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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

WILLIAM CAPACCHIONE, Individually and on Behalf of CRISTINA CAPACCHIONE, a Minor Plaintiff-Intervenors	:	
and	:	
MICHAEL P. GRANT, ET AL Plaintiff-Intervenors	:	
vs.	:	Civil Action No. 3:97-CV-482-P
THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL Defendants	:	
and	:	
JAMES E. SWANN, et al Plaintiffs	:	
vs.	:	Civil Action No. 1974
THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL Defendants	:	

PLAINTIFF-INTERVENORS AND PLAINTIFF CAPACCHIONE'S JOINT TRIAL MEMORANDUM

MICHAEL P. GRANT, ET AL., Plaintiff Intervenors acting on behalf of themselves and their minor children (Grant Intervenors), and Plaintiff Intervenor WILLIAM CAPACCHIONE, individually and on behalf of his minor daughter Cristina (Capacchione), submit this joint trial memorandum to better acquaint the Court with the issues these consolidated cases present for trial, and the case law which

authorizes the Court to finally confer unitary status on this school system and conclude the Swann litigation.

I. The History of the Swann Litigation

Given the fact the Swann case was a closed file for over twenty two (22) years before being reactivated by this Court, some historical background would seem helpful. The Swann litigation was initiated on January 19, 1965. As a remedy, Plaintiffs asked the Court to end de jure segregation of the public school system administered by the Charlotte-Mecklenburg County Board of Education (CMS) for the City of Charlotte and surrounding Mecklenburg County. CMS is now the 25th largest school district in the nation, with more than 150 schools. "The area is large - 550 square miles - spanning roughly 22 miles east-west and 36 miles north-south." Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1, 6, 91 S.Ct. 1267, 1271 (1971).

The District Court ordered CMS to end de jure segregation and to present a plan that would effectively desegregate the public school system. The District Court cited Brown v. Bd. of Ed., 347 U.S. 483 (1954) and 349 U.S. 294 (1955) (Brown II) as its authority. Therein, the Supreme Court held that "the transition to a unitary nonracial

system of public education was and is the ultimate end to be brought about" by a desegregation order. 377 U.S. at 234 (emphasis added). [1]

In discussing desegregation and unitary status, it is prudent to first define our terms. This Court has said "that the word 'dual' in the Supreme Court opinion is another word for 'segregated', and that unitary is another word for 'desegregated' or 'integrated'. Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1299, 1301 (W.D.N.C. 1969). Since a unitary school system is a legally desegregated school system, Section 2000c(b) of Title IV of the Civil Rights Act defines "desegregation" thusly:

> 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.

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[1] The problem that instigated this litigation is the refusal by CMS to adopt a race neutral student assignment plan, despite the fact the school district has now been legally desegregated for decades. The current race-based remedial desegregation plan adopted decades ago has metamorphasized into an institution the Board simply will not voluntarily relinquish. In the words of the Fourth Circuit, allegedly remedial preferences, "may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own." Maryland Troopers Assoc., Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993) (Potter, J. joining)

The Supreme Court has defined the aim of desegregation as: "to correct, by a balancing of individual and collective interests, the condition that offends the Constitution." Swann, 402 U.S. at 15-16.

In 1969, CMS had 57 schools that were racially identifiable as white, 25 racially identifiable Black schools. CMS also had 24 schools that were considered racially balanced. Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F.Supp. 1299, 1303 (W.D.N.C. 1969). In acknowledging the difficulties faced by CMS in devising and implementing an effective desegregation plan, the Swann court observed that Charlotte has always "had a very high degree of segregation of housing." Swann v. Charlotte Mecklenburg Bd. of Educ., 300 F.Supp. 1358, 1365 (W.D.N.C. 1969).

To assist the school system in overcoming these kinds of demographic barriers to desegregation, the District Court approved a Majority to Minority Transfer Program (M to M), [2] and closed seven (7) formerly Black schools which forced the transfer of over 3,000 black students to predominantly white suburban schools. Swann v. Charlotte Mecklenburg Bd. of Educ., 306 F.Supp. 1291 (W.D.N.C. 1969). [3]

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[2] It simultaneously facilitated M to M transfers by Black high school students by invalidating the rule that penalized athletes one year of eligibility upon transfer, due to the racially discriminatory effects of such a rule. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F.Supp. 1381 (W.D.N.C. 1969).

[3] The District Court also approved a faculty desegregation plan in this Order.

In 1969, the District Court specifically found there were no vestiges of the segregated dual school system, and thus no ongoing racial discrimination or inequality, in the following areas of operation:

1. Use of federal funds for special aid to the disadvantaged;

2. The quality of the facilities, including school buildings, and equipment, and in the use of mobile classrooms; [4]

3. Extracurricular activities: in response to the only objection made by the Swann Plaintiffs in this regard which was that coaches at predominantly black schools were predominantly black, and vice versa, the Court found "no pattern of discrimination appears in the coaching ranks";

4. Parent Teacher Association contributions and activities;

5. School fees;

6. School lunches;

7. Library books and facilities;

8. Curriculum and availability of elective courses;

9. Individual evaluation of students and assignment of students in advanced placement and achievement based class assignments; and

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[4] In 1971, this Court again stated "the formerly black schools are not shown nor suggested to be inferior in faculty, plant, equipment or program...." Swann v. Charlotte-Mecklenburg Board of Education, 334 F. Supp. 623, 625 (W.D.N.C. 1971).

10. Racial gerrymandering of school attendance zones to exclude black students.[5]

See Swann, 300 F.Supp. 1358, 1366-67 (W.D.N.C. 1969).[6] The court in 1969 also approved the Board's actions to desegregate its faculties, noting that the "goal" for desegregation of faculties was to "approach a ratio under which all schools in the system will have approximately the same proportion of black and white teachers." Swann, 306 F. Supp. at 1295.

On February 5, 1970, the District Court approved a Court consultant's desegregation plan for elementary schools known as the "Finger Plan" for the elementary schools. Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F.Supp. 265 (W.D.N.C. 1970). Cross appeals were filed. The Fourth Circuit Court of Appeals affirmed the District Court Order in all major respects. It vacated only that part of the 'Finger Plan' that required the pairing of predominantly white and black elementary schools to exchange students on a wholesale basis as a means of desegregation. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970).

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[5]In fact, the opposite has now come to pass with oddly shaped attendance zones - even the use of non-contiguous satellite zones - being used to achieve a predetermined racial mix of students in system schools.

[6]In a later Order, the Court continued to rely upon these early findings, stating: "The defendants contended and the court found in its April 23, 1969 order that facilities and teachers in the various black schools were not measurably inferior to those in the various white schools. It is too late now to expect the court to proceed upon an opposite assumption." Swann, 306 F. Supp. at 1298 (emphasis added).

A. The Supreme Court Opinion in Swann:

The Supreme Court reinstated the District Court order, see Swann v. Charlotte-Mecklenburg Board of Education, 399 U.S. 926, 90 S.Ct. 2247 (1970), and expanded on their rationale for reinstatement in an opinion published at 402 U.S. 1, 91 S.Ct. 1267 (1971). [7] The District Court entered an order after the first Supreme Court opinion in Swann on August 3, 1970 and clarified its prior order approving the Finger Plan by stating it was not requiring a specific racial balancing of the student bodies; that its "purpose is not [to require] some fictitious 'mix.'" Swann, 318 F.Supp. 786, 792.

