUDGET, TRANSPORTATION, & RACIAL BALANCE

The United States Supreme Court has directed district courts when considering whether a school district has eliminated the vestiges of discrimination to “look not only at student assignments, but ‘to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.’” Dowell, 498 U.S. at 250, 111 S. Ct. at 638 (quoting Green v. New Kent County Sch. Bd., 391 U.S. 430, 435, 88 S. Ct. 1680, 1693, 20 L. Ed. 2d 716 (1968)). “Two or more Green factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well.” Freeman, 503 U.S. at 497, 112 S. Ct. at 1449.

As this Court has previously explained, Green does not require an analysis of factors never determined to be in violation of the Constitution when considering whether a school district is unitary.

See Orders, February 12, 1998, and May 28, 1998. Of the six Green factors, no racial disparity was ever found with regard to faculty and staff assignment. See id. As a result, faculty and staff assignment will not be considered. In addition, although no finding of racial disparity was ever demonstrated, the Honorable Judge Russell G. Clark granted the KCMSD unitary status with regard to extracurricular activities. See Jenkins v. Missouri, 959 F. Supp. 1151, 1179 (W.D. Mo. 1997). Judge Clark also found student achievement as an additional, ancillary vestige to be remedied by the KCMSD. See Id. at 1179. The student achievement vestige will not be addressed by this Order, however, because the KCMSD withdrew its motion for unitary status on that issue. Finally, the Court ordered the KCMSD to modify its budgeting procedures so that actual expenditures would be reconciled with budgeted amounts. Consequently, this Order will only consider whether the KCMSD is entitled to unitary status with regard to facilities, budget, transportation, and student assignment.

A. Facilities/Budget/Transportation

The facilities, budget, and transportation vestiges are not in dispute except for their relationship to racial balance. First, the Jenkins Class acknowledges that the KCMSD has fulfilled its obligation with regard to capital improvements and agrees that the KCMSD is entitled to unitary status on this particular vestige. The Court agrees. In 1997, Judge Clark noted that “[n]o one can doubt the excellence of the current KCMSD facilities. While some renovation work remains incomplete at a few schools, the KCMSD still enjoys almost unequaled physical resources.” Jenkins, 959 F. Supp. at 1166. The Jenkins Class has stipulated that the remaining Court-ordered capital improvements have been substantially completed. Accordingly, the Court hereby declares the KCMSD unitary with respect to the facilities/capital improvements vestige.

Second, the Jenkins Class also agrees that no independent budget vestige remains. In 1997, Judge Clark rejected the theory of an independent “financial vestige” constituting any part of a

remaining vestige of prior discrimination. See Jenkins, 959 F. Supp. at 1169. The Court nevertheless ordered the KCMSD to modify its budgeting procedures so that actual expenditures would be reconciled with budgeted amounts. See id. at 1179. In its Transition Plan and subsequent 1998 Budget Stipulation, the KCMSD included measures to accomplish this task. The Jenkins Class agrees that the KCMSD has complied with the Court's order and eliminated any budget vestige. Nevertheless, the Jenkins Class contends that the KCMSD should not be declared unitary with regard to the budget vestige because it is intertwined with concerns related to racial balance. Therefore, whether the KCMSD has achieved unitary status on this issue will not be considered until the racial balance vestige is analyzed. If the KCMSD is found to have eliminated the racial balance vestige, the KCMSD also will be declared unitary with regard to the budget vestige.

Finally, the Jenkins Class acknowledges that there is no longer an independent transportation vestige of the prior *de jure* segregation. The Jenkins Class asserts, however, that the KCMSD is not entitled to unitary status on the transportation vestige because transportation is intertwined with concerns related to racial balance. In fact, Judge Clark previously denied unitary status as to student transportation because of its close connection to racial balance. See Jenkins, 959 F. Supp. at 1168 (“Transportation plays an essential role in achieving racial balance. Until that vestige has been eliminated to the extent practicable, the Court cannot relinquish its jurisdiction of transportation.”). Accordingly, the transportation vestige must rise or fall with the racial balance vestige.

