

LEGAL OPINION NO. 98-01

TO: Phil Bredesen
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Director of Schools

DATE: June 2, 1998

You have each requested a legal opinion from the Department of Law on the following question.

Question

Is the proposed Pupil Assignment Plan (the "Plan") dated May 14, 1998, (hereinafter "the Plan") legal? That is, will the Plan pass constitutional muster?

Answer

Yes, The vast majority of the Plan is legal and should pass constitutional muster. The racial set-aside for certain magnet schools is of doubtful legality.

Analysis

This opinion is divided into the following sections:

- [I. An Overview of the Kelley Case and Unitary Status Case Law](#)
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- [III. Post-Unitary Challenges and Equal Protection Analysis](#)
- [IV. Application of the Case Law to the Plan Components](#)
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I. An Overview of the Kelley Case and Unitary Status Case Law**A. History of the litigation**

To appreciate the significance of the Plan, it is helpful to understand the history of school desegregation in Nashville and Davidson County. What follows is a synopsis of that history:²

In 1955, a group of black students and parents in the City of Nashville filed *Robert W. Kelley, et al. v. Board of Education of the City of Nashville, et al.*, Civil Action No. 2094, in the United States District Court for the Middle District of Tennessee (the "District Court"). In 1960, a parallel case was filed against the separate Davidson County school system, *Henry C. Maxwell, Jr., et al. v. County Board of Education of Davidson County, Tennessee, et al.*, Civil Action No. 2956. Both suits relied upon *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("Brown I"),³ to challenge the separate schools established in Nashville and Davidson County for blacks and whites⁴ and asked for the immediate elimination of the dual systems of education that the city and county had operated pursuant to state law. After the consolidation of the two school systems under The Metropolitan Government of Nashville and Davidson County, the two lawsuits were combined and styled *Robert W. Kelley et al. v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee et al.*, No. 3:55-2094 (2094-2056).

In the early stages of the litigation, the City Board of Education and the County Board of Education attempted to dismantle the dual systems by integrating at a rate of one grade per year, utilizing such voluntary efforts as majority to minority transfers and parental preference. However, many years after the first mandate to

desegregate, the schools remained racially identifiable. The plaintiffs, relying on *Green v. County School Board of New Kent County, Virginia*, 390 U.S. 430, 88 S.Ct. 1689, 20 L.Ed2d 716 (1968),⁵ asked the District Court to order the dismantling of the dual system "with all deliberate speed." In 1970, Judge L. Clure Morton, relying upon *Green*,⁶ ordered that faculty throughout the school system should be immediately desegregated by transferring teachers, if necessary, beginning in the fall of that year, so that each school's faculty should reflect as closely as possible the racial composition of the system as whole (80% white and 20% black). In addition, the District Court ordered the Board to submit a comprehensive plan for the establishment of a unitary, non-racial school system to become effective at the beginning of the next school year.

In 1971, the Supreme Court approved a plan designed to achieve a student population in every school reflecting the system-wide ratio of black to white students through the transportation of small children in the early grades in predominantly black neighborhoods to predominantly white suburban neighborhoods, and the transportation of older children in predominantly white neighborhoods to the predominantly black inner city. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).⁷

In conformity with *Swann*, Judge Morton ordered in 1971 that Nashville implement a desegregation plan which would, as much as possible, result in each school's population falling within a range of 10% above and below the system-wide percentage of black students (then 25%). The only real difference with *Swann* was that the transportation order excluded a ring of suburban schools in the outer reaches of Davidson County because the District Court found that the distances for transportation to and from these areas were simply too great. At the same time, Judge Morton approved the Board's concept of placing comprehensive high schools along an imaginary ring following Briley Parkway, based in part upon the theory that these schools would be equidistant between the black and white populations, and, thus easier to desegregate.

After the Court's 1971 order, the Board sought approval for its high school building plans and the plaintiffs filed several motions for contempt. In late 1978, the Board asked for approval of the comprehensive high school plan, and at the same time the plaintiffs asked not only to have the previous contempt petitions heard, but also for further relief and for a hearing on their petition for attorneys' fees.

Judge Thomas A. Wiseman, who had been assigned to the case, conducted months of hearings in 1979 and eventually held that the Board's good faith implementation of the 1971 order had, through no fault of the Board, resulted in resegregation, because of the areas excluded from the 1971 order. Accordingly, the Court ordered the Board to develop a new plan that included the areas excluded in the 1971 plan.

The Board developed a new plan, which mirrored the 1971 plan, requiring students to travel to and from the outer reaches of the county. When this plan was considered by the District Court in 1980, it was rejected, and Judge Wiseman ordered the Board to come back with a new plan, which left all children in the elementary grades in schools near their homes, but which concentrated student diversity in the upper grade levels, particularly in the high schools (the "Wiseman Plan").

The Board set about implementing the Wiseman Plan, but a few days before school was to open in the fall of 1982, the plaintiffs obtained a stay from the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit"). The opening day of school was delayed in 1982 while the Board put the system back to where it had been the previous year. In 1982, the Sixth Circuit rejected the Wiseman Plan and ordered a county-wide plan based upon *Swann*. More specifically, the Sixth Circuit decreed that each school should be zoned to achieve a population reflecting the district's system-wide ratio (then 33% black), with a deviation permitted of plus or minus 15%.

The Board developed a new plan in consultation with the plaintiffs. For the most part, the plan that the Board is operating under today is the result of that process. The plaintiffs joined the Board to seek approval of the new plan, which was approved by the District Court on May 31, 1983. That plan included not only mandatory transportation for desegregation purposes, but also certain educational components and three magnet schools, the concept for which had been previously proposed and ordered by the District Court. The consent decree provided that after five years of operation under the new plan, the Board could approach the District Court for a declaration of unitary status. In addition, Antioch High School was permitted to remain open to give its community a chance to achieve desegregation through residential integration, which was accomplished in or around 1991.

Since 1983, on various occasions the Board has voted to modify the plan, which modifications have required District Court approval. The Board's process to date has been to approach the plaintiffs with these modifications

for approval, and then to petition the District Court with the plaintiffs' agreement. To date, each and every modification made by the Board has been approved by the plaintiffs, and the District Court has entered each of the agreed orders permitting such modifications without the necessity of additional hearings.

B. Local control and the meaning of unitary status.

In the wake of *Swann*, federal district courts throughout the country began mandating comprehensive, and sometimes controversial, desegregation orders to achieve what the lower courts conceived to be necessary to insure that "racial discrimination would be eliminated root and branch." *Green*, 391 U.S. at 438, 88 S.Ct. at 1694. The Supreme Court, concerned by the breadth of the remedial plans being ordered by the lower courts, issued several decisions designed to circumscribe their discretion.⁸ These decisions reemphasized one aspect of *Swann* that had been overlooked by the lower courts, that:

[R]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

Swann, 402 U.S. at 16, 91 S.Ct. at 1276.

That the Supreme Court was serious about returning control of schools to local school officials was never more forcefully stated than in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991),⁹ wherein the Court said:

As to the temporary nature of court supervision, from the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. Such decrees . . . are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs. The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems 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."

498 U.S. at 247-248, 111 S.Ct. at 637. (Citations omitted).

Just as the district courts were in need of guidance as to the appropriate methods to remediate de jure segregation, similar confusion and inconsistency existed over the meaning of "unitary". In *Dowell*, the Supreme Court established a three-part test to clear up the confusion. *Dowell* directs that in granting a motion for unitary status, the lower court consider:

- a. whether the school district has fully and satisfactorily complied with the court's decrees for a reasonable period of time;
- b. whether the vestiges of past discrimination have been eliminated to the extent practicable (utilizing the *Green* factors described supra, n. 6); and
- c. whether the school district has demonstrated a good faith commitment to the whole of the court's decrees and to those provisions of the law and the Constitution that were the predicate for judicial intervention.

Dowell, 498 U.S. at 248-250, 111 S.Ct. at 637-638.

However, the Supreme Court did not fully describe what the third step -- a demonstration of "good faith"-- would require. The Court acknowledged the concern that once a school district was declared unitary, it could quickly become resegregated. Deferring to the district court, however, the Supreme Court found such a possibility to be unlikely in the Oklahoma City school system:

[T]he court does not foresee that the termination of its jurisdiction will result in the diminishment of the [desegregation] plan or any affirmative action by the defendant [school] to undermine the unitary system so slowly

and painfully accomplished over the sixteen years during which the cause has been pending in the courts. . . .

Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . . .

Dowell, 498 U.S. at 241-242, 111 S.Ct. at 633-634.

Based on the Supreme Court's concern over post-unitary conduct, several lower courts have interpreted "good faith" to require some demonstration of a continued commitment to desegregation.¹⁰ Whether future conduct is relevant in obtaining unitary status remains uncertain.¹¹ However, it is clear that if the school district has met the Dowell three-part test, the threat of future de facto segregation does not justify continued court supervision. As the District Court for the Southern District of Georgia noted in *Stell*:

No one instant in time is especially "fitting" or "ideal" in the pronouncement of unitary status When a system has, however, effected desegregation to the extent practicable, federal court supervision of the public school system must come to an end. The [schools] are either unitary or not in respect to student assignments, and a fear that a system may resegregate in the future, absent credible evidence to support those fears, does not justify a federal court's continued monitoring of the system.

Stell, 860 F.Supp. at 1583.

C. Why the Plan was developed

Anxious to end judicial supervision, the Board, at the suggestion of legal counsel, seriously began to consider filing a motion to be declared unitary in 1992. As previously noted, it had been the Board's practice to obtain the plaintiff's agreement prior to approaching the District Court for any request to modify the court-ordered plan, and this same practice was followed in seeking unitary status.

Mindful of the possibility of protracted litigation if the plaintiffs contested unitary status, the Board determined that the input of both the plaintiffs and the community would be beneficial prior to approaching the district court with a motion requesting unitary status. The Board passed a resolution calling for the creation of a biracial committee to study "options" for obtaining unitary status. That committee, the Advisory Committee on Excellence and Equity, was tasked with producing a framework for a student assignment plan that would "maintain a culturally diverse and integrated school system of high quality . . . [that would] foster a desegregated school system while simultaneously giving families increased choices regarding their children's education."¹²

The recommendations of the citizen advisory committee, which included representatives of the plaintiffs, were collected in a document called "Commitment to the Future", dated July 23, 1996. This document was significantly modified and refined after hours of negotiation between the plaintiffs and the Board and has evolved into the Plan.