The Finger Plan called for deployment of several aggressive desegregation techniques (e.g., non-contiguous satellite zones; pairing of elementary schools). The plan created nine (9) noncontiguous satellite attendance zones. [8] Incredibly, despite going to a more "voluntary" student assignment plan (SAP) in the 1990s, CMS now incorporates over 60 such satellite zones into its current SAP. The plan projected the the pairing of elementary schools would increase Black enrollment to a low of 9% and a high of 38% Black students in elementary schools. Id. In fact, the practice of pairing continued for over 20 years and far exceeded these goals before finally being replaced

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[7]When the Supreme Court entered its order, CMS had more than 84,000 students housed in 107 schools. Approximately 24,000 students (29%) were Black; some 14,000 Black students attended 21 schools that were 99% Black. Swann, 402 U.S. at 6-7.

[8]Swann, 402 U.S. at 9.

during the first part of this decade by Magnet Schools that used even stricter racial quotas to insure "racially balanced" schools.

The Supreme Court specifically noted at the outset of its opinion approving the Finger Plan, the district court warning regarding the inability of the plan to meet any mathematical goal or quota for racial balance within a particular school's student body:

> Fixed [racial] ratios of pupils...will not be set.... [T]he Court will start with the thought that efforts should be made to reach a [certain]...ratio...but, to understand that variations from that norm may be unavoidable.

Swann, 402 U.S. at 9 n.4 (emphasis added).

In this case, CMS takes the unprecedented position that this Court should deny it unitary status based on the very standard the District Court acknowledged to be unreachable. Largely for political reasons and contrary to current Supreme Court opinions, CMS contends it cannot be declare unitary until all of its schools are indefinitely maintained within the confines of preset mathematical racial goals, regardless of their location or the residential racial demographics of the community the school serves. The Swann Court rejected this myopic view of desegregation law over 28 years ago:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or

mixing, that approach would be disapproved.... The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Swann, 402 U.S. at 24. (emphasis added).

CMS contends the fact a few schools currently have percentages of African American students which exceed the variance permitted in the court order is evidence of a "vestige" of the former segregated dual school system. The Supreme Court, even in 1971, recognized that the existence of such schools do not necessarily indicate "present or past discriminatory action." Swann, 402 U.S. at 26. In fact, the Court anticipated and rejected that contention by acknowledging that predominantly one race schools, despite the use of all constitutional efforts to desegregate, were inevitable:

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city...[C]ertain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. ...[T]he existence of some small number of one-race schools within district is not in and of itself the mark of a system that still practices segregation by law.

Swann, 402 U.S. at 25-26.

CMS justifies its racially gerrymandered attendance zones by contending they were legally required to avoid a decline in the system's "racial balance." However, the Supreme Court did not authorize the use of racially gerrymandered and noncontiguous satellite attendance zones on a long term basis. "As an interim corrective measure, [satellite and racially gerrymandered attendance zones] cannot be said to be beyond the ...remedial powers of a court." Swann, 402 U.S. at 27. Although 'administratively awkward" "inconvenient" and "bizarre" measures could be permitted in 1971 to **attain** racial balance, the clear context of that permission was where unavoidable "in the interim period." Id. At 28 (emphasis added). In spite of this clear limitation, and nearly thirty years after racial balance had been attained and maintained, CMS has geometrically increased its reliance on satellite zones, quotas and racial gerrymandering to maintain an artificial level of racial balance in its schools.

The Supreme Court made clear in Swann that, absent a continuing failure by CMS to deliver equal educational opportunity to Negro students due to the demonstrated presence and impact of vestiges of the former dual system, "there would be no basis for judicially ordering assignment of students on a racial basis. "All things being equal, with no history of discrimination, it might well be desirable to assign students to schools nearest their homes." Swann, 402 U.S. at 27-28. The Swann Court wisely predicted that changing residential patterns and community demographics will

impact, sometimes adversely, the degree of integration a desegregation plan will be able to maintain over time in a school system. Recognizing that such changes were usually caused by non-governmental action, the Swann Court made clear the consequences of such private action could not be the basis for any further race-based remedial measures required of a school system:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Swann, 402 U.S. at 31-32. (emphasis added).

B. District Court Implementation of 'Swann'

CMS deployed the "Finger Plan" which eliminated majority black schools "as nearly as practicable" by actively implementing the many desegregation techniques incorporated into the plan. Eschewing the leeway it was specifically provided by the Supreme Court in Swann, CMS has wrongfully incorporated racial quotas into its SAP. From 1969 forward to 1989, more than 90% of CMS schools complied with the court orders, even using the stringent racial quotas CMS relies on for its definition of integration. See Evaluation of Unitary Status in Charlotte-Mecklenburg, Report to the Court by Dr. David J. Armor (Armor Report) Table 1.

The Armor Report further established that CMS schools measure up quite well when compared to other unitary school systems having similar characteristics using commonly accepted indices of desegregation. The exposure index (measures how much students of one race come in contact with students of another race) has remained quite high since 1972. The imbalance index, while showing a small increase over time, has also continued to remain below a value of 30, or "substantially desegregated" for nearly thirty years. Id., Charts 4, 5, 6. CMS schools have remained largely in racial balance to date, despite major demographic changes. Over 83% of all schools presently meet the precise mathematical definition developed back in 1969 as an interim remedy to combat the then pervasive effects of de jure segregation. See Armor Report, Chart 1. These figures, particularly considering the fact they have been maintained over such

a long period of time, indicate both the long term and successful commitment of CMS to desegregation; they also constitute irrefutable evidence that CMS schools have been legally desegregated under present Supreme Court standards for decades.

Our review of the long history of this case has established that no desegregation order established any minimum black student population for any school. Originally, this Court ordered "[t]hat no school be operated with an all black or predominately black student body." Swann v. Charlotte-Mecklenburg Board of Education, 311 F.Supp. 265, 268 (W.D.N.C. 1970). In fact, this Court specifically rejected the Swann Plaintiffs' claim that "since the ratio of white to black students is about 70/30, the School Board should assign the children on a 70% white and 30% black, and bus them to all the schools." Swann v. Charlotte-Mecklenburg Board of Education, 300 F.Supp. 1358, 1371 (W.D.N.C. 1970). Instead, this Court stated it "does not feel it has the power to make such a specific order." Id. Ultimately, this Court only ordered that, "no elementary school except Hidden Valley shall be operated with a black student body exceeding the K-6 system-wide ratio plus 15%." Swann v. Charlotte-Mecklenburg Board of Education, (W.D.N.C. Unpublished Order April 17, 1980).

As to secondary schools, this Court ordered that CMS must not operate such schools "with a predominately black student body." Swann v. Charlotte-Mecklenburg Board of Education, 328 F.Supp. 1346, 1349 (W.D.N.C. 1971). No court order

prohibits schools that are predominately white in their student population. Indeed, in 1973, Judge McMillan approved a plan which allowed Matthews Elementary to maintain a student body with only a 10% black population. Swann v. Mecklenburg County Board of Education, 311 F.Supp. 265, 268 (W.D.N.C. 1970), see also, id., 362 F.Supp. 1223, 1228 (W.D.N.C. 1973).