B. Racial Balance Vestige

The KCMSD claims to have taken all practicable steps to eliminate the racial balance vestige of prior *de jure* segregation and, should therefore, be declared unitary with regard to racial balance. “Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has

been caused by a constitutional violation. 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.” Freeman, 503 U.S. at 494, 112 S. Ct. at 1447.

“Proper resolution of any desegregation case turns on a careful assessment of its facts.” Freeman, 503 U.S. at 474, 112 S. Ct. at 1437 (citing Green, 391 U.S. at 439, 88 S. Ct. at 1694). “[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.” Id. Therefore, the Court must begin by assessing the current racial imbalance within the KCMSD and the explanation for any racial imbalance found. See id. The Court will address the racial imbalance and explanation for it within the first prong of the Freeman test.

1. Has the KCMSD Fully and Satisfactorily Complied with the Court’s Decrees Regarding Racial Balance?

The KCMSD argues that the Jenkins Class has conceded this prong of the Freeman analysis because it agreed in the Unitary Status Stipulation that “[t]he KCMSD has complied with and implemented in all material respects the steps set forth in the Transition Plan with regard to student assignment, transportation, budget, and capital improvements, [and] [t]he KCMSD has complied with and implemented in all material respects the steps set forth in the School Closing Stipulation approved by the Court on April 12, 1998, and the 1998 Budget Stipulation approved by the Court on July 15, 1998.” Although the Jenkins Class admits that the stipulation is binding, it still argues that the KCMSD has not done what it agreed to do.⁴ Specifically, the Jenkins Class points to the School

⁴ The Court notes that the Jenkins Class has already conceded that the vestiges addressed in this Order have been eliminated to the extent practicable. See Jenkins v. Missouri, 216 F.3d 720, 735 (8th Cir. 2000) (Beam, J., Bowman, J., Loken, J. dissenting) (“The class now concedes that the

Closing Stipulation wherein the KCMSD agreed that commencing with the 1998-99 school year, enrollment at each KCMSD school would be capped at a maximum of 65% white students. The Jenkins Class contends that the KCMSD never even devised a plan to implement the cap at four schools of particular concern although it agreed to provide the Desegregation Monitoring Committee and the parties with such a plan.

The Court finds that the Jenkins Class is bound by its stipulation and cannot now assert facts contrary to that stipulation. See Gander v. Livoti, 250 F.3d 606, 609 (8th Cir. 2001) (“Valid stipulations are controlling and conclusive, and courts must enforce them.”). The Jenkins Class has made no attempt to obtain relief from its stipulations and is estopped from making the argument it now seeks to advance.

Furthermore, the Court finds that the KCMSD has substantially complied with the Court’s decrees regarding racial balance. In November 1986, “the District Court adopted the magnet-school program to ‘provide a greater educational opportunity to all KCMSD students,’ and because it believed ‘that the proposed magnet plan [was] so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.’” Jenkins III, 515 U.S. at 76-77, 115 S. Ct. at 2043 (internal citations omitted). The magnet program was the Court’s primary means of achieving reduced racial isolation, and the KCMSD fully complied with the order to implement the program. See Unitary Status Stipulation, ¶ 11.7.

The magnet school approach was very successful in terms of racial balance. By 1990, the KCMSD established ten magnet high schools, eleven magnet middle schools, and thirty-five magnet

only remaining vestige in this case, if any, lies within a portion of a black-white educational achievement gap that exists among the students of KCMSD.”).

elementary schools. Despite the high degree of residential segregation in the district, from 1993 to 1997, there were no schools in the KCMSD with greater than 50% white enrollment. Exh. 46F. In 1977, experts reported that the racial balance of the KCMSD was measured at 58.7 according to the index of dissimilarity.⁵ Exh. 46A & F. When the magnet school program was implemented in 1986, racial imbalance had been reduced to 54.4. Exh. 46A & F. In 1995, after operating the magnet schools for nine years, racial imbalance had been reduced to 28.5. Exh. 46A & F.

