THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
Civil Action No. 632

UNITED STATES OF AMERICA, Plaintiff, v. THE BERTIE COUNTY BOARD OF EDUCATION, *et al.* Defendants.	)	MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR FURTHER RELIEF

INTRODUCTION

Thirty-four years ago, this Court issued an order requiring defendant Bertie County Board of Education ("the District") to develop a school desegregation plan "providing for the complete elimination of the dual school system in the Bertie County schools with respect to pupil and faculty assignments, facilities, transportation, and other school activities." *United States v. Bertie County Bd. of Educ., et al.*, 293 F. Supp. 1276, 1283 (E.D.N.C. 1968). In reaching its conclusion about the District's desegregation responsibilities, this Court noted, *inter alia*, that Askewville Elementary operated as an "all-white school . . . with an all-white student body" and an all-white faculty. *Id.* at 1278.

The United States now seeks further relief in this case because the District's desegregation efforts have not been effective, insofar as the District, upon information and belief, has continued to operate Askewville Elementary as a racially identifiable white school since this Court's 1968 order. In the 2000-01 school year, white students comprised 15% (258/1665) of the District's total elementary school student enrollment (grades K-5), but 77% (117/151) of the

student enrollment in Askewville Elementary.[1] The faculty and staff assigned to Askewville Elementary follow the same pattern, as while white personnel comprised 54% (59/110) of all elementary school teachers and 26% (25/96) of all elementary school staff employed by the District in the 2000-01 school year, white personnel comprised 91% (10/11) and 75% (9/12) of Askewville Elementary's faculty and staff, respectively, during that same time period.[2]

The United States also seeks further relief because the District has failed to adhere to an appropriate student transfer policy since this Court's 1968 desegregation order. Upon information and belief, for several years the District followed an "open door" student transfer policy that permitted student transfers that, taken collectively, hindered desegregation. For example, from the 1998-99 to the 2000-01 school year, the District permitted a net of 60 white students (nearly 10% of the white student population in the District) to transfer to schools outside of the District (62 transferred out of the District; 2 transferred in). During that same time period, the District permitted a net of 13 white students transfer from the majority black school in their attendance zone to Askewville Elementary, the only majority-white school in the District (6 transferred out of Askewville Elementary; 19 transferred in). Further, although the District apparently stopped following its open door policy for student transfers in the summer of 2001 (after inquiry by the United States about that policy), the District currently is denying various transfers that would further desegregation in the District, and has not developed a new policy that is consistent with its desegregation responsibilities.

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[1] Data from District's response to the United States' January 2001 information request.

[2] *See* District's 2000 Elementary - Secondary Staff Information (EEO-5) Report. For purposes of the data summarized in this memorandum, the term "staff" includes all full-time personnel in the following categories listed in the EEO-5 Report: guidance, psychological, library/AV, construction/supervisor, other professional, teacher aides, technician, clerical/secretary, service workers, skilled craftsperson and labor-unskilled.

Since the United States began reviewing (in January 2001) the extent to which the District has been meeting its desegregation responsibilities, the District has not been able to provide the United States with any information indicating that the District has eliminated the vestiges of discrimination at Askewville Elementary or in student transfers to the extent practicable. Given that the District has failed to take appropriate steps to eliminate the vestiges of discrimination in these areas, further relief is warranted to ensure that the District complies with its desegregation responsibilities under this Court's 1968 order and applicable federal law.

NATURE OF THE CASE

On June 16, 1967, the United States filed suit against the District under Sections 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b). In its complaint, the United States alleged that the District, in operating its public schools, failed to take adequate steps to disestablish the dual school system, and violated the Fourteenth Amendment to the United States Constitution by denying equal protection of the laws to school-age black children. On August 5, 1968, this Court ordered the District to file a "plan of school desegregation providing for the complete elimination of the dual school system in Bertie County schools with respect to pupil and faculty assignments, facilities, transportation, and other school activities." *Bertie County*, 293 F. Supp. at 1283. The District filed its plan on April 18, 1969, and this Court approved the District's plan on June 2, 1969 and July 1, 1969. In 1972, this Court removed this case from the pending docket, subject to being reopened upon the filing of any pleadings or papers that would warrant reopening the case.

STATEMENT OF FACTS

A. Overview of the Bertie County School District

Bertie County, North Carolina, is located approximately 110 miles east of Raleigh, North

Carolina. In the 2000-01 school year, the Bertie County School District served a total of 3,605 students in its ten schools, which are: Askewville Elementary, Aulander Elementary, Colerain Elementary, J.P. Law Elementary, West Bertie Elementary, Windsor Elementary, C.G. White Middle, Southwestern Middle, Bertie High, and Serendipity Alternative School. The student enrollments, by race, for each school operated by the District were as follows in the 2000-01 school year[3]:

School	White	Black	Other	Total
Askewville (K-5)	117 (77%)	28 (19%)	6 (4%)	151
Aulander (K-5)	24 (13%)	163 (87%)	1 (< 1%)	188
Colerain (K-5)	30 (10%)	257 (88%)	4 (1%)	291
J.P. Law (K-5)	26 (24%)	78 (72%)	4 (4%)	108
West Bertie (K-5)	24 (5%)	451 (94%)	6 (1%)	481
Windsor (K-5)	37 (8%)	407 (91%)	2 (< 1%)	446
C.G. White (6-8)	37 (14%)	236 (86%)	1 (< 1%)	274
Southwestern (6-8)	110 (18%)	491 (81%)	7 (1%)	608
Serendipity (6-12)	3 (23%)	10 (77%)	0 (0%)	13
Bertie (9-12)	174 (17%)	864 (83%)	7 (1%)	1,045
Total Elementary	258 (15%)	1,384 (83%)	23 (1%)	1,665

[3] Data from District's response to United States' January 2001 information request.

