N. OPINION OF SUPREME COURT

(Filed June 27, 1977)

SUPREME COURT OF THE UNITED STATES

No. 76-539

DAYTON BOARD OF EDUCATION ET AL., *Petitioners*,

v.

MARK BRINKMAN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those

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[1] This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan*, 503 F. 2d 684 (CA6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App., at 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. App., at 73. On

protracted proceedings have been devoted to the formulation of a remedy for actions of the Dayton Board of Education found to be in violation of the Equal Protection Clause of the Fourteenth Amendment. In the decision now under review, the Court of Appeals for the Sixth Circuit finally approved a plan involving districtwide racial distribution requirements, after rejecting two previous, less sweeping orders by the District Court. The plan required, beginning with the 1976-1977 school year, that the racial distribution of each school in the district be brought within 15% of the 48%-52% black-white population ratio of Dayton.[2] As finally formulated, the plan employed a variety of desegregation techniques, including the "pairing"[3] of schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." We granted certiorari, — U.S. — (Jan.

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appeal, the Court of Appeals again reversed as to remedy and directed that the District Court "adopt a system-wide plan for the 1976-1977 school year. . . ." *Brinkman* v. *Gilligan*, 518 F. 2d 853 (CA6 1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App., at 99. On March 25, 1976, the details of the plan were approved by the District Court. App., at 110. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (CA6 1976).

[2] The District Court said that it would deal on a case-by-case basis with failures to bring individual schools into compliance with this requirement. It also ordered that students already enrolled in the tenth and eleventh grades be allowed to finish in their present high schools, and announced the following "guidelines" to be followed "whenever possible" in the case of elementary school students:

"1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

"2. Students should be transported to the nearest available school;

"3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter." App., at 104.

[3] "Pairing" is the designation of two or more schools with contrasting racial composition for an exchange program where a large proportion of the students in each school attend the paired school for some period. In the plan adopted by the District Court, it was the primary remedy used in the case of elementary schools.

17, 1976), to consider the propriety of this court-ordered remedy in light of the constitutional violations which were found by the courts below.

Whatever public notice this case has received as it wended its way from the United States District Court for the Southern District of Ohio to this Court has been due to the fact that it represented an effort by minority plaintiffs to obtain relief from alleged unconstitutional segregation of the Dayton public schools said to have resulted from actions by the respondent School Board. While we would by no means discount the importance of this aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system.

Indeed, the importance of the judicial administration aspects of the case are heightened by the presence of the substantive issues on which it turns. The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a case such as this where the District Court for the Southern District of Ohio was not simply asked to render judgment in accordance with the law of Ohio in favor of one private party against another; it was asked by the plaintiffs, students in the public school system of a large city, to restructure the administration of that system.

There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973); *Wright* v. *Council of City of Emporia,* 407 U. S. 451 (1972); *Swann* v. *Charlotte Mecklenburg Board of Education,* 402 U. S. 1 (1971). But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U. S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia, supra,* at 469.

It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

The lawsuit was begun in April 1972, and the District Court filed its original decision on February 7, 1973. The District Court first surveyed the past conduct of affairs by the Dayton School Board, and found "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system."[4] It cited instances of physical segregation in the schools during the early decades of this century,[5] but concluded that "[b]oth by reason of the substantial time that had elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy."

The District Court also found that as recently as the 1950s, faculty hiring had not been on a racially neutral basis, but that "by 1963, under a policy designated as one of 'dynamic gradualism,' at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system." It further found that by 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. The Court's conclusion with respect to faculty hiring was that pursuant to a 1971 agreement with the Department of HEW, "the teaching staff

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[4] The court pointed out that since 1888, Ohio law as construed by its Supreme Court has forbidden separate public schools for black and white children. See Ohio Rev. Code § 3313.48; *Board of Education* v. *State*, 45 Ohio St. 555 (1888).

[5] "Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." App., at 2-3 (footnote omitted).

of the Dayton public schools became and still remains substantially integrated."[6]

The District Court noted that Dunbar High School had been established in 1933 as a black high school, taught by black teachers and attended by black pupils. At the time of its creation there were no attendance zones in Dayton and students were permitted liberal transfers, so that attendance at Dunbar was voluntary. The court found that Dunbar continued to exist as a citywide all-black high school until it closed in 1962.

Turning to more recent operations of the Dayton public schools, the District Court found that the "great majority" of the 66 schools were imbalanced and that, with one exception,[7] the Dayton School Board had made no affirmative effort to achieve racial balance within those schools. But the court stated that there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions. It considered the use of optional attendance zones[8] within the District, and concluded that in the majority of cases the "optional zones had no racial significance at the time of their creation." It made a somewhat ambiguous finding as to the effect of some of the zones in the past,[9] and concluded that although none of the elementary optional

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[6] The Court also considered employment of nonteaching personnel, and observed that blacks made up a proportion of the nonteaching, nonadministrative personnel equal to the proportion of black students in the District, though in certain ocupations they were represented at a substantially lower rate.

[7] The court noted that a concerted effort had been made in the past few years to enroll more black students at the Patterson Co-op High School.

[8] An optional zone is an area between two attendance zones, the student residents of which are free to choose which of the two schools they wish to attend.

[9] The District Court found that three high school optional zones "may have" had racial significance at the time of their creation.

school attendance zones today "have any significant potential effects in terms of increased racial separation." The same cannot be said of the high school optional zones. Two zones in particular, "those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."[10]

The court found no evidence that the District's "freedom of enrollment" policy had "been unfairly operated or that black students [had] been denied transfers because of their race." Finally the court considered action by a newly elected Board on January 3, 1972, rescinding resolutions, passed by the previous Board, which had acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures. The District Court's ultimate conclusion was that the "racially imbalanced schools, optional attendance zones, and recent Board action . . . are cumulatively a violation of the Equal Protection Clause."

