No. 99-60846

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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JOAN ANDERSON and JUDY LYNN ANDERSON, minors, by their mother and next friend, Mrs. Bessie Anderson; JUANITA BENNETT, MARY LEE BENNETT and ARCHIE LEE BENNETT, minors, by their father and next friend, Mr. James Bennett; et al.,

Plaintiffs-Appellants

and

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellant

v.

THE CANTON MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Defendants

SCHOOL BOARD OF MADISON COUNTY; ROBERT E. COX, Superintendent of Education; HAROLD E. DACUS, Assistant Superintendent of Education; M.L. DEWEES, President; HAROLD H. WHITE, JR., Secretary; E.L. HENDERSON; M.C. MANSELL; E.W. HILL,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

_____

BRIEF FOR THE UNITED STATES AS APPELLANT

_____

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STATEMENT REGARDING ORAL ARGUMENT

This latest appeal in this longstanding school desegregation case challenges the district court's Order approving the Madison County School District's plan to build a new high school in the predominantly white Ridgeland community despite strong evidence showing that the plan will perpetuate an inequitable travel burden on black students, and that the plan was not developed to further desegregation as required by prior court orders and federal law. The district court's factual findings supporting its decision are clearly erroneous. The United States believes that oral argument is necessary to fully resolve this issue.

CERTIFICATE OF INTERESTED PERSONS

United States v. Madison County School District, No. 99-60846 (5th Cir.)

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

_____
Lisa Wilson Edwards
Attorney of record for United States

Joan Anderson and Judy Lynn Anderson, minors, by their mother and next friend, Mrs. Bessie Anderson

Juanita Bennett, Mary Lee Bennett, Archie Lee Bennett, Robert Lee Bennett, Frankie Lee Bennett and Willie Bennett, minors, by their father and next friend, Mr. James Bennett

Bettie Solis, Woodrow Solis, John L. Holston and Willie L. Holston, minors by their grandmother and next friend, Mrs. Luolla Chambers

Alex William Devine, minor, by his mother and next friend, Mrs. Annie Devine

Wyatt Adams George, Johnnie Lee George, Nola V. George, Kenneth George, Levon George and Beverly George, minors, by their mother and next friend, Mrs. Frances D. George

Gladys Dinkins and Joycetta Luckett, minors by their mother and next friend, Mrs. Lessie Luckett

James L. McCullough, minor by his father and next friend, Mr. W.E.L. McCullough

John Arthur Anderson, Jerome Anderson, and Sylvia Anderson, minors by their mother and next friend, Mrs. Mardee Reid

Lola Marnett Phillips, Arenda Phillips, Fay Dell Phillips, J.D. Phillips, Jr., and Lionel Phillips, minors, by their mother and next friend, Mrs. Kittrene Phillips

Georgia Mae Reid, George Washington Reid, Jr., and Pearl Lee Reid, minors, by their father and next friend, Mr. George Washington Reid

William Lewis Watson and Paul R. Watson, minors, by their mother and next friend, Mrs. Julia M. Small

Margoree Washington, Carrie Jean Washington, Truitt Washington, Walter Lee Washington, Joe Ruby Washington and Shirley Ann Washington, minors, by their father and next friend, Mr. Ben J. Washington

Jimmie Mae Washington, Joe Earl Washington, T.J. Washington, William Washington, C.D. Washington and Dorothy Jean Washington, minors, by their father and next friend, Mr. Frankie B. Washington

Carrie Nell Williamson and Sugar Ray Williamson, minors, by their father and next friend, Mr. Harvey Williamson

Madison County School District, Madison County, Mississippi

Robert E. Cox, Former Superintendent of Education, Madison County School District

Harold E. Dacus, Former Assistant Superintendent of Education, Madison County School District

M.L. Dewees, Jr., Former President, Madison County School Board

Harold H. White, Jr., Former Secretary, Madison County School Board

E.L. Henderson, M.C. Mansell and E.W. Hill, Former members, Madison County School Board

Mary McDonald, Current President, Madison County School Board

Shirley Simmons, Current Secretary, Madison County School Board

Burt Jackson, Ken McCoy, current members, Madison County School Board

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No. 99-60846

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Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS APPELLANT

APPELLATE AND SUBJECT MATTER JURISDICTION

The district court had jurisdiction of this school desegregation suit under 28 U.S.C. 1331, 1343, and 1345. On September 21, 1999, the district court granted the Madison County School District's motion to modify its desegregation plan and approved its proposal for new construction and renovation of school facilities. Appeals from the district court's order were

timely filed by the United States and private plaintiffs on November 19, 1999. This Court has jurisdiction under 28 U.S.C. 1292(a)(1) of this appeal from the district court's order modifying an injunction.

STATEMENT OF THE ISSUE PRESENTED

Whether, based upon errors both of law and fact, the district court abused its discretion in approving the school district's plan to construct a new high school in the predominantly white Ridgeland community.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

This appeal arises from a longstanding school desegregation suit brought by the United States and private plaintiffs. In 1969, 30 school districts in the Southern District of Mississippi, including the Madison County School District (MCSD), were ordered to dismantle their dual school systems based on race. Anderson v. Hinds County Sch. Bd., 423 F.2d 1264 (5th Cir. 1969). Since the 1969 desegregation order, the MCSD has come under other desegregation orders and consent decrees setting out objectives for eliminating the vestiges of its former dual school system.

On May 12, 1998, county voters approved a $55 million bond issue for the construction and renovation of county school facilities (Def. Exh. 131).[1/] The bond issue was validated by

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[1/] "R. __" refers to the numbered record documents listed in the district court docket sheet that is Tab 1 of the United

(continued...)

the Chancery Court of Madison County on September 9, 1998 (Def. Exh. 129).

With the passage of the bond issue, the MCSD moved, on October 7, 1998, to modify its desegregation plan, and sought approval of its proposed plan for new school construction and renovation (R. 3016). The plan included a proposal to construct a new high school in the predominantly white Ridgeland community. The United States and private plaintiffs opposed the school district's plan, arguing that for various reasons the plan violated the 1969 desegregation order, consent judgments, and federal law because, inter alia, it failed to further desegregation and distribute the travel burdens equitably between black and white students (R. 3031). The district court conducted a seven-day hearing on the plan (R. 3375).

On September 21, 1999, the district court entered its Memorandum Opinion and Order granting MCSD's motion and approving the plan with significant reservations (R. 3404 (see also U.S. Rec. Exc. Tab 2)). The United States and private plaintiffs appealed from the district court's order, and the United States moved the district court to stay its order pending appeal

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[1/](...continued)
States' Record Excerpts filed with this brief. "U.S. Rec. Exc. Tab __" refers to the tabbed items in the United States' Record Excerpts. "Tr. ___" refers to pages of the transcribed hearing held from May 17 to May 25, 1999. "Plt. Exh. __" refers to the United States' and private plaintiffs' numbered exhibits. "Def. Exh. ___" refers to defendant's numbered exhibits. "Order at ___" refers to pages in the district court's Memorandum Opinion and Order (dated Sept. 21, 1999), that is Tab 2 of the United States' Record Excerpts.

