

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952⁴

No. ~~8~~ - 1

OLIVER BROWN, MRS. RICHARD LAWTON, MRS.
SADIE EMMANUEL, ET AL., APPELLANTS,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE
COUNTY, KANSAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

FILED NOVEMBER 19, 1951

Probable jurisdiction noted June 9, 1952

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[fol. a]

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS**

[Caption omitted]

OLIVER BROWN, Mrs. RICHARD LAWTON, Mrs. SADIE EMMANUEL, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emerson, and

LINDA CAROL BROWN, an infant, by Oliver Brown, her father and next friend,

VICTORIA JEAN LAWTON and CAROL KAY LAWTON, infants, by Mrs. Richard Lawton, their mother and next friend,

JAMES MELDON EMMANUEL, an infant, by Mrs. Sadie Emmanuel, his mother and next friend,

NANCY JANE TODD, an infant, by Mrs. Lucinda Todd, her mother and next friend,

RONALD DOUGLAS RICHARDSON, an infant, by Mrs. Iona Richardson, his mother and next friend,

KATHERINE LOUISE CARPER, an infant, by Mrs. Lena Carper, her mother and next friend,

CHARLES HODISON, an infant, by Mrs. Shirley Hodison, his mother and next friend,

[fol. b] THERON LEWIS, MARTHA JEAN LEWIS, ARTHUR LEWIS and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend,

SAUNDRIA DORSTELLA BROWN, an infant, by Mrs. Darlene Brown, her mother and next friend,

DUANE DEAN FLEMING and SILAS HARDRICK FLEMING, infants, by Mrs. Shirla Fleming, their mother and next friend,

DONALD ANDREW HENDERSON and VICKI ANN HENDERSON, infants, by Mrs. Andrew Henderson, their mother and next friend,

RUTH ANN SCALES, an infant, by Mrs. Vivian Scales, her mother and next friend,

CLAUDE ARTHUR EMMERSON and GEORGE ROBERT EMMERSON, infants, by Mrs. Marguerite Emmerson, their mother and next friend, Plaintiffs,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS; Kenneth McFarland, Superintendent of Schools of Topeka, Kansas; and Frank Wilson, Principal of Sumner Elementary School, Defendants,

and

THE STATE OF KANSAS, Intervening Defendant

No. T-316 Civil

[fol. 1] AMENDED COMPLAINT—Filed March 22, 1951

1. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, section 1331. This action arises under the Fourteenth Amendment of the Constitution of the United States, section 1, and the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, section 41), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3000.00).

(b) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 1343. This action is authorized by the Act of April 20, 1871, Chapter 22, section 1, 17 Stat. 13 (Title 8, United States Code, section 43), to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, or rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, section 1, and by the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, section 41), providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

(c) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 2281. This is an action for an interlocutory injunction and a permanent injunction restraining the enforcement, operation and execution of statutes of the State of Kansas by restraining the action of defendants, officers of such state, in the enforcement and execution of such statutes.

2. This is a proceeding for a declaratory judgment and injunction under Title 28, United States Code, section 2201, for the purpose of determining questions in actual contro-[fol. 2] versy between the parties to wit:

(a) The question of whether the state statute, ch. 72-1724 of the General Statutes of Kansas 1935, is unconstitutional in that it gives to defendants the power to organize and maintain separate schools for the education of white and colored children in the City of Topeka, Kansas.

(b) The question of whether the customs and practices of the defendants operating under Ch. 72-1724 of the General Statutes of Kansas, 1935, are unconstitutional in that they deny infant plaintiffs the rights and privileges of enrolling in, attending and receiving instruction in public schools of the district within which they live while such rights and privileges are granted to white children similarly situated; where the basis of this refusal and grant is the race and color of the children, and that alone.

(c) The question of whether the denial to infant plaintiffs, solely because of race, of educational opportunities equal to those afforded white children is in contravention of the Fourteenth Amendment to the United States Constitution as being a denial of the equal protection of the laws.

3. (a) Infant plaintiffs are citizens of the United States, the State of Kansas, and Shawnee County, the City of Topeka, Kansas. They are among those classified as Negroes. They reside within various school districts in the City of Topeka, satisfy all requirements for admission to schools within the districts within which they live, have presented themselves for enrollment and registration at the proper times and places, and were denied the right to enroll therein, on account of their race and color. Instead, they

are required, solely because of race, to attend schools where they do not and cannot receive educational advantages, opportunities and facilities equal to those furnished white [fol. 3] children.

(b) Adult plaintiffs are citizens of the United States and the State of Kansas, are residents of and domiciled in Topeka, Shawnee County, Kansas, are taxpayers of said county, of the State of Kansas, and of the United States. They are the parents and natural guardians of infant plaintiffs named herein. By being compelled to send their children to schools outside the districts wherein they live rather than to schools within said districts, they must bear certain burdens and forego certain advantages, neither of which is suffered by parents of white children situated similarly to children of plaintiffs.

(c) Plaintiffs bring this action on their own behalf and also on behalf of all citizens similarly situated and affected, pursuant to Rule 23A of the Federal Rules of Civil Procedure, there being common questions of law and fact affecting the rights of all Negro citizens of the United States similarly situated who reside in cities in the State of Kansas in which separate public schools are maintained for white and Negro children of public school age, and who are so numerous as to make it impracticable to bring them all before the Court.

4. The State of Kansas has declared public education a state function in the Constitution of the State of Kansas, Article 6, Sections 1 and 2. Pursuant to this mandate, the Legislature of Kansas has established a system of free public schools in the State of Kansas, according to a plan set out in Chapter 72 of the General Statutes of Kansas, 1935, and supplements thereto. The establishment, maintenance, and administration of the public school system of Kansas is vested in a Superintendent of Public Instruction, County Superintendent of Schools, and City School Boards. (Constitution of Kansas, Article 6, section 1.)

[fol. 4] 5. The public schools of Topeka, Shawnee County, Kansas are under the control and supervision of the defendants.

(a) Defendant, Board of Education, is under a duty to enforce the school laws of the State of Kansas

6/22/51 1949
 amended at (General Statutes of Kansas, 1935, [and sup-
 Pre-Trial 72-1724
 A.J.M. plements thereto,] * section 72-1809); to
 maintain an efficient system of public schools
 in Topeka, Shawnee County, Kansas; to determine the
 studies pursued, the methods of teaching, and to establish
 such schools as may be necessary to the completeness and
 efficiency of the school system. It is an administrative de-
 partment of the State of Kansas, which discharges govern-
 mental functions pursuant to the Constitution and the laws
 of the State of Kansas. (Constitution of Kansas, Article 6,
 sections 1 and 2, General Statutes, 1935, and supplements
 thereto of Kansas, section 72-1601). It is declared by law
 to be a body corporate and is sued in its governmental
 capacity.

(b) Defendant Kenneth McFarland is Superintendent of Schools, and holds office pursuant to the Constitution and the laws of the State of Kansas, as an administrative officer of the free public school system of the State of Kansas. He has immediate control of the operation of public schools in Topeka, Shawnee County, Kansas. He is sued in his official capacity.

6. Defendant, Board of Education of Topeka, Shawnee County, Kansas, has established and at the present time maintains in the City of Topeka, State of Kansas, elementary schools for the education of the school children of the City of Topeka. They are located within different districts of the City of Topeka, whose boundaries are designated by the defendant, Board of Education.

7. White Children of elementary school age go to the school within the designated boundaries of the district in which they live.

[fol. 5] Infant plaintiffs live within the boundaries of these districts, but they are required to leave the districts within which they live and travel from one and one-half miles to

* Struck out in copy.

two miles to separate all-Negro schools, solely because of their race and color and in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

8. The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

9. Adult plaintiffs are required to send their children outside the school districts in which they reside to separate all-Negro schools, whereas parents of white children are permitted to send their children to schools close at hand within the district in which they live, solely because of race and color. Thus adult plaintiffs are being denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

10. Infant plaintiffs and adult plaintiffs are thereby being wilfully and unlawfully discriminated against by the defendants on account of their race and color, in that infant plaintiffs are compelled to attend schools outside the school districts in which they live, while white children similarly situated are not so compelled; infant plaintiffs and adult plaintiffs are being deprived of their rights guaranteed by the Constitution and laws of the United States.

11. Plaintiffs are suffering irreparable injury and face irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of, other than this suit for a declaration of rights [fol. 6] and an injunction. Any other remedy to which plaintiffs might be remitted would be attended by such uncertainties and delays as to deny substantial relief; would involve a multiplicity of suits; and would cause further irreparable injury not only to plaintiffs, but to defendants as governmental agencies.

Wherefore, plaintiffs respectfully pray that:

1. The Honorable Court, upon filing of this complaint, notify the Chief Judge of this Circuit as required by 28 U. S. C. A., section 2284, so that the Chief Judge may desig-

nate two other judges to serve as members of a three-judge court as required by Title 28, U. S. C. A., section 2281, to hear and determine this action.

2. The Honorable Court enter a judgment or decree declaring that the General Statutes of Kansas, 1935, 72-1724, is unconstitutional insofar as it empowers defendants to set up separate schools for Negro and white school children.

3. The Honorable Court enter a judgment or decree declaring that the policy, custom, usage and practice of defendants in operating under Ch. 72-1724, General Statutes of Kansas, 1935, in denying plaintiffs and other Negro children residing in Topeka, Shawnee County, Kansas, solely because of race or color, the right and privilege of enrolling in, attending and receiving instruction in schools within the district within which they reside as is provided for white children of like qualifications, are denials of the equal protection clause of the United States Constitution and are therefore unconstitutional and void.

4. The Honorable Court issue a permanent injunction forever restraining and enjoining the defendants from executing so much of Ch. 72-1724, General Statutes of Kansas, 1935, as empowers them to set up separate schools for Negro and white school children.

[fol. 7] 5. The Honorable Court issue a permanent injunction forever restraining defendants from denying the Negro school children of Topeka, Shawnee County, Kansas, on account of their race or color, the right and privilege of attending public schools within the district wherein they live, and from making any distinction based upon race or color in the opportunities which the defendants provide for public education.

6. The Honorable Court will allow plaintiffs their costs herein, reasonable fees for attorneys, and such other and further relief as may appear to the Court to be equitable and just.

7. The Honorable Court retain jurisdiction of this cause after judgment to render such relief as may become necessary in the future.

Bledsoe, Scott, Scott & Scott, by Chas. E. Bledsoe,
Charles S. Scott, John J. Scott, Attorneys for
Plaintiffs.

Duly sworn to by Charles E. Bledsoe. Jurat omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT AND
TO STRIKE—Filed May 15, 1951

Defendants move the court for an order, as follows:

1. Requiring plaintiffs to amend their amended complaint, paragraph 3 (a), last sentence thereof, which reads as follows: "Instead, they are required, solely because of race, to attend schools where they do not and cannot receive educational advantages, opportunities and facilities equal to those furnished white children." by making a more definite statement therein setting forth the facts upon which plaintiffs base their conclusion as to unequal advantages, opportunities and facilities, for the reason that the present statement is so vague or ambiguous that defendants cannot reasonably be required to frame a responsive pleading thereto.

2. Requiring plaintiffs to amend their amended complaint, paragraph 3 (b), last sentence thereof, which reads as follows:

"By being compelled to send their children to schools outside the districts wherein they live rather than to schools within said districts, they must bear certain burdens and forego certain advantages, neither of which is suffered by parents of white children situated similarly to children of plaintiffs."

by making a more definite statement therein setting forth the facts upon which plaintiffs base their conclusion that adult plaintiffs must bear certain burdens and forego certain benefits; for the reason that the present statement is so vague and ambiguous that defendants cannot reasonably be required to frame a responsive pleading thereto.

3. Requiring plaintiffs to strike from their amended complaint the following language in paragraph 7 thereof:

"and in violation of their rights under the Fourteenth Amendment to the Constitution of the United States."

[fol. 9] for the reason that the same is a conclusion and is redundant.

4. Requiring plaintiffs to amend the eighth paragraph of their amended complaint, which reads as follows:

“The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.”

by making a more definite statement therein setting forth the facts upon which plaintiffs base their conclusion that educational opportunities claimed therein are inferior to those provided for white children; for the reason that the present statement is so vague and ambiguous that defendants cannot reasonably be required to frame a responsive pleading thereto, and further requiring plaintiffs to strike from said paragraph 8, the following language:

“in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.”

for the reason that the same is a conclusion and is redundant.

5. Requiring plaintiffs to strike from paragraph 9 of the amended complaint the last sentence thereof which reads as follows:

“Thus adult plaintiffs are being denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.”

for the reason that the same is a conclusion and is redundant.

6. By requiring plaintiffs to amend their amended complaint by striking all of paragraph 10 thereof, which reads as follows:

“Infant plaintiffs and adult plaintiffs are thereby being wilfully and unlawfully discriminated against by the defendants on account of their race and color, in

that infant plaintiffs are compelled to attend schools outside the school districts in which they live, while white children similarly situated are not so compelled; infant plaintiffs and adult plaintiffs are being deprived [fol. 10] of their rights guaranteed by the Constitution and laws of the United States.”

for the reason that the same is a conclusion and is redundant.

Lester M. Goodell, George M. Brewster, 401 Columbian Building, Topeka, Kansas, Attorneys for Defendants.

[fol. 11] IN UNITED STATES DISTRICT COURT

DOCKET ENTRY

“May 25, 1951. At Topeka, before Huxman, Mellott, and Hill, JJ.: Defendants’ Motion for more definite statement and to Strike denied except as to paragraph 8 which is to be amended; plaintiffs given five days to amend paragraph 8 and defendants to have five days to plead or ten days to answer.”

[fol. 12] IN UNITED STATES DISTRICT COURT

AMENDMENT TO PARAGRAPH EIGHT OF THE AMENDED
COMPLAINT—Filed May 29, 1951

8. The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The respects in which these opportunities are inferior include the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors, tangible and intangible, offered to school children in Topeka. Apart from all other factors, the racial segregation herein practiced in and of itself constitutes an inferiority in educational opportunity offered

to Negroes, when compared to educational opportunity offered to whites.

Bledsoe, Scott, Scott & Scott, by Chas. E. Bledsoe.

Duly sworn to by Charles E. Bledsoe. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANTS TO AMENDED COMPLAINT AS
AMENDED IN PARAGRAPH 8 THEREOF—Filed June 7, 1951

1. Defendants admit the allegations stated in paragraphs 4 and 6 of the Amended Complaint, except that defendants allege that the City of Topeka is one school district, as hereinafter set forth. Defendants deny all the allegations stated in Amendments to paragraph 8 of the Amended Complaint, and further deny all the allegations stated in paragraphs 9, 10 and 11 of the Amended Complaint.

2. Defendants admit the allegations stated in paragraph 1 (a) of the Amended Complaint, except defendants deny that the amount in controversy, exclusive of interest and costs, exceeds \$3,000.00.

3. Defendants admit the allegations stated in paragraph 2, except defendants deny that infant plaintiffs are denied rights and privileges of enrolling in, attending and receiving instruction in public schools within the district in which they live; and deny that they have denied infant plaintiffs educational opportunities equal to those afforded white children.

4. Defendants allege that the City of Topeka, Kansas, is in and of itself one school district; that acting pursuant to authority vested in it, defendants have designated and defined 22 separate territories within the City of Topeka and in each of said territories have established and maintain a public elementary school, and white children are required to attend the elementary school located in the territory in which they live; that defendants have also established and maintain four separate elementary schools for colored children within said district, and only colored children in the City of Topeka may attend said four schools.
[fol. 14] Defendants further allege that the colored school

children, including infant plaintiffs, may attend any one of these four schools.

5. Defendants allege that said separate schools are established and maintained pursuant to the laws of the State of Kansas, G. S. 1949, 72-1724, and separate schools are provided only for elementary school children, to-wit, the first six grades.

6. Defendants allege that they have established and maintain junior high schools throughout the City of Topeka and have designated and defined territories for each of said schools; that both colored and white children may attend these schools and are required to attend the junior high school located within the territory in which they live.

7. Defendants allege that transportation facilities are provided for colored school children attending the four colored schools mentioned in paragraph 4 hereof, and said transportation facilities are furnished any colored school child attending elementary schools, upon request; that no transportation is furnished white children by the defendants.

8. Defendants admit the allegations stated in paragraph 3 (b) that adult plaintiffs are citizens of the United States, the State of Kansas, Shawnee County and the City of Topeka, Kansas, and deny the remainder of said paragraph. Defendants further deny that adult plaintiffs are compelled to send their children to schools outside the district wherein they live.

9. Defendants admit the allegations stated in paragraph 3 (a) that infant plaintiffs are citizens of the United States, State of Kansas, Shawnee County and the City of Topeka, Kansas, and that they are among those classified as negroes. [fol. 15] Defendants allege that infant plaintiffs have presented themselves for enrollment and registration in elementary schools for white children but were denied the right to enroll therein. Defendants allege that infant plaintiffs, because of race and color, do not satisfy the requirements for admission to schools for white children and by reason thereof they were denied admission. Defendants deny the remainder of paragraph 3 (a).

10. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraph 3 (c) of the Amended

Complaint, or that adult plaintiffs are taxpayers of Shawnee County, the State of Kansas, and the United States, as stated in paragraph 3 (b).

11. Defendants admit the allegations stated in paragraph 5 of the Amended Complaint, but deny that they are governed by General Statutes 1935, and supplements thereto, section 72-1809, for the reason that said statute applies to public schools in cities of the second class and not to public schools in cities of the first class to which class the City of Topeka belongs.

12. Defendants deny the allegations stated in paragraph 7 of the Amended Complaint, and allege that white school children of elementary school age in the City of Topeka are required to go to the elementary schools within the designated boundaries of the territory in which they live, and that these schools are within the school district of the City of Topeka; that infant plaintiffs go to elementary schools within the district in which they live, namely, the school district of the City of Topeka, Kansas, and they may attend any of the colored elementary schools within the City of Topeka, as set forth in paragraph 4 hereof. Defendants further allege that the distance traveled by colored children [fol. 16] in reaching the schools they attend is not on the average greater than the distance white children are required to travel.