Total Middle	147 (17%)	731 (83%)	8 (1%)	886
Total High	177 (17%)	870 (83%)	7 (1%)	1,054
Total Overall	582 (16%)	2,985 (83%)	38 (1%)	3,605

Under the dual system, the District operated Askewville Elementary, West Bertie Elementary and Bertie High as white schools, and Aulander Elementary, J.P. Law Elementary, C.G. White Middle and Southwestern Middle as black schools.

B. Historical Background – Case Activity

1. August 9, 1968 Desegregation Order

The Bertie County School District has operated under a desegregation order since August 8, 1968. *See Bertie County*, 293 F. Supp. 1276. In the August 1968 order, this Court recognized that the District's burden "'is to come forward with a [desegregation] plan that promises realistically to work, and promises realistically to work now.'" *Id.* at 1281 (quoting *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 439 (1968)). Accordingly, this Court directed the District to develop and file a desegregation plan to dismantle the District's dual system, with particular focus on "pupil and faculty assignments, facilities, transportation, and other school activities." *Id.* at 1283.

In connection with directing the District to file a desegregation plan, this Court provided important guidance about the legal requirements that the District should take into account in crafting its desegregation plan. For example, on the issue of student assignment, this Court noted its (and the Supreme Court's) disapproval of a "free transfer" plan that would enable white students to transfer from the schools in their attendance zones to the predominantly white schools in the district. *See id.* at 1280 (*citing Monroe v. Bd. of Comm'rs of City of Jackson, Tenn.* 391 U.S. 450, 459 (1968)). This Court also observed that "[i]f the defendants elect to desegregate

pursuant to geographic attendance zones, it is their obligation to draw those zones in such a manner as to eliminate the effects of past racial discrimination and to achieve desegregation." *Bertie County*, 293 F. Supp. at 1281 (also noting that the District must draw its attendance zones to counteract discriminatory racial residential patterns).

This Court also provided guidance on the District's responsibility to desegregate its faculty, starting with the propositions that: 1) the pattern of faculty assignment should be designed to avoid the identification of any school as black or white, and 2) "the ratio of white to nonwhite teachers at each school should reasonably approximate the ratio of white to nonwhite teachers in the system as a whole." *Bertie County*, 293 F. Supp. at 1282. This Court then explained that faculty desegregation "cannot be left to the voluntariness of teacher applicants or transfers," as school boards have an "affirmative duty" to do everything in their power to desegregate their faculties. *Id.*

2. District's 1969 Desegregation Plan

On April 18, 1969, the District filed its desegregation plan. *See* Appendix ("App.") at 9-21. The plan, which primarily dealt with student assignment, called for all students in grades eight and nine to attend Bertie Junior High, and called for all students in grades ten through twelve to attend Bertie High. *See* App. at 13. Regarding student assignment at the elementary school level, the District proposed seven attendance zones with the following projected student enrollments:

Zone	**White**	**Black**	**Total**
Zone 1 W.S. Etherige (1-4) Windsor (5-7)	318 (27%)	849 (73%)	1167

Zone 2 West Bertie (1-2) John B. Bond (3-5) Roxobel-Kelford (6-7)	116 (15%)	651 (85%)	767
Zone 3 S. Aulander (1-4) Aulander (5-7)	108 (33%)	215 (67%)	323
Zone 4 C.G. White (1-7)	66 (14%)	395 (86%)	461
Zone 5 West Colerain (1-4) Colerain (5-7)	171 (30%)	398 (70%)	569
Zone 6 J.P. Law (1-7)	46 (19%)	199 (81%)	245
Zone 7 Askewville (1-7)	139 (87%)	20 (13%)	159
Total (1-7)	964 (26%)	2727 (74%)	3691

See App. at 9, 11-12, 14-21. In connection with Zone Seven (Askewville Elementary), the District indicated that its projection of twenty black students enrolling in Askewville was an estimate, stating: "There will be approximately 20 Negro students in grades to be assigned." App. at 21. The District also stated in its desegregation plan, that "[t]eachers will be assigned without regard to race." App. at 12, 13.

The United States filed its response to the District's desegregation plan on May 8, 1969. *See* App. at 22-24. The United States did not object to the District's student assignment plan for grades 8-12 through twelve, and also did not object to the student assignment plan for grades 1-7, except to ask the Court for time to investigate a complaint about the alleged gerrymandering of the boundary line between Zones Four and Five. *See* App. at 22-23. The United States noted that the District's plan for faculty and staff assignment lacked specificity, but did not object to

the plan. *See* App. at 22. This Court approved the District's desegregation plan (reserving judgment on the boundary line between Zones Four and Five) on June 2, 1969, and approved the boundary line between Zones Four and Five on July 1, 1969. *See* App. at 25-26, 27.

