

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE

FRANCES SPURLOCK, et al,
Plaintiffs, §
§
vs. §
§ Civil Action No.: 3:09-00756
DAVID FOX, et al, §
Defendants. § JUDGE SHARP

PLAINTIFFS’ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
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Discriminatory Purpose: History of Nashville Segregated Schools and Rezoning

1.It took five years to implement the Kelley settlement, which means the attempts at rezoning started almost as soon as Kelley was implemented. MNPS School Board Chair Marsha Warden and Board member Karen Johnson testified the Board began looking at a need for rezoning in 2005. Tr. Vol.14, 2011:9-2012:5; 2026:10-11. The Council of Great City Schools was to study

Nashville rezoning but decided it was “so controversial” they would not touch it and Warden confirms the Board looked at rezoning in 2006 and 2007 and were unable to decide in 2007. But Board member George Thompson notes the “controversy” was the Seattle- Louisville Supreme Court decision. Tr. Vol.14,Tr.2030:1-14. Board member Thompson noted that Ford Foundation money was available to MNPS if we had a plan “that addresses those factors that the Supreme Court addressed, which I have not heard one time in terms of those factors being considered. Mr. Kindall spoke to the fact of factors which, as far as I know, had not been considered by the Task Force.” Tr. Vol. 14,2030:1-14.

2. Board member Kindall recalls the November 2007 Board meeting where then Director of Schools Dr. Pedro Garcia

“reported ...[about his] meeting with either some of the teachers or teachers and parents [at Brookmeade School]. And that they had made statements to the effect that the students from North Nashville, basically the Metro Center area, were the reasons for the low test scores that they had.... he felt the zoning plan would, in fact, resegregate kids. And he didn't want to be a part of that, so he dropped it.” Tr. Vol. 15, 2362: 10-22.

3.Task Force chairman Mark North recalls it also: Dr. Garcia visited a school that might be closed in a rezoning, Brookmeade School in the Hillwood cluster, where the parents and faculty told him if busing of black students from the non-contiguous zones would be eliminated, then there was no need to close Brookmeade because nearby white students would return. Tr. Vol.5, 696:7-697:18, see also, Tr.Vol. 1, 100:23-101:5.

4.Dr. Garcia, announced at the November 2007 Board meeting that he could not support this 2007 rezoning and did not want to be the Director if it was going to be adopted. Tr. Vol. 9 at 142, Tr. Vol. 1, 100:23-101:5. A few weeks later the defendants dismissed Dr. Garcia after he had served many years as Director.Tr. Vol. 1, 102:1-20.

5. Several MNPS defendants argued that rezoning was needed because elected officials like Mayor Purcell and Mayor Dean wanted MNPS to solve its utilization issues. But Mayor Bredesen upon studying decided the community needs of diversity outweighed the undercapacity issue. Tr.Vol.14, 2030:18- 2031:16.

6. So the Board tried to rezone for four years and on July 8, 2008 did so. The Board was unwilling to vote for a two week extension to study the final rezoning plan when it was presented on what amounted to two days notice. Tr.Vol.13,1639; Vol.15, 2396: 23 - 2397:4. Mr. Kindall got the rezoning proposal on Thursday evening at 10:30 p.m. and Friday through the weekend was the 4th of July holiday. Tr.Vol.14, 2015:13-16. Mr. Thompson testified he got the rezoning report only 45 minutes before the meeting started. Tr. Vol.1 at 106-107. Upon Mr. Thompson's motion to exclude Pearl-Cohn and Hillwood clusters from the plan being denied, Tr.

Vol.14,2029: 6-8 2032:22-2, he stated:

“We're dealing with an issue that had its origin long before Brown vs. Board of Public Education. And the entire fight in this community, for as long as I can remember, has been where are we going to school. Where are African Americans going to school? Where are whites going to school? And to this very day we're here divided over that issue.” Tr. Vol.14,2029: 17-22

7. Chairman Warden stops the Board discussion to ask for a legal opinion on the standard for recusal from Metro Legal Department. Tr.Vol.14,2024: 16-23. But neither the Task Force nor the Board asks for a legal opinion on the rezoning plan itself, even though they viewed it as one of the most important issues.Tr. Vol. 14,2036: 17-19. Why not? Because they already knew the answer. Def. Ex. 16 is the Nashville Law Department official legal opinion on the effect of Parents Involved in Community Schools v. Seattle School District, 551 U.S. 701 (2007) and they stated to the defendants “... the District is cautioned that race should not be used as a factor in placing or transferring students when creating or modifying MNPS policies.”Id. at 3.

Discriminatory Purpose: Community Task Force

8. The defendants and the Task Force kept no records of the Task force work. They recorded no votes. They kept no minutes or any other records of Task Force discussions. Tr. Vol.15, 2369: 8-9. The Task Force started their rezoning work with the Pearl Cohn cluster first before any other area of Nashville for no expressed reason in the Task Force documents. Pl. Ex 9 (the rezoning plan) at p.12 says at the end of the first paragraph: For purposes of student assignment, Pearl Cohn is a “challenging” cluster. When asked what this language meant, they claimed they were describing the small size of that cluster, but as Mr. Kindall said Pearl Cohn cluster shrunk in terms of population to a large extent because the defendants took out the areas (Sylvan Park, Charlotte Park) of white kids Tr.Vol.15, 2378: 2-15. Mr. Kindall concluded “if the Task Force, or the School Board that adopted it, saw the low student population as a challenge, that's pretty easy to fix, isn't it? You could just move the boundary line further towards Hillsboro High School or further toward Hillwood High School. Those are two clusters that are geographically adjacent. ... I'm sure other board members did, as well -- some correspondence from the Charlotte Park association. I think that's what they were called. Saying we do not want to come back in the Pearl-Cohn Cluster. And almost to the point I think it said we will not come back in the Pearl-Cohn Cluster.” Tr. Vol. 15,2378:16-2379:13; 2382.

9. Creation of a Task Force by the defendants was an aberration . Usually, the Board proposes and debates policies for MNPS as can be seen in the Board minutes. Of course they keep records. Also, the one Nashville precedent for a task force to propose explicit racial classifications was a citizen task force on rezoning in the Kelley desegregation case.Tr. Vol.15,2356:6-15; 25- 2357:4

Explicit Racial Classifications

10. The defendants' own lawyers advised them in 2007 that a rezoning plan using race would violate the law, Def.Ex.16, and the then Director of Schools in November 2007 warned the defendants that their proposed 2007 rezoning would materially increase racial segregation between Hillwood and Pearl-Cohn. Tr.Vol.1, 100-101; see also, Tr.Vol.3, 678-679, 697. Despite that advice, the MNPS school board voted 5 to 4 in 2008 to rezone the student assignments by removing most black students from those schools. Defendants generally deny such racial animus, but admit they considered only three factors for the rezoning: race, free and reduced meal eligibility (FARM), and building utilization or capacity. Pl. Ex. 32, 123, 124, 131.¹ They admit they “checked in a number of times ...and revisited those cases(PICS v. Seattle) to make sure we were on the right side of the Supreme Court rulings.” Tr. Vol.23,4117:11-13.

11. The Defendants' Community Task Force predicted in writing in the rezoning plan adopted by the MNPS school board, there would be a racially segregative effect for Nashville students and schools. Pl. Ex. 9 (this exhibit, substantially the same as Pl. Ex.131 is the Task Force recommendations which upon adoption by the School Board became the rezoning plan). That same racial segregation forecast for Pearl Cohn was presented to the Defendants when they voted in 2008 to adopt the rezoning policy, Pl. Ex. 9, and according to the Defendants' implementation data, such increase in racial segregation immediately occurred. Tr. Vol. 1, 102:1-20;198-200, Pl. Ex. 123(which is substantially the same as Deft. Ex. 7),124, and 131. The racial segregation that occurred in the fall of 2009 was the intended and expected effect of the rezoning policy that was adopted by the Defendants. Tr. Vol.1, 200; Pl. Ex.123, 124, 131. The rezoning segregated children who had been attending diverse schools. Tr.Vol.15, 2373: 12-13.

¹ These exhibits are the Defendants' Community Task Force Recommendations for rezoning adopted by the Nashville School Board as its rezoning policy in 2008 ,Pl. Ex.9, 32 and 131, and the Nashville School System Implementation Update on the Student Assignment Plan for September and October 2009 . Pl. Ex.123,124.

12. On the demographic reports forecasting the racial impact of the rezoning, School Board member David Fox even made handwritten notes where he computed only the white student enrollment because he wanted to gain share in white student enrollment. Tr. Vol. 7, 1018:21-1019:20. School Board member and Task Force chairman North also stated the Task Force should monitor with an eye toward market share and forecast the racial enrollment and FARM of each school for the purpose of racial diversity. Tr. Vol.14,1956:2-4. North admitted that racial “balancing” was the purpose. Tr. 1018:21-1019:20; Vol.5, 714:13-25. See also, Task Force member Cheryl Mayes saying the racial data was “in order to make sure that we were on the right track” regarding racial diversity in rezoning. Tr. Vol. 23, 4146:1-18. MNPS Director of Student Assignment in 2008, Larry Collier, testified the 2007 Garcia rezoning plan had no racial data and no racial demographics, Tr.Vol. 8, 1356:18-1357:21, but in this 2008 rezoning plan every school and every cluster has specific racial data on projected enrollment. But for this 2008 rezoning, the MNPS staff provided racial data. Tr. Vol.5, 710:15-21. Collier said his office provided the racial data because various members of the Task Force asked for it. Tr. Vol.5, 714:13-25. Vol.8, 1356:18-1357:21. Collier also testified his office provided the School Board the same racial demographic data because the School Board asked for it, Tr.Vol.8, 1361:13-22, because they wanted to know the diversity impact of the rezoning. Tr. Vol.8, 1359:20-1360:3. Vol.5, 716:1-14. The Task Force discussed the impact on racial diversity “closely” and discussed the Seattle and Louisville Supreme Court decision “pretty thoroughly.” Tr. Vol.5, 716:1-14; 780:8-21. Both the Task Force and the School Board had a copy of the Metro Nashville Department of Law written opinion that cautioned against using race as a factor in rezoning. D. Ex. 16 at 3. That legal opinion specifically examined the then MNPS Student Assignment Plan,

n.1, regarding the “SUBJECT: PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DIST.NO.1”.Id. at 1.

13. North Nashville, the area of the Pearl Cohn cluster and the non contiguous zones involved herein, is a 95 percent minority or black community. Tr. Vol.3,598:19-23; 692:1-7; Vol.23,4109:1-9; 4110:6-15. North Nashville has been 95, 98 percent black Mr. Kindall’s entire life. Tr. Vol. 15,2359: 23-25. Task Force Chairman North “knew that the students given the choice between ... Hillwood cluster and ...Pearl-Cohn cluster, that they were predominately African American.” It was almost entirely the same African American student areas who had been crosstown bused in the past under the Kelley case.Tr. Vol.3,693:1-19; 708:3-22. In other words, the Task Force and the School Board knew that by classifying/zoning based on the non-contiguous zones, they were classifying by race. As plaintiffs’ expert Dr. William Rock testified on cross-examination, if using race as classification is illegal under the PICS v. Seattle decision, then “I don’t know how you could have done what you did in Nashville [in the rezoning plan].” Tr. Vol.2, 260:14-261:16.

14. Mr. Kindall recognized the racial classifications: “I’ve been around here through the whole era of the desegregation. I went to segregated schools. ...When I see that [rezoning implementation] chart, I think of the old thing: It looks like a duck, walks like a duck, it is a duck. I can’t help but think that. And if we start in that direction, what’s going to stop us ... from continuing around this system? And then we end up with two school systems.”Tr. Vol.14, 1997:5-25.

15. Also, Nashville City Councilman Walter Hunt testified after the Kelley settlement from 1998 through 2008 the defendant Metro Government of Nashville Davidson County demolished, then rebuilt the predominantly black housing projects in North Nashville and kept all of them in

that same location—"right where they are, in the middle of the black community." Tr. Vol. 8, 1359:20-1360.

16. Dr. Morton-Young testified in her opinion the rezoning plan is the culmination of a long term series of moves and plans in Nashville for resegregation. Tr.Vol.2, 272:15-273:1. Task Force member, now School Board member Cheryl Mayes admitted she wanted the racial data on rezoning because "you have to maintain a certain level of diversity." Tr. Vol.11,1468: 2-18.

17. Also, the racial rezoning only went one way. Pearl-Cohn High School has been on the open enrollment list with space available for more students the entire time that Mr. North has been on the school board; yet no one on the Task Force proposed to use the unused capacity at Pearl-Cohn high school by moving white or any other students to Pearl-Cohn whether by choice or by assignment. Tr. Vol.5, 733:16-734: 1.No white students in Hillwood, or other white areas, were offered any zone choice schools in the Pearl-Cohn cluster under the rezoning. Tr. Vol.5, 703:16-704:15.Andrson Williams testified Tr.Vol. 23, 4121:8-14 the default zoning for the affected black students was set by the Task Force to be Pearl-Cohn, not Hillwood where they had attended.

18. The Defendants' rezoning plan, prepared by their handpicked Community Task Force on Student Assignment², and approved by the school board, was extremely detailed, with before-and-after geographic maps for the school system's 12 clusters and specific projections of the projected changes in enrollment at each school in the clusters, specifically broken down only by race (black, white, Hispanic, etc.); socioeconomic status (FARM-Free and Reduced Meal eligibility); and alleged building capacity. Pl. Ex. 9.These three factors (race, FARM and

² There were no qualifications to be on the Task Force, Tr. 56, and their information/data were supplied by the Defendants' employees from the previous years' proposed rezoning plan under Director of Schools Pedro Garcia .Tr.99; Tr. 1624.

capacity) were the only criteria used by the Defendants to craft this rezoning plan. Pl. Ex. 9, 123, 124, 131. Thus, the Defendants knowingly and intentionally voted for this rezoning plan with the direct knowledge it was based only on these three factors and with the direct knowledge that it would significantly reduce student diversity because the racial, FARM and capacity numbers and percentages were forecast in the rezoning plan for each school. For example, the Defendants' rezoning plan provides the following information about Pearl-Cohn High School and Hillwood High School (and similar information about every school): Pearl-Cohn was projected under the rezoning to go from 548 black students (88%) and 66 whites (11%) to 692 blacks (93%) and 47 whites (6%), while its Hillwood counterpart would change from 693 black students (49%) and 579 whites (41%) to 220 blacks (24%) and 584 whites (63%), i.e., 144 more black students at Pearl-Cohn in a black neighborhood and 473 fewer blacks at Hillwood in a white neighborhood. Pl. Ex. 131 at 41, 50.

19. The Community Task Force on Student Assignment plan calls for monitoring the “market share” again in total school enrollment “with an eye toward market share and whether the public schools are attracting the entire community,” which obviously refers to retaining or re-capturing white members of the community (there being no shortage of minority students in the system). Pl. Ex. 131.

20. In regard to the Hillwood cluster, the rezoning plan noted that so many black children were being sent back to North Nashville (“closer to their homes”) that it became inefficient to keep all the cluster schools in operation. Tr. Vol. 1, 131:42. Thus Brookmeade Elementary and Martha Vaught Middle School were closed as zone schools after 2008-09, even though they were decently integrated before the rezoning, 58.4% black students to 37.0% whites at former, and

50.3% blacks to 29.9% whites at latter, when compared to the district's overall ratios of 47.5% black, 33% white, 16% Hispanic, and 3.5% other races. Id. at 42-43; Pl. Ex. 123 at 2, Pl. Ex. 127.

21. Moreover, the rezoning plan continued, "the recommendations [to remove black students] result in low enrollment/capacity percentage for Hillwood High School. However, the area is ripe for some development that will increase the student population at Hillwood [High]." Pl. Ex. 131 at 43. In other words, "capacity" as a required factor in the rezoning was ignored anytime it helped keep black students out of white neighborhoods. No data was presented by the Defendants of any forthcoming "development" in Hillwood. The Defendants simply felt it was preferable to leave a large amount of space vacant at Hillwood High School, due to a net reduction of 136 black students, in favor of the invisible (but undoubtedly mostly white) students who were expected to somehow materialize in the future. Pl. Ex. 123 at 2. "It is important," the plan added, "that we allow space for those who live in the Pearl-Cohn cluster to choose Hillwood." As it turned out, after all those choices had been made, the vacancy rate at Hillwood increased from 30% to 35% in 2009-10, leaving 610 empty seats and 136 or more children of all races who could have filled them. Ibid. In this instance, the Defendants' oft-mentioned interest in facility utilization was not the real consideration, but a pretext instead.

Definition of Racial Isolation

22. A significant exchange took place when former School Board member Alan Coverstone, who now supervises charter schools and the new magnet schools for MNPS, raised the question of the meaning of "diversity" and then defined it in terms of the plan's "having an impact on racial isolation and the number of schools that are racially isolated across the district."

Q. (By Mr. Lottman) And how do you define *racial isolation*? [Objection omitted.]

A. Well, I think approaching district averages would be a start.

Q. (By Mr. Lottman) A start for what?

A. Diversity and reducing racial isolation.

Q. Yes, but what's racial isolation?

A. Racial isolation would be, you know, racial subgroups whose percentages are out of line with district averages. Tr. Vol.14, 2133: 3 to 2134:10.

23. Mr. North gives the same description of racial isolation by example: "Charlotte Park's demographics, for example, under this [rezoning] plan would have 14% Asian, 25% black, 31% Hispanic, 29% white. That's pretty diverse." Tr.Vol.14, 1966: 4-6. Former City Councilwoman and educator Betty Nixon testified Tr. Vol.15, 2251:7-14: "Q. What do you think the goals of Nashville schools should be respecting racial diversity or racial isolation? A....ideally, I think we should reflect the – the schools should reflect the community."

24. In her testimony, Dr. Leslie Zorwick clarified that experts Goldring and Smrekar refer to schools with 80 to 100% students of one race as racially isolated, and to those from 60 to 80% of one race as having a predominant racial group, e.g., predominantly black. In addition she noted that Dr. Gary Orfield, another expert she cited in her pre-hearing report, "talks about schools with 90% or more of one race as being intensely segregated," Tr. Vol.3,384-385, such as those in the Pearl-Cohn cluster. Tr. Vol. 3, 360:5-361:8; 368:1-6.

