

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

Chinyere Jenkins, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 77-0420-CV-W-1
)	
School District of Kansas City,)	
Missouri, et al.,)	
)	
Defendants.)	

**KCMSD’S REPLY TO PLAINTIFFS’ PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiffs’ Proposed Findings of Fact and Conclusions of Law (“Plaintiffs’ Brief”) do not provide sufficient support for the denial of the Motion for Unitary Status filed by the Kansas City, Missouri School District (“KCMSD”). This Reply supplements KCMSD’s Proposed Findings of Fact and Conclusions of Law (Dock. No. 5111) to respond to Plaintiffs’ specific arguments. In brackets at the beginning of each paragraph throughout this Reply, KCMSD suggests where these supplemental findings of fact and conclusions of law could be added to KCMSD’s Post Hearing Findings of Fact and Conclusions of Law (“KCMSD FOF”).

A. KCMSD Has Complied With The Court’s Orders, In Good Faith, For A Reasonable Time

1. [After KCMSD FOF ¶18] Plaintiffs argue that two provisions of the Accountability and Professional Development Plans have not been completely satisfied. Plaintiffs’ Brief at 41-42, 45-47. These provisions relate to evaluation of central office personnel and the number of people hired at the central office to support job-embedded professional development. These are minor specific provisions in the context of 18 years of KCMSD’s implementation of numerous complex Court Orders. In the overall course of Court Order

compliance in this case, and even in the area of student achievement, these are not areas of such significant concern that non-performance by the KCMSD would stand in the way of a finding of substantial compliance with the Court Orders. There is no question, however, that KCMSD has taken action on both of these issues. The only dispute is whether the action taken is sufficient.

2. [After KCMSD FOF ¶ 18] Plaintiffs claim that KCMSD has not “fully implemented” the Accountability Plan because performance-based evaluations of all central office personnel have not been completed.¹ The Accountability Plan requires that KCMSD develop a system of central office evaluation, but it does not state that each evaluation must be complete before that task is satisfied. KCMSD Ex. 1 at 6. Plaintiffs are incorrect that the implementation of the Accountability Plan is incomplete until lower-level administrators actually are evaluated. The Accountability Plan requires that competencies and outcomes must be developed for each “Central Administration Division,” KCMSD Ex. 1 at 6, which has been done (Pl. Ex. 19). KCMSD has met its burden of establishing that it has substantially complied in good faith with the Court-ordered Accountability Plan.

3. [After KCMSD FOF ¶ 18] On the 12 “new District-level positions for highly qualified content area specialists” required by ¶ 5 of the May 8, 2002 Order, the parties seem to have a semantic difference over whether only District instructional coaches “count” toward this requirement. The Plaintiffs so contend, and when a District witness was questioned about whether 12 District instructional coaches had been hired, agreed that they had not. Tr. I 57 (P. Rowles). KCMSD contends, however, that both District instructional coaches and District resource teachers function as content-area specialists. There were seven new District

¹ Plaintiffs’ suggestion that the Administration unnecessarily delayed implementation of the central office evaluation portion of the Accountability Plan by seeking input from the Board, Plaintiffs’ Brief at 41, is inconsistent with the Plaintiffs’ emphasis elsewhere on the importance of Board support for Administration initiatives.

instructional coaches for 2002-2003, four resource teachers who were newly assigned at the District level, and one new resource teacher to work with new and beginning teachers, Tr. IV 729-32 (Dr. B. Taylor), for a total of 12.

4. [After KCMSD FOF ¶ 18] Plaintiffs assert that the resource teachers should not count as highly qualified content area specialists because: (1) the resource teacher positions are not new; and (2) the resource teachers provide support in areas other than Communication Arts and Mathematics. Plaintiffs' argument is flawed in several respects. First, while KCMSD had resource teachers assigned to specific schools during the 2001-2002 school year, four new District-level positions were created for the 2002-2003 school year. Tr. IV 761-65 (Dr. B. Taylor). Second, the Court's May 8, 2002 Order, in language that the parties submitted to the Court, does not limit the new content area specialists to Communication Arts and Mathematics. The Court finds that KCMSD has substantially complied in good faith with the May 8, 2002 Order requiring the addition of 12 content area specialists.