Wherefore, Defendants pray that plaintiffs take naught; and that defendants have judgment and costs.

Lester M. Goodell, George M. Brewster, Topeka,
Kansas, Attorneys for Defendants.

Duly sworn to by Lester M. Goodell. Jurat omitted in printing.

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF THE STATE OF KANSAS—Filed June
15, 1951

Comes now the State of Kansas, an intervening defendant, by Edward F. Arn, Governor of said State, and Harold R. Fatzer, the Attorney General thereof, and for its answer to the amended complaint herein alleges as follows:

I

That the amended complaint in said cause fails to state a claim or cause of action against this intervening defendant upon which relief may be granted to the plaintiffs.

II

This intervening defendant admits the allegations contained in paragraph 1 of the amended complaint except that it denies the amount in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

III

This intervening defendant admits the allegations contained in paragraph 2 (a) of the amended complaint except that it expressly denies Chapter 72-1724 of the General Statutes of Kansas, 1935 (1949), is unconstitutional. This defendant is without knowledge or information to either admit or deny the truth or the allegations contained in paragraph 2 (b), (c), and paragraph 3 (a), (b) of the amended complaint.

[fol. 18]

IV

This defendant admits the allegations contained in paragraphs 4 and 5 of the amended complaint, but denies that the defendant, Board of Education of Topeka, Shawnee County, Kansas, is governed by the General Statutes of Kansas, 1935, and supplements thereto, Section 72-1809, for the reason that said statute has no application to pub-

lic schools in cities of the first class to which class the city of Topeka belongs.

V

For further answer herein this intervening defendant states it is without knowledge or information to either admit or deny the truth of the allegations contained in paragraphs 6, 7, 8 as amended, 9 or 10 of the amended complaint. All other allegations contained in the amended complaint which are not hereinbefore admitted or explained are hereby expressly denied.

Wherefore this intervening defendant prays that plaintiffs take naught by this action and that defendants have judgment for all costs herein expended.

Harold R. Fatzer, Attorney General for the State of Kansas; Willis H. McQueary, Assistant Attorney General for the State of Kansas; C. Harold Hughes, Assistant Attorney General of the State of Kansas.

[Verified by Willis H. McQueary.]

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

**Transcript of Proceedings of Pre-Trial Conference—Filed
October 30, 1951**

APPEARANCES:

Hon. Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit.

Hon. Arthur J. Mellott, Judge, United States District Court, District of Kansas.

Charles S. Scott, Topeka, Kansas; John Scott, Topeka, Kansas; Charles Bledsoe, Topeka, Kansas; Robert L. Carter, New York, New York; and Jack Greenberg, New York, New York. Appeared on behalf of Plaintiffs.

Lester M. Goodell, Topeka, Kansas, and George M. Brewster, Topeka, Kansas. Appeared on behalf of De-

fendants, Board of Education, Topeka, Shawnee County, Kansas, et al.

Harold R. Fatzer, Attorney General, State of Kansas, by Willis H. McQueary and Charles H. Hobart, Assistant Attorneys General, State of Kansas, Topeka, Kansas. Appeared on behalf of State of Kansas.

Harold Pittell, Official Reporter.

[fol. 20] Be it remembered, on this 22nd day of June, A.D. 1951, the above matter coming on for hearing before Honorable Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit and Honorable Arthur J. Mellott, Judge, United States District Court, District of Kansas, and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

* * * * *

[fol. 21] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Mellott: Do you have the appearances, Mr. Reporter?

The Reporter: Yes, Your Honor.

Judge Huxman: Gentlemen, the purpose of this session this morning is to hold a pre-trial conference to see whether we can simplify the matters and what can be agreed to before we go to trial next Monday.

Judge Mellott has called my attention to Rule 16. It provides for conference to simplify the issues, whether there is any necessity for amendments to the pleadings and to inquire into the possibility of obtaining admissions of fact concerning which there can be no dispute, limitation of the number of expert witnesses, the advisability of a preliminary reference of the issues to a master for findings and any such other matters as may simplify the issues at the time of the trial.

All the parties have entered—are in court and have filed pleadings; that is true of the State of Kansas, is it not?

Mr. McQueary: It is, Your Honor.

Judge Huxman: Is there a desire on the part of anybody to amend the pleadings in any manner; any necessity for amendment of pleadings?

Mr. Charles Scott: Yes, if the Court please. We have one amendment we desire to make.

[fol. 22] Judge Mellott: To what paragraph?

Mr. Charles Scott: Paragraph 5, sub-paragraph (a) of the plaintiffs' amended complaint.

Mr. Goodell: What was that again?

Mr. Charles Scott: Paragraph 5, sub-paragraph (a).

Judge Huxman: Paragraph 5 what?

Mr. Charles Scott: Paragraph 5(a).

Judge Mellott: Let me orient myself and Judge Huxman. Did you file a complete amended complaint?

Mr. Charles Scott: No, sir.

Judge Mellott: You filed an original complaint.

Mr. Charles Scott: And an amended complaint and——

Judge Mellott: And then in the amended complaint—there was an amendment to the amended complaint.

Mr. Goodell: I interpret that they did file——

Judge Mellott: You did file an amended complaint on March 22nd, didn't you?

Mr. Charles Scott: Yes.

Judge Mellott: The motion to make more definite was addressed to that amended complaint.

[fol. 23] Mr. Charles Scott: That is correct.

Judge Mellott: And then you filed an amendment to the amended complaint, under date of May 29th, did you not?

Mr. Charles Scott: That is correct, sir.

Judge Huxman: What do you desire presently?

Mr. Charles Scott: We desire to correct the statute of 72-1809 of the General Statutes of 1935 and the supplements thereto.

Judge Mellott: Let me get this in the pleading here. You are now talking about your original amended complaint, aren't you?

Mr. Charles Scott: The original amended complaint.

Judge Mellott: And you say you want to refer to paragraph 5 of that.

Mr. Charles Scott: 5(a).

Judge Mellott: 5(a). Your amendment is what; you want to make reference to the General Statutes of '49 instead of 1935, is that what you are saying?

Mr. Charles Scott: We also want to make reference to the General Statutes of 1949 and also strike therefrom Section 72-1809 and insert therein 72-1724.

Judge Mellott: 72-1724.

Mr. Charles Scott: That is correct.

[fol. 24] Judge Mellott: And does that read, then, that that is the General Statutes of Kansas for 1949?

Mr. Charles Scott: That is correct.

Judge Mellott: You wish to leave out the words, "and supplements thereto."

Mr. Charles Scott: Yes, we can take that out, that's true.

Judge Mellott: Let me see if I understand what you are doing. Paragraph 5(a), as amended, now reads: "Defendant, Board of Education, is under a duty to enforce the school laws of the State of Kansas (General Statutes of Kansas, 1949, Section 72-1724)", is that the amendment you are making?

Mr. Charles Scott: That is correct, sir.

Judge Mellott: Any other amendments?

Mr. Charles Scott: That is all we have.

Judge Huxman: Any objections to that? No objections; the amendment will be—

Mr. Goodell: If I understand his point, he cited in his amended complaint, which he now desires to correct, a statute which applies to cities of second class, erroneously when he intended to use—so we have no objection.

Judge Huxman: All right; the amendment will be ordered.

Judge Mellott: The Court will make the amendment by [fol. 25] interlineation.

Judge Huxman: Any other amendment to the pleadings?

Mr. Goodell: We have none, Your Honor.

Judge Huxman: No further amendments to any of the pleadings.

Mr. Bledsoe: If the Court please, at this time I would like to inform the Court we have two attorneys who are interested in this case with the plaintiffs, and they are here now, and I would like to present them to the Court at this time.

Judge Huxman: I will ask Judge Mellott to handle that because he knows how that matter is handled.

Judge Mellott: Very well. You may introduce them, if you will, and tell me who they are.

Mr. Bledsoe: They would like to be admitted for the purpose of this case only.

Judge Mellott: Present them.

Mr. Bledsoe: If the Court please, this gentleman here is Robert Carter, from New York. This, gentlemen, is Judge Huxman of the Tenth Circuit Court of Appeals; the gentleman over here is Jack Greenberg, of New York, and this is Judge Mellott of the District of Kansas Federal Court.

Judge Mellott: Are these gentlemen members of the bar?

[fol. 26] Mr. Bledsoe: They are.

Judge Mellott: In what state?

Mr. Bledsoe: New York.

Judge Mellott: In good standing?

Mr. Bledsoe: They are.

Judge Mellott: And are they admitted to practice in federal courts and courts such as this in their home jurisdiction?

Mr. Bledsoe: They are.

Judge Mellott: Never been disbarred. You vouch for them.

Mr. Bledsoe: I do.

Judge Mellott: Without further formality, then, they will be permitted to appear as counsel, along with the other gentlemen who presently appear as counsel in this case. Thank you, gentlemen; you may be seated.

Judge Huxman: Unless there is something else preliminary, we might—

Mr. Carter: Your Honor, if I may, I would like to raise one point. I don't think an amendment would be necessary to our pleadings, but we erroneously refer to school districts in Topeka, where it should be "territories", and we were going to make a stipulation with the defendants that they are territories rather than districts—and there is one school district.

[fol. 27] Judge Huxman: I think that is covered.

Mr. Carter: I just want to be sure.

Judge Mellott: I suppose, if necessary, for all proper purposes in this case, the Court can consider that where you use the word "district" in your pleading, that really what you are referring to is "territories." I believe I suggested that at an earlier proceeding here. It was my under-

standing Topeka was one school district, so you were referring to territories.

Judge Huxman: There is one other matter that might come up during the trial—at least I think the Court might want to make inquiry—will either or any of the parties to this litigation want to use expert witnesses?

Mr. Carter: Well, Your Honor—

Judge Huxman: For what purpose?

Mr. Carter: We want to use expert witnesses for the general purpose of showing that the segregation, which is the issue in the case, the segregation of the plaintiffs and of the class they represent in the negro schools is in fact a denial to them of their right to equal educational opportunities, that they are not getting equal educational opportunities by virtue of that. That is the purpose of our expert testimony.

Judge Huxman: Will there be any opposition to expert witnesses?

[fol. 28] Mr. Goodell: The—

Judge Huxman: —the use of expert witnesses by the plaintiffs?

Mr. Goodell: The way the question was stated, we will certainly object to that. We think that is a question of law. I, of course, don't know what turn it will take.

Judge Huxman: Well, the question of whether such testimony is competent, does not need to be decided at this time. The purpose of this inquiry is to ascertain how many such witnesses you will request and whether there shall be a limit. How many witnesses do you gentlemen desire on that question, assuming that the Court rules it is competent.

Mr. Carter: Well, Your Honor, I think that we were not certain of the exact number but approximately nine. We have approximately nine or ten people who we want to call who have made studies of this.

Judge Huxman: Well, the Court feels that nine witnesses on that one issue is too many witnesses. In other words, the issue is whether segregation itself, I presume, is not a denial of due process, irrespective of whether everything else is equal, to that furnished in the white schools, is that not your general contention?

Mr. Carter: Yes, sir.

Judge Huxman: Because of the effect it has upon the

[fol. 29] mind, upon the student, upon his outlook; I presume that would be your position.

Mr. Carter: That is absolutely correct, Your Honor.

Judge Huxman: Could nine witnesses give different testimony, or would their testimony be largely the same?

Mr. Carter: I doubt that, Your Honor. Our testimony will not be cumulative. Our purpose of getting these people was in order to give a rounded picture with respect to the subject that we have just raised. Now, we will have some witnesses who will testify as to tangible and physical inequalities also among those people, so that I think that it would be a great hardship to us if we were limited. We have no intention of merely bringing on witnesses to be cumulative.

Judge Mellott: That is the thing the Court thinks it should avoid. We shouldn't hear nine witnesses testify cumulatively even as experts, it seems to me, on the same thing.

Mr. Carter: I agree, but, Your Honor, we have no—we are not going to have duplication. Each of the people that we are asking to come here to testify will handle a different phase of this.

Judge Mellott: Then we should not limit you if that is what you expect to do.

[fol. 30] Judge Huxman: The Court feels this way, that it's difficult for it at this time to see where nine witnesses could testify on this one subject, to nine different sets of facts, unrelated facts, but you may be right; we do not intend to deny you the right to fully present your case. The Court, however, feels that after it has heard five witnesses, expert witnesses, if the Court then feels that the witnesses that you are offering thereafter are merely duplicating what has been said, an objection to their testimony on that ground will be sustained. If, on the other hand, the testimony is clearly different from what has been given, why you then should have the right to present your nine witnesses. But at the end of five, the Court will certainly scrutinize the testimony of the other four quite carefully to see whether it is duplication or additional testimony.

Mr. Carter: All right, sir.

Judge Huxman: Do you gentlemen then stipulate that, in any event, the expert witnesses which you request will be limited in number to nine.

Mr. Carter: Your Honor, frankly, our difficulty in making any stipulation like that is that Mr. Greenberg and I have just gotten here from New York this morning about——

Judge Huxman: This isn't the first case of this kind you were in. You were in the South Carolina case, weren't [fol. 31] you?

Mr. Carter: Yes, sir; but the thing is we haven't really had an opportunity to go over this. I would not want to make that stipulation. What I will say and what Your Honor has ruled is that after five, you will scrutinize whatever testimony we present for duplication, and we will certainly attempt to avoid that, but I wouldn't want to say that we would only have nine.

Judge Huxman: That was your statement in response.

Mr. Carter: I said approximately; I didn't want to be tied down to that number at all.

Judge Mellott: How much leeway do you want?

Mr. Carter: Well, I frankly think that we won't have more than nine, but I just would prefer not to be tied down. I am not going to, believe me, Your Honor, we are not going to parade a lot of witnesses here merely to keep you tied down.

Mr. Goodell: It would be under ninety, wouldn't it?

Mr. Carter: It will be under fifteen.

Mr. Goodell: Nine to ninety.

Judge Huxman: It would be the order of the Court that expert witnesses on behalf of the plaintiff, in the first [fol. 32] instance, will be limited to five, but if at that point the plaintiffs have additional witnesses which they feel have testimony to offer which has not been covered by these five, they will not be denied the right to present that testimony, is that correct, judge?

Judge Mellott: Yes, at this time, I think.

Judge Huxman: But that after five have been heard, the Court will reserve the right to reject any further evidence if it should feel that the evidence that is being offered is cumulative and not additional to what the first five have testified, is that fair to you boys?

In view of the fact that there has been a statement that plaintiffs will offer expert witnesses on this subject, assuming that the testimony will be received, will the de-

endants, or any of them, want to on their part offer expert testimony along this same line?

Mr. Goodell: Well, I am a little at a handicap of knowing exactly what their line is. They mention there is to be testimony from experts, as I understood it, on some physical facts which, of course, I don't know what they are referring to except I take it to mean that inferiority to—as to some—something relating to the school system and, of course, if that comes up, we will probably want to rebut that, not with experts, I don't think.

[fol. 33] Judge Huxman: Judge Mellott—

Mr. Goodell: As to the other phase which I understand is the psychological aspect and sociological, until I have heard their testimony, I am at a loss to know whether we will want to rebut it or attempt to rebut it.

Judge Mellott: Well, would it not be proper if the Court thought in terms of the same basic premise that in the event you do decide to offer experts rebutting the testimony of the plaintiffs' experts, that a limitation somewhat along the line suggested by Judge Huxman to the plaintiff should, likewise, apply to you.

Mr. Goodell: I certainly think so.

Judge Huxman: All right; that will be the order of the Court at this time.

Now, is there anything else, gentlemen, as to preliminary matters that we want to discuss before we go into these requests for admissions. Anything else that might be helpful in shaping the issues, shortening this trial.

I may state for myself, as a member of this court, that it would certainly be my purpose to afford the parties a full and complete hearing and an opportunity to present the issues fully and completely but, on the other hand, I would be very loathe to just permit the introduction of a great mass of testimony for any purpose whatever that has no bearing upon the issues; it merely prolongs and drags out [fol. 34] this trial.

Anything else preliminary? Do you care to say anything more?

Judge Mellott: I am quite sure Judge Hill and I concur entirely as to what you have just said, though my authority, of course, to speak is only to speak for myself.

Judge Huxman: In a preliminary conference, Judge

Mellott, to bring you up to date, purely informal, with attorneys for the plaintiffs and the defendants, I suggested that, as a preliminary to this pre-trial conference, each side prepare requested admissions of fact and serve them on the other side.

Judge Mellott: I am sure that was quite helpful.

Judge Huxman: We have that here this morning and, if there is nothing further, suppose, gentlemen, we proceed to see how many of these requests we can agree upon.

We will take up the defendants' requests for stipulations first.

No. 1 is a request for an agreement that the City of Topeka, Kansas, constitutes one school district.

Mr. Carter: We agree.

Judge Huxman: That is agreed to.

Judge Mellott: Thank you, gentlemen.

[fol. 35] Judge Huxman: Request No. 2:

“That defendants have designated within the City of Topeka, Kansas, eighteen territories and in each of these territories have established and maintain a public elementary school for white children only; in addition thereto defendants have established and maintain in the City of Topeka, Kansas, four separate elementary schools for colored children and attendance at these four schools is restricted to colored children. Exhibit A, which is made a part hereof by reference, is a map of the City of Topeka and adjacent territories attached to Topeka School District for school purposes only. Said Exhibit A correctly designates the school territory for white schools for the City of Topeka, Kansas. Said map also designates the four colored schools, which are Buchanan, McKinley, Monroe and Washington. Colored school children in the City of Topeka, Kansas, may attend any one of these four colored schools, and the choice of schools is made by the colored school children or their parents. The territory colored blue on Exhibit A represents areas not within the City of Topeka except for school purposes, and children residing in said areas attend schools in the City of Topeka, Kansas.”

Now, before you make any request, Judge Mellott has not seen Exhibit “A”. As a preliminary question, may I ask, Mr. Goodell, who prepared that exhibit?

[fol. 36] Mr. Goodell: The clerk of the Topeka Board of Education.