(R. 3531, 3533, 3538). The district court granted the United States' motion for stay on December 17, 1999.

Following the filing of notices of appeal, the parties began discussions to settle the issues on appeal in this case. On April 7, 2000, the MCSD school board approved a settlement agreement reached by the parties. The agreement settled all of the issues on appeal except one. The single outstanding issue that the parties were unable to resolve relates to the location of the new high school. The parties jointly moved for a partial remand of this case to effectuate the settlement. By that motion, the parties sought to have this Court remand a part of this case to the district court to effectuate the settlement agreement, and allow the parties to litigate in this Court the sole remaining issue, i.e., the location of the new high school. This Court granted that motion on April 17, 2000. The district court approved the parties' consent decree on April 24, 2000.

B. Statement Of Facts

1. Structure Of The Madison County School District. The MCSD is located north of the state capital, Jackson, and is bisected north and south by Interstate 55. The school district forms a "U" shape around the county seat of Canton, which has its own municipal school district. The MCSD is divided into three zones: Zone I is located in the northeast part of the county and is rural with only a few small towns; Zone II is located in the southern part of the county and includes the cities of Madison and Ridgeland; and Zone III is located in the western part of the

county, is rural, and includes the town of Flora (Order at 3-4; Def. Exh. 91). The MCSD enrolled a predominantly black student population until the late 1980's. In the last decade the student population has become increasingly white, due to the growth in population in the Madison and Ridgeland areas.

The MCSD has a white student population of 66%, a black student population of 32%, and 2% of the students are of "other" races (Order at 12). The school district operates ten schools, as follows (Order at 11):

School	Grades
Luther Branson Elementary	K-5
Velma Jackson[2/]	K-5 6-8 9-12
Ridgeland Elementary	K-2
Olde Towne Elementary	3-5
Olde Towne Middle	6-8
Madison Station Elementary	K-5
Madison Avenue Elementary	K-5
Rosa Scott Middle	6-8
East Flora Elementary/Middle	K-8
Madison Central High School	9-12

[2/] Velma Jackson operates three separate divisions at one campus.

The schools are configured in the following "feeder pattern" (Order at 12):

Zone I

Luther Branson K-5 Velma Jackson K-5	Velma Jackson 6-8	Velma Jackson 9-12

Zone II

<table>
<tr><td>Ridgeland Elem. K-2</td><td>Olde Towne Elem. 3-5</td><td>Olde Towne Middle 6-8</td><td rowspan="2">Madison Central 9-12</td></tr>
<tr><td>Madison Station K-5
Madison Avenue K-5</td><td colspan="2">Rosa Scott Middle 6-8</td></tr>
</table>

Zone III

East Flora K-8	Madison Central 9-12

During the 1998-1999 school year, the racial composition of these schools was as follows (Order at 12):

School	Students			
	White	Black	Other	Total
Luther Branson Elem.	7 (2%)	290 (98%)	0	297
Velma Jackson	8 (1%)	984 (99%)	0	992
Ridgeland Elementary	440 (73%)	141 (23%)	22 (4%)	603
Olde Towne Elementary	451 (79%)	100 (18%)	18 (3%)	569
Olde Towne Middle	413 (74%)	121 (22%)	27 (4%)	561
Madison Station Elem.	694 (75%)	208 (23%)	22 (2%)	924
Madison Avenue Elem.	1004 (87%)	138 (12%)	14 (1%)	1156
Rosa Scott Middle	794 (79%)	201 (20%)	14 (1%)	1009
East Flora Elem./Middle	56 (12%)	399 (88%)	0	455
Madison Central High	1338 (72%)	500 (27%)	27 (1%)	1865
Total	5548 (66%)	2739 (32%)	144 (2%)	8431

2. Consent Judgments. In 1987, the United States moved to enforce the desegregation orders entered by the courts against the MCSD. On August 5, 1988, after the United States, MCSD, and private plaintiffs reached an agreement, the district court entered a consent judgment that required MCSD to make improvements that would eliminate the racial identifiability of schools based on the racial composition of faculty and staff, to develop a plan for the full implementation of the county's majority-to-minority transfer policy, to ensure a uniform opportunity of course offerings to all students throughout the

school district, and to file periodic status reports with the court (R. 1592).

Another consent judgment, entered December 15, 1989, set out, among other things, the agreement for MCSD to construct and renovate the county schools, and ordered that the new construction and renovation not "contribute to the reoccurrence of a dual school structure within the District" (R. 1874). Pursuant to Singleton v. Jackson Mun. Separate Sch. Dist., 412 F.2d 1211 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970), the consent decree also required that school assignments of principals be made in a manner that would eliminate the racial identifiability of the district schools.

The MCSD continued to be in noncompliance with the district court's remedial orders. Pursuant to agreement of the parties, the district court entered another consent judgment on April 5, 1990, authorizing school construction and renovation (R. 2919). The 1990 Consent Judgement also required that experts be designated to review the school district's high school curriculum to document any disparities between the schools, and develop a plan to remedy any curriculum disparities that may exist at the Velma Jackson High School. The judgment required MCSD officials to develop a comprehensive magnet program at the historically and predominantly black Velma Jackson High School that would attract students of other races to enroll full time, and enhance the curriculum at the school.

3. Bond Referendum. In 1997, school board officials

began developing a school construction plan as part of a $49 million bond issue to present to voters. The bond referendum was submitted to the Department of Justice for preclearance pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c. On April 1, 1997, the Board withdrew the referendum prior to a public vote, because the school district had not obtained preclearance from the United States Attorney General (Def. Exh. 133; Tr. 796 (Miller)). A year later, on March 5, 1998, school officials approved a new bond initiative for $55 million for the construction and renovation of county schools (Def. Exh. 134). Following preclearance by the United States Attorney General, county voters approved the general obligation bond issue on May 12, 1998 (Def. Exh. 131).

The bond issue was subsequently challenged in Chancery Court by Flora residents, but the challenge was settled (Tr. 646-648 (Jones)). On September 9, 1998, the bond was validated by the Chancery Court of Madison County (Def. Exh. 129).

C. Hearing On MCSD's Motion To Modify Desegregation Plan

On October 7, 1998, MCSD moved to modify its desegregation plan to build new school facilities, and to renovate existing schools (R. 3016). The United States and private plaintiffs opposed the motion (R. 3031). The district court conducted a seven-day hearing on MCSD's motion to modify the desegregation plan (R. 3375). The following primary witnesses testified about, among other things, MCSD's failure to consider its desegregation obligations in formulating its plan for new construction, its

failure to evaluate alternative sites for locating the new high school, its failure to create pupil locator maps, the inequitable commuting times for black and white students attending Madison Central High School, and the inadequate process that MCSD undertook in projecting future student enrollment in the county.