Two years after this Court approved the District's desegregation plan in 1969, the Supreme Court explained that district courts have broad equitable powers that they may invoke in school desegregation cases to remedy past wrongs. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). In response to the Supreme Court's ruling, the Fourth Circuit remanded several cases to the district court to implement revised desegregation plans conforming with the expanded scope of remedies outlined in *Swann*. *See*, *e.g.*, *Riddick v. School Bd. of the City of Norfolk*, 784 F.2d 521, 524 (4th Cir. 1986) (referring to a case remanded for such a revised desegregation plan), *cert. denied*, 479 U.S. 938 (1986); *Medley v. School Bd. of the City of Danville, Va.*, 482 F.2d 1061, 1065 (4th Cir. 1973) (same). Here, however, the District continues to operate under a pre-*Swann* desegregation plan.

3. Re-Drawing of Zone Lines in 1991

The next substantive interaction between the District and the United States occurred in the early 1990s, when the District contacted the United States about the District's plan to build a new elementary school near the town of Windsor (the proposed school currently operates as Windsor Elementary), and convert C.G. White and Southwestern from elementary schools serving grades K-8 to middle schools serving all students in grades 6-8 (the remaining elementary schools would serve students in grades K-5). *See*, *e.g.*, District's August 16, 1991 letter to the United States. The United States responded on January 31, 1992, when it sent the District a request for additional information about the District's rezoning proposal and its desegregative impact. The District responded to the United States' request on February 19, 1992,

providing information about, *inter alia*, the effect that the rezoning proposal would have on student assignment, faculty assignment, and transportation. The United States did not correspond further with the district about the rezoning proposal.

The District implemented its rezoning proposal in 1991-92, without obtaining the approval of this Court. In 1990-91, under the old attendance zone lines, white students comprised 96% (186/193) of the students enrolled at Askewville Elementary (grades K-8), and 22% (645/2910) of all students at the same grade levels district-wide. In 1991-92, after the new attendance zones took effect (including the zone for Askewville Elementary, which the District expanded along the southern portion of the attendance zone boundary), white students comprised 83% (105/127) of the student enrollment at Askewville Elementary (grades K-5), and 20% (389/1908) of all students at the same grade levels district-wide. Upon information and belief, the District could have achieved further desegregation in Askewville Elementary had it (in addition to or instead of the adjustment to that school's attendance zone's southern boundary) extended the northern border of the attendance zone towards Powellsville, where several black families resided in the early 1990s (as well as today).

4. January 2001 Compliance Review

On January 8, 2001, the United States sent a letter and information request to the District to begin a review of the District and its compliance with this Court's desegregation orders and applicable federal law. As part of its review, the United States reviewed publicly available reports and data about the District, reviewed documents provided by the District in response to the United States' inquiries, and spoke with community members. The United States also conducted a site visit to the District in May 2001, during which it toured several schools and met with various District officials.

On June 20, 2001, the United States sent a letter to the District advising it of several areas where the United States believes the District needs to take steps to comply with this Court's desegregation orders and applicable federal law. The United States raised specific concerns about the following areas: 1) student assignments to Askewville Elementary, insofar as that school has a racially identifiable student enrollment; 2) student transfers to schools within and outside of the District, insofar as the District was following an "open door" policy for transfers that permitted student transfers that hinder desegregation; 3) faculty assignments to Askewville Elementary and Aulander Elementary, insofar as both schools had racially identifiable faculties; and 4) staff assignments to Askewville Elementary and C.G. White Middle, insofar as both schools had racially identifiable staff.[4] The United States concluded its letter by inviting the District to participate in a conference call to discuss the steps the District might take to address these issues.

5. Efforts of United States and the District to Negotiate

From July 2001 to July 2002, the United States and the District engaged in informal negotiations about the steps the district might take to address the concerns the United States raised in its June 2001 letter. On September 5, 2001, the District advised the United States that it had placed a moratorium on intra-district student transfers. The District also provided the United States with information about the steps the District is taking that may address the concerns raised

[4] The United States also raised concerns about: the use of race in classroom assignment at Windsor Elementary and Southwestern Middle; the operation of the gifted/talented program at J.P. Law Elementary and C.G. White Middle insofar as low numbers of black students are placed in the program; the operation of the special education program at Southwestern Middle and Bertie High insofar as high numbers of black students are classified as educable mentally disabled; and the quality of education offered at Aulander Elementary. Since the District is taking steps that may address the United States' concerns in these areas, it may be sufficient at this time to monitor the District's progress in each area.

by the United States about: the use of race in classroom assignments; the District's operation of its gifted/talented and special education programs; and the quality of education offered at Aulander Elementary.

The United States responded on November 5, 2001, advising the District that while the practices and procedures the District outlined in its September 5, 2001 letter might address some of the United States' concerns, the District had not addressed the United States' concerns about the District's practices and procedures concerning student assignments, student transfers (both intra- and inter-district); and faculty and staff assignments. The parties continued negotiations on those issues until July 2002, when the parties determined that they could not reach an agreement.

In a letter sent on September 11, 2002, the United States advised the District that the United States was prepared to file a motion seeking further relief unless, within seven days, the District notified the United States in writing that it wished to work out a consent decree addressing student, faculty and staff assignments, and student transfers. The District advised the United States that it is not interested in working out such a consent decree.

6. Current Status – Request for Further Relief

The United States asks this Court to grant its motion for further relief because, simply put, the District's desegregation efforts have not been effective in eliminating the vestiges of discrimination in the District's schools to the extent practicable. The United States principally seeks further relief on two issues: 1) Askewville Elementary's continued racial identifiability as a school for white students (facilitated by the District's student, faculty and staff assignment practices); and 2) student transfers. The United States summarizes the current status of each of those issues below.

