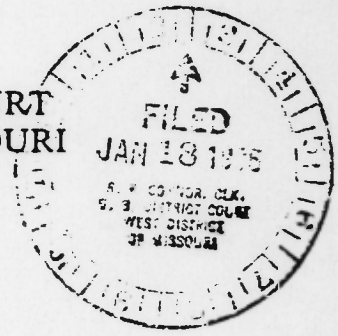
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



Kalima Jenkins, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	No. 77-0420-CV-W-4
	)	
State of Missouri, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

PROSPECTIVE PLAINTIFF-INTERVENORS'
CONSOLIDATED REPLY TO THE PARTIES'
SUGGESTIONS IN OPPOSITION TO MOTION TO INTERVENE

The parties have not put forth any compelling reason or established sufficient legal basis for denial of the Motion To Intervene in this case. The rules on intervention are to be liberally construed with doubts resolved in favor of allowing intervention. See e.g., Kozak v. Wells, 278 F.2d 104, 111-112, (8th Cir. 1960); Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175, 177 (8th Cir. 1978). Under the rule covering intervention as of right, Fed. R. Civ. P. 24(a), a prospective intervenor must assert (1) an interest in the subject matter of the primary litigation; (2) there exists a *possibility* that the petitioners' interest will be impaired; (3) there exists a *danger of inadequate protection* by the party representing the petitioners' interests; and (4) the petitioners have made timely application to intervene under the circumstances of the case. (emphasis added) Liddell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976).

The defendants and intervenor American Federation of Teachers (AFT) do not challenge the substance of the motion and limit their opposition to the timeliness factor. Plaintiffs assert that the motion is untimely, that movants do not have an interest in a desegregated school system, and that movants have not demonstrated inadequate representation.

Timeliness

There is no steadfast rule establishing when a motion to intervene is or is not timely. Timeliness is to be determined, on a case by case basis, examining all the relevant circumstances. NAACP v. New York, 413 U.S. 345, 935. Ct. 2591, 37 L. Ed.2d 648 (1973). While it is true that nine (9) years have elapsed from the time of the initial remedial order, that fact alone cannot be dispositive in light of the particular facts and circumstances of this case. In Bradley v. Pinellas County School Bd., 961 F.2d 1554 (11th Cir. 1992), parents alleging violation of the rights of African-American students and deficiencies in the implementation of the district court's desegregation order satisfied the timeliness requirement in a case much older than these proceedings. In that case the litigation was twenty-eight (28) years old and the challenged remedial order had been in effect for fifteen (15) years.

That approach was consistent with Stallworth v. Monsanto Co., 558 F.2d 257, 266 (5th Cir. 1977), which counselled against the use of "absolute" measures of timeliness, such as how far the litigation has progressed when intervention is sought or the amount

of time that has elapsed since the institution of the action. Because "the privilege of intervention stems from a desire to protect the rights of unrepresented third parties, it becomes apparent that the timely application required under Rule 24 was not intended to punish an intervenor for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervenor's failure to apply sooner." McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970).1/

The assertions of prejudice by the constitutional violators lack cogency and legal sufficiency. The state argues that it is too late to change the focus of the remedy. It is not the intent or purpose of the prospective intervenors to *change* the focus of the remedy. Their goal is to ensure that a major focus of the original remedy (the educational interests of African-American students) is pursued effectively. In their response, the state acknowledges that "dealing with the needs of minority students and predominantly minority schools" is a legitimate focus. State's response to Motion To Intervene at 5. Movants are not attempting to change that focus, but they are trying

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1/ The Plaintiffs and AFT do not allege specific prejudice to their interests due to any delay in the filing of the Motion To Intervene, nor do they assert "possible prejudice any delay due to intervention might cause" them. Liddell v. Caldwell *supra*, at 770. The State of Missouri argues that intervention "would inject new issues into formulation of the remedial plan," "further complicate and delay future litigation," and "that the delay would prejudice the State." State's Response To Motion To Intervene at 7-8. The Kansas City, Missouri School District (KCMSD) asserts that the intervention would "jeopardize" implementation of the Court's remedial orders, "needlessly complicate and delay" the litigation, increase costs and add to the burden of discovery. KCMSD's Suggestions In Opposition To Motion To Intervene at 4-5.

to ensure that an essential component of the original remedy receives adequate attention from the Court "in order to provide real and tangible relief to minority students." Freeman v. Pitts, 112 S. Ct. 1430, 1447 (1992).