Discriminatory Purpose and Effect: Racial Isolation and Choice under the Rezoning Plan

25. School Board member Ed Kindall with 27 years experience on the Board testified, Tr. 2399:8-2400:12, that about 90% of the rezoned Pearl Cohn students had been in diverse schools. Plaintiffs' Exhibit 221, at 2 (which is substantially the same as Defendants' Exhibit 7, p. 2, see Tr. Vol.14, 2126: 3 to 2127: 25) show racial impact that occurred in the Hillwood schools

between the year before rezoning plan implementation (2008-09) and the year it took effect (2009-10):

<u>School</u>	<u>Black Students 2008-09</u>	<u>Black Students 2009-10</u>	<u>Change</u>
Charlotte Park	238	113	- 125
Gower	145	153	+ 8
Harpeth Valley	87	88	+ 1
Westmeade	171	95	- 76
Bellevue Middle	199	143	- 56
H.G. Hill	222	174	- 48
Hillwood High	577	441	-136
Brookmeade	150	Closed	- 150
Martha Vaught	198	Closed	- 198

Id., at 2129:9 to 2130:24. In light of this net subtraction of 780 black students from Hillwood schools, Alan Coverstone, Executive Director of the MNPS Office of Innovation and former MNPS School Board member, was asked if the rezoning plan served the purposes of integration and diversity as far as Hillwood and Pearl-Cohn were concerned. Id., at 2132: 14-17; 2132: 24 to 2133: 1. (The Pearl-Cohn cluster added 631 black students to already 90%-plus black student bodies in the fall of 2009, and also opened a new school, then called Wharton, with 256 black students (95.9% of the total). Pl. Ex. 221, p. 6.) Eventually, the question was posed by the Court as “If you’re looking at whether or not schools are more racially isolated across the district, is Hillwood/Pearl-Cohn more or less racially isolated than they were before the change in plan,” to which Mr. Coverstone responded, “Moving in the direction of more.” Tr. Vol. 14,2134: 18-23. Mr. Coverstone agreed that the Pearl Cohn High School had a high percentage of black students and was moving in the wrong direction, thus posing a real problem in terms of racial isolation. Tr.Vol.15, 2200:10-18; 2201: 4-20

26. The racial isolation proposed in the rezoning plan was evident to reasonable people in the community. Betty Nixon read the rezoning plan many times and my initial reaction was “heavily a racially isolated ... area that had been created.” Tr. Vol.15, 2240:11- 2241:10. The rezoning plan is “A very large majority of the population in that area around Pearl-Cohn is black. And that's what was in the demographic” observed Mr. Kindall Tr.Vol.14, 1976: 4-9. “[T]he children in the Pearl-Cohn Cluster will attend K-12 schools in racial and socioeconomic isolation” stated Mr. Kindall.Tr. Vol.14,1985:24-1986:10. Elementary students in Pearl-Cohn could choose either Harpeth Valley or Gower schools in Hillwood, depending on where they lived; these were the Hillwood schools with the lowest percentages of black students in 2008-09. Pl. Ex. 123 at 2; Pl. Ex.131 at 23; Tr. Vol.1,41-42.At the MNPS Board meeting that voted on and adopted the rezoning, Marilyn Robinson addressed the Board about the Seattle-Louisville decision and stated the rezoning “plan seeks to take African American children out of integrated and successful schools in the Hillsboro and Hillwood Clusters...” Tr. Vol.14,1948:12-15. She pointed out it would move racial diversity in the wrong direction, Id. 1948:18-22, and would “deliberately and knowingly creat[e]” separate schools. Id. 1948:25-1949:2.She noted neighborhoods zoned to segregated schools will result in housing segregation in the Germantown and downtown Nashville neighborhoods. Id.1949:13-1950:1-3. Four years later a Hope Gardens-Germantown area resident, Mr. Heuser testified the rezoning plan disrupted the lives and threatened the efforts of families of many races who were trying to establish liveable, diverse communities. Tr. Vol.14,2040: 1 to 2104:5. Hope Gardens is racially diverse, “primarily a mix of white and African American. And low income people and ... what I would say would be all across the range of middle income people.” Id. 2045: 14-17. Avoiding racially isolated schools was “a huge factor” for living in the area, Id.,2044: 13-17; 2046:1-12, but under the rezoning Dr. Heuser’s

child is assigned to a “priority” racially isolated school in Pearl Cohn area ranking academically in the bottom 5% of the State. Pl. Ex. 203; Tr. Vol.14,2202:12 to 2204:15 (Alan Coverstone testimony). School Board member Ed Kindall told Mr. Heuser and others the research of Vanderbilt University professors Ellen Goldring and Claire Smrekar, see Pl. Ex. 128, 129, showing the educational futility of racially and socioeconomically isolated neighborhood schools, was available but not considered in the drafting of the rezoning plan. Tr. Vol.14,2082: 3-10; 2083:19 to 2084: 13.

27. The defendants’ mandated the removal of black students from Hillwood and then claim they gave the student a choice of two schools assigned by the defendants. Such “choice” does not correct racial isolation. Children and families in what have traditionally been considered “good” schools typically would see no reason to change, while for others the choice may be fraught with emotional difficulty. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971), the Supreme Court took note of the improbability “that young children (or their parents) would use ‘freedom of choice’ plans to disrupt existing patterns....” Testifying in this case, Dr. Zorwick said that “[r]esearch shows that people do not like to ... have what is called solo status. Nobody feels comfortable as the token minority member of whatever group, be it based on their race, sexual orientation, gender, etcetera. And what I would say is that the likelihood of a student choosing to go to a school where they would be a part of a very small minority is unlikely. That places a natural constraint on choice, where ... students and parents may prefer a school that’s not going to help [the] student succeed as much, to be able to avoid those negative social consequences of being a very small, visible minority.” Tr. Vol. 3at 366-367.

28. Dr. Zorwick observed that “[t]here seems to be a big push in the movement toward neighborhood schools, that they would allow students choice. And what I would say about

choice is this: It's hard for me to know what actually works and is good without hearing more about what those choice options are. For example, depending on where you are currently zoned. It strikes me that the students who don't have as good of schools are the only ones making the choice; in which case it's not really a choice for everybody." Tr. Vol. 3 at 366.

29. When the schools opened under the rezoning plan for the first time in the fall of 2009, it was clear the racial separation and isolation of students in the affected clusters had dramatically increased. Nowhere was this segregative effect (so identified by Plaintiffs' expert Dr. William Rock at Tr.194) more obvious than in the Pearl-Cohn, Hillwood, and Hillsboro clusters. Pl. Ex. 123 at 2, 6. The implementation update released by the Defendants in September, 2009, Pl. Ex. 123, clearly shows the changes in student enrollment in the above three districts, and the concentration of poverty in racially isolated schools that occurred as a direct result of the new rezoning plan:

** The percentage of black children in the total enrollment of Charlotte Park Elementary (Hillwood cluster) declined from 40.1% to 26.3%, while the percentage of white children increased from 22.6% to 36.3%. (As in other schools, the balance consisted of Hispanic, Asian, and other minority students.) The percentage of total enrollment eligible for free and reduced price meals (FARM) in the fall of 2009, a shorthand indicator of socioeconomic status, was 80.7% at Charlotte Park. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Westmeade Elementary (Hillwood cluster) declined from 46.3% to 23.8%, while the percentage of white children increased from 44.4% to 63.8%. The FARM percentage in 2009 was 41.0%. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Bellevue Middle School (Hillwood cluster) declined from 30.8% to 22.3%, while the percentage of white children increased from 60.4% to 67.4%. The FARM percentage in 2009 was 35.7%. Pl. Ex. 123.

** The percentage of black children in the total enrollment of H.G. Hill Middle School (Hillwood cluster) declined from 49.4% to 33.3%, while the percentage of white children increased from 41.2% to 44.6%. The FARM percentage in 2009 was 70.1%. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Hillwood High School (Hillwood cluster) declined from 47.3% to 38.9%, while the percentage of white children increased from 41.6% to 46.1%. The FARM percentage in 2009 was 57.9%. Pl. Ex. 123.

** And as noted above, the Brookemeade and Martha Vaught schools in the Hillwood cluster, with a total of 348 black students, were shut down in the fall of 2009 and most or all of the black children sent back to Pearl-Cohn. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Glendale Elementary (Hillsboro cluster) declined from 19.1% to 11.3%, while the percentage of white children increased from 70.0% to 78.4%. The FARM percentage for 2009 was 14.6%. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Julia Green Elementary (Hillsboro cluster) declined from 27.4% to 22.6%, while the percentage of white children increased from 65.8% to 69.7%, presaging future developments. The FARM percentage in 2009 was 22.2%.

** The percentage of black children in the total enrollment of Percy Priest Elementary (Hillsboro cluster) declined from 21.8% to 6.9%, while the percentage of whites increased from 73.6% to 85.1%. The FARM percentage in 2009 was 7.7%. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Moore Middle School (Hillsboro cluster) declined from 40.8% to 33.7%, while the percentage of white children increased from 52.3% to 61.7%. The FARM percentage in 2009 was 36.6%. Pl. Ex. 123.

** The percentage of black children in the total enrollment of Cockrill Elementary (Pearl-Cohn cluster) decreased from 44.6% to 26.0%, while the percentage of white children increased from 39.2% to 46.1%. The FARM percentage in 2009 was 91.0%. Pl. Ex. 123.

** The number of black children in the Buena Vista Enhanced Option school (Pearl-Cohn cluster) increased from 309 to 435. The school was 97.1% black in enrollment, and the FARM percentage in 2009 was 87.1%. Pl. Ex. 123.

** The number of black children in Park Avenue Enhanced Option (Pearl-Cohn cluster) increased from 440 to 676. The school was 95.9% black in enrollment, and the FARM percentage in 2009 was 93.9%. Pl. Ex. 123.

** The number of black children in John Early Middle School (Pearl-Cohn cluster) increased from 238 to 352. The school was 93.8% black in enrollment, and the FARM percentage in 2009 was 95.0%. Pl. Ex. 123.

** The number of black children in Pearl-Cohn High School (Pearl-Cohn cluster) increased from 606 to 761. The school was 90.4% black in enrollment, and the FARM percentage in 2009 was 85.0%. Pl. Ex. 123.

30. Plaintiffs' expert Dr. Tommie Morton-Young was born and raised in Nashville and is a graduate of the Nashville school system. She is a graduate of Tennessee State University and was the first African American to graduate from Peabody College of Vanderbilt University. Dr. Morton-Young earned her Ph.D. from Duke University, with a concentration in the area of social psychology and learning theory, and she holds a Permanent Professional Tennessee

Teaching Certificate (and is also certified in Michigan). She has taught at TSU and other universities, served for 24 years in the University of North Carolina system, and also held other adjunct professorships. She is the author of ten books, two in the area of schools and schooling, and numerous professional papers. Tr. Vol. 2 at 269-27; Pl. Ex 133.

31. Noting that “[t]he effect of the Nashville rezoning plan is to isolate children in already depressed neighborhoods,” Tr. Vol. 2 at 275, Dr. Morton- Young expressed extreme skepticism as to the efficacy of any such choice provision: “Schools of choice are often devised as options for school children.... The population that we have under discussion here is one that tends not to take advantage of choice. The parents generally are hard-working people. They work long hours. They are harried and tired when they get in.... There are also many rely heavily on the concept of the village. And that is my child is going—leaving here, going to school. So whatever they do there I’m going to trust that it’s going to be all right. So choice historically and specifically is not a viable concept as regards this population.” Id. at 277-278.

32. School Board member Brannon addressed the “choice” issue, Tr. Vol.14,2033:1-12:

“I wanted to address the statement about choice. I think choice is very important, it's just that I don't feel that students who have been recommended to come out of the Hillwood Cluster have had a choice on that. And I think that whatever we can do to have those students continuing to do well in those schools --Whatever we can do in order to have those students in the Hillwood Cluster, especially the elementary students, to continue to do well in their academic studies, I think that it's very important that they be able to remain in those schools.”

33. “See, I'm going to talk about choice here just a little bit. Those parents can already choose to send their kids to Buena Vista. That's not --All they've got to do is go and fill out the form and say, I want to go to Buena Vista. They can go there. All we've done with the choice issue is we're reversing it. We're saying you're zoned here now and we're going to give you a choice to continue to go out here. These kids already have these choices.” Ed Kindall, Tr. Vol.14,

1981:5-23. Choice is already a part of the school system. ... We are only “flipping the choice.” Ed Kindall, Id. 2034:4-2035: 24. “In my opinion, when you zone children, especially in certain parts of this community, you're telling them that's where I want you to go.” Ed Kindall Id.

1981:5-23. “[Y]ou’re forcing something down the community's throat. You're telling the community that's impacted -- adversely impacted -- we don't care about you. We want to keep 53%. We accomplished what we wanted out of the Hillsboro Cluster, the Hillwood section. And you at 53% -- now, you can go out and find whoever you want to come to your school. That's what you're saying to my community.”(George Thompson testimony) Id. 2032:3-11.

34. The same point was made by plaintiffs’ expert witness Dr.Rock:

I don’t know how effective that choice was [choosing a Pearl-Cohn or a Hillwood school under rezoning]. But my own feeling is when a Board of Education says this is good for your children and you’re a parent, you tend to believe the Board of Education.” Vol. 2, 260:14-261:16.

35. Also, there was no true choice of good schools offered when the academic scores of the schools are examined. None of the defendants denied the point by Mark North that to have a “choice” there has to be a choice of two good schools. Tr.Tr. Vol.14, 1973: 8-15.

36. Dr. Register said, however, that the district does not provide transportation to magnet-type schools, except for free public bus passes in certain circumstances. That means, he agreed, that student and families selecting an “other” school of choice under the Student Assignment Plan (or otherwise) would be somewhat limited by the lack of transportation. “[I]t’s impractical to provide yellow school bus transportation to the magnet schools,” he said. “Kids come from too many different places.” Thus even though such transportation was provided to a certain extent when Dr. Register was superintendent of Hamilton County schools, he said it was “highly unlikely” to be made available in Metro Nashville. Id., at 4023: 1-21.

37. In his testimony, Dr. Register observed that the way to resolve many of the current issues is to make all Metro schools good schools, but he agreed that the system had not yet reached that point. Id., at 4034: 1-6. That being the case, he was asked, if none of the schools in the Pearl-Cohn cluster was in good standing under No Child Left Behind after the 2011 testing, and all but two of the seven Hillwood schools were in good standing, would that not make it difficult for a parent or guardian to make an informed decision between a zone or a zone choice school? He reluctantly agreed that someone could be put in the position of deciding between a good school and a bad school without knowing which was which. Id., at 4034: 7-12; 4035: 15 to 4036: 3; 4036: 6-9; see also 4035: 6-13.

Plaintiffs' Expert Witness Dr. William Rock re Discriminatory Purpose and Effect

38. Plaintiffs' expert witness Dr. William Rock was Distinguished Service Professor Emeritus at the State University of New York: College of Brockport and held a number of other titles and memberships, after a distinguished career as an administrator in the Rochester, New York school district, as Deputy Associate Commissioner for Equal Educational Opportunity in the U.S. Office of Education in Washington, Department Chair of Educational Administration at the College of Brockport, and as a public school teacher. He received his bachelor's and master's degrees from the State University Center at Albany in 1956 and 1958, and an Ed.D. in educational administration from Teachers College of Columbia University in 1961. Pl. Ex. 121.

39. In the 1960's in Rochester, Dr. Rock was involved in an early effort to voluntarily desegregate a Northern school system, and was able to access a variety of Federal programs in order to improve the education of the district's students in the process of desegregation. In the 1970's, Dr. Rock was the project officer responsible for implementing the \$1.5 billion federal Emergency School Aid Act, which provided funds directly from the Federal government to

public school districts, mostly in the South, that were implementing desegregation plans. Dr. Rock received a special citation from the Secretary of Health, Education, and Welfare for his work on this program, as well as a letter of commendation from President Nixon in connection with an earlier desegregation assistance prototype. His career during this period involved the development, implementation, and review of desegregation plans and related programs. In the 1980's, he developed a weekend university program designed to attract more African-American administrators to work in the Rochester school district. Tr. 183-187.

40. Asked to evaluate the Defendants' new student assignment plan, particularly as related to the Hillwood, Hillsboro, and Pearl-Cohn clusters, Dr. Rock testified, in part on the basis of the above numbers, that the plan "clearly had a segregative effect." His review of the data showed that "many schools were declining in the percentage of black students. These are in the Hillwood and Hillsboro clusters, as well as elsewhere in the district, where they made significant reductions in the percentage of black students." Tr. Vol. 2 at 194. In summary, said Dr. Rock, 631 black students were added to the group of schools in the Pearl-Cohn cluster where the enrollment was already 90% black. On the other hand, in the Hillwood cluster, where the schools "were somewhat integrated by race, ... the result of the plan was to remove from schools in that cluster 432 black students and to increase the number of white students in those schools by 211. So, obviously those schools become whiter." Id. at 191-192.

41. Dr. Rock's view was that the number of schools affected by the plan was important, but so were the number of children affected and the impact on the individual child. "So, you know, let's say I'm a third grade student and I was going to, let's say, Charlotte Park school in the Hillwood cluster, which was 40% black in 2008. And let's say I've been going there my whole school career. You know, this is my school. Like any child, I'm going to this school and I take a

bus to go to school. It's my school. It's where my friends are and so on. And also, it's a school in which there's diversity both in terms of race and socioeconomic status and achievement levels. And then I'm being told that now I'm being rezoned to a school in Pearl-Cohn," where hundreds of black students are being added to schools that already are predominantly black. "So, obviously, the percentage of black students in isolation was being increased. It was being increased. And, obviously, the number was being increased as well." *Id.* at 190-192. Although the Defendants claim students reassigned to schools in Pearl-Cohn would have a choice to return under the new plan, the student in Dr. Rock's example would not have had the option of going back to the school previously attended. Pl. Ex. 131 at 22-23.