5. [After KCMSD FOF ¶ 18] Plaintiffs further argue that the degree of implementation of professional development from school-to-school is uneven, and that there has been some confusion in the schools about implementation issues. Plaintiffs' Brief at 47-48. These issues simply do not rise to a lack of substantial compliance with Court Orders. They are the kind of wrinkles in implementation that would be expected in any complex undertaking. Plaintiffs are not correct that this Court should await some level of high enthusiasm or "institutionalization" of professional development at every school, or further testing of whether it is "effective" beyond elimination of the vestiges identified in the 1997 Order.

6. [After KCMSD FOF ¶ 22] Plaintiffs point out that the Court's most recent order concerning professional development was only entered on May 8, 2002, and argue that

compliance is too short-lived to be for a reasonable period of time.² The May 8, 2002 Order, however, put in place a few remaining structural elements of the professional development process that were agreed to by the parties. Significant implementation of job-embedded professional development, and performance of many of the specific requirements of the 1999 Professional Development Plan, had been accomplished by the KCMSD much earlier.³ The evidence also shows, and the Court finds, that job-embedded professional development was occurring as part of the educational process in many KCMSD schools before May 2002.⁴

7. [After KCMSD FOF ¶ 32] KCMSD has evidenced a good-faith commitment to the continued implementation of the educational improvements in the remedial plans and orders. The Court is confident, based on the assurances of many KCMSD witnesses, that the professional development work begun under the Court Orders will continue.⁵ As Board President Mauro testified, since he has held a leadership position on the Board, the Board has made certain that the Court's orders have been carried out. Tr. IV. 806. Moreover, Dr. Taylor, Mr. Mauro and Board Vice-President Smith all assured this Court of KCMSD's commitment to

² Plaintiffs repeatedly embellish their argument that compliance with the Court Orders has not transpired for a reasonable time with suggestions that the adoption of final orders and plans is very recent. *E.g.*, Plaintiffs' Brief at 41 (updated Accountability Plan filed in February 2003). Without belaboring the record of events leading up to the most recent filings, the Court views many of Plaintiffs' statements as misleading. All issues concerning KCMSD's obligations under the Accountability Plan, for example, were resolved almost a year earlier. Order of March 20, 2002, Dock. No. 5000. The filing of the plan in February 2003 was a formality that drew no response from any party and no order from the Court.

³ *See* KCMSD FOF ¶¶ 15, 18 – 20.

⁴ This implementation well before 2002-03 was not limited to the eight so-called demonstration schools, as Plaintiffs suggest. Plaintiffs' Brief at 53. In fact, the demonstration schools received educators from numerous other schools who saw and participated in job-embedded professional development. KCMSD FOF ¶¶ 19, 20.

⁵ Of course, once unitary status is achieved, KCMSD should make its own educational decisions without court involvement. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Davis v. School Dist. of Pontiac*, 95 F. Supp.2d 688 (E.D. Mich. 2000). Plaintiffs commend to the Court the Fifth Circuit's practice of exercising jurisdiction for at least three years after the requirements for unitary status are met. Plaintiffs' Brief at 4 n. 3. This practice apparently is related to the Fifth Circuit's distinction between a school district that is "unitary" and one that has achieved "unitary status," which the Supreme Court specifically disapproved in *Dowell*. 498 U.S. at 245. This Court accordingly declines to follow that practice.

continue the educational initiatives in the Court's orders and to improve student achievement. Tr. IV 739-42 (Dr. B. Taylor); Tr. IV 800-03 (A. Mauro); Tr. II 382-388 (D. Smith).

8. [After KCMSD FOF ¶ 32] Plaintiffs have trivial bases for their questioning of KCMSD's good faith commitment to continued implementation of educational reforms, pointing to the Superintendent's spelling of "embedded"⁶ and the Board's "lax" oversight of the Superintendent's central office personnel evaluations. Plaintiffs' Brief at 57. Plaintiffs do not question the truthfulness of the assurances given by the District's leadership of their good-faith commitment, and Plaintiffs note that the performance of the Board and the administration in implementing the remedial plans has improved in the last two years. Plaintiffs' Brief at 56, 59. While Plaintiffs might be more convinced of the Board's good faith commitment if the Board issued some formal declarations to that effect, the Court's Orders and the case law do not require the Board or KCMSD to do so. The enactment or adoption of Board policies regarding future implementation of the remedial plans is not a prerequisite to a finding of good faith, or to unitary status. This Court is confident, relying on the sworn testimony of the Superintendent and Board members, that KCMSD has shown a good-faith commitment to treating students equitably in compliance with the Constitution and to continued implementation of the educational programs established in the remedy plans.