This obviously reflects the District Court's ongoing awareness of the racial demography and geography of this very large district, which contains large concentrations of predominately white population in suburban areas located far from the black population centers closer to the inner city of Charlotte. Residential demographics made any minimum minority student quota impracticable, if not impossible, to implement, given the great distances buses would have to travel, the traffic patterns that make movement of any large number of suburban kids to the inner city during the morning rush hour an impossibility, and demographic growth patterns. See Report to the Court of William A.V. Clark, Demographic Change in Charlotte-Mecklenburg, (hereinafter "Clark Report").

In 1974, the Board developed its own SAP with community input. The District Court accepted this remedial plan in 1974 and incorporated its prior orders. Swann v. Charlotte-Mecklenburg Schools Board of Education, 379 F.Supp. 1102, 1105 (W.D.N.C. 1974). This plan achieved high levels of integration in all schools. A year

later, the 1974 Plan having been implemented in good faith, the District Court deemed further court supervision unnecessary. Swann, 67 F.R.D. 648 (W.D.N.C. 1975). In closing the case, the District Court reminded all parties, by citation to its original 1969 Order, that desegregation does not depend on any particular racial balance in the schools: "The duty to desegregate schools does not depend upon ... any particular racial proportion of students." Swann, 67 F.R.D. at 650; see also Swann, 318 F.Supp. at 794. The Court confidently concluded that it did not anticipate CMS would ever return to a dual school system given how "exhaustively (and expensively)" all issues had been litigated, removed the case from the active docket, and ordered the case file be closed. Swann, 67 F.R.D. at 650.

Unfortunately, the District Court Judge's conviction that the case was at an end was proven wrong by CMS. Despite the notable success of CMS's desegregation efforts for thirty years, its Board has chosen to do the unthinkable -- to demand that court supervision continue into the next millennium. CMS asks this Court to sanction indefinite racial balancing of its schools via involuntary student assignments, race-based bussing and rigid racial quotas. Its racial balance goals no longer parallel any constitutional obligation to desegregate, but are driven by the political objective of a majority of CMS Board members to elevate racial "diversity" within the schools to a mandate rather than an aspiration the courts have held it must be constitutionally

limited to. CMS' Board has adopted this course of action using this Court's orders as both a sword and a shield in a manner which was never envisioned by the supervising court.

The case has remained largely inactive since 1975. In 1980, due to the increasing minority enrollment in the district, [9] CMS requested the District Court permit CMS to relax the racial "boundary line" used in the 1975 Order by allowing the black population of elementary schools a fifteen (15%) percent variance from the district wide racial composition of elementary school students as the benchmark by which the elementary SAP would be judged. Again, no floor was established for the percentage of black students that must attend a school and no prohibition of predominately white schools was ordered. See Swann Order dated April 12, 1980. There is no explanation in the Order as to why CMS did not seek the variance for middle and high school students.

Since then, substantial demographic changes have continued to occur in the County, driven by a massive influx of new residents during the 1980s-1990s. This suburban growth made even the relaxed elementary school standard difficult to

[9] The district is now made up of 40% African-American and 10% other minority students, In significant contrast to the demographics of the district in 1969: 71% white and 29% black. Swann, 306 F. Supp. at 1297.

maintain in outlying areas. This led to a substantial increase in the use of satellite zones. Clark Report.

In 1998, this Court reactivated Swann, consolidated it with the Capacchione litigation, and permitted the Grant intervention for the purpose of resolving all remaining issues regarding the unitary status of the Defendant CMS.

II. The Capacchione Claim

Capacchione filed his complaint challenging the CMS SAP for magnet schools, which employ separate racial lotteries to select the students that are to be enrolled in each program. Capacchione contends the racial component of the magnet SAP caused his daughter Cristina to be denied admission to a magnet school. Capacchione seeks a declaration that the use of a racially segregated lottery to achieve a specific racial composition for each magnet school student body is unconstitutional because it excludes students from magnet school programs on the basis of race.[10] Capacchione also seeks monetary damages and compensation for all reasonable attorneys' fees and expenses of litigation incurred in the litigation.

III. The Grant Intervenors' Claims

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[10] For example, if students of a particular race failed to apply or participate in the racially separate lottery, those unfilled seats were generally left open to insure the magnet school came as close to the system wide 60/40 white/black racial goal for enrollment as the applicant pool would permit.

The Grant Intervenors are parents of children eligible to attend public schools in Mecklenburg County. Parents have an intense interest in the education of their children.

Grant Intervenors have also objected to the race-based admission policies for district magnet schools. In addition, they have challenged the other race-based student assignment techniques employed by CMS, including satellite zones, midpoint schools and other racially gerrymandered attendance zones they contend are predominantly based on race, and designed to achieve a predetermined racial composition in a school's student body.

In response to CMS's contention that it is merely enforcing the Swann court's definition of racial balance, the Grant Interveners contend CMS has ignored the limitations on race-based student assignments contained in these Orders, and has transformed what was intended to be an interim remedial plan designed to eliminate any remaining vestiges of the former dual system of segregated education into a permanent race-based student assignment plan. This plan no longer has the remediation of constitutional deficiency as its goal but has become an end in itself. Grant Intervenors argue that the effect of CMS continuing to employ race-based student assignment techniques in a de facto desegregated system is to unconstitutionally subordinate important considerations such as school proximity and

the reduction of bussing and involuntary student assignments, to the district's politically motivated (and impossible) efforts to overcome the geographic and demographic realities of Mecklenburg County through by the brute force of a vast mandatory bussing and quota plan. Such emphasis on the minutiae of numbers rather than overall educational goals compromises equal educational opportunity for all CMS students.

IV. ISSUES FOR TRIAL

The threshold issue before this Court is whether CMS has, after thirty years of good faith implementation of a desegregation order, attained unitary status in student assignment or any other of the Green factors. The most important of these factors is student assignment, because it was the discriminatory assignment of students which was the hallmark and purpose of a segregated school system. See Swann, 402 U.S. at 6, 17 and 23.[11]

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race . . . .[12]

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[11]"Desegregation means the assignment of students to public schools and within such schools without regard to race . . . ." Swann, 402 U.S. at 17.

[12]The Court went on to note that school integration "does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." Swann, 402 U.S. at 23.

Swann, 402 U.S. at 23. The other Green factors represent important indicia of a segregated system, independent of student assignment. Id. at 18.

At the outset of the Capacchione litigation, this Court inquired of CMS whether it was a unitary school system. After due consideration and consultation with counsel, CMS dismayed us all by its response of "No." Instead, CMS elects to defend the case by contending thirty years was not enough time for the school system to attain unitary status. The intervention of the Grant Plaintiffs has provided the catalyst for an expanded review and evaluation of every aspect of the school system's desegregation efforts. Three decades have passed since CMS operated de jure segregated schools. The fact almost all CMS schools have been highly racially balanced for 29 years is ample evidence that any current imbalances are not attributable to vestiges of de jure segregation. As such, CMS is entitled to unitary status with respect to its student assignment practices. See Freeman v. Pitts, 503 U.S. 467, 112 S.Ct. 1430 (1992). It is clear now that a court may order incremental withdrawal of its supervision in a school desegregation case, declaring a school system unitary in one area before it has achieved full compliance in all areas. Id. at 490-91.

