Cowan et al v. Bolivar County Board of Education

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION DIANE COWAN, minor, by her mother and next friend, Mrs. Alberta Johnson, et al.; FLOYD COWAN, JR., minor, by his mother and next friend, Mrs. Alberta Johnson, et al.; LENDEN SANDERS; MACK SANDERS; CRYSTAL WILLIAMS; AMELIA WESLEY; DASHANDA FRAZIER; ANGINETTE TERRELL PAYNE; ANTONIO LEWIS; BRENDA LEWIS; and UNITED STATES OF AMERICA

PLAINTIFFS

INTERVENOR-PLAINTIFF V. NO. 2:65-CV-31-DMB BOLIVAR COUNTY BOARD OF EDUCATION, et al.

DEFENDANTS

OPINION AND ORDER On May 17, 1954, the United States Supreme Court issued the landmark decision of Brown v. Board of Education, holding Brown I). A year later, on May 31, 1955, the Supreme Court issued a second order directing compliance with Brown I Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (Brown II). Ten years

after Brown II, residents of Bolivar County, Mississippi, filed this now fifty-year-old action seeking the desegregation of their school system. After decades of litigation, this case is currently before the Court for the determination of an appropriate desegregation remedy for the high schools and middle schools in the .

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Upon the Court concludes that, in order to achieve constitutionally-required desegregation, the District must consolidate its high schools and must consolidate its middle schools.

I Procedural History A. Filing and First Order On July 24, 1965, 131 minor children, acting through their parents or guardians, filed this action against the Bolivar County Board of Education and numerous of its members, alleging that the defendants usage of operating the public schools of Bolivar County, Mississippi, on a racially segregated

Doc. #37-1 at ¶ 7. In their complaint, Plaintiffs alleged that the action was brought their own behalf and on behalf of all other Negro children and parents located in Bolivar County, Mississippi, who are similarly situated and affected by the policies, practices, customs 1

Id. at ¶ 5. Of relevance here, the original complaint alleged:

Bolivar County District No. 4 maintains six white schools: (1) Cleveland High School[,] (2) Margaret Green Junior High School[,] (3) Pearman Elementary School[,] (4) W.J. Parks Elementary School[,] (5) Boyle Elementary School [and] (6) Merigold Elementary School. Each of these schools is limited to attendance by white pupils only and are staffed by white teachers, white principals, and other white professional personnel. Regardless of location, these schools may be attended by white pupils only. Bolivar County District No. 4 also maintains four Negro schools: (1) East Side High School[,] (2) Nailor Elementary School[,] (3) B.L. Bell Elementary School [and] (4) Hayes Cooper Elementary School.

1 The docket does not reflect that this matter was ever certified as a class action.

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Each of these schools is limited to attendance by Negro pupils. They are staffed by Negro principals, Negro teachers and other Negro professional personnel. Regardless of location, these schools may be attended by Negro children only. Doc. #37-1 at ¶¶ VII(i) & (j). 2

On July 22, 1969, Chief Judge William C. Keady issued an order District Number Four of Bolivar County [is] permanently enjoined from discriminating on the basis of race or 3

Doc. #33 at 1. The order further

Id.

der adopted a district-proposed plan dividing the school district into two zones for students attending grades seven through thirteen, and five zones for students attending grades one through six. Id. at 1. Under the terms of the plan, each zone was assigned a corresponding school: Zone I 4

was assigned Cleveland High School; Zone II 5

was assigned East Side High School; Zone III was assigned Hayes Cooper Elementary; Zone IV was assigned Nailor Elementary School; Zone V was assigned B.L. Elementary School; Zone VI was assigned Parks Elementary School; and Zone VII was assigned Pearman Elementary School. 6

Id. at 2 3. Id. at 3.

Regarding the new system, Judge Keady ordered: 2 In addition to the allegations against the District, the complaint alleged discriminatory practices in Bolivar school districts. Doc. #37-1. defendants in one of the other districts in Bolivar County was filed. The desegregation efforts of these other districts are not at issue in this case. 3 Bolivar County School District Four is now the Cleveland School District. Doc. #12 at 1. 4 5 Id. 6 Because only the schools in Zones I and II are the subject of this opinion, the geographic boundaries of Zones III VII are not relevant and thus not included here.

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For the school year 1969-70, each student attending elementary grades 1 through 6 shall be assigned to attend the school in the zone in which he resides, and students attending grades 7 through 12 shall be assigned on the basis of their freedom of choice previousl For the school year 1970-71 and thereafter, each student in all grades 1 through 12 shall be assigned to attend the school in the zone in which he resides, provided, however, that any student entering the 12th grade for the school year 1970-71, irrespective of the place of his residence, shall have the right, if he so desires, to attend that high school which he attended for the school year 1969-

qualified personnel, not less than one of every six classroom teachers of a different race shall be employed and assigned to each of the schools or attendance centers for the 1969-70 school year, and for the 1970-71 school year and thereafter there shall be full faculty and staff desegregation, to such an extent that the faculty at each school is not identifiable to the race of the majority of the students at any such school. Doc. #33 at 3 4 (emphasis in original). Additionally, Judge Keady directed that ; school in which the student is enrolled; proper operation of the school system as whole, shall locate any new school and substantially

expand any existing schools with the objective of eradicating the vestiges of the dual school Id. at 4 5. To enforce all of his directives, Judge Keady ordered the defendants to submit annual reports on the status of their desegregation efforts and quarterly reports detailing the transfers of students. Id. at 6 7.

Six months later, on January 22, 1970 (after receiving two quarterly reports submitted by the District), Judge Keady issued an order stating that Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 4 of 96 PageID #: 4395 current school year 1969 70, students entering the system for the first time shall be assigned to , Order at 4. 7

B. United States Intervention and 1989 Consent Order On January 23, 1985, following over fifteen years of annual and quarterly status reports, the United States filed a motion to intervene as a plaintiff. Doc. #1 at 16. On March 21, 1985, the Court granted the to intervene. Id. The same day, the United States filed a -in-Inter alleging:

Defendants have actively pursued the following policies and practices, which [July 22, 1969] Order in Cowan and impeded the elimination of the vestiges of the dual system of public education in School

District Four. a. Defendants have instituted informally a dual residence policy and practice

allowing students to attend schools in zones outside of their residence if the student establishes a second residence during the week. b. The dual residency policy has adversely affected the desegregation of School

District Four and has served to maintain segregated schools. c. Defendants have made faculty assignments on the basis of race so that faculty

are assigned to schools

d. Defendants have made professional staff assignments on the basis of race so

that black persons serve as administrators for those schools with predominantly black student enrollments while white persons serve as administrators of schools with majority white student enrollments. e. Defendants in order to maintain racial segregation have chosen to construct

three new schools in areas such that black students continue to attend schools with 100% black enrollments.

7 The January 22, 1970, order does not appear on the

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f. Defendants have discriminated against students attending Eastside High

School, Nailor, and Merigold elementary schools with respect to the condition and maintenance of facilities. Intervenor Complaint at ¶ 13. 8 the docket. 9 On November 8, 1985, Judge Keady transferred the case to United States District Judge Glen H. Davidson. Doc. #101 at 2. On September 2, 1986, Judge Davidson entered an order transferring and reassigning the case to United States District Judge L.T. Senter. Id. The case was formally transferred to Judge Senter the next day. Doc. #1 at 17. From September 1986 until September 1989, the parties engaged in a protracted period of discovery while the District continued to submit status reports to the Court. See id. at 17 19. On September 21, 1989, Judge Senter entered a Consent Order which: (1) imposed additional requirements for faculty/professional desegregation staff at each school to the extent feasible shall reflect the districtwide ratio of minority and

nonminority faculty and professional staff; -to-minority transfer (3) directed the District to offer a minimum of two exclusive college preparatory classes at each high school and to provide transportation to students taking such courses; (4) modified the elementary and junior high attendance zones; 10

(5 8

The three new schools referenced in the Intervenor Complaint were Cypress Park Elementary, Eastwood Junior, at ¶ 15.

9 On June 17, 1985, the Court entered an order directing that a complaint filed by private citizens in a separate civil action be treated as a complaint in intervention in this action. See Doc. #1 at 16. The District answered the private intervenor complaint on August 1, 1985. Id. The private intervenor complaint was dismissed without prejudice on September 5, 1989. Id. at 19. 10 The 1989 Consent Order provided that the former Merigold Elementary School, which closed on July 1, 1986, would become part of the Pearman Elementary School zone (Zone VII). Doc. #12 at 6 7; Doc. #6-2. The order also modified the geographic boundaries of Zone IV. Doc. #12 at 7.

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opportunity of course offerings to all students) directed the creation

11

(7) directed the parties to take actions t]here will be no disparity of maintenance of any of the schools within the district; (8) mandat predominantly black Eastwood Junior High School [D.M. Smith]; 12

and (9) required the submission of annual reports on the status of its desegregation efforts. 13

Doc. #12 at 2, 4, 6 7, 9, 12, 14 16. Under the majority-to-minority transfer policy, the Court directed that shall exist schools containing a majority of either black or white students, the school district shall

encourage and permit a student (black or white) attending a school in which his or her race is the Id. at 4. Additionally, the D transportation system to transfer the Majority-to-Id. at 5.

11 plus or minus 5% of the total student population enro During the course of the litigation, the United States student population in the District, have resulted in disproportionately high enrollment of white students at Hayes Cooper relative to the District-wide population, Doc. #109-1 at 22 n.7. 12 Eastwood Junior High School was renamed D.M. Smith Middle School in 2007. Tr. 49, 736. 13 : total student enrollment of the district by race for the current school year; total student enrollment of each school by race for the current year; total number of total number of students by race participating in the majority-to-minor school; a description of all new construction (including renovations, modifications and additions), repairs or renovations related to health, safety, or emergencies, or repairs necessary to comply with state or local government -type programs in operat District; the total number of full time teachers by race in each school in the District; and the total number of

administrative staff, by race, of each school facility. Doc. #12 at 14 16.

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As for course offerings, Judge Senter ordered:

Beginning with the 1988 89 academic year and each year thereafter, the school district will identify specific required college preparatory courses, a minimum of two of which shall be offered each year exclusively at Eastside High School and a minimum of two of which will be offered each year exclusively at Cleveland High School. The courses offered at each high school shall not be based upon student preference at that school. Transportation shall be provided to those students at Cleveland High School who are taking the courses at Eastside High School, and transportation shall be provided to those students at Eastside High School who are taking the courses at Cleveland High School. Id. at 7 8.

C. 1992 and 1995 Consent Orders On November 13, 1992, Judge Senter entered a second consent order, in which he granted high level in the Cleveland School District, which program shall, to the extent possible and applicable, reflect the same implementation plans called for [in] the 1989 Consent Order for the

On February 6, 1995, Judge Senter entered a third consent order. Doc. #14. The 1995

o the extent possible and applicable, reflect the same implementation plans called for in the 1989 [and 1992] Id. at 2. The 1995 Consent Order as complied with the [1992 Consent Order] in implementing a magnet school program at the junior high Id. With the exception of an August 21, 2003, reassignment of this case back to Judge

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Davidson, see Doc. #101 at 2, the matter lay largely dormant for approximately sixteen years after entry of the 1995 Consent Order. 14

See Doc. #1 at 21. D. Judge Davidson On April 7, 2011, the United States filed a Motion to Exceed Page Limit, representing

desegregate its schools in the forty-one years since the 1969 Or Doc. #3 at 1 2. Judge Davidson granted the motion four days later. Doc. #4.

On May 2, 2011, (1) find the defendants in

violation of federal laws and the orders of this Court and implement a desegregation plan that will

immediately dismantle its one-race schools and put the In support of its motion, the United States argued that the District - , Id. at 23, 30, 36. Specifically, of relevance here, the United States asserted:

In a school district where approximately 67% of the students are black and 30% the schools on the east side of the railroad tracks are all black or virtually all black. The majority of the schools on the west side of the railroad tracks, including Cleveland High School, Margaret Green Junior High School, and Parks Elementary School, enroll a student body that is at least twenty percent more white than the student population for the District as a whole. Id. at 12 13 (internal citations omitted). The United States also represented:

[D]ata reported by the District reflects that while approximately 60% of the

14 During this time, the District continued to submit annual reports. See Doc. #1 at 21. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 9 of 96 PageID #: 4400

teachers is disproportionately large in schools with an all-black or predominantly black student population, and disproportionately small in schools that have a large contingent of white students. Thus, during the 2009-2010 academic year 89% of the teachers at Cleveland High School (on the west side) were white, but only 24% of the teachers at East Side High School were white. At the middle school level, 80% of the teachers at Margaret Green Junior High School (on the west side) were white but only 25% of the teachers at D.M. Smith Middle School (on the east side) were white. Id. at 27. On August 18, 2011, after seeking and receiving an extension to respond to the United . See Doc. #10; Doc. #15; Doc. #26. In its supporting brief, the District argued that it was not in violation of federal laws because: (1) -to-minority transfer initiative prove its good

for demographic changes unrelated to former state-

Additionally, the District Id. at 18.

On October 6, 2011, after seeking and receiving a separate extension, the United States replied in support of its motion. Doc. #29; Doc. #30; Doc. #31. In its reply, the United States the District of its duty to achieve desegregation in its schools. Doc. #31.

On February 27, 2012, Plaintiffs stitute or file [a] motion to intervene on behalf of present African American parents who have children that attend Two days later, on February 29,

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2012, Judge Davidson granted Plaintiffs twe

On March 20, 2012, Plaintiffs s order, filed a motion to substitute as plaintiffs eight African

American parents of students in the Cleveland School District: (1) Lenden Sanders, (2) Mack Sanders, (3) Crystal Williams, (4) Amelia Wesley, (5) Dashanda Frazier, (6) Anginette Terrell Payne, (7) Antonio Lewis, and (8) Brenda Lewis. Doc. #40. Judge Davidson granted the motion to substitute on March 28, 2012. Doc. #43 at 13 14. In the same order, he concluded:

After the District received authority in the 1995 Consent Order to implement a magnet school at the high school level, the District applied for and received funding to establish a magnet program at Eastside High to increase desegregation of the high school. The District reports that the magnet program, which currently operates without funding from the Department of Education, consists of a visual and performing arts program for grades 9 through 12 and an international baccalaureate diploma program for grades 11 and 12. In addition to Eastside

an attempt to enrich and equalize the educational experience of the two schools. attract Caucasian students to the majority-African-American Eastside High, today, the school is attended by 99.7% African-American students After the District received authority in the 1992 Consent Order to implement a magnet school program at the junior high level to promote greater desegregation, the District applied for and received funding to establish the magnet program at D.M. Smith Middle School. The magnet program, which currently operates without funding from the Department of Education, consists of an arts and international baccalaureate program that serves grades 7 to 8 in an attempt to reduce minority group isolation at the junior high level. Despite D.M. Smith Middle School s magnet program, the school remains a racially identifiable African-American school with an attendance of 99.7% African-American students

[W]ith respect to student assignment, the District should submit a plan for improving integration in only Eastside High School and D.M. Smith Middle Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 11 of 96 PageID #: 4402

School. The Court finds the District has demonstrated a good faith effort to comply with prior desegregation Orders and federal law with respect to its elementary schools. Id. at 24 25, 36 37 (emphases added). 15 Turning forty

percent -wide ratio of minority and non- minority faculty and staff. Id. at 39. Nevertheless, Judge Davidson concluded:

[T]he District has attempted to comply with the prior desegregation Orders by hiring and retaining minority teachers and administrators and engaging in activities to recruit qualified African-American applicants, including targeting predominantly African- . Accordingly, the District should propose a plan to achieve the mandated racial balance among

Id. (emphasis in original).