B. KCMSD Has Eliminated The Vestiges Of Segregation

9. [After KCMSD FOF ¶ 50] Plaintiffs argue strenuously that the KCMSD's evidence does not support the conclusion that the achievement gap has been reduced to the extent required by the 1997 Order. Plaintiffs have not offered any data analysis of their own, so

⁶ Plaintiffs' argument that Dr. Taylor's spelling of the word "embedded" shows a lack of familiarity with JEPD is unfounded. As noted in *Webster's Dictionary*, "embedded" may also be spelled "imbedded" (Dr. Taylor's spelling). More importantly, knowledge of the proper spelling of "embedded" is irrelevant to the commitment to implement the Court's remedial orders.

there is no record evidence on the extent of changes in the achievement gap other than that offered by the KCMSD and Dr. Podgursky. Plaintiffs argue, however, that there are several flaws in Dr. Podgursky's analysis and that this Court should not accept it to support the finding that the achievement gap between black and white students has reduced in the KCMSD to the extent required by the 1997 Order. The Court declines to make the findings suggested by Plaintiffs.

10. [After KCMSD FOF ¶ 50] Plaintiffs urge that Dr. Podgursky's analysis is flawed because it does not use tests of statistical significance or "confidence intervals," a statistical method of stating that an observation fluctuates due to measurement and sampling error. Pl. Ex. 56 at 5.⁷ In other words, Plaintiffs urge that, once Dr. Podgursky has calculated the change in mean test scores of black students over time, and the mean test scores of white students over time, and computed the change in the difference between the white mean and the black mean, his conclusion should be qualified with a statement that the change is a certain percentage or NCE difference "plus or minus" some range of potential error.

11. [After KCMSD FOF ¶ 50] Dr. Podgursky testified that he did not use confidence intervals because "that's not what Judge Clark was talking about" in the 1997 Order. Tr. III 516 (Dr. M. Podgursky). His conclusion was "that you could read Judge Clark's order as just a statement about the average, the observed average decline." Tr. III 516 (Dr. M. Podgursky). Unlike Dr. Trent's analysis on which the 1997 Order relied, which was an effort to state the causal effect of various factors, Dr. Podgursky simply was measuring changes in the gap. Tr. III at 544, 557-58 (Dr. M. Podgursky). Plaintiffs cite cases concerning the use of statistics to support inferences of discrimination in proving discrimination liability cases. Plaintiffs' Brief at

⁷ Plaintiffs' experts raised the confidence level issue late in the preparation for the hearing. Tr. III 558 (Dr. M. Podgursky) (Dr. Poggio did not raise confidence interval issue in response to Dr. Podgursky's first report).

10-11, 14. These cases are inapposite. The Court is not being asked to use statistical data to determine whether discrimination can be inferred because, for example, an employer hired many fewer African-Americans than were available in a labor pool. The question before the Court is simply whether a specific numerical target has been met.

12. [After KCMSD FOF ¶ 50] Dr. Podgursky's analysis is not a sample in the way that term ordinarily is used. Tr. III 517 (Dr. M. Podgursky). The MAP scores Dr. Podgursky used were not a sample drawn from the available MAP scores; he used all of the MAP scores available. Tr. III 517, 533 (Dr. M. Podgursky); Pl. Ex. 72 at 48 (Dr. A. Porter).⁸ Plaintiffs characterize the small number of white students whose test scores are available for analysis as a small data set. Plaintiffs' Brief at 10-11, 14. It is not a sample at all, but the entire universe of white test scores available. That is not the product of any statistical technique, but simply the reality of the student demographics of the KCMSD.