The State also argues that it will be prejudiced by the injection of new issues in the case. That is not correct, as stated above. Movants are not injecting new issues, but they are attempting to revitalize old issues (essential to the ultimate effectiveness of the remedy) that have been too long ignored by the existing parties. The State argues prejudice because the requests for relief will delay progress toward ending the litigation. They are once again mistaken. Unitary status will not be achieved until the schools are desegregated to the extent practicable, and that will not occur until African-American children are accorded equal educational opportunities and the effects of the once *de jure* segregated school system are eliminated. The "prejudice" that the State may suffer in not prematurely ending the litigation is not grounds for denying the intended beneficiaries of the desegregation effort a voice in that effort. "[Re-]formulation of the remedial plan" and re-examining the needs of African-American students at this stage of the proceedings 2/ is not prejudicial and may be necessary to expeditiously achieve a unitary school system. Therefore, it certainly is appropriate for this Court "to inquire whether minority students [are] being disadvantaged in ways that [require] the

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2/ This motion was filed as these proceedings are entering a new stage. The remedial programs in this case expire at the close of the current school year. The record indicates that the KCMSD has filed a draft Long-Range Magnet Renewal Plan (LRMRP) and that the Court will not "hear evidence on the issues relevant to developing a one year plan" until March 28, 1995. Order of December 7, 1994.

formulation of new and further remedies to insure full compliance with the Court's decree." Freeman v. Pitts, *supra* at 1446.

The defendants' further assertions are also insufficient to justify denial of the motion. The delay, expense, and inconvenience occasioned by a requirement that constitutional violators remedy their wrongs is not the sort of "prejudice" that justifies a denial of intervention.3/ Prejudice to the parties from the intervention itself should not influence the determination of timeliness and "mere inconvenience is not, in itself, a sufficient reason to reject as untimely a motion to intervene as of right." McDonald v. E.J. Lavino Co., *supra* at 1073; Stallworth v. Monsanto Co., *supra*.

The intervention motion was filed at this time because it was not until the July 19, 1994 hearing on conditions in the traditional schools and subsequent events such as the Plaintiffs' vigorous opposition to the Court's, *sua sponte*, change in the minority to non-minority placement ratio (to which none of the parties responded), and KCMSD's filing for the second time an LRMRP (prepared jointly with class counsel) devoid of any plans to eliminate the vestige of "low achievement" and a "general attitude of inferiority among blacks" did movants finally realize that the interests of African-American children simply would not be adequately represented. Perhaps they could have come to this conclusion

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3/ Penick v. Columbus Education Ass'n., 574 F.2d 889 (6th Cir. 1978), cited by the state, is easily distinguishable since there, the appellate court found no abuse of discretion in denying permissive intervention by the bargaining agent for public school teachers in the remedial stage of a desegregation proceeding where the interests of teachers in the proceedings appeared to substantially coincide with the interests of defendant school board and where the movant failed to suggest any actual specific dispute between itself and the school board or any failure on part of the board to represent its interests.

sooner, but hindsight is certainly illuminative. However, any failure to recognize the magnitude of the problem and organize themselves more expeditiously should not serve as a basis for denying African-American children and their parents the right to be heard on the critical issues that remain unresolved.