42. According to Dr. Rock, in a school district like Nashville in which the total enrollment is 47.5% black, there would naturally be many schools with majority-black student bodies, but that in itself should not be a concern. Nor, he said, was the number of majority-black schools what the district should be monitoring and reporting on: "[F]rom a school district's point of view, I would be looking at the percentage and number of the children in our schools who are black who attend racially isolated schools." In a school system where about half the students are black, Dr. Rock considered schools with between 80% and 100% to be racially isolated and thus a matter of concern per se and "because it isolates children not only by race, but also by socioeconomic status. And by being with children whose achievement levels are lower, that would generally be the case. So they're even more isolated." Tr. Vol. 2 at 190, 221 (quoting from Dr. Rock's deposition, Vol.1 at 14).

43. In other words, Dr. Rock was asked to and did assess the segregative effect of the rezoning plan, a basic inquiry in Fourteenth Amendment analysis, but he also opined that low

socioeconomic status and low achievement levels often accompany and thus compound the effects of racial isolation. Defendants have generally used 90%, not 80%, in this case as the percentage of black students amounting to racial isolation, thus of course reducing the number of schools so classified. But in a district with a 47.5% black enrollment, an isolation guideline of 80% seems appropriate, if not overly conservative. Defendants' expert Mr. Milan Mueller, who was not credentialed in education or educational administration, Tr. Vol. A at 6-7, used 90% in his testimony, but the figure of 75% was agreed on as the proper benchmark in the Florida case in which Mr. Mueller had previously testified. *Id.* at 39-40; *NAACP v. Duval County Schools*, 273 F.3d 360 at n. 4 (11th Cir. 2001). In any event, looking at the Pearl-Cohn cluster, the difference between 80% and 90% is immaterial, in that all the relevant schools in the cluster have enrollments that are more than 90% black.

44. Relying in part on the enrollment projections in the Task Force report that became the new student assignment plan, Dr. Rock testified that the segregative effect of the plan was not accidental or fortuitous, but "deliberate. It's something they deliberately did. And as far as the segregative effect, the Task Force predicted this was going to happen. ... So I've not really understood why anyone is saying there wasn't a segregative effect. The segregative effect was predicted by the Task Force. And according to the implementation plan data, it happened," though in some cases it was less than projected. Tr. Vol. 2 at 198-200. The segregation that occurred in the fall of 2009 was the intended and expected effect of the plan that was adopted by the school board. *Id.* at 200.

45. The reassignment of students in 2009 cemented the identity of the Pearl-Cohn schools as the place for black students of low socioeconomic status, and it significantly altered the nature of

many Hillwood schools to make them more identifiably white and thus more congenial for white students and their race-conscious parents. The data above clearly show the heightened identification of the Pearl-Cohn and Hillwood schools as being primarily intended for black and white students respectively, thus encouraging and reinforcing by governmental policy the separation of students on the basis of race.

46. Within the Hillwood cluster, the changes wrought by the new rezoning plan caused enormously significant changes in the racial character and identity of the Charlotte Park, Westmeade, and H.G. Hill schools, from plurality-black to plurality- or majority-white student bodies. Swings in population changed Hillwood High School from plurality-black to plurality-white and gave Bellevue Middle School a different, “whiter” look as well. In addition, the rezoning plan did nothing to narrow the vast disparities in concentration of low-income students between the Pearl-Cohn and Hillwood clusters, e.g., from 98.3% at the John Early middle school (Pearl-Cohn) to 21.1% at Harpeth Valley Elementary (Hillwood). Pl. Ex. 123 at 2, 6.

47. Already majority-white schools in the Hillsboro cluster, moreover, became super-majority white, such as Glendale Elementary (78.4% white, 11.3% black, 14.6% FARM percentage in the fall of 2009) and Percy Priest Elementary (85.1% white, 6.9% black, and 7.7% FARM percentage in the first year of the plan). *Id.* at 2. (Overall FARM percentage for the Nashville district in the fall of 2009, as shown on district documents, was between 64.5% and 69.7%. Pl. Ex. 124 at 9 (Defendant Metropolitan Nashville School System Implementation Update on Student Assignment Plan as of October 2009); Pl. Ex. 127 at 1.

48. Racial effects of the new rezoning plan were evident in the fall of 2009 outside the Hillwood, Hillsboro, and Pearl-Cohn clusters. The following examples from Pl. Ex. 123 (Defendant Metro. Nashville School System Implementation Update on Student Assignment

Plan as of September 2009) were products of the plan's unwinding and removal of the former mandatory non-contiguous zones:

** The percentage of black children in the total enrollment of Dupont Elementary School (McGavock cluster) declined from 32.3% to 17.3%, while the percentage of white children increased from 64.0% to 78.9%. The FARM percentage in the fall of 2009 was 74.3%.

** The percentage of black children in the total enrollment of Brick Church Middle School (Whites Creek cluster) increased from 63.8% to 85.2%, while the percentage of white children declined from 17.2% to 10.2%. The FARM percentage in 2009 was 90.3%. This school appeared to be headed to virtual 100% black enrollment, as even most of the Hispanics were removed in 2009 (16.8% to 3%).

** The percentage of black students in the total enrollment of Joelton Elementary (Whites Creek cluster) declined from 25.3% to 12.7%, while the percentage of white children increased from 71.0% to 84.1%. The FARM percentage in 2009 was 58.3%. This small school, with a total of 252 students (a decrease of 45), remained 42% under-utilized and was one of only two schools in the heavily-black Whites Creek district to have an enrollment that was less than 84.7% black. The other, Joelton Middle School, was 59.8% black, and 28% under-utilized.

49. Even more important than the number of racially isolated schools in the district, Dr. Rock testified, is how many children are in those schools and whether that number is increasing. Tr. Vol. 2 at 190. He calculated that between 2008-09, the year the new plan was readied, and 2009-10, the year it was implemented, the percentage of black students in racially isolated cluster schools (not counting special schools, and using 80% as the definition of isolation) rose from 22.3% to 24.7%. *Id.* at 193. "But whichever set of statistics you look at, clearly that's what's going on," he said. "More black children are being placed in schools that are isolated. And

they're particularly isolated by socioeconomic status, as well as race." Ibid. Moreover, during the testimony of Defendants' expert Milan Mueller, Tr. Vol. A at 42-47, 49; Pl. Ex.177, it was established and not disputed that in 2009-10, counting all cluster and special schools in the district, there were 29 racially isolated schools in Nashville to which a total of 10,202 black students were assigned, comprising 28.1% of all the black children in the district.

50. Plaintiffs' experts Dr. William Rock, Dr. Leslie Zorwick, and Dr. Tommie Morton-Young all agreed that there was no educational merit in the rezoning plan's central concept of maintaining or returning hundreds of black children to so-called neighborhood schools "closer to their homes," Pl. Ex. 131at 2, where many would be provided with "additional resources," Id. at 26-29, and spared the daily bus rides to integrated schools. Id. at 30.

51. "Everything we know about the education of children says that the worst thing I can think of happening to a child is to place a child in a school that's heavily isolated by socioeconomic status, in which almost all the children are coming from families with very low incomes, in which achievement level[s] are low, and in which they are also, in addition to these other things, isolated by race." Tr. Vol. 2 at 201. Referring to a 1967 report by the U.S. Commission on Civil Rights and to the writings of Vanderbilt University education professors Ellen Goldring and Claire Smrekar, Pl. Ex. 128, 129, Dr. Rock said that "[t]he real point of the [Civil Rights Commission] report and everything we have known since that report ... is that when we have isolated schools like this, we have not been able to overcome the effects of that isolation through compensatory education. Cities all over the country have tried all kinds of things. And there just has never been anything sustained happen to improve the achievement of children." Tr. Vol. 2 at 201.

52. The reports mentioned by Dr. Rock in his testimony included Smrekar and Goldring's "Neighborhood Schools in the Aftermath of Court-ended Busing: Educators' Perspectives on How Context and Composition Matter," Pl. Ex. 128, which became Chapter Seven in the book "From the Courtroom to the Classroom: The Shifting Landscape of School Desegregation," edited by Smrekar and Goldring and published by the Harvard Education Press in 2009; as well as an earlier paper that anticipated many of the problems that occurred in Nashville after the declaration of "unitary" status in 1998 ("Shifting from Court-Ended Desegregation in Nashville: Student Assignment and Teacher Resources," presented at the University of North Carolina at Chapel Hill, August 2002). Pl. Ex. 129.

53. Smrekar and Goldring's published paper, especially, portrays through staff interviews and otherwise the almost inescapably negative outcomes in Nashville of trying to educate children isolated day and night in conditions of poverty and social disorganization:

The main problem with this school [said one interviewee] is that these children all live together, they ride the school bus together, they are on the playground together, they are together all the time. So any problems that they have up there follows them here or vice versa. Pl. Ex. 128at 24.

There are no role models to mimic [said a school principal]. They are boys and girls who know each other, who know each other's parents and who do the same things, who solve problems the same way, who bring the same kinds of difficulties here to the building. That in itself is challenging because we all know that we grow from diversity and we just don't have diversity here. Id. at 30.

54. One result of the chaos, and often violence, in the lives of poor children and their inability to escape from it even at school is that their focus is on survival rather than learning. Id. at 20-24. Even in so-called "enhanced option" schools, i.e., those provided with smaller class sizes and an array of academic and social supports, Smrekar and Goldring found that in these

impacted areas, “the penetrating and punishing effects of neighborhood poverty undercut these efforts. . . . As the guidance counselor at [one] school observed, “We have so much here, and it still isn’t enough.” Pl. Ex. 128 at 44-45.

55. Plaintiffs’ expert Dr. Leslie Zorwick testified that she found indications of the school district’s awareness of and knowledge about Smrekar’s and Goldring’s work in the documents she was given to review, but little or no evidence that their research on Nashville schools had been utilized in the development of the current plan. “I saw data about racial composition of schools, about poverty levels in schools, about utilization, but very little of the vast peer reviewed literature that examines the benefits of more integrated school settings.” Tr. 362. Dr. Zorwick did find, in a copy of school district materials submitted to the U.S. Office for Civil Rights, two papers authored by Goldring and Smrekar, but with “no indication of how they were utilized, who they were given to, when they were given. I was also deeply surprised to see no reference to those [papers] in all of the e-mails that . . . oftentimes gave School Board or Task Force members tasks to do before their next meeting—things to review, things to come to conclusions about. So there’s no reference to these articles. And both of the articles overwhelmingly support the idea that neighborhood schools aren’t good for minority students.” Tr. 362-363.

56. If a school is racially isolated, Dr. Rock said, giving that school additional resources is “better than doing nothing. Certainly, it will help. But it just isn’t quite enough to overcome that isolation.” *Id.* at 204. Under the ESAA desegregation assistance program, he said, “[w]e were providing for these same kind of services, but in schools that were integrated; in schools where there were children from all different socioeconomic levels, so that children could see different value systems that existed at different socioeconomic levels. So they could see our total culture.

So they could have things to aspire to and see the differences. So they could learn how to live in a white society.” Id. at 205.

57. In this regard, Dr. Rock referred in his testimony to an article by Amy Stuart Wells, professor of the sociology of education at Teachers College of Columbia University, entitled “The ‘Consequences’ of School Desegregation: The Mismatch Between the Research and the Rationale” and published in the *Hastings Constitutional Law Quarterly*, 28 *Hastings Const. L.Q.* 771 (Summer, 2001). Pl. Ex. 130. Her thesis is that while improvement in test scores is one goal of desegregation, “the larger sociological point [is] related to black students’ access to and association with higher status institutions and the potential long-term effects of that access and association,” i.e., “the long-term and institutional effects of school desegregation on the life chances of African Americans not only in terms of their educational attainment but also their economic mobility and social networks.” Pl. Ex. 130 at 772-773. These are the benefits that Dr. Rock indicated would not be available in a racially isolated, neighborhood school setting.

MNPS Expert Witness Milan Mueller

58. Defendants’ expert Milan Mueller testified that with the rezoning there was a reduction in “schools that have a single group of 90% or more ... of a single ethnic or racial group,” Id., at 3560: 3-14, that is to say, in racially isolated schools with 90% or more black enrollment. The first question was why 90% was used as such a meaningful dividing line in a school district whose student population was only 46.0%, as opposed to 32.5% white and 17.3% Hispanic, Pl. Ex. 5, at 7, when plaintiffs’ key desegregation expert, Dr. William Rock, and Vanderbilt University education professors Ellen Goldring and Claire Smrekar had found 80% to be a more appropriate measure of racial isolation for the Metro Nashville district. Pl. Ex. 129*, at 14 n.5; Tr. Vol. 2, at 190: 14-17; Tr. Vol. 21, at 3656: 3-13, 16-21; 3657: 8-25; 3658: 1-12. This

difference was symptomatic of a fundamental disconnect between statistics and a true portrayal of the situation.

59. For whatever significance it may have, Mr. Mueller testified that the number of cluster schools with enrollments that were 90% black or more had decreased from 10 to 8 between 2008-09 and the current year, in his view a sign of increased diversity. Tr. Vol. 21, at 3560: 3 to 3561: 20; Deft. Ex. 19. But his count omitted five charter schools in this category (Drexel Prep 98.3% black, East End Prep 90.3% black, Nashville Prep 93.5% black, Smithson-Craighead Middle 96.1% black, and Smithson-Craighead Academy 99.2% black), one thematic magnet school (Jones Paideia Magnet 95.5% black), and one design center school (Haynes 95.2% black), for a total of 15 such schools now existing, which Mr. Mueller conceded was correct. Tr. Vol. 21, at 3665:7-14; see Pl. Ex. 5, 38, 226, 242; Tr. Vol. 21, at 3659:25 to 3660:5; 3661: 25 to 3662: 1; 3662: 23-25; 3663: 1-9; 3664: 3-9; 3665:3-6; see also Tr. Vol. 22, at 3766: 1-15 (exhibit admitted).

60. Mr. Mueller, however, also compiled two graphic displays showing all zoned (i.e., cluster) schools in the system with one-race enrollments of 80% or more, Pl. Ex. 227, since he was aware of that number's being "brought up" as well. Tr. Vol. 21, at 3655: 21 to 3656: 1-2. These displays yielded a total of 22 such schools, including the 90%-plus student bodies, but apparently excluded the same non-cluster categories noted above. So the final count of racially isolated schools under the more accepted, common sense definition of 80% is as follows:

School (Cluster, if any)	Black Student %	Black Student #
Carter-Lawrence Magnet (Hillsboro)	84.9%	320
Bellshire Design Ctr. (Hunters Ln.)	86.0%	399
Napier Enhanced Option (McGavock)	93.1%	380
Caldwell Enhanced Option (Maplewood)	97.6%	280

Glenn Enhanced Option (Maplewood)	90.6%	184
Buena Vista (Pearl-Cohn)	95.6%	417
Park Ave. Enhanced Option (Pearl-Cohn)	97.3%	567
Churchwell Museum Mag. (Pearl-Cohn)	92.0%	599
John Early Middle (Pearl-Cohn)	84.5%	366
Pearl-Cohn High School Pearl-Cohn)	92.0%	773
Kirkpatrick Enhanced Option (Stratford)	87.8%	296
Ross (Stratford)	85.9%	195
Warner Enhanced Option (Stratford)	87.3%	316
Alex Green (Whites Creek)	86.4%	299
Bordeaux Enhanced Option (Whites Creek)	89.4%	319
Cumberland (Whites Creek)	85.2%	333
Lillard (Whites Creek)	96.8%	367
Brick Church Middle (Whites Creek)	84.2%	320
Whites Creek High School (Whites Creek)	84.0%	828
Drexel Prep	98.3%	238
East End Prep	90.1%	73
Hull-Jackson Montessori	88.7%	433
Jones Paideia Magnet	95.5%	357
Smithson-Craighead Academy	99.2%	246
Creswell Middle Magnet	86.8%	449
Haynes Design Center	95.2%	276
KIPP	88.8%	277
LEAD Academy	89.2%	452
Nashville Prep	93.5%	86
Smithson-Craighead Middle	96.1%	273
Cohn Adult Learning Center	80.2%	85
McCann Adult Learning Center	91.7%	22

Pl. Ex 5.

61. The number of cluster-based racially isolated-black schools adds up to 19, while the number of non-cluster racially isolated-black schools numbers 13 (including the small groups of school-age attendees of two adult learning centers). A total of 10,825 black students, 29.7% of the district's black enrollment, receive their schooling in these 32 racially isolated settings every day. In addition, four MNPS schools are now racially isolated-white: Percy Priest in the Hillsboro cluster (83.2% white, 445 white students), Harpeth Valley in the Hillwood cluster

(80.5% white, 595 students), Joelton Elementary in the Whites Creek cluster (84.9%, 236 white students in a cluster where every other school but one is more than 80% black), and Glendale Elementary, a design center school (84.2% white, 319 white students). *Id.*, at 2, 5, 6. If these schools are included in the totals, there are 36 racially isolated schools in Metro Nashville, attended by 12,420 students of the predominant race.

62. Mr. Mueller offered seemingly conflicting testimony about the effects of the Student Assignment Plan on the Pearl-Cohn cluster, in which he seemed to value percentages and buildings over the human impact of the plan. See Tr. Vol. 21, at 3561: 21 to 3576: 3. Looking at exhibits featuring the percentages of black students at certain Pearl-Cohn schools over a period of years, he seemed to rely on what he generally described as “incremental shifts on the order of 1 or 2 percentage points” for a determination as to whether isolation or diversity had been served. *Id.*, at 3569: 3-16. So, for example, since Buena Vista Elementary had been 99.4% black in 2008-09, the year before plan implementation, and then fell to 96% in the following year, that meant racial isolation had decreased, Deft. Ex. 20; Tr. Vol. 21, at 3571: 12 to 3572: 3, even though the number of black students racially isolated in this school rose from 309 to 429. Deft. Ex. 7, at 6.

63. The fact that Park Avenue Enhanced Option had risen from 89.6% black enrollment in 2008-09 to 96.1% in 2009-10--and 97.3% now—was simply dismissed because the expert said the change was the result of different process, even though it is incorporated in the current plan, Pl.Ex. 9, at Bates # 00490, 00494, 00496-00498, and in the annual implementation updates, e.g., Pl. Ex. 5, at 4. Deft. Ex. 21; Tr. Vol. 21, at 3572: 4 to 3573: 3. And at W.A. Bass Middle School, which is not even an issue in the case, the African-American percentage had been fluctuating between 65 and 62.5% before the plan went into effect and is at 60.8% now, which

means “it had a slight decrease” (in what is not made clear). Deft.Ex.24; Tr.Vol.21, at 3575:6-12.