The plaintiffs and the Board have also entered into an agreement, dated January 13, 1998, (the "Agreement") which embodies the intentions of the parties relative to the commitment of the Board to implement the Plan after unitary status is declared. The Board committed to draft a five-year plan to implement the capital projects identified in the Plan. The Board further committed to obtain all necessary funding for these capital projects, to seek private and public funding for what are considered the "operational components",¹³ and to provide information to the public as the Plan is implemented, similar in kind to the information being provided the District Court in *Kelley*. In return, the plaintiffs agreed not to challenge the unitary status declaration or oppose the dismissal of the lawsuit.

The Agreement further provides that if the Metropolitan Council agrees to fund the capital component of the Plan on or before July 1, 1998, the Board will present a Stipulation and Order of Dismissal (the "Stipulation") to the District Court. This Stipulation will state that the Board has achieved unitary status and is entitled, as a matter of law, to dismissal of the lawsuit and the vacation of all injunctive decrees. The Stipulation does not either attach or incorporate by reference the Agreement.¹⁴ The Agreement (and the Plan referenced in the Agreement), will however, be offered to the District Court as illustration of:

the shared commitment of the plaintiffs and defendants to work together to establish, preserve and improve the public school system in Nashville . . . so that it affords the opportunity for a high quality education to all of its students.

However, as the Summary provides,¹⁵ the Board has "committed itself into the future only to seek funding for and to build the capital projects. . . ." and that :

local control over operation of the school system will be returned to the school board and . . . there will be no obligation, whether injunctive or contractual to operate this school system in a particular fashion.

D. Federal courts favor settlement of desegregation lawsuits

In structuring the Stipulation, Agreement and the Plan, legal counsel in Kelley were aware of the great latitude afforded by lower courts to negotiated settlements of desegregation lawsuits. Other school districts around the country have either settled their desegregation lawsuits in lieu of a court-imposed remedial plan, or have entered into settlements of the desegregation lawsuits as part of unitary status declarations. The school systems in Kansas City, Kansas and St. Lucie County, Florida were recently declared "unitary" upon the filing of such agreed orders. In the Kansas City case, the joint order included a settlement plan similar to the Plan proposed by the Kelley plaintiffs and the Board. These lower court decisions may serve as a guide to the District Court in granting the motion for "unitary status" in Kelley.

Federal courts look with great favor upon the voluntary resolution of litigation through settlement.¹⁶ This is especially true in the context of school desegregation cases that have an extensive history of bitter and complex litigation. See *Liddell v. Board of Education of the City of St. Louis*, 126 F.3d 1049, 1056 (8th Cir. 1997); *Little Rock*, 921 F.2d at 1383. The spirit of cooperation inherent in a good faith voluntary resolution is crucial to the long-range success of any desegregation remedy. *Little Rock*, 921 F.2d at 1383. The Seventh Circuit acknowledged that a remedial decree reached through agreement between the parties will likely, because of the community cooperation it inspires, more effectively implement the constitutional guarantee of equal protection than a court-ordered remedy which the community views as imposed upon it from the outside. *Armstrong*, 616 F.2d at 318. The only consideration for an appellate court is whether the agreement is "a fair, reasonable, and adequate" resolution to the problem. See *Armstrong*, 616 F.2d at 317; *Bronson v. Board of Education*, 604 F.Supp. 68, 70 (S.D. Ohio 1984). Since public policy favors such agreements, the courts approach them as presumptively valid. The Seventh Circuit found that:

because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and public.

Armstrong, 616 F.2d at 315; See *Little Rock*, 921 F.2d at 1391, 1393 (stating that settlement agreements are presumptively valid).

In *United States v. Unified School District No. 500, Kansas City (Wyandotte County), Kansas*, 974 F.Supp. 1367 (D. Kansas 1997) ("Kansas City"), the school district filed a motion for declaration of unitary status. *Kansas City*, 974 F.Supp. at 1368. The United States Department of Justice (the "DOJ") filed a brief in support of the school district's request. *Id.* The district court first determined that the school district had, based on the evidence provided at the hearing, satisfied the Dowell test for a unitary status declaration. The analysis of whether the school district had established "good faith" centered not only around compliance by the school district with the court-approved desegregation plan, but also the district's adoption of a "Desegregation Exit Plan". *Kansas City*, 974 F.Supp. at 1382-1384. There are many similarities between what was approved by the district court in *Kansas City* and what is being proposed in settlement of Kelley.¹⁷ The Desegregation Exit Plan was developed after significant community input, the recommendations of the plaintiffs, and the board administrators. The *Kansas City* plan was also the result of an evolutionary process. Several voluntary desegregation plans were considered before a final plan was approved. The district court, remarked on its the limited role in light of the fact that the parties had agreed to a settlement of the lawsuit:

The court's task in a school desegregation case is to both remedy the effects of past discrimination and ensure that a school system does not return to its segregative past. The court's task is nearly complete after twenty years of supervision of this district. The court's task was infinitely easier because of the cooperation between the parties

and attorneys constantly displayed since 1981. The parties and attorneys have gone to great lengths to avoid conflicts over many peripheral issues. Instead, they have focused their time and efforts on developing quality educational programs in the District while recognizing the principle of racial equality. In particular, the unprecedented collaborative efforts of the Department of Justice and the District since 1994 have produced the Desegregation Exit Plan which will provide the framework for operation of a unitary school system in the future. The attorneys and parties are to be commended. . . .

The thorough manner in which this Plan has been developed has made this court's task relatively easy. This comprehensive Exit Plan could well be a model for other courts and school districts of the type of planning process that can lead to the orderly withdrawal of judicial supervision in a school desegregation case.

. . . This case was not resolved in the courtroom with the testimony of star witnesses or the eloquent statements of attorneys. Rather, the administration, faculty, parents, students, and the community found their own answers through detailed planning, cooperation, and participation.

Kansas City, 974 F.Supp. at 1385-1386.

A similar settlement was reached in *United States v. Board of Public Instruction of St. Lucie County*, 977 F.Supp. 1202 (S.D. Fla. 1997) ("St. Lucie"). In *St. Lucie*, all parties agreed that a motion for unitary status should be granted. *St. Lucie*, 977 F.Supp. at 1205. Recognizing that "settlements are favored over continued litigation", that such settlements carry a "presumption of validity", and that the DOJ had experienced attorneys "fully aware of the issues", the court approved the settlement. *St. Lucie*, 977 F.Supp. at 1206.18

Finally, the decision in *Liddell* illustrates the importance of settlement agreements in the wake of *Dowell*. The *St. Louis* desegregation case has had a complex and bitter procedural history. The State of Missouri had been ordered to help fund the voluntary student transfer desegregation plan, but the State repeatedly attempted to be dismissed from the case. *Liddell*, 126 F.3d at 1053. The district court denied the State's request. *Liddell*, 126 F.3d at 1054. On appeal the Eight Circuit noted the dilemma remaining after *Dowell*: if remedial programs are eliminated or limited upon the declaration of unitary status, the "immediate effect will most probably be a significant resegregation of the city schools". *Liddell*, 126 F.3d at 1057. The court stated:

We do not say and are not prepared to say . . . how the mandate of the Supreme Court, particularly in *Dowell* that resegregation should not result from a declaration of unitary status, can be achieved; but the issue is one that must be dealt with either in settlement negotiations or by district court order. . . . We merely repeat that the complexity of the issues involved support the view heretofore expressed that the best way to resolve these problems and provide a quality integrated education to all city students is through good faith settlement negotiations.

Liddell, 126 F.3d at 1057.

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II. An Overview of the Plan

The Plan consists of the zoning plan, certain operational components and a capital or school construction program.

A. Zoning Plan - "Clusters"

The zoning component of the Plan fundamentally changes the way in which students are assigned or "zoned" to a specific elementary, middle and high school in two major respects:

- a) Three Tiers: Schools are divided into three tiers - all elementary schools will be for grades K-4, all middle schools will be for grades 5-8, and, with the exception of one magnet, all high schools will be for grades 9-12; and
- b) Consistent Feeder Patterns: Students will stay together as they go from kindergarten through 12th grade. All students from an elementary school will go to middle school together. All students from a middle school will go to

high school together.

The Plan provides that these two factors are the only "immutable factors" in the zoning plan, evidencing that the starting point for the new attendance zones was to allow these "two criteria [to] work together to provide continuity and stability for students and their families". See Summary, p. 5. The third factor, which is also the starting point for the clusters, was the decision to utilize the existing eleven comprehensive high schools and to "cluster" the elementary and middle schools which feed into the high school within the same cluster boundary.

Other factors , significant, but not "immutable" include:

1. Demographic Diversity: Both the Board and the Plaintiffs have recognized the value of diversity as an educational tool, in terms of promoting mutual understanding and in terms of enhancing student achievement. (See, e.g., Board of Education Minutes: December 8, 1992, April 25, 1995.) Consideration was given to demographic diversity in the preparation of the plan; however, the plan does not reflect a requirement of any specific ratios (racial, socioeconomic or any other) for the creation of zoned school districts. (See, e.g., Board Minutes: October 4, 1994; April 25, 1995; January 30, 1996; August 12, 1997; September 9, 1997; September 23, 1997.)

The plan ensures that opportunities will continue to exist for all students to attend diverse schools. Magnet schools, enhanced option schools and design centers are expected to provide this opportunity through voluntary enrollment. (Id.)

2. Educational Needs of Students: The plan recognizes the link between poverty (free or reduced lunch) and low achievement and includes particular features to address the educational needs of students at risk of school failure due to poverty. (April 25, 1995 Board of Education Minutes.) In addition, optional programs with different instructional approaches and curricular emphasis provide varied ways to address student needs. (Id.)

3. Facilities: The location, size and condition of existing school buildings and school sites along with population densities are necessarily taken into account in the development of any pupil assignment plan. (See, e.g., information to Board, April, 1998 regarding schools to be closed.) New state class size mandates were also addressed in considering facility needs.