Cappachione and Grant also contend that CMS has attained unitary status with respect to other Green factors. First, the district Court in Swann found numerous potential issues, including facilities and extracurricular activities, were not attributable

to racial discrimination by CMS. Swann, 300 F.Supp. at 1366-67. Second, this Court found CMS did not discriminatorily "track" black students into lower level classes and that the fact that "[f]ew black students are in the advanced sections and most are in regular or slow sections" was not based on their race but rather "on the achievement of a particular student in a particular subject." Swann v. Charlotte-Mecklenburg Board of Education, 300 F.Supp. 1358, 1367 (W.D.N.C. 1969). These findings are res judicata. Riddick, 784 F.2d at 531-32 ("The principles of collateral estoppel or issue preclusion are applicable to school desegregation cases."). Thus, any party claiming that CMS facilities, the under-representation of black students in advanced courses, and extracurricular activities are discriminatory should have the burden of proof to establish a new constitutional violation. See Riddick, 784 F.2d at 538. Additionally, CMS has been engaged in good faith desegregation efforts with respect to the other Green factors as well for many years. Examination of the evidence will show that CMS has, through good faith efforts over the past thirty years, eliminated vestiges to the extent practicable in the areas of faculty and staff assignment, transportation and quality of education, so as to entitle CMS to unitary status in toto. In the event that this Court disagrees, this Court must examine whether removal of the race-based student assignment plan will so adversely impact areas in which the Court finds vestiges of the dual school system remain that retention of control over student assignment is

necessary to insure CMS's eventual compliance in that other area. See Freeman v. Pitts, 503 U.S. at 497-98. However, it is to be noted in this regard that:

> federal court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.

Milliken v. Bradley, (Milliken II), 433 U.S. 267, 282 (1977); accord, Board of Educ. V. Dowell, 498 U.S. 237, 247 (1991).

Finally, Cappachione and the Grant Intervenors allege racial discrimination in the manner in which CMS has assigned them to (or prevented them from attending) particular CMS schools. These claims arise from the racial classification to which the students were subjected due to the CMS SAP. Cappachione and Grant contend that CMS has been de facto unitary for years. As such, there is no legitimate remedial need or basis for racial classification of students in CMS. CMS, having become de facto unitary in student assignment, cannot indefinitely defer a declaration of unitary status in an attempt to justify the institutionalization of race-based student assignment policies. If no remedial purpose is served by the racial nature of the SAP, then CMS

is subject to the requirements of strict scrutiny as is any governmental actor. CMS's student assignment plan cannot meet this strict standard.

The overarching legal issues for resolution by the Court are as follows:

1. Unitary Status:

(A) Whether CMS is unitary with respect to student assignment? This question requires an examination of whether CMS either is engaged in current intentional discrimination against African-American students in the area of student assignment or currently retains vestiges of the prior de jure system of segregation in student assignment which have not been remedied to the extent practicable over the thirty-plus years of this litigation.

(B) Whether CMS is unitary with respect to any other Green factors, including transportation, facilities, extracurricular activities, faculty assignment, and staff assignment? This requires an examination of whether CMS either is engaged in current intentional discrimination against African-American students or currently retains vestiges of the prior de jure system of segregation which have not been remedied to the extent practicable over the thirty-plus years of this litigation.

(C) If the answer to question A is no, the Court must determine whether the race-based student assignment plan is sufficiently narrowly tailored to remedy the adverse impact of any vestige found to still discriminate so as to comply with the strict

scrutiny test used to measures the constitutionality of a governmental use of race as an remedial measure? See People Who Care v. Rockford Bd. Of Educ.,111 F. 3d at 535.

(D) If the Court finds CMS to be unitary in student assignment but that vestiges remain in areas other than student assignment, the Court must consider whether any vestiges found to remain are so bound up with student assignment that retention of racial policies and judicial control of student assignment is necessary in order to ensure that unitary status is achieved in that other area. See Freeman v. Pitts, 503 U.S. at 497-98.

2. Constitutional Injuries[13]

(A) Race-based Magnet admissions: Whether the use of a racial quota to determine admission to CMS magnet school programs implemented by running two separate lotteries for African-American and all non-African American students, and racially balancing a school which was not and would not be in violation of the applicable court orders constitutes unlawful and unconstitutional racial discrimination

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[13] Intervenors have received constitutional injuries such that they have standing to pursue individual claims for relief. Intervention in suits concerning public schools has been freely allowed, and we see no reason why it should be denied . . . ." Graves v. Walton County Board of Education, 686 F.2d 1135, 1142 n.5 (5th Cir. 1982). This Court has already found that Intervenors have demonstrated an interest in this matter and presented common questions of law and fact already at issue in this action. Order of May 20, 1998. Moreover, intervention is the appropriate means of resolving the claims of parents in school desegregation cases. Adams v. Baldwin County Board of Education, 628 F.2d 895, 897 (5th Cir. 1980).

when CMS has been desegregated for many years in student assignment to the extent practicable?

(B) Satellite Zones: Whether the use of non-contiguous race based "satellite attendance zones" and "midpoint schools", which rely on bussing students within such zones to distant schools for purposes of achieving a certain racial percentage in the student body constitutes unlawful and unconstitutional racial discrimination when CMS has been desegregated for many years in student assignment to the extent practicable?

(C) Racially Gerrymandered Attendance Zones: Whether the use of racially gerrymandered school attendance zones, which ignore obvious geographical boundaries in order to achieve a certain "racial diversity" at a particular school, constitutes unlawful and unconstitutional racial discrimination when CMS has been desegregated for many years in student assignment to the extent practicable?

(D) Race-based Student Assignment Plan: Whether CMS's use of numerical racial quotas, which has the effect of both including and excluding students from certain schools because of race in order to achieve "diversity" or "racial balance" in each district school constitutes unlawful and unconstitutional racial discrimination when CMS has been desegregated for many years in student assignment to the extent practicable?

3. Are the Grant Intervenors and Capacchione entitled to monetary damages, and to their reasonable expenses of litigation, including attorneys fees and expert witness as compensation for the racial discrimination they have suffered and as prevailing parties in this litigation?

DISCUSSION OF LEGAL ISSUES

A. CMS IS A UNITARY SCHOOL SYSTEM

(1) The Nature of a Unitary System and the Court's Remedial Power

A "unitary" school system is one "which has been brought into compliance with the command of the Constitution." Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 245-46 (1991). This definition of unitariness was followed again in Freeman v. Pitts, 503 U.S. 467, 112 S.Ct. 1430, 1443-44 (1992) and is a correct statement of current law. Compliance with the Constitution in terms of desegregation is both simple and complex – simple because the original constitutional violation and the reason for the Court's intervention is a denial of equal protection to African-American students, and complex because a multi-faceted inquiry is needed to determine whether compliance has been attained.

In this case, the parties do not really contend that CMS currently engages in deliberate intentional discrimination against African American students. Instead, the court's inquiry must focus on the "vestiges" of de jure segregation alleged to be present

in CMS and engage in intense factual scrutiny of the evidence. Freeman v. Pitts, 503 U.S . at 474; Green, 391 U.S. at 439. Those vestiges do not exist separate and apart from the Constitutional violation based upon segregation of the races by law. Rather, to find vestiges of segregation, the Court must determine that currently obtaining conditions possess a traceable link to the de jure system. In other words, any presently observable disparity must be proximately caused by de jure segregation or other discriminatory action which is fairly attributable to the school district. See Freeman v. Pitts, 503 U.S. at 493-96. In Freeman, the Court explained this principle thus:

> In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are stubborn facts of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied.

Id. at 495-96 (emphasis added). Finally, the Court must find that any vestiges remaining are susceptible to practicable remedial action by the Board which it has failed to take.