The District Court's use of the phrase "cumulative violation" is unfortunately not free from ambiguity. Treated most favorably to the respondents, it may be said to represent the District Court's opinion that there were three separate although relatively isolated instances of unconstitutional action on the part of petitioners. Treated most favorably to the petitioners, however, they must be viewed in quite a different light. The finding that the pupil population in the various Dayton schools is not homogeneous standing by itself, is not a violation of the Fourteenth Amendment in the absence of

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[10] The following information about those zones is contained in an appendix to the District Court opinion:

High Schools	Date of Creation	% black population At date af creation	1972-73
Roosevelt/	1951	31.5	100.0
Colonel White	(Extended 1958)	0.0	54.6
Kiser/	1962	2.7	9.8
Colonel White		1.1	54.6

a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, assuming that it was a violation under the standards of *Washington* v. *Davis*, *supra*, appears to be so only with respect to high school districting. *Swann*, *supra*, at 15. The District Court's conclusion that the Board's recision of previously adopted school board resolutions was itself a constitutional violation is also of questionable validity.

The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein the court said:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." 503 F. 2d 684, 697.

Judged most favorably to the petitioners, then, the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed. Nor is light cast upon the District Court's finding by its repeated use of the

phrase "cumulative violation." We realize, of course, that the task of factfinding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 L. W. 4073 (Jan. 11, 1973), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

We think it accurate to say that the District Court's formulation of a remedy on the basis of the three part "cumulative violation" was certainly not based on an unduly cautious understanding of its authority in such a situation. The remedy which it originally propounded in light of these findings of fact included requirements that optional attendance zones be eliminated, and that faculty assignment practices and hiring policies with respect to classified personnel be tailored to achieve representative racial distribution in all schools.[11] The one portion of the remedial plan submitted by the

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[11] The District Court's first plan also contained the following provisions:

(V) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system;

(VI) Combination of two high schools into a unified cooperative school with district-wide attendance areas;

(VII) Formation of elementary and high school all-city bands, orchestras and choruses;

(VIII) Provisions for scheduling of integrated athletics;

(IX) Establishment of a minority language program for education of staff;

(X) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama;

(XI) Creation of centers for rumor control, school guidance and area learning. See App., at 35-36.

School Board which the District Court refused to accept without change was that which dealt with so-called "freedom of enrollment priorities." The court ordered that, as applied to high schools, new students at each school be chosen at random from those wishing to attend.[12] The Board was required to furnish transportation for all students who chose to attend a high school outside the attendance area of their residence.

Both the plaintiffs and the defendant School Board appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit. 503 F. 2d 684. That court considered at somewhat greater length than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the adoption of the Board's resolutions and the subsequent recission of those resolutions. This consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no factfinding of its own based on evidence adduced before the District Court. The Court of Appeals then focused on the District Court's finding of a three-part "cumulative" constitutional violation consisting of racially imbalanced schools, optional attendance zones, and the recision of the Board resolutions. It found these to be "amply supported by the evidence."

Plaintiffs in the District Court, respondents here, had cross-appealed from the order of the District Court, contending that the District Court had erred in failing to make further findings tending to show segregative actions on the part of the Dayton School Board, but the Court of Appeals found it unnecessary to pass on these contentions. The Court of Appeals also stated that it was unnecessary to "pass on the

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[12] The court thus eliminated a provision within the Board plan which gave first priority to students residing within the school's attendance zone.

question of whether the rescission [of the Board resolutions] by itself was a violation of" constitutional rights. It did discuss at length what is described as "serious questions" as to whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included within the "cumulative violation" found by the District Court. But it did no more than discuss these questions; it neither upset the factual findings of the District Court nor did it reverse the District Court's conclusions of law.

Thus the Court of Appeals, over and above its historical discussion of the Dayton school situation, dealt with and upheld only the three-part "cumulative violation" found by the District Court. But it nonetheless reversed the District Court's approval of the school board plan as modified by the District Court, because the Court of Appeals concluded that "the remedy ordered . . . is inadequate, considering the scope of the cumulative violations." While it did not discuss the specifics of any plan to be adopted on remand, it repeated the admonition that the court's duty is to eliminate "all vestiges of state-imposed school segregation." *Keyes*, *supra*, at 202; *Swann*, *supra*, at 15.

Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler*, 404 U. S. 1027 (1972); *Swann*, *supra*, at 24. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree,"

since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(b). If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law.

The Court of Appeals did not actually specify a remedy, but did, in increasingly strong language in subsequent opinions require that any plan eliminate systemwide patterns of one-race schools predominant in the district. 518 F. 2d 853, 855. In the face of this commandment, the District Court, after twice being reversed, observed:

> "This court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required."

We think that the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders by the Court of Appeals had it not reached this conclusion. In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents.

This is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the petitioners. As we have noted, respondents appealed from the initial decision and order of the District Court, asserting that additional violations should have been found by that court. The Court of Appeals found it unnecessary to pass upon the respondents' contentions in its first decision, and respondents have not cross-petitioned for certiorari from decision of the Court of Appeals in this Court. Nonetheless, they are entitled under our precedents to urge any grounds which would lend support to the judgment below, and we thing that their contentions of unconstitutionally segregative actions, in addition to those found as fact by the District Court, fall into this category. In view of the confusion at various stages in this case, evident from the opinions both of the Court of Appeals and the District Court, as to the applicable principles and appropriate relief, the case must be remanded to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence.

If the only deficiency in the record before us were the failure of the Court of Appeals to pass on respondents' assignments of error respecting the initial rulings of the District Court, it would be appropriate to remand the case to that court. But we think it evident that supplementation of the record will be necessary. Apart from what has been said above with respect to the use of the ambiguous phrase "cumulative violation" by both courts, the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional

findings addressed specifically to the scope of the remedy. It is clear that the presently mandated remedy cannot stand upon the basis of the violations found by the District Court.

The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, *Washington* v. *Davis*, *supra*, and *Village of Arlington Heights*, *supra*. It must then fashion a remedy in the light of the rule laid down in *Swann*, *supra*, and elaborated upon in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976). The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised only on the basis of a constitutional violation.' [*Milliken* v. *Bradley*], 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16. See *Rizzo* v. *Goode*, 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' 418 U. S., at 744; *Swann*, *supra*, at 16." *Hills*, *supra*, at 294. See also *Austin Independent School Dist.* v. *United States*, — U. S. — (1976) (MR. JUSTICE POWELL, concurring).

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis*, *supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how must incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional

violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra*, at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

While we have found that the plan implicitly, if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

The judgment of the Court of Appeals is vacated, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 76-539

DAYTON BOARD OF EDUCATION ET AL., *Petitioners*,

v.