64. The fact is that defendant’s expert gave little or no weight to the numbers of children affected by the plan but looked at percentages alone. See Id., at 3624: 13-24. In reference to the new magnet schools in the Pearl-Cohn cluster, where a total of 274 black students were added to schools that were already racially isolated even though the black percentages declined in two of them, Mr. Mueller insisted that a school (Robert Churchwell) with 599 black students (92% black) is more diverse than it was when it had only 454 black students and a 95.4% black enrollment. Deft. Ex. 32, at 4; Tr. Vol. 21, at 3621: 14 to 3624: 4. While agreeing that numbers are important as well as percentages, he nonetheless insisted that the magnets provide “a more diverse experience even though those numbers [of black students in racially isolated schools] are larger.” Id., at 3623: 7-25. And when reminded of the hundreds of black children who were placed in already isolated Pearl-Cohn schools when the Student Assignment Plan was implemented in 2009, Mr. Mueller still would not agree with plaintiffs’ expert Dr. William Rock, who had testified that he “would ... not just be looking at the number of schools. I think far more important is how many children are in those schools and whether that number is increasing.” Tr. Vol. 2, at 190: 21-25; Tr. Vol. 21, at 3624: 5-24.

65. A similar infirmity arises from the formulaic nature and application of another of Mr. Mueller’s diversity criteria, an increase in “schools that did not have a majority population of any of the ethnic or racial groups.” Deft. Ex. 16; Tr. Vol 21, at 3555: 18-20; 3557: 2-7. The Brookmeade school in the Hillwood cluster had a student body that was 58.4% African-American, 37% white, 2.3% Hispanic, and 2.3% white in 2008-09. Yet in 2009-10, it was gone, a positive mark according to Mr. Mueller’s criterion although as he agreed, it was not in any sense a segregated school. And the Martha Vaught school, also in Hillwood, was even closer to

the district average in 2008-09, with 50.3% black students, 29.9% white, 9.9% Hispanic, and 9.6% Asian. But the next year, it was gone too, with its black enrollees (like the individual Lewis plaintiff) likely returned to neighborhood schools in Pearl-Cohn or possibly elsewhere. So perhaps the no-majority measure does not always indicate the right result? Mr. Mueller could not give an answer. Deft. Ex. 7; Tr. Vol. 21, at 3667:17 to 3671: 20. As Dr. Rock had testified in 2009:

I would expect you would have many majority black schools [in the MNPS district]. I mean, you just would. And so I really didn't see what was – I couldn't see why they were looking at the number of majority black schools.

What I would have been looking for if I was doing this – from a school district's point of view, I would be looking at the percentage and number of the children in our schools who are black who attend racially isolated schools....

So I would have been looking more at that and what was happening in those schools, rather than the number of schools. Tr. Vol. 2, at 190: 6-20.

66. The no-majority criterion and its counterpart, the “multiracial” diversity measure (three racial or ethnic groups in a school with at least 10% each of the total), Tr. Vol. 21, at 3555: 21-24, also reflected perverse effects in the middle-class Hillwood cluster that enhanced white students' predominant status. The Charlotte Park school fit both categories in the year before rezoning (40.1% black, 22.6% white, 27.8% Hispanic), and in the current year (23.2% black, 37.7% white, 25.1% Hispanic); but where black students were the plurality group in 2008-09, by 2011-12 the white students occupied that position. At the Westmeade school, African-Americans went from 46.3% in 2008-09 to 23.4% in 2011-12, while whites increased from 44.4% in 2008-09 to 63.4%, a clear majority, in the current year. Blacks were in a 49.4% plurality at H.G. Hill in 2008-09 (as opposed to 41.2% whites), but in 2011-12 white students

were the plurality group at 46.5% while blacks were reduced to 29.6% of the total. Finally in this vein, the black student percentage at Hillwood High fell from a 47.3% plurality in the year prior to rezoning to 36.6% in the current year, while whites became the plurality with 46.9% as opposed to 41.6% in 2008-09. Deft. Ex. 97, at 1-2; Tr. Vol. 21, at 3633: 7 to 3637: 21.

67. Mr. Mueller agreed that the foregoing effects of the Student Assignment Plan constituted a substantial change in the makeup of these now or former no-majority and/or multiracial schools, Id., at 3636: 16-19, but then denied that the question of which racial group is in the plurality, or even in the majority, has a significant effect on the way a school is perceived. Id., at 3637: 22-25. He was also asked if he thought it was an accident that all these changes in the makeup of this group of Hillwood schools resulted in white pluralities' (or a white majority's) replacing a predominance of African-Americans – but he was unable to answer the question. Id., at 3638: 1-19.

68. An examination of MNPS' cluster organization, moreover, shows that under the rezoning plan at issue, the change in percentage of black students was far larger in Hillwood than in any other cluster—from 38% black in 2008-09 to 26% the following year and still 26% in school year 2011-12. Pl. Ex. 12; Tr. Vol. 21, at 3638: 20 to 3640: 14. Confronted with this information, Mr. Mueller agreed the rezoning plan was about more than adjusting the under-utilization of a few school buildings, that it also impacted reassignment of students from the non-contiguous attendance zones, that that it affected Bellevue, i.e., Hillwood, most of all. Id., at 3640: 15 to 3641: 6.

69. As for the massive return of black students to schools in the Pearl-Cohn cluster, Mr. Mueller attributed that to two factors: “parents exercising the choice of where to send their students,” and “the makeup of those [Pearl-Cohn] communities, being that they were

predominantly all above 90%.” Id., at 3569: 19 to 3560: 6. These explanations are contradictory in a sense, and the latter justification seems to assume that children who live in racially isolated areas should be expected to attend racially isolated schools. But of the hundreds of Pearl-Cohn children (nearly all black) who were affected by the plan, all were attending diverse or integrated schools before the plan was implemented, while more than 60% are now back in their neighborhood schools (100 minus 15.3 minus 23.0 at most). Corrected Stipulation of the Parties No. 1, at 1-2; Deft. Ex. 33, 87 (summary pages); see also Deft. Ex. 42; Tr. Vol. 24, at 4300: 13 to 4302: 11 (testimony of Dr. Leonard Stevens).

70. The way the district’s 12 clusters are drawn and incorporated into the current Student Assignment Plan, moreover, has a consolidating effect that makes these sub-districts more monolithically black, white, and mixed than do the separate black, white, and Hispanic maps drawn at the elementary school level. Compare Pl. Ex. 3 (2010 cluster map) with Deft. Ex. 13, 14, and 15 (2011 elementary school maps); see Tr. Vol. 21, at 3650:2 to 3652:2. When Mr. Mueller, who produced all these maps, was asked whether the clusters themselves might have a segregative effect on student assignment, he replied as follows:

... You have areas in the district that are more isolated. Segregated by – you know, I can’t comment to that. I don’t know all the histories of housing patterns here.

But I would say there is a – you see a pattern of isolation in areas, yes.

Q. (By Mr. Lottman) So your answer is yes?

A. I’m not making comments in terms of it being a pejorative. I’m saying you do see a higher concentration when you look at that cluster map, for the the entire cluster. Id., at 3652: 3-23.

71. Defendants’ other expert, Dr. Stevens, supported this view when he agreed that the 12 clusters were divided into four that were roughly two-thirds black enrollment (Pearl-Cohn,

Whites Creek, Stratford, and Maplewood), five that were roughly one-third black enrollment (Overton, Hillwood, Glenclyff, McGavock, and Hillsboro), and three that were roughly half-and-half (Hunters Lane, Cane Ridge, and Antioch). This arrangement, he agreed, means that the schools in those clusters are going to reflect the same racial makeup, in that the composition of schools in the district is determined by the composition of the cluster as a whole. Deft. Ex. 46; Tr., Vol. 24, at 4317: 17 to 4318: 12. Dr. Stevens was hesitant to characterize the cluster lines as a framework for a segregated school system, with extremes at the top and bottom, but only because they were largely created in 1998 (but adopted essentially unchanged in the current plan). *Id.*, at 4318: 13 to 4319: 10.

72. The rezoning plan's inclusion of a "choice" provision has been strongly emphasized by the defendants and both their experts as a highly positive aspect, if not the saving grace, of the Student Assignment Plan. As Mr. Mueller described it, somewhat vaguely, "So my understanding of the zoned choice option is that it gives the student the choice to attend a school in the feeder pattern or they could stay in the zoned alternative that they have. And that is a guaranteed choice to them. So they can select between one and the other. And they also have guaranteed transportation." Tr. Vol. 21, at 3576: 22 to 3577: 8.

73. Overall, it does not seem that a high priority has been given to the building utilization issue since the plan was adopted, in that (counting all schools) the number over 100% capacity has been 38, 31, 35, and 40 from 2008-09 to the present year, while the number under 70% utilization has been 28, 22, 19, and 21. Pl. Ex. 5, cover page.

74. Pressed for other possible justifications for the rezoning plan, Mr. Mueller mentioned giving noncontiguous-zone students and parents a choice—when, aside from considerations already mentioned, these families already had access to all options except returning to Pearl-

Cohn, a choice they could have been offered without losing their places in Hillwood. Tr. Vol. 21, at 3632: 11-14. Defendants' expert also mentioned a goal of eliminating mandatory busing, Id., at 3652: 15-16, but as the Director of Schools testified, some 40,000 to 50,000 of the 79,000 MNPS are bused to school as it is. Tr. Vol. 23, at 4024: 5-25 (testimony of Dr. Jesse Register).

75. "In sum," Mr. Mueller wrote in his expert report and repeated in court, "because no students from the formerly non-contiguous areas are required to attend schools in the Pearl-Cohn cluster [meaning they "chose" to do so] and because of a variety of options to choose a more diverse school are not only available but also widely used, any increase in the number of students attending schools with 90% African American enrollment is a result of parental choice." Tr. Vol. 21, at 3672: 2-8. Asked if he actually believed this statement, the witness first said that he did. Id., at 3672: 9-12. But then occurred the following colloquy:

Q. ... Isn't all of this the result of a new plan instigated by the school district that – Isn't it the result of the action of the school district that any of this happened?

MS. BUSSELL: And I don't know what he [the questioner] is talking about, *all of this*.

Q. (By Mr. Lottman) All this reassignment of students. All these people returning to Pearl-Cohn. Isn't it all because of the Student Assignment Plan?

A. Well, yes. There was a Student Assignment Plan that was passed. And that – It had a tangible impact, yes. Id., at 3672: 13-25.

MNPS Expert Witness Dr. Leonard Stevens re Racial Isolation

76. Dr. Leonard Stevens, an experienced consultant in the areas of school desegregation and student assignment, testified for the defendants at trial as an expert in those areas. Deft. Ex. 50; Tr. Vol. 24 at 4229: 12-23, 4233: 5-16; 4238: 24 to 4239: 3. Dr. Stevens has been paid about \$70,000 to \$75,000 so far for his testimony, and also has a \$24,000 contract with the defendants

for a separate project. He was at pains to point out that the two amounts should not be combined. Id., at 4291: 8 to 4292: 10.

77. In order to compile his two reports for the defendants, Dr. Stevens engaged in substantially the same activities and utilized many of the same measures as did those of the school district's other outside expert, Milan Mueller, with similar results raising similar questions and issues. Id., 4240: 17-25. He "looked closely" at the two school district clusters, Hillwood and Pearl-Cohn, that are at the center of this legal controversy, but was not troubled by the movement of hundreds of black children in and out of these districts or anything else that he observed. Id., at 4241: 1-3.

78. Dr. Stevens' trial testimony began with a series of ex cathedra pronouncements to the effect that the defendants' challenged Student Assignment Plan had no segregative effect, that it had no such effect on the district as a whole, and that it had no such effect on the Hillwood or Pearl-Cohn clusters. Id., at 4240: 9-14; 4244: 9-16. These opinions were stated without qualification, despite evidence in the record (some of which the witness was aware of) showing inter alia that 631 black students were added under the plan to the already isolated schools in the the Pearl-Cohn cluster and a new 256-student (95.5%) opened there as well, Pl.Ex. 221; Deft. Ex. 7; Tr. Vol. 2, at 192: 6-14; that 432 black students were removed from schools in the relatively affluent and integrated Hillwood cluster and two integrated schools in that cluster with a total of 348 black students were closed altogether, Pl. Ex. 221; Deft. Ex. 7; Tr. Vol. 2, at 191: 11-17; that the percentage of black children in racially isolated (80% or more black enrollment) increased in the year the plan was first implemented (22.3% to 24.7% in the cluster-based schools), Id., at 192: 25 to 193: 24), and the figure now for all schools is nearly 11,000 students representing nearly 30% of the total black population, Pl. Ex. 5; and that substantial segregation

and racial isolation exist in special programs such as thematic magnets, Pl. Ex. 226, design center schools, Pl. Ex. 242, charter schools, Pl. Ex. 38, and enhanced option schools. Pl. Ex. 5; Tr. Vol. 23, at 4016: 7-22 (all but one of nine enhanced option schools over 80% black enrollment, five at or above 90%) (testimony of Dr. Jesse Register).

79. Dr. Stevens later excused the mass movement of black children back to racially and socioeconomically isolated Pearl-Cohn schools by saying it was nothing new:

Q. Don't you think the plan does leave the children in the Pearl-Cohn cluster in racial and socioeconomic isolation?

A. Not more so than they were under the old plan, no.... I said [in his report] that the 90% schools, the one-race schools, were not affected by the modified plan. Tr. Vol. 24, at 4294: 5-7, 13-14.

The witness denied, however, that the import of this testimony was that the additional black students assigned to Pearl-Cohn didn't matter because the schools were already 90% black. Id., at 4294:24 to 4295: 1. He added that it was the families' responsibility, not the school district's, that these students moved from Hillwood to Pearl-Cohn schools. Id., at 4295: 3-9.

80. Dr. Stevens testified that in evaluating the effects of the re-zoning plan, he noted a substantial racial change in only one of the district's 12 clusters—Hillwood, which went from 38% to 26% black and has remained at that level through the current year. Def. Ex. 46; Tr. Vol. 24, at 4247: 6-8. Subjecting the Hillwood situation to “further analysis,” though, he was satisfied that “the modified plan had replaced the noncontiguous zones [which put Pearl-Cohn students in Hillwood schools] ... [with] zones in which students would have two optional schools to choose from.” Id., at 4247: 22-24; 4248: 4-8.

81. Later in his testimony, the defendants' expert succinctly summarized his reasoning or rationalization for finding no segregative effect with respect to the above student movements:

Q. But do you agree that the result was to make the black schools in Pearl-Cohn more black and to make the white or diverse schools in Hillwood whiter than before[?]

A. Well, there's two parts to your question. The schools in Pearl-Cohn were 90% under the old plan. They didn't become 90% because of the modified plan. They stayed 90%.
In the Hillwood Cluster – there is a reduced black percentage in several schools in Hillwood that black students from Pearl-Cohn had previously been assigned to on a mandatory basis, and now were not attending because that option was not chosen by their parents.
That's what happened. Id., at 4299: 5-17.

82. Dr. Stevens said he decided to work on this case, his first as a non-plaintiffs' expert, because he believes there is intrinsic value to integrated education and he felt "my service with the district would serve to protect and preserve integrated education with this district." Id., at 4243: 15 to 4244: 2. But what he did was to sanction the trading of integration and diversity for the school district's peculiar brand of "choice." Id., at 4250: 2-5.

"I would prefer the new plan," he explained, because it eliminated what I would call one-way busing. The non-contiguous zones, by definition, as they existed in this district, are inherently inequitable to black students....
A hundred percent of the burden of integration is borne by black students who live in these noncontiguous zones. ...
[I]n a unitary district, I would much prefer to see integration accomplished through choices effected by parents. Id., at 4250: 7-14, 23-25.

83. But if integration and diversity are valued as defendants and their experts have repeatedly said they are, then riding a bus to access those experiences may be a necessary inconvenience. As plaintiffs' expert Dr. William Rock testified,

[I]n cities children go to school by bus for many reasons. ...
So we use transportation. We use transportation by bus to get children to better educational opportunities. So I think the opportunity to go to a school which is more diverse, particularly in terms of socioeconomic status and achievement levels, as well as race, that's well worth [a] half hour on the bus.
Tr. Vol. 2, at 210: 2-3, 5-10.

84. Black students from Pearl-Cohn would still ride the bus if they took the Hillwood school offered them under the plan, see Pl. Ex. 9, at 4-5, or possibly just because of their distance or route to school. Tr. Vol. 24, at 4258: 24 to 4259: 3.

85. Dr. Stevens' own exhibit (from his report) shows that within the group of 4,204 children residing in former noncontiguous zones for 2011-12, preservation and protection of integration seemed to be somewhat lacking. In the former Pearl-Cohn zone, where 100% of the students were attending diverse Hillwood schools before re-zoning plan implementation, now only 42% at most were going to an integrated zoned option or other choice school while 58% remained in their Pearl-Cohn neighborhood school. For all the former noncontiguous zones combined, the figures were 45% using school choice and 55% staying behind. Deft. Ex. 42; Tr. Vol. 24, at 4279: 4-21; 4281: 1-19. Dr. Stevens agreed that these were the numbers and the children were situated as stated, but still would not concede that diversity had been reduced and attributed the outcome to family choice. Id., at 4300: 13 to 4302: 17.

86. As an illustration as to why a family might not select an out-of-cluster school for their child, Dr. Stevens cited the safety issues involved in taking the bus, such as the bus not running on schedule, bullying by other students, or a parent's having to leave work if the child became ill at school. Id., at 4253: 23 to 4254: 14. But he admitted there is always some risk regardless of the means of getting to school, Id., at 4337: 25 to 4338: 18, and said there was no reason to suppose that children taking the bus from Pearl-Cohn to Hillwood would be at any greater risk than anyone else. Id., at 4339: 9-13.

87. Somewhat ironically, after a long statement in favor of choices, Id., at 4283: 13 to 4284: 14; 4286: 7-23, when the discussion turned to making choice and integration work

together “synergistically,” the first step Dr. Stevens mentioned was for school districts “to use their transportation services, their school bus services, strategically.” Id., at 4286: 24 to 4287: 1-5. Thus he strongly approved of providing former noncontiguous zone residents with a guaranteed option -- and with transportation to that option, the aforementioned risks having seemingly disappeared. Id. at 4256: 22 to 4257:6;4287: 18-22.