4. Transportation: The plan seeks to decrease transportation distances and/or transportation times in order to better facilitate parental involvement and improve access to participation in extra-curricular activities. (See, e.g., Board Minutes: April 25, 1995; March 5, 1996; August 12, 1997; September 9, 1997.) The plan also takes into account changes in the road infrastructure that impact access to schools from different areas. (Id.)

5. Continuity: Existing zone lines were used as a starting point in developing new zones to prevent the potential negative impact of reassigning students to new school zones without any resulting benefit. (See, e.g., Board Minutes April 25, 1995.) In addition, certain densely populated areas in the inner city are currently split into numerous small, non-contiguous elementary school zones. Some of these are in areas of high mobility, which can result in frequent school changes under the current plan. Where possible, these areas have been enlarged or combined, reducing the likelihood of frequent school changes for highly mobile families. (See, e.g., Board Minutes: April 25, 1995; August 12, 1997.) Additional stability is provided by optional enrollment programs, such as magnets. For instance, once a student enrolls in a magnet school, the student may maintain continuous enrollment despite any number of changes of residence within Davidson County.

6. Choice: In several respects, (e.g., including magnet schools, enhanced option schools, design center programs and laboratory schools) the plan reflects the Board's desire to provide increased choices to parents in the education of their children. (See, e.g., Board Minutes: December 8, 1992; April 25, 1995.)

7. Community Involvement: Beginning with the appointment of the Advisory Committee on Excellence and Equity Committee in 1992, to which the Board, the Mayor, and the Plaintiffs appointed members. There were opportunities for community input in the planning process. (December 8, 1992, Board of Education Minutes.) This included presentations to the Board by various citizens' groups during the period leading up to approval of the new plan. (See, e.g., Board Minutes: December 8, 1992; December 16, 1993; February 8, 1994; January 30, 1996; April 9, 1996; June 25, 1996; May 14, 1996; May 28, 1996)

In addition to these factors, the zoning plan was designed so that "middle schools are located as much as possible in easily accessible locations within the cluster for all students assigned to the school. (Board Minutes: April 25, 1995). The factors outlined above were "identified and refined by the Board, Plaintiffs, staff, the Advisory Committee on Excellence and Equity, and the community" as the Plan evolved and were utilized in a flexible, holistic manner to arrive at the cluster boundaries:

It should be noted here that, as with any cohesive student assignment plan, criteria and concerns such as those listed above are interrelated and are applied in an interrelated fashion. Throughout the planning process, the Board, the staff, and the Plaintiffs were cognizant of the need to look at the plan as a whole rather than on a piecemeal basis. (August 12, 1997, Board of Education Minutes.)

B. Operational components: Magnet Schools and other Options for Choice

The Plan also continues the magnet school program currently in place as well as other "options for choice" which allow students to voluntarily attend schools other than their zoned schools.

1. Magnet Schools:

There will be fifteen magnet schools. Students apply for admission and are admitted by a random selection process. Some magnets have academic entrance requirements and some are based on interest in a specialized program. Attendance at the magnet schools is as follows:

(a) Martin Luther King, Jr. Magnet and Head Middle School Magnet. Head Middle School is designed to prepare students to feed into MLK. Head will have a Geographic Priority Zone in the neighborhood, which has not yet been drawn, from which children applying to Head will be given attendance priority for a portion of the available seats. The remainder of the students at Head (other than those from the Geographic Priority Zone) will be chosen in a single system-wide lottery. (Board Minutes: April 21, 1998.)

If a child attending Head meets the academic entrance requirements for MLK at any point, the student will be guaranteed a seat at MLK (Board Minutes: April 21, 1998.)

(b) Other Magnets Having a Geographic Priority Zone: Other middle school and elementary magnets are designed using the concept of the Geographic Priority Zone now existing for Hull-Jackson Montessori Magnet. In addition, many of the magnets are designed to feed into a related upper grade magnet school with students in the lower grade magnets feeding directly into the upper grade magnet with the same theme. (See cluster descriptions, pp.15-64 infra; See, e.g., Board Minutes: August 12, 1997; September 9, 1997.)

(c) Student Selection: On April 25, 1995, the Board determined that all of its magnet schools would operate with a student population of sixty percent (60%) white/other and forty percent (40%) African-American plus or minus ten percent (10%). (See, e.g., Board Minutes: April 25, 1995.) Since the signing of the Agreement, the Board has not specifically addressed the operation of any of its magnets except for Head and MLK.

The Board has not modified the selection processes for the other two currently existing academic magnets. Currently all students are subject to the same admission criteria and are selected through two lotteries designed to produce a diverse student population. (Id.)

2. Enhanced Options:

Enhanced option schools are designed to provide a community-based enhanced program in several locations around the county to meet the needs of at risk students. (See, e.g., Board Minutes: July 23, 1995 Board of Education Minutes.) The program may be enhanced by reductions in class size, extended learning opportunities like Saturday and summer classes, community use of the building for evening and weekend educational and recreational programs, high quality pre-kindergarten programs, after school supervision, homework help for students from the school and neighborhood, and similar program enhancements. Enhanced option schools can have an assigned population and/or be an option for voluntary enrollment of students from other zones. (See, e.g., Board Minutes: July 23, 1996; August 12, 1997, September 9, 1997; September 23, 1997; October 14, 1997.)

3. Cluster Design Centers:

Four cluster design center programs are developed to meet the needs of the students in a particular school or cluster. The program can be for the whole school, or it can be a program within a school (such as the Carpe Diem Program at Lakeview Elementary). Students can apply to attend a Design Center program at another school in their own cluster or in any other cluster. Design centers can serve a combination of a zoned and voluntary enrollment, or a totally voluntary enrollment. (Id.)

Four Cluster Design Centers are included in the plan, three serving elementary students and one serving middle school students. Other Design Center programs could be developed at the initiative of schools in a cluster, with Board approval.

4. Laboratory Schools:

Laboratory schools are designed to link local universities with one elementary and middle school (with continued involvement as a high school option). This will bring resources and expertise of the local universities directly to Metro students, with the Lab Schools serving as "demonstration schools" for the district. The Lab Schools will also provide opportunities to expose students to opportunities in the teaching profession. There are two schools which are designated as laboratory schools - a new elementary school to be built in the Pearl-Cohn Cluster, which feeds into a middle school, the McKissack Middle Laboratory School.

Enrollment for the new elementary laboratory school is optional, with students choosing to attend either Cockrill Elementary or the new lab school. (See, e.g., Board Minutes: August 12, 1997; September 9, 1997.)

5. Early Childhood Centers:

Two early childhood centers serving pre-kindergarten and kindergarten students are included in the plan, one at Caldwell (existing) and the other at Warner. These programs are totally voluntary in nature, and are designed to serve the needs of at risk children who reside in these areas and who will benefit from additional preparation before attending kindergarten. (See, e.g., Board Minutes: August 12, 1997; September 9, 1997.)

6. Dropout Prevention/Reclamation Center:

A new dropout prevention/reclamation center at Highland Heights is designed for secondary school students who have dropped out of school or may be at risk of dropping out. It will have a voluntary enrollment. (See, e.g., Board Minutes: August 12, 1997; September 9, 1997.)

C. Capital Program

The Capital Program consists of a chart listing the elementary and middle schools to be constructed or expanded to implement the Plan and the anticipated project costs. The total projected cost of the Capital Program is approximately \$206,800,000, and is expected to take approximately five years to complete construction of the projects. There is also a list of priorities to be followed in the construction of facilities which provides early commencement dates for those projects that eliminate the longest bus rides and that most quickly implement the shift to the three-tiered feeder patterns.

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III. Post Unitary Challenges and Equal Protection Analysis

A. Equal Protection

1. United States Constitution

Any post-unitary challenge to a voluntary school desegregation plan will be examined under traditional equal protection analysis. *Dowell*, 498 U.S. at 250-251, 111 S.Ct. at 638. The Equal Protection Clause is found in the Fourteenth Amendment to the United States Constitution and is intended to prevent state governments from denying to any person equal protection of the law. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S.Ct. 2816, 2824, 125

L.Ed.2d 511 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976)). This means that persons under like circumstances must be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs. In short: similarly situated persons must be treated alike. *F.S. Royster Guano Company v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). Circumstances which are different are not required to be treated the same. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). The equal protection clause seeks ultimately to render the issue of race irrelevant in governmental decisionmaking. See *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-1882, 80 L.Ed.2d 421 (1984). Accordingly, discrimination based upon race is highly suspect. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). Any preference awarded "members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *Brown I*, 347 U.S. at 493-494, 74 S.Ct. at 691-692. These rules are the essence of equal protection and they apply to all races. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224-225, 115 S.Ct. 2097, 2111, 132 L.Ed.2d 158 (1995) ("Adarand").

A successful challenge under the Equal Protection Clause requires either proof of 1) a law/policy which specifically permits governments to treat races or ethnic groups differently (suspect classifications); or 2) evidence that a law or policy which is facially race-neutral results in persons being treated differently based on a their race (disparate impact); and 3) evidence that the express racial classification or disparate impact was the result of intentional discrimination. *Washington v. Davis*, 426 U.S. at 245, 96 S.Ct. at 2050. In holding that a showing of discriminatory intent was required, the Court looked at school desegregation cases, saying that those cases:

[H]ave also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 93 S.Ct. 2686, 2696, 37 L.Ed.2d 548 (1973). The differentiating factor between De jure segregation and so-called De facto segregation . . . is purpose or intent to segregate."

Washington v. Davis, 426 U.S. at 240, 96 S.Ct. at 2048.

The Tennessee Constitution

The Tennessee Constitution, like the United States Constitution, guarantees "to citizens the equal protection of the laws." *Riggs v. Burson*, 941 S.W.2d 44, 52 (Tenn. 1997); *Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 412 (Tenn. 1995), cert. denied, 517 U.S. 1222, 116 S.Ct. 1852, 134 L.Ed.2d 952 (1996). "Article I, section 8 and Article XI, section 8 of the Tennessee Constitution confer the same protections as the Fourteenth Amendment to the United States Constitution." *Riggs*, 941 S.W.2d at 52. The Tennessee Supreme Court has noted that "[t]he concept of equal protection espoused by the federal and of our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.'" (quoting *F.S. Royster Guano Co.*, 253 U.S. at 415, 40 S.Ct. at 562); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d, 139, 153 (Tenn.1993) ("*Tennessee Small School Systems*"). "Things which are different in fact or opinion are not required by either Constitution to be treated the same." *Riggs*, 941 S.W.2d at 52 (citing *Tennessee Small School Systems*, 851 S.W.2d at 153).