The District's desegregation efforts have not been effective in eliminating the vestiges of

discrimination at Askewville Elementary. In 1968, this Court described Askewville Elementary as an "all-white school . . . with an all-white student body [and an] all-white facult[y] ." *Bertie County*, 293 F. Supp. at 1278. Over the thirty-four years since that finding, the District has continued to maintain Askewville Elementary as a racially identifiable, white, school. First, the District, through its student assignment practices, has maintained an identifiably white student enrollment at Askewville Elementary, as indicated by the following data:[5]

School Year (reports not available for all years)	**Askewville Elementary – % White Student Enrollment**	**District-Wide – % White Student School Enrollment**
1964-65	100% (161/161) * grades 1-8	32% (2302/7264) * grades 1-12
1965-66	100% (189/189) * grades 1-8	29% (1505/5169) * grades 1-8
1967-68	100% (165/165) * grades 1-8	29% (1964/6679) * grades K-12
1968-69	100% (152/152) * grades 1-7	25% (1022/4138) * grades K-7
1969-70 (first year of 1969 desegregation plan)	87% (139/159) *grades 1-7, as projected under desegregation plan	26% (948/3691) * grades 1-7, as projected under desegregation plan
1970-71	93% (172/185) *grades 1-7	23% (1389/5941) * grades K-12

[5] Where possible, the student enrollment data for Askewville Elementary is compared with the District-wide student enrollment for the same grade levels served by Askewville Elementary for that school year. For most other years, the student enrollment data for Askewville Elementary is compared with the District-wide student enrollment for all grades. The student enrollment data is drawn from the following sources: 1) District's reports to the United States Department of Education, Office for Civil Rights (1965-66, 1967-68, 1968-69, 1970-71, 1972-73, 1978-79); 2) District's September 5, 2001 letter and supporting documents to United States (1964-65, 1969-70, 1990-91, 1991-92, 2001-02); 3) District's response to United States' January 8, 2001 information request (2000-01); and 4) District's Data Reports to United States (1988-89).

1972-73	93% (166/179) * grades 1-7	23% (1351/5776) * grades K-12
1978-79	92% (145/158) * grades K-7	25% (718/2865) * grades K-7
1988-89	98% (181/184) * grades K-8	22% (654/2978) * grades K-8
1990-91	96% (186/193) * grades K-8	22% (645/2910) * grades K-8
1991-92	83% (105/127) * grades K-5	20% (389/1908) * grades K-5
2000-01	77% (117/151) * grades K-5	15% (258/1665) * grades K-5
2001-02	81% (116/143) * grades K-5	14% (237/1637) * grades K-5

The District has not advised the United States of any period of time since this Court's 1968 order when Askewville Elementary has not had an identifiably white student enrollment.[6]

Second, the District has maintained an identifiably white faculty at Askewville Elementary, notwithstanding this Court's observation in 1968 that the District had "not made adequate progress in faculty desegregation." *Bertie County*, 293 F. Supp. at 1278, 1282. The following data indicate that, year after year, the District's faculty assignment practices have enabled the faculty at Askewville Elementary to remain a white faculty:[7]

[6] The United States does not have student enrollment data for every school year since this Court's 1968 order. The District, however, has not provided any evidence that Askewville Elementary was desegregated to the extent practicable during any of the years (including the years for which the United States lacks data) since this Court's order.

[7] The faculty assignment data are drawn from the following sources: 1) District's reports to the United States Department of Education, Office for Civil Rights (1965-66, 1967-68, 1968-69, 1970-71, 1972-73); 2) District's September 5, 2001 letter and supporting documents to United States (1964-65, 1990-91, 1991-92); 3) District's response to United States' January 8, 2001 information request (2000-01); and 4) District's Data Reports to United States (1989-90).

School Year (reports not available for all years)	Askewville Elementary Faculty (teachers only – % white)	District-Wide Faculty (teachers only – % white)
1964-65	100% (5/5) * grades 1-8	35% (89/256) * grades 1-12
1965-66	100% (7/7) * grades 1-8	32% (54/170) * grades 1-8
1967-68	100% (8/8) * grades 1-8	37% (100/269) * grades K-12
1968-69	100% (5/5) * grades 1-7	40% (94/237) * grades K-12
1969-70 (first year of 1969 desegregation plan)	No data available	No data available
1970-71	100% (7/7) * grades 1-7	43% (103/237) * grades K-12
1972-73	86% (6/7) * grades 1-7	47% (111/234) * grades K-12
1989-90	89% (8/9) * grades K-8	45% (79/176) * grades K-8
1990-91	80% (8/10) * grades K-8	46% (83/180) * grades K-8
1991-92	63% (7/11) * grades K-5	49% (56/114) * grades K-5
2000-01	91% (10/11) * grades K-5	54% (59/110) * grades K-5

Based on these data, it is apparent that the District has not taken the necessary steps to eliminate the vestiges of discrimination in its faculty assignment practices at Askewville Elementary, insofar as that school continues to have a identifiably white faculty. To the extent that a handful of black teachers apparently were assigned to Askewville Elementary in the 1991-92 school year, it is important to clarify that, upon information and belief, the school remained identifiably white identity in that year as well, insofar as all but one of the school's academic classroom teachers