88. Perhaps because of the way the so-called zone choice is provided under the district's plan, however, students and families are not having much to do with it. The percentage of eligible Pearl-Cohn students selecting the zone choice option, i.e., the Hillwood placement specified by the district, fell from 20.2% in 2009-10 to 15.4% in 2010-11 to 15.3% in the current year, while for all former noncontiguous zone students the percentage fell from 25.4% to 18.7% to 16.4% during the same period. Meanwhile, the percentage of eligible Pearl-Cohn students opting for other choice options such as open enrollment, magnet schools, and the like – options they had had all along—was 29.4%, 28.1%, and 23.0% between 2009-10 and the current year, while overall it was 28.8%, 27.8%, and 27.5% for the past three years. Thus students and families do not seem overly concerned with the guaranteed acceptance and “ease of access” that Dr. Stevens extolled, or even necessarily with the lack of school district transportation to most “other” choices. Def. Ex. 33, 87; Corrected Stipulation of the Parties No. 1, at 1-2; Tr. Vol. 24, at 4258: 4-19. And most of them are simply staying near home, Ibid., which might be acceptable in certain quarters if a primary objective of the plan was simply to reduce the number of black students in Hillwood schools—which Dr. Stevens denied. Id., at 4309: 11 to 4312: 24, in particular 4310: 14-17.

89. It seems unfortunate, in any event, that the percentage of former noncontiguous zone students deciding to explore “other” choice schools under the magnet or open enrollment or

similar programs seems to be declining along with those taking the zone choice option. The percentage for these other options is still higher than for zone choice, and is higher overall than it is for Pearl-Cohn students alone. Corrected Stipulation of the Parties No. 1, at 1-2. Dr. Stevens testified, when asked, to his understanding that the district does not provide transportation for open enrollment, or for magnet schools except free public bus passes for students who qualify for free and reduced price meals. Tr. Vol. 24, at 4339: 14-24. The witness said that available transportation would be “a great incentive” in attracting students to help integrate a magnet school, but he was hesitant because of the cost that might be involved Id., at 4339: 25 - 4340: 11.

90. The district’s no-transportation policy may have been partially responsible for the fact that for thematic magnet schools overall, including the new magnets and those of long standing, seven of the 14 had more than 80% black enrollments and three of those were over 90%. Pl. Ex. 226; Tr. Vol. 24, at 4321: 16-21, 23-25. Only three of the 14, moreover, had made adequate yearly progress on the annual testing on 2010-11. Id., at 4322: 1-8. With regard to the older magnets and the prospects of the new ones, Dr. Stevens expressed the view that “magnets that are in a district like this that are not integrated should be the object of aggressive recruitment in order to make them integrated. I don’t think they should just be left alone to continue to be 90% one race.” Id., at 4322: 12-16.

91. In his testimony, Dr. Stevens was very supportive of the district’s effort to apply for and receive Federal funds to support the six new “MSAP magnets,” three of which are situated in the Pearl-Cohn cluster. Id., at 4267: 1 to 4278: 2. He was even acceptive of the fact that the Robert Churchwell, John Early, and Pearl-Cohn High magnets remained racially isolated according to plaintiffs’ definition (John Early’s black percentage having dropped to 84.5% in 2011), and the fact that combined, the three schools had added 274 more black enrollees to the

district's racially isolated population. Deft. Ex. 32 (same as Pl. Ex. 5), at 4; Tr. Vol. 24, at 4322:18 to 4326:3. The witness said he expected these schools to become integrated, Id., at 4326: 9-12, but his definition of integration for them was only that they be less than 90% black in enrollment. Id., at 4326: 13-25. Besides conflicting with common-sense interpretation of the term, Dr. Stevens' expectation here was a product of his conception of a separate body of law for unitary status districts, Id., at 4327: 4-10.

92. But Dr. Stevens said he did not know, or had not known before he testified, that two of the three Pearl-Cohn magnets, Robert Churchwell and John Early, as well as a third MSAP school, Bailey Middle, were among the lowest 5% of all schools in the State in terms of academic achievement. Id., at 4336: 5-14. Seeming genuinely surprised, Dr. Stevens was asked if he believed the information about these magnets' low academic standing, and responded, "It's not that I don't believe it. But I believe this is a race case, not an achievement case." Id., at 4336: 15-17. Still, he added that "[i]t would be better if [magnet schools] were performing at the top of the pile" in order to achieve the desired integrative results. Id., at 4336: 18-25.

93. Dr. Stevens agreed with the Court's statement, posed in the form of a question, that the detailed racial and ethnic projections in the re-zoning plan, Pl. Ex. 9, *passim*, "show that the Task Force and the School Board knew what the racial outcome was likely to be when they developed and approved the plan. Yes or no?" To which the witness answered "Yes." Tr. Vol. 24, at 4308: 14-25.

94. Record evidence suggestive of discrimination was also presented to Dr. Stevens, including the facts that Hillwood, a middle-class, relatively affluent school district, went from 38% to 26% black under the Student Assignment Plan, while Pearl-Cohn, the opposite of Hillwood in most respects, gained some 600 additional black students (actually more) under the

same plan. Id., at 4309: 19 to 4310: 13. His response was that there was no intent involved on the part of the district because of the students' and families' opportunity to go back. Id., at 4310:

14-22. Earlier the witness had testified:

If the district had simply abolished the noncontiguous zones and assigned the children in them to a neighborhood school, it would have raised a concern on my part about the negative impact that would have on the access to integrated education. But that's what the district did not do [meaning it gave the children in those zones the so-called choice to go back to a Hillwood school]. Id., at 4256: 16 to 4257: 6.

95. Dr. Stevens denied this statement was tantamount to saying that without a choice feature the district's plan would be discriminatory, Id., at 4332: 2-24. But he conceded the district is in a better position with regard to any charge of intentional discrimination if it has a choice provision included in its plan: "Oh, I think that would follow, yes." Id., at 4332:25 to 4333: 4. And while he testified that the noncontiguous-zone students were not "taken out" of their Hillwood schools and placed back in Pearl-Cohn under the plan, Id., at 4252: 15-24; 4295: 7-16, he also conceded that the home school was considered the default school for such students: "I knew that it – that it was the school to which the assignment would be made if the parent did not return the [choice] form, yes." Id., at 4317: 2-9; see Def't. Ex. 80, at 2. He also admitted that he did not know whether a parent's "choice" under the plan would be informed or not. Tr. 4304: 4 to 4305: 20.

96. In a related discussion, Dr. Stevens agreed that if a Pearl-Cohn student opted to return to Hillwood under the plan, it would be the school district, not the student or family, that designated the receiving school. Id., at 4295: 18 to 4296:15. Nor, he agreed, did the student have a choice of schools if he or she stayed in the Pearl-Cohn cluster, Id., at 4296: 16-20, and he "suppose[d]" that the so-called zone choice "could be between two schools that the parent didn't like." Id., at 4297: 2-5.

97. Early in his testimony, Dr. Stevens was asked about the effect of the district's "legal status," presumably its unitary designation, upon his evaluation and analysis. He responded that the law of desegregation is different for a district depending on whether or not it is under court supervision. Id., at 4245: 22 to 4246: 7. No further explanation was forthcoming, and no separate body of law for unitary-status districts was ever identified. But on a number of occasions, the witness testified that a certain policy or practice was "appropriate for a unitary school district," Id., at 4244: 17-19; 4256: 9-12, or words to that effect. Most prominently, Dr. Stevens said he considered schools with 90% or more students of a particular race or ethnic group to be one-race schools, but then felt unable to offer a comprehensive definition of what constituted an integrated or desegregated school: "There's no statistical definition of integration in this district because it is a unitary district. It is not a district under court supervision, where you would expect to have a statistical definition of a desegregated school." Id., at 4327: 4-18.

98. For districts under court order, Dr. Stevens mentioned a segregated/integrated standard of "plus or minus 15," which might mean 15 percentage points above or below the district-wide percentage of black students, or of all minorities, or a standard that might apply to some but not all of the schools. Id., at 4327: 21 to 4328: 23; 4343:15 to 4344: 9. See also Id., at 2133: 3 to 2134:10 (testimony of Alan Coverstone). Finally, but inconclusively, Dr. Stevens said "it is a perpetual debate as to what constitutes an integrated school in this district," Id., at 4330: 24-25, although "plurality schools" appeared to qualify. Id., at 4330: 10-13; 4331: 8-15. The defendants' expert denied that under his reasoning, a unitary school would be free to discriminate on the basis of race: "A district that is unitary, it if commits an unconstitutional violation it's in violation of the constitution. And it's subject to court supervision." Id., at 4331: 21 to 4332: 1.

99. Dr. Stevens included a set of recommendations in his report, including one that the district “monitor the racial composition of its magnet schools and design centers so that all are or will become racially diverse and thus serve as integration models for the District,” and another that the district “minimize the number of schools that are 90% or more of one race.” Pl. Ex. 254; Tr. Vol. 24, at 4362: 4-24. Other recommendations encouraged expansion of choice and integration, and avoidance of racial isolation. Pl. Ex. 254; Tr. Vol. 24, at 4290: 3-4. The witness said he did not know if the district was carrying out the recommendation concerning magnets and design centers. Id., at 4362: 11-13. As for the one-race schools, he said he would like to see them eliminated “in an ideal world.” Id., at 4362: 21-24. When asked if he thought the district was trying to eliminate these schools, he said, “I don’t have enough factual information to answer that question in an informed way,” but was then with some difficulty reminded of the John Early magnet which had reduced its percentage of black students below 90%. Id., at 4366: 16 to 4367: 4.

Plaintiffs’ Expert Witness Dr. Leslie Zorwick re Discriminatory Purpose and Effect

100. Plaintiffs’ expert Dr. Leslie Zorwick is Assistant Professor of Psychology at Hendrix College in Conway, Arkansas; she received her bachelor’s and master’s degrees in psychology from Emory University (2000) and The Ohio State University (2003), and a Ph.D. in psychology from Ohio State in 2007. She took classes at both the graduate and under-graduate levels to look at diversity in urban educational settings, and at the time of her testimony had been involved in an urban education initiative for approximately 13 years. Dr. Zorwick’s master’s-level and Ph.D. studies focused on social psychology, with a specialization in the area of stereotyping, prejudice, and identity. Tr. Vol. 3at 355-357; Pl Ex. 136.

101. Asked about her views on racially segregated schools, Dr. Zorwick testified that such segregation is harmful for both the social development and the educational success of black and white students. Moving toward more segregated schooling, she said, “ tends to be associated with worse educational outcomes for students and lower standardized test scores. ... [M]inority segregated schools that have a predominant population of minority students ... tend to be associated with higher levels of poverty, which is a factor that is related to a host of things that negatively affect educational success. In contrast, schools that move towards more integration, more equality across racial groups, tend to be associated with higher test scores, more cross-race friendships, improved social interaction, civic engagement, and the likelihood of more interracial interaction across the lifespan.” Tr. 358.

102. As to the key issue of moving African American students back to their neighborhood schools, Dr. Zorwick said the literature in her field “overwhelmingly” suggests that such a shift toward neighborhood schools disproportionately hurts minority students for several reasons:

First, schools that tend to have larger minority populations typically have teachers with less experience, less qualifications, in that they’re less likely to hold an advanced degree.

Second, minority students tend to be concentrated in schools schools that have fewer resources, which translates into fewer educational offerings, fewer [Advanced Placement] courses, lower overall achievement.

Third, minority students tend to attend schools in areas of more poverty, which translates into fewer opportunities for social networking, less likelihood of parents being comfortable interacting with the educational setting their children are in.

And this concentrated poverty tends to also be associated with larger classes, more absences, lower involvement in extracurricular activities. Id. at 359.

103. While the foregoing were general research findings about how neighborhood schools impact students, said Dr. Zorwick, the same phenomena have been empirically verified in the

Nashville public school system by the research of the above mentioned Drs. Goldring and Smrekar of Vanderbilt University:

In this research they find that moving towards more neighborhood schools is typically associated with ... what they call racially isolated schools, where there's a large percentage of minority students—so 80 to 100 percent minority populations. [Pl. Ex. 129. at 14-15 and n. 5.]

They say that racially isolated schools for minority students tend to be located in areas where there are fewer social resources, social assets—things like hospitals, libraries, schools, community centers; and more likely to be in areas where there are greater numbers of social liabilities, which Goldring and Smrekar and their colleagues define as areas with higher crime, higher drug arrests, higher domestic abuse rates, higher teen pregnancy rates, ...

What they say in their conclusion is that the goals of neighborhood schooling are to harness the power of the community to improve the achievement of students. But those communities vastly differ in the resources they offer to their students. And it can be very difficult for students in these racially isolated, predominantly minority communities to get the same benefit that students in more racially integrated areas receive. ... Tr. Vol. 3 at 359-361, 399-401.

104. Concentrating minority children in neighborhood schools has not been found to reverse the flight of white families from the public school system, contrary to popular belief:

Historically, across the country, the push for neighborhood neighborhood schools is oftentimes driven by a belief that white flight will be reversed. That is to say that white students who have left the public school system will return back to the public school system following this push toward neighborhood schools....

Now, as a rationale for why students should be attending schools in their own neighborhood, this seems to not only encourage category level judgments to be made—which ... set up this fertile ground for stereotypes—but it seems to privilege those [white] students over the students currently in the public school system, when there is a vast difference in the neighborhood schools students are zoned to.

Empirically,... it appears that white flight isn't typically

reversed after strong pushes for desegregation are relaxed. And so empirically, even a shift to neighborhood schools doesn't tend to bring white families back into the system. Dr. Zorwick , Id. at 364-365.

105. In her testimony, Dr. Zorwick also described the research in social psychology regarding politicians' use of "code words"—the idea that "there are sometimes policies or issues that are discussed in a race neutral way, but clearly have a racial component." For example, she said, "[p]eople have talked about neighborhood schools actually as a code word for segregated schooling." Id. at 367. Plaintiffs' expert Dr. Tommie Morton-Young agreed that "the phrase *neighborhood schools* is another term for segregated or separate schools." Tr. Vol. 2 at 277. And to Dr. William Rock, another Plaintiffs' expert, "the word *neighborhood schools* is sort of a fiction." Id. at 196 (italics in original). See also Tr. Vol. 23, at 4011: 18 to 4012: 13; 4013: 4-25 (testimony of Dr. Jesse Register).

106. Anyone may engage in stereotypical thinking and speaking, but politicians are perhaps the most prone to do so, Dr. Zorwick said, "[p]artially because we live in a society where egalitarianism and political correctness are valued. ... Unfortunately for politicians, because they oftentimes want to be re-elected, the desire not to say things that might upset certain constituents can make it very likely that [they] will use code words instead of invoking race, because it is such a politically contentious issue." Id. at 370-372. Another rhetorical device to watch in understanding what people are really saying, said Dr. Zorwick, is that of "aversive racism. [t]he idea ... that it's possible to come up with neutral ways to justify policies that are based on race." Id. at 372-373.

Discriminatory Purpose: Use of Pretexts by Defendants

107. In addition to this direct evidence of discriminatory intent and segregative effect, the Defendants used pretext and subterfuge to try to cover up the discriminatory effect and true

purpose of the rezoning. Mark North who chaired the Task Force believes that “more segregated schools” is a small price to pay to achieve this rezoning, especially since black children will be “more comfortable” in their own local schools. Tr. Vol. 3 at 430-431. Mark North stated in a meeting that busing is wrong and neighborhood schools would better serve children. Tr. Vol. 4 at 520. Mark North also claimed that by ending cross-town busing, the rezoning plan would make more efficient use of money. Tr. Vol.5 at 678-679. School board member David Fox told a community organization that he couldn’t use the words “black” or “African American” but had to use “free and reduced”, “at risk”, or “underperforming children”, Tr. Vol. 4 at 51, 579, 595, 633. Mark North and Mike Turner also stated they had to use non-racial descriptive words. Tr. Vol. 4 at 51. See also Tr. Vol.4 at 522. Mike Turner, an elected state Representative who served on the Task Force said life was better with neighborhood schools when he was growing up during a time of segregation. Tr. Vol. 3 at 424. See also, 425-426. Mike Turner stated that it is wrong to bus kids from projects into suburban schools and that a member of his family attending McGavock High School, had been assaulted by black students from the projects. Tr. Vol. 4 at 539-540. Minister Jerry Maynard quoted the Task Force (Mike Turner) stating that busing in Nashville is a terrible thing and wanting to return to neighborhood schools. Tr. Vol. 3 at 486. At best, the Task Force engaged in willful ignorance, when they never considered the impact on segregation in their rezoning plan. Tr. Vol.4 at 531-532.

108. The problems of previous Director of Schools Dr. Pedro Garcia started because he withdrew the rezoning plan states Mr. Kindall. Tr. 2036: 8-11. The pretext given at trial for his dismissal was failure of the school system to meet NCLB required scores. But the NCLB scores had been bad for years. During the three or four years of poor NCLB scores before the system went into “corrective action” the majority of the Board (that voted for the rezoning) strongly

supported Dr. Garcia. Mr. Kindall was asked “had the board ever threatened to fire Dr. Garcia or to remove him because of these academic problems or any other reason? A. No. In fact, the majority of the board was strongly supportive of Dr. Garcia.” When he pulled the 2007 rezoning plan, the “members turned on him.” Tr. 2364:3-17; 2365:8-17. Dr. Garcia “said that a couple of board members had come in and said pretty much, ...the mayor, the council, the School Board, and the chamber [of commerce] have lost confidence in you and you should resign.” Tr. 2364:3-17. When Mr. Kindall heard this, he “contacted Sue Cain with the [Metro Nashville city] legal department and asked her to intervene, because I thought that was inappropriate.” Tr. 2365:23-25; 2366: 10-11,18.

109. Dr. Garcia withdrew the 2007 rezoning plan over racial concerns in November 2007; in December 2007 the Board created the Task Force; and one month later, Dr. Garcia was dismissed. Tr. 2367:17-19. Board member (now former member) Karen Johnson claimed that Dr. Garcia was not dismissed because of the re-zoning issue, and that in fact the Garcia evaluations had nothing to do with and contained no references to zoning. Tr. Vol. ___, at 2027: 21 to 2028:1. In fact she claims the Garcia evaluations had nothing to do with and contained no “references zoning.” Id.(The Board’s evaluations of Dr. Garcia are D. Ex.99). In contrast, the current Director of Schools has received his lowest marks from the Board in connection with student achievement, but has not opposed or challenged the rezoning plan and has been given high ratings overall. Pl. Ex. 47; Tr. Vol. 23, at 4053: 20 to 4059: 1.