E. Submission of Initial Plans and Subsequent Opinion On May 15, 2012, the District submitted a East Side High School and D.M. Smith Middle School. Doc. #44 at 1. The proposed plan

called for: (1) the creation of new magnet programs at East Side High and D.M. Smith; (2) enhancements to the curriculums at East Side High and D.M. Smith designed to attract white students; (3) opening courses at East Side High and D.M. Smith which are unavailable to Cleveland High and Margaret Green students; and end of the 2013-2014 school year ... faculty racial makeup at each school will Id. at 1 6.

15 Judge Davidson noted in the order that the magnet programs implemented at Hayes Cooper and Bell Elementary produced successful integration. Doc. #43 at 28 29.

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On August 30, 2012, the United States filed an objection proposed plan. Doc. #48. In its objection, the United States programs and exclusive course offerings, two mechanisms which had failed in the past. Id. at 8 10. R District has agreed to reach its [faculty reassignment] targets by the

beginning of the 2013- the United States did not object to the reassign faculty and staff under this new timeline. Id. at n.1.

objection on December 11, 2012. Doc. #55; Doc. #66. At the hearing, the United States argued -grade structure for The next month, on January 24, 2013, Judge , finding:

[T]he attendance zones, as defined by the former railroad tracks in Cleveland, perpetuate vestiges of racial segregation. The high school and junior high school students should have a true freedom of choice to attend either high school and either junior high school. Accordingly, the Court orders that the heretofore- established attendance zones shall be abolished, thus establishing an open-

Also, the majority-to- requirement for [a student] to be a minority in the transferee school is eliminated, thus permitting any child within the District to enroll in either of the high schools or junior high schools, regardless of the racial composition of the student body at such schools. Doc. #78 at 8 9. On February 21, 2013 order. Doc. #80. In its motion, the United States argued that the freedom of choice plan endorsed by the Court was unconstitutional and had been previously rejected by Judge Keady when, during a 1969 hearing, he observed that

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wishes or choices 13. The United States again advanced a consolidation plan. Id. at 18 21. Judge Davidson denied the motion to alter his order on the ground that the judgment was (citing Anderson v. Sch. Bd. of Madison Cty., 517 F.3d 292, 296 (5th Cir. 2008)). In deciding not to alter his ruling, and

two junior- Id.

F. Appeal and Remand January 24, 2013, ruling and his decision denying the United States Doc. #94. On April 1, 2014, the Fifth Circuit Court of Appeals conclusion that the problem of the continuing racial isolation and racial identifiability of D.M.

Smith Middle School and East Side High School would be resolved by the implementation of a freedom of choice plan Cowan v. Cleveland Sch. Dist., 748 F.3d 233, 240 (5th Cir. 2014). Accordingly, the Fifth Circuit reversed and remanded plicit explanation of the reasons for adopting the freedom of choice plan, and/or for consideration of the alternative 16

Id. On June 18, 2014, on joint motion of the parties, Judge Davidson issued a scheduling order setting litigation deadlines, including a deadline for submitting proposed desegregation plans, . Doc. #99. The scheduling 16

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the event the Court holds a hearing on competing desegregation plans and orders a plan, the District will implement the plan by the beginning of the 2015 2016 school year or under another Id. at ¶ 12.

Approximately one month later, on July 21, 2014, Judge Davidson issued an order recusing himself from this action and assigning the case to the undersigned United States District Judge. Doc. #101.

G. Second Submission of Plans and Filing of Motions After this case was transferred to the undersigned, the parties twice moved for extensions of the deadline to submit proposed desegregation plans. Doc. #104; Doc. #106. The Court granted the first motion in part, and granted the second, extending the deadline to submit plans through and until January 23, 2015. Doc. #105; Doc. #107.

On January 23, 2015, the United States and the District filed competing proposed plans to achieve desegregation. Doc. #108; Doc. #109. On February 13, 2015, the District filed 17

two plans. Doc. #112; Doc. #113. Following a February 20, 2015, prehearing conference, this Court issued an order on February 25, 2015, directing the parties to circulate all expert reports by March 20, 2015, and to complete discovery by April 21, 2015. Doc. #117. About a week later, after another prehearing conference held March 3, 2015, the Court noticed an evidentiary hearing on the competing desegregation plans for May 18, 2015. Doc. #127.

One week before the close of the discovery period, on April 14, 2015, Plaintiffs filed a motion to substitute Reverend Edward Duvall for Plaintiffs Wesley and Payne. Doc. #160. In

17 On February 27, 2015, Plaintiffs filed . Doc. #123. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 15 of 96 PageID #: 4406

their motion, P -American parent of two children Id. at ¶¶ 3 4. On April 30, 2015, the District,

without filing an accompanying memorandum brief, filed a motion to dismiss Plaintiffs Frazier, Lewis, and Williams or, in the alternative, to exclude their proposed testimony at the upcoming hearing, for failure to appear for a noticed deposition. Doc. #166.

On May 4, 2015, and May 8, 2015, the United States and the District, respectively, filed motions in limine to exclude certain expert evidence. Doc. #172; Doc. #176. On May 14, 2015, the United States The same day, the District, citing a desire to formulate a new desegregation plan, filed a motion

to continue . Doc. #183.

H. Hearing and Rulings On May 15, 2015, this Court entered an order denying Plaintiffs motion to substitute, citing Plaintiffs to make the necessary showing to justify substitution under Rule 17 of the Federal Rules of Civil Procedure. Doc. #191. In addition to denying substitution, the order action the enrollment of their children in Cleveland schools has vanished, Payne and Wesley

are ordered to show cause, within fourteen (14) days of the issuance of this order, why they should not be dismisse Id. at 4 5 (footnote omitted).

Three days later, on May 18, 2015, the Court denied the motion to continue the hearing h considerations of diligence; the effectiveness of a continuance; the inconvenience to the parties, witnesses and the Court; and the absence of prejudice. Doc. #194. In doing so, the Court noted

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t necessarily bar the District from seeking to present Id. at 4 n.3. The Court also denied the on the grounds that, as the trier of fact, the Court would be able to Having denied the motions in limine, the Court denied the moot. Id. The same day, the Court Frazier, Lewis, and

Williams because the D right to discovery could be protected by imposing the less severe sanction of excluding Frazier, Lewis, and Williams from testifying at the evidentiary hearing. Doc. #195.

The evidentiary hearing on the proposed desegregation plans began on May 18, 2015, and concluded on May 22, 2015. 18

Doc. #205. On June 5, 2015, the Court toured and inspected all schools operated by the District with counsel for the parties. Approximately two months after the evidentiary hearing, on July 27, 2015, the

parties submitted proposed findings of fact and conclusions of law. Doc. #207; Doc. #208.

On October 16, 2015, the Court directed the prepared by a person with competent knowledge setting forth a revised or updated estimate for

the implementation Both parties submitted the requested affidavits on October

30, 2015. Doc. #210; Doc. #212.

18 The hearing began one day after the 61st anniversary of Brown I. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 17 of 96 PageID #: 4408

II Preliminary Matters A. Scope of Remand to establish the scope of inquiry on remand. As mentioned above, the Fifth Circuit remanded

plan, and/or for consideration of the alternative desegregation plans proposed by the parties, as

Cowan, 748 F.3d at 240. As a general matt further proceedings, determines only that the further proceedings must be had[. S]imilarly, a

18B Fed. Prac. & Proc. Juris. § 4478.3 (2d ed.). Thus, , free to pass upon any issue which was not expressly or implied

Newball v. Offshore Logistics , 803 F.2d 821, 826 (5th Cir. 1986). decide anything apart from the necessity of a further explanation of of

choice decision. Thus, remand grants the Court discretion to change its mind as to the appropriate desegregation plan to be adopted. 18B Fed. Prac. & Proc. Juris. § 4478.3. Likewise, insofar as the opinion left open the consideration of alternative desegregation plans, such properly remains before this Court. See Newball, 803 F.2d at 826. Accordingly, in considering

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a freedom of choice remedy, and may consider any plan properly before it. 19

Id. B. Applicable Standards The goal of desegregation was precisely articulated by the Fifth Circuit Court of Appeals in Cowan:

In desegregation cases, the objective is to eliminate from the public schools all vestiges of state-imposed segregation. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. The duty is not simply to eliminate express racial

segregation: where de jure segre its effects root and [T]he burden on a school board today is to come forward with a plan

748 F.3d at 238 (internal citations omitted and footnote omitted).

de jure segregation have been eliminated as far as practicable, the Supreme Court has identified several aspects of school operations that must be considered, commonly referred to as the Green factors: student assignment, faculty, staff, transportation, extracurr Anderson, 517 F.3d at [desegregation] decrees, the courts will be Milliken v. Bradley, 433 U.S. 267, 279 80 (1977) (alteration in original). T designed as nearly as possible to restore the victims of discriminatory conduct to the position

19 all elementary schools were integrated despite Cypress Park and Nailor Elementary having mainly black enrollment. Therefore, all black schools are not per se whether the failure to appeal actually had this effect, there is no dispute that single race schools are not per se unconstitutional, as explained below.

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Id. at 280 81 (internal quotation marks omitted).

The dist remedies, exclude those that are inadequate or infeasible and ultimately adopt the one that is Cowan, 748 F.3d at 240. When uncertainty about whether a proposed plan will, in fact, achieve desegregation have been unacceptable flaws in any school desegregation plan since Green United States v. CRUCIAL, 722 F.2d 1182, 1191 (5th Cir. 1983). The implementation of desegregation remedies is reviewed for abuse of discretion. Cowan, 748 F.3d at 238. In asking the Court to implement one of its plans, the District advances two initial arguments: (1) that the chosen remedy must be limited by the nature and scope of the 10; see Doc. #207

at ¶¶ 133, 137.

1. Constitutional violation at issue While the District argues that the constitutional violation to be remedied by this Court is the drawing of the attendance zone lines, the United States responds that the injury to be remedied is not the zones themselves, but the injury the zones were intended to redress the de jure segregation system. Doc. #122 at 3 4 have proven unsuccessful in practice, the District remains obligated to take all available steps to

Id. at 3 (citing Columbus Bd. of Educ. v. Penick,

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443 U.S. 449, 458 (1979); Davis v. E. Baton Rouge Sch. Bd., 721 F.2d 1425, 1435 (5th Cir. 1983)).

The Court agrees with the United States. In this case, the constitutional violation at issue is decades of state-sponsored segregation which existed at the point Judge Keady issued his initial order in 1969. The District has not cited, and this Court has not found, authority standing for the proposition that court-ordered desegregation plans that fail to achieve the desired desegregation absolve a school district of responsibility for remedying the effects of the initial state-sponsored segregation. To the contrary, the law is clear achieved the greatest degree of desegregation possible under the circumstances the Board bears

Davis, 721 F.2d at 1435. Thus, where a court-ordered plan fails to achieve desegregation, a school Penick, 443 U.S. at 459 60.

There is no dispute here that, in violation of the Constitution, the District has operated a the District has failed to achieve the greatest degree of desegregation possible under the circumstances. ll in its power to eradicate the Davis, 721 F.2d at 1435. If the District fails to discharge this duty, Penick, 443 U.S. at 459. Pu places no restriction on this Court in fashioning a desegregation remedy.

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2. Deference The District next argues that, because it has been acting in good faith to desegregate its schools, its plans are entitled to deference. Doc. #112 at 10, 17 (citing Green, 391 U.S. at 439; Wright v. Council of Emporia, 407 U.S. 451, 479 (1972) (Burger, J., dissenting); Hall v. West, 335 F.2d 481, 484 (5th Cir. 1964)); see Doc. #207 at ¶ 133 (citing Green, 391 U.S. at 439).

The United States responds: Without conceding the assertion of good faith here, even assuming that a school district has complied in good faith with a court-ordered desegregation plan, such compliance alone does not satisfy the d further action to effectuate meaningful desegregation. See Ross v. Houston Indep. Sch. Dist. automatically desegregated when a constitutionally acceptable plan is adopted and implemented, for the remnants of discrimination are not readily eradicated. We have several times refused to find unitary a school system whose operation continues to reflect official failure to eradicate, root and branch, the weeds of . The appropriate measure at this juncture is not whether the District has operated in good faith in the past, but whether its proposed plans are reasonably calculated to effectively desegregate East Side and D.M. Smith. Doc. #122 at 4 (internal footnote omitted).

The provision of Green to be acting in good faith and the proposed plan to have real prospects for dismantling the state- Green to the board of other more promising courses of action may indicate a lack of good faith, and at

the least it places a heavy burden upon the board to explain its preference for an apparently less Id.

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The notion expressed in Green that where a district proposes an effective, constitutionally permissible plan, such plan is entitled to deference, is reflected in the other two cases the District cites. See Wright authorities crosses the threshold of achieving actual desegregation, it is not for the district courts

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to overste Hall sequence of responsibility is first the school authorities (internal quotation marks omitted). Thus, to the extent either of the Dis achieve desegregation, such plan may be entitled to deference.

C. Standing of Plaintiffs Payne and Wesley Neither Payne nor Wesley responded to May 15, 2015, directive to cause, within fourteen (14) days of the issuance of this order, why they should not be dismissed

from this action for lack of standing. Accordingly, Plaintiffs Payne and Wesley will be dismissed from this action for lack of standing and for failure to comply with an order of the Court. See United States v. Hays, 515 U.S. 737, 743 Allen v. Wright[, 468 U.S. 737, 755 (1984),] made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied (internal quotation marks omitted); see also Larson v. Scott dismiss an action for failure

III Geography and History of the District As this Court previously observed: Cleveland, Mississippi is a small city in eastern Bolivar County in the Mississippi River Delta with a population of a little over 12,000 residents. The city was a creation of the railroad system; the land that is now Cleveland was the approximate halfway point between Memphis, Tennessee, and New Orleans, Louisiana. The Louisville, New Orleans & Texas Railroad incorporated the town, which was named Cleveland in honor of then-President Grover Cleveland in 1886. Cleveland has since become home to Delta State University and has been named one of the hundred best small communities in the United States. Cleveland is also the base of the Cleveland School District, which encompasses 109 square miles and serves the cities of Cleveland, Boyle, Renova, and Merigold. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 23 of 96 PageID #: 4414

Doc. #43 at 1 2. The District is roughly bisected by railroad tracks which run north to south through the towns of Merigold, Renova, Cleveland, and Boyle. U.S. Ex. 2. 20

IV The School District A. The District Today Cleveland, the center of the District, was characterized by Judge Davidson in his January 2013 opinion . Doc. #78 at 4. The city has been described . Tr. 360. Cleveland is home to Baxter Health Care, Bolivar Medical Center, Delta State University, and the recently-opened GRAMMY museum. 21

Tr. 347, 360 61. Cleveland is said to have No party

presented evidence describing the businesses or cultures in Boyle, Merigold, or Renova the other towns in the District.