Judge Huxman: Do you vouch for its territorial correctness and integrity?

Mr. Goodell: Absolutely.

Judge Huxman: All right. With that preliminary statement, is there any objection to the admission requested in request No. 2?

Mr. Carter: Well, Your Honor, this is the first—I think we have no objection on Exhibit “A”, but going over on to page 2—about the fifth line from the top—

Judge Huxman: Fifth line from the top on page 2.

Mr. Carter: “and the choice of schools is made by the colored school children or their parents.” I should think we have to get more information on that before we could agree. With that exception, we will agree.

Mr. Goodell: For clarity, what is meant there, of course, is choice of which of the four colored schools. It doesn’t mean to say—

Mr. Carter: It is a question in our minds as to whether that is true.

Judge Huxman: Do you have testimony to the effect that that is not true?

Mr. Carter: We may.

[fol. 37] Judge Huxman: You may.

Mr. Carter: Yes, sir.

Judge Huxman: Well, do you have reasons to believe that it is not true?

Mr. Carter: Well, the only thing I can say at this time, Your Honor, is that up to—as far as this is concerned, we have to know—we would have to make a little further investigation on this ourselves. We might stipulate, agree, that this is true by Monday, but I don’t think we can do it today.

Judge Huxman: All right. I just feel this way, that there ought to be a perfect willingness on the part of both parties to freely and frankly agree to facts concerning which there just can’t be any dispute. Now, if there is a question about a fact, that should not be agreed to, of course, but you have local colored counsel here who no doubt went to schools here, these segregated schools.

Mr. Carter: That is——

Judge Huxman: Do you agree to the request with the exception of that portion starting—with this exception: “Colored school children in the City of Topeka, Kansas, may attend any one of these four colored schools, and the choice of schools is made by the colored school children or their parents.”

Mr. Carter: All we reject is of the choice.

[fol. 38] Judge Huxman: Do you agree to everything but that?

Mr. Carter: We agree with the first part of the statement. All we don't know about is the choice.

Judge Huxman: I am just taking the one sentence. I don't like to divide a sentence. You want to reserve the agreement to that until Monday.

Mr. Carter: Yes, sir.

Judge Huxman: And, in the meantime, you will make an investigation and if you find that that is a fact——

Mr. Carter: We will agree to it.

Judge Huxman: Mr. Scott, you have been a resident of Topeka all your life.

Mr. Charles Scott: Yes, sir.

Judge Huxman: Are you able to say whether that is or is not a fact as the schools are administered.

Mr. Charles Scott: Qualified, Your Honor. We are allowed to go to the schools that are closest to our home. Now, whether or not the school board has any control over that or not, I don't know, but, as a practical matter, naturally, the colored students go to the school closest to their home.

Judge Huxman: I tell you what I wish you would do with your New York counsel. I wish you would have a conference [fol. 39] with the members of the school board between now and Monday and ask them if a colored student wants to attend any one of these four schools whether there is any restriction upon his right to do so.

Mr. Charles Scott: I will do that, Your Honor.

Judge Huxman: And then come in Monday morning——

Mr. Goodell: Of course, my information came from the board and the administrative officers on all these matters.

Judge Huxman: They should have the right to get that information themselves.

It is agreed, then, that request for admission No. 2 is agreed to with the exception of that portion which has just been read by the Court and, as to that portion, inquiry will be made by Monday and a statement by counsel for plaintiffs will be made then as to whether they agree to that portion which is presently eliminated.

We will take up No. 3:

“That the same curriculum is used in the elementary colored schools in the City of Topeka, Kansas, as is used in the elementary white schools in said city.”

Mr. Carter: After conference, Your Honor, we cannot stipulate to that.

[fol. 40] Judge Huxman: Do you claim that that is not so?

Mr. Carter: We would change in the first sentence where it reads, “That the same curricula is used”, we would change that to “prescribed” as long as curricula is understood to mean courses of study.

Judge Huxman: That is what the curricula means, isn't it, courses of study.

Mr. Goodell: That is what I intended by it.

Mr. Carter: I am not sure.

Judge Huxman: Do you have a different meaning of curricula?

Mr. Carter: Yes, sir.

Judge Huxman: Is there any objection to the elimination of the word “curricula” and the substitution of the “studies are used”?

Mr. Carter: “Prescribed” is what we want to use.

Judge Huxman: That wouldn't be any admission. The question is, is it actually used, that is the test.

Mr. Carter: We are advised that that is not true, Your Honor.

Judge Huxman: How?

[fol. 41] Mr. Carter: We at this table don't feel that we can stipulate to that at this time.

Judge Huxman: Well, do you intend to offer evidence to show that that is not so?

Mr. Carter: Yes, sir.

Judge Huxman: In what respect do you contend that there is a difference?

Mr. Carter: Well, there are several things that I have

right now at my fingertips that I can indicate. One is that there is a difference in terms of the special teachers and the special—there are special teachers that are used at the White schools. No special teachers or special courses for certain classes of the student body are at the Negro School.

Judge Huxman: The teachers have nothing to do with the courses of study?

Mr. Carter: Yes, sir. They have set up, as we understand it, Your Honor, set up at the White school a special course of study for children who are somewhat retarded who are not able to come up to the part of their class. Now, no such course is available at the Negro school. We also have a question right now as to whether even though the same courses of study are prescribed, and we think that we have evidence to show that it is not used, that this is not followed out at the Negro school generally.

[fol. 42] Judge Huxman: Mr. Goodell, what do you say with regard to the statement that special courses prescribed in white schools for sub-normal children are not in colored schools?

Mr. Goodell: I don't think that is curricula that is special—that comes under a heading later in our brief about special services which they cover in paragraph 8, which I don't think is embraced in the question of curricula.

Judge Mellott: I am wondering if you gentlemen perhaps are in dispute primarily about the definition of the word "curricula." I wonder if that is your difficulty.

Mr. Goodell: I think—my interpretation of it and the use I intended is the—as meaning the subjects taught, programs used in the school and the subjects taught, courses of study.

Judge Mellott: Well, do you wish to rephrase it so that it does limit it to those particular terms? Maybe your adversary will agree if you rephrase it.

Mr. Goodell: I am willing to change it, Your Honor, by striking out the word "curricula" and substituting therefor "that the same course of study"—"courses of study".

Judge Mellott: I suggest that counsel for the plaintiff give attention to what is being said.

[fol. 43] Mr. Carter: Yes, sir.

Judge Huxman: He is suggesting that perhaps a change in the word "curricula" might make this understandable

so you do agree upon its meaning and perhaps get closer to a stipulation.

Mr. Goodell: "That the same course of study is used in the elementary colored schools in the City of Topeka as is used in the elementary white schools." It will read, Your Honor, my suggested amendment.

Judge Huxman: Also keep in mind, gentlemen, that under Mr. Goodell's explanation this special matter which you mentioned for abnormal children is not meant to be included in here, and the agreement to this stipulation would not bar you from showing that some special services are rendered to white children that are not rendered to colored children. With that statement, are you willing to agree with this?

Mr. Charles Scott: At this time, Your Honor, I don't think we are inclined to accept it.

Judge Mellott: Your associates think they are. They say if you limit it to simply saying that the same course of study is used, that they don't have any objection.

Mr. Charles Scott: Well, this is the reason, Your Honor: We have examined a greater portion of the curricula, as prescribed by the school board, and we have found that [fol. 44] there are some differences, certain course of studies are offered in some schools and are not offered in some of the colored schools, and so I don't think we are inclined to accept it on those basis.

Judge Huxman: Can you name a specific instance?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right, let's have it.

Mr. Charles Scott: They have a course entitled "Literature Appreciation" that is offered in the fifth and sixth grades in several of the white schools, and it is not offered in one or two of the colored schools. Then you have——

Judge Huxman: Is that shown by the exhibits?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right. What would you say to this: Would you agree that the courses of study as outlined in these exhibits—what are the exhibits?

Mr. Charles Scott: If the Court please, now they label——

Judge Huxman: Are the courses of studies that are used.

Mr. Charles Scott: They call it the school program, but it appears to be the course of study.

[fol. 45] Judge Huxman: That is quibbling about words, isn't it?

Mr. Charles Scott: Well—

Mr. Goodell: I am willing to limit that again. I am not familiar with that matter he points out—to have it read, “That the same course of study required by the Kansas”—by law—“by the Kansas statute is given.” I think what he is talking about is some extra-curricular subject that some teachers of their own volition give, like outside reading, reference texts, and so forth, rather than a prescribed course of study.

Mr. Charles Scott: No, I beg to differ with counsel. This is prescribed by the school board and sent down.

Mr. Goodell: I am talking about what the state law requires to be taught in our Kansas elementary public school system.

(Colloquy was here had between counsel off the record.)

Mr. Goodell: If we are going to have a lawsuit here and pursue factual inquiry as to—as to school by school, of which there are twenty-two, we will be chasing down each textbook for outside reading that Miss Jones may prescribe at Randolph which Miss Baker at another school doesn't like, and she prescribes another text for outside [fol. 46] reading. Suppose they are taking history; one likes this for outside reading and another teacher likes another. That will frequently occur.

Judge Mellott: Do you have a printed course of study?

Mr. Goodell: Absolutely.

Judge Mellott: Do you have one?

Mr. Goodell: I have it attached as an exhibit here. And what I meant to convey and what I mean by this stipulation and will reframe it—

Judge Mellott: Where is it attached?

Mr. Brewster: Exhibit “F”.

Mr. Goodell: That the course of study required by our Kansas statute is followed in all of the schools without any distinction between the white and colored elementary schools.

(Colloquy was here had between counsel off the record.)

Judge Huxman: Shall we then eliminate request No. 3?

Mr. Goodell: Let's pass that, Your Honor.

Judge Huxman: We will pass request No. 3 and take up No. 4:

“That the same school books are used in the elementary colored schools in the City of Topeka, Kansas, as are used in [fol. 47] the elementary white schools in said city.”

Is that not related to 3 and also covered by your exhibits?

Mr. Goodell: Yes.

Judge Huxman: Shall we pass it?

Mr. Goodell: Yes, that is satisfactory.

Mr. Carter: Your Honor, we are having one of our expert witnesses, that is going to be a librarian, who is at the present time checking the holdings of all the schools.

Judge Huxman: Is what?

Mr. Carter: The holdings, the library holdings of all of the schools, and we therefore are not—we can't—

Judge Huxman: We passed 4.

Mr. Goodell: I would like to amend, in view of his remarks, I would like to amend that to read, “The same textbooks”—“school textbooks”—so that it doesn't—

Judge Huxman: All right, that will be permitted.

Judge Mellott: Do you agree that the same textbooks are used?

Mr. Carter: I think we will agree.

Judge Mellott: Very well.

Judge Huxman: Did you, Mr. Reporter, get request No. [fol. 48] 4, as amended?

The Reporter: Yes, Your Honor.

Judge Huxman: We will take No. 5:

“That each of the four colored elementary schools in the City of Topeka, Kansas, is situated in neighborhoods where the population is predominantly colored.”

Mr. John Scott: That is agreeable, Your Honor.

Judge Huxman: That is agreed to.

Judge Huxman: No. 6:

“That transportation to and from school is furnished colored children in the elementary schools of the City of

Topeka, Kansas, without cost to said children or their parents. No such transportation is furnished white children in the elementary schools of the City of Topeka.”

It would seem to me that is either a fact or isn't a fact.

Mr. Charles Scott: We will agree to that.

Judge Huxman: All right. No. 6 is agreed to.

No. 7:

“That the same services are offered to colored and white elementary schools by the school authorities of the City of Topeka, Kansas, except in the case of transportation, as [fol. 49] set out in the preceding paragraph hereof.”

Now, before you speak on that, I would like to ask a preliminary question: I am not sure that I understand, Mr. Goodell, what you mean by the “same services.”

Mr. Goodell: I mean services like supervised play of the children at recess and noon period; I mean services of public health, nursing, which is furnished the elementary schools, both white and colored alike; I mean services that are entailed in departmental heads calling on the elementary school system, such as music department, and giving supervision and advice to the teachers. That is what I mean.

Judge Huxman: Is there anything else that you include in services?

Mr. Goodell: No, that is what I mean.

Judge Huxman: All right. And your request, requested admission, that these services which you have mentioned are furnished both in the colored schools and in the white schools.

Mr. Goodell: That is correct.

Mr. John Scott: We don't accept that, if Your Honor please. I think that is a little too indefinite; we need a little more definite and certain——

Judge Huxman: That is the reason I asked you to state [fol. 50] specifically the kind of services he had in mind.

Mr. John Scott: Yes, Your Honor, I understand that, but, as it stands in the stipulation at the present time, we wouldn't have a way of knowing.

Judge Huxman: The stipulation as it reads in the printed record isn't going to be the record. The record

that is made is as modified by the statements of Mr. Goodell. They are the ones that go into the record.

All right; is that agreed to, then?

Mr. Carter: That is agreeable, Your Honor.

Judge Huxman: That is agreeable.

Judge Mellott: Well, are there any other services that either side thinks should be incorporated. Now, I have in my mind some three or four services. Now, in order to make that complete, do you wish to give us a more detailed or do you wish to add anything to the services which Mr. Goodell has referred to?

Mr. Carter: No, sir. We have one item that I think I spoke of before. I think that Mr. Goodell indicated that it was a service, but he doesn't include that in his special statements. The statement is satisfactory to us.

Judge Mellott: The word "services" is rather big and broad and all-inclusive.

Judge Huxman: Of course, it—all right, that is agreed [fol. 51] to, then, as modified by the explanation; the furnishing of services as stated is agreed to.

We will take up No. 8:

"That the distance traveled by colored children in reaching the schools they attend is not on the average greater than the distance white children are required to travel to reach the schools they attend."

Mr. Carter: Well, Your Honor, I don't think we want to stipulate on this. I don't think it has anything to do with the case. I think it's irrelevant.

Mr. Goodell: If the Court please, on that point, it is merely a mathematical proposition. That map, Exhibit "A", shows the whole City of Topeka and territory outside of the city is in blue, which is in Topeka for school purposes. We have marked on the map, Exhibit "A", each school territory. It shows, of course, the physical facts of distances which appear on this city map and can be computed. Children, in other words, living, for example—taking Exhibit "A"—in the blue territory over here in the corner (indicating) their school that they would have to go to, white children, would be Randolph, and all of that. Of course the matter of various school distances are written in

on the map—are identified. Of course to get at it any more accurately, which would be almost an intolerable job, would be to get each child that went to the city schools and get the [fol. 52] actual distance travelled divided by the number of children, and then you would get the average, and then get each colored child and get the actual distance divided by number of children, and then you would have the average.

Judge Huxman: Mr. Goodell, I doubt whether the Court would want that kind of a stipulation agreed to. That might be mathematically correct when you take an outlying territory. Now, to reach that result, you take territory that is not in the city limits and that—

Mr. Goodell: I have done some computing with a ruler, and I have taken the school population of the various schools, and I have taken distances in various different territories, and I know that as a matter of fact, it's a conservative statement, it's on the conservative side.

Judge Huxman: Well, now you may be right, but I wouldn't want this, as far as I am concerned; I wouldn't be content to have it established by stipulation that you can have four schools in the City of Topeka for one group of people and eighteen for another in that same territorial limit and yet those in the four schools would not be required to travel greater distances than the children that have eighteen schools. Now maybe it's a fact, I don't know.

Mr. Goodell: Keep in mind, Your Honor, that the colored schools have been, and that is covered by prior stipulation which is admitted, are located in neighborhoods in each case [fol. 53] which are predominantly colored neighborhoods; consequently, you don't have a situation in the case of where four colored schools have children living blocks—thirty some blocks—away from the nearest school which we—which does obtain in the case of many of our white schools—several of them—because of the population trends in the southwest part of our city in the last few years, particularly since the war. We have had great population trends out toward the west and southwest which has caused the territory to be taken in for school purposes and, in some cases, annexed territory, and has brought about that situation.

Furthermore, I—except for paragraph 8, when they make that as one of their grounds for inequality, is the matter

of distance travelled or inaccessibility of their schools. I can't see where that is too important because we do transport them in every case where they ask to be transported.

Judge Huxman: Now that is a conclusion which flows from what is done, and you might be right on that, but the fact is a different thing, and Judge Mellott and I are in agreement that the Court does not want the stipulation as an admitted fact in this case.

Mr. Goodell: Would it add anything to it for me to have some witness get on the stand and testify as to just what the map shows and testify that the children do come from [fol. 54] the territories as shown by the map, to the various schools. Now, to make anything—

Judge Huxman: Speaking for myself alone, Mr. Goodell, as I get—if I understand the effect of what you are trying to say, is that the average distances travelled by the white children are as great as the average distance travelled by the colored children.

Mr. Goodell: That's right.

Judge Huxman: I wouldn't be impressed with that in the case at all. If the fact remained that a colored child over here had to travel two miles and a number of colored children had to travel two miles by virtue of the fact that there weren't so many of them and you had an outlying district of white children which brought their average travelled distance to as great as the colored children had to travel, I still think it might be an imposition upon a colored child if it had to travel two miles whereas a white child did not have to travel two miles.

Mr. Goodell: We will have an isolated case. When I talk about travel, I say again, in the stipulations, have already been admitted on that; that they are furnished transportation so that travel doesn't seem to me as a very significant issue.

Judge Huxman: That is a different matter.

Mr. Goodell: But, be that as it may, you still have iso- [fol. 55] lated cases where a colored child may go twenty-four blocks by bus.

Judge Huxman: The Court is of the view that the request for stipulation No. 8 might be eliminated, so we might as well pass it for the time being.

Mr. Goodell: As I understand the Court, I have to prove

the distance all the white children go to school and the distance the colored children go to school, is that my understanding, is that correct? We would be here for days and days on that.

Judge Mellott: You have your map here, and I think you can demonstrate—you already have indicated what you think your demonstration would consist of. What Judge Huxman, as I understand, is suggesting, and I am in accord with his views, is a mere mathematical calculation out of which flows an average allocated in one instance to the colored pupils and in another instance to the white pupils, wouldn't be particularly helpful.