MARK BRINKMAN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 27, 1977]

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see *Washington* v. *Davis*, 426 U. S. 229, 253-254 (STEVENS, J., concurring), I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 76-539

DAYTON BOARD OF EDUCATION ET AL., *Petitioners*,

v.

MARK BRINKMAN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 27, 1977]

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i.e., busing] when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973) . . . ." *Ante*, at 3. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed, none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the school board appearing in the record should be used to support the result. The United States, as *amicus curiae*, concedes that the "three-part 'cumulative' violation found by the district court does not support its remedial order," Brief at 21, and also urges us to affirm the busing order by resort to other, additional evidence in the record. Under this circumstance, I agree

with the result reached by the Court. I do so because it is clear from the holding in this case, and that in *Milliken* v. *Bradley*, — U. S. —, — (1977), also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired.

This case thus does not turn upon any doubt of power in the federal courts to remedy state-imposed segregation. Rather, as the Court points out, it turns upon the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Ante*, at 3. As the Court recognizes, the task of the district courts and courts of appeals is a particularly difficult one in school desegregation cases, *ante*, at 14. Although the efforts of both the District Court and the Court of Appeals in this protracted litigation deserve our commendation, it is plain that the proceedings in the two courts resulted in a remedy going beyond the violations so far found.

On remand, the task of the District Court, subject to review by the Court of Appeals, will be to make further findings of fact from evidence already in the record, and, if appropriate as supplemented by additional evidence. The additional facts, combined with those upon which the violations already found are based, must then be evaluated to determine what relief is appropriate to remedy the resulting unconstitutional segregation. In making this determination, the courts of course "need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long-standing segregated system." *Milliken* v. *Bradley*, *supra*, at —.

Although the three violations already found are not of themselves sufficient to support the broad remedial order entered below, this is not to say that the three violations are insignificant. While they are not sufficient to justify the remedy imposed when considered solely as unconstitutional *actions*, they clearly are very significant as indicia of *intent* on the part of the school board. As we emphasized in *Keyes*, *supra*, at 207, "Plainly, a finding of intentional

segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." Once segregative intent is found, the District Court may more readily conclude that not only blatant, but also subtle actions—and in some circumstances even inaction—justify a finding of unconstitutional segregation that must be redressed by a remedial busing order such as that imposed in this case.

If it is determined on remand that the school board's unconstitutional actions had a "systemwide impact," then the court should order a "systemwide remedy." *Ante*, at 14. Under *Keyes*, once a school board's actions have created a segregated dual school system, then the school board "has the affirmative duty to desegregate the entire system 'root and branch.' " 413 U.S., at 213. Or, as stated by the Court today in *Milliken*, the school board must "take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' " *Supra*, at —, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 15 (1971). A judicial decree to accomplish this result must be formulated with great sensitivity to the practicalities of the situation, without ever losing sight of the paramount importance of the constitutional rights being enforced. The District Court must be mindful not only of its "authority to grant appropriate relief," *ante*, at 3, but also of its duty to remedy fully those constitutional violations it finds. It should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual school children that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected.

O. FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT

(Filed December 15, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, ET AL.,
Plaintiffs,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

INTRODUCTION

This matter is once again before the Court pursuant to the mandate of the Supreme Court of the United States. The nature of that mandate is such that although five years and four appeals have intervened, all evidence presented must be reexamined in light of a standard enunciated by the Supreme Court, and plaintiffs' cause of action must be reconsidered *ab initio*.

In accordance with instructions of the Supreme Court[1]

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[1] "All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate." Dayton Board of Education v. Brinkman, —— U.S. —— (1977), Slip Opinion at page 13.

an evidentiary hearing commenced November 1, 1977. Plaintiffs were given an opportunity to enlarge upon the existing record by the presentation of additional evidence and testimony. Eleven witnesses were called during four days of testimony. Following the hearing the Court re-examined in full the record developed at the initial hearing of this matter in November, 1972.

The course of this protracted litigation has been marked by conceptual differences not only as to the facts, but as to the legal significance of those facts. If the passage of five years has moved us no closer to a resolution of this case, it has finally produced a more precise framework by which violations and remedial measures under the Equal Protection Clause of the Fourteenth Amendment may be determined.

The Court finds it essential to describe this framework at the outset of this Order in order that the Findings of Fact may be evaluated by the appropriate legal principles.

Prior to 1976 there was support for the proposition that a violation of the Equal Protection Clause could be proved by a mere showing that actions of state officials had a segregative or discriminatory effect, regardless of their intent. *See Kennedy Park Homes Association* v. *Lackawanna,* 436 F.2d 108, 114 (2d Cir. 1970) *cert. denied* 401 U.S. 1010 (1971); *Hawkins* v. *Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc,* 461 F.2d 1171 (1972).[2]

Recognizing that some of the language in the earlier cases (particularly *Palmer* v. *Thompson,* 403 U.S. 217 (1971), and *Wright* v. *Council of the City of Emporia,*

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[2] This clearly was plaintiffs' view in their pretrial brief filed prior to the first hearing in this case: ". . . The law of the land with respect to school cases now is clearly not the intent but rather the effect of 'state action.'"
Pretrial Brief, filed November 3, 1972 at page 20.

407 U.S. 451 (1972)), might have led to this conclusion, the Supreme Court in *Washington* v. *Davis,* 426 U.S. 229 (1976), stated that "to the extent that those cases rested on or expressed a view that proof of discriminatory racial purpose is necessary in making out an equal protection violation, we are in disagreement." *Washington* v. *Davis, supra* at 245.

In regard to school desegregation cases, the Court also noted that: "The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." 426 U.S. at 240. The Court reaffirmed this principle *sub silentio* by its summary remand in *Austin Independent School District* v. *United States,* 429 U.S. 990 (1976).

While discriminatory effect may be relevant to a determination of segregative intent, it is conclusive on this question only in the rarest of circumstances. *See, e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960).

In *Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252, 267 (1977), the Court enumerated other factors which might be relevant to the question of segregative intent:

> [1] The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes . . . .
>
> [2] The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purpose . . . .
>
> [3] Departures from the normal procedural sequence

also might afford evidence that improper purposes are playing a role . . . .