1. School District's Witnesses. MCSD officials hired Gary Bailey as a consultant to develop the plan for new construction and renovation of the county's schools (Tr. 45-48). Bailey is not a demographer (Tr. 51), did not review the desegregation orders or consent judgments, and testified that he has no understanding of the school district's desegregation obligations (Tr. 55, 161; see also Tr. 1132-1133 (Garvin)). He testified that he was responsible for determining a site for the new high school that would relieve overcrowding at the existing Madison Central High School (Tr. 38). In making site decisions, Bailey did not use or create any pupil locator maps, which would show where black and white students live within the county (Tr. 56, 135, 193), and he made no determinations as to the commuting times for black and white students attending Madison Central High School (Tr. 56, 208-209, 216). Bailey admitted that he was unaware that 63 black children commuting from Flora travel 2-1/2 hours each way to attend Madison Central High School (Tr. 208-210, 214; Plt. Exh. 136). He conceded that using a pupil locator map would have informed him of this travel burden, and that he did not have this information when he developed the school district's plan for new school construction (Tr. 210, 214-215).

Bailey also stated that in formulating the MCSD's proposal for new schools, he relied on student enrollment projections given to him by James Reeves, MCSD's facilities director (Tr. 177-178). Bailey did not analyze the underlying assumptions that served as the basis for the enrollment projections (Tr. 178). The underlying data and the assumptions that formed the enrollment projections were prepared by a secretary to the school superintendent; the secretary was not a demographer and had no expertise in preparing enrollment projections (Tr. 831-832, 834 (testimony of Reeves)).

Bailey testified that while the plan was being formulated, he told parents at public hearings that no site had been selected for the new high school (Tr. 144). However, evidence at trial showed that when Bailey was developing the MCSD's plan for new school construction, he never analyzed the costs for constructing a new high school at any location other than the Ridgeland site (see Def. Exhs. 8, 9, 11, 12, 19, 20, 22, 23, 27, 29, 30, 31, 33, 36).[3/] While Bailey stated that the school district "discussed" other options for locating a new high school, no documents were created that fully analyzed the feasibility of any alternative

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[3/] Bailey testified that while providing consulting services for MCSD, he had a pre-existing work relationship with Holmes Community College (HCC) (Tr. 173). Bailey stated that officials at HCC had encouraged him to enter into a consulting contract with MCSD, and that HCC wanted MCSD to locate the new high school at the location in Ridgeland next to HCC (Tr. 172-173; Order at 93). HCC officials explained to Bailey that MCSD and HCC were interested in developing an "interlocal agreement" that would allow a new Ridgeland high school located next to HCC to gain "maximum benefit" by sharing share facilities and other resources with HCC (Tr. 172-173).

site (Tr. 99, 169-179).[4/] Moreover, Bailey's contract with MCSD reflects that he was retained for the specific purpose of analyzing the feasibility of the Ridgeland site (Def. Exh. 36; see also Tr. 1588). Bailey stated that school officials did not want to build a school on county-owned property at the 16th section parcel on Route 463 — which is about midway between the predominantly black Flora community and predominantly white Ridgeland and Madison communities (see Plt. Exh. 84). Without having analyzed the feasibility of the site, Bailey testified that the location was not appropriate because it had no utilities and was near a highway (Tr. 101). Bailey admitted, however, that there is some development along Route 463, northwest of Madison just beyond the 16th section parcel (Tr. 216). Bailey stated that school officials had considered that land for locating a new middle school (Def. Exh. 20; Tr. 186-187), but were concerned about the "saleability" of locating a school close to the predominantly black Flora community (Tr. 189). Bailey testified that school officials were concerned that white parents would not

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[4/] On the last day of the hearing, MCSD presented Gary Bailey as a rebuttal witness. Bailey was permitted to again testify about whether school officials considered any alternative sites for the new high school. Despite having testified earlier in the proceeding that no analysis was done of any alternative sites, he testified on rebuttal that on the same day that he entered into a consulting contract with MCSD (Def. Exh. 36), he attended a meeting with other consultants working for the school district where they discussed two sites at the 16th section parcel (Tr. 1568-1569, 1584-1585; Def. Exhs. 144(a), (b), and (c)). However, Bailey testified further that an analysis of the effects that MCSD's plan would have on the transportation burden of students, or the desegregative effects of the plan, was "excess information" and "was not required" in formulating the county's plan for new school construction (Tr. 1581-1583).

want their children transported to the western part of the county to attend school with a greater percentage of black children (Tr. 189).

When developing the plan, Bailey did not determine the distance that students would travel to the Route 463 location if the new high school was located there (Tr. 217). Bailey testified that during public meetings with Flora parents, it was apparent that black parents were angry that their children traveled such a long distance to attend high school (Tr. 218, 233). In 1997, East Flora parents submitted a report to the school district outlining their community's education needs (Tr. 233; Plt. Exh. 159). Bailey stated that he did not consider the views expressed in this document when formulating the MCSD's plan for new construction and renovation (Tr. 233).

The school district's expert, Michael Bridge, explained the racial makeup of the three county zones, and the population growth experienced within the county (Tr. 280-299, 304; Def. Exh. 74, 91, 92, 102, 111). He stated that the proposed high school in Ridgeland would reduce the number of students attending Madison Central by 500, and that the racial makeup of each school would be about 72% white and 25% black (see Tr. 309-310; Def. Exh. 85). He stated that constructing a new high school in Ridgeland would not increase the transportation burden on Flora students, and would shorten the travel time for high school students residing in Ridgeland (Tr. 311-312). He admitted that the new Ridgeland school does not benefit the large number of

black students traveling from Flora because they must continue to travel into Madison to attend school (Tr. 417-418).

On cross-examination, Bridge admitted that when he was hired by MCSD in mid-December 1998 -- two months after the school district filed its motion to modify the desegregation Order in October 1998 -- the school district never asked him to examine any attendance zone configurations other than zone changes required for locating a new high school at the Ridgeland location (Tr. 273, 348). Bridge agreed that pupil locator maps are important tools that should be used when deciding where to locate new schools, and that the school district had not developed this kind of map prior to selecting locations for new school facilities (Tr. 346). Like Bailey, Bridge also stated that he is unfamiliar with the school district's desegregation obligations with respect to transportation and facilities (Tr. 349, 440). Not only did Bridge testify that significant development around Madison Central High School did not occur until after the high school was built, he also agreed that as a general matter school construction encourages residential and commercial development (Tr. 445; Def. Exhs. 109, 110).

Sue Jones, Superintendent of MCSD, testified that school officials talked in March 1997, prior to retaining Gary Bailey as a consultant to the project, about locating the new high school at the 16th section parcel at either Route 463 or at Livingston Road, but that no studies were done to assess the feasibility of these sites (Tr. 484-485, 526; see also Tr. 48 (testimony of

Bailey)). She also stated that no formal studies were conducted on the effect that the bond issue (i.e., the school district's plan for new construction) would have on desegregation (Tr. 507). She testified that constructing a new high school in Ridgeland would reduce the commute of Ridgeland students by 2-1/2 miles (Tr. 508), but admitted that it would do nothing to reduce the lengthy commute by black Flora students (Tr. 638). Jones stated that the only school board member to vote against the bond issue was Shirley Simmons, who represents the Velma Jackson and Flora communities and is the only black member of the school board (Tr. 528-529). She stated that black parents attending public meetings at Velma Jackson and Flora opposed the school district's construction plans (Tr. 528-529). She stated that the Velma Jackson parents wanted to discuss other options (Tr. 528-529). Despite the views of the Velma Jackson parents, Jones testified that during the formulation of the plan school officials made clear that they did not want to change attendance zones (Tr. 538, 623).