According to the 2010 Census, the towns and areas of the District have a population of 19,292 individuals, with a racial composition of approximately 45.5% white, 51.5% African American, and 3.0% other races (including individuals of two or more races). National Center for Education Statistics, CENSUS 2010, Table [P3] Race [8], Cleveland School District, MS

20 Exhibits submitted by Intervenor- documentary evidence at the hearing.

21 At the time of the evidentiary hearing, the GRAMMY museum was under construction. Tr. 360 61. The Court March 7, 2016. See City of Cleveland, Mississippi, www.cityofclevelandms.com (last accessed April 29, 2016); see also In re Katrina Canal Breaches Consol. Litig. determined that courts may take judicial notice of government

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(available at http://nces.ed.gov/programs/edge/tables.aspx?ds=census&y=2010). 22

As of May 22, 2015, 23

the District had a total enrollment of 3,723 students. Doc. #200-1. Of these students, approximately 28.8% were white, 66.7% were African American, and 4.5% were other races. Id.

secondary school student population lives in Cleveland and its outskirts. See U.S. Ex. 2. Within Cleveland, African American students reside primarily in the southeast portion of town (where East Side High is located), to the east of the railroad tracks and to the south of State Highway 8. Id. White students residing in Cleveland reside primarily in the southwest portion of town (where Cleveland High is located), to the west of the railroad tracks and to the south of State Highway 8. Id. Outside of Cleveland, white students live almost exclusively on the west side of the tracks; however, African American students outside of Cleveland are not concentrated on either side of the tracks. Id.

The District currently operates ten schools, as more fully discussed below. In addition to the District schools, there are twelve private schools within a fifty-mile radius of Cleveland: Presbyterian Day School, in Cleveland; Bayou Academy; North Sunflower; Indianola Academy; Pillow Academy; Washington Day School; Christian Day School; St. Joseph; Lee Academy; Presbyterian Day School, in Clarksdale; Mariana Academy; and Heritage Christian Academy. Tr. 803 04.

B. The District Schools The ten schools currently operated by the District consist of two magnet

elementary schools servicing grades pre-K through 6th (Bell Academy and Hayes Cooper Center); 24

two

22 See Hollinger v. Home State Mut. Ins. Co., 654 F.3d 564, 571 23 A court-ordered annual report of enrollment in the District was filed after the close of the hearing. See Doc. #200- 1. In order to ensure the accuracy of the opinion, this Court will use the most recent enrollment data, rather than the data presented at the hearing.

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zoned elementary schools servicing grades K through 5th (Parks Elementary and Pearman Elementary); 25

one zoned elementary school servicing grades K through 2nd (Nailor Elementary); 26

one zoned elementary school servicing grades 3rd through 5th (Cypress Park Elementary); 27

two middle schools (Margaret Green Middle School and D.M. Smith Middle School); and two high schools (Cleveland High and East Side High). Doc. #200-1. Only the high schools and middle schools are at issue here.

The District is overseen by Superintendent Jacqueline Thigpen, an African American woman, 28

and by a five-person school board , of which two members are African American. Tr. 221, 810, 811.

1. High schools Cleveland High and East Side High, the two high schools, operated as zoned schools until the 2013 2014 academic year. 29

Doc. #109-1 at 4. The two high schools are close in distance, located only 1.2 miles apart. Id.

24 Although the United States has raised the possibility that the enrollment plan at the magnet elementary schools may be unconstitutional, see Doc. #109-1 at 8 n.1., neither party briefed the issue. The magnet schools are well- regarded in the District community and by experts. Tr. 373, 771. Of note, Bell Academy has a total enrollment of 365 students, of which 41.6% are white; 52.6% are African American; and 5.8% are of other races. Hayes Cooper has a total enrollment of 367 students, of which 49.9% are white; 43.6% are African American; and 6.5% are of other races. Doc. #200-1. 25 Parks Elementary has a total enrollment of 362 students, of which 49.5% are white, 46.1% are African American, and 4.6% are of other races. Pearman Elementary has a total enrollment of 262 students, of which 22.1% are white, 68.7% are African American, and 9.2% are of other races. Doc. #200-1. 26 Nailor Elementary has a total enrollment of 376 students, of which 0.8% are white, 98.7% are African

American, and 0.5% are of other races. Doc. #200-1. 27 Cypress Park Elementary has a total enrollment of 272 students, of which 0.4% are white, and 96.6% are African American. Doc. #200-1. 28 11. 29

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Since of choice plan, under which any high school student can enroll in either Cleveland High or East

Side High. Tr. 20. Also, ostensibly still operating under the 1989 Consent Order, the District allows students at one school to take classes at the other. Tr. 649 50. When students elect to take a class at a different school, they are bussed from their enrolled high school to the site of their class at the other high school. Tr. 232. Buses run each day between the two schools every class period except the last period of each day. Id. Depending on student course selection and course scheduling, it is possible for a student to make multiple trips between East Side High and Cleveland High during the course of a single day. Tr. 240. While the trip between the two schools may only take five to seven minutes, commuting students are often late for classes. Tr. 240, 629.

Although the high schools offer shared classes, they operate under their own budgets and run their own athletic teams and extracurricular programs. 30

See Tr. 202, 263, 652. In a typical budget year, Cleveland High normally has greater expenditures, but East Side High generally has a higher per pupil expenditure. 31

Tr. 263.

a. Cleveland High School Cleveland High, which is housed on the same campus as Margaret Green Middle School, 32

is comprised of four structures: (1) a main building built in 1949 (44,889 square feet);

30 Cleveland High and East Side High teams occasionally play each other. Tr. 790 91. When the teams play at Cleveland High, the fans sit in separate areas. Id. Although separate fan seating is a mandate of the Mississippi High School Activities Association, East Side High does not follow this rule. Tr. 798. While the community may be divided in their loyalties, and the rivalry game between Cleveland High and East Side High , alumni of both schools get along. Tr. 755 56. 31 Cindy Holtz, the Business Manager for the District, attributed the higher per pupil expenditures to East Side faculty having more advanced degrees than their Cleveland High counterparts, and East Side running of magnet programs. Tr. 263, 271. 32 The two buildings are connected by a walkway. Tr. 428. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 27 of 96 PageID #: 4418

(2) a gymnasium built in 1939 (17,114 square feet); (3) a band, computer, and tech lab built in 1964

(16,518 total square feet); and (4) a cafeteria built in 1959 (4,475 square feet). Tr. 428; Doc. #109-2.

John Poros, an expert in architectural design called by the United States, summarized the structures in his report:

The existing Cleveland High School facility has fair to poor conditions of interior finishes (materials such as floor tile, baseboard, acoustical ceiling panels, and plaster wall surfaces), difficulties with accessibility overall, and some deficiencies in facilities to support teaching. Acoustical ceiling panels are old, stained and sagging, wall surfaces in areas are damaged and rough, and floor tiles are scuffed and stained. Restrooms are in fair condition with newer tile floors, plumbing fixtures like urinals and toilets, as well as new plastic laminate toilet partitions. The state of the interior finishes are a matter of appearance and do not pose a safety hazard (as would be the case if the floor tile was crumbling and fraying creating a trip hazard, or if acoustical ceiling panels were to fall). The steel windows are not leaking, but are heavily caulked and thus not energy efficient. The roofs have been maintained as part of the District's overall maintenance plan. U.S. Ex. 27 at 4 (internal citations omitted). 33

Poros also opined that Cleveland High contains a number of design issues which render it potentially non-compliant with the Americans with Disabilities Act. Tr. 561, 589. Specifically, the science lab is located on the second floor such bathrooms that are on a half level down from the main

90. Poros stated that these problems could be remedied within a year and the cost of repairs Apart from the stated deficiencies, Poros de

33

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As for Cleveland High athletic teams use the gymnasium at Margaret Green. Id. at 4 5. Poros testified

that the , but are generally adequate. Id.

Poros also testified that Cleveland High has a maximum physical capacity of 720 students, and an optimal student capacity of 576 students. 34

Tr. 571 73. Based on these standards, during the three school terms immediately prior, Cleveland High never reached maximum physical capacity but regularly exceeded its optimal capacity. As of May 22, 2015, the school had a total enrollment of 614 students, of which 45.4% were white, 47.4% were African American, and 7.2% were of other races. Doc. #200-1. For the 2013-2014 academic year, the first year of open enrollment, Cleveland High had a total enrollment of 616 students, of which 46.6% were white, 46.1% were African American, and 7.3% were of other races. Doc. #102-1. For the 2012 2013 academic year, the year before the implementation of open enrollment, the school had a

total enrollment of 595 students, of which 47% were white, 45.5% were African American, and 7.4% were other races. Doc. #93-1.

Based on testing in English I, Algebra II, Biology I, and U.S. History, Cleveland High is rated as a C school. Tr. 221.

b. East Side High School East Side High sits across a two-lane road from D.M. Smith Middle School. Doc. #109-1 at 8. The East Side High compound is comprised of three buildings: (1) a main building built in

34 Poros calculated the optimal capacity by taking the Mississippi School Design Guidelines suggestions for Tr. 572. He calculated maximum capacity by multiplying the number of classrooms by the Mississippi Department Id. at 572 73; U.S. Ex. 28.

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1956 (52,370 square feet); (2) a band hall built in 1965 (6,791 square feet); and (3) a Science Building built in 1974 (10,951 square feet). Doc. #109-2.

Poros, as he did for Cleveland High, also buildings in his report:

The general building layout has a number of advantages in that most of the building is one story, the circulation is continuous and accessible, and the building has enough space around it to easily support additions. The building, although old, is in fair condition in terms of interior finishes (materials such as floor tile, baseboard, acoustical ceiling panels, and plaster wall surfaces). Interior finishes are worn in areas but replaceable. A renovation/addition project from 2012 certainly has helped to bring up the overall interior finish condition of the building. The HVAC system has been recently upgraded and science labs renovated. The roofs have been maintained as part of the District's overall maintenance plan. U.S. Ex. 27 at 7. 35

Poros explained suffer from some accessibility issues. Id. at 6. Specifically, [handicap] accessible and would require the installation of an elevator, the fire-rated enclosure of the existing interior and exterior stair, and the creation of a fire-rated corridor to access the existing outdoor exit 6. Except for this accessibility issue, Poros opined that Id. at 5. The school has a newly restored track, a football field, a baseball field, and a field house. Id.

Poros estimated that East Side High has an enrollment capacity of somewhere between 769 and 1153 students. 36

U.S. Ex. 27 at 24 26. In contrast, Joseph Henderson, an expert in

35 poor condition, and certain exterior and interior areas neither well maintained nor cleaned. While Poros opined in at 7, the Court observed instances of water-stained ceilings, and toured some areas which emitted odors indicating possible water and moisture intrusion.

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school architecture called by the District [East Side High]

37 CSD Ex. 18 at 1. Currently, East Side High offers an International Baccalaureate Diploma Programme for eleventh and twelfth graders. 38

Tr. 35. This program, which was created to draw a diverse group of students to East Side High, , and biology. Tr. 35, 289 90; CSD Ex. 12 at 17. Additionally, East Side High exclusively offers classes in AP calculus, trigonometry, and public speaking. U.S. Ex. 73. The IB program and the other exclusive offerings are available to Cleveland High students through busing. Id.

Through a memorandum of understanding with Mississippi Delta Community College, East Side High further offers college level courses for high school and/or college credit. Tr. 230 31, 238 39. Any student may enroll in these classes but must pay a sixty dollar fee in order to obtain college credit. Tr. 231. The classes are taught by East Side High [Community College] criteria for

36 Poros derived t 25. He calculated the lower number by taking East Side High Beverly Hardy, the multiplying that capacity by an 85% utilization rate, and then adding the estimated capacity of remaining educational spaces in the school (two science laboratories, a gymnasium, a STEM laboratory, an art room, a band room, and a music room), multiplied by utilization rates ranging from 38% to 75%. Id. at 24 26. According to Poros, this second calculation produces an average utilization rate of 75%, Id Side High Id. at 25. 37 Henderson reached his estimates by multiplying East Side High the 600 student estimate) and by 27 students (for the 675 student estimate). CSD Ex. 18 at Ex. A. Henderson explained that he did not consider the non-classroom spaces (the laboratories, gymnasium, STEM laboratory, art 7 68. 38 This IB program for ninth and tenth graders was discontinued because students were not academically prepared for it. Tr. 292. The District is targeting to re-institute the program within three years. Id.

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As of May 22, 2015, East Side High had a total enrollment of 344 students, of which 100% were African American. Doc. #200-1. For the 2013-2014 academic year, East Side High had a total enrollment of 349 students, of which 99.7% were African American, and 0.3% were other races. Doc. #102-1. For the 2012-2013 academic year (before open enrollment), the school had a total enrollment of 355 students, of which 99.2% were African American, and 0.8% were other races. Doc. #93-1.

For the 2014-2015 academic year, forty-eight Cleveland High students enrolled in one or more IB classes at East Side High. CSD Ex. 12 at 17. Of the forty-eight enrolled Cleveland High students, thirty (62.5%) were white, fourteen (29.2%) were African American, and four (8.3%) were of other races. Id. Forty-six students from East Side High, all African American, were enrolled in at least one IB course. Id. During the same time period, fifty-six students participated in the dual enrollment classes Delta State University. Tr. 229 230, 239.

Based on testing in English I, Algebra II, Biology I, and U.S. History, East Side High is rated as a B school. Tr. 221.

2. Middle schools All 6th through 8th graders in the District, except for the 6th graders attending the two magnet elementary schools, attend either Margaret Green Middle School or D.M. Smith Middle School. 39

Doc. #109-1 at 8. As mentioned above, Margaret Green is located on the same campus as Cleveland High, and D.M. Smith is located across the street from East Side High.

39 At times in this opinion, Margaret Green and D.M. Smith Middle is referenced as Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 32 of 96 PageID #: 4423

At the close of the 2014 2015 school year, the two middle schools had a combined enrollment of 761 students, with a racial makeup of 66.7% African American, 28.6% white, and 4.7% other races. Doc. #200-1.

a. D.M. Smith Middle School D.M. Smith Middle School consists of one building, built in 1976, which measures 45,682 square feet in size. Doc. #109-2. The building, which includes a new classroom wing completed in 2012, concept, 40

under which room partitions do not extend to the ceiling. U.S. Ex. 27 at 6; Tr. 574 75. In order to bring the classrooms up to the National Fire Protection Association Code, which is referenced by the Mississippi Department of Education educational guidelines, the walls would need to be extended to the ceiling and many of the classrooms would require the installation of an exterior opening. Tr. 576 77. Additionally, the District would need to install sprinklers in the building. Id.

According to Poros, t worn, but serviceable and

41

U.S. Ex. 27 at 6. Id.

Poros testified that the building housing D.M. Smith has a maximum physical capacity of 840

students and an optimal student capacity of 636 students. U.S. Ex. 27 at 6; Tr. 578. As of 40 According to Poros, the open classroom style was common in the late 1960 , with the idea that Tr. 575. However, teachers complained about the noise from adjoining classrooms and, except number of schools, 76. D.M partitions are not moveable and guidelines. Id. at 576. 41 Based on its own among other things, that D.M. Smith shares a cafeteria and common wall with Cypress Park Elementary (with no express demarcation between the two schools at the point of the common wall), that the boundaries of the school site are not fenced, and that the exterior grounds were in need of maintenance.