It is a mistake to assume that all social ills visited upon once disfavored races can be cured by resort to perpetual judicial supervision of local school systems. Instead, the guiding principle is one of restraint:

> [J]udicial powers may be exercised only on the basis of a constitutional violation and . . . the nature of the violation determines the scope of the remedy. A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.

Freeman v. Pitts, 503 U.S. at 489 (internal quotations and citation omitted). Similarly, despite judicial supervision for decades, such supervision is intended as a "temporary" measure, and courts must restore state and local authority to governments in compliance with the Constitution. Freeman, 503 U.S. at 489; Dowell, 498 U.S. at 247.

CMS erroneously contends it is required by a court order of ongoing and indefinite effect to continue to populate its schools by using race as the controlling factor in student assignment. CMS has badly misread the Swann court's decades old admonition/injunction not to resegregate the school system. This standard standing

order does not confer on CMS an indefinite right to effectively "discriminate" by equating a talismanic "60/40" (or indeed a "no majority of minority") notion of diversity to equal education opportunity. Moreover, CMS appears to ignore clear Supreme Court guidance as to the need for a school district to "correct" for private choice and action for which it is not and could not be responsible. Spangler, 427 U.S. at 436; Freeman, 503 U.S. at 494-96. This is nothing more than a restatement of relevant principles of proximate cause: the more distant in time the event, the less likely it is to be a causative factor so as to require legal obligations to attach. See Id. at 491 & 496. This is all the more true where, as here, CMS has acted in good faith toward its black students and in complying with the court's orders. Id. At 496.

A formerly de jure segregated system has the duty and responsibility to take all necessary steps to eliminate the vestiges of an unconstitutional de jure system. Freeman v. Pitts, 503 U.S. at 485. However, "when changes in the racial makeup of the schools were caused by demographic shifts 'not attributable to any segregative acts on the part of the school district,'" a court may not require the school system to implement a remedy. Id. at 487 (quoting Pasadena Bd. Of Educ. V. Spangler, 427 U.S. 424, 436 (1976)). In the "late phases" of a desegregation decree, "awkward," "inconvenient", and "bizarre" measures are not required to achieve constitutional

compliance. Freeman, 503 U.S. at 493 (explaining Swann). Instead, the focus is on the good faith of the school district. See Freeman, 503 U.S. at 496.

Where, as here, the school system has engaged in an ongoing effort over thirty years to correct the initial constitutional violations, and has in fact engaged in an heroic effort to counteract demographic and other forces over which it had no control in order to maintain artificially high levels of racial balance in student assignment, there is little doubt that the school system has worked in good faith to comply with the Constitution. Moreover, the fact that the vast majority of the schools were racially balanced despite demographic change for more than twenty years further severs any currently observable imbalance from the de jure violation. Finally, most of the schools which CMS has identified as out of compliance with the Court order because they are racially identifiable black were either de jure white or were not even built during the era of segregation. It is utterly impossible for such schools to reflect a vestige of segregation. See Freeman, 503 U.S. at 478. In order to qualify as a vestige, a present condition "must be tied to the discriminatory practices and policies that justified the ...decree..." in the first instance. Ho v. San Francisco Unified School District, 197 F.3d 854, 865 (9th Cir. 1998). Where a school system like CMS has devoted 30 years to removing all systemwide vestiges of segregation to the extent reasonably practicable, and now operates within the command of the Constitution, a court may not impose any further

affirmative obligations on the school district which go beyond the requirements of the Fourteenth Amendment. Any such effort simply has no basis in the Constitution. See Dowell, 498 U.S. at 249.

2). **CMS Has Previously Been Determined not to have Discriminated In Several Areas**

CMS has been determined to have no racial discrimination in several areas by Court Order entered in 1975 from which no appeal was taken. [14] Under those circumstances both the doctrine of res judicata and the well settled "law of the case" rule would preclude the relitigation of those issues. See Board of Ed. Of Oklahoma City Schools v. Dowell, 498 U.S. 237, 245-46 (1991).

3) **The Lack Of Unitary Status With Respect To A Green Factor Unrelated To Student Assignment Will Not Justify The Continuation Of Race Based Student Assignments**

In Green, the Supreme Court identified several areas of operation within a school system that should be assessed in the context of determining whether the vestiges of the former dual system have been eradicated such that the system can be declared unitary and all race-based remedial measures concluded. Those areas included faculty, staff, transportation, extracurricular activities, facilities and, of

[14] See supra at p. 4-5.

course, student assignment. Green, 391 U.S. at 435, 88 S.Ct. at 1692. The Swann Court provided a simple means by which to determine whether any of these Green factors caused a constitutional violation; i.e., the perpetuation of a vestige of the former dual system that so adversely impacted attainment of a desegregated school system that unitary status could not be declared for the system in that particular area of operation:

> [W]here it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights...is shown.

Swann, 91 S.Ct. at 1277.

However, any race-based remedy which goes far beyond the nature and scope of remedying any persisting vestiges conflicts with the fundamental principles expressed in Missouri v. Jenkins, ___ U.S. ___, 115 S.Ct. 2038 (1995); see also People Who Care v. Rockford Bd. of Educ., 111 F.3d 528 (7th Cir. 1997). For example, conformance to a systemwide racial percentages is not required by the Constitution. See Stell v. Savannah-Chatham County Bd. of Educ., 888 F.2d 82, 85 (11th Cir. 1989); Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977) (Milliken II).

The Stell case is particularly instructive in this regard. In that case, the district court had approved a desegregation plan which employed voluntary participation in magnet programs to desegregate the schools. However, all of the system's schools were not within plus or minus 20% of the systemwide student racial ratios. Id. Plaintiffs challenged the plan on appeal. Despite the fact that the school system **had not been declared unitary** and was not within plus or minus 20% (the court approved benchmark), the Eleventh Circuit held that the statistical numbers were not controlling. Id. More than bare statistics was required to show "segregation" and the isolation of minority children. Id.

It is clear the Swann court carefully reviewed a number of issues critical to the unitary status of this school system and found CMS to have eradicated all vestiges of the dual system from most of its areas of operation as early as 1975. It is for this Court to interpret the meaning and intent of that 1975 Order and those that preceded it. By giving voice to its plain meaning, this Court will preempt many of the arguments CMS has sought to use in order to delay the conferral of unitary status upon it.

B. THIS COURT SHOULD ENJOIN CMS FROM CONTINUED USE OF A RACE-BASED STUDENT ASSIGNMENT PLAN

Race-based governmental action requires strict scrutiny "whether or not the reason for the racial classification is benign or the purpose remedial." Shaw v. Hunt,

___ U.S. ___, 116 S.Ct. 1894, 1900 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. ___, 115 S.Ct. 2097, 2111 (1995); EOEA, 937 F. Supp. at 704. See also People Who Care, 111 F.3d at 535. All governmental classification of citizens based upon race is "inherently suspect and thus call[s] for the most exacting judicial examination." University of Cal. Regents v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell, J.); accord Miller v. Johnson, 515 U.S. ___, 115 S.Ct. 2475, 2482-83 (1995); Shaw v. Reno, 509 U.S. 630, 657-58 (1993); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); Loving v. Virginia, 388 U.S. 1, 11 (1967); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.)). This tenet is equally true in the desegregation context where race-based remedies are employed to correct past constitutional violations. See EOEA, 937 F. Supp. at 704; People Who Care, 111 F.3d at 535.

