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Quest for Unitary Status: The East Baton Rouge Parish School Desegregation Case

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> *This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least . . . .*[1]

The fog of confusion created by the school desegregation case in East Baton Rouge Parish has loomed over the school system for more than forty-five years. In this modern-day *Jarndyce v. Jarndyce*,[2] the battle between the private citizens of East Baton Rouge Parish and the School Board has continued to draw media attention as the parties "duke it out" in the federal court system to rectify the injustices of past and present discrimination within the school system. Although the case has remained very active on the docket of the District Court for the Middle District of Louisiana during this time, little progress has been made in restoring the school system to the control of local authority.

Since the inception of school desegregation in the 1950s, the United States Supreme Court has continued to manifest a desire for schools to be returned to the control of local authorities, but the Supreme Court has been slow to enumerate legal standards necessary for the termination of judicial control. However, in the past decade, the fog has begun to lift as the Court has gradually revealed what is required for a school system to be released from judicial control and granted unitary status.

This note will show that the East Baton Rouge Parish School System is ready to be released from the control of the district court. Part I lays out the facts and history of the East Baton Rouge Parish school desegregation case. Part II provides a history of the federal court's role in school desegregation. In Part III the concept of unitary status as established by the United States Supreme Court is discussed,

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1. Charles Dickens, Bleak House 4 (Bantam Books 1992) (1853).

2. *Id.* According to Dickens, this case originated before the close of the eighteenth century and, in 1853 when *Bleak House* was published, had not yet been resolved. Also, "more than double the amount of seventy thousand pounds ha[d] been swallowed up in costs." *Id.* at xxvi. This is analogous to the East Baton Rouge Parish desegregation case as it has perpetuated for almost half a century and cumulated millions of dollars in legal fees.

as well as the evolution of the standards established by the Court for determining whether a school system should be released from judicial control. Part IV reviews the recent trend in the United States circuit courts of relaxing the application of these standards, indicating the courts' growing interest in returning schools to local control. Finally, Part V examines the application of these standards to the East Baton Rouge Parish desegregation case including what evidence the school board will need to bring forth in order to finally be granted unitary status and freed from the control of the U.S. District Court.

I. THE FOG SETS IN: *DAVIS V. EAST BATON ROUGE PARISH SCHOOL BOARD*

The East Baton Rouge Parish school desegregation case[3] was filed in 1956 in response to the United States Supreme Court decision in *Brown v. Board of Education*.[4] In 1960, the Federal District Court for the Middle District of Louisiana issued an order prohibiting the East Baton Rouge School Board from continuing to operate a racially segregated school system.[5] Upon order of the court, the school board submitted a "freedom of choice" desegregation plan that was adopted by the court in 1963.[6] The plaintiffs to the litigation appealed the plan's approval, and the decision was reversed at the appellate level.[7] In 1969, Dr. D'Orsay Bryant and Mr. Alphonso O. Potter, active officers within the National Association for the Advancement of

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3. Davis v. East Baton Rouge Parish Sch. Bd., 570 F.2d 1260, 1261 (5th Cir. 1978).

4. 347 U.S. 483, 74 S. Ct. 686 (1954).

5. Citizens Task Force on Education Improvement, *Our Kids... Our Future: A Community Proposal to Return E.B.R. Public Schools Back to the Community, Background and History*, at http://www.ourkidsourfuture.org/background/background.html, (last visited Sept. 13, 2001).

6. *Id.* According to the "freedom of choice" plan, all students had the right to attend the school of his or her choice, subject to reasonable restrictions and limitations. Davis v. East Baton Rouge Sch. Bd., 219 F. Supp. 876, 881 (E.D. La. 1963). Transfer requests were to be filed with the school superintendent, and such transfers were to be liberally granted with no request denial being based on race or color. In making determinations as to granting or denying requests, the superintendent was allowed to consider such factors as the desire of the student and legal guardian, availability of space in the school requested for transfer, scholastic ability and achievement of the student, the student's age, etc. The plan gave the superintendent broad discretion in making decisions regarding requested transfers. *Davis*, 219 F. Supp. at 882.

7. *Supra* note 5.

Colored People (the NAACP), were allowed to intervene as plaintiffs.[8] In their motion to intervene, they alleged that the interests of local black children were not being properly represented.[9]

In 1970, the school board established a biracial committee to formulate a plan addressing the problems of student and faculty desegregation. The committee proposed a "neighborhood zoning" desegregation plan that was unanimously approved by the board and subsequently adopted by the district court.[10] The plan provided for desegregation of faculty, staff, transportation, extracurricular activities, student body composition, and school facilities. Also, in the 1970 plan, "[s]tudent assignment was based primarily on the neighborhood school concept," supplemented by a majority-to-minority (MTM)[11] transfer provision.[12] This plan for desegregation was later struck down as ineffective and, in 1981, another plan devised by the court was implemented in an attempt to "dismantle the dual educational system 'root and branch' as required by the Constitution."[13] During the next decade, dozens of orders were approved by the court to modify aspects of the 1981 plan, but the basic principles of the plan remained unchanged throughout the 1980s. In 1990, the school system began experiencing serious overcrowding problems, and the school board commenced looking for a solution to the problems of overcrowding without distorting its primary objective of desegregation.[14]

By the end of the 1995-1996 school year, the 1981 plan had failed to dismantle the dual school system.[15] Thus, in 1996, the Board proposed a new plan

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8. Davis v. East Baton Rouge Parish Sch. Bd., 570 F.2d 1260, 1261 (5th Cir. 1978).

9. *Id.*

10. *See supra* note 4.

11. A majority to minority (MTM) transfer is a tool used by the school district to assist it in meeting its obligations to become desegregated by allowing students who are presently attending school where they are in the racial majority to request transfers to schools where they are in the racial minority. Since its implementation in 1996, MTM transfers have almost tripled to more than 1700 transfer requests in the fall of the 2001-2002 school year. Charles Lussier, *EBR Schools See Drop in Transfer Requests*, The Advocate (Baton Rouge), Dec. 24, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=26789.

12. Intervenor Pl. Br. (May 25, 2001) citing *Davis*, 570 F.2d. at 1262.

13. Davis v. East Baton Rouge Parish Sch. Bd., 514 F. Supp. 869, 871 (M.D. La. 1981).

14. *See supra* note 5.

15. Davis v. East Baton Rouge Parish Sch. Bd., Transcript, R. Vol. 3, at 554-569.

> designed to raise and equalize the level of quality of the educational experience provided to the students attending the East Baton Rouge Parish Public School System, reduce the number of racially identifiable schools, stabilize and increase the number of students in the system, increase the number of students enrolled in desegregated schools, and increase interracial exposure among students.[16]

On August 2, 1996, the district court approved this Consent Decree after both the Board and the plaintiffs agreed to the provisions of the new plan.[17] Although relatively brief, the new plan contained eight major provisions, including provisions addressing community sensitive attendance zones, faculty enhancement of "racially-identifiable" black schools, and facility enhancements at "racially-identifiable" schools.[18] Since its implementation in 1996, numerous disputes have arisen regarding the interpretation and modification of the 1996 Consent Decree. Although the case has seen much activity, no explicit attention has been given to the termination of the desegregation case; instead, the parties continue to focus almost exclusively on procedural and remedial issues.[19]

On July 25, 2001, Judge John Parker, United States District Judge for the Middle District of Louisiana, resigned from the East Baton Rouge desegregation case.[20] Judge Parker, who had presided over the case for twenty-two years, expressed his dissatisfaction with the case's progress and the school board's lack of effort to comply with the 1996 Consent Decree. After Judge Parker stepped down, the case was assigned to United States District Judge James Brady, a recent addition to the federal bench.[21] Although Judge Brady has only been

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16. Davis v. East Baton Rouge Parish Sch. Bd., Transcript, R. Vol. 1, at 225.

17. Davis v. East Baton Rouge Parish Sch. Bd., Transcript, R. Vol. 1, at 226-27.

18. A desegregated school is defined in the 1996 Consent Decree as one whose student population is within 15 percentage points of the school system's racial makeup for each age group (elementary, middle school, and high school). If the student population falls outside the confines of this requirement, that school is defined as a "racially identifiable" school. Charles Lussier, *Desegregation Tool Blunted*, The Advocate (Baton Rouge), Oct. 3, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=24985 (hereinafter *Desegregation Tool*).

19. Wendy Parker, *The Future of School Desegregation*, 94 Nw. U. L. Rev. 1157, 1190 (2000).

20. Notice to Counsel, Davis v. East Baton Rouge Parish Sch. Bd. (M.D. La. 2001).

21. Charles Lussier, *Judge Parker Finally Has Enough*, The Advocate (Baton

involved with the case for a few months, he has indicated a desire to work with the parties to devise a solution to the desegregation problems in the parish. In an effort to ensure progression of the case, Judge Brady has set up informal meetings with the School Board, the original 1956 plaintiffs, the local NAACP, the U.S. Justice Department, as well as representatives from the Citizen's Task Force on Education Improvements[22] to discuss the objectives of each party to the case and to notify the parties of his expectations of the respective parties as the case continues.[23]

As is evidenced by the most recent pronouncement of the United States Fifth Circuit Court of Appeals regarding the School Board's appeal of a decision calling for the inclusion of pre-kindergarten students in school enrollment limits, the court has grown impatient with the perpetuity of the case and desires its expeditious resolution. As Judge King, Chief Judge of the United States Fifth Circuit Court of Appeals, so eloquently stated during oral arguments for the recent appeal, "[w]e can't micromanage this case."[24] However, the Fifth Circuit panel was also quick to point out that the responsibility for judicial supervision lay with the district court, not with the appellate court; and the district judge's rulings were to be given substantial weight upon review at the appellate level.