(six out of seven – 86%) in 1991-92 were white. Further, it is apparent that the District continues its practice of assigning white faculty to Askewville Elementary today – from the 1999-2000 to the 2001-02 school year, white personnel comprised 100% (4/4) of all teachers that the District hired and assigned to Askewville Elementary, while several black personnel were hired and assigned to fill similar teaching positions at other elementary schools in the district.[8]

Third, upon information and belief, the District has maintained an identifiably white staff at Askewville Elementary since this Court's 1968 order. Data from the 2000-01 school year show that, with the exception of principal, on-site staff positions at Askewville Elementary (*e.g.*, guidance counselors, librarians, teacher aides, secretaries, skilled craftspersons, unskilled laborers, etc.) are mostly held by white personnel. Specifically, white personnel comprised 75% (9/12) of the staff members at Askewville Elementary in the 2000-01 school year, while comprising only 26% (25/96) of the staff holding those positions in the District's elementary schools as a whole.[9] The District's recent hiring and assignment data mirror this pattern, as from the 1999-2000 to the 2001-02 school year, white personnel comprised 80% (4/5) of all staff members that the District hired and assigned (in various positions) to Askewville Elementary,

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[8] The District hired and assigned one white K-6 teacher to Askewville Elementary in both the 1999-2000 and 2000-01 school years. In each of those years, black teachers comprised 50% of all K-6 teachers hired and assigned by the District (9/18 and 7/14, respectively). Similarly, in 1999-2000, the District hired and assigned a white exceptional children's teacher to Askewville Elementary – black teachers comprised 40% (2/5) of all exceptional children's teachers hired by the District that year. The District hired and assigned a white art teacher to Askewville Elementary in 2000-01 – no other art teachers were hired in the District that year.

[9] Data from other school years reflect a similar pattern: 1) in the 1991-92 school year, white personnel comprised 59% (10/17) of the on-site staff at Askewville Elementary, but 37% (47/127) of all staff in the District's elementary schools as a whole; 2) in the 1990-91 school year, white personnel comprised 88% (7/8) of the on-site staff at Askewville Elementary, but 30% (47/156) of all staff in the District's elementary schools as a whole.

while black personnel filled several similar positions at other elementary schools in the district.[10] Ultimately, through its student, faculty and staff assignment practices, the District has continued to operate Askewville Elementary virtually as what that school was in 1968 – a white school with a white student body, a white faculty, and a white staff.

Finally, the District's desegregation efforts have not been effective in eliminating the vestiges of discrimination in student transfers. Until as recently as June 2001, the District adhered to an "open door" policy when considering student transfers. Under that policy, the District permitted inter-district and intra-district student transfers to any receiving school or school district, provided that space was available for the student requesting the transfer. In adhering to its open door policy, the District permitted several transfers that, taken together, hinder the District's desegregation efforts. For example, from the 1998-99 to 2000-01 school year, the District permitted a net of thirteen white students[11] in the district to transfer from the elementary school in their attendance zone to Askewville Elementary, the lone racially identifiable white school in the District. During that same time period, the District permitted a net of sixty white students[12] (nearly 10% of the District's total white student enrollment) to leave

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[10] The District hired and assigned one white (and no black) counselor to Askewville Elementary in both the 1999-2000 and 2001-02 school years. In those same years, black personnel comprised 50% (4/8) and 33% (2/6) of all counselors hired and assigned by the District. Similarly, in 1999-2000, the District hired and assigned a white media staff person to Askewville Elementary (the District described this hire as an "internal hire") – black personnel comprised 75% (3/4) of all media staff hired by the District that year. The District hired and assigned one black and one white teaching assistant to Askewville Elementary in 2000-01 – black personnel comprised 46% (6/13) of all teaching assistants hired in the District that year.

[11] Nineteen white students transferred into Askewville Elementary via intra-district transfer, and six transferred out, for a net of thirteen white students entering Askewville Elementary.

[12] Sixty-two white students transferred out of the District via inter-district transfer, and two transferred in, for a net of sixty white students departing the District.

the district altogether via inter-district transfers.

The United States seeks additional relief on the issue of student transfers because, upon information and belief, the District has yet to formulate an appropriate policy for student transfers. On September 5, 2001, the District advised the United States that it had placed a moratorium on intra-district transfers, and planned to consider whether it would be appropriate to consider modifications to its inter-district transfer policy.[13] Upon information and belief, however, the District currently is denying student transfers that would further desegregation, and has yet to adopt a student transfer policy that is consistent with its desegregation responsibilities.

APPLICABLE LEGAL STANDARDS

As a school system that was previously segregated by law and has not yet achieved unitary status, the Bertie County School District has an affirmative duty to eliminate all vestiges of past discrimination to the extent practicable. *See Board of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991) (outlining the standard that courts should apply when considering whether to dissolve a desegregation decree); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-59 (1979) (explaining that school boards that operated dual systems were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch") (*quoting Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 437-38 (1968)); *see also Vaughns v. Board of Educ. of Prince George's County*, 758 F.2d 983, 988 (4th Cir. 1985) (*citing Columbus* and *Green*). The affirmative duty to desegregate is a continuing responsibility, and "[p]art of the affirmative duty . . . is the obligation not to take any action that would impede

[13] In addition, upon information and belief, the District permitted students who transferred to Askewville Elementary and other schools under its open door policy to continue attending those schools despite the moratorium.

the progress of disestablishing the dual system and its effects." *Dayton Bd. of Education v. Brinkman*, 443 U.S. 526, 537-38 (1979). "Each instance of a failure or refusal to fulfill this duty continues the violation of the Fourteenth Amendment." *Columbus*, 443 U.S. at 458-59; *see also Vaughns*, 758 F.2d at 988 ("Until a school system has discharged its duty to liquidate the dual system and replace it with a unitary one, the school's duty remains in place.").