In addition to reducing the index of dissimilarity, the magnet school program also significantly increased interracial exposure.⁶ In 1997, when the KCMSD began implementing the mandatory reassignment plan, the interracial exposure index measured 20.8 in a district that was 31.5% white. Exh. 46A. By the beginning of the magnet school program in 1986, the interracial exposure index had fallen to 19.2, but total white enrollment also had fallen to 26.5%. Exh. 46A. By 1995, the KCMSD had an interracial exposure index of 18.8 in a district that was 20.3% white. Exh. 46A.

The KCMSD also successfully reduced the number of schools with greater than 90% minority enrollment. In 1977, 29 schools within the KCMSD had greater than 90% minority enrollment. Exh.

⁵ The index of dissimilarity is a common index used by social scientists to measure school desegregation. It demonstrates how evenly the races in the school district are distributed across schools. The measure varies from zero (perfect racial balance) to 100 (complete segregation). See Testimony of Dr. Rossell, Tr. pp. 103-04.

⁶ Often used by social scientists, interracial exposure measures the absolute level of contact between races. Interracial exposure is a weighted average of the percentage white in the average minority child's school. The higher the number of the interracial exposure index, the more integration that has been achieved. The interracial exposure index is obviously limited by the percentage white in the school district. Thus, the maximum interracial exposure that can be achieved in a school district that is 17.8% white (which was the percentage of white students in the KCMSD as of the 2000-01 school year) is 17.8. See Testimony of Dr. Rossell, Tr. 104-05. The KCMSD's 2000-01 index of interracial exposure is 13.8.

46F. By 1986, when the magnet school plan was implemented, the number had dropped to 25. Exh. 46 F. By 1995, even with a total minority population of 77.9%, only 15 out of 74 schools in the KCMSD had greater than 90% minority enrollment. Exh. 46F. Finally, the KCMSD reduced the number of majority white schools from 31 in 1997 and 17 in 1986 to 0 by 1995. Exh. 46F.

In 1997, the Court held a unitary status hearing. Based on the KCMSD's racial balance figures, the KCMSD's expert, Dr. Christine Rossell, opined that the District had achieved unitary status as of 1997. See Exhibit 52, pp. 80-81, 90-98; Tr. p. 123, line 23-p. 124, line 13. Although the KCMSD agreed that "racial isolation [wa]s near elimination," it opposed a determination that it had reached unitary status as to racial balance for two reasons. First, in 1995, the Supreme Court struck down the magnet schools' key focus on attracting white students from outside the KCMSD. See Jenkins III, 515 U.S. at 100, 115 S. Ct. at 2055. As a result, the KCMSD lost 1,476 suburban white students and had yet to reconfigure its racial balance to account for the loss. See Jenkins, 959 F. Supp. at 1167. Second, the KCMSD still needed to reduce its expenditures to match anticipated post-unitary status revenues in order to avoid insolvency. See Jenkins, 959 F. Supp. at 1167. As a result of these two concerns, the KCMSD sought a transition period to accomplish these tasks. The Court recognized that the KCMSD's magnet system would have to be altered because of the exorbitant cost. See id. ("The uncertain status of the available revenues for the District further complicates the analysis of the racial isolation vestige. The KCMSD will not be able to support and maintain the present magnet system because it is too costly, considering fiscal realities."). The Court found that the KCMSD was not unitary because of the unrealized affects of the partial dismantling of the magnet school approach. See id. As ordered by the Court, the KCMSD later submitted a Transition Plan to address these issues.