The Motion To Intervene does not threaten to stall the wheels of justice or to delay the adjudication of the rights of the existing parties. These movants do not seek to relitigate resolved issues or to dismantle the remedy already established. There should be sufficient means within existing parameters, if properly designed and implemented, to meet the needs of the African-American children. The prospective intervenors willingly take the case as they find it. Little Rock Sch. Dist. v. Pulaski Ctv. Sch. Dist., 738 F.2d 82, 85 (8th Cir. 1984). As a consequence, the existing parties need not fear that discovery will be delayed, that hearings will be postponed, that judicial decisions will be put off, or that various other forms of real or imagined prejudice will ensue by allowing African-American parents to have a seat at the table in order to directly participate in litigation of vital importance to their children. "[The] limited goal of future participation does not impose any untoward burden on the original parties where questions may arise about the proper workings of the [remedial order] with possible benefit to the court from [intervenors] participation in their resolution." Natural Resources Defense Council v. Costle, 561 F.2d 904, 908 (D.C. Cir. 1977). (See Hodgson v. United Mine Workers of America, 473 F.2d 118 (D.C. Cir. 1972) allowing intervention when the applicant sought to participate in an upcoming, remedial phase of the litigation.)

Under the circumstances, the addition of these movants (African-American students and parents in a school desegregation case) is neither unusual nor unmanageable, especially in light of the discretion this Court possesses to control the course of proceedings before it. "The District Court may, of course, bar [intervenors] from seeking to reopen a question settled by the [parties] since intervention [is] sought in order to participate in post-[judgement] implementation. As for future intervention by other parties, the District Court possesses ample discretion under [Rule] 24(a)(2) to see that [the] proceedings are workable, non-duplicative and fair." Natural Resources Defense Council v. Costle, *supra* at 911.

Interest In the Subject Matter of the Litigation

Plaintiffs' primary argument seems to be that the movants do not have an interest in the proceedings "that can only be protected if intervention is granted." That is not the standard. Rule 24(a) provides for intervention of right when the applicant claims an interest and is so situated that "the disposition of the action may as a practical matter impair or impede the applicants' ability to protect that interest..." They then go on to cite several cases where courts have denied intervention to parent groups that are opposed to desegregation. Of course, these cases are inapposite.

The proposed intervenors have a clear interest in the establishment of a desegregated school system. They have a direct interest in the elimination of racially isolated substandard schools. Their interest is broader than the interests of the parent

group in United States v. Perry County Board of Education, 567 F.2d 277 (5th Cir. 1978)4/

Throughout their pleadings, movants unequivocally assert an interest in eliminating racially isolated schools and eradicating all the effects of segregation, including the vestige of "low achievement" and a "general attitude of inferiority among blacks." The movants have clearly advanced an interest in the goal of expeditiously achieving a unitary school system --- a school system in which there is not a proliferation of racially isolated annexes and in which the glaring and ever widening disparity between the academic achievement levels of white students and the African-American victims of discrimination is eliminated. Their interest is in ensuring that the students of the KCMSD receive a truly desegregated education where all vestiges of prior segregation have been eliminated root and branch.

In their suggestions, Plaintiffs assert that "[d]esegregation of the school district...is not the interest claimed or advanced by the proposed intervenors" because "they complain that [f]or too long, the KCMSD has inappropriately treated the process of desegregation as a process that focuses solely on integrating schools." Plaintiffs Suggestions at 7. They go on to suggest that concern with "broad instructional issues such as raising student achievement and improving curriculum" is not an expression of an

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4/ In that case cited by Plaintiffs, the court denied intervention to a group of parents who merely sought to challenge the location of new schools when it was found that they did not have an interest in a desegregated school system. This Court has allowed intervention by a group of students challenging plans for the construction of a new school when it found that they had such an interest. Order of June 7, 1990.

interest in "desegregation and a unitary school system."5/ They are simply wrong. As stated above, parents of children enrolled in a once *de jure* segregated school system who seek to end racial isolation, increase student achievement, and improve curriculum, certainly advance an interest in a desegregated and unitary school system. These interests surely are sufficient to meet the requirements of Rule 24. See Liddell v. Caldwell, *supra*; Bradley v. Pinellas County School Bd., *supra.*

Adequacy of Representation

Basic consideration of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation.6/ Two criteria for determining adequacy of representation are that (1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel. Nat. Ass'n. of Regional Medical Programs v. Mathews, 551 F.2d 340, 344-345 (D.C. Cir. 1976).