[4] The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports.

Given the Court's decision in *Davis, Austin* and *Arlington Heights* as a predicate, the return of this case for reexamination was inevitable. The original decision of February, 1973 lacked the guidance of the 1976 determinations.

The Supreme Court first reviewed the substance of this Court's finding of "cumulative violations", a term which it found to be "not free from ambiguity". It noted that this Court's finding of racial imbalance in a substantial portion of the schools does not constitute "a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board".[3]

It also found that the effect of optional zones pertained only to high schools, and that the rescission of certain Board resolutions to desegregate the system had significance only if there was a constitutional duty to desegregate *ab initio*. The Court then concluded that "Judged most favorably to the petitioners, . . . the District Court's finding of constitutional violation did not, under our cases, suffice to justify the remedy imposed."[4]

The Court remanded the case to this Court with the following directions:

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[3] Dayton Board of Education v. Brinkman, supra, Slip Opinion at page 6.

[4] Supra — Slip Opinion at page 7.

> The duty of both the District Court and the Court of Appeals in a case such as this where mandatory segregation by law of the races in the schools has long since ceased[5] is to first determine whether there was any action in the conduct of the business of the school board which was intended to and did in fact discriminate against minority pupils, teachers or staff . . . . If such violations are found the District Court . . . must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted when that distribution is compared to what it would have been in the absence of such constitutional violation. The remedy must be designated to redress that difference and only if there has been a system-wide impact may there by a system-wide remedy.

While the requirement of segregative intent is not new to school desegregation cases (*Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 208 (1973)), the concept of incremental segregative effect is. As explained by the Supreme Court, it stands as a more precise formulation of the principle that "the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation." *Austin Independent School District* v. *United States,* 429 U.S. 990, 995 (1976) (Powell, J. concurring).

We read this language as imposing a burden upon the plaintiffs to prove the effect of any purposeful segregative act, not merely on a theoretical basis, but on a factual basis. The necessity for such burden may be found in the following statement by Justice Powell:

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[5] It is not clear from the above statement whether such duty would differ in states where mandatory segregation has only recently been abolished. Such a distinction might reduce the precedential assistance now available to district courts.

> The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children, especially those of tender age. Families share those interests wholly without regard to race, ethnic origin or economic status. It also is to be remembered in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action, but, rather, upon innocent children and parents. *Austin, supra,* 429 U.S. at 995, footnote 7.

Consistent with the admonitions of the Supreme Court, a full review of all evidence and testimony has been undertaken. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court submits its Findings of Fact and Conclusions of Law.

II

HISTORICAL PERSPECTIVE

A. Since shortly after the 1913 flood, Dayton's black population has centered almost exclusively on the West Side of Dayton. (T.R.1-623) [6] Since that time this population has moved steadily north and west. (Defendant's Exhibit BY) Without question the prime factor in this concentration has been housing discrimination, both in the private and public sector. Until recently, realtors avoided showing black people houses which were located in predominantly white neighborhoods. (T.R.1 2040-2055) In the 1940's, public housing was strictly segregated

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[6] For purposes of clarity the record produced at the hearings in November, 1972 will be identified as "T.R. 1" and the record produced at the hearings in November, 1977 will be identified as "T.R. 2."

according to race. (T.R.1 182-186) This segregated housing pattern has had a concomitant impact upon the composition of the Dayton public schools. (T.R.2 — 380, 382 — Robert Rice)

B. There is little dispute between the parties concerning early practices of the Dayton school system in its treatment of black students. *See* Request for Admissions filed October 16, 1972 and Answers to Plaintiff's Requests for Admissions filed October 26, 1972. Many of those practices, if they existed today, would violate the Equal Protection Clause. Among them are the following:

1. Between approximately 1910 and 1920, black elementary children were taught in separate and inadequate facilities located in the back of Garfield School. (T.R.1 — 619-623 — Ella Lowrey)

   In the 1920's black children were moved into the main brick building. However, two to three times as many black children as white children were assigned to a classroom.

   These practices continued until approximately 1934. At that time only two white children were left in the main building. The white teachers were all reassigned, and the school became all black with black teachers and a black principal.

2. Until approximately 1950 the athletic programs in the high schools were substantially segregated. Blacks were required to use separate locker rooms. (T.R.1 — 532) Black athletic teams were not permitted to participate with white teams until 1948. (T.R.1 — 482, 569, 608) At Steele High School during the 1930's blacks were not permitted to use the school swimming pool, (T.R.1 — 2013, 2014),

and at Roosevelt High School a separate swimming pool was set aside for blacks. (T.R.1 – 481, 532)

3. Two witnesses have suggested that black students were either encouraged or required to sit at the rear of classes at Roosevelt High School until approximately 1950. (T.R. – 505, 572) Black high school students were counseled exclusively by black counselors, (T.R.1 – 609-610), and were discouraged from taking college preparatory courses due to the lack of job opportunities for blacks. (T.R.1 – 480).

We found these incidents of purposeful segregation to be "at least inhumane and by present standards reprehensible". (Findings of Fact and Memorandum Opinion of Law February 7, 1973, at page 3) While they evidence an inexcusable history of mistreatment of black students, no evidence has been presented by the plaintiffs to show that "the segregation resulting from those acts continues to exist". *Keyes, supra* at 210. In the absence of evidence showing their effect on "the racial distribution of the Dayton school population as presently constituted", plaintiffs have failed to meet the remedial portion of their burden of proof.

III

RACIAL IMBALANCE

As this Court noted in 1973, "the great majority of all schools in the Dayton system are racially imbalanced . . .". (Findings of Fact and Memorandum Opinion of Law – February 7, 1973 at page 5) Indeed, in 1971-72 51 of the some 69 schools in the system were virtually all-white or

all-black. (Plaintiffs' Exhibit 1003) The evidence disclosed an acceleration of this phenomenon between 1959 and 1970. (T.R.1 – 548, 836) During this same period of time whites were fleeing from Dayton's West Side. (T.R.1 – 551) Between 1951 and 1972 the percentage of blacks in the school system went from approximately 18% to 45%. (Plaintiffs' Exhibit 100E; Defendants' Exhibit CU)

Both Mr. Robert French, Superintendent of Schools from 1947 to 1958, and Mr. Ralph D. Curk, former Director of Research for the system, noted that with one exception (termed the West Side Reorganization discussed herein at pages 12-13), no attempt was made to alter the racial characteristics of any of the schools. (French Deposition at page 42, Curk Deposition at pages 47-48; 52)

Contrary to the opinion of many of plaintiffs' witnesses (T.R.1 – 1684, T.R.2 – 159-161), the failure of school officials to take affirmative steps to alleviate this racial imbalance does not become actionable under the Equal Protection Clause unless the imbalance was precipitated by their own intentionally segregative acts.