110. Dr. Garcia investigated and decided the rezoning proposal was racist in nature and so advised the school board in November 2007. TR. Vol. 1 pg. 100-101. Shortly, after that negative recommendation on rezoning by Dr. Garcia, board member Karen Johnson made the

recommendation to create the Task Force on rezoning, Tr. Vol.5 at 772, and a few weeks later in January 2008, Dr. Garcia was ousted as Director.

111. Even more evidence of discriminatory motive and intent is Dr. Garcia's written memorandum from January 2008 when he was ousted: " I know the situation I find myself in today, and the pressure exerted upon me by {chairman} Marsha Warden, is the direct result of my decision to fight against her desire to move the African-American children from the Hillwood Cluster so she could be re-elected. Unfortunately, this is a racially-charged issue." Pl. Ex. 61: 3.

112. More evidence of pretext is obvious in the lack of interest in legal advice about the rezoning. Tr. Vol. 6 at 982. Dr. Garcia had been advised the rezoning could violate the law in *PICS v. Seattle* as the chair of the Task Force knew (Mark North, Tr. Vol.5 at 779; Ex. 16).

113. More evidence of pretext is that neither the Board nor the Task Force read, reviewed, or studied any data on rezoning and its effects. They ignored any and all scientific or empirical data that disagreed with them in their rush to judgment on rezoning. Board chair Marsha Warden admitted they did not rely upon nor were ever shown any scientific studies or data (other than race, FARM and capacity).Tr. Vol.10 at 1632. Task Force member Don Majors was surprised the Task Force didn't consider academic findings. Tr. Vol. 4 at 519-532 Yet specific studies of the Nashville schools and student assignment was available from Vanderbilt professors Goldring and Smrekar. The Task Force and Board knew of these studies and made a choice not to use them. TR. Vol. 4 at 512,528, 538; Vol. 6 at 923, 1008.

114. More evidence of pretext is the shifting and baseless justifications that the Defendants assert for their votes to adopt the rezoning. The Defendants assert building utilization or capacity along with saving costs through less unused capacity (see e.g. Tr. Vol.9 at 1582). Yet they admit the rezoning did almost nothing about the capacity issue. Board chair Marsha Warden claimed

the problem was Nashville had 20 schools with 30% of seats empty, Tr. Vol.10 at 1629, but then admitted after rezoning they still had 20 schools with 30% empty seats with no staff and no personnel fired, laid off or dismissed and no savings in transportation costs. Tr. Vol.10 at 1634. Mark North admitted the same no-results analysis is true in the Hunters Lane, Hillsboro and Hillwood clusters. Tr. Vol. 6 at 919-921. Most damning in this racial discrimination context is that Pearl-Cohn High School capacity had been severely underutilized for years, but none of the Defendants suggested that they move white students to Pearl-Cohn. Tr. Vol.5 at 733. There was no study and no data about neighborhood schools to support their assertions. Tr. Vol. 4 at 513; Tr. Vol. 6 at 995. Dr. Connie Smith, appointed by the state under No Child Left Behind to supervise these failing Defendants, testified that school board policy decisions should and must be data driven, especially considering that there is an abundance of data that can be used. Tr. 613.

Discriminatory Purpose: No Reply by Defendants to Any of the Racism Criticisms

115. Mr. Kindall prefaced his analysis of the rezoning at the July 8, 2008 Board meeting by stating he saw many, many things that he agreed Tr.1978:14-17. Then he spoke at length how the rezoning creates racial isolation for students, significant racial segregation, and leads to the old ways of two separate school systems in Nashville. Tr.2011:7-2013:15. Every Board member has an opportunity to speak about the rezoning after the Kindall analysis, but no supporter of the rezoning makes any response whatsoever to these racism charges. There is no denial by anyone. Ms. Warden never replies to any of the race issues by Mr. Kindall. Mr. Fox and Mr. North speak in support of rezoning but do not address race and do not respond to Mr. Kindall or to Mr. Thompson's and Dr. Porter's similar remarks.2018: 3-2020:18. Defendants' claim that they could not speak out because they were intimidated somehow by alleged boisterous or emotional conduct is simply not supported by the video of the meeting. These are elected officials who are

trying to act like they should be shielded from the opinions of the public. What reasonable person in our community, upon being accused of racism, would not respond?

Discriminatory Purpose: Pretext- School Building Utilization

116. The pretext by the defendants was they were concerned about unused capacity in schools. So why did they project the race of the students in each school under the rezoning plan? Board member Ed Kindall testified re this pretext. Tr. 2393: 13-24:

“ Q. The school board members could look at the Task Force report and count the numbers to know what the percentage underutilization was going to be?

A. That's correct.

Q. Let me ask a really basic question, Mr. Kindall, from 27 years experience in the school system. The numbers and percentages are the same whether the student is black, white, Hispanic, Asian, or anything else; aren't they? A. Right.

Q. It's just a student. A. That's correct.”

117. “If you look at the number of seats that we're talking about in this system and count those seats, we really haven't changed very much [under the rezoning].” (Kindall testimony) Tr. 1979:1-3. Mr. Kindall compared concern about majority white school unused capacity to majority black schools: “Now, we have talked about Pearl-Cohn being 61% and underutilized. Why then are we reducing Hillwood to 63%? ... We will still have at least 12 schools that are under capacity...from before. So did we really do what we said we were doing with the capacity issue?” Tr. 1976:20-1978:25. See also Anderson Williams testimony, Tr. Vol. 23, 4113:16-21.

Discriminatory Purpose: Pretext-No Data Driven Decisions

118. Defendants consciously ignored the research data available such as the Goldring-Smrekar reports. The rezoning allegedly places children “close to home and, thus improve educational opportunities and parental involvement. There's no empirical data or research to support this conclusion. In fact, the Goldring and Smrekar research on the Nashville school

system, which has been done over a period of four or five years, generally refutes that argument and says that concentration of poverty overwhelms that particular concept.” Ed Kindall at Tr. 1980:8-24. “At these community meetings did you ever hear any school officials quote or refer to any studies that had been done of Nashville schools about rates or amounts of parent participation in school activities? No.” Betty Nixon at Tr. 2252:15-23.

119. The defendants ignored academic achievement data for the schools that were compared and instead relied on the much disputed value added data. Tr. Vol.23,4213:4-4214:10 (Dr. Changas: disputed over effects of race, poverty and segregation differences). The defendants ignored the academic achievements of the Pearl Cohn children in school in Hillwood. The Nashville children who are bused the longest distance (Metro Center to Harpeth Valley) are primarily poor black children and they score very high with high passing rates, high attendance, and very few, if any, disciplinary problems. Ed Kindall at Tr. 1980:17-25.

120. The plan doesn't mention the cost to renovate Wharton school at all. The cost, I'm sure, would be in the millions.” Ed Kindall at Tr.1979: 24-1980:3. MNPS financial expert Chris Henson said (2005:14-2007:12) the rezoning cost estimate does not include capital costs and the bottom line is the extra cost is \$4.7 million minus \$2 million dollars net savings for closing schools. Kindall at Tr. 2014:6-17. The rezoning plan does not tell us the cost of transport or what the minimum number of students will be. Kindall at Tr. 2015:10-12

Discriminatory Effect: Denial of Equal Educational Opportunities for Black Students

121. As Drs. Goldring and Smrekar of Vanderbilt noted in their 2002 report on the Nashville Schools, “[t]he strong link between poverty and race is well documented; it is equally strong in Nashville.... Poor students are concentrated in minority schools.” Pl. Ex. 129 at 22. At the time, they said that 70% of students in racially isolated black schools (meaning 80 to 100% black

enrollment) participated in the free and reduced price meal (FARM) program, compared to 14% of students in racially isolated white schools and 26.3% in predominantly white schools. And the largest concentration of poverty, 86%, was in the so-called “enhanced option” schools. Ibid. This relationship still holds today, except the poverty rates in the most racially isolated schools are mostly in the 80th and 90th percentiles. Pl. Ex. 123.

122. So although the color of one’s skin does not determine academic achievement or future success, it is impossible to weigh the factor of race without also considering the burden of poverty and the harm this combination causes when overwhelming numbers of poor black children are deliberately placed together in places like the Pearl-Cohn cluster and the district’s enhanced option schools. With the accumulation of 40 years of research on the subject, some of the best of it done within this very school district, the educators who work for the Nashville schools must know that the strategy of grouping minority and low-income students together in neighborhood schools and providing them with a few extra measureables is exactly the opposite of what needs to be done. "As plaintiffs' expert Dr. William Rock testified, "when we have isolated schools like this, we have not been able to overcome the effects of that isolation through compensatory education."Tr. Vol. 2, at 201: 17-24; see also Dr. Changas ,Tr.Vol.23.4214:1-10.

123. At the hearing in this matter, Dr. Rock read a passage from his expert report into the record (at counsel’s request) and re-affirmed that it was still his words and his opinion: “Based upon my review of the 2008-09 student assignment plan, I can find no educational merit in the plan. Removing children from integrated schools is a clear step backward that can do nothing but harm to the children involved.” Tr. Vol. 2 at 215.

124. None of Plaintiffs’ experts believed that the possibility of choice justified the harm done by the massive reassignment of black and white children on the basis of their race. “I don’t

think we should ever give a choice to a child to go to a school that is isolated by socioeconomic status, achievement levels, and race,” Dr. Rock testified. Id. at 212....

I don't think we should ever give children a choice to attend a school that would not be as good as the situation they're in. ...

Children go to school in this country because they have to. We have compulsory education. When a child goes to school, the parents of that child expect the School Board is going to provide them with the best kind of education they can, with the resources they have available.

So when the School Board decides that we're going to rezone schools to send you to different schools; when the School Board says well, 30 minutes a day on a bus isn't good for you, things like that, that is not ... a choice. That really destroys the choice.” Id. at 252.

125. The annual No Child Left Behind testing did not produce good results for the Metro Nashville school district in 2011 (for the 2010-11 school year). The district was classified as “Restructuring I,” four steps from the bottom ranking, and likely would have been subject to some level of State intervention in 2011-12 if not for a waiver that allowed Tennessee to change the relevant standards. Tr. Vol. 22, at 3953: 10-25; 3954: 23 to 3955: 24.

126. According to its State report card for 2011, Def't. Ex. 96, the district did not make adequate yearly progress for its African-American students in mathematics or reading/language arts at the elementary/middle school level, or in language arts at the high school level. Id., at 3955: 5-17. On the other hand, the district's white and Asian students met all the NCLB goals in these areas, and so did the “students with disabilities” subgroup in the elementary and middle schools. Id., at 3955: 18 to 3956: 3. Director of Schools Dr. Jesse Register said it was “very hard” to meet the standards set by the Federal government for all the various subgroups. So when the waiver was granted, the same tests were to be administered, but different criteria were adopted and the student subgroups' performance was to be compared with all students in the

district and with State averages, but not against any kind of national standard. Id., at 3956: 14 to 3957: 12; 3957: 21 to 3958: 6. It was not clear how or whether this apparent relaxing of the requirements would help African-Americans and other underachieving groups catch up with those who were already able to meet the original goals.

127. The rezoning plan also contained a commitment to “[p]rovide additional resources in areas of highly concentrated poverty. Additional resources should include: incentive pay for teachers and staff; lower pupil/teacher ratio; higher ratio of social workers, psychologists, guidance etc.; technology/computers etc.” The rezoning plan did not specify a dollar figure, but the amount of \$5 million has been used by the Defendants. Pl. Ex. 131 at 19, 26-29; Tr. Vol. 5 at 765-767. But at the same time, the plan was adding hundreds of additional low-income black children to the Pearl-Cohn schools: 155 more to Pearl-Cohn High, 114 to John Early Middle School, 126 to Buena Vista Enhanced Option, 236 to Park Avenue Enhanced Option, and 256 to the new Wharton Elementary, thus increasing the concentration of poverty and educational need. Pl. Ex. 123 at 6 (actual figures, not projections, for September, 2009).

128. McKissack Academy was also projected in the rezoning plan to add 148 black students in 2009-10, allegedly to delay ninth-graders' exposure to the gang influence at the high school. Pl. Ex. 131 at 32-33, 41. No such gang worries were expressed in the rezoning for other student groups in non-black areas or anywhere else in the community. The option of removing students altogether from such a community situation where they have to be protected from their own schoolmates was apparently not considered. "In 2011, curiously, it was decided to move the McKissack Academy students to the high school after all for no very clear reason. Pl. Ex. 222; Tr. Vol. 15, at 2302: 12 to 2311: 9.

129. At a public forum, the language the school officials used in describing particular schools' No Child Left Behind ratings was misleading and wrong. Tr. 2254 : 9-16. Ms. Nixon mentioned many examples:

It's what was not said [about rezoning]. Because I had reviewed all the documents and the profiles of the schools. So what was not said were things relative to the school's prowess in regard to college preparation. So, for example, Hillwood had 13 AP [Advanced Placement] courses. And Pearl-Cohn had --I'm sure this is all in the documents, but Pearl-Cohn had two that were -- one that was actually active." Betty Nixon at Tr. 2244:15- 23. I saw that as of this year, Hillwood has 22 advanced placement courses. In the Pearl-Cohn site, there was not the profile that is typical of all the other schools, so I couldn't really determine what they had....Hillwood also had an entire program designed to get kids ready for college and college admission. At Hillsboro they had the International Baccalaureate Program, plus -- so there were 19 courses in that and 13 advanced placement courses. I could not find any corollary resources at Pearl-Cohn. Tr. 2245:21-2246:7. [Instead of a school profile at the Pearl-Cohn High School website] there was a letter to the parents and an official notification that it was a priority school. And priority school under No Child Left Behind appears to mean that it is -- needs a lot of improvement. And there was a letter to parents that would indicate that they could transfer to schools in good standing based on that designation." Id. 2246:10-16

130. On many levels, the most blatant indication of bias against black students may be that the rezoning plan recommends increasing the career and technical courses (CTE) at Pearl-Cohn High School, Tr.1959:16-17, but makes no such recommendation for any other high school in the city. Mr. Kindall pointed out extra resources to Pearl-Cohn "are very minimal and are geared more towards social issues than academic achievement. There is no way this Board, this mayor, this council, or anybody else can guarantee the sustainability in the future of those resources. There's just no way to do it. It's not legally possible.... we don't want people to coddle the Pearl-Cohn zone. We want to have the same academic curriculum achievement courses in that zone that we have anywhere in this city." Tr.1982: 7-17; 1985:8-23; 1990:10-13.

131. The idea of 5% incentive was to attract better teachers for Pearl Cohn schools, but the Board did not replace past teachers and then waited until spring 2009 to even discuss the 5% pay with MNEA to seek their needed approval. Most of the existing Pearl Cohn faculty was retained,

so it is unclear what efforts were made to get better teachers or how there could have been much difference from before. Tr. 2383: 21-22; 2384: 23- 2385:9. Also, the unwillingness of defendants to do anything, or even recognize the disproportionate rate of suspensions of black students , Tr.Vol. 23, 4204:15-19, obviously speaks to unequal educational opportunities.

MNPS Witness Cecil Steele: Denial of Equal Educational Opportunities

132. In recent years, the school district has been engaged in a re-design effort to establish smaller learning communities known as academies in each of its cluster high schools. Currently all 16,000 students in the 12 zoned high schools belong to a high school academy.Tr. Vol.15, 2269: 19-25; 2271: 12-14.

133. An academy consists of core academic, college preparatory courses including mathematics, science, social studies, and language arts, plus a thematic course such as engineering, health care, music publishing, or something else of that nature. Within these choices are myriad courses and levels such as advanced placement, honors, or standard classes, depending on the students' objectives. Id., at 2271: 18-25. Different numbers and types of academies are offered at the various district high schools. Pl. Ex. 31.

134. Among other things, the district wants every student in an academy to come out with college credit, professional certification, or both (as those terms are defined), and it wants every student to make of minimum score of 21 (out of 36) on the ACT achievement test that is taken in the 11th grade. Tr. Vol. 15, at 2273: 1-3, 13-14; 2319: 10-16.

135. Annual test results under the No Child Left Behind program for MNPS high school students in the 2009-10 and 2010-11 school years show a substantial gap between the scores for black and white subgroups, based on end-of course examination results for Algebra 1 and English (reading) for the ninth and tenth grades. Pl. Ex. 211; Tr. Vol. 15, at 2260: 10-22.

136. In mathematics, the percentage of African-American students testing as proficient or advanced went from 32% to 45% between 2009-10 and 2010-11, while white students scored 54% proficient or advanced in 2009-10 and 63% in 2010-11. As Dr. Steele admitted, “[t]here is a gap,” Id., at 2262: 5, but it narrowed somewhat in the second year. Id., at 2261: 11 to 2262: 8.

137. In the area of reading/language, the percentage of African-American high school students rated proficient or advanced dropped from 52% to 51% between 2009-10 and 2010-11, while the percentage of whites increased from 75% to 76%. Id., at 2262: 9-14. Dr. Steele testified that he was not satisfied with any such gaps between any groups. Id., at 2263: 16-18. (These numbers reflect the performance of all the district’s cluster and magnet high schools, including the academic magnets. Id., at 2263: 19-24; 2264: 1-2.).

138. The NCLB achievement gaps for black and white students in kindergarten through eighth grades, Pl. Ex. 210, are even larger in mathematics, while in reading the scores are lower for both groups but the distance between them is about the same. Tr. Vol. 15, at 2264: 10-17. Dr. Steele testified that “any student who performs low [in learning the basics] is going to struggle unless an intervention is done.” Id., at 2266: 3-7.

139. As for the targeted ACT test scores, *supra*, the results at predominantly-black Pearl-Cohn High school for the years 2009, 2010, and 2011 respectively were 16. 15.4. and 15 composite score; 14.9, 14, and 13.6 in English; 16.1, 16, and 15.2 in mathematics; 16, 15, and 15.2 in reading; and 16.8, 16.1, and 15.5 in scientific reasoning. Id., at 2319: 10-23; 2320: 4-12. While recognizing that all juniors were required to take the test beginning in 2010, there is still a downward trend in nearly all of these categories. Id., at 2320: 13-19.