The Fifth Circuit also suggested that since Judge Brady is now presiding over the case, the parties might benefit from the possibility of his interpreting the duties of the School Board to desegregate in a different manner than Judge Parker had previously. Because desegregation jurisprudence is so broad, it allows the presiding judge much discretion in interpreting the standards as he or she personally sees fit for declaring unitary status. After all, "judicial choice is inescapable . . . 'There is no guarantee of justice except the personality

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Rouge), July 26, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=24985.

22. The Citizens Task Force on Education Improvement was allowed to intervene in the desegregation suit on Mar. 1, 2000 as an amicus. The task force's primary objective is to come up with a plan for resolution of the East Baton Rouge school desegregation case, "deliver[ing] the public school system from Court control and back to the community." *See supra* note 5, at http://www.ourkidsourfuture.org.html (last visited Sept. 13, 2001).

23. Charles Lussier, *Brady Calls Desegregation Meetings*, The Advocate (Baton Rouge), Nov. 1, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=25640.

24. Joe Gyan, Jr., *EBR Board's Appeal Heard*, The Advocate (Baton Rouge), Sept. 8, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=24309.

of the judge."[25] Based on this potential for Judge Brady to be more sympathetic to the School Board's cause as well as the imminence and necessity of ending the federal court's supervision, the school board must take affirmative steps to acquire unitary status. The time has come for the East Baton Rouge desegregation case to reach a point of finality.

II. HISTORY OF SCHOOL DESEGREGATION

In the landmark decision, *Brown I*, the Supreme Court held that racial segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment.[26] In its decision, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[27] Although the Court established this fundamental principle that racial discrimination in public education is unconstitutional, the Court failed to provide any guidance as to how states should remedy the problem. It was not until one year later in *Brown II* that the Court considered the manner in which relief was to be accorded.[28] In *Brown II*, the Court ordered schools to desegregate "with all deliberate speed," and called upon the district courts to supervise the implementation of its decree.[29] These district courts were authorized to take measures necessary for and consistent with the ultimate goal of desegregation.

Although *Brown II* established who was in charge of supervising the desegregation process, the Court's decision left much uncertainty as to how the desegregation cases should be handled and exactly what should be required in order for such cases to be resolved. It was not until 1991 when the Supreme Court handed down its decision in *Board of Education of Oklahoma City Public Schools v. Dowell*[30] that the Court began to make clear how desegregation cases should be concluded.[31]

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25. Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Cours Mirabeau*, 59 La. L. Rev. 647, 650 (1999) (citing Eugen Ehrlich, Freie Rechtsfindung und Freie Rechtswissenchaft (Leipsig 1903)).

26. 347 U.S. 483, 74 S. Ct. 686 (1954).

27. *Id.* at 495, 74 S. Ct. at 692.

28. Brown v. Bd. of Educ. of Topeka, Kan. (*Brown II*), 349 U.S. 294, 75 S. Ct. 753 (1955).

29. 349 U.S. at 301, 75 S. Ct. at 757.

30. 498 U.S. 237, 111 S. Ct. 630 (1991).

31. Daniel J. McMullen & Irene Hirata McCullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 Case W. Res. L. Rev. 75, 78 (1993).

III. THE CONCEPT OF UNITARY STATUS

The ultimate objective of any desegregation order is to restore a school system operating in constitutional compliance to the control of state and local authorities. It was not until the 1990s, however, that the Supreme Court finally addressed the issue of terminating desegregation litigation with its decisions in three cases.[32] Taken together, these three cases clearly indicated "the Supreme Court's frustration with the long pendency of school desegregation litigation, but not with the inefficacy of court-ordered remedies."[33]

In *Dowell*, the Court emphasized that judicial supervision by the District Courts was intended only as a temporary arrangement and was not to operate in perpetuity.[34] The Court established three steps necessary for a school system to prove unitary status: (1) compliance in good faith with the applicable desegregation decree since it was entered; (2) elimination of vestiges of past discrimination to the extent practicable; and (3) demonstration of commitment to future compliance with the Fourteenth Amendment that the school system "would [not] return to its former ways."[35] In devising this three-part test, the Court emphasized the temporary nature of school desegregation remedies and the importance of returning control to the authority of local school boards.[36] Once the three-part test was satisfied, control should be returned to local authority.[37]

In *Freeman v. Pitts*, the Supreme Court again stressed its frustration with the longevity of school desegregation cases.[38] Here, the Court reaffirmed the three-part *Dowell* test and even went so far as to adopt the concept of partial unitary status.[39] This incremental concept allows the court to release one part of a school district that is considered unitary from its active supervision and retain jurisdiction

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32. Parker, *supra* note 19, at 1163. The cases included Bd. of Educ. of Okla. Pub. Sch. v. Dowell, 498 U.S. 237, 111 S. Ct. 630 (1991); Freeman v. Pitts, 503 U.S. 467, 112 S. Ct. 1430 (1992); and Missouri v. Jenkins, 515 U.S. 70, 115 S. Ct. 2038 (1995).

33. Parker, *supra* note 19, at 1163.

34. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 111 S. Ct. 630 (1991).

35. Parker, *supra* note 19, at 1163 (quoting *Dowell*, 498 U.S. at 247, 111 S. Ct. at 637).

36. Parker, *supra* note 19, at 1165.

37. *Id.* at 1164-65.

38. 503 U.S. 467, 112 S. Ct. 1430 (1992).

39. *Id.* at 488-89, 112 S. Ct. at 1444-45.

over another part that is not in compliance with unitary standards.[40] In determining whether the school system had achieved unitary status, the court analyzed the factors it had previously set out in *Green v. County School Board of New Kent County, Virginia*.[41] Under *Green*, a court must confront the question of whether the school system was unitary by undertaking a fact-sensitive inquiry with respect to six factors: student assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, and facilities.[42] In *Freeman*, the Court found that the school board had achieved a unitary system with regard to student assignments, transportation, physical facilities, and extra-curricular activities; but held the school district was not unitary in every respect.[43] Vestiges of the dual system still remained in the areas of teacher and principal assignments, resource allocation, and quality of education.[44] The Court recognized that the critical beginning point in addressing the degree of compliance with a school desegregation decree is the degree of racial imbalance within the school district itself.[45] In addition to an assessment of current racial mix within the school district, an explanation for the racial imbalance was considered vital to the Court's analysis.[46] The Court recognized dramatic changes in the racial composition of the county since the inception of the desegregation decree as well as a striking change in the racial proportions of the student population.[47] After analyzing the significant fluctuations in racial composition, the Court held that proof of demographic changes following a brief period of desegregation could preclude a determination that the school system

40. *Id.* at 490-91, 112 S. Ct. at 1445-46.

41. 391 U.S. 430, 88 S. Ct. 1689 (1968). In *Green*, the Court held that the adoption of a freedom of choice plan alone did not satisfy a school district's mandatory responsibility to eliminate all vestiges of a dual system. Instead, school districts have an affirmative duty to come forward with a plan that "promises realistically to work, and promises realistically to work *now*." *Id.* at 439, 88 S. Ct. at 1694 (emphasis added).

42. *Id.* at 435, 88 S. Ct. at 1693.

43. 503 U.S. at 471, 112 S. Ct. at 1436.

44. *Id.* at 474, 112 S. Ct. at 1437.

45. *Id.*.

46. *Id.* at 474-76, 112 S. Ct. at 1437-38.

47. The school system that the District Court had desegregated in 1969 had a 5.6 percent composition of black students; by 1986, the percentage of black students in the county school system had risen to 47 percent. *Id.* at 475, 112 S. Ct. at 1438.

is responsible for present segregation.[48] In essence, the Court held that demographic factors effectively rebutted the presumption that racial imbalances were caused by *de jure* segregation policies of the school system.[49] The Court expressed its acceptance that *de facto* segregation was a natural consequence of private American behavior and not the result of discriminatory vestiges within the school systems.[50] Once the racial imbalance caused by the *de jure* violation has been remedied, the school district is under no duty to remedy imbalances caused by demographic factors.[51] The Court recognized that attempts to remedy results of demographic shifts would result in never-ending judicial supervision of school districts simply because they were *once* guilty of *de jure* segregation.[52]

The *Freeman* Court also introduced the concept of partial unitary status and indicated its acceptance of it by saying that the courts' use of equitable discretion is vital to the resolution of desegregation cases.[53] By adopting the partial unitary status approach, "a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students."[54]

In *Missouri v. Jenkins*, the Court continued its development of the standards for granting unitary status.[55] As the Court had done in *Freeman*, it again focused on proximate cause as a limit on a defendant's desegregation obligation. But, in *Jenkins*, the Court went even further. Instead of reciting the causation presumptions and noting their potential limits, the Court ignored the presumptions altogether and imposed an "incremental effect" standard to the issue of causation.[56] Under this standard, the school board may argue that current vestiges of discrimination are not caused by the action or inaction of the school board, but by private forces.[57] Taken together, the incremental effect standard and the presumptions give defendant school boards the opportunity, potentially, to excuse current disparities

48. *Freeman*, 503 U.S. at 479-80, 112 S. Ct. at 1439-40.

49. Parker, *supra* note 19, at 1170.

50. *Id.* at 1171.

51. *Freeman*, 503 U.S. at 494, 112 S. Ct. at 1447 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32, 91 S. Ct. 1267, 1283-84 (1971)).

52. *Freeman*, 503 U.S. at 495, 112 S. Ct. at 1448.

53. *Id.* at 489, 112 S. Ct. at 1445.