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May 22, 2015, D.M. Smith had a total enrollment of 248 students, of which 99.6% were African American, and 0.4% were of other races. Doc. #200-1. For the 2013-2014 academic year, the school had a total enrollment of 258 students, of which 99.6% were African American, and 0.4% were other races. Doc. #102-1. For the 2012-2013 academic year (before open enrollment), the school had a total enrollment of 300 students, of which 99.7% were African American, and 0.3% were of other races. Doc. #93-1.

D.M. Smith As of April 29, 2015, the Middle Years Program enrolled 245 students, virtually the entire enrollment at D.M. Smith. U.S. Ex. 17. As the numbers above show, e Last year, D.M. Smith was a Id. Most recently, it

received a D rating. Id.

b. Margaret Green Middle School Margaret Green Middle School consists of three buildings: (1) a main building built in 1959 (26,991 square feet); (2) an addition built in 1955 (17,840 square feet); and (3) a gymnasium built in 1976 (19,133 square feet). Doc. #109-2.

Generally, as reported by Poros, 27 at 7. The building has numerous indices of foundation settlement, including cracking of CMU and brick wal and tilting of a doorframe. 42

Id.; Tr. 585.

Margaret Green has a maximum physical capacity of 750 students and an optimal student capacity of 568 students. U.S. Ex. 27 at 7. As of May 22, 2015, it had a total enrollment of 513

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students, of which 50.9% were African American, 42.5% were white, and 6.6% were of another race. Doc. #200-1. For the 2013-2014 academic year, Margaret Green total enrollment was 534 students, of which 49.3% were African American, 44.0% were white, and 6.7% were other races. Doc. #102-1. For the 2012-2013 academic year (before open enrollment), the school had a total enrollment of 461

students, of which 43.4% were African American, 49.9% were white, and 6.7% were of other races. Doc. #93-1.

Margaret Green ualify for the program, students must obtain teacher recommendations, achieve a certain score on a pre- algebra test, and have - 96. For the 2014-2015 school year, ninety-

five students were enrolled in M STAR program. Tr. 816. Of the 95 students, 29.5% were African American, 57.9% were white, and 12.6% were of other races. Id.

While M academic rating is not apparent from the record, a United States expert who reviewed the academic performance and accountability records opined that the s 96.

C. District Bonding Capacity

there are generally four ways in Mississippi in which a school district may borrow funds: (1) a general obligation bond issue, (2) a limited tax (three mil) note, (3) a general obligation lease purchase, and (4) a sixteenth section loan. 43

CSD Ex. 15 at 2. Id. Such bond may only be issued if 60% of

43 funding. CSD Ex. 15 at 4. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 35 of 96 PageID #: 4426

voters in the district approve the bond in a special election. Id debt limit is estimated at $27,993,700. Id. at 3.

A district may also borrow funds through the issuance of a limited-tax (three mil) note if it publishes notice and does not receive a petition supported by twenty percent of registered voters calling for an election on the notes. CSD Ex. 15 at 3. The District currently has the capacity to issue limited-tax notes in the approximate amount of $3.1 million to $3.4 million. Id.

Further, up to 20 years through Id. A district may issue a lease if it publishes notice and does not receive a petition calling for an election on the lease, and must then repay the lease each year from any available revenues. Id. under this program. Id. at 4.

Mississippi school district may borrow from its Sixteenth Section principal Id. at 4. Sixteenth Section fund is approximately $432,841. Id.

D. Community Perceptions According to Dr. Chresteen Seals, a Board member, academics and athletics of the 3, 245 46. Athletic events at East Side High ked Cleveland High events are even more crowded. Tr. 651 52.

Beyond athletics, both schools maintain very loyal alumni bases. Tr. 196, 641, 796. While East Side High alumni are generally proud of their school, some believe that other community members view East Side High and D.M. Smith in a negative light. Tr. 704, 790.

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One African American Tr. 732.

V Focus Groups In seeking to formulate desegregation plans, both the United States and the District convened focus groups Unsurprisingly, their focus groups generally yielded different results.

A. To run its focus groups and academic vice president at both Delta State University and the Mississippi University for

Women; and Dr. Cassie Pennington, a retired school superintendent from Indianola, Mississippi. Tr. 829 have both had years and years and years of experience facilitating and mediating and working with education in the 44

Tr. 38. focus groups where people from the community would be asked to come in and share ideas of

what we could do to make our school district and our community a positive experience for not to create six focus groups, with two focused on the elementary schools, two focused on the

middle schools, and two focused on the high schools. Tr. 38 39. To populate these groups, the District asked each of the following to nominate five persons to serve: (1) the principals of each school, (2) the Ministerial Association, (3) the mayor of Cleveland, (4) the Chamber of 44 Caston, who testified at the evidentiary hearing and was admitted as an expert in focus groups, estimated that he facilitated or led approximately seventy community focus groups during his career. Tr. 831.

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Commerce, Id. The District then sent packets of information to focus group participants. Tr. 59. Although the packets included background information on magnet programs and magnet schools, they did not include any information on school consolidation. Tr. 60.

The focus group nominees were split among the six groups, with each group convening twice in August 2014. Tr. 68, 838. Each meeting involved two hour-long sessions offices. Tr. 838, 841.

The focus groups were typically twelve to fifteen people in size. Tr. 80, 839. In addition to the participants, each session was attended by Jamie Jacks, counsel for the District; Beverly Hardy, and Karen Fioranelli, another District official. Hardy, Jacks and Fiora Caston] may not be in a positi

Although the United States was invited to participate in the groups, no representatives on its behalf attended in person. Tr. 841 42. However, the District set up a telephone connect to allow representatives to listen to the sessions. Tr. 842.

Superintendent Thigpen opened each meeting with a greeting before departing. 45

Tr. 842. Despite the presence of Thigpen, Jacks, Hardy, and Fioranelli, Caston testified that the participants were uninhibited in their participation. Tr. 845. Nevertheless, notes from a meeting reflect that Jacks referenced a study on white flight. Tr. 866.

During the discussions, according to Caston,

844 45. With regard to the high schools, Caston explained: 45

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lot of discussion, lot of questions. And then it would wane; and then it would move to the two high schools, two current high schools. And so their wish is for the magnet theme to continue upward, quality programs, quality faculty. That was consensus. And there would be exceptions to that, individual exceptions. Tr. 848. In a report he prepared approximately seven months after the focus group meetings, without any meeting minutes and without detailed notes, see Tr. 854, Caston summarized the focus group results:

The overall sentiments in all groups targeted successful programming (diversity and student performance) in the district (magnets, STAR, IB, band, athletics). In all groups (4), there was individual to mixed support for the organization/structure of the two high schools and middle (junior high school) schools. There was general serious concern about low performance at D.M. Smith Middle School. Discussion of the one high school was consistently toward the construction of a new high school. Anticipated challenges for such were discussed. Successful magnet and other innovative programming resulting in integration at multiple sites were cited in the groups as encouragement that significant success is possible for Eastside High School and Cleveland High School. It was evident that the general participant sentiment recognized the success regarding student enrollment and diversity in the district. It was the widely held view that the Cleveland School District is one of the very few success stories with integration in the Delta and State. CSD Ex. 59 at 1.

In addition to the focus groups, the District placed an online survey on its website. Tr. 69, 81. The survey, which was a part of the , asked parents to rank their top three preferred magnet programs. Id.; see also U.S. Ex. 11. The District received 756 responses to the survey. 46

U.S. Ex. 11. The highest rated programs were Science, elta Id. 46 Id. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 39 of 96 PageID #: 4430

B. On October 15 and 16, 2014, Clare Smrekar, 47

an expert for the United States, led four

as each reflected upon the academic quality, social environment, racial diversity, and general 1 at 3 4. The groups were attended by between three and eight community members, Smrekar, and Joe Wardenski, counsel for the United States. See Tr. 454; U.S. Ex. 10A at 1, 7, 13, 20. While Wardenski largely participated in the sessions as a questioner, notes of the sessions reflect that on at least one occasion, he gave schools. U.S. Ex. 10A at 16.

both black and white and other repeated a shared sentiment and core priority: to provide stronger, more vibrant and engaging learning U.S. Ex. 1 at 24. Smrekar conceded that but testified that ... and and excellence that would drive or produce diversity in the end. [T]hey envisioned new academic programs and rich new opportunities for all kids.

C. Criticisms of Focus Group Methodologies At the hearing, Smrekar criticized the procedure the District followed in arranging and implementing the focus groups that led to the creation of one of the desegregation plans (Plan A). Tr. 364 69. In particular, Smrekar testified that: (1) the inclusion

of magnet information in the packets sent to the participants was unduly influential, (2) the

47 Smrekar, an Associate Professor at Vanderbilt University, was admitted as an expert during the hearing on the topics of the social context of school desegregation policy, school choice, family and school and community relations, and school diversity. Tr. 331, 341.

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groups were too large to allow for discussion of a complex topic like desegregation, (3) the presence of a large number of people associated with the District could have influenced the

from the School Board played too active a role in the sessions, and (6) the nominating process . Tr. 366-70. Based on these deficiencies, Smrekar explained that she would not rely on the outcomes of the focus groups to assess the likelihood of white flight. Tr. 374.

The District accurately points out, however, that the evidence shows the focus groups suffered from at least two of the same deficiencies identified by Smrekar due to Doc. #207 at ¶ 61 (citing Tr. 454 59). Consequently, the Court concludes that, as a whole, the focus groups conducted by the

District and by the United States suffer from sufficient deficiencies to render their results largely unreliable. Accordingly, such results will be proposed desegregation plans.

VI

On January 23, 2015, commensurate with the modified deadlines 48

of the scheduling order, the District filed two separate proposed desegregation plans: a pr 49

Doc. #108.

48 On motions, the Court issued two orders extending the deadlines for the parties to submit their proposed desegregation plans. Doc. #105; Doc. #107. 49 During its opening statement at the hearing, the District set the tone for its presentation of evidence on the two plans, advocating for the maintenance of separate schools:

So if we err, I suggest we should err on the side of caution to make sure that we make this school district better and that we do nothing which has the risk of causing it to fail. Because we have two high schools. We have two valedictorians. We have two salutatorians. We have two athletic teams. We have two student body councils. We have two of everything. We have two homecoming Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 41 of 96 PageID #: 4432

A. Specifics of Plan A Believing that parents in the District craved choice, the District formulated its Plan A. Tr. 45 46. As presented, plan,

Doc. #108-1 at 1. Under the plan, the District 8th grade students would be afforded an opportunity to enroll at either East Side High or Cleveland High on a first come, first served basis, with each school maintaining an enrollment cap of 550 students. Id.

To encourage enrollment at East Side High, Plan A: (1) modifies East Side High program so that the offerings would only be available to East Side High students; 50

and (2) calls East Side High. Doc. #108-1 at 2. The early college program would serve as a partnership with Delta State University under which qualified 11th and 12th grade students at East Side High could enroll there for up to twelve hours of college courses for either college credit, or a combination of college and high school credit. 51 Id. To qualify for the program, an East Side High student would have to receive a composite score of at least Id.

queens. It gives an opportunity for twice, at least twice the number of students to succeed and to excel when they oth important. Tr. 17. 50 In its plan, the District represents that there are currently seventy-six students enrolled in the IB program. Forty- eight of the seventy-six are Cleveland High students, and thirty of the forty-eight are white. The District contends . Doc. #108-1 at 3. 51 In January 2015, the District represented that -1 at 7. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 42 of 96 PageID #: 4433

open

the current School Improvement Grant which D.M. Smith is receiving through the 2016-2017 -1 at 4. In the interim, and after the proposed merger, Margaret Green would continue to operate its STAR program. Id.

In explaining the delay in merging the two middle schools, the District originally t is scheduled to receive in years 2015-2016 and 2016- Doc. #108-1 at 5. However, before the hearing, the District represented

from the Mississippi Department of Education that [SIG] funds could transfer to the new Margaret Green. Therefore, the District could implement the new middle school [in] August .

In its November 2015 submission to the Court, the District represents that Plan A could be implemented for the 2016 2017 school year. Doc. #210 at 2.

B. Evidence on Plan A 1. predicted impact on desegregation During the hearing, the District and the United States elicited testimony from two experts professor of political science at Boston University called by the District, was admitted as an

expert in desegregation plans and their outcomes, statistical analysis of desegregation plans, and potential attitudes associated with desegregation. Tr. 84 85, 88. Claire Smrekar, as mentioned above, was called by the United States and qualified as an expert on the topics of the social context of school desegregation policy; school choice; family and school and community

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relations; and school diversity. Tr. 331, 341. Both experts submitted reports to the Court, which were admitted into evidence.

a. testimony and expert reports Rossell, unsurprisingly, She has studied public school desegregation for more than forty years, assisted school districts in designing desegregation plans, and served as an expert witness on desegregation plans. Tr. 84 85, 87. Rossell testified that she has done more than anyone else in designing and researching desegregation plans, and has completed more parent surveys than all but maybe one person. 52 Tr. 87 88.

Rossell explained that she uses two types of indices for evaluating levels of desegregation the index of dissimilarity and the index of interracial exposure. Tr. 92. The index of dissimilarity is a racial imbalance index. Tr. 92 93. In contrast, the interracial exposure index [of] white [students] Tr. 92. In articulating the distinction between these two metrics, Rossell elaborated that a school district with one white student in each school would have a perfect racial balance, but a very low interracial

exposure. Tr. 92 93.

Rossell testified that the interracial exposure in the District is increasing and that the percentage of white students in the District is declining. Tr. 94. She explained that, if this trend continues, the District Rossell noted that,

52 Rossell admitted though that she had not conducted a parent survey since she conducted one in Hattiesburg in 1989. Tr. 125 26. The only other survey she has conducted in Mississippi was in Natchez-Adams in 1988. Id.

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while the racial imbalance in the District has fallen generally, it increased slightly for the 2014- 2015 school year. 53

Tr. 95.

s secondary schools. See CSD Ex. 11-E (Table 2b). Her calculations indicate a pattern of decreases in racial imbalance 54

(except for the 2006-2007 and 2012-2013 academic years) and a pattern of increases in interracial exposure (except for the academic years from 2010 2013). Id.

Based on her analysis, Rossell opined to school districts that had been declared unitary since 1986 in the difference between the percentage white in the District versus the percentage white in the average African American . Tr. 99. As for racial balance, Rossell noted that the District is more racially balanced than numerous school districts at the time they were declared unitary, including Kansas City, Missouri; Fulton County, Georgia; Mobile County, Alabama; DeKalb County, Georgia; Dallas, Texas; Muskogee County, Georgia; Baton Rouge, Louisiana; and Denver, Colorado. Tr. 99 100. Rossell also noted that, while Cleveland 40 percent of its schools at or above 90 percent blac this number is less than the percentages approved by courts in Detroit and St. Louis. Tr. 108.