5/ Plaintiffs' characterization of the issues raised by movants is contrary to the arguments recently advanced on their behalf to the Supreme Court. Plaintiffs and their amici argued that inputs such as an improved curriculum, instruction, staff development, school climate, etc., and out puts such as student achievement, drop-out rates, attendance, etc., were relevant criteria in determining whether or not a school system was unitary. See Brief of Amici Curiae James Anderson, et. al., Appendix at 18-33.

6/ There are apparently no active class representatives in this case. The original named plaintiffs are not longer enrolled in KCMSD and have not been involved in this litigation for several years. In effect, class counsel has assumed the responsibility of the class representatives.

The record in this case clearly establishes that Plaintiffs have failed to fulfill their duty to vigorously represent the interests of African-American students, especially the traditional school populace. In its September 19, 1993 report to the Court, the DMC reported that the traditional schools were "in dire need of attention." Although approximately forty-three percent (43%) of all minority elementary school students enrolled in the KCMSD attend traditional schools, not one new traditional school has been built and renovation of several traditional schools has been delayed. When it became obvious that the dilapidated schools ordered closed would remain in operation for an extended period, and that there was a need to open temporary annexes, the Plaintiffs failed to move the Court to modify the sequence of capital improvement projects to accommodate the needs of the largely African-American traditional school populace.7/ As a result of Plaintiffs failure to fulfill their duty, a significant segment of the population for whom the remedy was ordered has been deprived of the full benefits ordered by the Court.

When the Court conducted a hearing to examine conditions at the traditional schools in response to subsequent DMC concerns about the conditions, Plaintiffs did not present any evidence and class counsel made a disparaging statement seeming to blame the students and their parents for their plight. See Traditional School Hearing Tr. 384-387. This alone is sufficient evidence of inadequate representation --- failure to fulfill duty.

7/ However, they moved swiftly to secure a stand-alone foreign language middle school for a relatively small group of magnet school students.

Plaintiffs' handling of this Court's, *sua sponte*, change of the minority to non-minority placement ratio is further evidence of both the conflicting interests within the class and the inadequate representation of movants interests when such conflicts arise. When class counsel vigorously opposed that change (ordered to give African-American students access to more seats in successful magnet schools) no one argued their position or represented their interests in having greater access to seats in successful magnet schools before this Court. In these adversarial proceedings, originally instituted on their behalf, the adjudicated victims should not have to rely on the Court to represent their interests.

Plaintiffs' myopic view of the remedial focus of this case is additional evidence of their inability to adequately represent the interests of the proposed intervenors. In the face of this Court's repeated pronouncements (See e.g. the Memorandum Opinion of June 14, 1985; Order of April 16, 1993; Order of April 14, 1994; Order of August 19, 1994; and Order of October 24, 1994) Plaintiffs refuse to recognize that the desegregation remedy in this case is "two-pronged" with equally important goals of integrating the schools (alleviating racial isolation) and eliminating all the effects of discrimination. Since Plaintiffs do not recognize the latter as a legitimate interest (See Plaintiffs' Suggestions In Opposition at 7) they certainly cannot adequately represent the interests of the proposed intervenors in its pursuit. Movants interests are consistent with the original remedy and their concern is that a major thrust of the original remedy that is essential to the equal educational rights of the African-American children is being

inadequately represented. Their ability to protect their interest in receiving the full benefits of remedial plans will be substantially impaired if intervention is denied.