13. [After KCMSD FOF ¶ 50] While DESE reports confidence intervals to school districts with MAP scores, Pl. Ex. 71, it does not apply confidence intervals when it makes decisions using MAP scores with significant consequences for schools and school districts, such as applying cut-offs for performance levels. Tr. III 518, 558-60 (Dr. M. Podgursky); Tr. III 413-15 (Dr. B. Schulte); KCMSD Ex. 24 at 29-35. DESE takes significant action, such as designating schools for improvement, based on changes in test scores from one school year to the next (without using confidence intervals). Tr. III 561 (Dr. M. Podgursky). Plaintiffs' own

⁸ Plaintiffs also suggest that Dr. Podgursky's analysis is "ipsative," or redundant, because it states conclusions regarding the MAP scores using scale scores, the MAP index, and the Terra Nova scores (which are part of the MAP). Tr. IV 631-33 (Dr. J. Poggio); Plaintiffs' Brief at 17-18. Dr. Podgursky used multiple measures for two good reasons: first, that Dr. Poggio, one of the Plaintiffs' experts, had criticized his work previously for relying only on MAP scale scores, Tr. IV 649-51 (Dr. J. Poggio), and, second, that only the Terra Nova yields an NCE score, which had been the focus of this Court's 1997 Order. The Court also finds that Dr. Podgursky was straightforward about the fact that the underlying test data that produces the index and scale scores is identical (the Terra Nova is based only on part of the MAP). KCMSD Ex. 19 at 6-10. The Court rejects any suggestion that

expert, when he assembled a post-deposition chart on achievement gap changes in Kansas school districts, did not use confidence intervals but simply subtracted to calculate the difference in mean scores over time, as Dr. Podgursky did. Tr. IV 683-86 (Dr. J. Poggio); Pl. Ex. 70.

14. [After KCMSD FOF ¶ 50] Experts on both sides agree that the extent of achievement gap reduction required by the 1997 Order is 13%. Tr. III 457-59 (Dr. M. Podgursky); Pl. Ex. 72 at 23-24, 26-27 (Dr. A. Porter); Tr. III 584 (Dr. J. Poggio). *See* Plaintiffs' Brief at 1-2. It is clear, however, that KCMSD would have to achieve reductions in the achievement gap greater than 13% if confidence intervals are calculated on the observed reductions. Dr. Porter, one of Plaintiffs' experts, agreed that the "sample statistic" would have to be greater than 13% before he would agree that a given data point achieves the 13% reduction. Pl. Ex. 72 at 57 (Dr. A. Porter). Dr. Podgursky calculated the confidence intervals that would be applied on the MAP data. KCMSD Ex. 20. The confidence intervals are wide, because of the relatively small number of white students at the higher grade levels. Tr. IV 693-95 (Dr. M. Podgursky). So, for example, Dr. Podgursky testified without contradiction that the required NCE reduction for 11th grade Communication Arts would be 1.7 NCEs if a 13% reduction were required, but 4.8 NCEs if confidence intervals are applied. Tr. IV 691-93 (Dr. M. Podgursky); KCMSD Ex. 20 at 6 (Figure 1). The required achievement gap reductions on the scale scores would have to be between 31.95% and 74.37% (depending on the grade and content area) if confidence intervals are applied, rather than the simple 13% stated in the 1997 Order. KCMSD Ex. 20 at 4 (Table 2).

15. [After KCMSD FOF ¶ 50] The Court finds that the 13%, or 2.6 NCE, requirement in the 1997 Order does not require that a statistical test be performed to calculate the

Dr. Podgursky used multiple measures to create an appearance that several independent measures supported his conclusions, or that he failed to explain the differences among the three measures.

reduction. The application of what Plaintiffs' expert here called "inferential statistics" is not appropriate. Even that expert referred to the reluctance of those working in statistics to address "proof" or "facts" rather than probabilities. Tr. III 581-82 (Dr. J. Poggio) ("[t]here are no facts in sampling statistics, they are all probabilities"). Proof is precisely what the Court must address here, and proof is what the 1997 Order requires. The Court finds that the 13% or 2.6 NCE reduction should be calculated based on observed reductions rather than confidence intervals or inferential statistics.