Given her findings, . It respects human dignity, the human dignity of both races. It gives peop

53 Rossell hypothesized that this increase may be due to the fact that she used a different date for determining enrollment for the 2014 2015 academic year. Tr. 95. 54 It appears Rossell miscalculated the index of dissimilarity for secondary schools by looking at the total student population in the District rather than the population of secondary schools. See Tr. 824; CSD Ex. 11E (Table 2b). The District, apparently index of dissimilarity, the outcomes of her analysis regarding the index of interracial exposure are unaffected. #207 at 9 n.4.

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probably going to be the most stable and She felt, however, that Plan A should be implemented without enrollment caps. Tr. 112.

As for the actual impact of Plan A on white student enrollment at East Side High, Rossell

students to enroll at East Side High. Tr. 117 18. Rossell opined that limiting the magnet programs to only East Side High -E at 6.

b. Smrekar testimony and expert report Smrekar testified that Plan A was unlikely to create racially balanced schools, which she 55

Tr. 382. With regard to reasonable deviation, Smrekar explained that 15 tandard of some flexibility across urban school districts that

enrollmen

Addressing the IB program at white parents prefer dedicated magnets when magnets are

Tr. 402. Smrekar opined that the exclusive IB p

55 Smrekar testified that t Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 46 of 96 PageID #: 4437

attract approximately ninety white students (the amount necessary to bring East Side High to a 20% white enrollment) to enroll at East Side High. Tr. 405. In reaching this conclusion, Smrekar noted that that an 8th grade student choosing their school under Plan A would not know whether she would

qualify for the IB program. Tr. 405 07.

Wit 56

Smrekar testified that for the 2014-2015 academic year, forty-four twelfth grade students would have been eligible for the program. Tr. 413. Of these forty-four students, half were white, 40% were African American, and 10% were of other races. Id. In addition to being relatively small, Smrekar noted that the early college program, which is another form of a PWS, would suffer from the same low pulling power as the IB program. Tr. 414. All in all, Smrekar

As for drawing students to D.M. Smith, Smrekar testified that D.M. Smith legacy, an identity associated with [completely abrogates

amount of time in a way that impacts all 1 at 10 (emphasis in original).

ment caps with a first come, first [s], who

56 Smrekar testified that the Delta State Dual Enrollment program proposed under Plan A does not meet the traditional definitions of an early college program because it lacks a to prepare the students for college courses. Tr. 409 11.

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are in the best position to make these decisions, who can get the information and act on it in the 397. While Smrekar felt that the enrollment caps may alleviate some of the overcrowding at Cleveland High,

2. Feasibility of Plan A All parties agree that Plan A is, in essence, a continuation enrollment policy with the addition of an early college program. Accordingly, there is little

question that the District has the means to implement the proposed plan. Superintendent Thigpen testified that she was unaware of any financial impediments to the District implementing Plan A. 57

Tr. 222. Additionally, testified that the District has funds to pay for the early college program under Plan A. Tr. 275.

John Poros, the United States architectural expert, are adequate to implement Plan A. Tr. 599. He also testified that under the Mississippi School Design Guidelines, the , populations for a small district are 300 to 600 for middle schools and 400 to 800 for high

schools. Tr. 608 09. However, Poros said that these recommendations refer more to learning communities, not school enrollment, and that a school may use downsizing strategies to achieve smaller groups from larger enrollments. Tr. 617 18.

coordinator, explained that the District has not experienced any issues in implementing Judge

57 Thigpen admitted that she did not know the precise staffing needs for implementation of Plan A. Tr. 224. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 48 of 96 PageID #: 4439

choosing any middle school or high school. Tr. 46, 49 50. She believes that student tardiness caus

3. District officials opinions of Plan A With the exception of Superintendent Thigpen, who supports Plan A and Plan B but prefers the latter, 58

Plan A was the desegregation plan of choice for the majority of the school officials who testified at the hearing.

Hardy was the best plan for our school district and [is] what the 46. She be able to choose After speaking with Dr. Rossell, however, Hardy believes that Plan A should be implemented

without enrollment caps. Tr. 50.

Obie James, an African American in-school suspension teacher and football and softball coach at East Side High, offered testimony supporting Plan A. He testified that he came home to Cleveland from living in Arkansas so that his children could attend East Side High. Tr. 183 84, 278. James pointed out that under the current open enrollment plan, there are no impediments to children choosing to attend any of the schools in the District. Tr. 187.

Todd Fuller, a Cleveland resident in his eighth year of service on the Board, testified that Tr. 201. Fuller elaborated that extracurricular activities are very important for

children in the region and that the way the current open enrollment system is set up allows

58 See Tr. 221. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 49 of 96 PageID #: 4440

children to participate in extracurricular activities which they otherwise might not be able to pursue. Tr. 202.

Dr. Chresteen Seals, an adjunct professor at Mississippi Valley State University, and a [b] 243 45. Seals believes, however,

that a new school is not financially feasible. Tr. 245. In the absence of a new school, Seals prefers Plan A because she does not want to close schools choice of where you want to go. Tr. 245.

4. Community opinions of Plan A The testimony at the evidentiary hearing revealed mixed community support for Plan A. Gary Gainspoletti, an accountant, business owner, and alderman-at-large for the City of Cleveland, testified that, based on conversations with his clients, people that I have talked to is leave it alone, keep the system that we have in place because it has

879 80.

Aparna Nandula, a parent in the District, testified that she opposes Plan A because Cleveland High lacks academic and extracurricular opportunities for her daughter. Tr. 685.

Another parent in the District, Edward Duvall, testified that he does not support Plan A because the

plan currently at Cleveland High railroad tr 08.

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C. Analysis of Plan A In its objections, and in its proposed findings of fact and conclusions of law, the United States asserts that 59

plan and that: the Supreme Court and Fifth Circuit have not promise to work, must be rejected when other workable desegregation alternatives are

ap proposed modifications to the freedom of choice plan would produce different results. 60

Doc. #113 at 11 20; Doc. #208 at 41 42.

Specifically, the United States argues that not promise to work,

must be rejected when other workable desegregation alternatives are available that promise immediate de Doc. #113 at 11. This interpretation of freedom of choice case law seems to rest on a section of Green in which the Supreme Court held:

as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state- imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system,

Green, 391 U.S. at 440 41 (internal footnote omitted).

59 See Green 60 Plaintiffs raise largely the same arguments. See Doc. #123 at 7. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 51 of 96 PageID #: 4442

This conclusion was affirmed six years later in Monroe v. Board of Commissioners, when the Supreme see Arthur v. Nyquist court concludes there are reasonably available ways of integrating the school system which

promise to be speedier and more effective than freedom-of-choice measures, then it must impose

Green freedom of choice plan is not necessarily an unreasonable remedy for eliminating the vestiges of

state-sponsored segregation, but it has historically proven to be an ineffective desegregation Cowan, 748 F.3d at 238 (citing Green, 391 U.S. at 439 40). The Fifth Circuit found that Judge Davidson failed to explain why the freedom of choice plan would be effective in ending segregation or why he selected the freedom of choice plan over the other available alternatives. Id. at 240. This focus on the effectiveness of open enrollment and the availability of other reasonable alternatives resonates with Green that freedom of choice plans will be constitutional only if such plans are supported by evidence that they will work and if they are the most effective of the available desegregation options. Thus, in evaluating Plan A, the Court must first decide whether the plan offers real promise in creating a unitary system and, if so, whether it is the most effective of available desegregation remedies.

Addressing the promise of a unitary system, the United States argues that, since Judge Davidson implemented the freedom of choice plan, there has been no appreciable change in the racial composition of the District . Doc. #113 at 12 13; Doc. #208 at 41. The United

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States therefore alter the non-minority enrollment at East Side High or D.M. Smith. Doc. #113 at 13, 19. In

response, the District essentially argues that racial imbalance in schools is not per se unconstitutional. Doc. #121 at 4; Doc. #207 at ¶¶ 148 152. Accordingly, in determining Plan , the Court must decide to what extent, if any, the Constitution demands changes in non-African American enrollment at East Side High and at D.M. Smith. If the Constitution demands a change, the Court must then decide whether Plan A is likely to bring about the required change.

1. Propriety of one-race schools As the District correctly argues, under Swann v. Charlotte-Mecklenburg Board of Education Thus Cowan, 748

F.3d at 238. In the Fifth Circuit, however, maintenance of a system with substantially one- Davis, 721 F.2d at 1434

that the remaining one- Id retention of all-black or virtually all- Cowan, 748 F.3d at 238 39 (quoting Valley v.

Rapides Parish Sch. Bd., 702 F.2d 1221, 1226 (5th Cir. 1983)). In other wor Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 732 (2007), the specific

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circumstances in a district may render the maintenance of single-race schools unconstitutional.

Davis, 721 F.2d at 1434.

may define a school as a one- Flax v. Potts, 915 F.2d 155, 161 n.8 (5th Cir. 1990)

(noting courts have utilized range of between 70% and 90% single race). In his March 28, 2012, generally refers to schools with a student body of at le

Here, although Smrekar testified that a student enrollment of within 15% of the District racial makeup represents racial balance, see Tr. 341, 383; there was no testimony as to what constitutes a one-race school in the District. See Price v. Denison Indep. Sch. Dist., 694 F.2d 334, 353 (5th Cir. 1982) (district court erred by applying one-race presumption based on racial n of a one-race school, which represents the highest ratio identified by courts. Accordingly, for the purpose of this opinion, a one-race school in the District is one with a single race of greater than 90%. When utilizing this definition, it is clear that both East Side and D.M. Smith are one-race schools. The question thus becomes whether their one-race enrollments are vestiges of past discrimination.

While this Court has not found any Fifth Circuit case law specifically enumerating factors to consider when determining whether single-race schools are vestiges of past segregation, the Cowan opinion observed:

The retention of single-race schools may be particularly unacceptable where, as here, the district is relatively small, the schools at issue are a single junior high school and a single high school, which have never been meaningfully desegregated and which are located less than a mile and a half away from the only other junior high school and high school in the district, and where the original purpose of this configuration of schools was to segregate the races. Apart from the Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 54 of 96 PageID #: 4445

fact that Cleveland has not sought a declaration of unitary status and has not challenged the the record now before us, the situation in Cleveland is distinguishable from those where we have found that the retention of some one-race schools did not preclude a declaration of unitary status. 748 F.3d at 238 39. Other Fifth Circuit decisions have considered Davis, 721 F.2d at 1435; whether the housing patterns occurred during the life of the proposed

plan, Flax, 915 F.2d at 161 district has eliminated all vestiges of discrimination, id. at 161; and whether the district had made

-race schools, Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 228 (5th Cir. 1983).

Drawing from this relevant and binding authority, the Court concludes that, in determining whether one-race schools are vestiges of past segregation, a court should consider: (1) the size of the district, (2) the number of schools at issue, (3) the distance between the relevant schools, (4) whether the

relevant schools had ever been desegregated, (5) whether the schools were originally intended to be single race schools, (6) whether the district had previously been declared unitary, (7) the extent to which housing patterns influence the enrollment at the schools, (8) whether the housing patterns occurred during the life of the proposed plan, (9) other evidence of vestiges of discrimination, and (10) whether the district has made intensive efforts to eliminate one-race schools.

As the Fifth Circuit explained in Cowan, the first six factors weigh against the continued maintenance of one-race schools at East Side High and D.M. Smith. 748 F.3d at 238 39. While the District presented some evidence that parents prefer neighborhood schools, it is unclear to what extent, if any, housing patterns currently impact enrollment at East Side High and D.M. Smith, in the wake of open enrollment. Accordingly, the seventh and eighth factors are neutral.

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However, insofar as there is little to no evidence of vestiges of discrimination in areas unrelated to student assignment (faculty, transportation, extracurricular activities, and facilities), the ninth factor weighs programs at East Side High may qualify as efforts to eliminate one-race schools, such efforts Consequently, the Court gives little weight to the tenth factor.

Upon consideration of the Fifth Circuit-endorsed factors, the Court concludes that the continued operation of East Side High and D.M. Smith as single-race schools is a vestige of discrimination and that, therefore, a plan which allows such continued operation must be rejected. 61

61 In arguing that its one-race schools are constitutionally permissible, the District, in its response to the United relies primarily on two cases: (1) Stell v. Savannah-Chatham Cty. Board of Education, 888 F.2d 82, 84 85 (11th Cir. 1989), in which the Eleventh Circuit affirmed implementation of a magnet school program, notwithstanding evidence of racial imbalance in some schools; and (2) Parents Involved, 551 U.S. at 756 (Thomas, J., concurring), in which Justice Thomas wrote that de jure segregation, there is no ultimate remedy for racial 6. Both cases are easily distinguishable from this case. First, in Stell (an opinion not binding on this C F.2d at 86 (internal quotation marks omitted). Specifically, the district in Stell enrollment and transfer projections, and the possibilities of succe Id. at 83. Additionally, the Eleventh Circuit established by the school board, th Id. at 85. Thus, at most, Stell stands for the proposition that current racial imbalance will not invalidate a plan where evidence suggests that the plan will be effective and where such racial imbalance does not result in isolation of the minority students. In Parents Involved, Justice Clarence Thomas, writing in concurrence, observed can result from de jure segregation, it does not necessarily, and the further we get from the era of state-sponsored U.S. at 756. In making this observation, Justice Thomas distinguished between districts which either did not have a history of de jure segregation or had such a history and been declared unitary, and districts with a history of de jure segregation in which the harms of the dual system had not been remedied. Id. at 752 54. The latter is the situation in this case.

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2. Whether Plan A will eliminate one-race schools In arguing that the changes to the freedom of choice plan A will not produce effective results, the United States contends that: (1) alterations to the IB

program and creation of a new magnet program were already considered and rejected by Judge Davidson; (2) there is no evidence the exclusive IB offering would encourage white students to enroll at East Side High; (3) the Delta State program will not encourage desegregation; (4) a 550- student enrollment cap could exacerbate segregation; and (5) the proposal for the middle schools makes no changes to the current system.

a. Previous proposals The United States argues that, in 2012, the District proposed to restructure the IB program within the context of its initial plan which Judge Davidson found inadequate. Doc. #113 at 13 conclusion has no bearing on this inquiry.

b. Efficacy of exclusive offerings and early college program Next, the United States asserts there is no evidence any white families would send their children to East Side High to enroll in the IB program. Doc. #113 at 15. Indeed, the United States some white families would choose to keep their children at Cleveland High, even if it meant not participating in the IB program. Id. Additionally, the United States argues that, even if all white IB students enrolled at East Side High, East Side High would still be a 92.1% African American school. Id. at 14 15.

As for the early college program, the United States argues that the proposed early college offerings at Delta State would be ineffective because students in the District who have a

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composite score of 18 or higher on the ACT already have an option for dual enrollment credit. Id. at 16. The United States further contends that insofar as the early college program requires an ACT score of 21, and the average ACT score in the District is 17.9, the qualifications for the program would appeal to a small percentage of the District. Id.

The District responds that it anticipates t East Side High as a result of the proposed changes. Doc. #121 at 8. The District represents that, while it cannot stop students from enrolling under the current dual enrollment option, Delta State is considering increasing tuition, and that such an increase would encourage students to enroll in the free early college program at East Side High. Id. The District does not address the United point that the early college program would only be available to a small percentage of students.