Lee Douglas Miller, president of the MCSD school board, testified about the process of developing the plan for new construction. While he knew that the school district is under a desegregation order, he admitted that he never read the orders or the consent judgments (Tr. 740-741). He stated that in developing the proposal for new school construction and renovation, the school district's objectives were to eliminate overcrowding and improve the administration of schools (Tr. 729). The school district initially planned to split Madison Central

High School by creating a ninth grade annex, and creating an upper high school and lower high school (Tr. 729). He stated that at public meetings at Madison Avenue Elementary School, parents expressed their interest in a new high school facility (Tr. 732). He stated that the MCSD Facilities Director, James Lee Reeves, was responsible for locating sites for new schools (Tr. 736). He stated that the school district considered two sites on the two 16th section parcels (Route 463 and Livingston Road), but rejected them because of the "remote" locations. With respect to the Route 463 location, Miller testified that the site was rejected because of the lack of water and sewer services, and the board's concern about access to fire and police protection (Tr. 734). He stated that prior to the 1997 bond proposal, the school board looked at student populations, racial makeups, and costs, but did not create student locator maps (Tr. 747-748). He stated that the school board decided early in the planning process that it would not change any attendance zones (Tr. 748), except for the zone that would allow for students to attend the new Ridgeland High School (Tr. 749-750). Miller admitted that school board members had settled on the Ridgeland location as the site for the new high school many weeks preceding the March 17, 1997, school board vote on the $49 million bond issue (Tr. 753-757; Plt. Exh. 59).

Miller stated that no comparative study was done to analyze the transportation burden that the new Ridgeland school would have on black and white students (Tr. 759-760). He was not aware

of the transportation burden on the black Flora students traveling to Madison Central High School until this litigation, and he agreed that the black Flora students spend an inordinate amount of time on the bus commuting to and from high school (Tr. 761; 765-766). Miller admitted that the MCSD did not hire a desegregation expert to assist in formulating a plan for the bond issue, because the school district's interest was in eliminating the overcrowding (Tr. 785-786). Despite the continued racial identifiability of the historically black schools, Miller testified that school officials did not want to disturb the status quo at the county schools, and he agreed that in order to "sell" the bond issue the board could not propose any rezoning (Tr. 785-788).

2. United States' And Private Plaintiffs' Witnesses. The United States presented as its initial witness James Lee Reeves, director of facilities for MCSD (Tr. 805-806). Reeves was hired by MCSD to assist in developing the bond issue and the school district's plan for constructing new schools (Tr. 809-812). Reeves testified that he started drawing up proposals for the 1997 bond issue in December 1996 (Tr. 816). While working on the bond issue, he stated that he never developed a proposal for building a new high school at any location other than the Ridgeland site (Tr. 813-816, 868). He testified that he worked closely with consultant Gary Bailey on the bond issue (Tr. 869), and that each of the three draft documents prepared by Bailey proposed a new high school only at the Ridgeland site (Tr. 873-

876; Plt. Exhs. 26, 27, 28). He stated that he did not have the completed bus routes list and did not evaluate transportation burdens imposed on black and white students when developing the plan for locating the new high school (Tr. 881). He never discussed with school officials any proposal that would entail changes to the attendance zone lines (Tr. 817), and he stated that the school board did not consider altering attendance zones because of the political implications of doing so (Tr. 884-885).

In evaluating the population growth for each school zone, Reeves stated that he relied on enrollment projections prepared by the secretary for school superintendent Sue Jones (Tr. 831-832; see also Tr. 775-780 (Miller)). He admitted that the secretary is not a demographer (Tr. 831-832). The growth rates that he relied on for each zone were based on the secretary's simple calculations, which estimated growth for each zone at between eight and ten percent (Tr. 834).

The United States' expert witness, Kelley Carey, is a demographer and school facilities planner. He has worked as a planner and demographer for school systems and their facilities for over 25 years (Tr. 910; Plt. Exh. 82). Carey has advised school districts on issues related to site selection and bond issues, program development, and comprehensive long-range planning, including overseeing program management during the construction of bond issues (Tr. 910-911). He has worked throughout the United States for school districts with student enrollments ranging from 7,000 to 100,000 students (Tr. 911). He

has also engaged in extensive demographic work, including: assessing the capabilities of existing facilities; determining where students are located throughout school districts; developing computer mapping of students; studying enrollment histories and trends; and developing enrollment projections (Tr. 912).

Carey testified about the desegregative effect of MCSD's plan for new construction (Tr. 909). He prepared a pupil locator map using information from local maps, zoning documents, and student addresses (Tr. 930-931). Carey testified that locating a new high school in Ridgeland does little in terms of accounting for growth, and does not further desegregation (Tr. 970-976). He testified that MCSD has a responsibility to respond to long-term demographic changes in the county (Tr. 989-988, 991). He stated that the Ridgeland location, which is south of the existing Madison Central High School, is in the southern "funnel" within the county (Tr. 987-988; see also Def. Exh. 102). Carey also testified that locating the new school within the southern "funnel" of the county limits the school district's flexibility with respect to meeting future needs (Tr. 990; Plt. Exh. 83 at p. 17 & Chart A-5 (see also U.S. Rec. Exc. Tab 5)). It also limits MCSD's future ability to address transportation burdens in Flora (Tr. 1001-1002). Carey reported that

> [t]he proposed location for the new high school is at the extreme south of the school district area, somewhat in a funnel area of the bottom of the district map. The existing Madison Central High School guards the entrance to that funnel from the rest of the school district. It would be imprudent to plan for a future zone that bypasses the

> existing school in order to justify the location of a new one [Plt. Exh. 83 at p. 17].

Carey concluded that "placing a new school in the Ridgeland zone creates the typical problem of an 'in-fill school' that comes in behind other existing schools to serve a relatively small and circumscribed area" (Plt. Exh. 83 at pp. 17-18). He stated that these kinds of schools are "subject to early obsolescence or under-utilization because of the difficulty of rezoning new growth areas into the school" (Plt. Exh. 83 at pp. 17-18). Carey anticipated that by constructing a new high school in Ridgeland, MCSD could never justify constructing a new high school in the 16th section parcel at Route 463 in the northwest portion of the county in the future (Tr. 999-1000).

Carey also testified on the merits of constructing a new high school at the alternative 16th section parcel site located at Route 463. He reported that the Route 463 location is a good site because it can serve a larger number of students (Plt. Exh. 83 at pp. 18-19). He testified that attendance zones could be drawn horizontally across the county (See Plt. Exh. 84; Tr. 1005), and that this attendance zone could, for example, shift up or down as demographics change (Tr. 1012-1013). Carey also stated that sewer and water service can easily be provided at the site (Tr. 1007; Plt. Exh. 83 at p. 18), and that police and fire can reach the site within ten minutes (Tr. 1008, 1084-1085).