Where a party (the United States, in this case) alleges that racial disparities remain in a school district's schools, policies and/or practices, the party is "entitled to a presumption that the current disparities are causally related to prior segregation, and the burden of proving otherwise rests on" the defendant school district. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 327 (4th Cir. 2001) (*en banc*); *see also Freeman v. Pitts*, 503 U.S 467, 494 (1992) ("The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation."). In meeting its burden, a school district often must go beyond demonstrating mere compliance with its original desegregation plan or the court's orders, because "in some desegregation cases simple compliance with the court's orders is not enough for meaningful desegregation to take place." *Belk*, 269 F.3d at 334 (explaining that a desegregation order or plan "entered in the 1960s or 1970s could have underestimated the extent of the remedy required, or changes in the school district could have rendered the decree obsolete"); *see also Columbus*, 443 U.S. at 459-460 (noting that, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the school district implemented a court-approved desegregation plan in 1965, but, in connection with its affirmative duty to desegregate, was required to develop a more effective plan in 1969).[14] Instead, a school district must show,

[14] As previously noted, the desegregation plan in this case was drafted and approved in 1969, before the Supreme Court explained, in *Swann*, that district courts have broad equitable powers that they may invoke in school desegregation cases to remedy past wrongs. *See supra* p.

beyond mere compliance with the original decree, that the vestiges of the dual system have been eliminated to the extent practicable. *Belk*, 269 F.3d at 334*; see also Davis v. Bd. of Sch. Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness."); *Green*, 391 U.S. at 439 (explaining that a district court should assess a desegregation plan by examining the effectiveness of the plan in achieving desegregation).

ARGUMENT

This Court Should Grant the United States' Motion for Further Relief Because the District Has Failed to Eliminate the Vestiges of Prior Discrimination at Askewville Elementary and in Student Transfers to the Extent Practicable.

A. *The District, by continuing to operate Askewville Elementary as a racially identifiable white school (as indicated by student, faculty and staff assignments), is violating this Court's 1968 order and applicable federal law.*

In 1968, this Court identified Askewville Elementary as an all-white school with an all-white student body and an all-white faculty, and directed the District to develop a desegregation plan that would completely eliminate the vestiges of discrimination in those and other areas. *Bertie County*, 293 F. Supp. at 1278, 1283. Notwithstanding this Court's directive, however, the District has continued to operate Askewville Elementary as a racially identifiable white school because, as the following analysis will demonstrate, the District's efforts to desegregate have simply not been effective.

First, the District has not taken sufficient steps comply with this Court's directives concerning the remedial steps needed to achieve desegregation in its student assignments. In 1968, this Court advised the District that if the District decided to "desegregate pursuant to attendance zones, it is [the District's] obligation to draw those zones in such a manner as to

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8 (noting that the federal courts have revised desegregation plans to conform with *Swann*'s expanded scope of remedies).

eliminate the effects of past racial discrimination and to achieve desegregation." *Id.* at 1281. The District has not met that obligation in drawing its zone lines, because neither the zone lines submitted as part of the district's 1969 desegregation plan nor the zone lines drawn by the District (without this Court's approval) in 1991 have been effective in eliminating the effects of past discrimination or in furthering desegregation at Askewville Elementary. Indeed, year after year, Askewville Elementary has maintained a white student enrollment of 77% or higher (up to 98% white in the 1988-89 school year), in stark contrast to the white student enrollment at the elementary school level in the District as a whole, which (based on available data) has never exceeded 27% since the desegregation plan was implemented in 1969. *See Swann*, 402 U.S. at 25-26 (explaining that there is a presumption against schools that are identifiably one race); *see also Belk*, 269 F.3d at 319 (endorsing the district court's use of a plus/minus 15% variance from the district-wide ratio to determine whether a school was racially imbalanced).[15]

Further, the District has not met its continuing and affirmative duty under federal law to take steps to further desegregation and eradicate all vestiges of discrimination in its student

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[15] To be sure, Askewville Elementary appears to be located in a predominantly white community; further desegregation is practicable, however, because, upon information and belief, black families reside in areas that, while outside of the current attendance zone for Askewville Elementary, are only a short distance away from the school. Moreover, the District's decision to locate a school in Askewville (made in or around 1964, when Askewville Elementary was constructed) constituted a breach of the District's affirmative duty to further desegregation, because it was foreseeable that the District's decision to select the Askewville construction site would have the effect of maintaining the racial separation of the schools. *See Columbus*, 443 U.S. at 460, 462 (observing that "[t]he Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system," and upholding the district court's finding that the school district breached its duty to alleviate desegregation in the years after 1954 by selecting construction sites that hindered desegregation). When a school district, as here, "presents a district court with a 'loaded game board'" in the form of schools improperly constructed in sites that hinder desegregation, affirmative steps such as the "remedial altering of attendance zones [are] proper to achieve truly non-discriminatory assignments." *Swann*, 402 U.S. at 28.