54. *Id.* at 493, 112 S. Ct. at 1447.

55. 515 U.S. 70, 115 S. Ct. 2038 (1995).

56. Parker, *supra* note 19, at 1172.

57. *Id.*

by arguing that such disparity is not caused by the defendant, but "by demographics, socioeconomic status, and similar factors."[58] The Court held that the ultimate issue in partially dissolving judicial supervision was "'whether the [constitutional violator] 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.'"[59]

Related to the incremental effects standard was the Court's progressively growing acceptance of *de facto* segregation. Since its decision in *Dowell*, the Court has gradually begun to show its acceptance of racial segregation as a "natural consequence of purely private behavior."[60] *Jenkins* reflects the Court's recognition of a reality in today's society that there exist racial disparities caused entirely by activities outside the scope and control of the school board. The Court seems to be indicating that its primary purpose is not to eradicate segregation, but to provide the victims of discrimination with effective remedies.[61]

This line of decisions demonstrates that school districts still must prove the absence of continuing vestiges of past discrimination, but the burden is greatly alleviated by the Court's focus on local control and its acceptance of continued segregation or immediate resegregation.[62] Put another way, the need to end the judicial responsibility of supervising the actions of the school districts outweighs the significance of remaining vestiges of segregation in the school systems.

IV. THE FOG THINS IN THE CIRCUITS

There has been an increasing tendency in the federal appellate courts to affirm district court rulings of unitary status in order to uphold the goal set out by the Supreme Court of returning school systems to the control of local and state authorities. In the brief span of time between March and October 2001, the Eleventh, Seventh, and Fourth Circuits each expressed their rising approval of declaring school systems unitary, evidencing the increasing reluctancy of courts to retain supervision if good faith efforts have been made by the respective school boards to eliminate the vestiges of a dual system.

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58. *Id.*

59. *Jenkins*, 515 U.S. at 89, 115 S. Ct. at 2049 (quoting *Dowell*, 498 U.S. at 249-50, 111 S. Ct. at 638).

60. Parker, *supra* note 19, at 1177.

61. *Id.*

62. *Id.* at 1178.

A. Eleventh Circuit's Approach: Manning v. School Board of Hillsborough County, Fla.[63]

In March 2001, the Eleventh Circuit took the federal jurisprudence promulgated in *Dowell, Freeman*, and *Jenkins* and applied it to dissolve a desegregation decree in *Manning*, the oldest active case on the docket of the Middle District of Florida.[64] The court held that demographic shifts were a significant reason for racial imbalances in the school system, and such imbalances were inevitable despite the school board's good-faith effort to eliminate such vestiges of past discrimination.[65] Therefore, the court found that the school board had overcome the presumption that racial imbalances were the result of *de jure* segregation, and the school system was deemed to have achieved unitary status.[66]

The *Manning* plaintiffs filed a class action suit in 1958 on behalf of all "minor Negro children and their parents" residing in the Hillsborough County School District.[67] In 1962, the district court found that the school board was operating a segregated school system in violation of the Fourteenth Amendment.[68] Over the next thirty years, the school system remained under the district court's judicial authority, with the most recent desegregation plan accepted by the parties and the court in 1991. In 1994, the plaintiffs moved to enforce the 1991 Consent Order which called for the elimination of single grade centers and the establishment of middle schools. The district judge deferred ruling on the motion and *sua sponte* recommitted the matter to the magistrate judge for consideration of whether the school district had become unitary, thereby eliminating the need for judicial oversight.[69]

In August 1997, the magistrate judge issued a report in which she opined that the school system had achieved unitary status, basing her findings on the application of the six *Green* factors. In addition, quality of education, a seventh ancillary factor previously examined by other courts in similar cases, was considered.[70] The magistrate judge also made factual findings regarding the defendant's good-faith

63. 244 F.3d 927 (11th Cir. 2001).
64. *Id.*
65. *Manning*, 244 F.3d at 945.
66. *Id.* at 947.
67. *Id.* at 929.
68. *Id.*
69. *Manning*, 244 F.3d at 930.
70. *Id.* at 934.

compliance with past desegregation decrees. Based on her findings, she recommended that the district court release the school system from its supervision.

After considering the magistrate's findings and recommendations, the district judge concluded that the school system had not achieved unitary status.[71] For six of the seven factors examined by the magistrate judge, the district judge adopted most, if not all, of magistrate's findings. However, with regard to student assignments, the district judge expressed disagreement with the magistrate's recommendation. Additionally, the district judge was skeptical of the school board's good-faith compliance efforts.

The critical issue in this case was whether the racial imbalances in county public schools were caused by the school board's past *de jure* segregation or, alternatively, whether the imbalances were caused by nondiscriminatory facts and circumstances.[72] Expert testimony was presented that the current racial imbalances were caused, not by the school board's actions, but rather by shifts in demographics. Based on such expert testimony, the district judge determined there existed no indication that the racial identity of the schools had been deliberately caused by the segregative practices of the school board and "'based on the totality of the evidence, a shift in demographics [was] a substantial cause of the racial identifiability in Hillsborough County's schools.'"[73] However, she still declined to grant the school system unitary status because she could not conclude that the demographic shifts were the *sole* cause of the racial imbalances.[74] Furthermore, the district judge refused to find the school board's action to be in good-faith compliance with the desegregation decree.[75] The judge faulted the defendant for not "utiliz[ing] the available techniques [to desegregate] to the maximum extent practicable" and for not demonstrating a willingness to aggressively desegregate the school district to the maximum extent practicable.[76]

On appeal, the Eleventh Circuit reiterated that in determining whether the vestiges of discrimination have been eliminated to the extent practicable, the court must examine the six areas of school operation established in *Green*.[77] Furthermore, the court specifically

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71. *Manning*, 244 F.3d at 930.
72. *Manning*, 244 F.3d at 936.
73. *Id.* at 936 (citing *Manning*, 24 F. Supp. 2d 1277, 1303 (M.D. Fla. 1998)).
74. *Manning*, 24 F. Supp. 2d at 1302.
75. *Manning*, 244 F.3d at 938-39.
76. *Manning*, 24 F. Supp. 2d at 1312, 1335.
77. 391 U.S. 430, 435, 88 S. Ct. 1689, 1693 (1968). These factors are student

endorsed the statement in *Jenkins* that "a school board has no obligation to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control."[78] In addition, the court emphasized that returning schools to local control at the earliest date possible is "essential to restor[ing] their true accountability in our governmental system . . . [w]here control lies, so too does responsibility."[79]

Traditionally, once a plaintiff proves *de jure* segregation, a presumption arises that all racial imbalances within a school district are the result of such *de jure* segregation. However, citing its previous decision in *Lockett v. Board of Education of Muscogee County School District, Georgia (Lockett II)*,[80] the court contended that a school board can rebut the presumption that racial imbalances are constitutionally violative. This presumption can be rebutted when the school board shows that some external force, which is not the result of past or present discrimination on its part and is beyond its control, substantially caused the racial imbalances.[81] Where a school board shows that demographic shifts are a substantial cause of the

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assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, and facilities.

78. *Manning*, 244 F.3d at 941 (citing *Jenkins*, 515 U.S. at 102, 115 S. Ct. at 2055-56.

79. *Id.* at 942 n.25 (citing *Freeman*, 503 U.S. at 490, 112 S. Ct. at 1445).

80. 111 F.3 839 (11th Cir. 1997). In *Lockett II*, black public school students had obtained an injunction prohibiting the school board from operating a segregated school system. When the students sought an injunction to force the board's compliance, the case went before the district court for consideration on the merits. The district court granted the school board's motion for declaration of unitary status. On appeal, the Eleventh Circuit Court of Appeals limited its discussion of the *Green* factors to student assignments since the parties to the case stipulated to the school system's eliminating the vestiges of *de jure* segregation with regard to the other five *Green* factors. The court relied on expert testimony that racial imbalances were the result of dramatic demographic changes in Muscogee County, such as an increase in the number to black students and a decrease in the number of white students, a decrease in white fertility rates, a difference in purchasing power between white and black families, a preference of white and black families to live in neighborhoods primarily composed of families of the same race, and the location of housing projects. Based on this evidence, the court concluded that racial imbalances were "the result of voluntary housing patterns and demographic change," and therefore, not a vestige of the previously dual system. *Id.* at 843.

81. *Id.* at 843.

racial imbalances, that school board can overcome the presumption of *de jure* segregation.[82] Thus, the law does not require a school board to eliminate the vestiges of past discrimination to the *maximum* extent practicable; it merely requires that vestiges of past discrimination be eliminated "to the *extent* practicable."[83]

The district judge in *Manning* erred in holding the school board to a higher standard than the law requires; the school board was only obligated to prove that racial imbalances were not the result of present or past discrimination on its part. In this case, the school board's expert evidence and testimony showing the imbalances to be the result of voluntary housing patterns and demographic shifts were sufficient to overcome the presumption, so the school system was deemed unitary.[84] The plaintiff could not undermine the strength of the school board's demographic evidence by merely asserting that demographics *alone* did not explain the racial imbalances.[85] Once the defendant establishes a rebuttal, the plaintiff must show that the demographic shifts are the result of prior *de jure* segregation or some discriminatory conduct in order to preserve the presumption of *de jure* segregation.[86]

Another important point made by the court in *Manning* concerns the district judge's failure to provide the school board with clarification of what specific steps should be taken by the school board to desegregate "to the maximum extent practicable."[87] Although the court acknowledges that the standard "maximum extent practicable" is an incorrect standard, the court duly recognizes the duty of the district judge, upon request, to provide the school board with a "precise statement" of its obligation under a consent decree.[88] Therefore, when a school board's motion to be declared unitary is denied by the district court and the defendants request a reason for the denial, the district judge has an obligation to provide specific guidance to the school board as to what steps must be taken in order for the system to achieve unitary status.[89]

The court also addressed the district judge's finding that the school board had not made a good-faith effort to comply with past

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82. *Manning*, 244 F.3d at 945.