Carey reported that locating the new high school at Route 463 gives MCSD "more flexibility to respond to growth," allows for "greater rezoning flexibility in the future," does not

"obviate any future high school locations to respond to unforeseen population growth," and "greatly reduces the travel burden of students in the * * * Flora area" (Plt. Exh. 83 at p. 19). Carey testified that under the MCSD's plan to locate a new high school in Ridgeland, there would be 153 black and 54 nonblack students who live over 10 miles from their designated high school (Plt. Exh. 83 at p. 20 (Table C); Tr. 1014-1016). Carey reported that by locating a new high school at Route 463, only 12 black students and 26 nonblack students would live more than 10 miles from their designated high school (Plt. Exh. 83 at p. 20 (Table C); Tr. 1016). Given these attributes, Carey testified that the Route 463 site is "an acceptable location for a high school" (Tr. 1009).

Carey stated on cross-examination that he does not think that MCSD engaged in any documented process for planning where to locate the new high school (Tr. 1067-1068), and that MCSD's method of projecting future school enrollments is "very arbitrary" (Tr. 1068; see also Tr. 1070-1072). In contrast to the elemental technique employed by school officials for projecting future enrollments (p. 10-11, 18, supra), Carey prepared five-year projections of enrollment by school and grade (Plt. Exh. 83 at 5; Tr. 1102-1103). Carey's methodology for projecting school enrollments "consists of examining actual data on live birth trends, comparing those numbers for each year to the number showing up in [the] cohort group at the appropriate year after their birth" (Plt. Exh. 83 at 5). Using this

methodology, Carey reported that "high school enrollment is projected to grow from 2,197 students in 1998 to 2,800 students in year 2003" (Plt. Exh. 83 at 9; see also Plt. Exh. 83 at A42-A43 (Table VIII)). Carey projected that by 2003, the total student population in the county will be 9,793, in contrast to MCSD's projected enrollment of 12,653 (Tr. 953). Carey testified that he has used this formula for over 20 years, and that it has been extremely accurate in projecting future enrollments (Tr. 1089-1090). Carey testified that MCSD's over-projection creates a "bad data base" that will "directly affect [MCSD's] conclusions [as to] what needs to be built" and how facilities will be allocated, including "the need for classroom space" (Tr. 953-954).

Carey also expressed concern that MCSD officials did not consider "alternative attendance zones that could further desegregation" (Tr. 1104), and that no officials "ever seriously looked at anywhere to put a high school except in Ridgeland" (Tr. 1105). He stated that "serious examination of alternatives simply do[es] not exist," and that school officials "didn't even have a student dot map to go by for planning," "did not have reasonable, reliable enrollment projections," and gave no serious consideration to the travel burden and the opportunity to reduce the burden on black children (Tr. 1104-1105). Carey stated that in view of the "very large bond issue" he would "expect a thorough examination of alternatives" and "documentation" of alternatives (Tr. 1106).

D. District Court's Memorandum Opinion And Order

Following the hearing, the district court entered its Memorandum Opinion and Order. Despite finding MCSD in partial noncompliance with its prior desegregation orders and criticizing its new construction plan as "in some respects short-sighted, inexplicable and ill-advised" (Order at 124), the district court granted MCSD's motion and approved its plan for new school construction and renovation.

1. Prior to evaluating the new construction and renovation plan, the district court first evaluated various areas of required compliance as set out in the 1969 desegregation order and subsequent consent decrees. The court addressed the transportation burden as part of its compliance review. The court observed that under the 1969 desegregation order, MCSD was required to ensure that the transportation system, including bus routes, are examined regularly by school officials, and that the "transportation of eligible pupils [is conducted] on a * * * nondiscriminatory basis" (Order at 82). Based on evidence establishing that high school students traveling from the predominantly black Flora area to Madison Central High School endure a bus ride of nearly 2-1/2 hours each way, the court determined that the MCSD's transportation schedule imposes an undue burden on black students and does not comply with the 1969 desegregation order (Order at 82). The court ordered the MCSD to provide to the court and the parties the copies of all bus routes, and for every student whose travel time exceeds one and

one-half hours to "describe its efforts to reduce this time and the reason or reasons it has been unable to effect a reduction" (Order at 85).

2. The district court next evaluated the MCSD's proposal for new school construction and renovation. Despite finding that the new high school would not alleviate the transportation burden imposed on the black students in the Flora community, and recognizing the 16th section parcel as a possible location for a school site, the district court determined that "the proposed [Ridgeland] site will not negatively affect desegregation in the district, either now or in the future" (Order at 99). The court acknowledged that MCSD failed to consider the transportation burden that would continue to be imposed on the black Flora students traveling to the new high school in Ridgeland or to Madison Central (Order at 101-102), but stated that locating a school on the 16th section parcel would reduce the Flora students' travel time only minimally (Order at 105). The court further found that insufficient growth was expected in and around the 16th section parcel to warrant locating a new school there (Order at 107-109). The court also credited the testimony School Superintendent Jones and School Board President Miller that MCSD officials rejected the 16th section parcel because of its remoteness and lack of development (Order at 106 n.54, 108-109 & n.55).

The district court authorized the proposal despite finding undisputed evidence that MCSD "made no study of the * * *

comparative transportation burdens of white and black high school students in the Madison Central attendance zone," and no study of the burdens associated with "traveling to the school situated on the Hwy. 463 Sixteenth Section site," or "any other site, versus the comparative burden on students" traveling to a new school in Ridgeland (Order at 101-102). While the district court found the MCSD's enrollment projections for the Madison and Ridgeland areas somewhat "inflated and based on questionable methodology," the court stated that the "demographic changes (in the southern area of the county) upon which the District's motion is based justify the construction of some new schools to address the overcrowding of the schools in these areas" (Order at 119-120 & n.62).

The district court stated that it does not "endorse" the MCSD's plan for new construction and renovation, even though it granted the school district's motion (Order at 124). The district court stated that the MCSD's proposal to "construct[] a high school half the size of the existing Madison Central which leaves little actual growing room * * * does not seem particularly prudent" (Order at 125). Moreover, the court observed that "most of the District officials have never even read the desegregation orders and judgments and none seems to have any comprehension of their import" (Order at 125). The court stated, however, that because school officials have not "acted in an intentionally discriminatory manner [or] in bad faith," and because the plan does not negatively affect desegregation in the school district, the MCSD's motion would be granted (Order at 126).

SUMMARY OF ARGUMENT

In proposing a plan for modifying its desegregation plan and constructing new schools, MCSD is under a continuing obligation to ensure that any new measures further desegregation and help to eliminate the effects of the prior dual system. The 1969 desegregation Order states specifically that MCSD must take measures to ensure that students in the school system are transported on a nonsegregated and nondiscriminatory basis. Contrary to this overarching constitutional obligation, however, MCSD's plan for locating a new high school in the predominantly white Rigdeland community does nothing to reduce the inequitable transportation burden imposed on black Flora students. The district court approved MCSD's plan for locating a new high school in Ridgeland despite overwhelming evidence that MCSD officials did not consider the school district's desegregation obligations in formulating its plan, prepare pupil locator maps or properly assess future growth in student population to ensure that new school facilities are allocated equitably, or consider altering attendance zones to ensure that its proposal for new school construction would further desegregation. Moreover, MCSD officials refused to give meaningful consideration to alternative sites for the new high school that would reduce the existing travel burden of black high school students.