assignment practices to the extent practicable. *See Dowell*, 498 U.S. at 249-50 (explaining the responsibilities of school districts in the desegregation context); *Columbus*, 443 U.S. at 460-61 (explaining that the school district's "continuing 'affirmative duty to disestablish the dual school system' is . . . beyond question") (*quoting McDaniel v. Barresi*, 402 U.S. 39, 41 (1971)); *Vaughns*, 758 F.2d at 988-89 (explaining that, until a school district attains unitary status, its affirmative duty to desegregate remains in place). Despite that responsibility, the District has not taken the steps necessary to desegregate Askewville Elementary to the extent practicable. The District has modified its attendance zones on only one occasion since implementing the 1969 desegregation plan – in 1991, the District adjusted Askewville Elementary's attendance zone lines (as noted above, without this Court's approval),[16] but only achieved the marginal improvement of reducing the school's white student enrollment from 96% in 1990-91 to 83% in 1991-92.[17] Because white students comprised 20% of the student enrollment in the District's elementary schools as a whole in 1991-92, the District continued to operate Askewville Elementary as a racially identifiable white school. Since adjusting the zone lines in 1991, the District has not taken any steps to further desegregation in student assignments to Askewville Elementary, despite yearly student enrollment data showing that the current zone lines are not effective in desegregating that school to the extent practicable.

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[16] The Fourth Circuit has explained that, while a school district that has not attained unitary status may modify its desegregation plan, "the board must show that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination." *Riddick*, 784 F.2d at 535.

[17] In 1991, the District extended the southern border of Askewville Elementary's attendance zone. As previously noted, upon information and belief, the District could have achieved further desegregation in Askewville Elementary had it instead (or in addition) extended the northern border of the attendance zone towards Powellsville, where several black families reside.

Second, the District has exacerbated Askewville Elementary's racial identifiability as a white school by failing to take appropriate steps to desegregate the faculty and staff assigned to that school. The Supreme Court has explained that faculty and staff assignments "are among the most important indicia of a segregated system," as "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . , a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann*, 402 U.S. at 18; *see also Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 978 F.2d 585, 590 (10th Cir. 1992) (recognizing that a school district's pattern of assigning minority faculty/staff in a manner that reflects minority student assignment may reinforce racial identifiability, and stating that "a failure to achieve compliance with regard to faculty/staff assignment is particularly disturbing because it is the one facet within the exclusive control of the local school authorities"). Being aware of the importance of this issue, this Court, in its 1968 order, directed the District to desegregate its faculty assignments. *Bertie County*, 293 F. Supp. at 1283. In so ordering, this Court cautioned the District against leaving the desegregation of its faculty to the "voluntariness of teacher applicants or transfers," and endorsed the proposition that the ratio of white to non-white teachers at each school in the District should reasonably approximate the ratio of white to non-white teachers in the District as a whole. *Id.* at 1282.[18]

[18] The Supreme Court has rejected the proposition that, in the context of school desegregation, teachers may only be assigned on a "color blind" basis. *Swann*, 402 U.S. at 19. To the contrary, the Supreme Court has endorsed the use of mathematical ratios (*e.g.*, comparing the racial composition of the faculty at each school to the racial composition of the faculty in the district as a whole) as a benchmark that district courts may use to assess whether a school district has sufficiently desegregated its faculty and staff assignments. *See Freeman*, 503 U.S. at 481-82, 497-98 (upholding a district court's finding, based on mathematical ratios, that a school district had not fully desegregated its faculty and staff assignments).

As part of its 1969 desegregation plan, the District announced that "[t]eachers will be assigned without regard to race." The District's race-neutral policy for teacher (and presumably staff) assignments, however, has not been effective in desegregating the faculty and staff at Askewville Elementary. Instead, the available data suggest that the District has not been adhering to its race-neutral faculty and staff assignment policy, insofar as year after year, the faculty and staff at Askewville Elementary have continued to be identifiably white while the District hires and assigns black personnel in substantial numbers to other schools in the district. Indeed, in almost all years for which data are available, white personnel have comprised a majority of the faculty and staff at Askewville Elementary, in numbers that substantially exceed the racial composition of the faculty and staff employed by the District as a whole.[19] In the face of the continued racial identifiability of the faculty and staff at Askewville Elementary, the District has taken no additional steps to eliminate the persisting vestiges of discrimination in its faculty and staff assignment, instead seeing fit to stand pat on its ineffective desegregation plan.

Ultimately, the District, through its failure to follow this Court's 1968 order and through its breach of its affirmative duty to eliminate the vestiges of discrimination in its schools to the extent practicable, the District has continued to operate Askewville Elementary virtually as what was deemed unconstitutional in 1968 – as a racially identifiable white school with an identifiably white student body, faculty and staff.

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[19] To the extent that the racial composition of the faculty at Askewville Elementary moved closer to the District-wide composition in 1991-92 (63% white in Askewville; 49% white District-wide in grades K-5), that apparent progress disguises the fact that teaching assignments to academic classrooms remained reserved for white teachers that year insofar as they occupied six out of seven of those positions. Moreover, any progress that occurred in 1991-92 appears to have been fleeting, as white personnel comprised 91% of all teachers assigned to Askewville Elementary in the 2000-01 school year, but only 54% of all K-5 teachers District-wide.