The initial discretion to determine what is different and what is the same resides in the legislatures of the States, and legislatures are given considerable latitude in determining what groups are different and what groups are the same. . . In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest. . . .

Tennessee Small School Systems, 851 S.W.2d at 153.

The Tennessee Supreme Court has "consistently followed the framework developed by the United States Supreme Court, which, depending on the nature of the right asserted or the class of persons affected, applies one of three standards of scrutiny: (1) strict scrutiny, (2) heightened scrutiny, and (3) reduced scrutiny or the rational basis test." *Riggs*, 941 S.W.2d at 52; *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994).

In a post-unitary equal protection challenge, the plaintiff will bear the burden of proving both disparate impact and that the disparate impact is due to a discriminatory intent. *Dowell*, 498 U.S. at 250-51, 111 S.Ct. at 638, citing *Washington v. Davis* and *Arlington Heights*.

B. Strict Scrutiny -- Suspect classes and fundamental rights

Any policy or plan that is found to intentionally discriminate on the basis of race will be subjected to the strictest scrutiny and will be justifiable only by the weightiest of considerations. *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964). This is because race is considered a suspect class. *Korematsu v. United States*, 323 U.S. 214, 215, 65 S.Ct. 193, 194, 89 L.Ed. 1435 (1944). This level of review is known as strict scrutiny and requires the court to ensure that: 1) the classification is justified by a compelling (very important and convincing) governmental interest; and 2) the classification is narrowly tailored (does not impact more people than absolutely necessary and that the persons impacted are not impacted any more than is absolutely necessary) to achieve that interest. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989)("Croson"); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)("Cleburne").

This same strict level of scrutiny applies when a fundamental right is involved. There is no fundamental right to education under the Fourteenth Amendment. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973); *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2396, 72 L.Ed.2d 786 (1982). However the right to a "free public education" is guaranteed by Article XI, Section 12 of the Tennessee Constitution. *Tennessee Small School Systems*, 851 S.W.2d at 151. "[T]he precise level of education mandated by Article XI, Section 12, . . ." has not been defined by the Tennessee Supreme Court. *Id.* However the Court noted that:

The power of the General Assembly is extensive. The constitution contemplates that the power granted to the General Assembly will be exercised to accomplish the mandated result, a public school system that provides substantially equal educational opportunities to the school children of Tennessee. The means whereby the result is accomplished is, within constitutional limits, a legislative prerogative. . . .

Tennessee Small School Systems, 851 S.W.2d at 156. Thus it appears that strict scrutiny will be applicable to an equal protection challenge under the Tennessee Constitution only when a classification affects the obligation to provide a substantially equal educational opportunity to school children in Tennessee.

1. When will strict scrutiny apply to a post-unitary voluntary desegregation plan?

Once a school system is declared unitary, if that system chooses to engage in voluntary desegregation, that plan may be subject to strict scrutiny. If it is, there must be a compelling governmental interest that is being furthered after de jure segregation has been remedied, and the program must be narrowly tailored to achieve that interest.

a. Race preferences or set-asides

Strict scrutiny applies when the policy or plan at issue gives preferential or exclusionary treatment on the basis of race and where the policy or policy is deemed to be race-based. Policies and plans that involve racial set-asides are subject to strict judicial scrutiny because they classify and treat differently similarly situated persons on the basis of race. Thus, to withstand constitutional challenge such policies and plans must be justified by a compelling governmental interest and must be narrowly tailored to further that interest. "The clearest statement of the Court's somewhat mixed messages in this area is that programs that make race or ethnicity a requirement of eligibility for particular positions or benefits are less likely to survive constitutional challenge than programs that merely use race or ethnicity as one factor to be considered under a program open to all races and ethnic groups." *Dallinger, O., Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. PeOa, Legal Guidance, Memorandum to General Counsels (June 28, 1995).*

b. Race-based policies or plans -- race as the predominant consideration

Any government program or policy that is considered race-based will be subject to strict scrutiny. In attempting to predict how a court may evaluate whether a student assignment plan is race-based, the equal protection analysis utilized by the Supreme Court in the challenges to racial gerrymandering of electoral districts is likely to be

utilized. Generally, as in the set-aside cases, anytime race is considered to be the predominant factor in how electoral districts are drawn, the redistricting plan will be subject to strict scrutiny. *Bush v. Vera*, 517 U.S. 952, ---, 116 S.Ct. 1941, 1953, 135 L.Ed.2d 248 (1996). However, as the Supreme Court has noted:

redistricting differs from other kinds of decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

Shaw v. Reno, 509 U.S. 630, 646, 113 S.Ct. 2816, 2826, 125 L.Ed.2d 511 (1993) (emphasis in original).

However, the courts must give deference to decisions made by legislatures in developing redistricting plans. In *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), the Supreme Court recognized that redistricting is the duty of the legislature and that the good faith of the legislature in performing this duty must be presumed.

The Court explained in *Miller* that in order to establish that race predominated in the drawing of district boundaries:

. . . a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual share interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can defeat a claim that a district has been gerrymandered on racial lines.

Miller, 515 U.S. at 916, 115 S.Ct. at 2488 (citations omitted).

To determine if race was the predominant factor in drawing an election district, the court considers the district's shape to be one important indicator. An oddly-shaped district persuasively demonstrates the rejection of traditional race-neutral criteria of compactness, contiguity and respect for political subdivisions in favor of race-based considerations. *Shaw v. Reno*, 509 U.S. at 642, 113 S.Ct. at 2834. In *Bush*, the plaintiff asserted that irregular district lines were evidence of the predominance of race. *Bush*, 517 U.S. at ---, 116 S.Ct. at 1952. The Court recognized that although there was a correlation between race and race-neutral criteria, upon a close examination of the facts, this correlation could not explain the irregularity of the district boundaries. *Bush*, 517 U.S. at ---, 116 S.Ct. at 1952-1953. The court did not accept the race-neutral justification because at the time of redistricting, the legislature had compiled significant race-based data, but had not compiled any correlative race-neutral data. *Bush*, 517 U.S. at ---, 116 S.Ct. at 1953.

However, despite the importance of the district's shape, courts do not rely solely on one indication that race was the predominant factor. In addition to irregularly shaped districts, statements of legislative intent will be offered to prove that consideration of race predominated in the way the district was drawn. *Bush*, 517 U.S. at ---, 116 S.Ct. at 1952-1953; *Miller*, 515 U.S. at 916, 115 S.Ct. at 2489-2490; *Shaw v. Hunt*, 517 U.S. 899, ---, 116 S.Ct. 1894, 1902, 135 L.Ed.2d 207 (1996). Courts are usually unwilling to accept a race-neutral explanation for an irregular district if the race-neutral consideration came into play after the race-based consideration. *Shaw v. Hunt*, 517 U.S. at ---, 116 S.Ct. at 1901.

In *Miller*, the Supreme Court recognized the distinction between being aware of racial considerations and being motivated by them saying:

ë[D]iscriminatory purposeí . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, í not merely in spite of, í its adverse effects. The distinction between being aware of racial considerations and being motivated by them may be difficult to make. [T]his evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.

Miller, 515 U.S. at 916, 115 S.Ct. at 2488.

2. Is racial diversity a compelling governmental interest?

Though the Supreme Court has accepted the need to remedy the present effects of past de jure discrimination as a compelling governmental interest, *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986), the Court has been exacting in its interpretation of what constitutes the present effects of past discrimination. There must be specific past discrimination by the governmental unit involved. *Id.* Correcting the effects of past "societal discrimination" is not sufficient to justify racial classification. *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848.

While it is clear that racial diversity is a compelling governmental interest if vestiges of de jure discrimination remain and a school system continues to be supervised by the federal courts, that such an interest continues to be compelling in the post-unitary world is not as clear. The Supreme Court indicated that racial diversity was a substantial governmental interest in *Swann*, wherein the Court said:

[S]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ration of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann, 402 U.S. at 15, 91 S.Ct. at 1276.

In *Regents of the University of California v. Bakke*, 438 U.S. 265, 269-270, 98 S.Ct. 2733, 2737, 57 L.Ed.2d 750 (1978), the Supreme Court considered a specific numerical set-aside for minorities in the University of California at Davis Medical School. This set-aside was challenged by a white student who was denied admission to the school. *Bakke*, 438 U.S. at 276, 98 S.Ct. at 2741. Five of the nine Justices agreed that Bakke should be admitted to the school, but the five did not agree on the reasons. Four of the five Justices joined in a separate opinion supporting the judgment based on the enforcement of Title VI of the Civil Rights Act of 1964 while Justice Powell's opinion supported the judgment based on the application of the Equal Protection Clause. Justice Powell also concluded that benign racial classifications were "constitutionally permissible in the context of higher education [because] [t]he atmosphere of speculation, experiment and creation so essential to the quality of higher education is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312, 98 S.Ct. at 2759-2760. Justice Powell held, in a portion of the opinion in which four different Justices joined, that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin". *Bakke*, 438 U.S. at 320, 98 S.Ct. at 2763. However, opponents of benign racial preferences have attacked *Bakke* and Justice Powell's conclusion that racial diversity was a compelling interest in an educational setting.

In *McLaughlin by McLaughlin v. Boston School Committee*, 938 F.Supp. 1001 (D. Mass. 1996) ("*McLaughlin*"), the court determined that racial diversity was a compelling governmental interest. *McLaughlin* involved an equal protection challenge to a racial set-aside for admission to Boston's highly prestigious and competitive examination schools. In *McLaughlin*, the plaintiff sought to enjoin Boston Latin School, which had a 35% set-aside for Black and Hispanic students, from denying her admission. The court distinguished *Hopwood*, which was decided in the context of a law school admissions program, from programs fostering educational diversity in a primary and secondary school setting. *McLaughlin*, 938 F.Supp. at 1015. In applying strict scrutiny, the court recognized that, even in a post-unitary district, the need to remedy the lingering effects of past discrimination was a compelling interest. *McLaughlin*, 938 F.Supp. at 1012-1016. The court also recognized that racial diversity in primary and secondary schools was a compelling interest even after the school system was declared unitary. *McLaughlin*, 938 F.Supp. at 1016.