In view of these shortcomings, the district court abused its discretion in approving MCSD's plan to locate the new high school in the predominantly white Ridgeland community.

STANDARDS OF REVIEW

The district court's approval of the school district's plan for new school construction is reviewed for abuse of discretion. United States v. Georgia, Meriwether County, 171 F.3d 1333, 1337 (11th Cir. 1999). Any errors of law are reviewed de novo. United States v. Texas, 158 F.3d 299, 306 n.8 (5th Cir. 1998). Its findings of fact are reviewed for clear error. Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 225 (5th Cir. 1983).

ARGUMENT

THE DISTRICT COURT'S APPROVAL OF MCSD'S PLAN TO LOCATE THE NEW HIGH SCHOOL IN THE PREDOMINANTLY WHITE RIDGELAND COMMUNITY WAS AN ABUSE OF DISCRETION

The district court authorized the implementation of a plan for new school construction despite finding that the plan will not further desegregation, and that MCSD officials responsible for developing the plan lacked a good faith commitment to the court's desegregation orders (Order at 125). Despite the various shortcomings implicit in the plan for locating the new high school in the predominantly white Ridgeland community, and evidence that the plan will foster an inequitable transportation burden on black students, the district court approved that aspect of the plan in part because if found that the plan will not "negatively affect[] desegregation in the district" (Order at 126). The district court also determined that there were no reasonable alternative sites for locating the new high school. The district court's determination that the plan is appropriate because it will not have a negative effect on desegregation is an

improper application of law, and its findings supporting its determination that there are no reasonable alternative sites that will further desegregation are clearly erroneous. Accordingly, the district court abused its discretion in approving the aspect of MCSD's proposal to locate the new high school in Ridgeland. See, e.g., Black Law Enforcement Officer's Ass'n v. City of Akron, 824 F.2d 475, 479 (6th Cir. 1987) (a district court "abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.").

A. The District Court Erred In Approving The MCSD's Plan Because The School District Did Not Satisfy Its Affirmative Obligation To Take All Practicable Steps To Further Desegregation

"The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman v. Pitts, 503 U.S. 467, 485 (1992). Until unitary status is achieved, school districts have a "constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986), citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. County Sch. Bd., 391 U.S. 430, 437 (1968).

The district court in this case approved a troublesome plan for locating a new high school in Ridgeland not because the plan nonetheless furthered desegregation, but rather because the plan "will not negatively affect desegregation in the district" (Order

at 99). The standard employed by the district court for evaluating a modification to a desegregation order is improper.[5/] To fulfill a duty to desegregate, "school officials are obligated not only to avoid any official action that has the effect of perpetuating or re-establishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system." Harris v. Crenshaw County Bd. of Educ., 968 F.2d 1090, 1094 (11th Cir. 1992) (emphasis added). The school district's "duty to desegregate is violated if [it] fails to consider or include the objective of desegregation in decisions regarding the construction * * * of school facilities." Ibid. An "effective [desegregation] plan * * * that 'promises realistically to work now' * * * should produce integration of * * * transportation * * * along with integration of students." Adams v. Mathews, 403 F.2d 181, 188 (5th Cir. 1968), quoting Green, 391 U.S. at 438.

[5/] In approving MCSD's plan for new school construction and renovation, and in its rulings with respect to the compliance issues, the district court also observed that the school district had not acted with discriminatory intent (Order at 125-126; see also Order at 38, 46, 48). If the district court was requiring the United States and private plaintiffs to prove discriminatory intent to enjoin the construction program, the district court committed legal error. Because MCSD continues to be subject to a desegregation decree, it is required to avoid action that causes any discriminatory effects. See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (The "measure * * * of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."). Thus, proof of discriminatory intent is not the standard. Moreover, although the district court authorized the plan, the court was unable to find "that the [MCSD] has exhibited a 'good faith commitment' to the court's desegregation orders," and determined that if it were "confronted at this time with a motion to terminate any aspect of [MCSD's] desegregation decree, that motion would almost certainly be denied" (Order at 125 (emphasis in original)).

Under that obligation, school districts with transportation systems should ensure that "bus routes and the assignment of students to buses [are] designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis." Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211, 1218 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970). Thus, while MCSD is not barred from seeking to modify its desegregation plan, it must show that the "proposed changes are consistent with its affirmative duty to eliminate discrimination," Clark v. Board of Educ., 705 F.2d 265, 271 (8th Cir. 1983) (emphasis added), and do not merely maintain the status quo. The district court in this case recognized MCSD's overarching constitutional duty to "affirmatively work toward furthering desegregation" (Order at 116), but erred in approving a plan that does nothing toward that constitutional objective.

The plan's failure to further desegregation is hardly surprising, given the testimony of MCSD officials that they were unaware of the school district's desegregation obligations under numerous consent judgments and federal law. MCSD officials who testified at trial stated that they had not reviewed the district court's desegregation orders or consent judgments, and had no understanding of the school district's desegregation obligations (see pp. 10, 14, 15, supra; Tr. 1132-1133 (testimony of Garvin)). Because MCSD officials never understood their obligations under the Constitution, they failed to develop a plan that would satisfy the school district's obligations to further

desegregation within the school district. In fact, at trial MCSD officials uniformly testified that the primary motivation in selecting location for a new high school was to reduce overcrowding within Ridgeland and Madison without significantly altering attending zones, and avoiding transporting Ridgeland students outside their community (see pp. 10, 14-15, 17, supra; see also Tr. 481, 623 (testimony of Jones); Tr. 1132-1133 (testimony of Garvin)). MCSD's preference of avoiding rezoning where students are otherwise transported on a discriminatory basis is contrary to its obligation to disestablish the dual school system. See, e.g., Henry v. Clarksdale Mun. Separate Sch. Dist., 409 F.2d 682, 689 (5th Cir.), cert. denied, 396 U.S. 940 (1969) ("A school board's zoning policy may appear to be neutral but in fact tend to retard desegregation because it binds pupils to custom-segregated neighborhoods."). In the case of MCSD, the "board's failure to take corrective action amounts to the [county's] giving official sanction to continued school segregation contrary, to the mandate of this Court and the Supreme Court." Ibid.

MCSD witness Bailey was responsible for developing MCSD's plan for new school construction. Bailey, as well as MCSD witness Bridge, testified that when the plan was formulated, MCSD never prepared pupil locator maps (see pp. 10, 14, supra). These maps would have informed MCSD officials of the race and residential locations of children within the school system, and would have assisted in assessing the distances that students

travel to attend school (see p. 14, supra; see also Tr. 210 (testimony of Bailey)). Because MCSD failed to prepare such a map in designing its plan for new school construction, school officials were unaware of the residential locations of students by race, and thus were unable to plan for new construction that would be responsive to the transportation needs of students and ensure that the transportation burden is borne equitably.