The burden resting on intervenors to show that their interests are not adequately represented by existing parties is a "minimal one." Little Rock Sch. Dist. v. Pulaski Cty. Sch. Dist., *supra* at 84. The requirement of Rule 24 is satisfied if the applicant shows that representation of his interests "may be" inadequate; and the burden of making that showing should be treated as minimal. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10, 92 S. Ct. 630. 636, 30 L.Ed.2d. 686 (1972). See Liddell v. Caldwell, *supra*, a case in which the court found inadequate representation --- failure to fulfill duty to represent the interests of a group of African-American students (by a certified plaintiffs' class consisting solely of African-American students) when differences arose over the focus of the remedial plan agreed to by the named class representatives.

Similar to the successful intervenors in Liddell, the movants herein have established that the Plaintiffs are not adequately representing their interests in implementation of a "two-pronged" remedial plan. Moreover, they have established that Plaintiffs' have failed to represent their interests in eliminating the vestiges of "low achievement" and "general attitude of inferiority among blacks"; that there are conflicting interests within the class; and that the LRMRP prepared jointly by the KCMSD and Plaintiffs is generally devoid of realistic plans to eliminate all the vestiges of segregation to the extent practicable. Under the circumstances of this case, the minimal burden under Rule 24 has been exceeded.

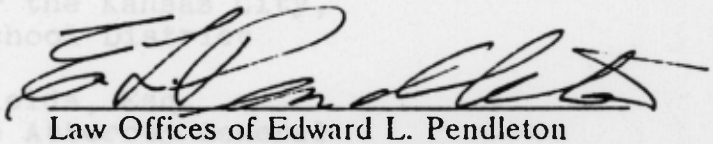
In identifying the unavoidable conflicts within the class and the inadequate representation of movants interests in the resolution of those conflicts, these parents do not cast aspersions or "impugn any element of bad faith" on Plaintiffs or class counsel. The inadequate representation of movants interests may very well be attributable to the composition of the class (all present and future students of the KCMSD). Plaintiffs have indicated that conflicts affecting the competing interests of the distinct groups within the class often arise and are resolved by class counsel. See Motion of Plaintiffs To Alter or Amend This Court's Order of August 19, 1994 at 5-6. As a result, the interests of some class members have not been adequately represented. These movants merely assert that intervention is warranted because there is inadequate representation of their interests and that too great a burden has been placed upon class counsel, who is charged with the responsibility of representing the interests of both white students and the African-American victims of discriminatory conduct, two functions that may not always dictate the same approach to the conduct of the litigation during this remedial phase when it is critical that the interests and needs of the victims are vigorously represented and clearly articulated before the Court. See Trbovich v. United Mine Workers of America, *supra* at 539.

Conclusion

For the reasons discussed in these Reply Suggestions, as well as for the reasons contained in the Motion To Intervene, Suggestions In Support of Motion To Intervene,

and the Amended Complaint In Intervention, the movants have established their right to intervene in this litigation under Rule 24(a). Permissive intervention under Rule 24(b) is also appropriate in this case. As outlined above, the Prospective Intervenors clearly seek to raise issues that share common factual and legal questions within the main action. Further, intervention will cause no prejudice or delay. Thus, even if this Court should determine that not all of the requirements of Fed. R. Civ. P. 24(a) have been met, it should permit the requested intervention under Rule 24(b). Movants respectfully request the Court to issue its order granting their motion on the record or, in the alternative, to conduct an evidentiary hearing to allow them to present evidence in substantiation of the issues presented in the Motion To Intervene.

Respectfully submitted,



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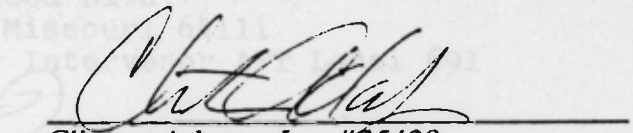

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