16. [After KCMSD FOF ¶ 50] Plaintiffs further argue that Dr. Podgursky's analysis gives too little attention to grade levels, and should not rest merely on overall findings. Pl. Ex. 56 at 2; Plaintiffs' Brief at 19. They point out that the 13% reduction was not achieved at every grade level tested on the MAP, even in the scoring method (scale scores) that shows the most positive results. *See* KCMSD Ex. 19 at 6-7 (the gap as measured by scale scores declined on all comparisons, but declined by at least 13% in 9 of 12 points of comparison). Plaintiffs' experts argue that 13% of the gap must be eliminated in all or virtually all points of comparison, or at least that there be fewer exceptions than Dr. Podgursky found. Pl. Ex. 72 at 32 (Dr. A. Porter). The Court finds that this would raise the standard for achievement gap reduction beyond the requirement of the 1997 Order. If the achievement gap in virtually every grade in virtually every subject must close by at least 13%, common sense dictates that the overall reduction must be larger than 13%. That is not what the 1997 Order says.

17. [After KCMSD FOF ¶ 50] Plaintiffs point to the fact that the 1997 Order displayed tables that showed, grade by grade, the effects of race and teacher efficacy on test scores, and increases in the achievement gap during the years students stayed in the KCMSD. 959 F. Supp. at 1159. That is correct, but the 1997 Order did not establish grade-by-grade

achievement gap reduction requirements for the KCMSD. The operative Order language simply directed “that the KCMSD reduce its achievement gap by 2.6 NCE’s within three years,” and the analysis in the Order concluded that the “mandate to the KCMSD [is] to reduce the achievement gap by 2.6 NCEs” because “13% of the initial gap and 13% of the increase in the gap may be traced to the prior discrimination within the KCMSD.” 959 F. Supp. at 1179, 1165. The 1997 Order did not, by its terms, require reductions at individual grades. The 1997 Order was the “rather precise statement of [the obligations of the KCMSD] under a desegregation decree,” *Jenkins v. Missouri*, 122 F.3d 588, 595 (8th Cir. 1997), quoting *Jenkins v. Missouri*, 515 U.S. 70, 101 (1995), that the Supreme Court called for in this case in 1995. The Court is unwilling to read into that “precise statement” requirements not found there.⁹

18. [After KCMSD FOF ¶ 50] Plaintiffs’ Brief seems to suggest that KCMSD should have conducted a grade-by-grade analysis that starts not from a 20-NCE gap but from whatever gap was stated for that grade in the 1997 Order. Plaintiffs’ Brief at 27-28.¹⁰ If Plaintiffs were correct that a grade-by-grade analysis is required to demonstrate that the achievement gap is reduced, the reduction requirement likely would be far lower than 13% for many classes, because the components underlying the conclusion that 13% of the achievement gap is a vestige of segregation were not uniform across the grades. The 1997 Order characterized the “effect of race” on test scores as between 4 and 9% and the effect of teacher efficacy as between 2 and 4%, and accordingly attributed 13% of the achievement gap (calculated by adding the high end of both ranges) to the vestiges of segregation. 959 F. Supp. at

⁹ It also is noteworthy that in affirming the 1997 Order, the Eighth Circuit described the overall percentage and NCE reductions, but said nothing about the grade-by-grade data. *Jenkins*, 122 F.3d at 598-99.

¹⁰ Plaintiffs state, without citation, that 20 NCEs is not the starting point for the reduction but “the typical measure of student score variation (the standard deviation) on the NCE scale. . . .” Plaintiffs’ Brief at 28. That assertion appears not to be based in the record or the 1997 Order. The practical impact of this assertion is unclear, because it seems to call for a very different analysis than Plaintiffs’ experts recommend.

1165. Yet, the grade-by-grade charts in the 1997 Order show that when the percentages attributable to each factor are totaled for each class, none of the classes reaches 13%. They range from 5.3% (tenth grade math) to 11.9% (sixth grade reading). The Court doubts that the Plaintiffs would want the KCMSD to be required only to reduce the vestiges of segregation at the grade-by-grade levels actually found in the 1997 Order, because that would result in a standard less than 13% (and, in many cases, substantially less) for every grade in both content areas.