As mentioned above, the evidence is weak that either exclusive offering would draw white students

to East Side High. Hardy averred that, based on the focus groups, she anticipated some parents would ing their child East Side High. Doc. #114-6 at ¶ 9. However, there is no indication how many parents would engage in such consideration, or to what extent the thought would lead to increased enrollment. This uncertainty is of especial concern given that, as of the 2014 2015 school year, only thirty white students were even enrolled in the IB program, and only twenty-two 12th grade white students would even qualify for the early college program.

With regard to the early college program, the evidence is undisputed that the program would be available to only a small number of white students. Furthermore, there is nothing in the record to suggest that any of the eligible white students, who can already pursue college

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credit courses through other means, would elect to enroll full-time at East Side High for the purpose of obtaining college credit.

concept promises to transform East Side High and D.M. Smith from one-race schools.

Accordingly, the plan is deemed unconstitutional in this regard.

c. Enrollment caps The United States -student enrollment cap at to East Side in sufficient numbers to eliminate the racial identifiability of East Side as a black school[, but t]he basis for this assertion 19.

In response, the District contends that it anticipates students who choose Cleveland High ... Court to implement Plan A without the enrollment caps and allow the District to return to the

Court if the facilities at either school cannot accommodate the enrolled students. Doc. #207 at ¶ 120. To the extent by requesting Plan A be implemented without enrollment caps, the Court need not consider whether such caps are unconstitutional within the context of Plan A. 62

d. Middle school plan The United States argues that, as drafted, 63

Plan A makes no alterations to the current middle school arrangement, which has produced a single race school at D.M. Smith. Doc. #113

62 ion of such caps in the context of Plan A would

63 To the extent the District seeks to modify Plan A by calling for an immediate consolidation of the middle schools at East Side High, such plan suffers from the same logistical flaws discussed below in the context of Plan B.

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at 19. The District does not respond to this argument. Thus, the District has offered absolutely no evidence that Plan A would alter the enrollment at D.M. Smith, a burden only it bears. Accordingly, insofar as Plan A would result in a one-race school at D.M. Smith, this fact provides additional grounds for . 64

D. Summary Freedom of choice plans may be implemented only if they promise to work and if they are the most effective of the reasonably available alternatives. In order to work, a plan in the District must turn D.M. Smith and East Side High from one-race schools to just schools. Based on enrollment numbers, freedom of choice has not worked to achieve desegregation in the District. Because .M. Smith and East Side High as one-race schools, the plan is unconstitutional and may not be adopted. 65

VII

A. Specifics of Plan B The Board developed Plan B as an alternative to Plan A based on the view expressed in the focus groups that parents wanted freedom of choice but were not opposed to closing D.M. Smith. Tr. 51. In formulating this plan, the Board looked at the success of its magnet [w] or high

64 Furthermore, as explained below, consolidation is a more reasonable and effective desegregation alternative. 65 See Doc. #207 at ¶ 152 (citing United States v. Jefferson Cty. Bd. of Educ., 380 F.2d 384, 424 (5th Cir. 1967) (Godbold, J., Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); see also Parents Involved, 551 U.S. at 720

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Under Plan B, the District would assign every student to East Side High and then re-open Cleveland High -1 at 8. The enrollment for the Cleveland High magnet would be capped between 450 and 550 and Id. at

10. Students would apply for the Cleveland High magnet program between November 1 and February 28 of each school year. Id. at 9. Further, East Side High would operate the IB program and the early college program described in Plan A. Id. According to the District, enrollment goals for both schools will be 65% black and 35% non-black with a reasonable

66 Id. As for the middle schools, Plan B calls for D.M. Smith to close in the 2017-2018 academic year, with the building to be converted into extra space for Cypress Park Elementary students. Id. at 10. Beginning in the 2017-2018 school year, all students in the 6th, 7th, and 8th grades, except for 6th grade students enrolled at Bell and Hayes Cooper, would have to enroll at Margaret Green. Id. Margaret Green would continue to operate its STAR program and would

Id. at 9 10. Access to the STEM program would be d Id. at 10.

Plan B, which was submitted to the Court in January 2015, initially called for full implementation by the 2017 2018 school year. Id. In its November 2015 submission to the

66 e which appears to make the racial be mandatory. See Doc. #207 at ¶ 159. The Court will consider the plan under both formulations.

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Court, the District represents that Doc. #210 at

3 4. The District further represents that b]ecause of the construction and curriculum design necessary to implement [the middle school portion of] Plan B, the District needs until August ... Id. at 2 3.

B. Evidence on Plan B 1. predicted impact on desegregation Christine Rossell testified that Plan B is not fully formulated and that However, while she does not favor Plan B, Rossell testified that the plan is preferable to the 112, 118.

Claire Smrekar supports only the one middle school aspect of Plan B. Tr. 417, 426 27. In her report, however, provides no data or projected estimates on enrollment size for the new STEM within-school

rationale, and detailed plan for student enrollment in the STAR and STEM programs, the

potential for within-school segregation in classrooms and across programs at Margaret Green is Id. In concluding such, Smrekar cited the current STAR non- reduce the number and percentage Id.

For the high schools, Smrekar believes that Plan B is unlikely to create meaningful desegregation due to the low pulling power of the proposed PWS at East Side High and

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-black students who wish to attend Cleveland High School but are not admitted to that school through the admissions lottery

Ex. 1 at 12 14. Specifically, Smrekar reiterated the concern expressed in her testimony about Plan A that the proposed early college program at East Side High was unlikely to draw a sufficient number of white students. Id. at 14. -student pool in [the District] -black, also

expressed concern that the general education population at East Side High would remain segregated

under Plan B, even if the school itself desegregated. Id. at 12, 14.

As for Cleveland High, Smrekar observed in her report: [S]ince collected responses to the identifiable (i.e., the District did not ask respondents to indicate their race), we do not know whether (or not) magnet themes reflect widely or equally shared interests by parents across racial groups. In other words, we do not know whether (or not) the surveys are representative of the entire population of parents in the district. Consequently, the conclusion reached by the District that the attraction to these thematic curricula will produce and sustain a racially mixed student enrollment pattern at each high school is neither supported by the information I reviewed, nor likely, given historical student enrollment patterns and school loyalties. Id. at 15.

2. Feasibility of Plan B The testimony and other evidence STEM magnet aspect of the plan.

capacities. Additionally, both experts, Smrekar and Rossell, testified as to the difficulties of operating a dedicated high school magnet in a smaller school district.

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a. Faculty feasibility Smrekar testified that the District lacks the capacity to implement a STEM focused 24. In her report, Smrekar explained that her of teacher professional background data furnished by the district regarding teacher certification

by subject area at the secondary level [revealed] no evidence that the district has the U.S. Ex. 1 at 16. She believes that t magnet program at the middle schools. Id.

Id. at 16.

Hardy testified that, as with Plan A, the District has not undertaken a formal analysis to determine its staffing needs under Plan B. Tr. 71. She believes, however, Id. Notwithstanding this statement, Hardy commented necessary because the District has insufficient faculty to support an arts magnet program, as

contemplated under Plan B. Tr. 52 53.

b. Facility feasibility In concluding that the District lacked the capacity to implement a STEM-focused dedicated magnet high school, Smrekar cited the difficulty in cultivating facilities for the Also, in her report, Smrekar noted that plan

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programs with adjusted/expanded enrollment at each high school and Margaret Green MS U.S. Ex. 1

at 16.

The architectural experts agreed that the District is not currently equipped to implement numerous aspects of Plan B. as a shared resource to all the 450-550 STEM students envisioned at CHS, the district would

need to add a minimum of four accessible science classrooms, assuming five periods of science 13. He further opined that if Cleveland High were to also offer an arts program, it would need to upgrade its auditorium and band hall. Id. Poros did not provide a cost-estimate for these improvements.

As for the middle schools, Poros believes that, in order for Margaret Green to accommodate the additional students from D.M. Smith, it would need to add ten to twelve classrooms (including science laboratories) teach 13 14. Poros estimates the cost

for these additions to be approximately $1.95 million . 67

Id. at 14. Finally, Poros hypothesized that Margaret Green would need to construct a new cafeteria, including a kitchen and storage area, for $1.15 million . Id. However, he remarked that the need for the additional cafeteria and kitchen could be obviated by changes in scheduling. Tr. 616 17.

According to Joseph Henderson, Margaret Green campus could accommodate the students from East Side High by adding twelve classrooms, a

67 twelve. See U.S. Ex. 27 at 13 14. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 65 of 96 PageID #: 4456

small administrative area, and restrooms to the existing structure. Tr. 149 50. The addition of the extra spaces could be completed in 12 to 18 months and would cost approximately $2.4 million. Tr. 150. cost estimate, however, did not consider the cracking of Margaret he opined could increase the estimate. Tr. 161 64. He also admitted that he did not consider the extra load on the support spaces at the middle school when developing his estimate. Tr. 162.

c. Financial feasibility Jacqueline Thigpen testified that she does not foresee any financial impediments to implementing Plan B. Tr. 222. Nevertheless, she hypothesized that the District [the necessary] Tr. 227. However, Smrekar believes is insufficient to secure magnet funding

for its proposed school because necessary to adequately support and sustain theme-supportive personnel or facilities (labs,

studios) and materials (computers, software) as required by [Magnet School Assistance Program] U.S. Ex. 1 at 16 17. Hardy testified that the Dis Tr. 807.

d. Dedicated high school magnets school district and that Cleveland already has two magnet schools. Tr. 120. Having never seen a

successful dedicated magnet school at the high school level, she also such an institution. Id. at 120 21.

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- [with] large portfolios of choice ... Tr. 425. Smrekar could not name a dedicated magnet high school in a district the size of the Cleveland District. Id.

3. District official opinions of Plan B Thigpen testified that, while she supports both Plan A and Plan B, she prefers Plan B because it consolidates the middle schools but allows choice at the high school level. Tr. 221 22. Todd Fuller, a member of the Board, testified that, while he prefers Plan A, he

4. Community opinions of Plan B Community members varied in their evaluations of Plan B. Aparna Nandula, a parent in the District, expected to graduate before the possible

implementation of the plan. Tr. 685.

Vickie Blake, another parent in the District, testified that she is very concerned about the While she likes the idea of a STEM magnet, dual enrollment, and the IB program, she prefers the United plan. 68

Tr. 667, 670.

Edward Duvall, another District parent, testified that he opposes Plan B because he feels l the smart kids from East Side

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and .

Fuller testified that if Plan B were implemented, the may lose students because there are eight or ten private schools within a 50-mile radius of Cleveland and 69

Tr. 205. Hardy concern that the community would object to Plan B, testifying that

C. Analysis of Plan B The United States objects to Plan B on the grounds that: (1) the high school portion of the plan is unlikely to be implemented; (2) the middle school portion of the plan is unlikely to be implemented; (3) the middle school plan unnecessarily delays desegregation; (4) the proposed programs at Margaret Green could result in within-school segregation; and (5) it is unclear whether

the high school plan would result in desegregation.

1. Implementation of high school plans The United States argues that Plan B should be rejected for the simple reason that the District does not have the capacity to implement a STEM magnet at Cleveland High, as called for by Plan B. Doc. #208 at 43. As support for this proposition, the United States points to: (1) Rossell opinion that dedicated magnet high schools are nearly impossible to operate; (2) Smrekar opinion that the District lacks the teachers and specialized facilities necessary to implement a STEM magnet; and (3) Smrekar opinion that, given the lack of details in the magnet plan, it is unlikely that the District would receive magnet funding. Id. at 35, 43 44.

69 Fuller explained that if students leave, the school district will lose funding. Tr. 206. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 68 of 96 PageID #: 4459

The District contends that, based on their testimony, Thigpen and Hardy believe the District has the staff and funds necessary to implement a magnet theme and that Smrekar

¶ 159 (citing Tr. 71 72, 222 23, 508).

Although this Court has not found a Fifth Circuit case dealing with whether a district has the capacity to implement its own plan, it is beyond dispute that the District must introduce a plan that realistically promises to work and work now, and that a district court must exclude . Cowan, 748 F.3d at 238, 240. It stands to reason a plan that cannot be implemented is infeasible, and does not promise to work and does not promise to work now. So, if the District is unable to implement the magnet program portion of Plan B, the plan must be deemed to fail. See Quality Ed. for all Children, Inc. v. Sch. Bd. of Sch. Dist. No. 205, 385 F. Supp. 803, 823 24

As the District asserts, both Hardy and Thigpen testified that the District has the funds and staff necessary to implement Plan B. Tr. 71 72, 222 23. Hardy testified that the District cience teachers for what the state requires now, and the STEM program will, offered no support for the proposition that state standards are the same as magnet standards.

Likewise, Thigpen testified that she did not actually know the staffing requirements for Plan B. Tr. 224. that, based upon her review of teacher certification by sub there is no evidence that the district has the organizational capacity to support or maintain a dedicated STEM high school magnet 6.

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Similarly, beyond offering vague assurances of funding, the District officials offered no facts or evidence upon which this Court could comfortably conclude that the District has the capacity to secure a magnet grant or, in the absence of a magnet grant, other money to support a STEM program at Cleveland High through other means. Indeed, insofar as Plan B itself does not call for specific

construction at Cleveland High, 70

it is unclear whether the District officials statements about funding were even intended to encompass the capacity to upgrade the facilities. Even if such funding could be secured, the District has offered no estimate as to when Cleveland

Finally, it is not enough to say that the District has the potential to formulate a magnet program free from faculty, funding, or facility deficiencies. As Smrekar and Rossell explained, the formulation and maintenance of a magnet program demands substantial time and resources. Rossell even went so far as to testify that she had never seen a successful dedicated magnet at the high school level. Tr. 120 21. In light of this testimony, the Court declines to endorse a dedicated magnet plan based on nothing more than an expressed possibility that such a plan is likely feasible.

In short, the District has proffered little to no evidence that it has the faculty to run a STEM program or the ability to fund such a program at the high school level. There is absolutely no evidence that the District could procure sufficient facilities within a reasonable time frame (or has a plan in place to desegregate the high schools before the implementation of unresolved matters described above, the Court must conclude that the District has failed to

sustain its burden of proving that Plan B promises to work and promises to work now. See Hoots 70 See Doc. #108-1 at 7. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 70 of 96 PageID #: 4461

v. Pennsylvania, 539 F.Supp. 335, 342 s [magnet] proposal is still in an embryonic state. They have no projections on how many students would be expected to attend this voluntary program, or how racially mixed this school might be. The plan is too vague and the effects on desegregation too speculative to be acceptable ... ; see also Coal. to Save our Children v. State Bd. of Educ. in the business of modifying desegregation orders to make way for concepts .

2. Implementation of middle school plans The United States also argues that Plan B should be rejected because the proposed middle school programs, like the high school programs discussed above, do not promise to work. Specifically, the United States argues:

The success of the [middle school] plan is contingent on the District successfully meeting a broad constellation of highly uncertain or unlikely conditions, including three mil bonding authority for the expansion and renovation of [Margaret Green] to accommodate all middle school students in the District; securing sufficient capital and operation funding to implement and support the variety of proposed programs; and, ensur depends on the support of the District and the Cleveland community, and the District presented testimony from only one witness, the current superintendent, who actually favored Plan B. Doc. #208 at 44 45.