Mr. Goodell: Of course there is inequality within the white structure. You have some white kids living next door and half a block away from the schoolhouse and others living thirty-six blocks away. To cure that we would have to have a schoolhouse on every corner. There always has to be that disparity.

Judge Huxman: But, as Judge Mellott has just stated, [fol. 56] an average distance travelled arrived upon the composite of a great number, has very little weight with me.

Mr. Goodell: I admit that fallacies in it, of course. I have to prove that because they have injected that as an issue.

Judge Huxman: They might be willing to concede that you having arrived at this by average, that the total distance travelled by all the white children and the total distance travelled by the colored children would produce this result; that is a different matter. But, anyhow, it wouldn't take you very long to prove that, how this computation was arrived at.

Mr. Goodell: Your Honor, I am not trying to say that I proved that on a school attendance record. I took—arbitrarily—distances and assume there would be children going to school in some of *their* territory. Now, that was an assumption. To get at that on a factual basis, I would have to get the school attendance from each and every one of these schools, look up the records where each kid lives, put those altogether, those children and distances, divided by the number of children to get at the average distance, and I would be all summer doing that.

Judge Mellott: I don't think we would ever ask you to do that or permit you to do it.

Judge Huxman: Request No. 8 is omitted.

[fol. 57] Mr. Brewster: One statement, judge. Plaintiffs' objection to this stipulation was the fact that distance travelled was immaterial. If that is what he meant, are you willing to stipulate, then, that the distance the students are required to travel is not an issue in the lawsuit.

Mr. Carter: No; I didn't say that. I said that the stipulation was immaterial.

Judge Huxman: No use or purpose would be served by pursuing the inquiry further because the Court itself has eliminated request No. 8.

Mr. Brewster: The point was——

Judge Huxman: We will come to No. 9:

“That Exhibits B-1 to B-22, inclusive, attached hereto and made a part hereof, are correct compilations for each of the elementary public schools in the City of Topeka, Kansas, and correctly state for the 1950-1951 school period the following as to each school designated:

“1. Name of elementary school.

“2. Name of principal.

“3. Class-room units.

“4. Enrollment.

“5. Kindergarten units.

“6. Kindergarten enrollment.

“7. Names of teachers, grades taught, enrollment for each grade, and average daily attendance.”

[fol. 58] Now, before we go to that, I think I would like to clear up in my mind a matter that is somewhat cloudy. I want to be sure that I understand these designations. “SP” means what?

Mr. Goodell: Special.

Judge Huxman: Special teacher. What does “K” mean?

Mr. Goodell: Kindergarten.

Judge Huxman: And the figures appearing after “K” is the number of kindergarten students, or what is that? For instance, in Buchanan, you have this: “Teacher, SP K 1 1-2 2 2-3”.

Judge Mellott: I suppose those are first grades.

(Colloquy was here had between Court and Counsel off the record.)

Judge Mellott: Do you stipulate, gentlemen, that these exhibits are correct and reflect those various matters?

Mr. Charles Scott: If the Court please, we agree to everything. I think there is a typographical error in the name of Mildred Starnes, as appears on Exhibit "B-1." The name should be changed to Myrtle. It isn't material.

Judge Mellott: Any correction such as that is not very material, but if you want them corrected—

[fol. 59] Judge Huxman: Do plaintiffs agree to request for admissions as contained in No. 9, then.

Mr. Carter: Yes, sir.

Judge Huxman: No. 9 is agreed to.

No. 10:

"That Exhibits C-1 to C-22 inclusive, attached hereto and made a part hereof, are correct compilations for each of the elementary public schools in the City of Topeka, Kansas, and correctly state for the 1950-1951 school period the following as to each school designated:

"1. Name of teacher or principal.

"2. Total service.

"3. Degree or hours credit.

"4. 1950-1951 salary.

"5. 1951-1952 salary."

Is there any objection to agreeing to that?

Mr. Charles Scott: No, sir.

Judge Huxman: All right. Request No. 10 is agreed to in toto.

No. 11:

"That in arriving at the salary to be paid teachers in the elementary public schools of Topeka, Kansas, the determining factors are the same for colored teachers as for white teachers, and the application of these factors is the [fol. 60] same."

Mr. Carter: Well, Your Honor, we can't say that this is a fact. We don't think it's important.

Judge Huxman: That's rather a conclusion, isn't it?

Mr. Goodell: Maybe it is, except what is meant by it, the

clear implication of it, what I meant to say, if it can be made plainer, I will amend it to say it. No distinction is made in the matter of payment of salaries between white and colored teachers.

Judge Huxman: Well, Mr. Goodell—

Mr. Goodell: —because of color.

Judge Huxman: The Court is of the view that No. 11 perhaps would serve no useful purpose if agreed to, and it is of such a nature that the plaintiffs perhaps shouldn't be required to agree to it. I doubt if they make an issue of that.

Mr. Goodell: If the Court please—

Judge Mellott: They have covered it in the preceding paragraph admitting what the salaries are, haven't they?

Mr. Goodell: That admits salaries, yes. That shows the physical facts of what the salaries being paid are, yes.

(Colloquy was here had off the record.)

[fol. 61] Judge Huxman: What is it you state?

Mr. Goodell: The amendment to the amended complaint which is amending paragraph 8 of the amended complaint filed in this case makes blanket allegations. They don't go into particularity, but they make blanket allegations of disparities that exist between the white and the colored elementary schools. Now one of the disparities covered by that pleading in amendment to paragraph 8 of the original —of the amended complaint, is teaching. Now I take it that under that allegation it would be fair—it would be a fair line of proof for them to admit—to introduce evidence that we are treating the teacher differently with respect to their contracts and their salary and so forth. So of course you don't get as good work and their children are suffering because they are not getting the benefit of a well-paid teacher.

Judge Huxman: Speaking for myself, Mr. Goodell, I am still of the opinion that even if that is so, if that is their position, it's a matter that you can't very well reduce to an absolute agreement. They may not—

Mr. Goodell: I see the Court's point about that.

Judge Huxman: —they may not contend that. If they do, it's their burden to establish. If they fail to establish

it, it's out of the case. If they make the contention it's a very simple matter for you to prove that it isn't so.

[fol. 62] Mr. Goodell: Of course they know that whether it's a fact or not. I say that it's a fact, but I agree with you that they may not care to admit it and perhaps shouldn't be required to.

Judge Huxman: No. 11 is out. All right. No. 12:

"That Exhibit D, attached hereto and made a part hereof, is a correct compilation of statistics of the transportation costs for the colored elementary schools in the City of Topeka for the 1950-1951 school period."

Mr. Goodell: That is shown by our records, the treasurer's office.

Judge Mellott: Do you contend that that is not an accurate compilation, gentlemen?

Mr. Charles Scott: We agree to it.

Mr. John Scott: That is admitted.

Judge Huxman: No. 13:

"That Exhibits E-1 to E-5 inclusive, attached hereto and made a part hereof, are correct compilations of statistics relating to public school nurses in the City of Topeka, Kansas, and correctly set forth statistics relating to public health nurses in the City of Topeka for the 1950-1951 school period."

Mr. Goodell: Now all that exhibit is is to show the number [fol. 63] of persons or children served by the various public school nurses over the city as reflecting on the question of whether there are enough nurses to give adequate service to the colored schools. In other words, it shows the load per pupil for the nurses.

Mr. Carter: Your Honor, there again is one of the things that we don't know. We are not going to controvert it.

Mr. Goodell. Our records show it.

Judge Huxman: If the records show it, could you not agree to the exhibit without agreeing to the matter which they intend to establish by it. You don't have to agree to that. You could agree that this is a fact or the facts shown by this exhibit are correct. You don't have to agree to the conclusion that flows from that.

Mr. Carter: All right.

Judge Huxman: All right. It is then agreed that Exhibits "E-1" to "E-5", as attached to the request for stipulations, are correct.

Mr. Carter: Yes, sir.

Mr. Goodell: The record is correct.

Judge Huxman: And the facts therein reflected are the facts.

Mr. Carter: All right.

Judge Huxman: All right.

[fol. 64] No, No. 14:

"That Exhibits F-1 to F-22 inclusive, attached hereto and made a part hereof, are correct compilations of the elementary public school program for each of the designated elementary schools in the City of Topeka, Kansas, for the 1950-1951 school period."

Any objections to that?

Mr. Carter: No, sir. We agree to that.

Judge Huxman: You agree.

Mr. Carter: Yes, sir.

Judge Huxman: All right. Request for admission No. 14, as read, is agreed.

Judge Mellott: Let me be on the record for just a moment.

I believe that if I have understood correctly what Judge Huxman has accomplished so far in the pre-trial, it has resulted in the receipt in evidence of all of these exhibits here, is not that correct, gentlemen?

Mr. Charles Scott: That is correct.

Judge Mellott: I am wondering if we shouldn't just turn these exhibits over to the clerk and let him mark them as exhibits admitted in evidence for all purposes, and then they constitute a part of the formal record.

Mr. Brewster: We have additional ones, supplemental requests.

[fol. 65] Judge Huxman: I think that is a good suggestion, Judge Mellott, and the parties have agreed to it.

Mr. Goodell: If Your Honor please, we were going back to the preceding paragraphs which were passed for the moment in the light of this last exhibit.

I am willing to amend paragraph 3 by substituting for "curricula" the words, "course of study."

Judge Huxman: Mr. Goodell, let me ask you, for my information, these exhibits, I forget what the numbers of them are, set out the courses of study.

Mr. Goodell: "F-1."

Judge Huxman: The "F" series of exhibits sets out the actual courses of study that are taught in all of these schools.

Mr. Goodell: That's right.

Judge Huxman: What does your request for admission No. 3 add to what those exhibits actually show?

Mr. Brewster: How would it be if on 14 we just added, "And said program includes all courses of study prescribed by the law of the State of Kansas." Is that what you are getting at?

Mr. Goodell: I wanted to make that plan that we were following the prescribed course of study.

Judge Huxman: You have actually set out the courses of study that you say are taught.

[fol. 66] Mr. Goodell: All it takes to pick it up and make it complete——

Judge Huxman: There is no contention made that they don't conform to the state requirements. If they want to claim it, let them prove it. You say those are the courses of study.

Mr. Goodell: I don't care to belabor the point.

Judge Huxman: What would 3 add?

Mr. Goodell: Three supplements 14 only in respect, that it ties up and shows that it's a legal course of study being followed or taught.

Judge Mellott: May I suggest that the reporter read what Mr. Brewster interpolated and see if, perhaps, his interpolation may not be added as a part of your admission with reference to Exhibit "F".

(Portion referred to by Judge Mellott read aloud by the reporter.)

Judge Mellott: Is there any reason why you couldn't supplement No.——

Mr. Carter: I think, if I may, Your Honor——

Judge Mellott: Any reason why you couldn't supplement No. XI which you have agreed to, by the addition of what Mr. Brewster just said.

[fol. 67] Mr. Carter: I frankly am unable to see where it adds anything. We have admitted the facts.

Judge Mellott: I don't think it adds much. You are not contending that Topeka in the operation of its school system is refusing to abide by the statutes of Kansas and the orders of the state superintendent of public instruction with reference to courses of study, are you; you are not making that contention.

Mr. Carter: I would prefer, however, Your Honor, if the exhibit which sets out the courses and they are admitted in the record, I think they speak for themselves.

Judge Mellott: You haven't answered my question. I think you should answer it. Do you contend that the board of education of the City of Topeka, Kansas, is not complying with the state law and the regulations and the orders of the state superintendent of public instruction?

Mr. Carter: That is not our contention, no.

Judge Mellott: All right.

Judge Huxman: Then why do you object to this addition? The only reason you could object to it is that you claim they aren't complying.

Mr. Carter: Well, Your Honor, the point is that we have admitted the courses of study. These are facts which [fol. 68] they have set forth in the record; these are the courses of study which are taught.

Judge Mellott: Well, I think we would take his statement as an admission that of course he is not contending that the Board of Education of Topeka is doing other than complying with the Kansas statutes so far as course of study is concerned. I would certainly spell that out of counsel's statement.

Judge Huxman: With that statement by counsel perhaps the addition isn't necessary.

Judge Mellott: I don't think so.

Judge Huxman: Let's take up the supplemental requests for stipulations which have been filed by the defendants.

No. 15:

“That Exhibit G, attached hereto and made a part hereof, is a correct statement taken from the records of the Board of Education of the City of Topeka, Kansas, pertaining to bus schedules for colored elementary school children for transportation furnished said children by the said Board of Education for the 1950-1951 school year.”

Is there any objection to agreeing to that stipulation?

Mr. Carter: We agree to that, Your Honor, with the exception of line 9.

[fol. 69] Judge Huxman: Line 9?

Mr. Carter: Line 2 under “Monroe”; that is on the exhibit itself.

Judge Mellott: That is on the exhibit.

Mr. Carter: Line 2 under “Monroe.”

Judge Huxman: Which says, “8:10—First and Kansas.” You don’t agree to that.

Mr. Goodell: You mean that is erroneous? What should it be?

Mr. Charles Scott: Should be First and Quincy.

Mr. Goodell: Is that correct, First and Quincy?

Judge Mellott: Let’s change it to First and Quincy, then.

Mr. Goodell: I am writing that in as an amendment then.

Judge Huxman: And, as amended, plaintiffs agree to request 15 for admissions.

Mr. Carter: Your Honor, Mr. Scott brought something to our attention. This addendum down here, “Bus picks up students also anywhere along route.”

Judge Mellott: You haven’t gotten to that yet, have you?

Mr. Carter: That is on the same exhibit—on the exhibit.

[fol. 70] Judge Huxman: “Bus picks up students also anywhere along route.” You don’t agree to that?

Mr. Carter: I understand that they picked them up at these various stops.

Mr. Goodell: They do and, in addition, along the way at not designated stops they will pick them up. That is what they tell me; I don’t know. That is what the clerk’s office tells me has been the practice for years.

Judge Mellott: Well, do you Topeka lawyers especially, do you know whether that is a fact or not?

Mr. Charles Scott: No, sir.

Judge Mellott: Suppose we admit the exhibit, then, eliminating from it the parenthetical clause and let that remain as an item requiring proof, if that is required.

Judge Huxman: If requested. As so modified, do you agree to the admission?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right.

No. 16:

“That Exhibit H attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to teacher load in the kindergartens of the Topeka public schools for [fol. 71] the 1950-1951 school year.”

Any objection to agreeing to that?

Mr. Carter: Our witness informs us that this is not correct.

Judge Mellott: Who is your witness?

Mr. Carter: Dr. Speer.

Judge Mellott: What does he know about it; has he checked the records?

Mr. Carter: Yes, sir.

Judge Mellott: Is he here now?

Mr. Carter: No, he isn't.

Judge Mellott: How much of that is covered here in exhibits which are already in evidence.

Mr. Carter: I don't know.

Judge Mellott: You have stipulated with referee, I believe it was “E” or “F”, has already been covered. Let me refer back here.

Mr. Brewster: Series “B”, I imagine.

Judge Mellott: You have shown here what the number of kindergarten children were in each of the schools, and you have shown what the average daily attendance of the kindergarten was. I don't know what is shown by “H”.

Mr. Carter: Isn't this the teacher load? These are facts taken from that other report, isn't it, Mr. Goodell?

[fol. 72] Mr. Goodell: Sure. It's a breakdown of each school in the City of Topeka showing the teaching load per teacher. In other words, children each teacher has under her for particular grades starting with kindergarten.

Judge Mellott: What I am asking is simply this: Isn't Exhibit "H" a mere assembling of the data which is already in Exhibit "B"?

Mr. Goodell: It's calculations drawn therefrom from that other data; it's a mathematical, in other words, reduction of what the other exhibits show. I can prove that; I don't care to argue it.

Judge Huxman: Now, gentlemen, the Court is of this view, that this exhibit is just a compilation of the other exhibits already in there.

Mr. Carter: But, Your Honor, Mr. Goodell himself says it's a calculation based upon it which is entirely different.

Judge Huxman: That is what I mean, a compilation made from data already in. It's a simple calculation, and it's either right or it's wrong.

Mr. Goodell: Calculation—it's a reduction of the figures used down to teaching load.

Judge Huxman: The Court is of this view, that we will not ask for an admission at this time, and we will give both parties an opportunity to check this exhibit again, against [fol. 73] the basic data which is contained in these other exhibits, and then, before we start into the trial Monday morning, we will again ask Mr. Goodell whether he is satisfied with the correctness, and we will also ask plaintiff- then if they still contend that this computation is not correct, to have for the benefit of the Court your computation in which you point out the manner and respect in which this is not correct. Now if it is not correct, it shouldn't go in. If it is correct, I know both parties want to agree to it.

Now, that is 16, isn't it?

Mr. Goodell: Yes.

Judge Huxman: That will be passed until Monday morning.

Both parties here have shown a spirit of fairness and cooperation and I see no reason in the world why you shouldn't get together on the question of whether this exhibit is or is not correct.

No. 17:

"That Exhibit I attached hereto and made a part hereof is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to

teacher load in the first six grades of the elementary schools of the Topeka public school system for the 1950-1951 school year.”

[fol. 74] Mr. Carter: We could shorten this, Your Honor, if we might have the same ruling as you made on the last one apply to this one.

Judge Huxman: All right. We pass No. 17 to Monday.

Mr. Brewster: As I understand it, their claim is, using the first series of exhibits, we haven't computed correctly, is that what they mean?

Mr. Goodell: No, they are challenging the reductions we made there.

Judge Huxman: No. 18:

“That Exhibit J attached hereto and made a part hereof is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to auditoriums and gymnasiums in the elementary schools of the City of Topeka, Kansas.”

Mr. Goodell: I think there is a typographical error in that which I would like to correct.

Judge Huxman: All right. Where is that.

Mr. Goodell: Exhibit “J”. On the Monroe School where I have in my exhibit “combination”, meaning that they have combination auditorium and gymnasium, that is erroneous, according to my later information, that they do not have a gymnasium, only an auditorium.

Judge Huxman: Only an auditorium.