In its Transition Plan, the KCMSD sought to “[m]aintain, to the extent practicable, the gains the KCMSD has made in eliminating the racial isolation vestiges of the formerly segregated school system.” Transition Plan, p. 8. The essence of the Plan was to offer the KCMSD’s patrons and students a choice between successful magnet themes and traditional neighborhood schools. See Transition Plan, p. 9. Fiscal realities dictated that the KCMSD could only attempt to preserve some of the gains it had made in eliminating racial isolation between 1976 and 1997. The parties and the Court recognized that the KCMSD would never have more racial balance than it did at the unitary status hearing in 1997. See Transition Plan, Section IV, Preserving the Gains of Desegregation to the Extent Practicable, at 175; Unitary Status Stipulation, ¶ 11.m (“At the time of the Transition Plan . . ., all parties recognized that the creation of neighborhood schools in Kansas City would result in some degree of reduced racial balance.”). Without the ability to afford the expensive magnet school transportation system, and the loss of 1,476 white students, the KCMSD’s attainment of racial balance at or “near perfection,” see Dr. Christine Rossell, Tr. p. 124, line 21, p. 125, line 8, was soon lost. See Jenkins, 959 F. Supp. at 1171 (Dr. Michael Stolee, the KCMSD’s expert, “confirmed that, given the constraints of the District’s demographics, further efforts at achieving a better racial balance would be impractical.”).

As expected, the KCMSD’s figures presented at the March 2001 hearing show less racial balance than the balance figures presented at the 1997 hearing. Dr. Rossell testified on behalf of the KCMSD at the hearing in both 1997 and 2001. Dr. Rossell testified that the current student population within the KCMSD is 17.8% white. Tr. at 103-04. The interracial exposure index, however, is 13.8. Exh. 46I. Dr. Rossell explained that the current index of interracial exposure is “excellent . . . you probably have as small or smaller a gap between the percent white and the percent white in the average minority child[s] school than most other school districts, including some of the predominately

white ones.” Tr. p. 146, line 15-21. Similarly, despite an increase in the dissimilarity index from 33.8 in 1997 to 50.1 in 2001, Dr. Rossell’s opinion is as follows:

Even at an index of 50, it is still, for a school district that is 82% minority, pretty good. Typically, school districts of that racial composition that are not under court order, but have no discrimination . . . they just have neighborhood schools, have got indices of 60, 70. . . .[I]n addition, if we compare Kansas City to other school districts at the time they were declared unitary, Dallas, for example, had an index of dissimilarity of 55 when it was declared unitary. And that’s not uncommon.

Detroit, I think . . . was around 60 or 65, and it is because the index of dissimilarity is very much influenced in terms of the number of black in all-black schools, . . . it really gets very difficult to get a good index when you are up to around 70% minority.

Tr. p. 145, line 16- p. 146, line 8.

Dr. Rossell testified that the increase in dissimilarity that the KCMSD has experienced is not inconsistent with a finding of unitary status because the transition planners and the parties all contemplated that such an increase would occur.⁷ In fact, the parties stipulated “that the creation of neighborhood schools in Kansas City [as contemplated by the Transition Plan] would result in some degree of reduced racial balance solely as a result of residential segregation.” Unitary Status Stipulation, ¶ 11.m. In addition, the parties agreed that “changes in racial balance in individual schools in 98-99 and 99-00 resulted directly from implementation of the court-approved transition plan and the stipulation of the parties.” *Id.* at ¶ 11.r. Even with the agreement that some racial imbalance would occur with the choice of neighborhood schools, Dr. Rossell stated that “[i]t is quite remarkable that you have gotten back to neighborhood schools and the index has only increased by 15 points. . . . [T]hat’s probably the worse that it is going to get, because the plan is in place.”

⁷ “[T]he parties contemplated that this would occur when you went to neighborhood schools. It was well known among every party in this case and everyone involved that the neighborhoods were not perfectly integrated. Therefore, if you go to a neighborhood school plan, you are going to have some racial imbalance.” Dr. Rossell, Tr. p. 143, line 2-7.