First, under both Poros essary funding for Margaret Green expansion would be somewhere between

two and three million dollars, a range which three mil bonding capacity. Unlike the other available funding sources, there is nothing in the record which would suggest that the District lacks the capacity to obtain a three mil note to renovate Margaret Green. Rather, it appears the only way the District could fail to obtain the necessary three mil note would be if twenty percent of registered voters petitioned for a special election and if the note was voted down in the subsequent special election. There is

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no indication this particular series of events would occur. Thus, the Court concludes that the United States argument to the contrary must be rejected. Insofar as it appears the District has the capacity to pay for these improvements, the Court finds that the funding for the facilities does not invalidate Plan B.

Moreover, except for the evidence related to faculty needs discussed below, the only evidence related to implementation of the magnet programs at the middle school the testimony of Hardy, Thigpen, and Holtz supports a finding that the District has the capacity to implement the proposed middle school programs.

Regarding faculty, the evidence supporting inability to implement the middle school programs is much weaker than for the high school portion of Plan B. As

t lack of a pool of qualified teachers in a specific However, unlike her opinion of the high school program, Smrekar never opined or testified implementation of the middle school programs unlikely or impossible.

Finally, the Court is not persuaded that the lack of District official support is grounds for rejection of the plan. Indeed, if it was District official support) would have to be summarily rejected.

aspect of Plan B is mixed. While it appears the District has the financial ability to procure the

necessary middle school facilities, there is a question of whether the District has the ability to attract the necessary faculty to operate a middle school STEM magnet program. Although these circumstances are less than ideal, the Court cannot conclude that the middle school proposal

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under Plan B is so uncertain to be implemented as to warrant its rejection. See Ayers v. United States, 769 F.2d 311, 314 (5th Cir. 1985) Though it may lack specific details with respect to the exact steps to be taken in each area of implementation and the precise timing of such steps, the plan presents a comprehensive framework for implementation of desegregation (citation omitted and

internal alterations omitted).

3. Speed of desegregation of D.M. Smith The United States argues that the 2017 2018 target date for the consolidation of the middle schools would take more time than that proposed by the United States. Doc. #113 at 20; Doc. #208 at 44. Although the timelines proposed in the various plans may likely no longer be practicable given the timing of this order, the implementation timelines for the plans and the evidence before the Court suggests that Plan B, which requires significantly more construction and funding than the would likely consolidate the middle schools at least one year later than the plan for consolidation urged by the United States. Thus, the question becomes whether such a delay is constitutionally permissible.

ngs of

[the Supreme] Court the obligation of every school district is to terminate dual school systems at Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19, 20 (1969). An unwarranted delay, therefore, may be sufficient grounds to reject a proposed plan. CRUCIAL Green ; see

Adams v. United States, 620 F.2d 1277, 12 Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 73 of 96 PageID #: 4464 delays desegregation at the junior and senior high levels [where] the junior high schools would be integrated over a four-year period [and] the high schools over a seven-

In Miller v. Board of Education, the Fifth Circuit considered whether a three to five year delay to allow for construction of three new elementary schools was permissible under Alexander 2d 1234, 1235 36 (5th Cir. 1973). In concluding that the delay was impermissible wholeheartedly approve of the innovative concepts of educational parks, which in the long run

will indeed end [segregation], the laudatory purpose cannot freeze half a decade of education Id. at 1236.

Like the Fifth Circuit in Miller segregation in its middle schools. However, also like the Miller court, this Court cannot

countenance an additional year when a more immediate alternative exists. Accordingly, Plan B must be rejected as constitutionally infirm in this regard. 71

4. Within-school segregation at new Margaret Green The United States next argues that Plan B could result in within-school segregation at Margaret Green because African Americans are under-represented in the STAR Program and that, if the trend continues, the STAR Program could at 24; see also Doc. #208 at 44

sufficient safeguards to prevent within-sc 71 When comparing the two States did not cite, and this

Court has been unable to find, any authority which would support the proposition that the availability of a cheaper desegregation plan invalidates a proposed plan.

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The District responds: If Plan B is chosen by this Court, the District will ensure that all enrollment criteria for these special programs will not discriminate on the basis of race. Specifically, the District will ensure that entrance into the STEM program at Margaret Green is based on the same lottery system used for the other elementary magnets and which will also be used for the high school STEM magnet. As for the STAR program, it has specific academic criteria and is based on, among other things, test scores. As such, the population in the program will fluctuate from year to year, but the procedure for gaining entrance into the program is constitutional. Doc. #121 at 10 11.

The Fifth Circuit Supreme Court and this Court require[] the elimination of not only segregated schools, but also Johnson v. Jackson Parish Sch. Bd., 423 F.2d 1055, 1056 (5th Cir. 1970). Where classes are based on achievement grouping and result in segregation sufficient to raise an inference of discrimination be permitted in an otherwise unitary system if the school district can demonstrate that its

assignment method is not based on the present results of past segregation or will remedy such 72

United States v. Gadsden Cty. Sch. Dist., 572 F.2d 1049, 1052 (5th Cir. 1978); see Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, However, where an

inference of discrimination exists and a showing of non-discrimination cannot be made, the grouping must end. Id. 72 The Gadsden court referred to a method of selection based on standard tests and teacher recommendations as Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F.Supp. 487, 495 n.12 (N.D. Miss. 1987), , present performance and how proficient he has become in mastering certain skills. On the other hand, ability grouping is based upon IQ test results, as opposed to standardized achievement future performance Id. (emphasis in original).

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There can be no dispute that enrollment in the STAR Program, which is determined by an algebra test, teacher recommendations, and grade point average, may be characterized as achievement grouping. Furthermore, the evidence shows that the STAR Program has an enrollment of just 29.5% African American students in grades seven and eight, despite that student population being approximately 48.5% at Margaret Green. Put differently, the African American population at Margaret Green eligible for the STAR Program is 1.64 times greater than the African American population in the STAR Program itself. This discrepancy is sufficient to raise an inference of discrimination. See Montgomery, 665 F.Supp. at 496 (finding inference The District, however, has

made no effort to show that

the enrollment standards creating this discrepancy are not based on the present results of past segregation or will remedy such results through better educational opportunities. In the absence STAR Program as a means to achieve desegregation is permissible.

5. High school plan unlikely to lead to desegregation The United States also argues that, even if the District could implement the high school component of Plan B, there is no evidence the plan will effectively desegregate the high schools. Doc. #208 at 43 44. In making this argument, the United States reasserts its position that neither the IB program nor the early college program, either alone or in combination, can ensure that white students will enroll at East Side High in large enough numbers to result in desegregation. Id. The United States also disproportionately white even under a lottery-ment would

Id. at 44. Finally, citing Stanley v. Darlington

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School District names, mascots, and athletics teams at ESHS would maintain the longstanding racial

identifiability of ESHS as a black school, 73

Id. at 43. First, the uncertain drawing power of the proposed IB and early college programs would compel rejection of the plan on the ground that it does not promise to desegregate East Side High. However, to the extent Plan B requires specific enrollment ranges at each school, the lack of drawing power is largely irrelevant insofar as a school with mandatory enrollment does not need to draw students. For the same reason, the alleged continued character of East Side High the promised desegregation.

Although is no guarantee that the targets would be 8 at 44, there is nothing in the record which would suggest the District is incapable of satisfying its goal of having both schools 74

fall within the stated goals. Thus, the Court rejects the United would not achieve desegregation.

D. Summary For the reasons above, the Court concludes that Plan B is unconstitutional because: (1) it s middle schools; (2) it would propagate within-school segregation at the new Margaret Green Middle School by maintaining an

73 Plaintiffs raise largely identical arguments. See Doc. #123 at 7. 74 The existence of goals for both schools allevia black and 20 to 50 percent [white], as the District proposes, the resulting enrollment at East Side is likely to remain

23.

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achievement grouping program that results in substantial under-representation of African Americans without sufficient justification; and (3) the high school element of the plan does not promise to work and work now.

VIII United States Plan A. Specifics of United States Plan The United plan (U.S. Plan) requires the simultaneous consolidation of the high schools and middle schools. Doc. #109-1 at 2 District would, beginning in the 2016-2017 school year, assign all students in 9th-12th grades to

a single comprehensive high school housed in the current Cleveland High and Margaret Green 75

Id. at 15. It also calls for all faculty and staff currently assigned to the two high schools to be re-assigned to the consolidated high school. 76

Id. at 19. The United States estimates that this consolidated high school would open with approximately 1,098 students with a racial makeup of 62.9% African American, 32.4% white, and 4.7% other. Id. at 15.

Simultaneously, under the U.S. Plan, the District, also beginning in the 2016-2017 school year, would assign all 6th through 8th grade students (except for the 6th graders at Bell and Hayes Cooper) to a consolidated middle school housed at the current East Side High facility. 77

75 Although the U.S. Plan new high school would be an attractive option to the community generally, which would undoubtedly contribute to the success of this -1 at 17. The United States -26 million on a 35- Id. The United States raise this much money. Id. at 18 n.6. 76 Under the U.S. P would undertake a process to reassign affected staff to other positions or schools, or take other action deemed appropri -1 at 19. The plan also calls for the elimination of duplicative extracurricular activities. Id. at 20. 77 The United States Side facility is in good overall condition and could house a middle school -1 at 25.

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Id. at 21. As with the consolidated high school, the U.S. Plan requires the elimination of redundant faculty and staff positions and duplicative extracurricular activities. Id. at 24. It mandates program, but appears to make continuation of the STAR program optional. See id. at 22 23. The United States estimates that the consolidated middle school would open with approximately 692 students with a racial makeup of 70.5% African American, 26.2% white, and 3.3% other. 78

Id. at 21. In the January 2015 submission of its consolidation plan, the United States proposed full implementation for the 2016-2017 academic year. However, the U.S. Plan directs the District to, during the 2015-2016 year: to establish proper educational curricula and programs for the new schools, such as within-school programs; and (3) form an advisory panel to engage the community in ensuring effective desegregation of the schools. Id. at 20 21.

To ensure the District continues to move in the direction of desegregation, the U.S. Plan calls for continued annual reporting. Doc #109-1 at 26. Additionally, the U.S. Plan requires that the District receive the Court approval: (1) for any planned changes to the structure or use of existing or new school facilities, (2) to change the zoning for elementary schools, or (3) to introduce or change any within-school or limited enrollment programs. Id.

In its November 2015 submission to the Court, the United States represents that its plan may still be implemented by the 2016 2017 academic year and

78 The United States attributes the lower white percentage to the fac magnet elementary schools, which are disproportionately white relative to the District- Doc. #109-1 at 21 22. Although not dispositive in this matter, the Court notes that the disproportionate white programs as desegregation tools.

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Doc. #212 at ¶ 12.

B. Evidence on U.S. Plan 1. impact on desegregation To the extent the U.S. Plan requires the formation of a single middle school and a single high school, there is no question it will create perfect racial balance at the secondary school level in the District. However, the experts disagreed on the extent the U.S. Plan would impact the that is, to what extent the plan would create schools.

Smrekar testified: [A]fter careful analysis, after reviewing all the documents, after spending almost a year thinking about this and spending time in this community, it is my conclusion that a one-high-school model is the most effective, will achieve desegregation realistically and immediately. I believe it will draw students and maintain diversity in this community because it offers what the families demanded. 79 Tr. 429. 30. The one-school

, right: desegregation, academic quality and enhance[d] educational environments, and equity and opportunity. Tr. 436.

Smrekar testified that research has shown that the ideal size for a middle school is 600- 650 and the ideal size for a high school is 800 900. Tr. 433. She testified, however, that 1000 79

Smrekar made two visits to the Cleveland community one in July 2014 and one in October 2014. Tr. 341, 357. met with school officials, and led a community meeting. Tr. 346 54. The October trip involved leading the focus groups. Tr. 357.

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extracurricular opportunities, and the same is true at the middle school. Tr. 433 34. According to Smrekar, this holds true even for high schools closer to 1100 students. Id. at 434.

aspect of the U.S. Plan, Smrekar testified that the concept of fresh start developing a magnet school, you want a fresh start, you want to rebrand. You want parents to

Id. Smrekar explained that this concept of rebranding could apply in Cleveland because parents expressed a desire Id. Rebranding is also important because, according to Smrekar, it will allow the District to distinguish between traditional

here, where a two-school model changes to a one-school model. Tr. 436. Along the same vein, Smrekar testified that, if the Court adopts the U.S. Plan, it will be important to memorialize the successes and histories of the two high schools. Tr. 438 39.

With regard to potential losses of extracurricular opportunities, Smrekar testified that the single school concept could increase the size of student government and athletic teams. Tr. 444. She could not state, however, whether the U.S. Plan would result in the loss of any athletic scholarships for students. Tr. 499.

Rossell that would reduce diversity in the District. Tr. 103. Specifically, Rossell noted that mandatory

reassignment plans, 80

80

In her research, Rossell did not differentiate between consolidation and other forms of mandatory reassignment. Tr. 129 30.

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schools 81

have been found to cause white student enrollment loss. Tr. 103. In addition to white student enrollment loss, Rossell explained that mandatory reassignment plans cause which she defined as 82

Tr. 103. She opined that for districts with a greater than 35% minority population, implementation of a mandatory reassignment plan causes a loss of 65% white enrollment from three years before the plan to eleven years after the plan, and that implementation of a voluntary magnet plan causes a loss of 44%. Tr. 107. Rossell attributed white loss to three factors: (1) racial prejudice, (2) worries about losing control of a child , and (3) a desire for neighborhood schools. 83

Tr. 140 41. Of these three factors, losing control is the most important in her opinion. 84 Id. at 140. Rossell remarked that Tr. 125.

81 According to Rossell, there are three types of mandatory reassignments. Tr. 126 e no choice. If you live at a certain address and your race is a certain race, you are assigned to a school that the District olled choice[,]

[e]ither you get rid of all the attendance zones or you keep attendance zones. But the bottom line is first thing you try to do is to get people to volunteer to go to the correct school racially. And choice. Id. 82 83 capacity of the given Ellis v. Bd. of Pub. Instruction of Orange Cty., 423 F.2d 203, 207 (5th Cir. 1970). Neither party has advanced the idea of neighborhood schools as a desegregation method in this case. The Court notes, however, that the proximity of the two schools and the applicable housing patterns would likely render such an approach ineffective. 84 When asked about current attitudes regarding race and freedom of choice in education, Rossell testified [J]ust before Barack Obama was elected President of the United States, 90 percent of Americans would vote a fully qualified black president. So I assume that attitudes towards the principle of integration and the abhorrence of racial prejudice are pretty much united and everyone is uni

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In looking at Mississippi schools, Rossell noted that mandatory reassignment plans had caused substantial white enrollment loss in the school districts of Natchez-Adams, Hattiesburg, and McComb. Tr. 97 108. She also remarked in Madison County was successful in creating desegregation and maintaining interracial

exposure. Tr. 109.