Federal courts are not empowered to effect or approve a race-based remedy in the absence of a constitutional violation. Missouri v. Jenkins, ___ U.S. ___, 115 S.Ct. 2038, 2061 (1995) (O'Connor, J., concurring); Voinovich v. Quilter, 507 U.S. 146, 156 (1993); Growe v. Emison, 507 U.S. ___, 40-41, 113 S.Ct. 1075, 1084 (1993). As Justice O'Connor has stated, "[t]he unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent

a constitutional violation." Missouri v. Jenkins, 115 S.Ct. at 2061 (O'Connor, J., concurring).

Thus, if this Court finds that CMS is unitary in any respect, then it becomes the burden of the school district to establish the need for any race-based remedy it employs. A race-based remedy to cure the vestiges of past discrimination requires a "strong basis in evidence of the harm being remedied." Miller v. Johnson, 515 U.S. ___, 115 S.Ct. 2475, 2491 (1995); Shaw v. Reno I, 509 U.S. 630, 656 (1993); EOEA, 937 F. Supp. at 706; see also People Who Care, 111 F.3d at 535 (racial discrimination even for remedial purpose requires justification by "solid evidence"). The evidence of a constitutional violation must be specific to the area where a remedy is imposed and traceable to the actions of the government. Shaw v. Hunt, 515 U.S. ___, 116 S.Ct. 1894, 1906 (1996); Wygant, 476 U.S. at 288 (O'Connor, J., concurring). Remedying general "societal" discrimination is not within the power of the Court to compel. Id.; Shaw v. Hunt, 116 S.Ct. at 1906.

The current CMS SAP is a race-based governmental sponsored and implemented program originally intended to remedy any vestiges of the era of de jure segregation student assignment. This Court should not permit the continued use of any race-based SAP where the racial balance or composition of the student body is not required in order to eliminate the vestige identified. Nor is there a strong basis in evidence

establishing that CMS intentionally violated any prior Court Order or engaged in any segregative intentional discrimination against black students with respect to student assignment subsequent to the removal of all vestiges of the former dual system.

In the area of student assignment expert testimony will establish the source of any statistical racial identifiability of any CMS school is not due to de jure segregation, or any vestige thereof, but to demographic residential patterns unrelated to any act or omission of CMS. This fact was known to CMS by virtue of numerous reports prepared by CMS management employees. This indisputable fact eliminates any correlation between the relatively few so-called racially "identifiable" black schools that now exist and any conceivable vestige of the prior dual school system:

> It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation, and the law need not proceed on that premise. Further, as the de jure violation becomes more remote in time and demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith commitment to a desegregation plan.

Freeman, 503 U.S. at 495-96.

The fact CMS knew residential demographics were driving any so called racial imbalance in certain CMS schools was the subject of a major study completed in 1994 by former Assistant Superintendent Jeffrey Schiller, entitled Demographic Changes in the Charlotte-Mecklenburg Community: Implications for School Integration (Schiller). Dr. Schiller made the following findings:

(1) "There has been a change in school integration in CMS. And, changing and shifting population patterns are the primary cause." Schiller at p. 7.

(2) "[T]here is no evidence that CMS policies or practices are responsible for the increase in the percentage of black students attending predominantly black schools. The increase in the percentage of black students attending predominantly black schools is mostly a result of black population growth in attendance areas that are already either integrated or predominantly black." (Schiller, p. 16).

(3) "We know that the number of school-age children in ...[predominantly black attendance] areas are growing, yet, the growth occurred in the black population while the white population actually declined. We know the number of school age children in these areas no longer reflects the systemwide ratio of 60/40. In fact, the ratio is almost reversed with black children becoming almost 60% of the school age population." (Schiller, p. 17).

(4) "We also know that as the inner city neighborhoods became "blacker" their suburban counterparts became 'whiter'." (Id.)

(5) "An examination of student assignment records showed that no policy decisions were made to concentrate black students into particular schools. In fact, the opposite is true. Generally, elementary school zones were irregularly shaped...to include...an appropriate number of black and white children to meet court guidelines." (Schiller, p. 19, emphasis added).

(6) "...[S]atellite attendance zones were created, adjusted, or dissolved based upon the impact they had on the racial balance of their assigned school. In other words, the intent of the changes in student assignment was, in part, to insure that the black ratios in schools met court guidelines. These methods of student assignment are indicative of the annual 'tinkering' that occurred over the years..."(Schiller, p . 19 emphasis added).

In the present case, the attempt by CMS to link its new allegations of unequal educational opportunity to a de jure system of segregation in student assignment that ended thirty (30) years ago is nothing more than rank speculation and contrary to logic. In his report, Dr. Armor established that CMS schools, on the whole, were well within permissible deviations from their systemwide racial percentages for more than twenty (20) years. It is therefore highly unlikely that any current racial imbalance in an

isolated school is due to any vestige of 30 year old de jure segregation. Incredibly, some of the schools CMS points to as "racially identifiable" black schools were, at the time of de jure segregation, white schools and vice versa. It takes more than this kind of rank speculation to justify the rather incredible contention that lingering effects of segregation have caused a formerly de jure black school to become majority white.

The evidence will show that any "racial identifiability" of a particular CMS school was caused by interaction of (1) residential demographics; (2) private parental decisionmaking and (3) economics. If a school's racial makeup is due to residential demographics, population growth trends, or other factors unrelated to governmental race-based decisions, there is no remediable discrimination. See Freeman v. Pitts, 503 U.S. 467, 495, (1992); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971).

A school system is under no duty to remedy imbalance caused by demographic factors.

> The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation. And the law need not proceed on that premise.

Freeman, 112 S.Ct. at 1448. Unless any observable chronic racial imbalance in a school can be traced to a demonstrable constitutional violation perpetrated by CMS

specifically with respect to student assignment, this Court should not permit the gratuitous use of race to annually "rebalance" the racial composition of the district's schools. Freeman v. Pitts, 503 U.S. 467, 112 S.Ct. 1430, 1446 (1992).

The newly proposed CMS Controlled Choice Plan (CC Plan)[15], exceeds the remedial powers of this Court, by perpetuating a race based SAP. It will not be serve an acceptable race neutral alternative SAP. Therefore, the Court must not allow the CC Plan to be implemented as an alternative to the current plan. This plan also exceeds the authority of CMS to enact a student assignment plan of its own, as it is not narrowly tailored to achieve a compelling governmental objective.

11. The Current SAP Is Not Narrowly Tailored To Serve The Limited Purpose Of Remedying Any Remaining Vestiges

A government may not use race to burden or benefit, to classify or circumscribe, to define or deprive its citizens of a public benefit. Race-based decision making by governments is what caused the problem of segregation to begin with. Race is far too dangerous an element, absent a credible showing that the use of race is the only means by which to remedy an injury caused by discrimination, to constitutionally permit

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[15] In response to this suit and apparently anticipating the imminent demise of the quota driven SAP now in place, CMS will urge the Court to permit it to adopt a Controlled Choice Plan abominably known as the "Family Choice Cluster Plan". We expect to present evidence that Controlled Choice is an aggressive desegregation technique in the area of student assignment that provides tight substantive control over a school's racial composition because it allows CMS to control for the race of every student in the system. It would be anomalous to replace the existing unconstitutional plan with a plan that potentially uses race to a greater degree.

governments to use it as a criteria by which citizens - students are burdened or benefitted. To use an accessible metaphor: Governmental use of race in classifying its citizens is analogous to radiation therapy. Radiation treatment -- itself potentially deadly -- can be justified to treat serious diseases such as cancer if used in small, controlled doses directly applied to the cancerous cells. Unchecked, nuclear radiation causes death and deformity well into future generations. Similarly, a government must use race sparingly, in a narrowly targeted fashion, and only for the most serious of constitutional infirmities when no other remedy will suffice.