140. An examination of the full list of high school academies for the current school year shows that Pearl-Cohn and two other predominantly black high schools, Stratford and Whites

Creek, have only two academies each, while a fourth such school, Maplewood, has three (as does plurality-white Hillwood High School); others have as many as five. Pl. Ex. 5, 31. Some of the differences, Dr. Steele testified, were due to the size of the student bodies. Tr. Vol. 15, at 2275: 23 to 2276: 12.

141. In addition, Pearl-Cohn is already denominated the Entertainment Magnet High School, and yet both its academies seem duplicative of the same theme: The Academy of Entertainment Communication and The Academy of Entertainment Management. Pl. Ex. 31. Dr. Steele denied that the school's offerings were overlapping or that at some level it had been decided that black students are only interested in entertainment. Tr. Vol. 15, at 2276:13 to 2277:1.

142. The high schools administrator described a process of subject matter selection that involved, among other things, regional workforce data, labor market statistics, and alignment with local college and university offerings, Id., at 2277:2-20, which somewhat seemed to contradict his assertion that there was not a "trade school" element to some of the magnets and academies. Id., at 2342: 16-22. But the only method he identified for factoring in student or family preferences was to phase out academies chosen through the described process within a year if the students failed to register for them. Id., 2277: 13-17. Dr. Steele's description of an elaborate mechanism for matching academies with particular schools included several layers such as "CEO champions," industry council partnerships, academy advisory boards, post-secondary and business partners, and school staff, but there was no mention of student or family input. Id., 2279: 11 to 2280: 25.

143. To paraphrase some of the questions that occurred to the Court, how is it that, say, Antioch High has the Academy of Hospitality and Maplewood has the Academy of Consumer Services? How is it that Hillsboro High School gets the Academy of Global Health and Science,

Cane Ridge has Architecture and Construction, Law, and Health Management -- and Pearl-Cohn has Entertainment Communications? Why is Pearl-Cohn designated for Entertainment Communications and Entertainment Management while other schools have academies like International Fine Arts, International Business, Global Health and Science, Law, Health Management, and Architecture? Id., at 2279: 11-13; 2281:1-6, 12-15.

144. Dr. Steele tried to explain the distribution of fancy and plain-sounding academies by saying some schools have a theme and “[t]hese are just simple names [that] align with that overall theme.” Id., at 2281:16-22. “Second to that,” he said, “is their location and the businesses and colleges that they support. So right around the school-- ... Like Pearl-Cohn, they are the closest school to Music Row. All of the BMI, ASCAP, SESAC, the record labels, and Belmont Entertainment and SAE colleges. That’s what dictates where those programs are located.” Id., at 2282: 2-7. Leaving aside the geographical assumption that students who live in North Nashville can just stroll over to these locations, this explanation does not entirely dispel the feeling that the identity assigned to Pearl-Cohn High School is at best a racial stereotype and at worst a way to reinforce the school’s and its students’ racially isolated status.

145. If a young person attends his or her cluster high school like most students, and the school is saddled with academies he or she would not have chosen (because of stereotyping or any other reason), it does not seem easy for that student to switch to a subject or curriculum he or she really wants to pursue, except perhaps for a student transferring from Pearl-Cohn to Hillwood High School under the current Student Assignment Plan. Pl. Ex. 9 at 4-5, and assuming one of Hillwood’s three academies is attractive, the prospective enrollee would presumably have to apply for another school under the district’s open enrollment policy. Under this policy, the student’s choice would not be guaranteed but could be limited by space or staffing limitations,

and district- provided transportation would not be available. Tr. Vol. 15, at 2273: 24 to 2274: 22. So it is questionable to what extent the academy system currently functions as an early-concentration opportunity for Pearl-Cohn students who are not interested in the entertainment business, or others who would like to study something available somewhere else. Dr. Steele said such occasions were “beginning to be more and more,” but was unable to state a number. Id., 2274: 17-25; 2275: 1-3.

146. There was no evidence at trial that the district conceived of the academy system as a way of varying the character and perception of its various high schools, particularly Pearl-Cohn, or of using the attraction of various academic, artistic, and professional curricula as a means of introducing a degree of diversity into some of its schools, or at least a number of its students into a diverse educational experience. Similarly, it appeared there was little interest in trying to use the rigorous, widely respected International Baccalaureate program to instill some intellectual pride and excitement in (and perhaps attract some new students to) one or more of the Pearl-Cohn schools or -- for like reasons and for improvement of the academic environment in general -- to offer more chances at college credit through the long-established Advanced Placement program. See Pl. Ex. 26, 27; Tr. Vol. 15, at 2282:17 to 2284:5; 2287:10 to 2288: 4; 2293: 10-15, 19-25; 2294:3-10; 2294:25 to 2295: 14.

147. Expansion of the I.B. program to the Pearl-Cohn cluster was flatly rejected at trial (“No. And I would not consider it,” Id., at 2287:13-14), and the number of A.P. classes on campus, which stood at two at the time of approval of the Student Assignment Plan, had risen to just five at Pearl-Cohn High, the lowest in the system. Id., at 2292: 16 to 2293:9; 2294:13-17. Moreover, on a system-wide basis, only 48% of the students enrolled in Advanced Placement classes actually took the test for college credit, probably because of the \$70.00 to \$90.00 cost per

test which the district refuses to pay—except possibly after the fact, on the basis of performance. “I cannot force kids to take the test,” Dr. Steele explained. Id., at 2298: 22 to 2300: 7; 2300: 13-24. In general, the school district did not seem to see its advanced academic programs as a means of improving and diversifying the educational experience of black students, or even as something to which these students should aspire.

148. Dr. Steele testified about a “dual enrollment” program across the district that was somewhat similar to Advanced Placement courses, in that certain classes would be offered to students for both high school and college credit. Id., at 2339:12 to 2340:10. While the program at Pearl-Cohn High School was described as being implemented and as actually begun, Id. at 2339: 14-16; 2349: 16-17, the witness then conceded he was “not sure” if any Pearl-Cohn students were presently involved. Id., at 2349: 20-25.

MNPS Witness Alan Coverstone –New Magnet and Charter Schools

149. The following figures were introduced in Plaintiffs’ Exhibit 221, at 2 (which is substantially the same as Defendants’ Exhibit 7, p. 2, see Tr. Vol. 14, at 2126: 3 to 2127: 25) to inform the witness and the Court as to what changes had occurred in the Hillwood cluster schools between the year before rezoning plan (2008-09) and the year it took effect (2009-10):

School	Black Students 2008-09	Black Students 2009-10	Change
Charlotte Park	238	113	- 125
Gower	145	153	+ 8
Harpeth Valley	87	88	+ 1
Westmeade	171	95	- 76
Bellevue Middle	199	143	- 56
H.G. Hill	222	174	- 48
Hillwood High	577	441	-136
Brookmeade	150	Closed	- 150
Martha Vaught	198	Closed	- 198

Id., at 2129:9 to 2130:24. In light of this net subtraction of 780 black students from Hillwood schools, the witness was asked if the new plan served the purposes of integration and diversity as far as Hillwood and Pearl-Cohn were concerned. Id., at 2132: 14-17; 2132: 24 to 2133: 1. (The Pearl-Cohn cluster added 631 black students to already 90%-plus black student bodies in the fall of 2009, and also opened a new school, then called Wharton, with 256 black students (95.9% of the total). Pl. Ex. 221, p. 6.) Eventually, the question was posed by the Court as “If you’re looking at whether or not schools are more racially isolated across the district, is Hillwood/Pearl-Cohn more or less racially isolated than they were before the change in plan,” to which Mr. Coverstone responded, “Moving in the direction of more.” Tr. Vol. 14, at 2134: 18-23. As described above, on cross-examination, Mr. Coverstone defined “racial isolation” as racial subgroups whose percentages are out of line with district averages. Id., at 2133: 3 to 2134:10.

150. Mr. Coverstone and his office are also responsible for the operation of the six new magnet schools, three in the Pearl-Cohn cluster, that are supported by a three-year, \$12,000,000 grant from the Federal government under the Magnet Schools Assistance Program. Id., at 2106:7 to 2107:1; Tr. Vol. 15, at 2195: 1-4; Deft. Ex. 79, at 3-4; see 34 CFR Part 280. In the Pearl-Cohn cluster are two museum-themed magnets, Robert Churchwell and John Early, and one focused on the entertainment, Pearl-Cohn High School. The choice of subject matter for these schools was decided on by “school level people,” “[d]istrict level people,” local museums, and “people who could be involved.” There was no formal survey, however, of students and families to determine what topics they might have been interested in. Tr. Vol. 15, at 2195:12-25.

151. According to the Defendants, “[o]ne major goal of the new magnets is to promote more diverse school enrollments in schools that are located in residential areas with high minority populations.” Deft. Ex. 79, at 4. (In addition to the three magnets in the Pearl-Cohn

cluster, two were opened in the Stratford cluster and one in Maplewood, both of which have predominantly black student populations.) Under the applicable Federal regulations, funded magnet school programs should be designed, inter alia, to bring students from different social, economic, ethnic and racial backgrounds together, 34 CFR 280.1, and to carry out high-quality education programs that will substantially strengthen students' knowledge of academic subjects and the attainment of tangible and marketable skills. 34 CFR 280.1(d), 280.20(b)(6); Tr. Vol. 15, at 2201: 22 to 2202: 10. But there was no formal survey of students and families to determine what topics they might have been interested in. Tr. Vol. 15, at 2195:12-25.

152. For the current school year (2011-12), there was a noticeable change in the black-white ratio of the John Early student body, but it remained more than 80% African-American; and the black percentages at the other two Pearl-Cohn magnets continued to exceed 90%. Specifically, John Early added 64 black students and 42 whites and went from 95.6% black last year to 84.5% in the current year; Robert Churchwell added 145 black students and 23 whites and went from 95.4% to 92.0% African-American; and Pearl-Cohn High added 65 blacks, lost eight whites, and went from 90.2% to 92.0% black enrollment. Pl. Ex. 5 (also Deft. Ex. 9), at 4 of 7; Tr. Vol. 15, at 2196: 1 to 2197: 5; 2200: 23 to 2201:16. Mr. Coverstone agreed that the high school, at least, had a high percentage of black students and was moving in the wrong direction, thus posing a real problem in terms of racial isolation. Id, at 2200:10-18; 2201: 4-20.

153. Overall, the three new magnets in the Pearl-Cohn cluster attracted a total of 274 additional black students to schools that by plaintiffs' definition are still racially isolated; it is not unprecedented in Metro Nashville for magnet schools located in predominantly black areas without school district transportation to become segregated or racially isolated. See Pl. Ex. 226 (thematic magnet schools).

154. In terms of educational quality, the testimony indicated that two of the three magnets in the Pearl-Cohn cluster, Robert Churchwell and John Early, are currently ranked in the bottom 5% on student achievement under the State's new accountability system. Another Pearl-Cohn cluster school, Buena Vista, is also on the list, as is another of the new magnet schools, Bailey Middle from the Stratford cluster. Pl. Ex. 203; Tr. Vol. 15, at 2202: 12 to 2203: 7; 2203: 23 to 2205: 1. Mr. Coverstone agreed that such performance did not constitute high-quality education and said that "[w]e have work to do." Id., at 2205: 5-6.

155. Another part of Mr. Coverstone's domain is that of charter schools—programs operated by private entities with public funds under ten-year contracts with the School Board, which has the power to approve and continue the contract or to terminate or non-renew it if conditions are not met or, in the latter case, for other reasons as well. Id., at 2153: 19-25; 2154: 1-15; 2160: 17-23; 2231: 20-21; see Pl. Ex. 34, 37D.

156. It is not disputed that charters are considered to be public schools subject to the equal protection clause of the Fourteenth Amendment. Id., at 2160:25 to 2161: 1-10.

157. There are no specific legal requirements for charter schools per se to maintain some level of diversity or of racial or socioeconomic integration. However, according to Mr. Coverstone, the MNPS school district has expressed a desire support schools that do meet such standards, generally seeking to make such determinations during the application and approval process. To this end, the district's published priorities include a preference for charter schools "that show a commitment to diversity," and require that admissions occur through an open enrollment process followed by a lottery process if necessary. Pl Ex. 34, at 2; Tr. Vol. 15, at 2154: 16 to 2155: 1-14. Mr. Coverstone said that under the rules, charter schools were not to be "selective" either in what students they recruit or in what students are admitted. Id., at 2155:1-21.

158. Eleven charter schools are operating in the Metro Nashville district in the current school year, two more have been approved to open in 2012-13, and at the time of trial the district was considering 11 more applications for the year after that. No particular number has been set for the ultimate number of charters to be approved. Id., at 2164: 2-22. The direct cost to the district's budget for charter schools in 2012-13 is expected to be \$25,000,000, but the actual fiscal effect may be greater. Tr. Vol. 23, at 3891: 8 to 3892: 6; Tr. Vol. 23, at 4048: 16 to 4049: 10 (Dr. Jesse Register testimony).

159. For the current year, nearly all the active charters were racially isolated by the plaintiffs' definition, and for five of the 11 the percentage of black students was 90.1% or more: Drexel Prep 98.3% black, 0.4% white, 0.4% Hispanic; East End Prep 90.1% black, 5.3% white, 7.0% Hispanic; Nashville Prep 93.5% black, 2.2% white, 3.3% Hispanic; Smithson-Craighead Middle 96.1% black, 1.8% white, 1.8% Hispanic; and Smithson-Craighead Academy 99.2% black, 0% white, 0.8 Hispanic. Two others were between 80 and 90% black (KIPP 88.8% black, 2.6% white, and 7.7% Hispanic, and Lead Academy 89.2% black, 6.1% white, 3.7% Hispanic), while two were approaching the 80% mark for racial isolation (Liberty Collegiate 73.8% black, 14.6% white, and 5.7% Hispanic, and New Vision Academy 78.1% black, 7.5% white, and 14.4% Hispanic). The remaining two charters, Cameron College Prep and STEM Prep, were plurality and majority Hispanic respectively. (The district as a whole in 2011-12 is 46.0% black, 32.5% white, 17.3% Hispanic, and 4.1% other.) Moreover, none of the four charter schools that participated in No Child Left Behind testing in 2010-11 met the standard for adequate yearly progress. Pl. Ex. 5, 38, 54; Tr. Vol. 15, at 2181: 14 to 2182: 14; 2184: 25 to 2188:22.

160. Under the current Student Assignment Plan, students in the former non-contiguous zone were reassigned to their neighborhood schools and offered a designated alternative school

in the cluster they had been attending or, if they wished, the same choice options that were available to most other students. One of these “other choice options” could have been, and could be in the future, a charter school such as those already operating or yet to be developed. In 2011-12, only 15.3% of the eligible children in the Pearl-Cohn cluster chose the Hillwood cluster school they were offered, but 23.0% opted for the other options available. As Mr. Coverstone conceded, some of the students who decide to attend a charter school under the plan could find themselves back in a racially isolated setting. Corrected Stipulation of the Parties No. 1, at 1-2; Pl. Ex. 9, at Bates #00481; Tr. Vol. 15, at 2192:17 to 2193:24.

161. Mr. Coverstone testified that having nine of 11 charter schools more than 70% black was not the result he was striving for: “Diversity is only partly these numbers. Diversity numbers should change, percentages should change, as you have a diverse and excellent education. Just like test score should change as you have a diverse and excellent education. No. We are headed in a different direction. That’s why we’ve made that a priority.” Id., at 2188: 23-25; 2189: 1-7.

162. Adequate yearly progress, as mentioned above, was a concept based on schools’ and school districts’ reaching high annual achievement levels over a relatively short period of time. As Mr. Coverstone explained, “[t]hat is the old state accountability system, which has now been replaced by the new accountability system. And it was based on escalating targets for proficiency rates for students as a whole in the school, as well as subgroups.” One of the reasons the system was changed, he said, was that “so many schools in the state were missing the targets.” Now the system is “generally based on an assumption that schools ought to increase their proficiency rates four to five percent per year every year and that [racial, ethnic, and other] subgroup gaps that occur in that data ought to be reduced by six to eight percent per year.” Id., at 2182: 15 to 2183:

12. (One point apparent from this description is that it will now be difficult to measure student progress over the recent past and possibly the first few years of the new accountability system.)

163. One of the charter school applicants considered by Mr. Coverstone's office and the School Board in 2012, submitted by Arizona-based Great Hearts Academies Nashville, presented a new issue since it proposed a "classically based curriculum" to be offered in middle-class West Nashville without provision of transportation for children from other parts of the district. According to the MNPS Office of Innovation's recommendation report, filed by the defendants on June 4, 2012 at the Court's request, the proposed West Nashville school was the first of five that Great Hearts intended to operate in various Metro locations. Report, at 5 (Great Hearts section); Tr. Vol. 15, at 2164: 25 to 2165:12.

164. At trial, Mr. Coverstone was asked if an applicant could be allowed to set up a charter school that offered classical education in a mostly middle-class area and not provide transportation to others. The witness answered that the lack of transportation would play a "significant" role in the review process, "[i]n relation to financial operations and diversity, in particular.... And clearly, where the question is ... if you locate in an area that's isolated and you don't provide transportation, you don't have a plan, then can you really be said to have a commitment to diversity." Id., at 2171: 2 to 2172: 17.

165. When the Office of Innovation's report was issued at the end of May, 2012, the Great Hearts application was recommended for denial on the following basis:

... because there is no specific plan for student recruitment and enrollment and the lack of a transportation plan. Additionally, the location in west Nashville does not align with district priorities as outlined in the request for proposal in September, 2011.

Although a charter school is not required to offer transportation by law, the complete absence of transportation is deeply concerning for the

[review] committee. The budget does not include funding for transportation. Along with the lack of transportation is the insufficient detail for identifying the targeted student population.

A plan is mentioned that would create a network of carpools and parent volunteers for students, raising concerns with reviewers that students with limited means of transportation who live outside the area where parent volunteers travel will be effectively excluded from this school. ...

The applicant stated clearly a belief that if a parent wants their children to attend a specific school, the[y] will find a way to get there, and because the applicant is seeking to open a network of schools in different locations, they could meet the diverse needs of students by locating their schools in communities throughout the county. ...