While the Supreme Court has deemed racial imbalance in the schools an important indicia of a system in which intentional acts of segregation may have occurred, *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971), such imbalance alone does not establish a Fourteenth Amendment violation. *Dayton Board of Education* v. *Brinkman*, Slip Opinion at page 6. It can only be viewed in the context of evidence of intentionally segregative actions by the Board.

III

FACULTY ASSIGNMENT AND HIRING

After a second perusal of the transcripts, depositions, and exhibits in this case, the Court considers the description in its 1973 Order concerning the three-phase policy on faculty hiring and assignment[7] to be substantially accurate. Those findings will be expanded here.

A. During the 1930's, black teachers were hired only as they were needed to teach black children. (T.R.1 — 619-642)

B. The black population of the city increased during the 1940's and concomitantly more black teachers were hired. As this Court noted in its previous Order: "There is no direct evidence that black teachers were forbidden to teach white children at any school . . .". (Order of February 7, 1973 at page 3). *See* Appendix A.

There is evidence that in 1950 there were no black teachers teaching white students in any school in the system. (T.R.1 — 235) Whites were hired to fill vacancies in white or integrated schools, and blacks were hired only to teach in black schools. (T.R.1 — 233-234)

Mr. French noted that while there was pressure from black community leaders to hire black teachers at this time, "[n]othing was ever said about the placement of black teachers. There was no demand for the placement of black teachers". (French Deposition at page 53)

C. Beginning in 1951 however, the entire Board of Education, one of whose members was black, reached an an-

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[7] See Findings of Fact and Memorandum Opinion of Law, February, 1973 at pages 3-4.

written understanding that this segregative placement policy should be phased out. The substance of the new policy of integration, known as "dynamic gradualism", was that "we will move as fast as we can move tactfully, without creating polarization". (T.R.1 — 281)

D. Although remnants of the old policy, such as discouraging black teachers from going to all white schools (T.R.1 — 317; 1005-1006), and assigning black substitute teachers to black schools (T.R.1 — 402-403), did continue to appear after 1960, the policy of dynamic gradualism was substantially implemented during the 1950's and 1960's.

In 1951 a black teacher was assigned to teach in an integrated classroom for the first time. (T.R.1 — 237) By 1963 there was at least one black faculty member in each of the high schools, and there were black faculty members in 44 of the 64 schools in the system. (Plaintiffs' Exhibit 130C) By 1969 each school had at least one black faculty member, many of the faculties were totally integrated (Defendant's Exhibit AN), and there was at least one black athletic coach in seven of the eleven high schools. (Defendants' Exhibit AP) Indeed by 1969 the Dayton school system had the most black educators and the second highest percentage (29.4%) of black educators of the twenty largest systems in the State of Ohio. (Defendants' Exhibit AQ) In addition, the administrative staff was keeping pace with this trend. (Defendant's Exhibits AK, AN, AL)

E. In March of 1969 after a Title VI Compliance Review, the Office of Civil Rights of the United States Department of Health, Education and Welfare determined that the Dayton school system was in noncompliance as to its assignment of professional staff. After a meeting with HEW officials, the Board issued a resolution to desegregate the faculty by September of 1971. Each school would be re-

quired to reflect the racial balance of the district as a whole. (T.R.1 – 988; Plaintiff's Exhibit 11F)

As the figures contained in Plaintiff's Exhibit 1002 (pages 65, 66) indicate, the Board substantially fulfilled this commitment by the 1971-72 school year. (T.R.1 – 1276)

F. The Court finds that until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative. Despite the policy of dynamic gradualism, vestiges of the Board's earlier illegal practices were evident until approximately 1963. But by 1969 all traces of segregation were virtually eliminated. The racial quota imposed upon the Board by HEW in 1969 edged the legal limit in requiring racial balance in all of the schools of the system. *See Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18-24 (1972). By 1972 the system had reached an appropriate racial balance in faculty assignment. No further action by the United States District Court was required.

G. The incremental segregative effect of the Board's earlier policy must now be addressed. Many of plaintiffs' witnesses asserted that the placing of black teachers in all-black schools had the effect of identifying that school as being black, thus impacting black children into black schools. (T.R.1 – 365-369; 410-414; T.R.2 – 33; 435) According to the plaintiffs, this racial identifiability continued even after the faculty was desegregated. (T.R.1 – 433; 1533-35; T.R. 2 – 33-34)

The Court believes the evidence to be to the contrary. In every specific instance brought to the Court's attention in which black faculty were assigned to black schools, the school was already identifiable as being black because of the racial population of the students.

In 1957 this was true of Weaver, Miami Chapel, Highview, Garfield, Wogaman, and Willard. (T.R.1 — 1489; Plaintiffs' Exhibit 130B) It was true when Garfield and Willard were closed and the students in those two all-black schools were sent to McFarlane in 1962 (T.R.1 — 539), and it was true of Jackson and Westwood in 1960. (T.R.1 — 364-365; 538)

In integrated schools such as Edison, Central, Drexel, Jane Adams, Irving, Jackson, Whittier, and Roosevelt High School, where the faculties had been all-white, racial identifiability did not turn on the assignment of one to four black teachers to staffs ranging in size from 20 to 60. *See* Plaintiffs' Exhibit 29, 130B; Defendant's Exhibit AU)

Dr. Wayne Carle, District Superintendent from 1968 to 1972, was compelled to agree that if these schools were racially identifiable, it was because of their student composition, not because of their faculties. (T.R.2 — 266-267)

Assuming *arguendo* that faculty desegregation could not eliminate the racial identifiability of a school in 1972, the Court finds difficulty in understanding how an integrated faculty in all-black schools in the 1950's and 1960's could have significantly affected the identifiability of such schools.