In holding a Majority to Minority Transfer program unconstitutional, the Court in EOEA explained the problem well:

> The policy denied white children the opportunity to go to a school of their choice but, perhaps more importantly, through its policy the school board tells those whom it is charged to educate that they are less entitled to the benefit of the law solely because of the color of their skin. At the same time, the policy sends a contradictory message that the school board values white students but places a smaller value on its nonwhite students who are free to transfer out of the district. These effects demonstrate the insidious nature of race-based distinctions: A stigma is placed on all of those whom the policy seeks to divide.

EOEA, 937 F. Supp. at 708. For these reasons, neither a court nor a government may utilize such a hazardous remedy as a race-based classification without both a strong basis in evidence of the actual discrimination to be remedied and a narrow tailoring of any race-based remedy.

The current CMS SAP, as well as the newly proposed CC Plan, are patently race-based measures that cannot peacefully co-exist with a unitary (nonracial) school system. As such, they are subject to strict scrutiny. It has been shown supra that there is no strong basis in evidence for concluding that CMS committed any material violation of a prior Court Order or of the Constitution. Therefore, CMS can not establish a compelling interest which justifies the employment of any race-based remedy. See EOEA, 937 F. Supp. at 706.

Even if there were a compelling interest[16], the CMS SAP is not narrowly tailored to redress any proven continuing constitutional violation. People Who Care, 111 F.3d at 534; EOEA, 937 F. Supp. at 707; see also Jenkins, 115 S.Ct. at 2048 ("[a] desegregation remedy 'is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct.'") (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974) (Milliken I)). In other words, a desegregation remedy must "directly address and relate to the constitutional violation itself." Jenkins, 115 S.Ct. at 2049; see also Milliken v. Bradley, 433 U.S. 267, 270 (1977) (Milliken II) ("the scope of the remedy is determined by the nature and extent of the constitutional violation") (quoting Swann

[16] CMS contends the fostering of racial diversity is a sufficiently compelling interest to justify its use of race as a basis for student assignment. The Courts have rejected this notion. See Part C. infra.

v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)); Freeman v. Pitts, 112 S.Ct. at 1444; see also Shaw v. Hunt, 116 S.Ct. at 1906 (remedy must be imposed within the area where the proven violation actually occurred). "The remedy must therefore be related to 'the condition alleged to offend the Constitution.'" Milliken II, 433 U.S. at 280 (emphasis in original). Controlled Choice is not.

The absence of any ongoing "narrow tailoring" by CMS of its SAP is well illustrated by the Magnet School Program (MSP). CMS employs a racial quota, derived from the district's racial demographics, as the basis for conducting two separate lotteries, one for black students and one for all other students[17], in an effort to create the "perfect" 60/40 composition of students in each magnet school. If one race fails to apply in numbers sufficient to fill its quota, those seats are left vacant despite over subscription by the other race. CMS creates waiting lists by race for admission. This policy of purposefully excluding students to maximize "racial diversity" (interims of the racial ratio of Black and white which includes all other minority) is not narrowly tailored to the limited constitutional task of insuring equal African American access to the program. Obviously, there is no legal authority or constitutional basis for contending that black children should be denied access to a

[17]Minorities other than African Americans are counted as Caucasian students by CMS largely for historical reasons which are no longer valid. CMS has, over the past two decades, experienced substantial increase in Asian and Hispanic students. These other minorities now constitute approximately 10% of the District.

magnet school program because the seats (40%) allotted to their race have been oversubscribed, while the seats (60%) allotted for white students (and other minorities) were under subscribed and the school's capacity is capable of accepting those wait listed black students who failed to gain admission through the initial lottery.

The admission quotas for the MSP have caused both deserving black and white students to be excluded. It creates situations where highly desirable schools with specialized and unique programming unavailable elsewhere in the system actually go underutilized. Furthermore, CMS uses its MSP quotas to obtain a certain percentage of black students in a magnet school - like Olde Providence - which but for the racial set asides, would have a predominately white student body. Since this condition would not violate the Court's orders, the MSP quota is obviously not tailored to any real or alleged remedial purpose; much less to complying with this Court's orders. This result is the product of how racial quotas work at their very worst.

In sum, the quantum of race used in the current SAP, including the MSP, is broader and far more invasive than any potential residual vestige in the area of student assignment could justify. Given the boundaries of the constitutionally permissible use of race in remedial schemes, the current SAP far exceeds what would be required to

remedy a violation of the Constitution, even if such a violation were present. There is no basis in law to require CMS to make each school's student body mirror the racial composition of the entire school system, when it acknowledges residential patterns vary widely from that ratio throughout the CMS service area. This type of racial quota is egregiously overinclusive, requiring more governmental intervention and disruption of a proximity based, common sense student assignment plan than would be required to remedy any potential remaining vestiges (assuming any could be shown to still exist 30 years after CMS implemented remedial measures).

CMS is seeking to have this Court sanction its longstanding adherence to an SAP based on its political preference for student bodies with racial ratios plus or minus 15% of district racial composition for all 150 plus schools. This is far too strict a standard since "[t]he Supreme Court has made clear that, while racial ratios provide a useful tool for analyzing various plans, they are not to be used as rigid barriers." Id. In the words of Judge Posner, such a cramped leeway is "a misplaced exactitude," not a narrowly focused remedy. People Who Care, 111 F.3d at 536. Given the acknowledged effect the dramatic demographic shifts predicted by the Supreme Court in Swann have had on the racial composition of many CMS schools, it would be impossible to constitutionally justify any attempt by CMS to "remedy" the effects of private and voluntary housing choices.

As a last gasp effort to save its commitment to government engendered "racial 'diversity', CMS now purports to "confess" to discrimination in the desegregation of its faculty, the maintenance of its facilities and the education of underperforming students. It is telling that CMS only "confessed" these alleged shortcomings after the case was reactivated. Although it had no formal remedial plan in place to address these alleged deficiencies, it is clear from the evidence that CMS employees, superintendents, and Board members have worked diligently to address any identified shortcomings, such as by implementation of the 'Bright Beginnings' program to improve achievement, and to insure equitable distribution of funding, as shown in the allocation of bond money.It is also telling the Swann plaintiffs never filed a single motion in twenty plus years to renew court supervision of the case, or to remedy any discrimination or other deficiency in the progress of CMS towards unitary status.

The plain fact of the matter is that these eleventh hour confessions by CMS of alleged deficiencies in facilities and faculty will not save an unconstitutional SAP. One may not base the need for a student assignment remedy on, for example, discrimination in faculty hiring. See Freeman v. Pitts, 112 S.Ct. 1430. The remedy for any alleged shortcomings in other areas of the district's operations, assuming sufficient evidence of such violations is presented, would address those specific conditions. That does not require the continued mandatory student assignment based

on race. See Id.; EOEA, 937 F. Supp. at 707-08; Milliken II, 433 U.S. at 280. Any remaining vestige with respect to faculty or facilities is not of the same nature as a vestige in student assignment since any changes in student assignment will not have any effect on governmental decisions regarding the hiring and assignment of faculty or the decision to upgrade a facility.