MCSD's estimation of future growth was also flawed, as it was not prepared by a demographer (see p. 11, 18, supra). MCSD witness Bailey, who admitted that he is not a demographer, testified that in formulating MCSD's plan for new school construction, he relied on student enrollment projections that had been prepared by the administrative secretary of the school superintendent (Tr. 831-832, 834 (testimony of Reeves). Because of flaws in the data relied on by Bailey, the MCSD thus over-projected future student enrollment in the Ridgeland area (see pp. 21-22, supra). The United States' expert witness Carey testified that MCSD's overprojections will directly affect the school district's determinations related to allocating facilities and locating classroom space (Tr. 953-954 (testimony of Carey)).

Witnesses testifying for MCSD also stated that they did not examine any attendance zone configurations other than that which would be necessary for locating a new high school in Ridgeland (see pp. 14-16, 18, supra). The various cost assessments prepared by Bailey accounted only for constructing a new high school in the predominantly white Ridgeland community (see p. 11,

supra). When questioned by black Flora parents as to the proposed location of the new high school, school officials misled parents, telling them that no had site had been selected (see p. 15-16, supra). The evidence showed, however, that no site other than that at Ridgeland was ever meaningfully evaluated for locating the new county high school (see p. 14-18, supra). Moreover, MCSD School Superintendent Jones testified that no studies were done to assess the effect that the bond issue would have on desegregation (see p. 15, supra).

As a result of MCSD officials' failure to consider the school district's desegregation obligations, failure to develop pupil locator maps to aid in determining the proper location of the new high school, over-projecting future student enrollment in the Ridgeland area, and refusing to even consider altering attendance zones or constructing the new high school closer to Flora at the request of black county residents, MCSD's proposal will foster an inordinate travel burden on black students in Flora in direct contravention of the MCSD's desegregation obligations. The district court observed that in 1969, the school district was ordered to periodically examine the school system's "transportation system (including bus routes)" to "insure the transportation of all eligible pupils on a * * * nondiscriminatory basis" (Order at 82). Unrefuted evidence at trial showed, however, that 63 black students who commute from Flora travel up to 2-1/2 hours each way to attend Madison Central

High School (Tr. 208-210, 214; Plt. Exh. 136). School Superintendent Jones admitted that locating a new high school in Ridgeland would do nothing to reduce the lengthy commute by black Flora students, but would reduce by 2-1/2 miles the commute of Ridgeland students, most of whom are white (Tr. 508). In clear contravention of its desegregation obligations, MCSD chose to reduce the transportation burden for Ridgeland students, most of whom are white, by 2-1/2 miles each way, while maintaining the transportation burden on Flora students, most of whom are black, at a maximum of 2-1/2 hours each way. Under the MCSD's plan to build a new high school in Ridgeland, black students will be required to travel up to five hours each day to enable white students to travel less than five miles each day.

Moreover, MCSD officials testified that they had not examined the school district's transportation system in direct contravention of the 1969 desegregation Order, and were unaware of the excessive transportation burden imposed on black students prior to this litigation (see pp. 10, 17, supra). MCSD witness Bailey even dismissed this concern over the transportation burden of black students as meritless, testifying at trial that the commuting data (Plt. Exh. 136) was "excess information" and was "not required" for developing the school district's plan for new school construction (Tr. 1581-1583).

The United States' expert witness Kelley Carey reported on the long-term effect that MCSD's proposal for locating a high school in Ridgeland would have on black Flora students. He reported that

> [t]he travel burden cost of [MCSD's] plan is that 74% of the students traveling over 10 miles to school are black students. * * * At bottom, the net result of the district plan is reduction in travel burdens for non-black students and the continuance of a large travel distance for black students in the Flora area that could [otherwise] be greatly lessened

(Plt. Exh. 83 at p. 21). The district court concluded that "neither the superintendent or any of her staff nor the school board or any member thereof reviewed any bus routes prior to discovery in connection with the District's motion, and certainly no one critically examined the routes to insure that there was no discrimination in the transportation of pupils to their respective schools" (Order at 82).

Based on the evidence, and the district court's findings, it is clear that in developing the proposal for new school construction, MCSD officials did not consider their desegregative responsibilities under federal law, in direct contravention of their constitutional duties to insure that county students are transported "on a non-segregated and otherwise non-discriminatory basis." Singleton, 419 F.2d at 1218.

B. The District Court Erred In Finding That No Feasible Alternative Site Exists For The New High School That Would Further Desegregation

Despite evidence that MCSD officials failed to consider their court-ordered obligations to develop a plan that furthers desegregation, the district court approved the plan for locating the new high school in the predominantly white Ridgeland community on the ground that there were no desegregative alternatives (Order at 126). The district court's findings

supporting this conclusion are clearly erroneous.

When seeking to modify a desegregation plan, the MCSD is required to consider "practical alternative sites" that will further desegregation in the school district. Tasby v. Estes, 517 F.2d 92, 106 (5th Cir.), cert. denied, 423 U.S. 939 (1975). The evidence showed, and the district court found (Order at 101-102), however, that school officials did not consider any alternatives for new construction that would further desegregation. MCSD officials did not seriously consider locating the new high school at any location other than the predominantly white Ridgeland neighborhood. During the trial, school officials and consultants indicated that during the development of the bond proposal, no feasibility studies were done of any alternative sites for the new county high school (see pp. 11-12, 14-15, supra). Moreover, unrefuted evidence established that when the new construction plan was being developed by Bailey and Reeves, no serious consideration was given to any site other than the Ridgeland location (see pp. 11-12, 17-18, supra). Indeed, from the outset of the planning process, MCSD's consultant Gary Bailey was interested in promoting the site at Ridgeland, which is adjacent to, and favored by, his pre-existing client, Holmes Community College (see p. 11 n.3, supra).

While MCSD failed in its duty to assess alternative sites that would further desegregation, the district court found that the alternative proposed by the United States and private

plaintiffs that would clearly further desegregation was "not appropriate for a school at this time" (Order at 109). The court's finding is clearly erroneous. During trial, the United States and private plaintiffs proposed that school officials consider -- as but one possible location for the new high school -- the site at Route 463, nearly equidistant from the predominantly white Ridgeland and the predominantly black Flora communities. See Plt. Exh. 84; see also United States v. Hendry County Sch. Dist., 504 F.2d 550, 554 (5th Cir. 1974) (district court did not abuse its discretion in permitting construction of new school on site equidistant from white and black communities). The land at the 16th section parcel is owned by MCSD and is located on Route 463, northwest of Madison in the direction of Flora (Plt. Exh. 83 at pp. 18-19 (see U.S. Rec. Exc. Tab 5); Plt. Exh. 84; Tr. 1003). Evidence showed that a new high school at Route 463 could open with about 900 students (as compared to MCSD's projections for the proposed Ridgeland High School of 679 students), of whom 33% would be black, while Madison Central would retain about 1,300 students, of whom 22% would be black (Plt. Exh. 83 at p. 19 & A11; Tr. 1004-1006, 1010). With an initial student population of 900, a new high school at Route 463 would alleviate more of the overcrowding at Madison Central with a larger black student enrollment that is closer to the overall racial composition of students in the school district (Plt. Exh. 83 at p. 19; Tr. 1010-1011). Moreover, United States expert witness Carey provided extensive testimony showing that

constructing a new high school at Route 463 allows for greater re-zoning flexibility (pp. 20-21, supra), and his report showed that locating a new school at that site allows for a horizontal boundary cutting across the county that can be easily adjusted northward or southward to accommodate changing student demographics (Plt. Exh. 84; Tr. 1004-1005; see also p. 20, supra).