On May 28, 1998, the *McLaughlin* district court again found that racial diversity in the Boston public schools served a compelling governmental interest. *Wessmann v. Boston School Committee*, --- F.Supp. ---, 1998 WL 271218 (D. Mass. 1998) ("*Wessmann*"). At issue in *Wessmann*, was the revised selection criterion adopted after the original set-aside was determined to be insufficiently narrowly tailored in *McLaughlin*. (See discussion below). *Wessmann*, 1998 WL 271218 at 2. The new policy selected students for 50% of the eligible seats exclusively on academic aptitude (the "qualified applicant pool"). *Wessmann*, 1998 WL 271218 at 5-6. The remaining spots (the "Remaining Qualified Applicant Pool") were filled "according to composite score rank [academic aptitude] in proportion to the racial/ethnic composition of that particular school's Remaining Qualified Applicant group." *Wessmann*, 1998 WL 271218 at 6. This policy was "designed to provide each school with a student body that

reflects the racial and ethnic diversity of that school's Remaining Qualified Applicant Pool". *Id.* In this way, the race-based policy changed as the racial and ethnic composition of the student population in the relevant applicant pool changed. *Id.* Additionally, the policy contained a 'sunset provision' requiring the school superintendent to examine the policy each year and make recommendations as needed. *Id.* Finally, the Boston School Board instituted enrichment programs in the lower schools designed to increase minority participation in the Qualified Applicant Pool. *Id.* Rejecting *Hopwood* as unpersuasive, and distinguishing *Adarand*, *Crosby* and *Bakke*, the court determined that "[t]his litigation is not about the place of diversity in the work place, the market place, or in graduate education . . . [but] the obligation of a school district to determine what policies and practices will best prepare its children to succeed in a competitive and diverse society." *Wessmann*, 1998 WL 271218 at 8. The court held that:

Here, the Boston School Committee's interest in affording Boston Latin students the educational opportunities inherent in a diverse setting is most compelling. Diversity avoids the predictably adverse consequences of racial and ethnic isolation. Moreover, diversity can be an important factor contributing to students' intellectual and moral development, thereby preparing them to survive and thrive in a pluralistic society.

Wessmann, 1998 WL 271218 at 11.

3. Is the program narrowly tailored to achieve diversity?

Racial set-asides in magnet school admissions programs have been successfully challenged in post-unitary cases primarily on the grounds that the set-aside was not sufficiently narrowly tailored. Although the *McLaughlin* court found that racial diversity was a compelling interest justifying a racial set-aside in a magnet school admissions program, the set-aside was held to be unconstitutional because it was not narrowly tailored to serve that compelling interest. *McLaughlin*, 938 F.Supp. at 1016. The court held that "[h]owever justifiable and appropriate the set aside might have once been, it is not now, in . . . 1996, narrowly enough tailored to pass constitutional muster." *McLaughlin*, 938 F. Supp. at 1016. Because the school did not study the feasibility of alternative remedies or provide for a built-in termination mechanism, the set aside was not narrowly tailored. *McLaughlin*, 938 F.Supp. at 1016. Thus, although strict numerical quotas are probably not constitutionally permissible, other race-conscious approaches to achieve diversity and remedy past discrimination may be constitutionally valid.

In *Wessmann*, the court determined that the revised student selection policy was sufficiently narrowly tailored. *Wessmann*, 1998 WL 271218 at 12-13. The factors that influenced the court in arriving at this decision were: 1) the flexibility of the policy (there was no fixed percentage and the number of minorities changed to reflect changes in the applicant pool); 2) the program included a sunset provision so that it could be revised, or even eliminated as racial diversity is achieved; and 3) the policy was "achievement driven" — that is, race or ethnicity was only part of the equation. *Wessmann*, 1998 WL 271218 at 13. All students had to qualify on the basis of academic achievement and the policy promoted that goal. *Id.*

C. Rational Basis Scrutiny

If the policy or plan at issue does not involve racial discrimination or a fundamental right, or if the defendant has rebutted the initial showing of a racial discrimination by demonstrating the policy or plan is justified on race-neutral grounds, that policy or plan will only be subjected to rational basis scrutiny. Most classifications carry a presumption of validity and undergo only a cursory examination by the courts in which the policy maker must show some rational basis (a logical reason) for the policy and that the reason is related to the means chosen to carry out the policy. *Cleburne*, 473 U.S. at 442, 105 S.Ct. at 2355. This lowest level of scrutiny is referred to as rational basis scrutiny.

1. When will rational basis scrutiny apply?

Rational basis scrutiny will apply to the majority of equal protection challenges that do not involve suspect classes or the impairment of fundamental rights. The Sixth Circuit has not reviewed a post-unitary desegregation challenge since the Supreme Court decided *Dowell*. However, the Sixth Circuit did review a voluntary desegregation plan that had been implemented to cure de facto segregation in the City of Grand Rapids school system. *Higgins v. Board of Education of City of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974). The analysis used by the Sixth Circuit in examining Grand Rapids' voluntary desegregation plan should be applied to any challenge

to the Plan that is filed after unitary status has been achieved.

Higgins involved a voluntary desegregation plan, adopted by the school board in 1968, designed to remedy de facto segregation. Higgins, 508 F.2d at 784, n.7. Black students and their parents brought a class action against the Grand Rapids board of education alleging, in 1970, that the board was operating the schools in a manner which perpetuated de facto segregation. Higgins, 508 F.2d at 782. As a result of these voluntary efforts, the high schools were completely integrated and the racial imbalances at the junior high and middle school levels had improved. Higgins, 508 F.2d at 784. Despite the voluntary plan, South Middle School continued to be approximately 95% black. Id. Plaintiffs alleged that the board had carried out policies intended to confine black students to largely black schools by: 1) using neighborhood schools in the elementary grades, 2) failing to change boundary lines to achieve a better racial balance, and 3) building and constructing schools in such a way as to segregate black students. Higgins, 508 F.2d at 785. Plaintiffs also alleged that the board's efforts toward racial balance were achieved by the busing of black students without a corresponding sharing of the burden by whites. Higgins, 508 F.2d at 785.

In response to the plaintiffs' contention regarding busing, the court recognized that these allegations should be closely scrutinized and that the burdens and inconveniences of integration should not be placed discriminatorily. Higgins, 508 F.2d at 793. In response to the plaintiffs' contention that the boundary lines and feeder patterns represented segregative intent, the court held that:

The sole instance of boundary changes to which a significant complaint was lodged was that of a shift of a white area from South School to Burton School, thus making South somewhat "blacker." This instance, standing alone is not sufficient to give rise to an inference of segregative intent where there exists, as in this case, a rational explanation for the shift in terms of capacity problems at South [Middle School].

Higgins, 508 F.2d at 786. The Sixth Circuit went on to say that "[t]he mere fact that there is some incidental racial effect is alone insufficient to support a finding of a constitutional violation." Higgins, 508 F.2d at 788. "When no discrimination is shown, racial imbalance alone is no warrant for relief." Higgins, 508 F.2d at 790.

Once the Higgins court determined that the school district had not engaged in intentional discrimination and that the segregation in the schools was due to race-neutral factors, the court applied a low level of scrutiny. Higgins, 508 F.2d at 794. Relying on Swann, the Sixth Circuit held that the board's decision as to student assignment, transportation and the siting of school facilities should be given great deference:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation . . .

Higgins, 508 F.2d at 793, citing Swann, 402 U.S. at 16, 91 S.Ct. at 1276.

The Sixth Circuit (like Justice Powell in Bakke) recognized the importance of racial diversity in an educational setting, and also noted the importance of mixing economically disadvantaged students with other students. Higgins, 508 F.2d at 794. The court suggested that a socio-economically diverse student population was an important and legitimate rationale in busing or drawing district lines.

The evidence suggests that at least a part of the reason for moving more of the school population toward the periphery is a desire to broaden the education of those children of low socioeconomic status, regardless of race.

Higgins, 508 F.2d at 794-795.

The court went on to say:

An integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs.

Higgins, 508 F.2d at 795.

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IV. Application of the Case Law to the Plan

A. The zoning plan should pass constitutional scrutiny

The right to a free public education has never been interpreted under either the United States Constitution or the Tennessee Constitution to provide a right to attend a particular school or the school that is geographically the closest to a student's residence. As long as substantially equal educational opportunity is provided, the assignment of students to a particular school is within the plenary discretion of the local school board. See Tennessee Code Annotated, § 49-6-3102. Because all students will be assigned to a specific school, as long as the schools are substantially equivalent programmatically and structurally, the zoning plan should be reviewed under the lowest level of scrutiny. Further, a zoning plan may take race into consideration and still be subject to a rational basis level of scrutiny. It is only when race is the predominant consideration in designing the zoning districts that strict scrutiny will apply.

An examination of the rationale for the zoning plan, as provided in the Summary, reveals no evidence that the clusters were designed to achieve a certain fixed racial balance. While the Commitment to the Future, the preliminary document which was a forerunner to the Plan, contains statistical information on the racial composition of the elementary, middle and high schools in each cluster, the final cluster boundaries differed from those envisioned in Commitment to the Future. Further, the zoning plan was not designed to achieve any specific racial balance. Thus, unless a plaintiff demonstrates that race was the predominant factor in drawing the boundaries, any constitutional challenge should be reviewed under the lowest level of scrutiny.

The proposed zoning plan was based on both race-neutral and race-conscious criteria. In determining how students were to be assigned the Board and the plaintiffs began with the immutable factors: 1) the three tiers; and 2) the consistent-feeder-patterns. Further, the elementary and middle schools were "clustered" within the eleven existing comprehensive high schools zones. These race-neutral factors gave specific direction to how the zoning boundaries were drawn. In addition, the following race-neutral criteria were utilized:

facility capacity and the utilization existing facilities to the extent practicable;
decreasing transportation distance and time to facilitate greater parental involvement;
minimizing disruption to students currently attending schools (avoiding changing current student assignments where the other criteria could be met);
greater continuity (less frequent school changes) in areas where the population is highly mobile;
locating middle schools as centrally as possible within the cluster (geographic convenience)

As described above, each of these factors was applied in an inter-related and holistic fashion in arriving at the zoning boundaries. It is clear that some of the elementary and middle school district boundaries can be characterized as irregular and some of these district boundaries are non-contiguous. These facts, standing alone, should not result in strict scrutiny.