19. [After KCMSD FOF ¶ 50] For example, Plaintiffs pointed at the hearing to the “Class of 2003,” and the fact that those students, who just graduated from the KCMSD, took the Mathematics MAP in 2001 and the Communication Arts MAP in 2002. Plaintiffs argue that this class failed to get the full benefit of achievement gap reduction, because their scores in those years showed 11.1% and 10.6% gap reductions, rather than the full 13%. KCMSD Ex. 19 at 21. For the tenth grade, however, the 1997 Order showed the combined effect of race and teacher efficacy on student test scores as only 5.3% (the Order did not state a grade-level measure for eleventh grade). 959 F. Supp. at 1159. By that grade-level standard, the Class of 2003 has had the full measure of achievement gap reduction found to be a vestige of segregation.

20. [After KCMSD FOF ¶ 50] What the KCMSD has presented is very responsive to the expectations of the 1997 Order. KCMSD has presented grade-by-grade and separate content area data for scrutiny and analysis, but has stated composite results as well, like the 1997 Order. The achievement gap reduction demonstrated by the KCMSD meets the test of the 1997 Order when the composite is calculated, and in the vast majority of grades and content areas.¹¹ It would not be a reasonable reading of the 1997 Order to require that the KCMSD reduce the

¹¹ See KCMSD Proposed Findings, ¶ 42-45.

achievement gap at every grade level to a higher standard than is stated for each grade level in the 1997 Order.

21. [After KCMSD FOF ¶ 54] Plaintiffs urge that tests in addition to the MAP be used to measure whether KCMSD has closed the achievement gap by at least 13%. Pl. Ex. 56 at 5-6. The KCMSD has given a test in reading and mathematics called the Stanford 9, also known as the SAT 9, in the fall of each year since 1999-2000 to grades 3 through 11. KCMSD Ex. 26. Plaintiffs suggest that further analysis should be done using the SAT 9. The evidence showed, however, and the Court finds, that introducing the SAT 9 into the achievement gap reduction analysis creates a host of problems. The SAT 9 is given in the fall, and the results on that test accordingly cannot be compared with the results of a spring test like the MAP, even according to Plaintiffs' experts. Pl. Ex. 72 at 35 (Dr. A. Porter); Tr. III 605 (Dr. J. Poggio). The evidence also established that fall testing may show greater achievement gaps and less of the influence of schools on student learning than spring testing. KCMSD Ex. 19 at 4-5; Tr. III 467-69 (Dr. M. Podgursky).

22. [After KCMSD FOF ¶ 54] Student participation in the SAT 9 is not required by the State or the KCMSD. Tr. III 409 (Dr. B. Schulte), Tr. IV 715, 719 (Dr. B. Taylor). The Superintendent would not agree that the SAT 9 is aligned with the KCMSD curriculum; he is considering eliminating SAT 9 testing (which the remedy plans and party filings before the Court permit him to do). Tr. IV 779, 716-18 (Dr. B. Taylor). The consultants hired both by the Plaintiffs and by the KCMSD to observe professional development in KCMSD schools saw much evidence of attention to the MAP, but almost no attention to the SAT 9. Tr. II 226 (Dr. J. Gouwens); Tr. II 270 (Dr. S. Hill); Tr. II 329-30 (Dr. R. Wallace).

23. [After KCMSD FOF ¶ 54] The evidence also showed low student participation in certain groups in certain years of SAT 9 testing. KCMSD Ex. 19 at 5, 20 (Table 1). Even Plaintiffs' expert recommends a complex analysis of the characteristics of the students not taking the SAT 9 to see if they are typical of the District before concluding whether the SAT 9 should be part of the analysis. Tr. III 605-10, Tr. IV 617-19, 644-46 (Dr. J. Poggio); Plaintiffs' Brief at 27 (suggesting an analysis that includes use of previous year's test scores to predict future test scores). It is unknown what such an analysis would show. Accordingly, the evidence before the Court does not support the conclusion that it is appropriate to include the SAT 9 in an analysis of the achievement gap.