B. *The student transfer policies that the District has followed since this Court's 1968 order violate this Court's 1968 order and applicable federal law.*

In 1968, this Court expressed its disapproval of free transfer plans in districts (such as Bertie County) where many schools have a majority of black students, as such plans allow white students to transfer from the schools in their attendance zones to predominantly white schools. *Bertie County*, 293 F. Supp. at 1280. Despite this Court's guidance, the District was effectively operating a free transfer system as recently as June 2001. Specifically, until at least June 2001, the District reviewed student transfer requests under its "open door" transfer policy, which, in operation, permitted free transfers to any school within or outside of the district, provided that space was available in the receiving school and that the student (or parent) provided transportation.

By adhering to its open door transfer policy, the District violated both this Court's order and federal law. From the 1998-99 to 2000-01 school years, a net of 13 white students transferred from the majority black elementary school in their attendance zone to Askewville Elementary, the sole majority white school in the District. During that same time period, a net of 60 white students (nearly 10% of the District's total white student enrollment) transferred to schools outside of the District altogether. Thus, through its open door transfer policy, the District was allowing white students to do exactly what this Court warned against in 1968 – re-route themselves, via free transfers, to the identifiably white school in the District (Askewville Elementary). Further, in permitting a substantial number of white students to transfer to Askewville Elementary or to schools outside of the District, the District breached its affirmative duty to eliminate the vestiges of discrimination in its schools, as the transfers, taken as a whole, have hindered the District's ability to desegregate its schools.

Presumably in response to the United States investigation, the District placed a

moratorium on intra-district transfers on or before September 5, 2001, and began revising its policy for those types of transfers.[20] Upon information and belief, the District has also limited inter-district transfers. The district current transfer policies, however, violate federal law because, upon information and belief, the District is denying transfers that would further desegregation. Further, to the United States' knowledge, the District has not adopted or implemented any new student transfer policies that will be consistent with the District's desegregation responsibilities. *See Belk*, 269 F.3d at 326 (endorsing the proposition that a school district should monitor student transfers to make sure that there is not a "run on the bank" at a given school).

C. *Further desegregation is practicable to eliminate the vestiges of discrimination in the District's student, faculty and staff assignments to Askewville Elementary, as well as the District's student transfer policy.*

There are practicable measures that the District can implement to desegregate student assignments to Askewville Elementary. To address the continuing racial identifiability of Askewville Elementary, the District simply could re-draw the attendance zone for that school to further desegregation in that school's student enrollment to the extent practicable. Upon information and belief, black families reside in areas that are outside of the current attendance zone but are within a short distance of Askewville Elementary, and thus easily could be included in a revised attendance zone for that school.[21]

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[20] As previously noted, it appears that the District permitted students who transferred to Askewville Elementary and other schools under its open door policy to continue attending those schools despite the moratorium.

[21] There are other practicable measures that the district could implement to further desegregation in student assignments, including: (1) clustering Askewville Elementary with nearby elementary schools that have higher enrollments of black students – for example, Askewville Elementary and J.P. Law Elementary could serve all students in grades K-1 that currently attend those two schools and Windsor Elementary, while Windsor Elementary could

There are also practicable measures that the District can implement to desegregate faculty and staff assignments to Askewville Elementary. The District could simply reassign certain teachers and staff members to and from Askewville Elementary to ensure that the racial composition of the faculty and staff at that school reasonably approximates the racial composition of the faculty and staff in the District as a whole. *See Freeman*, 503 U.S. at 482, 497-98 (indicating that a district court may require a school district to reassign personnel to address vestiges of discrimination in faculty and staff assignments). After having taken that step, the District could also implement measures to ensure that it hires and assigns faculty to each individual school on a non-discriminatory basis.

Finally, there are practicable measures that the District can implement to eliminate the vestiges of discrimination in its student transfer policies. First, to the extent that the District has not already done so, it could abandon its open door policy for student transfers. Second, the District could develop a new student transfer policy that includes a majority-to-minority transfer provision (as described above), and that includes a mechanism that will enable the District to ensure that it does not consent to transfers that would have the cumulative effect of hindering desegregation.

All of these options are practicable measures (there may be others as well) that the District could implement to eliminate the vestiges of discrimination in student, faculty and staff

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serve all students in grades 2-5 that currently attend that school, Askewville Elementary and J.P. Law Elementary. *See Swann*, 402 U.S. at 27 (noting that a district court has the remedial authority to require the pairing, clustering or grouping of schools to further desegregation in student assignment); and (2) implementing a "majority-to-minority" transfer program that would allow students in schools where their racial group exceeds the District's overall racial composition to elect to transfer to schools where their racial group's representation is below the District's overall racial composition. *See id.* at 26 (observing that "[a]n optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan").

assignments to Askewville Elementary and in student transfers.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court grant the United States' Motion for Further Relief, and order the District to: (1) formulate, adopt and implement a plan approved by this Court that promises realistically to work now to eliminate the vestiges of discrimination, to the extent practicable, in student, faculty and staff assignments to Askewville Elementary, and in student transfers; and (2) provide, after this Court approves such a desegregation plan, periodic reports to this Court and to the United States about the District's progress in desegregating its schools to the extent practicable.[22]

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This the _____ day of _____ 2002.

[22] After the District files its response to the United States' Motion for Further Relief, and the United States files any reply thereto, this Court may wish to convene a status conference to discuss the appropriate way to set this matter for discovery, consideration and resolution.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2002, I served a copy of the following pleadings to counsel of record, by depositing a copy of the same in the U.S. Mail, postage prepaid, at the addresses listed below:

United States' Motion for Further Relief
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