The various Board minutes referenced in the Plan, as well as the suggestions contained in the document called Commitment to the Future, do reflect that the plaintiffs, the citizen advisory group and the Board were conscious of how their decisions would impact the racial balance achieved under court supervision. The drafters of the Plan were careful to include demographic diversity as one of the many objectives in student assignments. Information supplied by those primarily responsible for drafting the Assignment Plan (legal counsel for the Board, staff members and legal counsel for the Kelley plaintiffs) revealed that race was only one of many factors considered in drawing the boundaries. Since the consideration of race as one of many relevant factors in drawing district boundaries was recognized as permissible in *Bush, Miller and Shaw v. Reno*, and race was not the predominant basis for the drawing of district boundaries, the zoning plan should pass constitutional scrutiny. As noted in *Higgins*, socioeconomic diversity is a legitimate interest that can be utilized in a zoning plan.

Legal counsel for the Board provided the Department of Law with maps that identify, for all clusters, the location by race, the performance level and the income level of all third graders. These maps confirm statements by

counsel for the plaintiffs and the Board that the clusters were drawn to achieve not only racial diversity but also to promote socioeconomic diversity. The Board has also provided a scatter graph which indicates an:

inverse relationship of the percent student population receiving free/reduced price lunch (a commonly used measure of poverty per school) and average achievement level. More simply stated this shows that, as a general rule, the higher the percent of poor children the lower academic achievement tends to be in a school (as measured by standardized tests).

The elementary and middle school district boundaries were drawn based on performance and socioeconomic factors, as well as race. This is true for both the contiguous and non-contiguous clusters.

If a plaintiff, however, was able to show that the zoning plan was drawn with race as the predominant consideration, the Board would be required to justify the student assignments as furthering a compelling interest and as being narrowly tailored to achieve that purpose. As discussed above, there are several cases that provide support for the position that racial diversity in elementary and secondary schools serves a compelling interest. Though this area of the law may be unsettled it is very possible that a race-based zoning plan would pass constitutional muster. The likelihood that a plaintiff could prove that the zoning plan was drawn with race as the predominant consideration is remote because the assignments that may appear to be race-based can be explained on race-neutral grounds.

B. The transportation plan should pass constitutional scrutiny

In a major metropolitan area, such as Metropolitan Nashville and Davidson County, busing of students is a necessity. There are areas within the county where the student population are both especially dense and sparse. This factor, coupled with the capacities of existing facilities, dictates that some students will be on a bus longer than others. Further, the assignments were made with the intention to minimize both disruption and capital costs by retaining existing student assignments and utilizing existing facilities to the extent practicable.

If the Plan is challenged after unitary status is achieved, one of the considerations will be whether the transportation burden falls more heavily on one race. If this impact is established, the person or persons challenging the Plan would then be required to show that such a disproportionate impact was intended. Absent these findings, the transportation component of the Plan should survive a constitutional challenge.

The Department of Law has been advised by counsel for the plaintiffs and the Board and by the staff of the Board that most students will be on the bus for a shorter time and will be traveling shorter distances to their assigned schools. In fact, some of the longer bus rides are in the contiguous zones, which tends to rebut any inference that the irregular shapes and non-contiguous zones were drawn for a racial purpose. Overall, whether the entire busing program impacts one race disproportionately is difficult to determine. It does appear that in some non-contiguous zones, the transportation burden may have a disproportionate impact on minority elementary students. Nevertheless, this apparent disproportionate impact will be alleviated to a great degree because these students will have "options" to attend schools that are closer to their homes. These optional programs are clear indicators that any disproportionate burden from the transportation plan was not the result of invidious discriminatory intent.

Absent evidence of discriminatory intent, the transportation plan will be subject to only a rational basis level of scrutiny. Under that low level of scrutiny the transportation component of the Plan, like the cluster boundaries, should be considered to further important and legitimate educational interests.

C. The operational components, with modifications, should pass constitutional scrutiny

1. The Magnet Schools

The Plan calls for the addition of a number of magnet schools. With respect to location, many of the new magnet schools are to be centrally located to minimize transportation time for most students. One newer feature of the magnet school program in this Plan is the interconnectedness, in terms of specialized programming between certain elementary, middle and high school magnets. Because the successful post-unitary challenges have all involved magnet school set-asides and, because magnet schools are considered to provide an enriched curriculum, particular attention must be paid to the student admission requirements for the magnet schools.

a. Geographic priority zones

The Plan provides that enrollment at magnet schools will be voluntary. In some cases, a "geographic priority zone" will be drawn around the school, giving preference to children within that zone. The geographic priority zone can be characterized as a sub-district of the cluster and thus, the same principles that apply in drawing district boundaries should be utilized in drawing the geographic priority zones. As of the date of this opinion, neither the geographic priority zones nor the percentage of available seats that will be assigned to the geographic preference has been determined. Consequently, it is not possible to weigh the impact of these "priority zones" on student's opportunity to compete for a magnet school position.

If the benefit of a magnet curriculum disproportionately impacts one group on the basis of race, and if that disproportionate impact is intended, the Board must provide a compelling governmental interest to justify the intended result. Again, it is unclear whether achieving a particular racial balance qualifies as a compelling governmental interest. Assuming the court follows the cases noted above that hold that racial diversity is a compelling interest in an educational setting, a geographic priority zone designed to achieve a racial balance may withstand strict scrutiny so long as it is narrowly drawn to achieve that purpose. To the extent that the geographic priority zones are drawn to give greater choices to students who bear the greatest transportation burden, they should not be found to have been motivated by discriminatory intent.

b. Specific racial set-asides

The Summary provides that, on April 25, 1995, the Board determined:

that all . . . magnet schools would operate with a student population of sixty percent (60%) white/other and forty percent (40 %) African-American plus or minus ten percent (10%).

Based on the post-unitary cases where set-asides for admission to magnet schools have been successfully challenged, it is probable that this type of fixed racial percentage would be characterized as a racial preference subject to strict scrutiny. As previously described, it is possible the Sixth Circuit will conclude that racial diversity is a compelling educational interest in the elementary and secondary school setting. However, the racial balance specified in this set-aside does not change as the racial percentages of the student population changes and is thus distinguishable from the flexible racial guideline adopted by the Boston School Board as described in *Wessmann*. In addition, the fixed racial balance does not take into account other minorities or ethnic groups in the student population, which was fatal to the set-aside in *McLaughlin*. For these two reasons this type of set-aside will probably fail the narrowly tailored test described above.

The safest course is to eliminate the fixed racial set-aside component of the magnet school admissions program. If the Board wishes to maintain a racial balance in the magnet schools, we recommend it look to the method utilized by the Boston School Board and approved in *Wessmann* as an illustration of the process needed to arrive at narrowly tailored, flexible racial/ethnic guidelines.

2. Enhanced Options

The Enhanced Option schools, Cluster Design Centers, Laboratory Schools, early childhood centers and dropout centers are all designed to provide additional services to at-risk or low achieving students. While these programs are designed to primarily benefit a particular group, the maps mentioned above reveal that most of these schools are located in areas with high concentrations of lower achieving students. Therefore like the zoning plan, performance and socioeconomic diversity goals support the enhanced options. Thus, this operational component should be reviewed under the lowest level of scrutiny.

Most of these programs will have a combination of open enrollment and an assigned population. To the extent a population is assigned, locating these enhanced programs in areas with high concentrations of lower achieving students will be considered to be a race-neutral decision. Because of the correlation between race, income and performance, that the majority of programs are located in predominantly minority areas should not be found to be evidence of discriminatory intent.

D. The capital plan should pass constitutional scrutiny

In Swann, the United States Supreme Court observed:

[T]he construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people.

Swann, 402 U.S. at 20, 91 S.Ct. at 1278.

Thus, a court will give the Board's choices relative to the closing and construction of schools wide berth. Unless those choices may be proven to be racially motivated, they will be sustained. The capital program implements the zoning plan described above, and like the zoning plan, the capital plan should be sustained if a constitutional challenge should be forthcoming.

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V. Conclusion

Voluntary desegregation plans that do not involve racial classifications that exclude or stigmatize a minority group are designed to further the extremely important government interest of enabling the races to learn and live together, an interest the courts have allowed post-unitary school systems to pursue. The Plan similarly furthers this important government interest. Therefore, it is the opinion of the Department of Law that the Plan should pass constitutional muster, with the possible exception of the racial set-asides for the magnet schools.

The Department of Law recommends if racial diversity is desired in the magnet schools, the racial set-asides be modified to be more narrowly tailored. The plan approved in Wessmann is illustrative of such a narrowly tailored plan. Finally, since there is no single document that the Board has approved that describes in one place all the components of the Plan or the rationale for those components, the Department of Law recommends that the Summary (as modified to address the magnet school set-aside issue) should be formally approved by the Board.

This opinion is limited to the question presented and should not be interpreted to apply to any other matter.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

James L. Murphy III
Director of Law

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After receiving this request for a legal opinion, the Department of Law met with Marian F. Harrison, legal counsel for the Metropolitan Board of Public Education (the "Board"), in Kelley, et al. v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al., ("Kelley") and Richard H. Dinkins, counsel for the plaintiffs, to determine which document constituted the Plan. Because the Plan had been frequently amended as the parties worked towards an agreed upon plan, it became evident that there was not a single document that contained all of the plan components or the rationale for those components. At the request

of the Department of Law, Ms. Harrison provided a summary of the Plan, dated May 14, 1998 (the 'summary'). This Opinion, then, directs itself to that Summary.

This synopsis is taken from a memorandum prepared in 1996 by Marian F. Harrison.

Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 74 S.Ct. 686, 347 U.S. 483, 98 L.Ed. 873 (1954) (Brown I). Brown I was a consolidation of cases from Kansas, South Carolina, Virginia, and Delaware. In those states, black children were denied admission to schools attended by white children under laws requiring or permitting segregation according to race ("De jure segregation"). Brown I, 347 U.S. at 487, 74 S.Ct. at 688. The Supreme Court held that segregation of children in public schools solely on the basis of race, even if the physical facilities and other tangible factors were equal, deprived the children of the minority group equal educational opportunities in contravention of the Equal Protection Clause of the Fourteenth Amendment. Brown I, 347 U.S. at 495, 74 S.Ct. at 692. In a subsequent decision, the Supreme Court instructed lower courts to utilize equity principles in constructing remedies, listing the following factors to consider in implementing Brown I:

problems related to administration, problems arising from physical condition of the school, the school transportation system, school personnel, revision of school districts and attendance areas, and revision of local laws and regulations, and the adequacy of any plans school authorities might propose to meet these problems and to effectuate a transition to racially nondiscriminatory school systems.

Brown v. Board of Education. of Topeka, Kansas., 349 U.S. 294, 300-301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) ("Brown II"). The Supreme Court also instructed the lower courts to enter such orders ". . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." Brown II, 349 U.S. at 301, 75 S.Ct. at 757.

This dual system of schools was established by law and is, thus, known as "de jure" segregation. "De facto" segregation is segregation which is inadvertent and established without the assistance of government action but, instead, is caused by social, economic or other factors. Blacks Law Dictionary 375 (5th ed. 1979).

In *Green*, the Supreme Court held that school districts that once operated a racially dual system were charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which "racial discrimination would be eliminated root and branch." *Green*, 391 U.S. at 437-438, 88 S.Ct. at 1693-1694. The school district in *Green* had opted for a "freedom of choice" plan which allowed all students to apply to the school board if they wanted to change schools. *Green*, 391 U.S. at 432-433, 88 S.Ct. at 1691-1692. When the case was presented to the Court, no white students and only a handful of black students applied to move from one school to another. *Id.* The Court found that this plan did not satisfy the school district's mandatory responsibility to eliminate all vestiges of a dual system. The Court went on to criticize the school district saying:

[A] plan, that at this late date, fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable. "The time for mere "deliberate speed" has run out." *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 234, 84 S.Ct. 1226, 1235, 12 L.Ed.2d 256 (1964); *Goss v. Board of Education of City of Knoxville, Tenn.*, 373 U.S. 683, 689, 83 S.Ct. 1405, 1409, 10 L.Ed.2d 632 (1963). The burden on a . . . board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

Green, 391 U.S. at 439, 88 S.Ct. at 1694. (Emphasis in original).

In addition to the emphasis on the immediacy of the need to eradicate segregation, *Green* delineated the aspects of the educational system, including student attendance patterns, which must be free from racial discrimination before the mandate of *Brown II* is met. They are: faculty assignments, staff and resource allocation, transportation, extra-curricular activities, and school facilities (referenced herein as "the *Green* factors"). *Green*, 391 U.S. at 435, 88 S.Ct. at 1693.

Swann v. Charlotte Mecklenburg Bd. of Ed., 91 S.Ct. 1267, 402 U.S. 1, 28 L.Ed.2d 554 (1971) *Swann* marked a turning point in the degree to which the lower federal courts, under the clear mandate of the Supreme Court, became involved in crafting detailed, comprehensive desegregation plans and mandating their implementation. The Court stated that specific racial quotas could not be mandated by a court and that the existence of a small number of one-race, or virtually one-race, schools within a district was not in and of itself the mark of a system that still practiced segregation by law. *Swann*, 402 U.S. at 26, 91 S.Ct. at 1281. Nevertheless, the district judge or school authorities were directed to make every effort to achieve the greatest possible degree of actual desegregation which would necessarily involve the elimination of one-race schools and making limited use of mathematical ratios is within the equitable remedial discretion of the lower courts. *Swann*, 402 U.S. at 25, 91 S.Ct. at 1280. Noncontiguous zoning, school-pairing and busing were specifically embraced as acceptable desegregation tools in remedying de jure segregation. *Swann*, 402 U.S. at 28, 91 S.Ct. at 1282-1283. The Supreme Court did recognize that students would have a valid objection when the time or distance of travel was so great as to either risk the health of the children or significantly impinge on the educational process. *Swann*, 402 U.S. at 30-31, 91 S.Ct. at 1283.

The Supreme Court initially limited the power of the lower courts to require a specific degree of racial balance in the schools, or to require an inter-district remedy involving school districts that were uninvolved with and unaffected by any constitutional violation in *Milliken v. Bradley*, 418 U.S. 717, 740-745, 94 S.Ct. 3112, 3124-3127, 41 L.Ed.2d 1069 (1974) ("Milliken I"). In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435, 96 S.Ct. 2697, 2704, 49 L.Ed.2d 594 (1976), the Court held that it was not within the discretion of the district court to require the school district to rearrange its attendance zones each year to ensure a desired racial mix. In *Milliken v. Bradley*, 433 U.S. 267, 281, 97 S.Ct. 2749, 2751, 53 L.Ed.2d 745 (1977) ("Milliken II"), the Court held that a district court's remedial authority extends only to the breadth of the violation proven and that a valid desegregation remedy must: (1) be tailored to the nature and scope of the constitutional violation; (2) be designed to restore the victims of discrimination to the position they would have occupied had the discrimination not occurred; and (3) take into account the interest of state and local authorities in managing the public schools. *Milliken II*, 433 U.S. at 280-281, 97 S.Ct. at 2757-2758. In *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766, 2770, 53 L.Ed.2d 851 (1977), the Court stressed the importance of local autonomy of school districts as a vital national tradition.

In 1977, after operating under a desegregation plan, the Oklahoma City school district asked to be and was declared unitary. *Dowell*, 498 U.S. at 241, 111 S.Ct. at 633. The school district continued voluntary desegregation until 1984, when it adopted a new voluntary desegregation plan that eliminated busing. *Dowell*, 498 U.S. at 242, 111 S.Ct. at 634. Plaintiffs filed to reopen the case, contending that the school district had not achieved "unitary" status and that the post-unitary student assignment plan was a return to segregation. *Id.* The district court refused to reopen the case and the Tenth Circuit reversed. *Dowell*, 498 U.S. at 243, 111 S.Ct. at 634. The Supreme Court reversed the Tenth Circuit and remanded the case to the district court. *Dowell*, 498 U.S. at 251, 111 S.Ct. at 638.

In *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 978 F.2d 585 (10th Cir. 1992), cert. denied, sub nom., *Unified School District No. 501, Shawnee County, Kansas v. Smith*, 509 U.S. 903, 113 S.Ct. 2994, 125 L.Ed.2d 688 (1993), the Tenth Circuit, when reviewing the Topeka school board's request for unitary status, held:

Depending on the definition of "good faith," the possibility of immediate resegregation following a declaration of unitariness seems all too real. For this reason, we are convinced that evaluation of the "good faith" prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be said to be acting in "good faith." See *Dowell*, 498 U.S. at 248-49, 111 S.Ct. at 637 (prior to discharge, district court must find "that it was unlikely that the school board would return to its former ways.")

Brown, 978 F.2d at 592. In *Stell v. Board of Public Education for the City of Savannah*, 860 F.Supp. 1563, 1564 (S.D. Ga. 1994) the court analyzed the school board's compliance with a voluntary desegregation plan using the Green factors, and determined that the school district had been desegregated in all required areas. *Stell*, 860 F.Supp. at 1582. As sufficient evidence of the board's "good faith", the court considered a board resolution, in which the board formally stated its commitment to continuing desegregation. *Stell*, 860 F.Supp. at 1582. (citing *Brown*, 978 F.2d at 591 (school board's resolution declaring intention to comply with Constitution in the future some evidence of good faith)).

See the dissenting opinion in *Brown*, 978 F.2d 585, which points to the problem inherent in requiring evidence of a continued commitment to desegregation:

"[T]his requirement could make the withdrawal of federal court supervision more apparent than real if it requires the promise of affirmative conduct on the part of the school board once a district becomes unitary. Good faith compliance with a desegregation decree over a reasonable period of time is relevant because it is evidence that any current racial imbalance is not the product of a new de jure violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future."

Brown, 978 F.2d at 599, n.4 (dissenting opinion). (Citations omitted).

See, e.g., Board Minutes: December 8, 1992.

The "operational components" are also described as the "options for choice" and include the Enhanced Schools, Cluster Design Centers, Laboratory Schools and additional magnet programs as described more fully in Part II, B. See Summary, p. 3.

The Agreement and the Stipulation both state that the Agreement is not enforceable by the District Court as part of the Kelley case.

See Summary, p. 1.

While settlements of desegregation lawsuits are appropriate, the settlement itself must "attain a certain level of constitutional compliance." *Armstrong v. Board of School Directors*, 616 F.2d 305, 319 (7th Cir. 1980) (citing *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976), cert. denied, 433 U.S. 914, 97 S.Ct. 2987, 53 L.Ed.2d 1100 (1977)). The court noted: "[A] school desegregation settlement which authorizes clearly unconstitutional behavior is, on its face, neither fair, reasonable nor adequate as required by the class action standard." *Armstrong*, 616 F.2d at 319-320. Further, whether the settlement violates this standard depends on the state of the law at the time

the settlement was submitted for approval. There must have been some prior judicial decisions that have "found the practice to be illegal or unconstitutional as a general rule." *Armstrong*, 616 F.2d at 321. In *Little Rock School District v. Pulaski County Special School District No. 1*, 921 F.2d 1371 (8th Cir. 1990) ("Little Rock"), the Eighth Circuit overturned the district court's disapproval of a desegregation settlement. *Little Rock*, 921 F.2d at 1376. The district court had based its disapproval on its view that the settlement agreement was "facially unconstitutional". *Little Rock*, 921 F.2d at 1383. The agreement contemplated a school attendance plan in which several schools would be all black. *Little Rock*, 921 F.2d at 1385. The Court of Appeals, comparing school desegregation cases with Eighth Amendment prison-overcrowding cases, found that the settlement plan was not unconstitutional merely because it included some racially identifiable schools. *Little Rock*, 921 F.2d at 1384-85. The United States Constitution's general equal protection guarantees are effectuated in detailed remedial plans that "are very much a matter of judgment and discretion." *Little Rock*, 921 F.2d at 1384. Because of this discretion, it cannot be said that a plan that allows a 15% versus 20% deviation in the racial makeup of a particular school is unconstitutional. *Id.* Instead, the Appellate Court found the settlement plans to be "reasonable good-faith efforts to solve seemingly intractable problems, efforts involving give and take on the part of all concerned, but embodying also significant relief for the plaintiff class." *Little Rock*, 921 F.2d at 1388.