24. [After KCMSD FOF ¶ 54] Plaintiffs also questioned why the KCMSD did not include in its analysis the Iowa Test of Basic Skills (ITBS) data for years following the data on which the Court relied in the 1997 Order. The Court finds this suggestion peculiar. All of the parties agreed in the Assessment Plan in 1999 that the KCMSD should dispense with the ITBS, a nationally normed, multiple-choice test, in favor of tests that provide a fuller and richer assessment. *Accord*, Pl. Ex. 72 at 43-44 (Dr. A. Porter) (supporting the MAP's use of performance items, such as required student writing, in addition to multiple choice questions); Pl. Ex. 72 at 68 (Dr. A. Porter) ("certainly do[es] not" quarrel with the decision to abandon ITBS); Tr. IV 622 (Dr. J. Poggio) ("I don't think [the ITBS] was great, I didn't have a great admiration of the ITBS at that point"). This Court previously has observed that "MAP assessments reportedly provide more accurate measurements of student learning and better tools for teaching than the ITBS." Order of July 6, 2000 (Dock. No. 4860) at 13.

25. [After KCMSD FOF ¶ 54] In addition, the evidence shows that the KCMSD changed the reporting of student race on the ITBS from black and white to minority/non-

minority in 1993-94. KCMSD Ex. 26. According to Plaintiffs' expert Dr. Porter, it is a "[b]ig problem" to compare achievement gaps on tests reporting minority/non-minority with black/white, if there are Hispanics and other minorities enrolled.¹² Pl. Ex. 72 at 67 (Dr. A. Porter). Dr. Poggio simply would not use the ITBS for 1993-94 through 1996-97, because the reporting categories were minority/non-minority. Tr. IV 647-49 (Dr. J. Poggio); KCMSD Ex. 26.

26. [After KCMSD FOF ¶ 54] Plaintiffs' arguments do not undermine the Court's finding that the MAP is the proper measure of achievement gap reduction. Even assuming the SAT 9 or other tests were factored into the analysis, they showed less reduction or inconsistent reduction of the achievement gap,¹³ the Court could not plausibly hold that such evidence outweighs the MAP data and demonstrates that the gap is not closed, since the MAP is the State's mandatory test for accreditation and accountability purposes. The Plaintiffs would have the 1997 Order require that achievement gap reduction be demonstrated on any and all tests given by the KCMSD. That argument, like others made by the Plaintiffs, would have the practical effect of ratcheting up the standard set in the 1997 Order, which this Court will not do.

27. [After KCMSD FOF ¶ 54] Plaintiffs also urge that the impact of charter schools undermines the confidence that the Court should place in the conclusion that the achievement gap has reduced by at least 13%. Plaintiffs' Brief at 19-20. It is true that many students resident in the KCMSD enrolled in charter schools since they became available in fall of 1999, but Dr. Podgursky took account of charter schools in his analysis. KCMSD Ex. 19 at 10-13.

¹² There are non-black minority students in the KCMSD. Currently, approximately 13% of District students are Latino, 2% are Asian, and less than 1% are Native American. Tr. IV 712-13 (Dr. B. Taylor).

¹³ Plaintiffs suggest that work papers of Dr. Podgursky concerning the SAT 9 (not included in his final report) show variability year to year in whether the gap is closing. Pl. Ex. 58; Plaintiffs' Brief at 25. No one asked Dr. Podgursky about the completeness or correctness of that document, which is marked "draft." The Plaintiffs'

Dr. Podgursky concluded that the impact of charter schools over time on the achievement levels in the KCMSD likely is modest and cannot be stated with any certainty because data simply are not available that tie the achievement of charter school students to their schools of previous attendance. Tr. III 550 (Dr. M. Podgursky). So, for example, it is impossible to know whether relatively high scoring white students now in charter schools previously were KCMSD students, private school students, or home schooled. The Court is not willing to discount the analysis the KCMSD presented, and hold the District under federal court supervision indefinitely, because the achievement gap data on charter school students previously enrolled in the KCMSD is not separately available.

28. [After KCMSD FOF ¶[54] Plaintiffs further argue that the Court should not find that the achievement gap has been reduced to the extent required in the 1997 Order until the reduction is stable for some period of time. Pl. Ex. 56 at 8. The report by Plaintiffs' experts urged that an analysis of the achievement gap should "extend three to five years past the time at which the gap first meets the criterion of a 13% reduction." Pl. Ex. 56 at 9. *See* Plaintiffs' Brief at 12.