Based on the facts and evidence presented in this case, the indefinite continuation of the race-based SAP is unconstitutional. That is because the current SAP exceeds both the nature and scope of any potential remedy for any remaining vestige. There is an insufficient basis in fact to conclude, as CMS would have, that perpetuation of drastic race-based remedies is necessary because almost thirty years of tight racial controls have failed to desegregate CMS. Accordingly, this Court should grant the Grant Intervenors and Capacchione relief by declaring the current CMS SAP unconstitutional. The Court is authorized to declare CMS a unitary school system, particularly in the area of student assignment. CMS should also be permanently enjoined from continuing to assign students on the basis of race in the future and from employing the newly proposed CC Plan as an alternative to its current unconstitutional plan.

C. RACIAL DIVERSITY IS NOT A COMPELLING GOVERNMENTAL INTEREST

In this case, CMS has plainly stated its desire and intent to continue to use race-based student assignment techniques beyond those needed to eliminate the vestiges of the former dual system for purposes of increasing racial diversity within system schools.[18] This gratuitous use of race flatly contravenes current Supreme Court precedent and does violence to the original Swann opinion itself which wisely stated:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities.

Swann, 91 S.Ct. at 1279. The Supreme Court has continued to uphold this principle in declaring that school integration cannot remedy all "stubborn facts of history". Freeman v. Pitts, 503 U.S. at 495-96. Furthermore, CMS' proposed perpetual use of race conscious student assignment measures to obtain an undefinable diversity in its schools is contrary to the Equal Protection Clause's "central mandate [of] racial neutrality in governmental decisionmaking." Miller v. Johnson, 515 U.S. 900, 904 (1995).

As the Supreme Court observed in Miller v. Johnson, 515 U.S. 900, 115 S.Ct. 2475, 2486 (1995)(internal citations omitted):

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[18] "CMS has...a policy of maintaining racial diversity in its schools. CMS has adopted this as a sound educational policy...to assign students to schools [to] create and foster the best educational environment...and achieve the educational benefits that flow from [racial] diversity among students...". See CMS Answer, Third Defense at p. 12.

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution." They also cause society serious harm.

Id. At 904.

> It is partially because of that potential for stigmatization and stereotyping that "racial diversity" has been determined to be insufficient to meet the demands of strict scrutiny. Hopwood v. State of Texas, 78 F.3d 932, 944-48 (5th Cir. 1996), held that
> Accordingly, we see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity even as part of the consideration of a number of factors, is unconstitutional.

Id. at 945-46.

The issue of racial diversity as a compelling state interest was examined by the First Circuit in Taxman v. Board of Education of Township of Piscataway, 91 F.3d 1547 (3rd Cir. 1996).[19] The plaintiff won a judgment for racial discrimination and that judgment was affirmed by the Third Circuit in a lengthy opinion that examines the current state of the law on the use of race by a governmental entity in the conferral of employment-related public benefits. The Taxman court followed Hopwood, supra, in rejecting "diversity" as a sufficiently compelling reason to engage in the race-based

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[19] The case was to be decided by the United States Supreme Court until an eleventh hour settlement funded principally by civil rights groups, was reached to pay off plaintiffs' judgment and resolve the case.

conferral of public benefits. Still more recently, the First Circuit has noted that a vague notion of "diversity" is insufficient as a compelling interest in the absence of evidentiarily supported reasons and sufficient definition. Wessman v. Gittens, ___ F.3d ___, 1998 WL 792148 (1st Cir. 1998). The clear weight of authority from courts which have examined this issue have held that racial diversity is an insufficiently compelling interest to withstand strict scrutiny. See, e.g., Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996); Equal Open Enrollment Ass'n (EOEA) v. Board of Educ. of Akron City School Dist., 937 F. Supp. 700, 709 (N.D. Ohio 1996); Taxman v. City of Piscataway, 91 F.3d 1547 (3d Cir. 1996); Hitler v. County of Suffolk, 977 F. Supp. 202 (E.D.N.Y. 1997); Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996); Wessman v. Gittens, ___ F.3d ___, 1998 WL 792148 (1st Cir. 1998).

Even if this Court found racial diversity to be a compelling interest, CMS's policy is not narrowly tailored to any compelling interest. See People Who Care, 111 F.3d at 534; EOEA, 937 F. Supp. at 707; Jenkins, 115 S.Ct. at 2048; Milliken v. Bradley, 418 U.S. 717, 746 (1974) (Milliken I)); Milliken v. Bradley, 433 U.S. 267, 270 (1977) (Milliken II). Defendants' race-based student assignment policy is apparently of unlimited duration to be implemented as long as the Defendants believe that the ratio between Black and White students can be improved. "Even if 'diversity' were defined, the plan does not indicate that it will end when diversity is achieved."

Taxman, 832 F.Supp. at 850. Such a policy does not involve a "temporary" measure that seeks to "attain" rather than "maintain" a "permanent racial...balance." Johnson, 480 U.S. at 639-40; Weber, 443 U.S. at 208.

Finally, to be narrowly tailored, CMS's SAP must be designed and employed so as to harm the fewest number of innocent parties and targeted to reach its intended beneficiaries. Wessman v. Gittens, 1998 WL 792148 (1st Cir. 1998); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994). This is not the case here, where CMS is engaged in overcorrecting for factors clearly beyond its control, imposing tighter racial quotas than what the law or this Court's orders require, and attempting to justify its continued stranglehold on student racial mix by claiming other goals have not yet been attained. CMS's SAP misses the constitutional mark and is not sufficiently narrowly tailored to survive strict scrutiny.

V: CONCLUSION

Although CMS has maintained to this Court that it believes itself not yet unitary in any regard, the evidence tells a different story. It tells the story of a school system which worked hard to make a desegregation remedy work – and kept working at it for more than twenty years. When it became evident in the early 1990s that the old SAP was failing to maintain the level of desegregation the district had come to desire wholly apart from the reasons behind its inception, CMS kept trying, through an altered SAP

and new programs and policies, to be the "premier desegregated urban school system in the nation." The problem here is that when CMS attained those goals as far as practicable, it did not stop.

Ignoring its own documents, the law, and the realities of the situation, CMS has in effect said: We can continue our politically popular stance, gain more federal funds, and remain invested in our self-image if we keep race-based policies in place. This is too high a price to pay for the constitutional rights of Charlotte's citizens. CMS should be proud of its accomplishments as the city that made it work. However, when that same entity is practicing on its youngest, most vulnerable citizens policies which declare their color to be the most important thing about them, it has gone too far. The parents, students, and citizens of Charlotte-Mecklenburg County deserve better. They deserve a declaration that CMS has attained unitary status and must be enjoined from further race-based student assignment policies.

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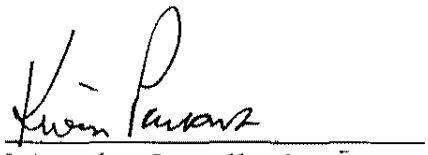

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing "Plaintiffs-Intervenors' Plaintiff Capacchione's Joint Trial Memorandum" in the above-captioned proceeding has been served this 12th day of April, 1999 by hand delivery and first-class mail, postage prepaid, upon the attorneys at the addresses listed below:

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