The Court finds that the predominant factor in racial identifiability of schools is the pupil population, not the composition of the faculty of the school. (T.R.1 — 367-368; T.R.2 — 256-257) The effects of placing black faculty in schools which were already identifiably black were not significant in terms of the racial distribution of the Dayton school population as it existed in 1972.

A preponderance of the evidence does not show an incremental segregative effect of the Board's policy of hiring and assignment of teachers.

IV

ATTENDANCE ZONES

A. Since 1952 the Dayton school system has operated on a strict attendance zone system of assignment. With few exceptions these zones have not been altered since 1952. (T.R.1 — 1482; 1590; T.R.2 — 265-266) For the most part Dayton's schools are "walk-ins" and are located close to the center of their attendance zones. The attendance zones themselves are geographically compact. (T.R.1 — 1556-1562) No evidence has been presented suggesting that attendance zones were redrawn to promote segregation.

B. The evidence discloses three major boundary changes since 1951, exclusive of boundary changes for new schools:

1. The West Side Reorganization

Unlike many actions of the Board, there is little dispute among the parties and witnesses that this reorganization was an experiment in integration, and was intended as such. Its purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so. (French Deposition at page 39; Curk Deposition at page 61; T.R.1 — 978-981; 1501; T.R. 2 — 151-155)

The substance of reorganization was as follows: In 1951 the Board had before it two alternative plans for redrawing elementary attendance zones in the West Side. Plan A contemplated slight alterations to the attendance zones and additions to the all-black Garfield and Willard schools. Plan B contemplated shrinking the district of all-black Wogaman School and expanding the attendance boundaries of Jackson (35.9% black) and Weaver (67.6% black). All-black

Garfield School's boundaries were also to be diminished and the boundaries of Edison (43% black) and Irving (46.6% black) were to be expanded.

In conjunction with Plan B, six optional zones were established between 1952 and 1953. They are as follows:

Willard	Irving	Whittier	Willard
100% Black 1951	46.6% Black 1951	29.9% Black 1951	100% Black 1951
Whittier	Miami Chapel	Wogaman	Highview
29.9% Black 1951	100% Black 1953	100% Black 1951	1.7% Black 1951
Edison	Jefferson	Jackson	Westwood
43% Black 1951	0% Black 1951	35.9% Black 1951	0% Black 1951

(T.R.1 — 1457-1458; 1486; 1663-1674)

After being apprised of these alternative plans for action, leaders from the West Side community opted for Plan B. The Board of Education approved Plan B in December of 1952. (T.R.1 — 1873-1874)

The experiment was in fact a failure. Within three years the integrated schools involved in the plan became predominantly black. No other attempt was ever made to alter attendance boundaries for the pur-

pose of integration. (French Deposition at 39-40; T.R.1 – 1500)

The plaintiffs have gone to great lengths in describing the segregative effects of this plan. Dr. Gordon Foster described the situation as "essentially one of diddling around piecemeal with desegregation . . . ." (T.R.1 – 1501) The only alternative which Dr. Foster suggested was to transport children out of or into the area. (T.R.1 – 1505)

Whatever the effects of this reorganization may have been, its purpose was clearly integrative rather than segregative. Lack of success in an innovative plan intended to advance integration is not synonymous with segregative intent.

A preponderance of the evidence does not show a segregative intent as to the West Side Reorganization.

2. The Stivers Boundary Change

The redrawing of this attendance zone was necessitated by the construction of Highway 35. No question has been raised as to its intent, and its effect was integrative. (T.R.1 – 1255-1257; 1592-1593)

3. The Middle Schools

In 1971 the Board of Education altered the traditional K through 8, 9 through 12 grade structure by establishing five middle schools. (T.R.1 – 1306-1307) A child would attend K through 5 in an elementary school, 6 through 8 at a middle school, and 9 through 12 at a high school. The feeder elementary schools were those in the closest proximity to middle schools. (T.R.1 – 1308-1309)

There is evidence both that the middle schools had a segregative effect and an integrative effect. (T.R.1 — 1308; 1538) There is no evidence to indicate that the schools were established with the purpose of segregating students.

A preponderance of the evidence has not shown a segregative intent in the establishment of middle schools.

C. Prior to 1950 the attendance zone system of assignment was so loosely operated that a student had little difficulty transferring to a school outside his zone. (French Deposition at page 17) While the attendance zone policy was more strictly enforced after 1950, there were exceptions to this policy. For purposes of symmetry only, the Court has grouped them into two catagories: Miscellaneous Transfers and Optional Zones.

1. Miscellaneous Transfers

A. Shawen Acres

From the 1930's until the early 1950's black children from Shawen Acres Orphanage were sent to the all-black Garfield School, located in a distant part of the city. (T.R.1 — 476-477; 511; 1230-1237) The schools surrounding Shawen Acres were at that time virtually all-white. School administrators asserted that if black children were sent to these schools, they would immediately be perceived as from an orphanage and would be ostracized by their peers. (Curk Deposition page 54-57)

After approximately 1950 these children were reassigned to Loos, Van Cleve, Brown and Shiloh

Schools, all of which were predominantly white. (T.R.1 – 511)

While arguably this might be termed a purposeful segregative act, the plaintiffs have failed to offer any objective proof as to its incremental segregative effect on the racial distribution of the school population.

B. The Opening of McFarlane School

In 1962 the new Dunbar High School was opened and the old Dunbar High School became McFarlane Elementary School. Willard and Garfield which respectively were two blocks away and four blocks away were closed and their students were transferred to McFarlane. (T.R.1 – 1653)

Plaintiffs argue that the closing of these two all-black schools and the creation of a new one constituted a purposeful segregative act. If there had been an all-white school or integrated school in close proximity to McFarlane, as was the case with Barrett and Stedman Schools in *Keyes* v. *School District No. 1, Denver, Colorado,* 313 F. Supp. 279, 282 (D.Colo. 1969), the Court might be inclined to agree. Here, however, in order to avoid an all-black school, the Board would have been forced to transport the children from the Willard and Garfield zones to schools substantial distances away. (T.R. 1 – 1654-1660)

Viewing the circumstances as a whole, we believe that the Board's action was consistent with the policy of assigning children to the closest school.