83. *Lockett II*, 111 F.3d at 842 (emphasis added).

84. *Manning*, 244 F.3d at 945.

85. *Id.* at 944-945.

86. *Id.* at 944-945.

87. *Manning*, 28 F. Supp. 2d 1353, 1355 (M.D. Fla. 1998).

88. *Manning*, 244 F.3d at 943 citing *Jenkins*, 515 U.S. at 101, 115 S. Ct. at 2055.

89. *Id.* at 943, n.26.

federal desegregation decrees. The district judge pinpointed two areas of concern that precluded her finding the school board to be in good faith: the school board's apathy and lack of a functioning MTM program. Again, the appellate court found that the district judge had applied an erroneous legal standard, stating, "[t]he law does not require a defendant school board to take every conceivable step in attempting to desegregate."[90] Thus, the defendant's lack of a functioning MTM program does not necessarily preclude a finding of good faith compliance. As explained by the court in *Lockett II*, in determining if a school board has acted in good faith compliance, a court should not dwell on isolated discrepancies, but rather should "consider whether the school board's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations."[91] The *Manning* court found that the magistrate judge had been correct in her finding that a school board's affirmative duty to desegregate did not require adoption of the most desegregative alternative available.

Based on these findings, the Eleventh Circuit held that the Hillsborough County school system had indeed achieved unitary status. The case was remanded to the district court for its declaration of the school system as unitary, thereby terminating the judicial supervision of the school system. The Eleventh Circuit's decision in *Manning* has yet to be overruled.[92]

B. Seventh Circuit's Approach: People Who Care v. Rockford Board of Education[93]

Approximately one month after the *Manning* decision, the Seventh Circuit cited *Manning* in its decision, *People Who Care v. Rockford Board of Education.*[94] In acknowledging that the board had no legal duty to remove vestiges of societal discrimination for which it was not responsible, the court recognized that factors other than discrimination had contributed to the unequal educational attainment within the school system.[95] These factors included, but were not

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90. *Id.* at 945 (citing *Freeman*, 503 U.S. at 493, 112 S. Ct. at 1447). *Freeman* expressly rejected the premise that "heroic measure must be taken to ensure racial balance."

91. *Manning*, 244 F.3d at 946 (citing *Lockett II*, 111 F.3d at 843).

92. Also, the United States Supreme Court denied the petitioner's writ of certiorari Oct. 1, 2001.

93. 246 F.3d 1073 (7th Cir. 2001).

94. *Id.*

95. *Id.* at 1075-1076.

limited to, poverty; parental education and employment; family size; parental attitudes and behavior; prenatal, neonatal, and child health care; peer-group pressures; and ethnic culture. The court recognized that the influence of some of these factors may have been caused by or "exacerbated by discrimination," but such discrimination was not committed specifically by the defendant school board.[96] Also, in considering the length of the litigation,[97] the scale of the expenditures,[98] and the level of desegregation achievement by the school system,[99] there was compelling evidence to end the court's supervision over the school system, rather than merely modify it as urged by the plaintiffs.[100]

C. Fourth Circuit's Approach: Belk v. Charlotte-Mecklenburg Board of Education[101]

The Charlotte-Mecklenburg Schools (CMS) had operated under a federally supervised desegregation plan since 1971. This plan included limited use of racial ratios, pairing and grouping of school zones, and extensive busing. The implementation of the 1971 plan was so successful that the district court removed it from its active docket in 1975, expressing its belief that the school board was committed to achieving desegregation and well on its way to achieving unitary status. Nearly three decades later, however, CMS remained under judicial supervision. It was not until 1997 when a lawsuit was filed by a white student challenging the constitutionality of the magnet school admissions policy that the Fourth Circuit was prompted to determine the validity of the district court holding CMS worthy of unitary status. In making its determination, the court applied the *Dowell* standard of whether the Board had "complied in good faith with the desegregation

96. *Id.* at 1076.

97. The school desegregation litigation had begun years ago and resulted in a remedial decree in 1973. Since that time, the school system had been subject to the district court's oversight. *Id.* at 1074.

98. Through the end of 1999, the taxpayers of Rockford has incurred total costs of $238 million to comply with the 1996 decree and its predecessors. More than half of that amount had been incurred since 1996. Attorney fees alone were approaching $20 million. *Id.* at 1075.

99. As a result of the significant expenditures made and Rockford's policy of allowing parents to choose which public school their children would attend, the school district had succeeded in desegregating its schools by the end of 1999 when it filed its motion to dissolve the remedial decree. *Id.* at 1075.

100. *People Who Care,* 246 F.3d at 1075.

101. 269 F.3d 305 (4th Cir. 2001).

decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable."[102] Implicit in the court's use of the term "practicable" was "a reasonable limit on the duration of . . . federal supervision."[103] The Fourth Circuit applied the six *Green* factors[104] to the CMS case to determine whether the district court's account of the evidence was plausible in light of all of the facts and circumstances.[105]

In regard to student assignments, the first and perhaps most critical of the *Green* factors, the district court had adopted a plus/minus fifteen percent variance standard[106] to determine whether or not a school was racially balanced. However, if a school fell outside this variance, a "reasonable and supportable explanation" would suffice to rebut this presumption of racial imbalance.[107] The court found that since 1970, of the 126 schools in CMS, only thirty-seven schools were racially imbalanced according to the plus/minus fifteen percent variance standard for more than three years.[108] The court found that racial imbalances in schools had increased in recent years; however, the court was satisfied that "demography and geography ha[d] played the largest role in causing imbalance."[109] Based on the school board's efforts to

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102. *Dowell*, 498 U.S. at 249-50, 111 S. Ct. at 638.

103. Coalition to Save Our Children v. State Bd. of Educ. of State of Del., 90 F.3d 752, 760 (3d Cir. 1996).

104. *See Green, supra* notes 41 and 77.

105. *Belk*, 269 F.3d 305, 318.

106. The standard was a plus/minus fifteen percent variance from the district-wide ratio of black to white students. When schools were outside this variance, they were considered racially
imbalanced. *Id.* at 319.

107. *Id.* (citing Capacchione v. Charlotte-Mecklenburg Schs., 57 F. Supp.2d 246 (W.D. N.C. 1999).

108. *Id.* at 319-20 (citing *Capacchione*, 57 F. Supp.2d at 248). Twenty schools had black student bodies higher than fifteen percent above the district-wide ratio for more than three years, and only seventeen schools had black student bodies lower than fifteen percent below the district average for more than three years. Additionally, CMS had not operated a single-race school since 1970. *Id.*

109. *Id.* at 320 (citing *Capacchione*, 57 F. Supp.2d at 250). Some of the relevant statistics included the following: (1) the county population had increased from 354,656 in 1970 to 613,310 in 1997; (2) the racial composition of the county had changed from seventy-six percent white and twenty-four percent black in 1970 to sixty-eight percent white, twenty-seven percent black, and five percent other in 1997; (3) inner city and nearby suburbs had lost large numbers of white residents as they spread farther out into the formerly rural sections of the county (white flight); and (4) the school system's racial composition in 1997 was fifty percent

racially balance schools coupled with substantial growth and demographic shifts, the court held that "the present levels of imbalance [were] in no way connected with [the] *de jure* segregation once practiced in CMS."[110]

When faculty assignments were examined, the court found that in 1997-1998 only ten of CMS's 126 schools were imbalanced.[111] This small imbalance was insufficient to reject the district court's finding of unitary status. Examination of the third *Green* factor, facilities and resources, manifested inequalities in the adequacy, safety, accessibility, and appearance of the school facilities in the county. However, these disparities were found to be "functions of the age of the facilities at issue because different building standards apply when a new facility is constructed as compared to when an older facility is renovated" or expanded.[112] The court found no nexus between these disparities and any intentional racial discrimination by CMS. Additionally, the court commended CMS for its history of allocating funds in renovating old facilities on a per-pupil basis, noting that a large portion of its funds were used to improve schools in predominantly black areas.[113]

Next, the court considered issues of transportation. In 1998, five out of six students in CMS rode a bus to school. However, this service was provided free of charge for all students, regardless of race, who lived more than one and a half miles from their schools. The court found no vestiges of past discrimination is this area and held that the present state of busing "'may be about the best CMS can do.'"[114]

Regarding staff assignments, the fifth *Green* factor, the court recognized that no findings of discrimination in school staffing were ever made. Therefore, the court concluded that CMS had complied with its constitutional duties regarding staff assignments.

The final *Green* factor considered was extra-curricular activities. The evidence presented showed that black and white participation in extra-curricular activities varied from year to year, but participation was approximately equal. Disparities that existed in some areas "were not shown to be linked to the former dual system."[115]

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white, forty-two percent black, and eight percent other. *Id.* at 320 (citing *Capacchione*, 57 F. Supp.2d at 236-39).

110. *Id.* at 322 (citations omitted).

111. *Belk*, 269 F.3d at 326. The district court had used a plus/minus fifteen percent variance standard similar to the one used for student assignments. *Id.*

112. *Id.* at 327 (citing *Capacchione*, 57 F. Supp. 2d at 265).

113. *Id.* at 328 (citing *Capacchione*, 57 F. Supp. 2d at 266).

114. *Id.* at 329 (quoting *Capacchione*, 57 F. Supp. 2d at 253).