[fol. 75] Judge Mellott: What do you want to do, strike out the word “combination” and put in the word “yes” under “Auditorium.”

Mr. Goodell: That's right and “no” under “Gymnasium.”

Judge Huxman: And “no” under “Gymnasium”, all right. That correction will be made.

Mr. Carter: Your Honor, we don't feel that we can accept this at this time. We are today, as of today, our experts are now checking these items, and we cannot say whether they are true or not, so we are not willing to accept them as of now.

Judge Huxman: We will pass that as we have some of these others until Monday morning.

Judge Mellott: May I inquire if counsel understand that we are expecting you to tell us Monday morning whether these are correct and, if they are not, you will give us what you say the correct data is.

Mr. Carter: I understand that completely.

Judge Huxman: No. 19:

“That no distinction is shown by the Board of Education of the City of Topeka in school plant facilities and equipment, because of race or color. Instead, the same factors are considered and applied by said Board of Education as to plant facilities and equipment in both white and colored [fol. 76] elementary schools.”

Mr. Carter: We can't agree to that.

Judge Huxman: All right, plaintiffs will not be required to agree to No. 19.

No. 20:

“That Exhibit K attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to original cost of school buildings in the City of Topeka, Kansas, and correctly states the following:

“1. Name of building or school.

“2. Year of construction.

“3. Structural cost.

“4. Land cost.

“5. Equipment cost.”

Mr. Carter: We agree.

Judge Huxman: 20 is agreed to.

No. 21:

“That Exhibit L attached hereto and made a part hereof, is a correct statement from the records of the Board of Education of the City of Topeka pertaining to the present appraised value of the school buildings and equipment, for both white and colored elementary schools; that said appraised value is the appraised value furnished by the appraisers for the insurance underwriters for the purpose of

[fol. 77] fixing values of said buildings and equipment for issuing insurance thereon.”

Mr. Carter: We agree to that.

Judge Huxman: No. 21 is agreed to.

Now, that completes the defendants' request for agreement.

Judge Mellott: In the light of what has just been gone through, the Exhibits “G” and “K” and “L” seem now to be ready for admission formally, is not that correct, gentlemen?

Mr. Charles Scott: That is correct.

Judge Mellott: The clerk, then, will mark them as admitted in evidence. The others just covered, namely, the others, “H”, “I” and “J” may be handed to the clerk and marked for identification only.

How has the map been marked, if at all.

Mr. Goodell: Exhibit “A”, Your Honor.

Judge Mellott: Exhibit “A”. It may be marked and admitted in evidence, subject to any corrections that counsel may desire to call to the Court's attention based upon the draftsmanship of the map.

Mr. Goodell: I do think this, Your Honor, I want to re-check it. I think since this map was prepared, the copy prepared which came from the map that the Board of Education clerk's office keeps, that there is a segment of that southwest territory that may have been annexed so it wouldn't be correctly outside of the city now.

[fol. 78] Judge Huxman: Yes.

Judge Mellott: Well, I believe we all know and can take judicial notice of the fact that under the statutes of Kansas pertaining to cities of the first class, schools within and adjoining cities of the first class, that the statutes contemplate, and most of the cities of Kansas do, attach to the cities for school purposes territory which is outside of the city, and that is what you refer to as property attached to the city for school purposes.

Mr. Goodell: Yes.

Judge Mellott: Now since your map indicates that certain of that territory has been attached for school purposes but that there may be some inaccuracies in that, you have not

checked to see if subsequently some of the territory has actually been annexed to and brought into the city for all purposes.

Mr. Goodell: I will reconcile that with all the later annexations.

Judge Huxman: Let me ask you this, Mr. Goodell, is it your understanding that this map is accurate and correct as to the close of the school year?

Mr. Goodell: Yes.

Judge Huxman: Then it would seem to me, that is, on the questions which we have, that what has taken place in the last three or four months or as to the annexation of [fol. 79] additional territory, would not be any factor in determining the constitutionality — the questions before us in this case, do you gentlemen agree with that?

Mr. Charles Scott: Yes.

Judge Huxman: And if this map is correct as drawn, any changes since would not need to be shown.

(A brief recess was here had at the conclusion of which the following further proceedings were had:)

Judge Huxman: Let me address this remark to attorneys for plaintiffs: Has your request for admission No. 1 not already been met by defendants' request for admission 1. There is no difference in them, is there?

Mr. John Scott: Except for the latter part, Your Honor, "That Negro children of elementary school age are compelled to attend one of the four Negro schools aforementioned because of their race and color, pursuant to the custom and usage provided in General Statutes 1949, 72-1724."

Judge Huxman: That is a fact, isn't it?

Mr. John Scott: Yes, sir.

Judge Huxman: I am asking Mr. Goodell now. That latter part is a fact now, isn't it?

Mr. Goodell: I think it's embraced in our stipulation.

Judge Huxman: You do not have that—you do not have [fol. 80] in your request the statement, "Negro children of elementary school age are compelled to attend one of the four negro schools because of their race and color pursuant to the custom and usage provided in G. S. 1949, 72-1724." You do not have that in your—

Mr. Goodell: We don't use the statute; we say they are required to attend instead of compelled.

Judge Huxman: That is a fact that it is because of their——

Mr. Goodell: That's right.

Judge Huxman: All right, then—is it then agreed, gentlemen, that it is a fact and so stipulated for the purpose of this trial that negro children of elementary school age are compelled to attend one of the four negro schools provided for in Topeka because of their race and color pursuant to the custom and usage provided in G. S. 1949, 72-1724.

Mr. Goodell: Well, that is a fact. I don't think the "custom and usage" is provided by the statute. It's simply an authorization, but we won't quibble about that.

Judge Huxman: Suppose we eliminate "custom and usage" as authorized.

Mr. Goodell: That is all right.

Judge Mellott: I understand there isn't any dispute.

[fol. 81] Mr. Goodell: We will admit it.

Judge Mellott: —that they are, you say, required—the word "required" connotes about the same thing as compelled.

Judge Huxman: He objected to the words "custom and usage" provided by the statute. The statute doesn't perhaps provide a custom.

Mr. Goodell: I would say pursuant to the statute.

Judge Huxman: All right. We will put in the word "pursuant", is that agreed to?

Mr. Goodell: Yes.

Judge Huxman: All right.

Now, we will take up No. 2:

"2. That the distance be computed based on city blocks from given points of residence of infant plaintiffs and other Negro children similarly situated, to the designated Negro schools where they must attend as outlined on the official map of the City of Topeka."

Judge Mellott: Since we did not require you to go into that average one, it seems to me that you wouldn't want to insist upon this, would you, Mr. Scott?

Mr. John Scott: Well, if Your Honor please——

Judge Huxman: In other words, do you want to go back [fol. 82] now to the defendants' request No. 8 and add to it what you now have, is that what you want to do?

Mr. John Scott: No, sir. We will withdraw that.

Judge Huxman: You will withdraw request No. 2.

Mr. Carter: No, sir. We are talking about an entirely different point there, Your Honor.

Judge Mellott: I don't understand what you are talking about.

Mr. Carter: I will try to explain it for a moment. When the defendants are talking about averages, insofar as we are concerned, we feel that that is irrelevant because it has nothing to do with the individual disadvantage. When we speak here of a distance which is travelled by individual plaintiffs we are attempting to show an individual disadvantage which these plaintiffs have in making the trip. We are not talking about general averages; we are talking about what affects the individual plaintiff, and I think that is entirely a different point.

Judge Huxman: Mr. Counsel, we didn't permit the defendants to commit you to a yardstick of measuring distances and why should we——

Mr. Carter: We will put on proof to that effect.

[fol. 83] Judge Huxman: Let me just finish my sentence for the record so it doesn't stand up there in the air. Why should we permit you to commit them to a yardstick of measurement?

Request for admission No. 2 is withdrawn.

Request No. 3:

“Infant plaintiffs and other Negro children similarly situated are transported by buses to the Negro schools where they attend and are picked up by said buses at designated points along prescribed routes in accordance with schedules and designated pick-up points outlined by the School Board or its agents. A copy of the schedule of routes is hereto attached marked Exhibit ‘A’ and made a part hereof.”

That schedule has already been agreed to, hasn't it, and request No. 3 will therefore, I presume, be withdrawn.

Judge Mellott: That is Exhibit “G” which has been ad-

mitted in evidence with the parenthetical clause, "Bus picks up students also anywhere along the route." eliminated.

Now you gentlemen did tell us, did you not, that you would make inquiry and find out, if you can, by Monday morning whether the parenthetical clause is or is not applicable, can you not do that?

[fol. 84] Mr. John Scott: Yes, sir.

Judge Huxman: That's right.

Judge Mellott: Then that probably covers everything that you have. Now you have a copy of the schedule of routes.

Mr. John Scott: Yes, sir.

Judge Huxman: Is it any different from Exhibit "G"?

Mr. Charles Scott: No.

Mr. John Scott: No, it's exactly the same.

Judge Mellott: Do you propose to offer it in evidence as an additional exhibit?

Mr. John Scott: No, sir. The one that the defendants offered—

Judge Huxman: The entire request No. 3 is withdrawn in view of the admissions already made.

Mr. John Scott: That's right, sir.

Judge Huxman: Request for admission No. 4:

"That no provision made for shelter or protection against inclement weather conditions or safety regulations at designated pick-up points for infant plaintiffs and other Negro children similarly situated while waiting for the arrival of their respective buses."

[fol. 85] What do the attorneys for the defendant say as to that request?

Mr. Goodell: We don't have shelter-houses, so I would say we do admit that. "Safety regulations" is pretty broad. I don't know what they mean by that.

Judge Huxman: Well, what would you say to this: Safety regulations other than those provided for traffic generally.

Mr. Brewster: The board of education doesn't provide the lights anyway.

Mr. Goodell: In Topeka the Police Department and the

traffic control division have jurisdiction over those matters.

Judge Huxman: Don't you gentlemen feel that the question of safety regulations could be deleted? What value is there to——

Mr. John Scott: Well, if Your Honor please——

Judge Huxman: Now you can show, if you want to, that there are no added regulations or precautions. Of course the Court will take knowledge, in the absence of anything else, that the usual conditions with respect to traffic and travel in the city obtains, and no other, unless it's shown.

Mr. John Scott: Yes, I think that is sufficient, don't [fol. 86] you?

Mr. Carter: Yes.

Mr. John Scott: I think that is sufficient.

Judge Huxman: Then is it agreed that request for admission No. 4, as follows, is agreed to:

“That no provision made for shelter or protection against inclement weather”——“That no provision is made for shelter or protection against inclement weather conditions.”

Do the defendants agree to that?

Mr. Goodell: That is correct.

Judge Huxman: And we will omit from your request the reference to any additional safety regulations.

Mr. John Scott: Yes, sir.

Judge Huxman: I didn't go quite far enough, Mr. Reporter. The admission should read as follows:

“That no provision is made for shelter or protection against inclement weather conditions at designated pick-up points for infant plaintiffs and other Negro children similarly situated while waiting for the arrival of their respective buses.”

That is the admission as it is agreed to.

Judge Mellott: The affirmative answer was made by counsel for the School Board.

Mr. Goodell: Yes.

[fol. 87] Judge Huxman: No. 5:

“That said buses make only two trips a day to and fro to the respective all Negro schools in the morning as prescribed”——

Judge Mellott: We don't have the exhibit, so I suppose—

Judge Huxman: Would you object if we substituted for your Exhibit "A" the number of their exhibit to which—

Judge Mellott: Exhibit "G".

Mr. John Scott: That will be perfectly all right.

Judge Huxman: "in the morning as prescribed in Defendants' Exhibit 'G' admitted in the record and in the evening at the close of school."

Judge Mellott: I understand that is admitted.

Mr. John Scott: Yes, sir.

Judge Mellott: Correct, Mr. Goodell?

Mr. Goodell: Yes.

Judge Huxman: I wanted to stop there purposely; so far you admit that much of the request of No. 5.

Mr. Goodell: The schedule shows that they are taken to the school in the morning and returned at night.

[fol. 88] Judge Huxman: Now, we will take up the rest of the request because we might run into trouble there. The further request is made for an admission, "As a result, infant plaintiffs and other Negro children similarly situated are required to spend the entire day at their respective school without the opportunity and benefit of seeing their parents during the noon hour and are required to eat cold lunches which are prepared by their parents before leaving home in the morning."

Mr. Goodell: We are not prepared to admit. It's a conclusion.

Judge Huxman: That is a conclusion, isn't it, that flows from the admission.

Mr. John Scott: We can prove that, Your Honor.

Judge Huxman: That portion of the request will be denied.

Mr. Goodell: I don't think it's a proper issue in the case because they are treated no differently than white children. If they want to go home for lunch, they go, and if they don't, they stay and eat lunch.

Judge Huxman: That is argumentative, in any event.

Request No. 6:

"That the respective buses are without any supervisor other than the driver to exercise disciplinary measures [fol. 89] and control of said children."

Is that agreed to?

Mr. Goodell: I don't think we send a guard along; I believe that is accurate; we just have a driver.

Judge Huxman: You agree to that, then.

Mr. Goodell: I would like to check it. I think it's correct.

Judge Huxman: Let's put it this way, you agree to that, subject to your right to check and withdraw your agreement if your further investigation shows otherwise.

Mr. Goodell: Yes.

Judge Huxman: No. 7:

"That Buchanan School does not have an auditorium or gymnasium; such facilities are available at Sumner,"—before we go further, gentlemen, we have already covered the question of auditoriums and gymnasiums in the series of exhibits designated "J".

Mr. John Scott: Yes, sir.

Judge Mellott: We have not yet admitted "J", but you were to—

Mr. John Scott: —check it.

Judge Mellott: —check it and give us any corrections on Monday morning.

Mr. John Scott: That's right.

Judge Huxman: Then we should not agree to request [fol. 90] No. 7 here and that can be ironed out on your investigation as to Exhibit "J", as proffered by the defendant.

Mr. John Scott: Yes. We will withdraw that.

Judge Huxman: Request for admission No. 7 is withdrawn because of these other matters in the record.

No. 8:

"That Monroe School's playground or a portion thereof is separated by a public thoroughfare adjacent to the building and located on the easterly side of said playground is the A. T. S. F. Railroad right-of-way and track."

Is that a fact, Mr. Goodell?

Mr. Goodell: I believe that is accurate, yes.

Judge Huxman: Then you admit request No. 8 as read.

Mr. Goodell: Yes.

Judge Huxman: All right.

No. 9:

“That no provisions are made for electrically operated school stop signs and safety signals at any of the Negro schools and no safety measures are provided for Infant Plaintiffs and other Negro children similarly situated who are required to cross the intersection of First and Kansas [fol. 91] Avenue at a time when the vehicular traffic is dense, while they are enroute to the designated bus pick-up points and at other busy intersections throughout the City of Topeka where Infant Plaintiffs and other Negro children similarly situated are required to cross enroute to designated bus pick-up points.”

Mr. Goodell: We can't admit that because it isn't an accurate statement. Furthermore, we have no control over traffic lights, electric devices. The City of Topeka Police Department takes traffic counts at various points in town and, from their determination, decide that a designated point should have school blinker signs, and we have several cases, the evidence will show if we get in that point,—in several cases requested signs which they on the traffic count didn't think it was justified and wouldn't put them in. We don't have any control over it.

Mr. John Scott: If Your Honor please——

Judge Huxman: Didn't we, when we had up defendants' request for agreement, agree that there were no extra safety or traffic regulations provided at these places.

Mr. Goodell: I don't think so. There are some——

Judge Mellott: Let me ask this question: You agree, do you not, Mr. Scott and counsel for the plaintiffs, that Mr. [fol. 91a] Goodell is correct in his statement that the Board of Education has nothing whatever to do with putting in blinker lights and safety devices for school children and others to cross the public streets, but at best, can only request that the traffic department of the state and the city police department take care of those matters; do you not agree that that is a fact?

Mr. John Scott: We agree that that is a fact and also, to extend that, Your Honor, I think the first part of that request is a fact, that there are no——

Judge Mellott: Well, I suppose that if you divide the

request, there may be some merit, "That no provisions are made for electrically operated school stop signs and safety signals at any of the Negro schools." Now, I suppose—

Mr. Goodell: If the Court please, that is not accurate.

Judge Mellott: Then you should not agree upon it.

Mr. John Scott: It is accurate.

Mr. Goodell: No, it isn't accurate.

Mr. John Scott: We can prove it, Your Honor.

Judge Huxman: The Court feels that that is a very minor matter, whatever the electrical arrangements are or aren't, and, if you can't agree on it, it will take only fifteen [fol. 92] minutes of evidence to establish what the fact is.

Mr. Goodell: They make a broad statement, as I understand it, no safety devices in any of the areas traversed by the colored children to go to their schools—

Judge Huxman: They don't say that at all.

(Colloquy was here had off the record.)

Mr. Goodell: For example, on 10th Street, you have Parkdale School and Washington School in very close proximity. The negro children who have to cross 10th Street to get to Washington School that walk and don't ride, they use that traffic sign—I mean there is a designated crossing for school children where they cross over 10th there for Parkdale. Now it's splitting hairs to say that is solely for Parkdale and no benefit to Washington.

Judge Huxman: Well, the Court feels that is a minor matter.

Mr. Goodell: We have got that situation in other parts of town.

Judge Huxman: It's a simple matter, and we will not require the parties to agree on that—request No. 9.

Mr. John Scott: We can prove it very easily, Your Honor.

[fol. 93] Judge Huxman: I believe the attorneys for the plaintiffs will agree that this case, the outcome, doesn't hinge upon that one little factor; I doubt whether it's going to be determinative too much.

Now, does that conclude plaintiffs' requests for admissions?

Mr. John Scott: Yes, sir.

Judge Huxman: We want to ask at this point counsel for the State of Kansas whether they have at this time any requests for admissions of fact in addition to what has been agreed to and, if not, whether they go along with, and agree to, these admissions which have been made by the respective parties to this litigation.