Based on her research on mandatory reassignment plans, Rossell opined that, should the Court implement the U.S. Plan, ly half of the white students assigned to the East

to Rossell:

The first people who will not show up will be the people who have the means [to] put children in private schools. That is disproportionately white, but it isn't only . The next group will be motivated middle class and working class families. And then even the poorest families will eventually just not

move into a school district. Tr. 827. 85

Rossell stimates in this regard are consistent with her research on white enrollment loss following mandatory reassignment. Tr. 821.

Smrekar defined mandatory reassignment ciated with school districts that move from local zoning arrangements to reassignments that take kids out of those local She testified that the U.S. Plan is not a form of mandatory reassignment because the Distric plan, there is one school. All children attend this one high school. There is no other sort of

40.

85 Rossell testified that wealthy African Americans. And the 9th wealthiest woman in the world, through her own means, is Oprah Winfrey, who was educated

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As for white enrollment loss, Smrekar considered the history of racially identifiable legacies of the schools, the private school supply, tuition costs, and the racial composition of public schools in the contiguous counties. Tr. 440 41. She also considered the financial demographics of the region and the District, and the results of her focus groups, but not the community meeting held in July 2014. Tr. 520, 898 99. Based on these considerations, f significant or damaging magnitude he explained that the private school market only included two schools Bayou Academy and Presbyterian Day School. 86

Tr. 441. More generally, Smrekar elaborated -enrollment has to do with a whole array, like housing factors, economic factors like closure of a factory, closure of a major employer. That kind of Id. Conversely (and somewhat contradictorily),

Smrekar testified that she based such conclusion on the economic demographics of the District and her belief that parents would not want to spend money to send their children to private schools. Tr. 898. In reaching this conclusion, Smrekar did not consider the results of desegregation efforts in Natchez, Hattiesburg, McComb, Indianola, Shaw, or Madison County. Tr. 508 09.

Smrekar opined that the survey data utilized by Rossell in considering white enrollment s a large shift in attitudes around racial integration, [and]

86 impact this conclusion because, beyond Bayou Academy, Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 84 of 96 PageID #: 4475

Smrekar, when parents have a choice of schools, their primary concerns are quality, proximity, and safety. Tr. 899.

While Smrekar testified that consolidation of the schools would likely preclude magnet funding, she explained that there a number of alternative funding sources of private, corporate foundations interested in assisting school districts, particularly [those] that . Tr. 480, 521.

2. Feasibility of U.S. Plan combined optimal capacity of Cleveland High and Margaret Green is 1,144 students, which

ojected population of a comprehensive 9th-12th grade high school by ninety- seven students, leaving room for modest growth in the student population under [the U.S. P]l U.S. Ex. 27 at 8. While single science lab would be sufficient for a

consolidated high school, Poros opined that a second lab could be converted from existing classrooms. Tr. 587 88; U.S. Ex. 27 at 9 10.

As for East Side High, Poros opined that the optimal capacity could accommodate the projected enrollment for a single middle school. Tr. 591. Additionally, Poros

Tr. 590-91.

In reaching his conclusions, Poros did not consider what impact consolidation would testify whether the new school would have sufficient athletic facilities. Id.

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As detailed above, Henderson testified that East Side High, in its current configuration, could not accommodate the projected enrollment for a consolidated middle school. Tr. 146. However, he testified that it would be cheaper to turn East Side High into a consolidated middle school than it would be to turn Margaret Green into a consolidated middle school. Tr. 164 65.

To the extent the U.S. Plan advocates (but does not require) the construction of a new school, Henderson estimated that a new high school with a full athletic complex would cost between $35 and $37 million. Tr. 148; CSD Ex. 15 at 4.

3. District official opinions of U.S. Plan Fuller, a Board member, would involve enrollment loss and that, as a result of this l

every student that attends a school in the District, the District receives $5,535 from the State and that any loss in enrollment would result in a corresponding loss of funding. Tr. 887. According to Fuller, this loss of funding would result in a loss of extra-curricular and educational opportunities. Tr. 210. Seals, another Board member, testified that she was opposed to consolidation because she was concerned for a loss of athletic and extra-curricular activities. Tr. 245 46.

James, an East Side High faculty member and coach, testified that the U.S. Plan [to Cleveland] for one reason, for my kids to go to East

James testified [of] [and] the pride, and that he believes consolidation would force some teams to

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cut interested players. Tr. 184 86. According to James, this loss of athletic opportunities is James testified that his daughter asked him whether she

could attend a different school if the U.S. Plan is implemented. Tr. 184. Finally, he testified that he would leave town if consolidation is implemented. Tr. 194

4. Community opinions of U.S. Plan that [for consolidation], but there is also support for not consolidating the schools. Tr. 222. This opinion was borne out in the testimony presented to the Court.

Gary Gainspoletti, an accountant, business owner, and alderman-at-large for the City of Cleveland, testified that people in Cleveland are nervous, fearful, and resentful regarding the possibility of consolidation. Tr. 880. Obie James testified that he only knew one East Side High parent who supported consolidation, and that parent did not graduate from East Side High. Tr. 198.

On the opposite end of the spectrum, Tim Holbrook, who worked as a principal at D.M. Smith and Cleveland High things that lacking for want of having pooled resources, some things that could happen if

these schools were together[,] Id. In discussing potential cost savings, Holbrook identified the cost for school administrators, and transportation of students between the schools. 87

Tr. 625 26.

87 Holtz testified that the only place the District would save money under the United States driving positions totaling $29,600 in expenses. Tr. 886. She explained that operational costs would not drop
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Holbrook believes consolidation of the athletic teams and bands would improve the quality of play and performance. Tr. 635 36. He also believes students at both East Side High and Cleveland High are enthusiastic about the idea of a consolidated school. Tr. 637 38. Holbrook admitted, however, that these beliefs came from discussions about a brand new high school. Tr. 653. While he acknowledged that he is aware of fears in the community that consolidation would result in the loss of tradition, Holbrook testified that 42.

Leroy Byars, a former football coach at East Side High, testified that consolidation would create more competitive teams and would allow for more sports offerings. Tr. 793. But Byars also testified that he does not believe white students would attend the consolidated middle school at East Side High. Tr. 800.

Keith White, Duvall, Nandula, and Blake, all parents in the District, testified in support of consolidation. Blake testified that she supports the U.S. Plan because she . we would have more funds available that could

She conceded, however, that she did know whether there would be savings or whether consolidation would improve the 75.

Duvall supports the U.S. Plan because: for our k

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in better athletic and academic programs. Tr. 706.

Nandula supports the U.S. Plan because she thinks a larger student population would increase competition and that competition would be good for students. Tr. 683.

White testified that the U.S. Plan

how you take these schools up, how you band- . White believes though that , Tr. 732.

Lenden Sanders, one of the plaintiffs, supports the U.S. Plan student to participate in all the programs and whatever they have to offer. Every child will have

754 55. He believes that consolidation will increase academic and extra-curricular options. Tr. 755.

C. Analysis of U.S. Plan The District concedes that the U.S. Plan is constitutional. Doc. #207 at ¶ 161. However, in its objections, the District urges the Court to reject the consolidation plan because:

plans are constitutional and this of the middle school students cannot be educated in the East Side High building,

as proposed by the United States; (3) [sic] the IB program cannot be automatically transferred to Cleveland High, as suggested by the United States[;] and (4) [sic] the District does not have the funds to build a new high school. Doc. #112 at 5 6. Additionally, at the hearing and in their proposed findings of fact, the District contends that the United States sult in a loss of extracurricular activities and

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athletic opportunities, and also result in schools that fall outside the recommended enrollment range in Mississippi.

1. Impact of consolidation members, the District argues that consolidation should be rejected because it will drastically

reduce the white enrollment in the District. Doc. #207 at ¶¶ 143 47, 153 55. The United States responds that white flight may only be considered when choosing between constitutional plans and that even if white flight could be considered, the U.S. Plan is unlikely to cause white flight. Doc. #208 at 47 48.

a. Consideration of white flight permissible plans, cannot be accepted as a reason for achieving less than complete uprooting of

the dual public school system. White flight must be met with creativity, not with delay in [de]segregation. United States v. Pittman, 808 F.2d 385, 391 (5th Cir. 1987) (quoting Davis, 721 F.2d at 1438).

In this case, having already found two of the three plans submitted unconstitutional for the reasons above, the Court is not in a position to choose between constitutionally permissible plans. Accordingly, white flight is an inappropriate objection to the U.S. Plan. See id.

b. Likelihood of white flight To the extent white flight is a valid concern, the evidence on the issue is mixed. twenty-five year old survey data and case studies that failed to differentiate between

consolidation and other forms of mandatory reassignment, is flawed Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 90 of 96 PageID #: 4481 testimony, which predicted little to no white flight, based in part on an inaccurate count of local private schools, failed to consider the impact of consolidation in similar districts. Similarly, while the District officials and Leroy Byars, a former District employee, predicted a substantial loss in white enrollment, such dire predictions are somewhat offset by the fact that the District currently maintains numerous majority-African American schools with significant white enrollments without suffering white enrollment loss Pearman, Bell, Nailor, and Margaret Green.

The Court suspects that white enrollment loss related to consolidation, like most things, will fall somewhere between the two extremes. The District is likely to suffer some white enrollment loss as a result of consolidation. While this is a concern, it is insufficient, in the absence of an alternative constitutional plan, to reject consolidation. Rather, potential white enrollment loss is a problem that must be met with creativity. To this end, the U.S. Plan calls for a rebranding effort, a diverse offering

of academic programs, and the formation of a multi-racial advisory panel to ease the transition all methods this Court finds reasonable and appropriate.

2. Deference Although the District argues the U.S. Plan should be rejected in deference to either Plan A or Plan B, deference, as explained above, may only be accorded to constitutional plans. Because the Court has found the warranted.

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3. East Side High capacity The District, pointing to the fact that the total middle school enrollment at Margaret Green and D.M. Smith was 771 students in February of 2015, 88

takes issue with the United States , as presented in its plan, that the consolidated middle school would have 692 students. Doc. #112 at 18. Indeed, at the hearing, Henderson architectural expert, testified that the projected enrollment for a consolidated middle school would be closer to 800. Tr. 147. The District argues that, under either formulation, East Side High lacks capacity to house the projected middle school enrollment. Doc. #112 at 18.

As explained above, Poros and Henderson reached different estimates of East Side High city of non- like laboratories and the gymnasium; Henderson did not. Though this Court is inclined to credit High could be easily and quickly addressed by adding between two to four classrooms, a construction

4. Availability of IB program The District, citing the affidavit of its co-magnet coordinator, Debbie Fioranelli, contends that the IB programs are school specific, and that by transitioning East Side High to a consolidated school, the District would lose the high school IB program until it can re-apply for a new program. Doc. #112 at 18 19. The United States responds that the Diploma Programme Manager of the International Baccalaureate program advised the United States that the

88 The number has since dropped to 761. Case: 2:65-cv-00031-DMB-JMV Doc #: 215 Filed: 05/13/16 92 of 96 PageID #: 4483

consolidated high school would be able to maintain its IB program if certain conditions were met. Doc. #122 at 15; see also Doc. #122-2.

High could maintain its IB program following consolidation. program is without merit.

5. Cost of new school The District contends that its expert estimated a new high school would cost approximately $36.5 million. Doc. #112 at 19. The District also argues that, even with the lower sum, the chances are unlikely that it could pass a bond for $26 million, the upper range of the for a new school. Id. The District further states that Margaret Green and Cleveland High may be designated historical landmarks, which could complicate any construction efforts. Id. at 19 20. The United States

the U.S. Plan does not require construction of a new school. Doc. #122 at 16. Because the Court agrees that the U.S. Plan does not require construction of a new school, plan.

6. Extracurricular activities and athletics At the hearing, community and Board members testified overwhelmingly about the importance of extracurricular activities and athletics within the community, as well as about the fear of losing such opportunities. Apart from speculation that an unknown number of students may lose scholarship opportunities and that sports teams may have to cut kids, however, there is absolutely no evidence that consolidation will result in any appreciable loss of athletic or extracurricular opportunities. To the contrary, the U.S. Plan only calls for the elimination of

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redundant extracurricular activities. Accordingly, the concerns regarding extracurricular activities and athletic opportunities are insufficient to defeat the U.S. Plan.

7. Enrollment size As mentioned above, the Mississippi School Design Guidelines recommend that the District should have a middle school population of 300-600 students and a high school population of 400-800 students. Tr. 608 09. But but refer to a population within a school. Tr. 618. There is no indication that a consolidated school could not create smaller populations within a larger enrollment population. The U.S. Plan explicitly contemplates the formation of academies within each school. The Mississippi School Design Guidelines , therefore, do not provide a basis for rejecting the U.S. Plan.

IX Appropriate Remedy As observed in Cowan the various proposed remedies, exclude those that are inadequate or infeasible and ultimately

adopt the one that is most likely to achieve the desired effect:

In considering the proper means to desegregate the District, the Court is confronted with three plans: , , and (3) the U.S. Plan. For all of the reasons discussed above, the Court concludes that Plan A is inadequate to desegregate the schools, and that Plan B is inadequate and infeasible. Accordingly, the Court is left with the United States The U.S. Plan, though, is not without challenges facilities and, most concerning, is opposed by some community members and key decision makers in the District. However, the U.S. Plan is the only one most likely to achieve the desired

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effect of desegregation. Thus, consolidation represents the only constitutional avenue presented and available to this Court. In ruling for consolidation, the Court does not call into question the sincerity or the motives of supporters, both African American and white, the District officials and community

members who testified in support of such plans. The Court is s plans stems from the same laudable purpose that motivates the United States and Plaintiffs an overwhelming desire to ensure excellent education for all children in the District. Although these good intentions cannot render the proposed unconstitutional plans constitutional, 89

t to the education of its children will no doubt ensure that the gem that is Cleveland, along with its surrounding areas, only shine brighter as the shadows of segregation recede.

X Conclusion Nearly fifty years ago, the United States Supreme Court announced that slow days of all deliberate speed have given way to the mandated duty to immediately

Miller v. Bd. of Educ. of Gadsden, 482 F.2d 1234, 1236 (5th Cir. 1973) (citing Alexander, 396 U.S. at 20). In the decades since this pronouncement, the District has failed to meet this obligation as it concerns the high schools and middle schools in Cleveland, Mississippi. This failure, whether born of good faith, bad faith, or some combination of the two, has placed Cleveland in the unenviable position of operating under a desegregation order long after schools in bastions of segregation like Boston, Jackson, and Mobile have been declared unitary. More

89 See Keyes v. Sch. Dist. No. 1 Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979)).

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important, and of far greater harm, the delay in desegregation has deprived generations of students of the constitutionally-guaranteed right of an integrated education. Although no court order can right these wrongs, it is the duty of the District to ensure that not one more student suffers under this burden. Accordingly, and for all of the reasons above:

1. Plaintiffs Wesley and Payne are DISMISSED for lack of standing; 2. The Court ADOPTS the desegregation plan [109] proposed by the United States;

and 3. In view of the adoption of the United are each DIRECTED to submit to the Court a proposed timeline to implement

in its high schools and middle schools. The proposed timeline is to be submitted no later than twenty-one (21) days from the entry of this Opinion and Order. SO ORDERED, this 13th day of May, 2016.

/s/ Debra M. Brown UNITED STATES DISTRICT JUDGE

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