[Great Hearts'] diversity plan is based on a neighborhood school model for serving multiple populations in separate school locations and does not align with the district's priorities, mission, or vision. Report, at 9-10, 12 (Great Hearts section).

166. According to the defendants' notice of filing, Doc. 333, at 1, the School Board denied eight of the pending ten charter school applications, including the one from Great Hearts, which still has a right to appeal. Tr. Vol. 15, at 2176: 1-2. The outcome of this matter is of great importance to the plaintiffs and others involved in the Metro Nashville schools, because of the possibility, inter alia, that the Great Hearts proposal, if ultimately approved, could erect a second tier of segregated schools (see the enrollments of existing charters, above) on top of the present segregated system, and leave the latter even more racially and socioeconomically isolated than it is now. Great Hearts and other charter schools may still be licensed through an appeals process.

MNPS Charter Schools Are Racially Isolated as are the New Magnet Schools Which Are Not Part of Rezoning and Could have Been Properly Developed Independent of Rezoning

167. Also, according to the Defendants, "[o]ne major goal of the new magnets is to promote more diverse school enrollments in schools that are located in residential areas with high

minority populations.” Deft. Ex. 79, at 4. (In addition to the three magnets in the Pearl-Cohn cluster, two were opened in the Stratford cluster and one in Maplewood, both of which have predominantly black student populations.) Under the applicable Federal regulations, funded magnet school programs should be designed, inter alia, to bring students from different social, economic, ethnic and racial backgrounds together, 34 CFR 280.1, and to carry out high-quality education programs that will substantially strengthen students’ knowledge of academic subjects and the attainment of tangible and marketable skills. 34 CFR 280.1(d), 280.20(b)(6); Tr. 2201: 22 to 2202: 10. But there was no formal survey of students and families to determine what topics they might have been interested in. Tr.Vol. 15, 2195:12-25.

168. Discussing the performance of the district’s thematic magnet schools, Dr. Register agreed that one way to help magnets become more diverse was to make them so good that students would go to them no matter where they were located. Tr. Vol. 23, at 4022: 10-18.

Dr. Register expressed great concern about the growing influx of charter schools into Tennessee and Nashville under broad new State legislation, and was asked in particular about an application from Great Hearts Academies Nashville, which was believed to be proposing a school in the midst of an affluent area without offering transportation from other parts of town, thus potentially becoming a sort of free private school mostly for white families and students. Could such a proposal, from any applicant, be approved? Dr. Register said it would not be prohibited by law but would be contrary to the guiding principles set forth in MNPS’ request for proposals. Id., at 4045: 25 to 4046: 11; 4047: 20 to 4048: 5. (No decision had been made at the time, but the school district later rejected the application in question, but it is now pending appeal. See the defendants’ notice of filing dated June 4, 2012. Doc. 333 at 1.)

169. The Director of Schools testified that “we’re at a very critical time in this state, and particularly in Nashville,” as to how many and what kind of charter school applications are going to be submitted and approved. With the “wide open door” that now exists, he said, decisions will have to be made about what is productive for the community and the children of Nashville. Id., at 4050: 14-21.

14. Defendants Could Have Designed A Rezoning That Complies With the Law

170. “Several of the recommendations can be implemented without creating the so-called unintended consequences, such as increased segregation.” Ed Kindall Tr. Vol.14, 1987:24-1988:2

171. A rather remarkable colloquy occurred at the end of Mr. Mueller’s cross-examination in 2009, after he was asked whether, with all the demographic and geographic information he had at hand, he could not have drawn up a better student assignment plan than the one the Defendants came up with:

Q [by Mr. Lottman]. So what you are saying is that the way the Student Assignment Plan comes out has a lot to do with the way you want it to come out; isn’t that right? The parameters you set for the plan in the first place?

A [by Mr. Mueller]. What I am saying is typically the district will go forth and through the task force or committee come back and identify plans and put that before evaluation and go through a number of what-if scenarios and come to the determination of what they are driving at, the priorities for each particular school.

Q. But if through that process the district had decided that it wanted to do a plan with fewer ... 90 percent schools, it could have done that, couldn’t it? It could have designed a plan with fewer ... 90 percent Black schools?

A. I suppose there could have been an opportunity to come up with that opportunity, and you have to compare that with other impacts in terms of --

THE COURT: If it had been the highest priority?

THE WITNESS: If that had been the highest priority and that’s the one to—just avoid having 90 percent schools of a single group, something probably could have been designed.

Q. (By Mr. Lottman) And the same is true for diversity, you probably could have come up with more diverse schools if that had been the highest priority, a greater number of diverse schools if that had been the highest priority?

A. Possibly, yes. Tr. Vol. at 63-64.

Evidence From the 2009 Hearing

172. The substantive factual issues above are also substantiated in the 2009 hearing in this case as summarized in “PLAINTIFFS’ DESIGNATION OF TRANSCRIPTS AND EXHIBITS DESIGNATION BY SUBJECT MATTER (EVIDENCE FROM 2009 HEARING) (ATTACHMENT #1) filed with the Court May 23, 2012 (Document 324) which plaintiffs hereby incorporate by reference as if fully set forth herein..

CONCLUSIONS OF LAW

1. In *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), the Supreme Court stated its simple and enduring rationale: “to separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” School districts have many ways of making a school identifiable as intended for one race or another. Policies that continue the effects of the former dual system via any later actions of school officials cannot be countenanced unless linked to important and legitimate ends, see *Freeman v. Pitts*, 503 U.S. 467, 515-516 (1992) (Blackmun, J., concurring in the judgment), which in this case they have not been. See *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007).

2. “The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.” *Washington v. Davis*, 426 U.S. 229, 239 (1976). “Proof of racially discriminatory intent or purpose is required to show a

violation of the Equal Protection Clause”. *Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 265 (1977).

3. “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification,” *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979), i.e., it must be subjected to and survive strict scrutiny. This rule has recently been applied in the context of public education programs, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), and of course, specifically in the *Parents Involved in Community Schools* case, supra. In order to satisfy strict scrutiny review, a school district “must demonstrate that the use of individual racial classifications in [student] assignment plans ... is ‘narrowly tailored’ to achieve a ‘compelling’ government interest [citation omitted],” and the only two interests that have persuaded the Supreme Court in the school context are “the compelling interest of remedying the effects of past intentional discrimination,” and “the interest in diversity in higher education” as upheld in *Grutter*, supra. See *PICS*, supra, 551 U.S. 701. So even if some form of diversity at the elementary and secondary school level could qualify for such treatment, the Defendants have not even alleged an interest that could be considered “compelling.” If anything, the interests they seek to serve run in the opposite direction since the Defendants’ rezoning decreases diversity.

4. As this Court stated in its Memorandum opinion on the motions to dismiss and for summary judgment in this case (Document 308): “When the government uses explicit racial classifications for the distribution of benefits, discriminatory intent is presumed, and those policies are always subjected to strict scrutiny.” *Anderson v. City of Boston*, 375 F.3d 71, 82 (1st Cir. 2004), citing with approval *Personnel Administrator of Mass. v. Feeney*, supra at 272.” The use of race as the primary basis for assignment of students is plain on the face of the challenged rezoning plan, and

so it is clear that strict scrutiny is required. The Court should review Defendants' rezoning plan under the strict scrutiny standard. As stated by the Court in Document 308:

If applicable, strict scrutiny requires Defendants to show their plan "is 'narrowly tailored' to achieve a 'compelling' government interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). There are two possible avenues by which the Court can conclude that strict scrutiny applies. First, "[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Cmty. Schs.*, 551 U.S. at 720. This inquiry seeks out "explicit racial classifications for the distribution of benefits." See *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 82 (1st Cir. 2004). Second, where the government action is race-neutral on its face, strict scrutiny will still apply if the policy has a discriminatory effect and discriminatory purpose. See *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). Sources of evidence relevant to discerning the existence of discriminatory intent include the historical background of the decision, the sequence of events leading up to the decision, departures from normal procedure, departures in the substantive factors considered, and the legislative or administrative history. *Vill. of Arlington Heights*, 429 U.S. at 267-68. The mere awareness of a program's discriminatory effect, without more, does not amount to discriminatory intent. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *United States v. Thorpe*, 471 F.3d 652, 661 (6th Cir. 2006).

Plaintiffs rely on *Lewis v. Ascension Parish School Board*, 662 F.3d 343 (5th Cir. 2011) (per curiam). As this Court stated in its Memorandum (Doc.308):

In *Lewis*, the district court had refused to apply strict scrutiny to a race-neutral plan that reassigned students based on geographical location. *Id.* at 349. Nonetheless, evidence in the record indicated that the school board members considered the race of reassigned students so as to preserve the racial balance in existing schools and maintain the district's unitary status. *Id.* The Fifth Circuit found "troubling" any consideration of race, in light of the Supreme Court's decision in the *Parents Involved* case. *Id.* Ultimately, the court was able to decide the case on other grounds, remanding for further factual findings on the question of discriminatory impact and motive.

Here the proof on explicit racial classification is clear (see paragraphs 10-21 of FOF above).

5. In the alternative, if the Court considers the rezoning plan to be facially neutral, then as the Court stated in its Memorandum (Doc.308):

"an inquiry into intent is necessary to determine whether the legislation [or official action] in some sense was designed to accord disparate treatment on the basis of racial considerations."

Washington v. Seattle School District, 458 U.S. 457, 484-485 (1982). The Supreme Court has enumerated several factors relevant to this inquiry, including (but not necessarily limited to) “the degree of disproportionate racial effect, if any, of the policy; the justification, or lack thereof, for any disproportionate racial effect that may exist; and the legislative or administrative historical background of the decision.” Arlington Heights, supra at 266-268.

Or the plan may simply be "unexplainable on grounds other than race." Id. at 266. The consideration of these factors calls for the application of strict scrutiny and a decision that the rezoning plan, as applied, violates the Constitution.

6. A disproportionate racial effect can be evidence of an invidious discriminatory purpose. Anderson v. City of Boston, supra at 88-89. And “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law [or policy] bears more heavily on one race than another.” Washington v. Davis, supra at 242. In this case it is almost exclusively black children who are being maintained in or removed to racially identifiable, racially isolated, and socioeconomically deprived public schools under the challenged policy.

7. The Defendants attempt to offer other, purportedly non-racial justifications for the adoption and implementation of the challenged rezoning plan. But “[b]enign intentions do not immunize government action” from strict scrutiny where, as here, the policy or plan at issue employs racial classifications and otherwise evinces racial discrimination in the provision of public educational services. Anderson v. City of Boston, supra at 85; Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998). Nor are such policy or operational considerations likely to rise to the level of a compelling interest required under PICS, supra, to justify the assignment of students on the basis of race. Further, the shifting justifications in this case by the Defendants call the credibility of these Defendants into question and such “shifting justifications” of Defendants are evidence of pretext.

Cicero v. Borg-Warner Automotive, Inc., 280 F.3d 579, 592 (6th Cir.2002). As the Court ruled in Yick Wo v. Hopkins, 118 U.S. 356 (1886):

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

8. Courts have adopted measures of what is an unacceptably racially imbalanced school that range from 40% to 90% of the racial group at issue in the enrollment of a particular school (see FOF paragraphs 22-24 above). Dr. Leonard Stevens, the Defendants' expert on this issue was quoted in *Mannings v. School Board of Hillsborough County*, 1995 U.S. Dist. LEXIS 22267 at 25 (M.D. Fla. 1995) (subsequent history omitted) as saying "once you get schools that are running 20 points or more at variance from the district-wide average, racial identifiability is a fact of life and becomes a reality for that school." See also *Stell v. Board of Public Education*, 860 F. Supp. 1563, 1571-1574, 1582 (S.D. Ga. 1994) (utilizing a plus-or-minus 20% standard). On the other hand, in *Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir. 1987), the court declined to decide whether an 80% or a 90% enrollment makes a school racially identifiable, while saying that 75% was too low a figure for the Boston schools and noting that there were very few identifiable schools by either definition. In *Tasby v. Wright*, 713 F.2d 90, 97 n.10 (5th Cir. 1983), the court noted that the trial judge had defined a "one-race" school as one with a student body that was 90% or more composed of either Anglo or "combined minority races," while a "predominately one-race school" was one with a 75/25 racial ratio. In Nashville, where the overall percentage of black children is 47.5% (as against 33% white), it does not seem that the highest threshold (90%) is appropriate for the term "racially isolated," but rather that 80% is more than adequate to connote a very high level of minority and racial concentration. See also,

NAACP v. Duval County Schools, 273 F.3d 360 at n. 4 (11th Cir. 2001) where the Court used 75% as the proper benchmark for racial isolation in the Florida case in which Defendants' expert Mueller testified.

9. Professors Goldring and Smrekar of Vanderbilt University, who have chronicled Nashville's school racial composition for more than a decade, have it right when they categorize district schools with 80 to 100% black enrollments as "racially isolated Black," and those with 60 to 80% black enrollments as "predominantly Black." Pl. Ex. 129 at 22-25. Plaintiffs' expert Dr. William Rock utilized the same definition of a "racially isolated" school with respect to the Nashville system. Tr. Vol. 2 at 190. This discussion is somewhat academic, in any event, in connection with the pending motion for a preliminary injunction since the relevant schools in the Pearl-Cohn cluster (and many elsewhere) all had student bodies that were more than 90% black in the 2009-10 school year under the Defendants' rezoning plan. Pl. Ex. 123 at 5-6. And of course, a school can be racially identifiable or de jure segregated without necessarily being considered racially isolated in these terms.

10. Defendants assigned and reassigned students on the basis of race, not for a compelling or any other legitimate government objective, but for the purpose and with the effect of increasing and enhancing the racial separation and segregation of the public schools. The evidence shows this was done purposely and deliberately by the Defendants in order to remove black students from the relatively diverse Hillwood and Hillsboro schools and add them to the already racially isolated schools in the Pearl-Cohn cluster, while at the same time adding white students to the Hillwood and Hillsboro districts (or leaving spaces vacant), all so that middle-class white students and their families would feel more comfortable about enrolling in or returning to the Nashville public schools. This conduct by Defendants is a violation of the Fourteenth

Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 168 L.Ed. 2d at 523.

11. By proper declaratory and injunctive relief on behalf of the class and individual plaintiffs and against the defendants, their officers and agents, this Court should declare that said defendants, by adoption and implementation of the 2008 Student Assignment Plan which became effective in the fall of 2009, have intentionally discriminated against plaintiffs and the class by assigning them to schools on the basis of race for purposes of segregation and without any legitimate or compelling justification. The Court should conclude the rezoning plan violated the 14th amendment by applying the strict scrutiny standard both because the rezoning employs racial classifications and because the rezoning has a discriminatory effect and discriminatory purpose. In the alternative, even by a lesser standard than strict scrutiny, the Court should conclude the rezoning violates the 14th amendment.

12. The Court should enter an injunctive order as follows: permanently enjoining the application of the rezoning plan voted on July 8, 2008 to the members of the plaintiffs' class; permanently enjoining the defendants and their officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation with the defendants or their officers, agents, servants, employees, and attorneys, from approving, licensing or operating any school, whether public, charter or vouchered whose student enrollment is more than 80% one race or ethnicity or whose projected student enrollment is more than 80% one race or ethnicity; and requiring the appointment of an interim monitor recommended by the plaintiffs to supervise the defendants to insure removal and prevention of racially segregative schools, policies and programs and requiring the defendants to appoint a full-time internal monitor acceptable to plaintiffs, at the level of Deputy Director of Schools reporting directly to the

Director of Schools, who will ensure the removal and prevention of racially discriminatory policies and programs, oversee the development of plans and strategies for that purpose, serve as liaison between the district and the plaintiffs (and through them the Court), and otherwise work to ensure that diversity issues are considered and included in all aspects of school district operations; requiring the defendants to develop within 30 days the plans, action steps, and timetables necessary (a) to return all affected students as nearly as possible to the diverse schools they attended prior to implementation of the 2008 Student Assignment Plan (or which they would now be attending but for that plan) or (b) to create a mega-cluster composed of the current Pearl-Cohn, Hillwood, and Hillsboro administrative clusters and assign students therein so as to achieve the maximum possible diversity within the rules required by PICS v. Seattle or (c) to develop and implement some other mode or method of student assignment that will achieve equivalent results and (d) in any such plan to ensure the elimination of 80%-plus one-race schools to the maximum extent possible.

13. In addition, any such plan should also address the recommendation of defendants' expert Dr. Stevens to "monitor the racial composition of [their] magnet schools and design centers so that all are or will become racially diverse and thus serve as integration models for the District," through, inter alia, the use of geographic preferences where appropriate and all necessary transportation services. The new plan should provide also any student residing in the cluster within 3.5 miles of the academic magnet high schools (M.L. King and Hume Fogg) who meet the academic requirements have the right of assignment to said magnet schools for the 2012-2013 school year and thereafter . The defendants will also organize and provide school bus routes and other free transportation to and from a centrally designated location in Bellevue, Hillwood, Hermitage, Goodlettsville, Madison, Antioch, Brentwood, Forest Hills, Oak Hill, and

Green Hills for any elementary magnet and middle school magnet schools in the existing Pearl Cohn cluster for students choosing said schools. The defendants will also adopt a policy of assignment of the highest rated faculty and principals in MNPS to the schools with the highest rates of FARM eligibility and with the lowest academic achievement scores.

14. The internal monitor should be empowered and required to certify all charter schools approved by or for the district that the establishment and operation of such school will not interfere with or diminish any plaintiff's access to a diverse educational experience, and if unable to certify the same, to bring his or her concerns to the attention of plaintiffs and the Court.

15. Plaintiffs ask the Court to schedule a status conference to be held shortly after the plans required above have been developed and submitted to address questions of adequacy of defendants' planning and compliance efforts and the need for additional remedial measures.

16. Counsel also request such other, further, or different relief as the Court may deem proper, including but not limited to costs and disbursements by plaintiffs and reasonable attorneys' fees as the prevailing party.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the this document was sent by the Middle District Court electronic filing system to James L. Charles, Kevin C. Klein, Keli J. Oliver, James W.J. Farrar, Allison Bussell, John Borkowski and Elizabeth A. Sanders on the 25th day of June 2012.

/s/ Larry Woods