Mr. McQueary: If Your Honor please, the position of the State of Kansas, insofar as this lawsuit or this controversy is concerned, is going to be to endeavor to uphold the constitutionality of the statute in question, and our participation will be limited to that field, and so far as equal facilities or the conditions provided by the Board of Education of the City of Topeka or the facilities enjoyed by the negro, by the plaintiffs, we are not going to make that a matter of issue insofar as we are concerned. We have no knowledge as to that; we haven't investigated it. That will be left solely to the other parties in this matter.

Judge Huxman: Then I understand your position is that you have no request for admissions of fact.

[fol. 94] Mr. McQueary: We have none, Your Honor.

Judge Huxman: And that the state has no interest in these admissions which have been made by the parties, the plaintiff and defendant, other than the state, because you do not think that they touch the state's phase of this case.

Mr. McQueary: That is a correct statement.

Judge Huxman: All right.

Mr. Goodell: I have one more matter. I would like to request a stipulation that the—as an exhibit, that seventeen cities, first and second class cities of the State of Kansas, operate separate colored and white schools in the elementary grades, and I have an exhibit.

Judge Huxman: I am not sure that I understand that, Mr. Goodell.

Mr. Goodell: I have an exhibit with the names of the cities showing that seventeen cities in the State of Kansas are operating their elementary school systems similar to Topeka—strike that—operating separate white and colored schools in the elementary grades pursuant to the same statute.

Judge Huxman: Is there any objection to that admission?

Mr. Greenberg: Yes, Your Honor. We object on the [fol. 95] ground that what may happen in any other city in the State of Kansas is not relevant to the rights of our particular plaintiffs who operate in this school system here and now.

Judge Huxman: Since there is one member of the Court not here, in any event we will—and since this is the trial court, we will receive it. You have no objection to the correctness of the statement.

Mr. Greenberg: We don't know, as a matter fact; we haven't—

Judge Huxman: You have no reason to doubt the correctness of the statement.

Mr. Greenberg: We have had no occasion to investigate it because we haven't thought it pertinent.

Judge Huxman: The exhibit will be received subject to its materiality.

Judge Mellott: It will be marked as Exhibit "M", Defendants' Exhibit "M".

Judge Huxman: Also subject to the right of counsel before trial, if he so desires, to attack it as to its correctness.

Mr. Greenberg: That is agreeable.

Judge Huxman: Is there anything else?

Judge Mellott: That may be taken up Monday also.

[fol. 96] Judge Huxman: Is there anything else now, gentlemen?

Judge Mellott has a matter that he would like to inquire about. Go ahead, judge.

Judge Mellott: I was only going to suggest to my associates on the bench that we may not have covered categorically sub-division (6) of Rule 16 which says that it's proper for us at a pre-trial to give consideration to such other matters as may aid in the disposition of the action. That is, of course, only a general statement. Does either side care to suggest, in line with that sub-section, any other matters which you think might be taken up with the Court at this time which would aid in the disposition of the action.

Mr. Goodell: I think of none, Your Honor.

Judge Mellott: Very well. The concluding sentences of the rule under which we are now functioning provides that, "The court shall make an order which recites the action taken at the conference, the amendments allowed to the

pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel;”.

Now, where a pre-trial is handled as intelligently and as expeditiously as this has been handled by reason of the [fol. 97] preliminary requests for admissions having been made and secured to some extent, it seems to me that perhaps it is wholly unnecessary for this tribunal to make any order because your record itself shows just what disposition has been made.

Counsel may desire to secure from the reporter copies of what has been accomplished, but I believe that the way in which this has been handled that everybody has it pretty well in mind, and I am suggesting that perhaps it would be mere supererogation and wholly unnecessary for the Court in this particular instance to dictate into the record a lengthy order inasmuch as Judge Huxman has pretty well covered that as we have proceeded.

Do you think this Court should make a separate order or not?

Mr. Goodell: No, I think not.

Judge Huxman: All right. Anything else that anyone has to suggest which might tend to expedite this hearing before we recess. If not, the pre-trial conference will be recessed until 10:00 o'clock Monday morning when we will take up for final disposition the matters that we have left here in abeyance and which you gentlemen on your respective parts will investigate and see if you can satisfy yourselves, and we will then make final disposition of that and immediately go into the trial of this case at the conclusion—final conclusion of the pre-trial conference.

* * * * *

[fol. 98] (Reporter's Note:) The further proceedings in the pre-trial conference had on June 25, 1951, are contained in the transcript of proceedings of the hearing proper.

* * * * *

Reporter's Certificate (omitted in printing).

[fol. 99] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CORRECTING TRANSCRIPT OF RECORD—Filed August
27, 1951

It has been called to the attention of the Court that certain minor typographical errors exist in the certified record filed in the Court in the above entitled cause. The Court Reporter has checked the record and confirms the existence of these minor typographical errors.

So that the record may speak the truth, it is considered, ordered and adjudged that it be corrected in the following respects:

That on Page 10, Line 4, the name “Dr. Spee” be corrected to read “Dr. Speer”; that on Page 56, Line 2, the phrase “Hold are they” be corrected to read “How old are they?”; that on Page 115 in the last two lines the word “depredations” be changed to read “deprevations”; that on Page 119, Line 2, the sentence there should be made [fols. 100-103] to read “. . . United States *there* are . . .”; that the index record be corrected to correctly reflect the name of Horace B. English as it appears on Page 145 of the record; that at Page 162, Line 4, the phrase “minor groups” be changed to read “minority groups”; that on Page 164 in Line 7 from the bottom the word “roll” be changed to “role”; that at Page 169 the record be corrected to show “direct examination was by Mr. Carter”; that at Page 173 in the third line of the paragraph marked “Q” the last word “them” be deleted; that at Page 212 in Line 9 from the bottom the word “minitors” be changed to “monitors”; that at Page 219, 11 Lines from the top, the sentence should read “of the entire school system?”; that at Page 248, 6 Lines from the bottom, the semi-colon after the word “individual” be changed to a comma; that at Page 249, 12 Lines from the top the word “disadvantages” be changed to “disadvantaged”; that at Page 251 and 255 where the case name McLawrin appears the record be changed to show the name of the case to be “McLaurin”.

It is by the Court further considered, ordered and adjudged that a filing of this order constitute the correction of the record and that copies of this order be furnished to the parties requesting or now having a copy of the record.

(S.) Walter A. Huxman, United States Circuit Judge.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 105] TRANSCRIPT OF PROCEEDINGS—Filed October 16,
1951

[fol. 106] Be it remembered, on this 25th day of June, A.D. 1951, the above matter coming on for hearing before Honorable Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit; Honorable Arthur J. Mellott, Judge, United States District Court, District of Kansas, and Honorable Delmas C. Hill, Judge, United States District Court, District of Kansas, duly constituted as a Three-Judge Court under Chap. 155, Title 28, U.S.C., and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

[fol. 107] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Huxman: I take it there are no additional parties to be entered of record. All of that was done the other day, was it? Anyone else to be entered as an attorney of record?

Mr. Goodell: If the Court please, this is Mr. Bannon, attorney for the Board of Education of Leavenworth, Kansas.

Judge Huxman: Do you desire to have your name entered as—

Mr. Bannon: As appearing, Your Honor, but I do not know whether or not the Board might ask for authority to file a brief at some later stage of the proceeding.

Judge Huxman: All right.

Mr. Goodell: The attorney for the Board of Education at Coffeyville.

Judge Mellott: I suppose he should be admitted only as amicus curiae at this time since he filed no pleading.

Mr. Goodell: I suppose so.

Mr. Dallas Knapp, attorney for the Board of Education at Coffeyville called me and asked to have his name entered and wanted to be allowed to participate for filing a brief.

Judge Huxman: Well, we will have his name entered at this time, and we will determine——

[fol. 108] Mr. Goodell: The same is true of Mr. Hal Harlan, of Manhattan, Kansas, who is attorney for the Board of Education there.

Judge Huxman: What do they desire?

Mr. Goodell: To have his name entered and be permitted to file a brief.

Judge Huxman: His name will be entered, and the question of filing of briefs amicus curiae will be determined at the conclusion of the hearing.

Mr. Goodell: Surely.

Judge Huxman: Now, at the conclusion of our pre-trial conference Friday there were certain matters that were passed for final determination this morning. The first one I have noted is Stipulation 16, which reads as follows: "That Exhibit "H", attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka, pertaining to teacher load in the kindergarten of the Topeka public schools for the 1950 and 1951 school years." Attorneys for plaintiff wanted opportunity to check into that. What do you say this morning?

Mr. Carter: We are willing to accept that.

OFFERS IN EVIDENCE

Judge Mellott: Let the record show Exhibit "H" is formally admitted then in evidence.

Defendants' Exhibit "H", having been offered and [fol. 109] received in evidence, is contained in the case file.

Judge Huxman: All right. Request 17; "That Exhibit 'I', attached hereto and made a part hereof, is a correct statement of facts from the Board of Education of the City of Topeka, pertaining to teacher load in the first

six grades of the elementary schools of the Topeka public school system for the school years 1950 and 1951.”

Mr. Carter: We will accept that, too.

Judge Huxman: The record may show that their request No. 17 is agreed to, stipulated, and that Exhibit “I” is admitted.

Defendants’ Exhibit “I”, having been offered and received in evidence, is contained in the case file.

Judge Huxman: Request No. 18, “That Exhibit ‘J’, attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to auditoriums and gymnasiums in the elementary schools of the City of Topeka, Kansas.”

Mr. Carter: On that we have a question, Your Honor; definition, I suppose. Our investigation reveals——

Judge Huxman: I didn’t understand.

Mr. Carter: We have a question. I suppose it’s one of definition and——

Judge Huxman: Let’s look at Exhibit “J”. Is that in [fol. 110] the original exhibits?

Mr. Carter: That is in the supplement attached to the supplement that you were reading; pertains to auditoriums and gymnasiums.

Mr. Goodell: Which one are you talking about now?

Mr. Carter: Exhibit “J”.

Mr. Goodell: Any particular part of Exhibit “J”?

Judge Huxman: All right. Now what is it?

Mr. Carter: We are unable to accept the definition under “Buchanan” “Yes”, as having an auditorium because our investigation shows that there are two rooms, makeshift rooms, that have been thrown together in which there are chairs. Now we think that is totally different from the feeling of an auditorium which has been built in the school. With that reservation, we will accept that part.

Judge Huxman: If we eliminated “Buchanan” do you accept the statements in Exhibit “J” as to the auditorium and gymnasium in Central Park, Clay—what are the three colored schools?

Mr. Goodell: Monroe.

Judge Huxman: Do you accept the rest of the exhibit with the exception of that pertaining to Buchanan?

Mr. Carter: Well, just three items, Your Honor. If you [fol. 111] read down there to Lafayette——

Judge Huxman: Is that a colored school?

Mr. Carter: No, sir; that is not. It is shown here “yes” an auditorium, “no” gymnasium. We have found that there is a playroom in the school building which is ample, and we think that that should be entered on the record.

Mr. Goodell: We say “yes” it has an auditorium.

Judge Huxman: Suppose we change the “no” to “play-room”, what do you say, Mr. Goodell?

Mr. Goodell: I don’t think it’s accurate; neither is his statement accurate about Buchanan. We will offer evidence on it.

Judge Huxman: All right. If you can’t agree, we will eliminate Lafayette from the exhibit.

Mr. Carter: And we have the same——

Judge Huxman: Just a minute. How about Buchanan? You won’t agree to Buchanan as stated in the exhibit?

Mr. Carter: No, sir.

Judge Huxman: We will eliminate Buchanan.

Mr. Carter: We agree with everything else on the exhibit with the exception of Polk and Potwin and in both of those schools there are playrooms, even though there is no gymnasiums.

Judge Huxman: Polk and Potwin. All right. We will [fol. 112] eliminate Polk and Potwin. With Buchanan, Lafayette, Polk and Potwin eliminated, do you agree to Exhibit “J” as it now remains?

Mr. Carter: Yes, sir.

Judge Huxman: The record will then shown that it is agreed that Exhibit “J”, with Buchanan, Lafayette, Polk and Potwin eliminated therefrom, will be admitted and received in the record as evidence.

Defendants’ Exhibit “J”, as agreed to above, having been offered and received in evidence, is contained in the case file.

Judge Huxman: Now, that is all that I have marked that was left for consideration today. Have I omitted anything?

Mr. Carter: No, sir, not that I know of.

Judge Huxman: Any other stipulations that the parties wish or can agree to as to evidence?

Mr. John Scott: If the Court please, we have prepared a map of the City of Topeka for the purpose of showing valuations of the buildings that are located within the City of Topeka school district.

Judge Huxman: That is a- evaluation of the school buildings?

Mr. John Scott: The school buildings; that is correct, sir, and we would like to enter this as a stipulation in this [fol. 113] particular case.

Mr. Goodell: I couldn't agree to that without knowing something about it. Who appraised it?

Mr. John Scott: Dr. Speer.

Mr. Goodell: I wouldn't agree to such a thing as that. It's some school teacher that gave an expert opinion about—

Mr. John Scott: It's no such a thing.

Judge Huxman: Now, gentlemen, don't get to quarreling with each other before the real trial starts.

Mr. John Scott: This was taken from your exhibits.

Judge Huxman: Now, just a minute; you address your remarks to the Court, please. If you can't agree to it, why you can offer it in the due course of time, and we will then rule on it at that time.

Judge Mellott makes this suggestion, and I agree with him: This case to the Court is just another burden that we have in a trial to be decided by us and approached by us just as any other case that comes before the Court. It will be the endeavor of the Court to decide this case according to the law and the evidence. We realize that, of course, there is considerable sentiment in this case that you can't get away from. We trust that, first, there will be no quarreling or bickering among counsel; it's not [fol. 114] called for; it isn't necessary; doesn't add anything to the value of the case. We trust that counsel will keep that in mind. Also, there will be no demonstration on the part of the audience or spectators in any way. This, of course, is a public trial. We want all those who are interested to be here; but the decorum that is main-

tained in federal courts must be maintained throughout the trial.

Is there anything else before we proceed to the trial of the case? If not, the Court is ready to proceed with the trial of case No. T-316, Orville Brown and others vs. Board of Education of Topeka, Shawnee County, Kansas.

Mr. Carter: If Your Honor please, plaintiffs would like to invoke Rule 43(b) of the Federal Rules of Civil Procedure and call as the first witness the president of the Board of Education, Mr. Kelsey Petry.

Judge Mellott: That is what, calling your adversary as a hostile witness?

Mr. Carter: Yes, sir.

Judge Mellott: "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent" and so forth. Proceed.

Judge Huxman: You may proceed.

Judge Mellott: The witness that was called come forward; Mr. Speer, was that his name?

[fol. 115] Mr. Goodell: It is my understanding that this witness was out of the city.

Judge Huxman: Who is the witness?

Mr. Goodell: Mr. Petry, who is president of the board.

Judge Huxman: Is he here? Is Mr. Petry here?

Mr. Goodell: He was out of the city, I think, when the subpoena was issued, in Colorado.

Mr. Carter: Then we will call Mr. Saville.

Judge Huxman: Mr. Saville present? Come forward and be sworn.

ARTHUR H. SAVILLE, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Carter:

Q. Mr. Saville, how long have you been a member of the Board of Education of Topeka?

A. About twelve years.

Judge Mellott: May I have the witness' name?

The Witness: Arthur H. Saville.

By Mr. Carter:

Q. What are your duties and responsibilities as a member of the Board of Education?

[fol. 116] A. To adopt policies that are carried out by the school administration, build a budget and various things of that sort.

Q. Does the Board of Education promulgate rules and regulations governing the entire school system of Topeka?

A. Yes, sir.

Q. You maintain, do you not, eighteen schools, elementary schools, in Topeka that are located in eighteen territories, is that correct?

A. Elementary schools? I think there are twenty-two.

Judge Huxman: Isn't that all stipulated to, the number of schools that are maintained.

Mr. Carter: Yes, sir; it's stipulated to, but I am leading up to a question.

Judge Huxman: All right.

By Mr. Carter:

Q. Well, you maintain a total of twenty-two.

A. I believe so, yes, that is correct.

Q. Eighteen are for white children and four for negro children.

A. That's right.

Q. Now, why is it that the Board of Education requires negro children to attend the four separate schools in Topeka?

Mr. Goodell: Object to that as incompetent, irrelevant and immaterial and invading the province of the Court. The pleadings show the issues are joined, that they are doing it, [fol. 117] and they are doing it under a permissive statute, 72-1724. The personal feelings of a board member has nothing to do—

Judge Huxman: I think the objection will be sustained.

Mr. Carter: I think, if I may—

Judge Huxman: It's agreed they are doing it under statute and the ordinance of the City of Topeka.

Mr. Carter: I know that, Your Honor, but I think that I would be entitled to inquire as to whether there are any rules and regulations that the board adopted.

Judge Huxman: You did inquire that and you ask him now why they maintain them. The objection is sustained.

By Mr. Carter:

Q. In your opinion, as a member of the Board of Education, would the board—wouldn't the board have a much simpler problem, since it must maintain the high schools on an unsegregated basis, to integrate negro and white children at the elementary school level?

Mr. Goodell: Object to that as incompetent, irrelevant and immaterial, not having any probative force on the issues in this case.

Judge Huxman: The objection will be sustained.

By Mr. Carter:

Q. Mr. Saville, are you familiar with the document known [fol. 118] as the comprehensive plan of the City of Topeka and Shawnee County, Kansas. I might add that this was—this document was sponsored jointly by the Board of City Commissioners, the Board of County Commissioners and the Board of Education of Topeka and, at the time of the sponsorship, your name, A. H. Saville, is listed as being on the board.

A. Yes.

Q. You are familiar with this.

A. Is that the Bartholomew plan?

Q. Yes, sir.

A. I believe I remember it.

Q. Can you tell me whether or not this plan has been adopted, is being followed at the present time by the Board of Education.

Mr. Goodell: Object to that as incompetent, irrelevant and immaterial; has to do with a long-range view building plan; outside the issues of the case.

Judge Huxman: The objection will be overruled. He may answer.

The Witness: Frankly, I don't remember. What was the date of that?