Similarly, Dr. Rossell discounted the significance of the increase in the number of 90%+ minority schools that occurred between 1997 and 2001. Dr. Rossell testified that the 90% measure to determine racially isolated schools in the KCMSD is of little value in a school system that is 82% minority. Applying the typical plus-or-minus 15%, or plus-or-minus 20% racial balance standards employed in other desegregation cases⁸ to determine whether the KCMSD schools are racially isolated, Dr. Rossell explained, would result in substantially all of the KCMSD's schools being adequately balanced. See Tr. p. 108, line 9-25.

Dr. Rossell did not find the increase in majority white schools from 0 in 1997 to 8 in 2001 inconsistent with a conclusion that the KCMSD has reached unitary status because the Court and the parties approved the plan to return some District students to neighborhood schools:

[T]he increase occurred by going to neighborhood schools, drawing compact zones around those schools, just as the transition plan laid out, just as the stipulation laid out, of complying with the Court orders. And everyone knew that this would create some predominantly white schools by going to neighborhood schools, but the school district would offer a choice. It would offer a choice to minority students to come into those neighborhoods, and it would offer a choice to white students to go out of those neighborhoods, and that was all agreed upon. And that was all part of the plan.

Tr. p. 149, line 8-18.

Dr. Rossell also addressed the number of 90% minority and 50%+ white schools. Dr. Rossell testified that the KCMSD has by now experienced substantially all of the increase in these areas that the transition plan, by allowing students to choose to go to neighborhood schools, itself anticipated:

I would say eight predominantly white schools are [sic] about the maximum that you are going to get, and the reason why you have them is because you have neighborhood

⁸ See, e.g., Reed v. Rhodes, 179 F.3d 453, 465 (6th Cir. 1999) (finding that the inflexible 15% parameter by which the racial composition of each school is measured had to be modified); United States v. School District of Omaha, 521 F.2d 530, 547 (8th Cir. 1975) (ordering integration of school district with 20% black enrollment, and deeming schools with 5-35% black enrollment to be integrated).

schools. None of these are all white schools, they are around the range of 60 to 70 percent white. They would have been considered perfectly integrated schools in many school districts in the U.S. And so since the plan is in place, eight is about the maximum that you are going to find. And my guess is that it is going to go down, I would predict that it will go down.

Tr. p. 135, line 4-10; see Tr. p. 148, line 13-18.

Although some racial imbalance exists, the KCMSD has fully complied with the Court's decrees. The KCMSD has spent the last 15 years complying with this Court's orders to eliminate racial imbalance. In fact, the District essentially eliminated the vestige in 1997 according to the racial balance figures and the expert opinions. The Court finds that this Freeman factor weighs in favor of granting the KCMSD unitary status on the racial balance vestige.⁹

2. Is Retention of Judicial Control Over Racial Balance Necessary or Practicable to Achieve Compliance with the Student Achievement Provisions of the Court's Decree?

The second prong of the Freeman analysis recognizes that “[t]wo or more Green factors may be intertwined or synergistic in their relation, so that a constitutional violation of one area cannot be eliminated unless the judicial remedy addresses other matters as well.” Freeman, 503 U.S. at 497, 112 S. Ct. at 1449. The only vestige remaining that could be intertwined with racial balance is that of the student achievement gap. As outlined in the Transition Plan, however, the remedy for the student achievement gap is to improve curriculum, enhance professional development, and strengthen student assessment and accountability programs. Furthermore, the KCMSD has additional incentive to improve the education of its students due to its current unaccredited status.

⁹ Even if the Court considers the Jenkins Class's contention that the KCMSD failed to cap the white enrollment at a few schools, the Court finds this deviation an immaterial non-compliance issue. The District contends that an insufficient number of minority students had enrolled at the schools. Furthermore, the Court's Desegregation Monitoring Committee was aware of the District's plan to exceed the cap and made no objection.