115. *Id.* at 329. Black students often outnumbered white students in holding elected student government offices while white students were better represented in

In addition to analyzing the *Green* factors, the court may, in its discretion, consider other ancillary factors not mentioned in *Green*.[116] The three additional factors the Fourth Circuit chose to consider were teacher quality, student achievement, and student discipline. In examining teacher quality, the court found that the experience level of teachers in primarily white and primarily black schools was relatively equal, with teachers in imbalanced-white schools only averaging approximately one year more teaching experience than those in imbalanced-black schools. Therefore, the court held that students were receiving equal access to quality teachers in all CMS schools.

Next, the court considered student achievement. The Fourteenth Amendment of the United States Constitution guarantees equal protection, but not equal outcomes.[117] However, if low black student achievement is the result of vestiges of past or present discrimination committed by the school system, such disparity must be eliminated to the extent practicable.[118] However, "[m]ost courts [ ], including this [one], have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination."[119] Based on expert testimony, the court held that the true causes of the achievement gap were socioeconomic factors.[120] The court recognized that while such startling gaps are disturbing, they are not the result of CMS's actions or lack thereof, so they were not the result of a residual dual system.

In the area of discipline, statistics showed that of the students disciplined from 1996 to 1998, sixty-six percent were black students.[121] However, the court noted that "'disparity does not, by

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honors programs. However, there was no evidence that CMS was responsible for these variances. *Id.*

116. *Id.* at 319.

117. *Id.* at 330 (citing *Dowell*, 498 U.S. at 249-250, 111 S. Ct. at 638).

118. *Id.*

119. *Belk*, 269 F.3d at 330 (citations omitted).

120. *Id.* at 331. Data presented at trial by an expert witness included the following: (1) A black family's average annual income was $31,000 compared to $59,000 for white families. (2) Only fifteen percent of black parents had college degrees while fifty-eight percent of white parents did. (3) CMS provided sixty-three percent of black students with free lunches; only nine percent of white students received this benefit. (4) Eighty-three percent of white students resided with both parents in a single residence compared to only forty-two percent of black students. *Id.*

121. *Id.* at 332.

itself, constitute discrimination.'"[122] CMS had adopted uniform guidelines for discipline in all of its schools so that students would receive the same level of punishment for certain offenses; therefore, the court found that CMS did not treat African-American students differently in matters of discipline.

Based on its analysis of the *Green* factors, the court found that CMS had achieved unitary status. The court recognized that the school system was not perfect, as it faced expanding student population, aging facilities, and a limited amount of funding. However, such difficulties were not found to be "vestiges of the former *de jure* system,"[123] thus the 1971 decree was dissolved, returning control to the local authorities.

As is evidenced by these three recent cases, the U.S. circuit courts are beginning to show an increasing approval of terminating federal judicial supervision of school systems. The line of jurisprudence has significantly progressed from the days of extremely strict construction of the desegregation jurisprudence in effect in the 1970's. This is clearly indicative of the courts' frustration with the longevity of school desegregation cases.[124] The courts seem more willing to compromise policies of desegregation in order to return school systems to local control.

V. HAS THE TIME FINALLY COME FOR THE FOG TO LIFT IN EAST BATON ROUGE PARISH?

Given the recent determinations of unitary status by other circuit courts coupled with the Supreme Court's increasing approval of releasing schools to the control of local authorities and its acceptance of inevitable *de facto* segregation, the time has come for the East Baton Rouge Parish School Board to shift its focus from the endless battle over procedural and remedial issues to the goal of attaining dissolution of judicial supervision. To accomplish this, the school system must prove that it has achieved unitary status. Recently, the School Board has expressed a tenacious interest in putting an end to the desegregation case making the strategic move of hiring a prominent Washington, D.C. law firm, Cooper & Kirk, to take over as lead counsel in the case. In the October 25, 2001 School Board meeting, Cooper & Kirk partner, Michael Kirk, informed the Board that based on his analysis of the Board's efforts to comply with the

122. *Id.* (citing Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 281 (W.D. N.C. 1999).

123. *Belk*, 269 F. 3d at 335.

124. Parker, *supra* note 19, at 1175.

Consent Decree and the change in demographics within East Baton Rouge Parish, the school system is unitary. Although Kirk reiterated these sentiments to reporters after the meeting, he emphasized that he would prefer to have the support of the other parties to the suit before he goes forward to seek a declaration of unitary status.[125] Relying on Kirk's opinion, the School Board voted to seek an immediate end to the desegregation case but only after discussing it with the other parties in the case.

This was the Board's first step toward seeking the court's declaration of the system as unitary. The School Board has not sought declaration of unitary status at any time during the forty-five year history of the case. One problem likely to be faced by the School Board is that according to the 1996 Consent Decree entered into by the School Board and the plaintiffs, the Board is not eligible to vitiate the decree on its own motion until 2004. However, according to General Counsel for the East Baton Rouge Parish School Board Maxwell Kees, if the system is indeed unitary, the Board has a constitutional obligation to seek the termination of judicial supervision.[126]

At the request of Judge Brady, the Board has temporarily postponed its plan to file for unitary status.[127] Judge Brady has asked all parties involved to participate in one last round of mediation before litigating the case in his court.[128] All parties agreed to his request for mediation; however, nothing in the mediation is binding without a vote of the Board. Anticipating that the mediation may not solve all the problems of the case, Judge Brady did set a trial date, if necessary, for November 12, 2002.[129]

According to Kirk, the Board has not only complied with the requirements of the 1996 Consent Decree but "greatly exceeded" many of these requisites, especially in the area of teachers, facilities,

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125. Charles Lussier, *Board Says It's Time to End Suit*, The Advocate (Baton Rouge), Oct. 26, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=25505.

126. Interview with Maxwell Kees, General Counsel East Baton Rouge Parish School System (Nov. 1, 2001).

127. Charles Lussier, *EBR says '96 Deal Exceeded*, The Advocate (Baton Rouge), Dec. 14, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=26561 (hereinafter *Deal Exceeded*).

128. Charles Lussier, *Sides Mull Last Round of Deseg Talks*, The Advocate (Baton Rouge), Dec. 6, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=26372.

129. *Id.*

and technology.[130] The School Board must present evidence of good-faith compliance with the Consent Decree and present other evidence to show that discrimination has been eliminated to the extent practicable in the areas such as the ones set out in *Green*.

A. Student Assignments

First addressing student assignments, the most controversial issue in the desegregation case, the Board claims to have eliminated the old system of black and white schools and done everything "practicable" to eliminate segregation, as required by the Consent Decree. Under the 1996 Decree, the Board had a duty to open and maintain thirty-three magnet schools, advertise these magnet schools, increase their minority enrollment, and fund this program with a minimum of 5.7 million dollars.[131] In compliance with these requirements, all thirty-three magnet programs were opened between 1996 and 1999, and magnet programs were advertised in print, radio, and television media.[132] Also, minority enrollment was enhanced with revised curricula and a Scholastic Academic Program.[133] Additionally, the Board greatly exceeded its spending requirements, investing 14 million dollars to date in magnet school programs.[134]

Another requirement of the Consent Decree was the implementation of MTM transfers.[135] Also, the Board was required to aggressively recruit transferees, particularly at racially identifiable schools.[136] In response to these requirements, the Board took affirmative steps toward compliance. Since implementation in 1996, no MTM request has ever been denied.[137] Also, due to advertising and aggressive recruiting, MTM transfer requests have significantly

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130. *Supra* note 127.

131. East Baton Rouge Parish School System Unitary Status Presentation to the United States Department of Justice at slide 5 (Nov. 19, 2001) (unpublished PowerPoint presentation, on file with the East Baton Rouge Parish School Board Office) (hereinafter "East Baton Rouge Parish Presentation").

132. *Id.* at slide 6.

133. *Id.*

134. *Id.*

135. In MTM transfers, students may transfer from schools where they are in the racial majority to schools where they are in the racial minority. Charles Lussier, *EBR Schools See Drop in Transfer Requests*, The Advocate (Baton Rouge), Dec. 24, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=26789.

136. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 7.

137. *Id.* at slide 8.

increased from 699 requests in 1996 to 1,694 requests for the 2001-2002 school year.[138]

The Decree also called for the elimination of fourteen racially identifiable schools within three years of the Decree's implementation.[139] Indicative of its good faith efforts, the Board managed to eliminate eight racially identifiable schools since the inception of the 1996 Consent Decree leaving the school system with fifty-six racially-identifiable schools.[140] However, there are legitimate explanations for the school system's failure to comply with this requirement. First, the Consent Decree was negotiated in part on the assumption that significant numbers of students would return from private schools after the Decree's implementation.[141] This has not been the case. As indicated by Chart 1, private school enrollment in East Baton Rouge Parish has continued to increase since the implementation of the Decree.[142] Second, the Consent Decree assumed that the school system's enrollment would stabilize.[143] This also has not occurred. Since the adoption of the Decree, the student attrition rate has continued to accelerate as evidenced by Chart 2.[144] Enrollment in East Baton Rouge Public Schools has dropped almost 20,000 since its peak in the 1970's when nearly 70,000 students attended parish public schools.[145] This decline in enrollment has cost the school system more than 20 million dollars in state education funding since 1994.[146]

The Board does not deny that Baton Rouge public schools are racially imbalanced, but evidence demonstrates that the imbalance is

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138. *Id.*

139. *See Desegregation Tool, supra* note 18.

140. *Id.*

141. East Baton Rouge Parish School System Statement of Compliance with Consent Decree Requirements 7 (Nov. 19, 2001) (presented to the NAACP and the U.S. Dept. of Justice at Nov. 2001 school board meeting, on file with the East Baton Rouge School Board Office) (hereinafter "EBR Statement of Compliance").