The court reviewed the various components included in the Desegregation Exit Plan. Similar features are included in the Plan developed by the Kelley plaintiffs and the Board (See Part II, Overview of the Plan, *infra*), such as: magnet school programs, including some with a geographic preference, designed "to attract a more diverse student body"; a "Basic Schools program", enhancing the educational opportunities for those students and additional resources and program enhancements for schools with the highest concentrations of poverty (similar to enhanced option schools); redistricting of certain school zones to achieve some level of integration in the zoned schools; "pure" feeder patterns where students stay together from elementary to middle to high school; facilities available for other community needs (similar to Design Center Schools); one of the schools would be used as a teaching and developmental academy for instructors wishing to pursue innovative teaching strategies which require advanced technology (similar to Lab Schools).

The school district's Operation Student Assignment Plan, negotiated between the parties and approved by the district court in 1991, was deemed to have satisfied the Green factors. The creation of an external monitoring group, established to review each of the Green factors "relative to the maintenance of a unitary system" as well as voluntarily monitoring of demographic changes to "plan effectively for racially and ethnically diverse school enrollments in the future" favorably influenced the court to approve the settlement. *St. Lucie*, 977 F.Supp. at 1208, 1214.

Because the Metropolitan Government is a government of limited powers, a school board must be granted the authority to assign students to specific schools and provide transportation to and from school. *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988). State law clearly and unmistakably grants the Board the authority to enroll all students under its jurisdiction. In fact, the authority is deemed to be "full and complete and its decision as to the enrollment of any pupil in any . . . school shall be final." Tennessee Code Annotated, § 49-6-3102. Tennessee Code Annotated, § 49-6-3103 lists a variety of factors a school board may look to in making student assignments, including available room, available transportation facilities, the effect of the assignment on the "welfare and best interests of the student", and "sociological, psychological and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness. Regarding transportation, Tennessee Code Annotated, § 49-6-2101 authorizes school boards to bus children to their school of enrollment. If the child's residence is more than 1 1/2 miles from their assigned school, the State provides funding to local boards of education to help defray the costs of transportation. (These statutes also contain provisions purporting to prohibit assigning or transporting students to achieve racial balance. These provisions were considered by the District Court in *Kelley*, 615 F.Supp. 1139, 1144 (M.D. Tenn. 1985), to be evidence of segregative intent on the part of the State, and in light of *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), are of questionable constitutional validity.)

See Summary, pp. 5, 15-64.

"There are 11 clusters. Each cluster is a geographic area that is served by one comprehensive high school and the elementary and middle schools that feed into that high school. Clusters may also include magnet schools and other specialized programs. By clustering a group of schools together in this way, students will attend school within a geographic area, more students will attend schools closer to home, and bus transportation will be reduced. Also, special education programs, ENCORE, and English-as-a-Second Language (ESL) services can be provided within clusters, reducing transportation and providing greater continuity for students served by these programs." Summary, p. 3.

See Summary, pp. 6-7.

In addition to the goals and rationale for the pupil assignment plan outlined herein, it is fundamental that the Plan was the result of the Board's interest in bringing an amicable end to this 43 year-old lawsuit. (See, e.g., Board Minutes August 12, 1997.)

See Summary, pp. 3-4, 10-11

See Summary, pp. 11-12.

See Summary, pp.12-13.

Bellshire and Cameron are zoned schools; Kings Lane and Haynes will both have voluntary enrollment. Students from outside the assigned or Geographic Priority Zone for each school may apply for available seats, with students within the cluster being given a first priority, and students outside the cluster being given a second priority.

See Summary, p.13.

See Summary, p. 13.

See Summary, p. 14.

See Summary, pp. 65-70.

The Plan, as noted previously, is not a settlement plan that will be incorporated into the final order of the District Court, but will be submitted to the District Court as an integral part of the settlement of the Kelley lawsuit. Thus, the settlement case law described above, which should result in a highly deferential review of the Plan in any subsequent litigation, may not be dispositive. The legality of the Plan, as a post-unitary voluntary plan, will therefore be considered in light of traditional equal protection analysis.

Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at, 2049. However, it is not required that a plaintiff prove that the challenged action rested solely on racially discriminatory purposes. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Arlington Heights"). Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. *Id.* When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified. *Arlington Heights*, 429 U.S. at 265-266, 97 S.Ct. at 563. The Supreme Court went further in *Arlington Heights* to describe how a plaintiff would prove discriminatory intent: Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it bears more heavily on one race than another, . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent . . . [an obvious] pattern . . . , impact alone is not determinative, and the Court must look to other evidence. The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also might shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. *Arlington Heights*, 429 U.S. at 266-268, 97 S.Ct. at 564-565 (footnotes and citations omitted).

As Justice O'Connor recently noted, strict scrutiny is not intended to be "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237, 115 S.Ct. at 2117.

42 U.S.C. § 2000d, et seq. ("Title VI"). Title VI prohibits the use of federal funds for the furtherance of discrimination. While it remains unclear whether Title VI does, in fact, provide a private right of action because all of the Supreme Court opinions have been plurality opinions, recent decisions have permitted a private right of action. In *Buchanan v. City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996), the Court required a showing of discriminatory intent to overcome a summary judgment motion. However, the regulations under Title VI require only a showing of disproportionate impact. See *Graham v. Tennessee Secondary School Athletic Association*, 1995 WL 115890 (E.D. Tenn.). To obtain compensatory damages, versus injunctive relief, however, a plaintiff may be required to show intentional invidious discrimination. Once the plaintiff has met the initial requisite burden, the burden shifts to the defendant to show that it had a compelling interest and that the government program is narrowly tailored. See, *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582, 602-603 103 S.Ct. 3221, 3232-3233, 77 L.Ed.2d 866 (1983).

In *Hopwood v. State of Texas*, 78 F.3d 932, 934 (5th Cir. 1996), rehearing en banc denied, 84 F.3d 720 (5th Cir), cert. denied, 518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996), the Fifth Circuit faced a challenge to a minority set aside admissions program for the University of Texas Law School. The court expressly rejected the benefits of educational diversity as a compelling governmental interest by relying on the fact that no other Justice joined Justice Powell in this portion of *Bakke*. *Hopwood*, 78 F.3d at 944. However, Justices Ginsberg and Souter in dissenting from the denial of certiorari, indicated that *Hopwood* might not be the definitive answer to the question of whether educational diversity is a compelling governmental interest. *Hopwood*, 518 U.S. 1033, 116 S.Ct. 2581. See also dissent from denial of en banc review in *Hopwood*, 84 F.3d 720, 724 (5th Cir. 1996). In *Tito v. Arlington County School Board*, 3 ECLPR 58, No. 97-540-A (E.D. Va-Alexandria Div. May 13, 1997), the district court evaluated an equal protection challenge to the admissions program for an alternative preschool. Admissions were based on a lottery but, once the quota for white students had been filled, white students were passed over in

favor of Black, Asian and Hispanic students that were lower on the lottery list. Looking to Bakke, the school contended that racial diversity in preschool education was a compelling interest. The court rejected the diversity argument because the admissions program was based solely on race and; therefore, was not narrowly tailored to promote diversity. Additionally, the court questioned whether diversity was a compelling governmental interest.

There were three "examination schools" in Boston, like the academic magnet schools in Nashville, where entrance to the programs was highly competitive. A student could apply to one or more of the examination schools.

Because the case decided only whether a preliminary injunction should be issued, it was not dispositive on the constitutionality of the set-aside program. However, in determining whether to issue a preliminary injunction, one factor the court evaluated was the likelihood of success on the merits. Therefore, the case was instructive on how a court would later rule on the question of whether the program is constitutional.

The court noted that "there is no Supreme Court decision that has held that diversity is not a compelling state interest in the context of intermediate and secondary public school education" and that, contrary to the holding in Hopwood, Bakke is precedential, as it was supported by five Justices. Wessmann, 1998 WL 271218 at 10. (Emphasis added). Further, the court noted that Bakke had never been overruled by the Supreme Court and "ë(i)f a precedent of this Court [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving [to the Supreme Court] the prerogative of overruling its own decision.í Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85, (1989)". Wessmann, 1998 WL 271218 at 11.

These maps are transparencies that overlay the eleven clusters. Maps to scale were also made available.

The scatter graph is contained in a memorandum, dated April 8, 1998, prepared by Michelle Kubant, a staff member with the Board.

See Summary, p. 11.

In *Jacobson v. Cincinnati Board of Education*, 961 F.2d 100 (6th Cir. 1992), cert. denied, 506 U.S. 830, 113 S.Ct. 94, 121 L.Ed.2d 55 (1992), an equal protection challenge was brought against a school board's faculty assignment program. *Jacobson*, 961 F.2d at 101. Teachers were assigned or transferred to schools so that the percentage of black teachers in any particular school was not greater than or less than 5% of the total percentage of black teachers in the entire school system. *Jacobson*, 961 F.2d at 102. The Sixth Circuit acknowledged that the program was race-conscious, but held that the program was not an illegal racial preference because the program "applied equally to black and white teachers". *Jacobson*, 961 F.2d at 103. Since the program did take race into account it received a heightened level of scrutiny; however, since the program was considered to impose equal benefits and burdens on all races relative to their make-up in the teacher population, it was not subjected to strict scrutiny. *Jacobson*, 961 F.2d at 102. The Sixth Circuit relied upon *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3rd Cir. 1984), cert. denied, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985), in utilizing this intermediate level of scrutiny. *Jacobson*, 961 F.2d at 103. In light of the Supreme Court's criticism of *Kromnick* in *Adarand*, 515 U.S. at 221, 115 S.Ct. at 2110, the use of the intermediate level of scrutiny is now questionable.

"Enhanced Options" include all of the "options for choice" described in section B of the Plan Overview (Part II) except for the magnet schools.