Despite this evidence of the desegregative attractiveness of the Route 463 site, the district court deferred to the unsubstantiated claims of school officials and found that the Route 463 site lacked future growth potential and was too remote (Order at 106 n.54). These findings are also clearly erroneous. Expert witness Carey's report showed that the area around the Route 463 site northwest of Madison "is a mixture of increasing developments in the central part and rural areas interspersed on both sides" (Tr. 1006). Carey's report determined that

> growth is continuing from the Madison Central High School area out along [Highway] 463 and in large subdivisions north and south of Highway 463. The attractiveness of the terrain and the signs of continuing development are all positive

(Plt. Exh. 83 at 18 (See U.S. Rec. Exc. Tab 5)). Constructing a school at Route 463 would influence the pattern of residential development in the county since "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of the people." Swann, 402 U.S. at 20. The district court rejected this site also in part because of unsubstantiated claims by school officials that the site could not accommodate necessary services (Order at 106-107 n.54, 113). Expert witness Carey

researched the Route 463 site at the 16th section parcel. Based on that research and interviews with county services officials, Carey determined that the Route 463 site has ready access to sewer and water, and that police and fire personnel can respond to emergency calls to that location within ten minutes (see p. 20, supra).

The district court's rejection of the alternative site also turns on its erroneous conclusion that a new school at the Route 463 site would not significantly reduce the travel burden for the black students traveling from Flora to Madison Central (Order at 105). Based on the rebuttal testimony of MCSD witness Bridge (Tr. 1621-1624), the district court determined that the "greater part of the transportation burden experienced by Flora-area students is not in the traveling between the point on Hwy. 463 where the Sixteenth Section site is found and Madison Central, but in the collection and travel time required for them even to get to Hwy. 463" (Order at 105). Certainly, the way to reduce the travel burden on black Flora students is not to locate a new high school even farther from these students who are already unduly burdened. Rather, it would be to locate a school closer to the students suffering the burden and increase the number of buses transporting these students to the new school. As United States expert witness Carey testified, locating a new school at the Route 463 site would significantly reduce from 153 to 12 the number of black students traveling over ten miles to high school (Plt. Exh. 83 at 20-21; Tr. 1014-1020 (Carey); see also p. 21,

supra). See, e.g., United States v. Board of Pub. Instruction, 395 F.2d 66, 69 (5th Cir. 1968) (where school officials failed to locate new school in a manner that would assist in eliminating the vestiges of the old dual system, new construction in the county would be delayed until that action was taken).

Based on his analysis of MCSD's proposal and his evaluation of the alternative site proposed by the United States and private plaintiffs, expert witness Carey concluded that locating the new high school in Ridgeland is imprudent, does not respond to demonstrated trends in enrollment growth, and does not alleviate the travel burden of black students who "live on the other side of Flora, away from Madison Central [High] School, and travel over 20 miles to school each way" (Plt. Exh. 83 at 21 (emphasis added)). Expert witness Carey determined that

> the demonstrated growth in high school enrollment in the proposed Ridgeland high school zone is only one-third of the projected enrollment growth within the current Madison Central High School zone, which is to be somehow divided in building a new school. That growth allocation means that most of the high school enrollment growth will be north of Ridgeland. Concentration of schools in certain areas may simply represent insufficient planning or no planning being done before the proposal was questioned. But, concentration of the high schools in this case represents, in my opinion, that type of planning, plus a manifest indifference to an opportunity to relieve excessive travel burden placed on minority students

(Plt. Exh. 83 at p. 22).

The evidence at trial also showed that the Route 463 site was rejected by school officials because of concerns over white flight (Tr. 188-190 (testimony of Bailey)). While the record shows that white flight was a motivation for rejecting the site

for the location of a middle school, it is reasonable to infer that white flight played a role in MCSD's refusal to give serious consideration to that site for locating the new high school as well.

During discussions over school locations, MCSD educational consultants had proposed using the Route 463 site as a location for a new middle school (Def. Exh. 20, 22; Tr. 121, 126, 186-187 (Bailey)), thus placing the new school midway between East Flora and the Madison/Ridgeland areas. Placement of a middle school at this site would have required rezoning so that students from both zones would attend the new school (Plt. Exh. 84). School officials testified that this plan was considered but that due, in part, to concerns about white flight and the "saleability" of the bond issue, it was rejected (pp. 12-13, supra). MCSD witness Bailey testified:

> We were aware that they (Flora parents) were concerned about the distance [their children] were being bussed to Madison Central, the high school students. You also were addressing the issues of white parents who would — students would be going to a larger percentage black school that you risk losing some of the support of those parents

(Tr. 189). Presumably these same fears drove MCSD officials from seriously studying the feasibility of the Route 463 site as a location for the new high school.

These fears, however, are not only unsubstantiated, but are also an impermissible basis for avoiding construction of a new school facility that would further desegregation. The Supreme Court has made clear that the exodus of parents and students out of fear of integration, or "white flight," is no excuse for

school officials to avoid desegregating. United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972); Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968); see also Lee v. Anniston City Sch. Sys., 737 F.2d 952, 957 n.3 (11th Cir. 1984). There is, however, a "valid distinction between using the defense of white flight as a smokescreen to avoid integration," and addressing "the probability of white flight in attempting to formulate a * * * plan which would improve the racial balance in the schools without at the same time losing the support and acceptance of the public." Liddell v. Missouri, 731 F.2d 1294, 1313 (8th Cir.) (internal quotation marks omitted), cert. denied, 469 U.S. 816 (1984), quoting Higgins v. Board of Educ., 508 F.2d 779, 794 (6th Cir. 1974).

MCSD's rejection of Route 463 as a location for a new school was motivated in part by its fear of white flight. These fears are, however, unsubstantiated and were simply used as a "smokescreen" by MCSD to avoid its desegregative obligations. While the district court viewed the proposal for constructing any new school at Route 463 as a feasible way of furthering desegregation, it erred by wholly deferring to school officials' unsubstantiated claim that locating a new school at that location was not "practicable" (Order at 122-123). In any event, the evidence shows that MCSD's refusal to seriously consider the Route 463 site, or any site located closer to Flora, was motivated in part by the desire to avoid conflict with white families whose children would attend the new high school, and to

ensure that the bond would gain county-wide approval among white voters. The district court thus abused its discretion in deferring to MCSD and rejecting the alternative proposal for locating the new high school closer to Flora.

CONCLUSION

For the foregoing reasons, the district court's order approving MCSD's plan to build a new high school in Ridgeland should be reversed, and the case remanded to the district court with instructions to require MCSD to develop a new plan for locating the new county high school at a location that will reduce the travel burden for the Flora students.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. Pro. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 10,694 words.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2000, two copies of the Brief For The United States As Appellant and one disk containing the Brief's text were sent by overnight, Federal Express delivery to each of the following persons:

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