A preponderance of the evidence does not show that such action was taken with segregative intent.

C. Edison School Fire

On April 24, 1968 Edison School, which was predominantly black, was destroyed by fire. Classes of students and their teachers were sent intact to predominantly white schools. (T.R.1 — 583) The black children were mixed with the rest of the school population when school reopened the following year. (T.R.1 — 611)

Plaintiffs argue that the failure of the defendant to break up these classes of children with five to six weeks of school remaining in the year is evidence of segregative intent. Perhaps such an inference could be drawn if the condition had persisted into the following school year. The action taken was administratively sound for the short period it lasted. Since it was not continued the following year, the preponderance of the evidence does not show segregative intent.

D. Jefferson and Westwood Overcrowding

In the 1969-70 school year, the school administration found it necessary due to overcrowding to transport children assigned to Jefferson and Westwood Schools to other schools, most of which were predominantly white. (Defendant's Exhibit BA; T.R.1 — 1322; 1975) These transfers ended after two years, when the problem of overcrowding was relieved by the middle schools. (T.R.1 — 1323)

Plaintiffs' proffered into the 1972 record the testimony of Dr. Wayne Carle concerning the opposition of white parents whose children attended the receiving schools for the Jefferson transfers. (T.R.1 — 2125-2133) The Court found this testimony irrelevant in 1972, and finds it irrelevant today. What irate citizens

may have said or done cannot be imputed to the Board, unless the Board was swayed by such conduct. No evidence has been presented to suggest that this was the case here.

A preponderance of evidence does not show a segregative intent as to these transfers.

E. Stivers and Roth Transfers

With the expansion of its boundary in 1969 and the assignment of black students to the school, Stivers experienced a number of racial disturbances. At the request of their parents, 34 black students were given temporary transfers to Dunbar or Roosevelt. (T.R.1 — 1259-1266)

A similar problem was encountered at Roth, where 36 white students were transferred to other schools after complaining of threats and harassment from black students. (T.R.1 — 1259)

The Department of Health, Education and Welfare cited these two actions as incidents of resegregation. All too often federal agencies look only to numbers and ignore realities that may exist. (T.R.1 — 1261) These students were transferred on an emergency basis, for one year only, and for the safety of the students involved. The record is devoid of any evidence of segregative intent as to these transfers.

F. Freedom of Enrollment

A review of all the evidence in this case reveals nothing which need be added to this Court's prior findings concerning the freedom of enrollment policy of the Board. Accordingly, those findings are hereby incorporated into this Order. (See Appendix A)

G. Emergency Disciplinary, Medical and Special Education Transfers

This Court has also examined the testimony concerning emergency disciplinary, medical and special education transfers. (T.R.1 — 1524-1525; 1972-1974) A preponderance of the evidence indicates that such transfers were made for legitimate rather than segregatory reasons.

2. Optional Zones

From 1950 to 1972 the Board of Education instituted a number of optional attendances zones, which allowed children living in such zones to select from among two or more schools. The unofficial criteria for setting both attendance zones and optional attendance zones included the availability of space, distance, hazards, accessibility and convenience. (T.R.1 — 1878-1879) The plaintiffs have alleged that optional attendance zones were used as a segregative tool by the board. After reviewing the optional zones which existed in 1972 and the optional zones which were eliminated prior to 1972; the Court makes the following findings:

A. Jackson — Residence Park — Carlson

In 1951 an optional zone was established between Residence Park and Jackson Schools. At that time Residence Park was all-white, and Jackson was 35.9% black. (Plaintiff's Exhibit 100E) Carlson School, built in 1958 was later included in this optional zone. (T.R.1 — 346-347) Included in this optional area was the Veteran's Administration Hospital.

Plaintiffs have alleged that this zone was established to allow white children from the Hospital to attend an all-white school. (T.R.1 – 1452-1454) This allegation is unsupported by evidence. All V.A. students did in fact go to Residence Park, rather than Jackson, but their numbers amounted at most to 40 white students and 8 black students in the course of 15 years. (Defendant's Exhibit CO) By 1963 all three of the schools in this option were over 80% black. (Plaintiff's Exhibit 130C) The Court finds this optional zone to be insignificant in terms of either segregative intent or effect.

B. Roosevelt – Colonel White

In 1951 an optional zone was carved out of the northern boundary of the Roosevelt High School attendance zone, forming roughly a rectangle bounded by Oxford Avenue to the north, Superior Avenue to the south, Salem Avenue to the east, and Rosedale Drive to the west. (T.R.1 – 1459; 1637-1643; 1882-1888) Roosevelt at this time was 31.5% black.

Colonel White housed only ninth and tenth grade students who then completed high school by attending Fairview High School. Both Fairview and Colonel White were 100% white in 1951. (Plaintiff's Exhibit 100E) In approximately 1957 Colonel White became a four-year school. In 1957 the optional zone in question was extended south to Wolf Creek and a short distance west.

No single or predominant reason for the establishment or original configuration of this zone appears from the testimony. Obstacles to access, including Wolf Creek, a set of railroad tracks, a tire company,

and a packing house had confronted students living in the northern portion of this zone since it was established in 1940. Students living north of Wolf Creek who wished to take public transportation to school were required to take a bus downtown and then transfer to a bus which ran along West Third Street to Roosevelt. (French Deposition page 21; T.R.1 — 520-521) By 1951 more direct public transportation was available to Colonel White and Fairview from this area. (T.R.1 — 1885)

In the final analysis the convenience of students and parents became the deciding factor in setting up the zone. (T.R.1 — 1888) As Mr. French stated in his deposition:

> "They said they couldn't see why their youngsters couldn't attend Colonel White because it was closer and that the transportation was better, and this agitation went on for a couple of years. We made a study of it and had a meeting on it and decided that it was a logical and legitimate complaint, and therefore we said the children in this area could have the choice of either going to Roosevelt or to Colonel White."
>
> (French Deposition pages 27-28)

The Court has scoured the entire record in this case in search of some cogent evidence that this optional attendance zone was created for purposes of segregating white students from black students. No such evidence has been found. Not even the effect of the optional zone indicates such a purpose. In 1963 Colonel White was only 1.1% black and Roosevelt had become 94.5% black. Both of these figures reflect the changing racial compositions of the attend-

ance areas which the school serve. (Defendant's Exhibit BY; Plaintiff's Exhibit 130C)

By 1969 Colonel White was 19.3% black and Roosevelt was virtually all-black, again reflecting the composition of their basic attendance zones. By 1972 Colonel White had become 54% black. (Plaintiff's Exhibit 1003) Despite the fact that the black population of Colonel White was increasing during this time, no attempt was made to eliminate or alter the optional zones. As the estimate in Table 3 of Defendant's Exhibit DA indicates, even if the optional zone had been included in Roosevelt's attendance area, Roosevelt would still have been 87% black in 1970.