29. [After KCMSD FOF ¶[54] Plaintiffs' experts conclude that "performance data and information are not available to do a proper and complete evaluation at this time," but that "data will be available through the state and district assessment systems over the next few years to address the core charge of" the 1997 Order. Pl. Ex. 56 at 11-12; *accord*, Tr. IV 670 (Dr. J. Poggio) ("there is insufficient data at this time to speak to the issue of has the criteria been met"). (Plaintiffs' experts apparently believe that data collection is not complete, and would disregard some early years of MAP administration, believing some gains made in the early years of a new

expert who testified about the papers could not vouch for their accuracy, Tr. IV 646-47 (Dr. J. Poggio), so the Court can draw no conclusions from them.

test are not attributable to real increases in learning. However, they are unable to cite to any research authority that this claimed effect differs between black and white children. Pl. Ex. 72 at 53 (Dr. A. Porter.)

30. [After KCMSD FOF ¶[54] Plaintiffs suggest an alternative method of analysis, in which graphs plotting mean achievement levels by grade and content area for white and black students would be developed separately by years. Pl. Ex. 56 at 9. A confidence level would be placed around the gap, minus 87% (the part of the gap that, under the 1997 Order, is attributable to factors other than segregation).

31. [After KCMSD FOF ¶[54] The Court is unwilling to wait for a “few years” to gather data, and then conduct an analysis, or to require some years of stability once the achievement gap reduction has been achieved. In the 1997 Order, the Court required that the KCMSD meet the 13% level of achievement gap reduction in three years. 959 F. Supp. at 1165, 1179. The Eighth Circuit repeated that expectation in affirming the 1997 Order. *Jenkins*, 122 F.3d at 601-02. It would be inconsistent with that holding for the Court now to find that five years of MAP data in Mathematics and four years of MAP data in Communication Arts are insufficient to conduct an analysis of the gap reduction.¹⁴

32. [After KCMSD FOF ¶[54] Moreover, the testimony on how the Plaintiffs would have this analysis done is confused and contradictory. The following chart shows basic differences in the testimony of Plaintiffs’ two experts on how they would do such an analysis:

¹⁴ Plaintiffs seem to favor DESE’s method of viewing achievement gap reduction over a five-year period. Plaintiffs’ Brief at 14-16. Their reasoning is not clear. Dr. Podgursky’s analysis looked at scores at the beginning and end of a similar period (five years for Mathematics and four years for Communication Arts). DESE’s method does not calculate an overall reduction, as the 1997 Order requires, but is based on a count of the number of times that the gap reduces, rather than increases, over a five-year period. That is a fundamentally different measure than is called for in the 1997 Order. Tr. III 420-21 (Dr. B. Schulte).

	Dr. Porter	Dr. Poggio
Content areas to be covered	Reading, math, science, social studies (Pl. Ex. 72 at 58)	Reading, math (Tr. IV 664)
Whole confidence band below the 0 line?	Yes (Pl. Ex. 72 at 30, 54)	No (Tr. IV 664-66; KCMSD Ex. 36)
How long gap reduction of 13% to be sustained	3 – 5 years (Pl. Ex. 72 at 58)	Maybe as little as 2 years (Tr. IV 671-72)
Use composite measure? ¹⁵	Yes (Pl. Ex. 72 at 61-62)	Only if no “anomalies in the data” (Tr. IV 668-69)

33. [After KCMSD FOF ¶ 54] The Court declines to hold the KCMSD under Court jurisdiction for several more years of analysis. The Court should relinquish jurisdiction upon convincing proof that the vestiges of segregation have been eliminated, because “necessary concern for the important values of local control of public school system dictates that a federal court’s regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.” *Dowell*, 498 U.S. at 248, quoting *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring). The Court finds the remedy ordered by this Court has been effective to eliminate the vestiges of segregation.

¹⁵ Plaintiffs argue that Dr. Podgursky’s composite measures are based on “averaging” and that a composite permits some grades at which achievement gap reduction is greater than 13% to compensate for grades at which the reduction is less. Plaintiffs’ Brief at 34. Plaintiffs’ own experts, however, both agreed on the usefulness of a composite measure.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were electronically mailed this 27th day of June, 2003 to:

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