142. *See* East Baton Rouge Parish Presentation *supra* note 131, at slide 18. *See also* Chart 1 of the Appendix.

143. *See* EBR Statement of Compliance, *supra* note 141, at slide 7.

144. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 16. *See also* Chart 2 of the Appendix.

145. Charles Lussier, *EBR Down 1,900 Students*, The Advocate (Baton Rouge), Oct. 2, 2001, *available at* http://br.theadvocate.com/news/story.asp?StoryID=24965. The school system experienced a significant decrease in enrollment from the 2000-2001 school year to the 2001-2002 year. Enrollment fell from 53,188 in 2000-2001 to 51,258 in 2001-2002.

146. *Id.*

largely the product of demographic shifts that have taken place over the years. The racial composition of East Baton Rouge Parish schools has dramatically shifted in the last thirty years. As evidenced by Chart 3, since the late 1970's, the racial makeup of the school system has shifted from majority white to majority black.[147] As East Baton Rouge Parish demographics change each year, a desegregated school inevitably means a more predominantly black one since according to the Consent Decree, a desegregated school is one whose student population is within fifteen percentage points of the school system's target racial makeup for each age group based on the demographics of the parish's student population each year.[148] These numbers change annually as the school system's racial makeup shifts to a more predominately black student population.[149]

Another fact that evidences the Board's good faith efforts and its support for minority children is the fact that the School Board spends approximately 7500 to 8000 dollars per student annually on inner city schools, which are principally black, while spending only 3500 dollars per student in suburban schools, which are predominately non-black.[150] Although this inequality in student spending seems absurd, the Board's actions are an attempt to fulfill its obligations under the Consent Decree. Outside the confines of the Consent Decree, such action by the School Board would be classified as invidious reverse discrimination.

Although it is almost inevitable that racial imbalances will still exist within the school system, according to *Manning*, *People Who Care*, and *Belk*, the School Board should be able to rebut the presumption that the racial imbalances were the product of *de jure*

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147. *Id. See also* Chart 3 of the Appendix.

148. *See Desegregation Tool, supra* note 18. The school system is divided into three age groups: elementary, middle school, and high school. For the 2001-2002 school year, the target percentages are as follows:

Elementary	74.5% black
Middle School	72.2% black
High School	61.8% black

So, for example, based on these target percentages, a desegregated elementary school is one with a black population of at least 59.5 percent but not higher than 89.5 percent. Therefore, a desegregated school is indeed a primarily black school. *Id.*

149. *Id.*

150. Interview with Clayton M. Wilcox, East Baton Rouge Parish School Board Interim Superintendent, in Baton Rouge, La. (Nov. 1, 2001).

segregation caused by present and past discrimination within the school system. In *Manning*, the court declared the school system unitary despite the fact that seventeen of its schools remained racially identifiable.[151] Also, even though the student population in the county had almost doubled between 1969 and 1996, the percentage of black students in the school system remained fairly constant at approximately nineteen percent.[152] These demographic shifts were held sufficient to hold the school board in *Manning* free from fault for the continued segregation in the racially identifiable schools. *A fortiori*, the demographic shifts in the East Baton Rouge school system have been much more dramatic, so the Board's argument that remaining vestiges of discrimination are not the result of *de jure* segregative practices of the school system should be accepted by the court as viable. Additionally, in *Manning*, the 1971 Order had directed the establishment and implementation of an MTM program.[153] However, from 1977 to 1996, the School Board did not publicize the program and no MTM transfer request was made.[154] Contrary to this, the East Baton Rouge School Board has not only made significant efforts to market its MTM program, but it has granted every request made, with transfer requests increasing more than 200 percent from 1996 to 2001. For these reasons, it seems that the Board has complied with the Consent Decree with regard to student assignments.

B. Faculty and Staff Assignments

Regarding faculty and staff assignments, the 1996 Consent Decree required faculty racial balance within a plus/minus fifteen percent test similar to the one set out for racially identifiable schools.[155] It requires that no school's faculty have a racial combination more than fifteen percent removed from the overall faculty makeup of the entire school district for that level of education.[156] Since implementation of the Consent Decree, seventy-five percent of the schools meet this plus/minus fifteen percent

151. Manning v. Sch. Bd. Of Hillsborough County, Fla., 244 F.3d 927, 935 (11th Cir.), *cert denied*, 122 S. Ct. 61 (2001).

152. Manning v. Bd. of Public Instruction of Hillsborough County, Fla., 427 F.2d 874, 876 (5th Cir. 1970); Manning v. School Bd. of Hillsborough County, Fla., 24 F. Supp.2d 1277, 1292 (M.D. Fla. 1998).

153. *Manning*, 244 F.3d at 939.

154. *Id.*

155. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 9.

156. *See* EBR Statement of Compliance, *supra* note 141, at slide 3.

requirement.[157] Most schools are in compliance at the beginning of each school year due to exhaustive efforts by the school administrations; however, this less-than-100 percent compliance is attributed to the tremendous faculty attrition, particularly in racially identifiable schools that occurs during the first few months of each school year.[158] The school system makes great efforts to replace these lost faculty members, but several factors beyond the school system's control hamper these efforts.[159] First, Louisiana suffers from a severe shortage of certified teachers.[160] Also, state law requires the school system to hire the most qualified individual available when replacing these teachers, which often conflicts with the race-conscious requirements of the Consent Decree.[161]

A second mandate of the Consent Decree dealing with faculty assignments requires racially identifiable black schools to have faculty-pupil ratios equal to those at other schools within the school district.[162] In response to this requirement, the Board ensures that no racially identifiable black school has a pupil-teacher ratio higher than any other public school in East Baton Rouge Parish.[163] As evidenced by Chart 4, student-teacher ratios are slightly lower in racially identifiable schools than in predominately white schools at each educational level.[164] Also, the faculty in racially identifiably black schools is, on average, more experienced than in other parish schools.[165] Another fact that evidincing the Board's good faith effort to comply with the Consent Decree is its use of bonus and stipend incentive plans to lure faculty to commit to long-term contracts to teach at specific parish schools.[166]

A similar situation arose in *Belk*. There the court also applied a plus/minus fifteen percent variance test.[167] The court found that not all schools were in compliance with the standard;[168] however, it found

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157. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 10.

158. *See* EBR Statement of Compliance, *supra* note 141, at slides 3-4.

159. *Id.* at slide 3.

160. *Id.* at slide 3-4.

161. *Id.* at slide 4.

162. *Id.* at slide 3.

163. *Id.* at slide 4.

164. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 10. *See also* Chart 4 of the Appendix.

165. *Id.* at slide 10.

166. *Id.* at slide 4.

167. Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 326 (4th Cir. 2001).

168. In 1997-98, twelve percent of the schools failed to satisfy the requirement.

the current condition to be a far cry from the former dual system in which almost no black students had white teachers.[169] The court's conclusion that the school system evidenced no predisposition to assigning black teachers to predominately black schools and white teachers to predominately white schools was sufficient for a finding that CMS had met this *Green* factor.[170] Based on a totality of the evidence indicating the Board's good faith efforts to comply with the Consent Decree requirements regarding faculty assignments and in light of the holding in *Belk*, the actions of the Board should be sufficient to satisfy this second Green factor.

C. Facilities

Another important *Green* factor addressed in the 1996 Consent Decree is school facilities. Under the Decree, the Board was required to make repairs to racially identifiable black schools and seek sources of income to fund these recurring needs.[171] In response to this demand by the Decree, the Board obtained taxpayer approval of a somewhat comprehensive tax plan which would allow the school system to update its facilities.[172] Large portions of this funding was dedicated to curing the inequalities present in racially identifiable black schools.[173] Today, the facilities at racially identifiable black schools are comparable and, in some cases superior, to those at non-identifiable black schools.[174]

Also in reference to school facilities, the 1996 Consent Decree required the School System to appropriate at least 600,000 dollars for the 1996 through 1999 school years and 1 million dollars annually thereafter for facility enhancement.[175] This appropriated funding was to be expended in accordance with the recommendations of the facilities monitor.[176] In response to these stipulations, the Board has budgeted the requisite amounts each year, consistently spending the money in accordance with the recommendations of Dr. Gordon, the

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Id.

169. *Id.*

170. *Id.*

171. *See* EBR Statement of Compliance, *supra* note 141, at slide 2.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at slide 2, slide 6. The Consent Decree also required the appointment of a physical facilities monitor. By court order, Dr. William Gordon was appointed to this position.

facilities monitor.[177] The Board works exceedingly hard to accommodate the recommendations of Dr. Gordon as it has never refused to fund any of his suggestions for facility enhancement.[178]

The desegregation plan of the Consent Decree required the use of temporary buildings in order to provide adequate teaching stations since the Decree required the lowering of the student-teacher ratio.[179] However, these temporary buildings were only to be used short-term for the purpose of implementing the changes required by the Consent Decree regarding student-teacher ratios.[180] Use of the buildings was subject to strict supervision of the court which required the Board to make reports to the court certifying where temporary buildings would be used, that the buildings would further the interests of desegregation, and that receiver sites would not make use of emergency teaching stations.[181] Also, the Decree required the Board to commit to the reduction and eventual elimination of the temporary buildings.[182] In the fifth year of the plan, one third of the temporary buildings were to be eliminated; after eight years, seventy-five percent of the buildings were to be eliminated.[183] In response to these stringent requirements by the Decree, the Board has made good faith efforts to comply. The Board has sought court approval each time it has wished to move a temporary building to a new location and has always made all required certifications regarding the new placement of temporary buildings.[184] The Board also complied with the fifth year elimination plan of one third of the temporary buildings in use and submitted a reduction plan to the court which will allow the school system to achieve the elimination of seventy-five percent of all temporary buildings within nine years of the adoption of the decree.[185]

In *Belk*, the court found that the disparities in the area of school facilities was not attributable to the action or inaction of the School Board.[186] Based on expert testimony, current inequalities in school facilities "were functions of the age of the facilities [] because

177. EBR Statement of Compliance, *supra* note 141, at slide 2.

178. *Id.*

179. Consent Decree at 6, Davis v. East Baton Rouge Parish Sch. Bd., 56-1662-A (M.D. La. 1996).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* EBR Statement of Compliance, *supra* note 141, at slide 6.