The Jenkins Class asserts that racial balance is linked to student achievement because the District could attract and market itself to a more racially-balanced student population if the schools were better academically. Although the Court agrees that better schools could possibly attract a more evenly-mixed student body, the Constitution does not require the District to recruit students to obtain a particular ratio of white to black students. The District simply cannot segregate its student population within the boundaries of the KCMSD. The Court does not find that the racial balance vestige and academic achievement gap vestige are intertwined such that the Court cannot relinquish control over racial balance. Accordingly, this Freeman factor favors granting unitary status to the KCMSD with regard to racial balance.

3. Has the KCMSD Demonstrated its Good Faith Commitment to the Whole of the Court's Decree?

Pursuant to Freeman, the Court must consider “whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court’s decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.” 503 U.S. at 491, 112 S. Ct. at 1446. “A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation, and enables the district court to accept the school board’s representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.” Freeman, 503 U.S. at 498-99, 112 S. Ct. at 1449-50.

The Court finds that the KCMSD has evidenced a good faith commitment to maintaining, to the extent practicable, an integrated school district. Not only has the KCMSD complied with the Court’s orders with regard to racial balance, but it has stipulated to its intent to retain certain measures designed to maintain a more racially diverse student body at various schools. In particular, the

KCMSD has agreed to maintain the Lincoln College Preparatory Academy, the Paseo High School Fine and Performing Arts program, the development of “small learning communities” within the comprehensive high schools, and the retention of a large number of magnet schools at the elementary and middle school levels. See Unitary Status Stipulation, Appendix A. To foster these programs, the KCMSD also has committed to providing requisite transportation at a significant cost. See id.

The KCMSD’s commitment to maintaining an integrated school system was explicitly endorsed in the Transition Planning Principles:

The Transition Plan, while recognizing that the demographics of the District makes significant concentrations of minority students in many schools inevitable, will adopt safeguards to avoid the resegregation of the District into a few predominately white schools and a larger number of predominately minority schools.

Transition Plan, Exh. 47, p. 9. Furthermore, the KCMSD has increased motivation to provide its students with choice in order to compete with similar themes at new and existing charter schools. As Dr. Rossell testified, the failure to maintain these schools would lead to further loss of students and funding to charter schools. See Testimony of Dr. Rossell, Tr. p. 130, lines 1-15. Enrollment at some neighborhood schools has boomed, indicating that the KCMSD’s patrons want the right to choose.

The history of this case illustrates the KCMSD’s commitment to racial balance. In fact, the KCMSD was originally a plaintiff in this litigation. See Jenkins III, 515 U.S. at 79, 115 S.Ct. at 2044. Furthermore, the KCMSD opposed a motion for unitary status as to the racial balance vestige in 1997 to completely address the partial dismantling of the magnet school program. See Jenkins v. Missouri, 122 F.3d 588, 593 (8th Cir. 1997). Even today, Dr. Rossell has indicated that the index of dissimilarity in the KCMSD is remarkable considering that it is a 82% minority school district. Tr. p. 178, lines 23- p. 179, line 2.

The Court finds that the KCMSD has demonstrated its good faith commitment to the Court's decree to eliminate racial imbalance. Accordingly, the final Freeman factor weighs in favor of granting the KCMSD unitary status with regard to the racial balance vestige.