By Mr. Carter:

Q. The document was published May, 1945.

A. I couldn't tell you; I couldn't answer that yes or no.

Q. You can't say whether before this document was [fol. 119] published you looked at it as a member of the Board of Education and approved it.

A. Yes, I looked at it—I am familiar to some extent with the contents of the document, but I have no recollection at this time what's contained in it.

Q. Well, if I may, I would like to address your attention to several extracts from the document and find whether this is the policy of the board or whether you approved of it. The document reads as follows, under Schools, Chapter 7. "Schools and Recreational Facilities. No city affords satisfactory living facilities unless adequate parks and schools are available to all persons living therein. Just as the economic welfare of the community is largely dependent upon the extent and diversity of its commerce and industry, the mental and physical wellbeing of the population are largely dependent upon the educational and recreational facilities available. The vital role which public education plays in democracy has long been recognized." Would you subscribe to that statement?

Mr. Goodell: We object to that as pursuit here of an academic matter of a report prepared by Bartholomew which this witness didn't prepare.

Judge Huxman: What's the purpose of this line of questioning?

Mr. Carter: This is a document, Your Honor, which was [fol. 120] sponsored by the Board of Education. It is true that it sets up a long-range plan. The document was prepared by Harlan Bartholomew, but it is indicated in the document that changes were made in it, and so forth, at the suggestion of the various people here listed, the members of the Board of Education. I think that I am entitled to attempt to find out whether or not this witness, as a member of the Board of Education, either had anything to do with the preparation of the document, whether he agrees with the

statements, some of the statements which are listed here and whether they are being followed. Now, Mr. Saville indicates he does not know whether this plan is now being followed by the Board of Education.

Judge Huxman: Mr. Counsel, the question before the Court in this case is not what the viewpoint of anyone is or might be as to the future, the present or the past; but it seems to me the question in this case turns upon what the City of Topeka has and is doing, and what they may think about it is immaterial, if they are furnishing adequate facilities. If they are doing that, then what they are thinking about is immaterial. The objection to this line of questioning is sustained.

Mr. Carter: Your Honor, I don't want to press this point too much, but I think the Court is being unduly severe. [fol. 121] There are statements in here which have to do with a question of the adequacy of facilities.

Judge Huxman: That is a long-range program laid down by a man, Bartholomew, who is not even a member of the Board of Education. It has nothing to do with what the City of Topeka is doing or is not doing with regard to its school system. No, the objection will be sustained. That line of questioning will not be pursued.

Mr. Carter: All right, Your Honor. I think that is all.

Judge Huxman: Any questions?

Mr. Goodell: No questions.

Judge Huxman: Any need for this witness remaining longer or may he be excused from attendance?

Mr. Carter: We have no further need for him.

Judge Huxman: You are not required to attend further upon the Court.

(Witness excused.)

KENNETH MCFARLAND, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Carter:

Q. Mr. McFarland, you are at present the superintendent [fol. 122] of schools of Topeka, Kansas?

A. Correct.

Q. How long have you been superintendent?

A. Nine years.

Q. Are there any rules and regulations that you know of that are in force with regard to the choice of schools by negro pupils in the school system, among the four that are set aside for them?

A. Well, we have administered the schools as they were organized at the time this administration took over in 1942. The four negro districts were established at that time.

Q. What I am driving at is what determines, in terms of the place in the city where a negro child lives, what determines what school that child will attend?

A. Those districts were drawn prior to 1942 and adopted by the Board of Education, and we have administered them in essentially the same form.

Q. Well, may I have what they are?

A. Well, you have a map.

Judge Huxman: Doctor, what he asks is what determines the location, if you know. Is that what you want?

Mr. Carter: I am trying to ask—there are four negro schools—the white schools—the school system is divided into territories. That apparently is not true of the negro [fol. 123] schools. Now a negro who lives—out let's say—let's say the Randolph area, what determines what school, what colored school, he or she will attend? That is what I am trying to find out. Are there any rules about that? ered by the admitted state of facts.

Mr. Goodell: Object to this as already having been covered by the admitted state of facts.

Judge Huxman: I am sorry; repeat that question.

(The last preceding question was here read by the reporter.)

Mr. Goodell: The objection is that this is in conflict with the admitted statement of facts.

Judge Mellott: Was it admitted? I have overlooked it, and that is what I was asking Judge Huxman, is the reason he didn't hear you. In paragraph 2, I believe, of your original stipulation—

Mr. Goodell: On Page 2, Your Honor, there was that—that portion was not agreed to.

Judge Mellott: That is what I thought.

Mr. Goodell: I withdraw my objection.

Mr. Carter: That is what I am trying to find out.

Mr. Goodell: Our pleadings allege that a colored child may attend any one of the four colored schools based upon [fol. 124] the selection of his parents.

Judge Mellott: As I recollect it, counsel did not agree upon that Friday, so I think he should pursue it.

Judge Huxman: The witness may answer.

The Witness: Theoretically, the plan would be to give the best coverage possible with four buildings in relationship to where children live and with relationship to bus routes, and so forth.

By Mr. Carter:

Q. Now, Mr. McFarland, the defendants have introduced a series of exhibits relating to school program, teacher salaries, bus schedules and transportation costs. Are you familiar with those exhibits?

A. Not in detail. I am familiar with the fact that the exhibits were prepared and delivered to the counsel.

Q. They were prepared in your office.

A. By my office, yes.

Mr. Carter: If I may get the exhibit "F"(1) to "F"(22).

Mr. Goodell: You have copies of that.

Mr. Carter: All right.

By Mr. Carter:

Q. I want to direct your attention—these are the exhibits. Now, those exhibits "F"(1) to (22) relate to the school schedule program for the school year in each of the schools. [fol. 125] Judge Mellott: You said "F"(22).

Mr. Carter: "F"(1) to (22) covering the twenty-two schools.

By Mr. Carter:

Q. That is the school program for each of the schools. What I want to know, we do not have any information as

to the hours that school is in session. Would you have that at your fingertips?

A. Well, 9:00 o'clock until 4:00 o'clock is the general hour for elementary schools.

Q. Is there any difference with respect to—does that apply from the first grade through the sixth grade?

A. No, first grades convene a little later, adjourn a little earlier, so do kindergartens. They also have different schedules for the first few weeks of school than they do later.

Q. Without regard for the first few weeks of school, I would like to get the accurate figures on that, if available. When does kindergarten convene and when does it let out?

A. Well, we have let the kindergartens out at 11:30.

Q. They convene at 9:00?

A. And convene at 9:00.

Q. Do you have any in the afternoons?

A. 1:30 and 3:30.

Q. 1:30 and 3:30.

A. I think most of those——

[fol. 126] Q. What about the first year, the first grade?

A. We usually, during warm weather, when the schools first start, we are more lenient on those; we will start about fifteen minutes later.

Q. That would be 9:15.

A. 9:15. We will let them out at 11:30 and sometimes 11:45.

Q. 11:30, 11:45. They reconvene at what time?

A. 1:30, 1:15.

Q. Until 4:00. What about the second through sixth?

A. 1:15 to 4:00.

Q. What about the morning schedule?

A. 9:00 to 12:00.

Q. 9:00 to 12:00. An hour for lunch.

A. Right; an hour *or* a half or an hour and fifteen minutes, depending.

Q. In order that I may be absolutely correct on this, you have half session of kindergarten, half day of kindergarten from 9:00 to 11:30 or from 1:30 to 3:30.

Judge Huxman: Answer, doctor.

The Witness: Yes.

By Mr. Carter :

Q. You have in the first grade, you convene at approximately 9:00 or 9:15; you let out at approximately 11:30, 11:45.

A. Right.

Q. And reconvene at 1:15 to 4:00.

[fol. 127] A. That's right; those are approximately right. There are some variations in that. We have a schedule here, if you want it, admitted in evidence.

Q. If you have the schedule.

A. We have a complete schedule of that and will be glad to get it.

Q. Well, I think it would be—if it's here I would like to see it because I am going to ask some questions.

Mr. Goodell: If the Court please, we introduced, and it's admitted, the program. I don't understand—do you claim they don't get as many hours of instruction?

Mr. Carter: What I am trying to find out is the hours of the classes. You have introduced the program but not the hours of the school.

Mr. Goodell: If the Court please, we submit it would be immaterial unless he claims there is disparity between the two schools as to hours of instruction.

Judge Huxman: I don't see much probative value to that unless there is discrimination, if you will not pursue it too far—

Mr. Carter: I am going to ask some questions on it, Your Honor, and I think the questions will be germane. I wanted [fol. 128] to be certain that Mr. McFarland is certain of his hours. I don't want to have an approximation, and I am not trying to lead you or trap you. I merely want to get the facts. I think it's important for us to know the school schedule.

The Witness: We should prepare a schedule and hand it to you for every school, in that case.

By Mr. Carter :

Q. You mean there are differences?

A. And differences in season, difference in time.

Judge Huxman: Does counsel contend there is a discrimination in those hours between colored schools and white schools?

Mr. Carter: We are trying to find out something which we think is—affects the school program with regard to a particular school in terms of—that would—it would be important for us to know what hours the classes are in session, and it is for that reason I am particularly anxious to find that out.

Judge Huxman: Do you contend there is any discrimination between the hours in the colored schools and in the white schools?

Mr. Carter: That is not what we are directing it to, Your Honor. We would contend there is discrimination if certain facts occur with regard to the hours that the school operates. For example, I would be interested chiefly in [fol. 129] Washington School. I am chiefly interested in what the schedule is in Washington School, particularly the first grade, kindergarten and the second to sixth grade.

Judge Huxman: Mr. Counsel, the Court feels that this is purely a fishing expedition at this time. You don't make an allegation that there is discrimination in the hours of school in colored schools as against the white schools. You are just, by your frank admission, you are stating that you are trying to see whether there is or not. The Court is going to sustain this objection; going to sustain an objection to this line of questioning at this time. You have an opportunity at recess to get this schedule and go over it. If you can find anything material in it, why you may then pursue this line of examination and Dr. McFarland will be available. But just to go into a fishing expedition in all of this line of testimony, the Court doesn't think it's proper. The objection will be sustained at this time.

Doctor, you will make available to counsel those schedules for their examination, if you have them.

The Witness: We have them.

Judge Huxman: Then if you want to renew your request for this examination later on, you may pursue it, but at this time the objection is sustained.

[fol. 130] Mr. Carter: The thing I want to find out, I think I can find out.

By Mr. Carter :

Q. Now, I would like to direct your attention to Exhibit "G", which is the morning schedule, bus schedule, to take the negro children to school, is that correct?

A. Yes.

Judge Mellott: What is your—

Mr. Carter: Exhibit "G".

Judge Mellott: Exhibit "G".

By Mr. Carter :

Q. I understand that from—from Mr. Goodell that there was not submitted a schedule for taking the children home, but he has advised me that that would be available. Now, I would also like to address your attention to Exhibit "D" and then we can take "D" and "G" together.

Mr. Goodell: Exhibit what?

Mr. Carter: "D".

Judge Huxman: "D" like in dog.

Mr. Carter: "D" like in dog.

By Mr. Carter :

Q. Now, I am directing your attention to both of those schedules, both of those exhibits. I note that you—the Board of Education paid a Miss Washington for transportation of negro pupils in 1950-1951. Can you tell me what part of the schedule on Exhibit "G" Miss Washington [fol. 131] handled?

Judge Huxman: What is the materiality of that?

Mr. Carter: I want to find out, Your Honor—I want to find out the bus schedule for each—who is handling each of the bus schedules because we think it's material.

Mr. Goodell: We object to this as being outside—

Judge Huxman: Will you state in what respect it's material.

Mr. Carter: Well, for example, I want to find out whether Mr. Grimes handles both the schedule which is listed at the top to Washington and the one listed at Monroe; whether Mr. Grimes handles the 8:00 o'clock pick-up to

8:29 and then—I think I want to find out how that operates. I want to find out what bus—which of these people handles the taking of the children to McKinley and which handles the taking of the children to Buchanan.

Mr. Goodell: I object to this as incompetent, irrelevant and immaterial, and outside the scope of the issues made up by the pleadings and the admitted stipulation of facts. The two exhibits that he's asked to compare with, one of them is [fol. 132] a regularly maintained bus; the other he has called attention to are some teachers, an isolated case of a teacher or two in the kindergarten who has taken her private car and taken children home, which ordinarily would be done by taxi cabs or by the bus, but to let the teacher make a little extra money, at their request voluntarily, she has taken them home and has been paid by the Board of Education.

Judge Huxman: Mr. Counsel, the Court fails to see any materiality in the question as to who drove the bus. The Court can't see how it makes any difference.

Mr. Carter: Let me pursue it for a moment; I won't take up your time, Your Honor.

By Mr. Carter:

Q. The bus schedule, as listed here, indicates that with regard to Monroe School, children are taken to Monroe; they begin at 8:00 o'clock; they are let off at Monroe School at 8:29. Now, it's my understanding—I would like to have it cleared up—that this same bus driver and this same bus then has a pick-up at 6th and Brannan at 8:30. Now I—the only way I can find that out—

Judge Huxman: Ask the witness if he knows whether that is a fact or not.

Mr. Carter: That is what I asked, Your Honor, whether Mr. Grimes handled both of these schedules. Mr. Grimes is the one who is involved in this.

[fol. 133] Mr. Goodell: Do I understand it that you challenge the accurateness of that exhibit now? You want to inquire into its accuracy, is that what you are getting at?

Mr. Carter: I would like to find out whether Mr. Grimes handles both of these and, therefore, I have a right to, of course, inquire into that.

Mr. Goodell: If the Court please, we renew our objection. They have admitted the bus schedule as being accurate excepting only that they stop at additional places other than the scheduled bus stops.

Judge Huxman: The doctor may answer, if he knows. I fail to see the materiality of it.

The Witness: I don't know.

Mr. Carter: All right, that's okay.

By Mr. Carter:

Q. Now, Mr. McFarland, in your schools are there anything that you call special rooms that you have set aside for white children in your public school system?

A. Yes.

Q. Are there any such special rooms for negro children in the public schools?

A. We have no special rooms for negro children. We have health rooms for both, but not special rooms.

Q. What is the nature of these special rooms?

A. Special rooms are for groups that are, for one reason [fol. 134] or another, unable to fit into regular classroom, do regular work and still we would consider as public school people.

Q. If you know, can you tell us why there are no special rooms for negro children?

A. We haven't had the need. We haven't had, we felt, sufficient numbers of them who were far enough out of line from the regular group to warrant special rooms.

Q. Are any provisions made in the school system for hot lunches, aside from the health rooms? I understand the health rooms are for undernourished children.

A. That's right.

Q. Aside from that, are any provisions made for hot lunches?

A. Not in elementary schools.

Q. I see. Now that would apply to the negro children regardless of the fact that whether they were too far to go home to lunch, you make no provisions for hot lunches for them, is that right?

A. Outside the health rooms, no provision. You understand we have two health rooms for four colored schools,

where we have only two health rooms for eighteen white schools.

Q. I understand. Can you tell me, in terms of the transportation of pupils to school, if you know, can you tell me what is the number of children that are transported, negro children that are transported to school, total number.

[fol. 135] A. I couldn't give you that figure. I don't have it at hand.

Q. Is that figure available?

A. We can get that for you.

Q. Would I be able to get that from you?

A. Yes.

Mr. Carter: That's all. . .

Judge Huxman: Any questions by defendants?

Mr. Goodell: We have no questions.

Judge Huxman: Anyone request the presence of Dr. McFarland any further, or may he be excused?

Mr. Carter: Well, I would like for Dr. McFarland to be able to get from him the school schedule and the number of pupils transported, and I think—

Dr. McFarland: You mean class schedule or hours? You want hours?

Mr. Carter: Hours that the school is in session, that is, including the afternoon recess.

Judge Huxman: Can you furnish that, doctor?

Dr. McFarland: Yes.

Judge Huxman: Will you furnish that to counsel on each side and also copies for the Court?

Dr. McFarland: Yes, sir.

(Witness excused.)

[fol. 136] LENA MAE CARPER, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. State your name to the Court please.

A. Lena Mae Carper.

Q. Are you one of the plaintiffs in this action?

A. Yes.

Q. Where do you live, Mrs. Carper?

A. 1217 Hillsdale.

Q. 1217.

A. Yes.

Mr. Goodell: Twelve what?

The Witness: 1217 Hillsdale.

By Mr. John Scott:

Q. Is that in the City of Topeka?

A. Yes.

Q. Are you married, Mrs. Carper?

A. Yes.

Q. And do you have children or a child of school age?

A. I have one.

Q. What is her name?

A. Katherine Louise Carper.

Q. How old is she?

A. She's ten years old.

[fol. 137] Q. Will you state to the Court what school she attends?

A. She attends the Buchanan School.

Q. The Buchanan School. What grade is she in?

A. Fifth grade.

Q. Fifth grade.

Mr. John Scott: For the purpose of the record, the residence the plaintiff, Mrs. Carper, has testified to appears to be in the district Gage and Randolph indicated on the official map of Topeka, the same being Exhibit—Defendants' Exhibit "A".

Mr. Goodell: No, that is our exhibit "A". Oh, pardon me. Did you say was in both of those school districts?

Mr. John Scott: Yes, and it's also indicated on the map in the color of red and blue.

Mr. Goodell: Do you mean it's in Gage and Randolph?

Mr. John Scott: Gage-Randolph.

Mr. Goodell: There are two different territories.

Mr. John Scott: She lives in the same district.

By Mr. John Scott:

Q. Now, Mrs. Carper, how does your child go to school?

A. She has to walk about four blocks on Huntoon and then [fol. 138] has to cross the highway at Huntoon and Gage and catch a school bus.

Q. What time does she catch the school bus?

A. The school bus is supposed to be there at 8:40. However, I go to work, and I go with her each morning she goes to school, and sometimes it has been as high as five minutes to nine before the bus showed up.

Q. Can you state to the Court the approximate distance from the school—strike that—the approximate distance of the pick-up point to the Buchanan School.