184. *Id.*

185. *Id.* The Temporary Building Reduction Plan was approved by the court.

186. *Belk*, 269 F.3d at 327.

different building standards apply when [] new facilit[ies] are constructed as compared to when an older facility is renovated."[187] The court also considered the school system's track record in renovating old facilities, noting that "'CMS ha[d] spent a large portion of its [funding to] improv[e] schools in predominantly black areas.'"[188] Based on these findings, the court held that "any disparity as to the condition of the facilities [] was not caused by intentional discrimination by [the School Board], but instead was a [result] of the age of the facilities and the ever-present problem of allocating [] scarce funds."[189]

The compliance efforts in *Belk* were similar to those of the East Baton Rouge Parish School Board. Like CMS, the Board has taken affirmative steps toward curing disparities in school facilities, especially in racially identifiable schools. The Board's track record for complying with Consent Decree requirements regarding facilities should be sufficient to warrant the Board's satisfaction of the facilities requirement of Green.

D. Other Evidence of Good-Faith Compliance Efforts

Stressed by the court in *Manning* was the idea first introduced in *Lockett II* that in determining whether a school board has acted in good faith compliance, the court should not dwell on isolated discrepancies, but rather should consider whether the board's actions form a consistent pattern of lawful conduct aimed at eliminating the effects of previous bad acts.[190] In addition to the three specific areas of compliance efforts discussed previously, the Board has continued to show its dedication and enthusiasm to the cause of desegregating its schools. In every area of the Consent Decree requiring the appropriation of a minimum amount of funding, the School Board has not only complied, but it has consistently spent more than required in its effort to comply with desegregation requirements.[191]

In addition, the Board prides itself on strides made to upgrade technology in the parish schools.[192] The Consent Decree called for a detailed accounting of the technology needs of the school system.[193]

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187. *Id.*

188. *Id.* at 328 (citing *Capacchione*, 57 F. Supp.2d at 266).

189. *Id.* at 328.

190. *Manning*, 244 F.3d at 946 (citing *Lockett II*, 111 F.3d at 843).

191. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 12-14. *See also* Chart 5 of the Appendix.

192. *See Deal Exceeded*, *supra* note 127.

193. *See* EBR Statement of Compliance, *supra* note 141, at slide 25.

After assessing these needs, the Board was able to develop a long-term plan, now implemented, for meeting these needs.[194] Also, the Decree required the Board to spend 200,000 dollars in 1996 for planning, equipping, and training to bring the school system's technology up to date, especially targeting those schools that have been historically majority black schools.[195] Since that time, the Board has allocated 200,000 dollars each year to racially identifiable black schools to provide for their technological needs.[196] As a result of these efforts, racially identifiable black schools now have a computer to student ratio significantly lower than that required by the Consent Decree.[197]

E. Dangers of Continued Court Supervision

The Board has several well-supported concerns regarding the continuation of court supervision. According to the statistics previously presented in Charts 2 and 3, if court supervision continues, in five to ten years, the East Baton Rouge Parish School System will consist *entirely* of poor, black children.[198] This will make compliance with the Consent Decree requirements regarding student assignments even more onerous. Also, uncertainty about the future of the court's supervision of the school system is continuously driving more students away from the public school system.[199] This includes not only white middle class flight, but the 2000 and 2001 school years have indicated an increased black middle class flight from the parish public school system.[200]

Another reason school board officials are pushing for unitary status to be granted is the upcoming election in early 2003 when school officials will ask East Baton Rouge Parish voters to renew the

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 27.

199. *Id.* at slide 25. As a result of the 2000-2001 enrollment cap dispute, the school system lost 1704 students in 2000 (1510 white, 194 black) and 1852 students in 2001 (1523 white, 329 black). *Id.*

200. *Id.* at slide 24-25. In 2000, 627 white and 533 black students left the public school system to attend private schools. That same year 160 white and 60 black students opted home schooling as a preferred means of education. This trend continued in 2001 with 569 white and 409 black students moving to private schools and 173 white and 6 black students choosing to be educated at home. *Id.*

one-cent sales tax which expires in 2004.[201] This sales tax provides 286 million dollars that is needed to keep improving the school system and maintain competitive teacher salaries.[202] School officials fear that if continued, judicial supervision of the school system will deter parents who have removed their children from the public school system due to uncertainty from supporting taxes necessary to run viable schools for the poorest students in the parish.[203] Additionally, as long as judicial supervision remains intact, non-education related compliance costs, such as legal fees and administrative costs, will continue to plague the taxpayers of East Baton Rouge Parish.[204]

CONCLUSION

The declaration of the East Baton Rouge Public School System as unitary is no longer a far-fetched hope; it is now an attainable goal that can be reached quickly and efficiently with the cooperation of all interested parties. Returning the school system to the control of the local authorities will allow the school system to better cater to the needs of the citizens of East Baton Rouge Parish, eliminate the School Board's burden of excessive legal fees from its already limited budget, and alleviate the court's grueling task of supervising the school system's every move. In light of all of the federal jurisprudence discussed in this note, the East Baton Rouge Parish School System should be able to attain unitary status and be declared free from the supervision of the judiciary, putting an end to nearly a half a century of desegregation litigation and permanently lifting the fog of confusion that has loomed over the school system for so long.

*Jessica E. Watson**

201. *See Sides Mull Last Round of Deseg Talks, supra* note 128.

202. *Id.*

203. *See* East Baton Rouge Parish Presentation, *supra* note 131, at slide 27.

204. *Id.* at slide 15.

* Recipient of the Vinson & Elkins Best Student Casenote or Comment Award, 2001-2002. The author extends special thanks to Professor Paul R. Baier, George M. Armstrong, Jr. Professor of Law, Paul M. Hebert Law Center, Louisiana State University, for his insight and guidance in the creation of this casenote.

APPENDIX

Chart 1

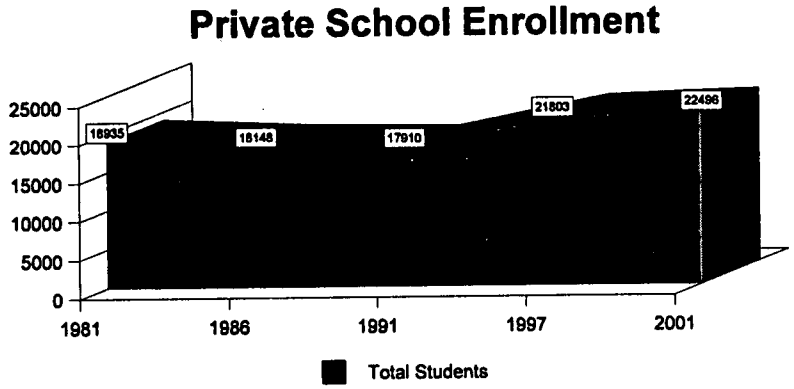

Private School Enrollment
25000
20000
15000
10000
5000
0
18935
18148
17910
21803
22496
1981
1986
1991
1997
2001
Total Students

Chart 2

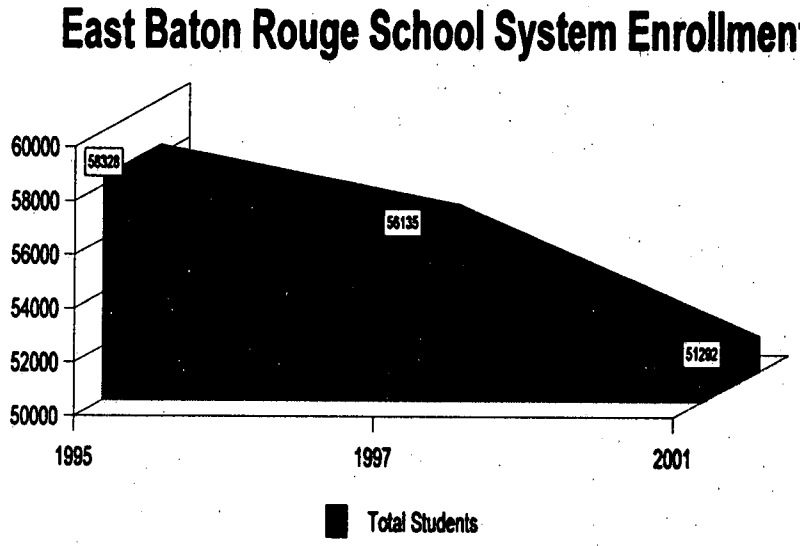

East Baton Rouge School System Enrollment
60000
58000
56000
54000
52000
50000
58328
56135
51282
1995
1997
2001
Total Students