4. Has the KCMSD Eliminated the Racial Balance Vestige to the Extent Practicable?

As directed by the Supreme Court, the ultimate inquiry in considering whether a school district should be declared unitary is “whether the [school district] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.” Board of Ed. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237, 249, 111 S. Ct. 630, 638, 112 L. Ed. 2d 715 (1991). The Court “must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.” Jenkins III, 515 U.S. at 99, 115 S. Ct. at 2054. The Court has already determined by analyzing the three factors of Freeman that the KCMSD has complied in good faith with the Court's decree and that the vestiges considered are not intertwined with any vestige to remain under judicial supervision. The Court must still find, however, that the KCMSD has done everything practicable in order to declare the District unitary with regard to racial balance.¹⁰

The KCMSD's student population is 82.2% minority and 68.8% black. The small minority white student population is concentrated on the eastern and western fringes of the District, while most black student population is concentrated in the center and souther portions of the District. To

¹⁰ The Court does not suggest that judicial control over a school district could last forever as long as one more theory could be advanced or step taken. See Coalition to Save Our Children v. Board of Educ., 90 F.3d 752, 761 (3d Cir. 1996) (“Were we to allow federal supervision to continue after a finding that the schools districts have complied with our desegregation mandate, we would effectively preclude those school districts from achieving that goal. In sum, we cannot reconcile the prospect of indefinite federal supervision . . . with the ultimate purpose of that supervision—to foster the creation of autonomous, racially balanced school systems.”).

counteract the demographics of the student population and still retain the essential “choice” plan, the KCMSD has considered other options, in addition to the magnet programs it already has established, to determine if other practicable steps remain to enhance racial balance. Those additional options will be discussed below.

a. Is transportation a practicable step to further reduce racial isolation? For the last 24 years, the KCMSD has transported the students within the District back and forth across the city in order to integrate its schools. In fact, these efforts brought the District to “near perfect” racial balance. The expense of the transportation system related to the former magnet school system has already been discussed as impracticable due to fiscal realities. The stipulations by the parties called for the KCMSD to reduce transportation as well as other funding. In addition, the KCMSD faces new budget challenges with the creation of the charter schools. See Unitary Status Stipulation, ¶ 11.i (“The loss of students and funding to charter schools has required and will continue to require additional budget cuts, school closings and program consolidations.”). In light of these legitimate budget constraints, the KCMSD cannot practicably increase the number of students it transports.

b. Can the magnet programs practicably be expanded? Because the magnet program relies heavily on transportation, the KCMSD cannot practicably expand the program. Furthermore, many of the District’s current magnet schools are not well attended. Many of the KCMSD patrons are choosing to send their children to neighborhood schools, leaving empty seats at formerly well-attended magnet schools. See Exh. 37 & 38. As a result, expanding the magnet schools would be impracticable and not foster greater racial balance.

c. Is involuntary reassignment a practicable step? Dr. Rossell testified that the KCMSD could possibly achieve marginally better racial balance by mandatorily reassigning remaining white students to various schools. She also explained, however, that mandatory

reassignment would create even greater white flight and reduce the interracial exposure index, creating less integration. See Tr. p. 125, line 9, p. 126, line 21. Both parties agree that mandatory reassignment is not a practicable step that could be taken to achieve greater racial balance. See Unitary Status Stipulation, ¶ 11.j (“[A]ny mandatory student assignment plan would be wholly inappropriate and counterproductive, causing further loss of both white and black students to charter schools and the suburban school districts. Therefore, any practicable student assignment plan must preserve student choice as an element of the plan.”). Accordingly, mandatory student reassignment is not a practicable option.

d. Is an increased student recruitment program a practicable step? At the hearing, counsel for the Jenkins Class suggested that the KCMSD could include a substantial student recruitment or marketing effort to enhance racial balance. Although such a plan was formerly in place as a remedial measure, the marketing plan was already being phased out pursuant to court order before Judge Clark relinquished control of the case in 1997. Dr. Rossell testified that marketing efforts can make “marginal changes in increasing enrollments in magnet schools.” Tr. p. 170-71. Applied to the KCMSD, however, the marketing plan has never been effective. Dr. Rossell pointed to the KCMSD’s history, when the District’s marketing efforts cost eight to nine hundred thousand dollars per year, and explained that the District’s white student enrollment still dropped almost every year. See Tr. p. 180-81. Furthermore, Dr. Rossell explained that the increase in white students that marketing might bring would not affect the District’s racial balance in a meaningful way. See Tr. 180-81. Accordingly, the Court finds that an expanded marketing plan is not a practicable step that the KCMSD could take.