A. Oh, in the neighborhood of about—oh, I say about twenty-four blocks, anyhow.

Q. And can you state to the Court what schools that you live near?

A. She—we live near the Gage Park or the Randolph School.

Q. Randolph School. And is there also a school now under construction located at 17th and Stone?

A. Yes.

Q. Do you know the name of that school now under construction?

A. No, I don't.

Q. Are you also located near that particular site?

A. Yes.

Q. Now, Mrs. Carper, do you prepare a lunch for your child?

A. Yes.

[fol. 139] Q. Every day that she attends school?

A. Yes.

Q. Does she come home for dinner?

A. No.

Q. What time does she return home?

A. She usually gets home around 4:30.

Q. Around 4:30. Have you ever had an occasion to observe the number of people riding the bus that your child rides?

A. When the bus comes for my child it's nearly loaded.

Q. When you say "nearly loaded" be more explicit about that, Mrs. Carper.

A. Sometimes it is really overloaded.

Mr. Goodell: Move to strike that answer as a conclusion of the witness.

Judge Huxman: Overruled.

By Mr. John Scott:

Q. And I believe you stated, Mrs. Carper, that there have been times that the bus has been late, is that correct?

A. Many times.

Q. Would that be during the cold winter months?

A. Yes.

Q. And what would your child and other children be doing at that time?

A. They would usually stand in the cold waiting for the bus until they couldn't stand it any longer, and then we would take them to a small grocery store on Gage and [fol. 140] take them in there and try to get them warm until the bus come. When the bus come, I would get out and hail the bus in front of the store to pick them up.

Q. Are there any shelters or any means of protection against weather conditions there on the corner where the bus stops?

A. None.

Q. Is there a stop signal there at Huntoon and Gage?

A. Absolutely none.

Q. Can you tell the Court what the traffic conditions are where your little girl catches the bus?

Mr. Goodell: Object to this as outside the scope of the issues and the pleadings. There is no evidence that the Board of Education has any control over safety devices, the installation or operation of them.

Mr. John Scott: If the Court please——

Judge Huxman: Just a minute. The objection will be overruled.

By Mr. John Scott:

Q. Did you understand the question?

(The last preceding question was here read by the reporter.)

A. At that time of the morning the cars are really congested going along that highway. It's really congested

traffic along there at that time. In the morning most people are going to work at that time.

[fol. 141] Mr. John Scott: I believe that is all. You may cross examine.

Mr. Goodell: No questions.

Judge Huxman: You may step down; call your next witness.

(Witness excused.)

KATHERINE CARPER, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. Katherine, don't be nervous; these gentlemen up here are your friends. Now, what is your name?

A. Katherine Carper.

Q. Katherine, how old are you?

A. Ten.

Q. When is your birthday?

A. February 24th.

Q. February 24th.

A. Yes.

Q. Where do you live, Katherine?

A. 1217 Hillsdale.

Q. What—was that your mother that was just on the stand?

A. Yes, sir.

Q. Do you know the difference between right and wrong, [fol. 142] Katherine?

A. Yes, sir.

Q. And you know what it means to tell the truth, don't you?

A. Yes, sir.

Q. Now, Katherine, you attend Buchanan School, is that correct?

A. Yes, sir.

Q. And you also ride the bus.

A. Yes, sir.

Q. I want you to tell these three gentlemen up here—strike that. Just tell the Court how many people, the conditions of the bus that you ride when you catch it in the morning,

A. It is loaded, and there is no place hardly to sit.

Q. There is no place hardly to sit, is that right?

A. No, sir.

Q. People are standing up.

A. Yes, sir.

Q. And you have stood on the corner when it was cold, is that right?

A. Yes, sir.

Q. And did your hands get cold?

A. Yes, sir.

Q. Now what grade are you in, Katherine?

A. Fifth.

[fol. 143] Q. Fifth grade.

A. Yes, sir.

Q. Do you know what time you arrive at school in the morning?

A. Quarter to nine.

Q. And what time does school—what time does school start?

A. Nine o'clock.

Q. Nine o'clock. And what time do you get out at noon?

A. Quarter to twelve.

Q. Quarter to twelve.

A. Yes, sir.

Q. Do you know what time the first grade gets out?

A. Eleven thirty.

Q. And do you know Mrs. Crawford?

A. Yes, sir.

Q. What grade does she teach?

A. The first and half the second.

Q. Is that at Buchanan School?

A. Yes, sir.

Q. And does she do anything else other than teach school?

A. Takes the kindergarten home.

Q. The kindergarten children home.

A. Yes, sir.

Q. What time does she take the kindergarten children home?

A. Eleven thirty.

Q. Eleven thirty. And what does she do with her class?

[fol. 144] A. Let's them go into Miss McBrier's room.

Q. Mrs. McBrier?

A. Yes, sir.

Q. What grade does she teach?

A. The third and half the second.

Q. The third and half the second. Is her class out at the time that Mrs. Crawford's children go in there?

A. Yes, sir.

Q. They are out. Katherine, I want you to tell these three gentlemen what the conditions of the bus in the evening are when you go home.

A. Sometimes when I get on the bus it is loaded, and there is no place to sit.

Q. And are the children sitting on top of each other?

A. Yes, sir.

Mr. Goodell: We object to this whole line of leading questions of counsel testifying rather than the child.

Judge Huxman: They are slightly leading, but try not to lead the witness. The objection is overruled.

By Mr. John Scott:

Q. In your neighborhood, Katherine, do you live in a neighborhood with white children?

A. Yes, sir.

Q. Do you play with them?

[fol. 145] A. Yes, sir.

Q. What schools do they go to?

A. Randolph.

Mr. Goodell: I object to that as incompetent, irrelevant and immaterial, outside the issue.

Judge Huxman: Objection to this line of questioning will be sustained.

Mr. John Scott: I believe that is all.

Judge Huxman: Any questions? You may be excused.

(Witness excused.)

Mr. Goodell: If the Court please, if they will tell me where these children live, what the distance is to the pick-up point, we will agree to all of this and shorten this up.

Judge Huxman: They are entitled to make their case. We will proceed this way, at least presently.

OLIVER L. BROWN, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. You may state your name to the Court, please.

A. Oliver Leon Brown.

Q. And where do you live, Mr. Brown?

[fol. 146] A. 511 West First Street.

Q. Are you a citizen of the United States?

A. I am.

Q. And you are a plaintiff in this lawsuit?

A. I am.

Judge Huxman: Talk a little louder, Mr. Brown.

Judge Mellott: He didn't answer yet.

The Witness: Yes.

By Mr. Bledsoe:

Q. What is your business or occupation?

A. Carman welder.

Mr. Bledsoe: Speak a little louder.

The Witness: A carman welder.

Judge Huxman: Mr. Brown, it's difficult to hear you. I wish you would make an effort to speak so we can hear you distinctly; we want to hear what you say.

By Mr. Bledsoe:

Q. Are you married?

A. Yes.

Q. And, if so, who constitutes the members of your family

A. I do.

Q. What I mean by that, who constitute the members of your family?

A. I have a wife and three children.

Q. What are the ages of your children?

[fol. 147] A. My oldest daughter is eight years old; I have one four and another one five months.

Q. What is the name of your daughter, oldest daughter?

A. Linda Carol Brown.

Q. In what school district or territory do you live, Mr. Brown?

A. I live in the Sumner District.

Q. Sumner School District.

A. Yes.

Mr. Bledsoe: For the purpose of the record, if the Court please, let it be shown that the witness resides in Sumner School District. I think it's this district here marked (indicating on exhibit)—that is colored red.

Judge Mellott: Well, I am afraid your testimony standing alone isn't too intelligent; it isn't to me. Now, as I understand it, Topeko is one school district, you agreed at the pre-trial, but you said that there were certain territories.

Mr. Bledsoe: Well, I may substitute territory for—if I may—territory for district.

Judge Huxman: Wouldn't it be more helpful to the Court if you just had these witnesses locate their residence with reference to the colored school that they attend, rather than having it defined by the various territories. [fol. 148] That is the important factor, how far they are from school.

By Mr. Bledsoe:

Q. Now, Mr. Brown, where do you live with reference to Monroe School?

A. Well, — stated that I live at 511 West First Street which is fifteen blocks, approximately, from Monroe School.

Mr. Goodell: I didn't get that.

Judge Mellott: Fifteen blocks from Monroe School.

The Witness: Twenty-one blocks, pardon me; approximately twenty-one blocks.

By Mr. Bledsoe:

Q. You are talking about now the way your daughter has to travel to go to Monroe School, is that correct?

A. That is true.

Q. Does your daughter ride the school bus?

A. Yes,

Q. All right. Now, Mr. Brown, what time does your daughter leave home in the morning to walk to First and Quincy, the bus pick-up point, to go to school; what time does she leave home?

A. She leaves at twenty minutes 'till eight o'clock.

Q. Twenty minutes of eight.

A. Every school morning.

Q. What time, or thereabouts, does she board the bus [fol. 149] at First and Quincy?

A. Well, she is supposed to be there at eight o'clock and which she has been, in many instances, but many times she has had to wait through the cold, the rain and the snow until the bus got there, not knowing definitely what time it gets there all the time.

Q. All right. Now, Mr. Brown, she boards that bus about eight o'clock. What time does she arrive at the school?

A. She's supposed to arrive at the school around 8:30.

Q. Eight thirty. And, as I understand it, what time does the classes begin at school?

A. Nine o'clock.

Q. What does your daughter do between the time the bus arrives at the school at 8:30 and 9:00 o'clock?

A. Well, there is sometimes she has had to wait outside the school until someone came to let them in, through the winter season and likewise, many times.

Q. What else does she do, if anything?

A. Well, there is nothing she can do except stand out and clap her hands to keep them warm or jump up and down. They have no provisions at all to shelter them.

Q. And what you want the Court to understand is that your daughter is conveyed to the school, she gets there by 8:30 in the morning, and that she has nothing to do until school starts at 9:00 o'clock, is that right?

[fol. 150] A. That is correct.

Q. Now, Mr. Brown, you don't—withdraw that, please. What provisions are made by the school board for your daughter to have warm lunch, if any.

A. There are no provisions made at all.

Judge Huxman: Mr. Bledsoe, hasn't it been agreed and testified to by Dr. McFarland that no provision is made for warm lunches?

Mr. Bledsoe: I beg your pardon; I believe you are correct, if the Court please.

Judge Huxman: That stands admitted, doesn't it?

Mr. Bledsoe: That's right; that is all right. Let me withdraw that, please.

By Mr. Bledsoe:

Q. Now, then, your child—you don't get to see your child during the daytime until she returns home in the evening, is that right?

A. That is correct, sir.

Q. Would you, Mr. Brown, would you like to have your daughter home, have the same opportunity of giving her parental guidance as the white fathers and mothers might do their child.

A. Yes, sir.

Mr. Goodell: We object to the form of that question as assuming a state of facts not in evidence and, in fact, contrary to some of the admitted stipulation of facts.

Judge Huxman: The objection will be sustained.

By Mr. Bledsoe:

Q. But you do not see your daughter from the time she leaves in the morning until she returns in the evening, is that correct?

A. I do not.

Q. What time is that?

A. She gets home around fifteen minutes to five.

Q. Fifteen minutes to five. Do you know whether or not there is any provisions made to shelter or protect your daughter while she is standing on the street or the designated bus pick-up—

Judge Huxman: Mr. Bledsoe, that has been testified to, and I think it's conceded no shelter is provided in any of these points where colored children are picked up, is that not so, Mr. Goodell?

Mr. Goodell: That's right.

By Mr. Bledsoe:

Q. Now, Mr. Brown, what is the condition of the area there between your residence and First and Quincy where your daughter boards the bus?

A. Well, there are a considerable amount of railroad tracks there; they do a vast amount of switching from the Rock Island yards and from the time that she leaves [fol. 152] home until she gets to Quincy, First and Quincy, to board the bus, she has to pass all of these switch tracks and she—also including the main thoroughfare, Kansas Avenue and First; there is a vast amount of traffic there morning and evening when she goes and returns. There is no provisions at all made for safety precautions to protect those children passing these thoroughfares at all.

Q. Now, Mr. Brown, if your daughter were permitted to attend Sumner School would there be any such obstructions or any such conditions as she will meet on her way to First and Quincy?

A. Not hardly as I know of.

Q. How far is it from your residence to Sumner School?

A. Seven blocks.

Q. Seven blocks. Mr. Brown, are you assessed a tax for the support and maintenance of the public schools of the City of Topeka?

A. I am.

Mr. Goodell: We object to that, if the Court please; it's wholly outside the scope—

Judge Huxman: He may answer.

The Witness: I am, sir.

By Mr. Bledsoe:

Q. Mr. Brown, do you consider it an advantage to have a school in the neighborhood in which you live near your home? Do you consider that an advantage?

[fol. 153] Mr. Goodell: We object to that as incompetent, irrelevant and immaterial what he considers.

Judge Huxman: Objection sustained.

Mr. Bledsoe: If the Court please, I believe that is really a part of our case.

Mr. Goodell: If the Court please, every parent would like to have a school next door, but that is impossible.

Judge Huxman: I think it flows naturally it's an advantage to live closer to a school than to have one far away. I don't think we need to spend much time to establish that fact. I think the Court will take judicial knowledge of the fact that if it had children of school age it would rather have them go to a close school than one far away.

By Mr. Bledsoe:

Q. Mr. Brown, is there a more direct route from your residence, 511 West First Street, to the bus pick-up point at First and Quincy; is there any more direct route than there?

A. Than just my family do you mean?

Q. No, for your daughter going down to the bus pick-up point, is there a more direct route for her to travel?

A. No, there isn't.

Q. There is not.

Judge Huxman: Any questions?

[fol. 154] Cross-examination.

By Mr. Goodell:

Q. Mr. Brown, you see that map there, Defendants' Exhibit "A"?

A. I do.

Q. You understand that the portions colored there form the school territory for the whole city of Topeka.

A. I do.

Q. And, directing your attention to the corner here or all the area in blue, you understand that that is territory outside of the city limits of Topeka, but in Topeka for school purposes alone.

A. I understand.

Q. What?

A. I understand that.

Q. You say your child goes four blocks to the bus pick-up point.

A. She goes six blocks to the pick-up point.

Q. Six blocks, pardon me. Don't you know as a matter of fact that in many, many instances there are children that go to the white schools in this town that go thirty and thirty-five blocks and walk to get there.

Mr. Carter: I object to that.

The Witness: Where at?

Mr. Carter: I see no materiality to this question.

[fol. 155] Judge Huxman: Objection will be sustained. That is not proper cross-examination of this witness.

Mr. Goodell: No further questions.

Judge Huxman: The Court will take a short recess of approximately ten minutes.

(The Court then, at 11:15 o'clock a.m., stood at recess until 11:25 o'clock a.m., at which time the following further proceedings were had:)

Judge Huxman: You may proceed:

DARLENE WATSON, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. State your name to the Court, please.

A. Darlene Watson.

Q. Where do you live?

A. I live at 508 West First.

Q. Do you have children of school age?

A. Yes, I do.

Q. And what school do your children attend?

A. They go to Sumner.

Q. Sumner School. Are you acquainted with Oliver Brown and his family, the Oliver Brown who just left the stand.

A. Yes; we are neighbors.

[fol. 156] Q. You are neighbors. Now, Mrs. Watson, are you able to tell the Court what time Linda Brown leaves in the morning to go to school?

Mr. Goodell: We object to this as repetition; simply cumulative; already been testified to.

Judge Huxman: Yes, this evidence is cumulative but plaintiff is entitled to reasonable latitude.

Mr. Goodell: We will admit the time you say is right; we will admit that.

Judge Huxman: You may answer.

The Witness: I have watched her leave at 7:40.

By Mr. Bledsoe:

Q. Now, do you have a son who attends Sumner School?

A. Yes.

Q. What time does you son leave; you live directly across the street from Mr. Brown.

A. That's right.

Q. Now, what time does your son leave to go to Sumner School?

Mr. Goodell: We object to this as incompetent, irrelevant and immaterial, and not tending to prove any burden within the scope of the 14th Amendment which is what this lawsuit involves, for the reason that if this is a proper inquiry, then we have got to subpoena all of the parents of the white children and show in some cases they live [fol. 157] thirty-six blocks away, and they have to leave maybe at 7:15. It's pure accident where families may live close to schoolhouses. We can't have schoolhouses next door to everybody.

Judge Huxman: The objection will be overruled.

The Witness: My boy leaves at 8:40, twenty minutes of nine.

Q. Twenty minutes of nine.

A. Yes.

Q. How far is it from your home to the Sumner School?

A. It's seven blocks.

Q. Seven blocks. And you just testified that Linda leaves home at 7:40 in the morning.

A. That's right.

Mr. Goodell: We object to this as repetition.

Mr. Bledsoe: That is all.

Judge Huxman: Mr. Bledsoe, speaking for myself alone, for your future guidance, I will take judicial knowledge of

the fact that where there are only four colored schools in a town of this size, against eighteen white schools, that there are innumerable instances of this kind where colored children will go by a white school and go much farther to [fol. 158] a colored school than they would be required to go if they had the privilege of attending the white school. That is what you are trying to establish, isn't it?

Mr. Bledsoe: That is, if the Court please.

Judge Huxman: I think we can take judicial knowledge of the fact that that is inevitable where you have only four colored schools as against eighteen white schools.

Mr. Bledsoe: That is. You may take the witness.

Mr. Goodell: No questions.

ALMA JEAN GALLOWAY, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. State your name to the Court, please.

A. Alma Jean Galloway.

Q. Mrs. Galloway, please speak right out enough so the Court and the reporter may hear you, please. Where do you live, Mrs. Galloway?

A. 428 North Lake.

Q. 428 North Lake.

A. Yes.

Q. Do you have a child or children of school age?

[fol. 159] A. Yes; I have two.

Q. Have two. How old are they?

A. One is six and one is five.

Q. And do they attend any of the public schools in the City of Topeka?

A. Washington School.

Q. Washington School. Do you know the approximate distance Washington School is from your residence?

A. I think it's sixteen blocks.

Q. How do they go to school?

A. Well, they take the school bus.