Chart 3

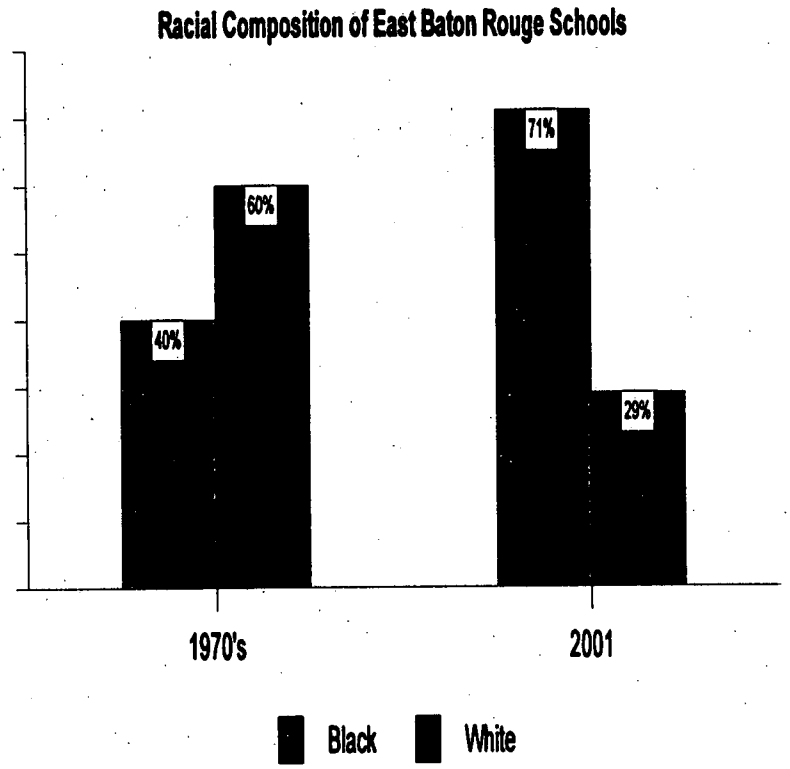

Racial Composition of East Baton Rouge Schools
40%
60%
71%
29%
1970's
2001
Black
White

Chart 4

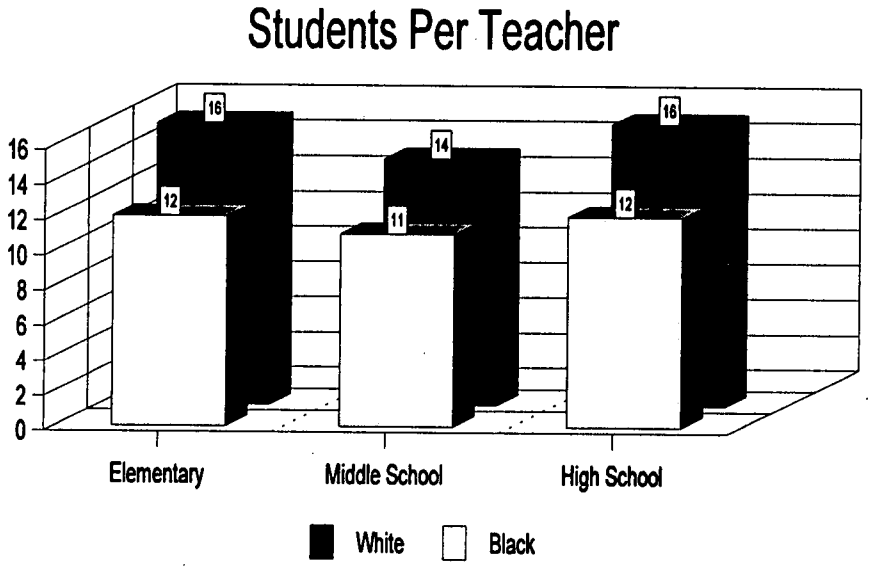
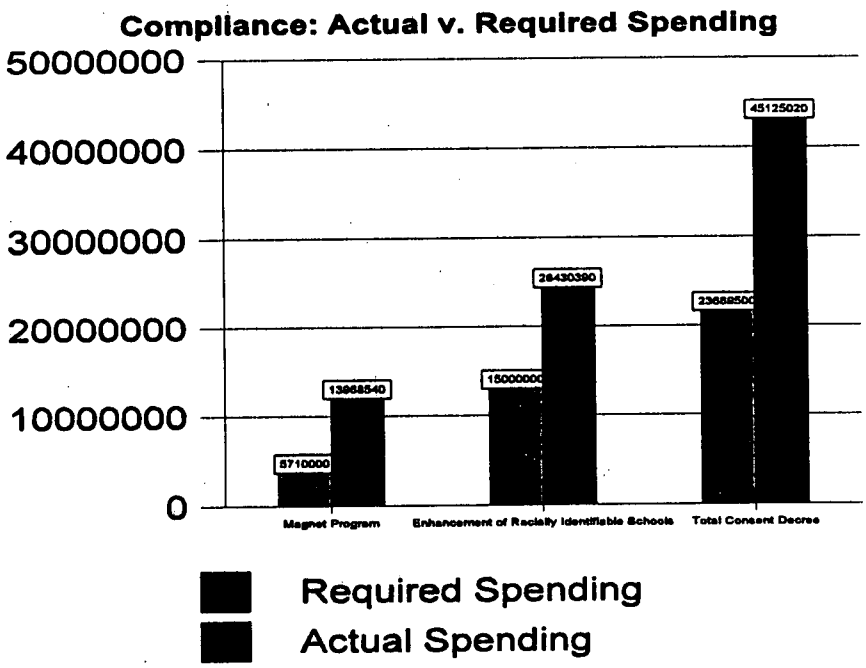
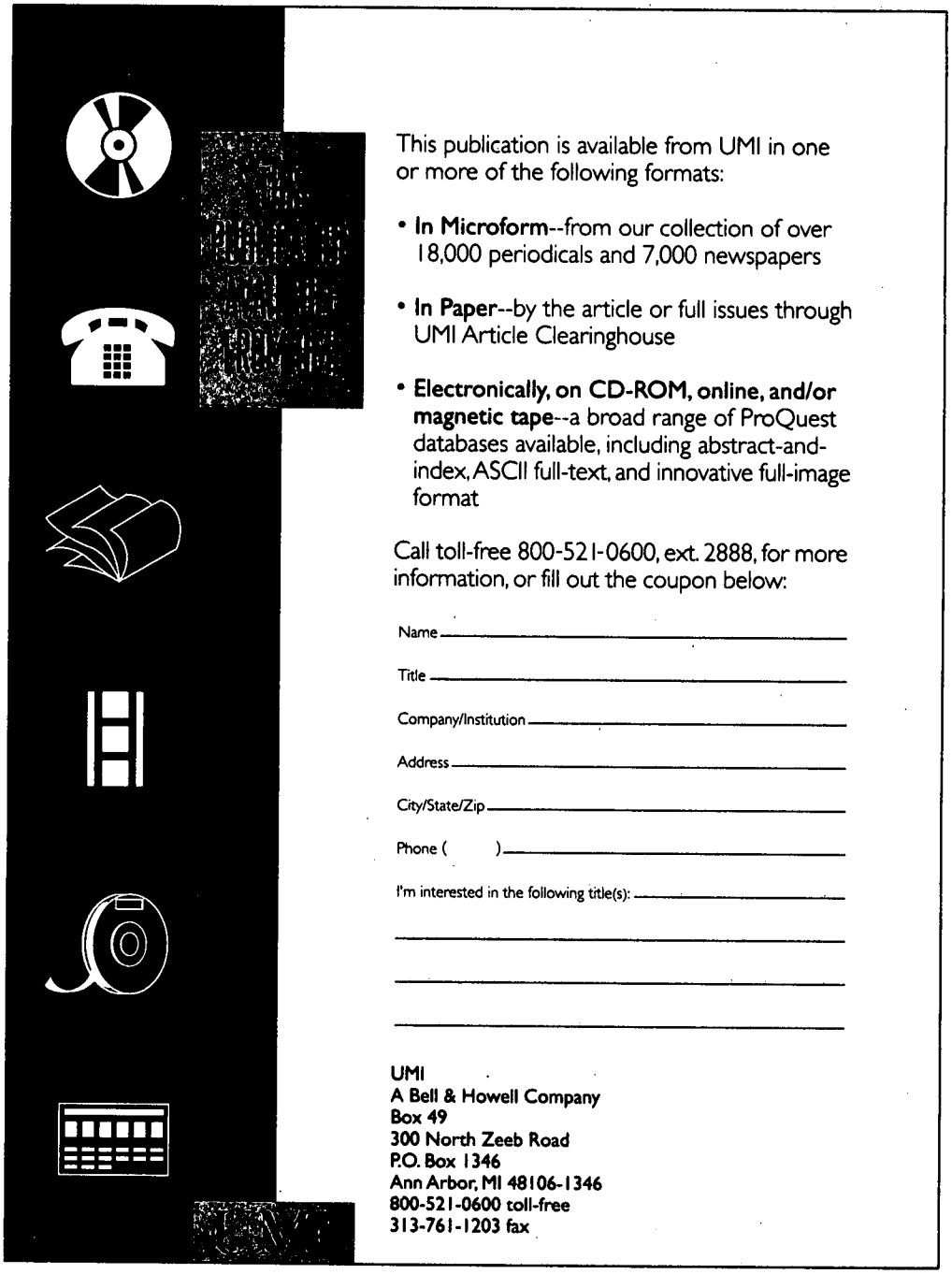

Students Per Teacher
16
14
12
10
8
6
4
2
0
16
12
14
11
16
12
Elementary
Middle School
High School
White
Black

Chart 5


Compliance: Actual v. Required Spending
50000000
40000000
30000000
20000000
10000000
0
5710000
13968540
15000000
28430390
23688500
45125020
Magnet Program
Enhancement of Racially Identifiable Schools
Total Consent Decree
Required Spending
Actual Spending



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