e. Are there any other practicable steps that the KCMSD can do to enhance racial balance? At the hearing, counsel for the KCMSD specifically asked Dr. Rossell whether there were any remaining practicable steps the KCMSD could take to further enhance racial balance. Dr. Rossell

testified that “[t]here is minor little tweaking that could be done, but it is not going to affect much, a few students here, and a few students there. It is not going to be much.” Tr. 141, line 21-24. She cautioned, however, that a change in the plan may well drive still more students from the District: “Often . . . this good-intentioned tweaking can have a negative affect in a world in which people are free to do what they want. . . . When you . . . change a boundary zone you could easily drive some whites out.” Tr. p. 174, line 9-13.

The Court has little difficulty finding that the KCMSD has done everything practicable with regard to racial balance. The KCMSD is not required to tinker with its plans and program in order to gain unitary status when only marginal gains in racial balance would result. The Court finds that the KCMSD has fully complied with the Court’s decree with regard to racial balance and no practicable steps remain that would substantially improve racial balance within the District.

5. Even if Practicable Steps Remain, is the Current Racial Imbalance in the KCMSD Proximately Caused by Prior *De Jure* Segregation?

The KCMSD also asserts that even if practicable steps remain, the current racial imbalance within the District is not proximately caused by prior *de jure* segregation. Although the Court has already found that the District has eliminated the vestige to the extent practicable, it also finds that the current racial imbalance in the District exists as a result of choice and not prior segregation.

“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.” Freeman, 503 U.S. at 495, 112 S. Ct. 1448. The KCMSD has amply proven that the current racial imbalance is a result of patron choice. In 1997, the causal connection between the KCMSD’s racial imbalance and prior *de jure* segregation was broken. At that point, the KCMSD had spent hundreds of millions of dollars on improved facilities, magnet school programs, and student transportation in an unprecedented effort to eradicate the lingering vestiges of

discrimination. The results of these efforts dramatically improved racial balance. As to the racial balance vestige, in Dr. Rossell's opinion, the District had achieved unitary status in 1997. See Exh. 52, pp. 80-81, 90-98; Tr. p. 123, line 23 - p. 124, line 13.

As a result of its racial balance achievements in 1997, the KCMSD eliminated any link the current racial imbalance has to prior *de jure* segregation. Absent such a causal link, the Court cannot continue exercise of its remedial authority over the racial balance vestige. See Freeman, 503 U.S. at 491, 112 S. Ct. at 1445 (“[T]he district court may determine that it will not order further remedies in the area of student assignment where racial imbalance is not traceable, in a proximate way, to constitutional violations.”).

IV. CONCLUSION

The Court finds that the KCMSD has demonstrated good faith compliance to the Court's decree and eliminated the vestige of racial balance to the extent practicable. Furthermore, the Court determines that any current racial imbalance in the KCMSD is no longer a proximate cause of prior *de jure* segregation. As a result, the KCMSD is entitled to a declaration of unitary status with regard to racial balance. In addition, the KCMSD is declared unitary with regard to the closely tied vestiges of budget and transportation. Lastly, the parties have agreed that the District has fulfilled its obligations with regard to facilities and should be declared unitary with regard to this vestige.

Having declared the KCMSD unitary with regard to facilities, budget, transportation, and racial balance, the District's only remaining discriminatory vestige is that of the student achievement gap. All efforts must be directed at improving the academic standing of the KCMSD.

Based on the foregoing discussion, the Court hereby

GRANTS the KCMSD motion for partial unitary status with regard to the facilities, budget, transportation, and racial balance vestiges of prior *de jure* segregation.

IT IS SO ORDERED.

/s/ DEAN WHIPPLE
Dean Whipple
United States District Judge

Date: March 29, 2002