A preponderance of the evidence has not disclosed any segregative intent or effect in the establishment of the Roosevelt-Colonel White optional zone.

C. Colonel White — Kiser

This optional zone was carved out of the Colonel White attendance zone in 1962. The ostensible reason for creating this zone was to shift more students to Kiser, which had traditionally been under capacity. (T.R.1 — 1898-1899; French Deposition page 30) The Court is unaware of any evidence which would contradict this explanation.

The effect of this optional zone on the racial composition of Colonel White was nil, since only white students lived in the zone and the racial balance at Colonel White was nearly perfect in 1972. (Plaintiff's Exhibit 15B; Defendant's Exhibit DA) Between 1967 and 1971 twenty-seven white students opted to Colonel White and 102 opted to Kiser. In the 1971-72 school

year, no whites opted to Colonel White and 20 opted to Kiser.

A preponderance of evidence does not disclose any segregative intent or effect in the establishment of the Colonel White – Kiser optional zone.

D. Other Optional Zones

The Court has examined the testimony on the following optional zones and has found nothing to indicate that they were established with the intent to segregate. (*See* T.R.1 – 1466-1474; 1602-1615 (Westwood – Gardendale Zone); 1630-1635; 1645-1652; 1905-1917) Those which existed as of 1972 include the following:

EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population at Date of Creation	Percentage Black School Population As Of 1972-73
Elementary Schools:			
1. Belle Haven/	1955	0.0	17.7
Ft. McKinley		0.0	2.6
2. Residence Park/	1959	a.	100
Jane Adams		29.3 b.	78.7
3. Lincoln/	1957	0.0	0.6
Horace Mann		0.0	3.1
4. Cleveland/	1956	0.0	0.8
Belmont Elem.		0.0	9.4
5. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
6. Eastmont/	1957 c.	0.0	0.7
Lewton		0.0	5.8

Optional Zone	Date of Creation	Percentage Black School Population at Date of Creation	Percentage Black School Population As of 1972-73
High Schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Wilbur Wright/	1956	2.2 b.	9.2
Belmont H.S.		0.0	5.2

* a. Figures not available
b. Figures as of 1951
c. Figures as of 1963-1964

Those which were terminated prior to 1972 include the following:

	Date of Creation	% of Black Students As of 1960 d.	Date Terminated	% of Black Students As of 1971-1972
High Schools:				
Belmont	1956	.09	1969	2.7
Stivers		0.6		12.3
Belmont	1956	.09	1969	2.7
Wilbur Wright		3.5		5.5
Elementary Schools:				
Ft. McKinley	1960	0.0		1.6
Fairport		0.1	f	39.7
Fairport	1960	0.1		39.7
Fairview		1.7	f	7.4

	Date of Creation	% of Black Students As of 1960 d.	Date Terminated	% of Black Students As of 1971-1972
Fairport	1960	0.1		39.7
Cornell Heights		44.2	f	72.3
Jefferson Elem.		60.1		91.3
Cornell Heights	f	44.2	f	72.3
Jefferson Elem.		60.1		91.3
Brown	f	0.6	f	1.0
Jefferson Elem.		60.1		91.3
Edison	f	97.3	f	99.7
Westwood	1957	94.7		99.5
Gardendale		7.9	f	72.3
Cleveland		0.0		0.3
Lincoln		0.0		1.0
Franklin	f	0.0	f	0.0
Orville Wright		0.0		6.7
Kemp	f	0.0	f	7.2
Emerson	1965	0.0	e.	5.6
Irving		100	e.	99.5

* d. Taken from Plaintiff's Exhibit 130D

e. This zone was eliminated three to four years later with the opening of Highway 35. It had virtually no students in it when it was established. (T.R.1 — 1649-1650)

f. Date unavailable from the evidence.

According to the testimony of Mr. Ralph Curk, all of these zones were established for one or more of the five legitimate reasons stated above. (T.R.1 – 1905-1917) No testimony was presented by the plaintiffs which would indicate to the contrary. The objective effects of these zones on the racial composition of the schools which were involved does not disclose any pattern or plan which might have been racially motivated.

The preponderance of evidence has not established any incremental segregative effect or segregative intent as to the now abandoned use of optional zones.

D. The final exception to the Board's attendance zone policy of assignment is the establishment of city-wide high schools which draw their enrollment from the entire district. Two such schools have long been a part of the Dayton system:

1. Paul Lawrence Dunbar High School

Named after a famous black poet who was a native Daytonian, Dunbar opened in 1933 with an all-black staff, a black principal and an all-black student body. (T.R.2 – 411) Throughout its history the school had an open enrollment policy, although in 1942 the 7th and 8th grade classes from Garfield and Willard were assigned to the school. (T.R.1 – 1519) Evidence was also presented which indicates that some black students may have had their elementary school records automatically transferred to Dunbar during the 1930's and 1940's. (T.R.1 – 1388) Although any student in the city could attend Dunbar, for practical purposes only blacks did. (T.R.1 – 1519) Indeed, black students living in the eastern-most portion of the school district traveled across town to attend Dunbar, al-

though they could have attended schools closer to their homes. (T.R.1 – 497-498)

In 1962 Dunbar High School was converted to McFarlane Elementary and a new Dunbar High School was opened. While initially there were some objections by the NAACP to the site of the new school, these objections were withdrawn in 1959. (Defendant's Exhibit N; T.R.2 – 386-388; T.R.2 – 508-512) The new Dunbar had its own attendance boundaries and open enrollment was eliminated.

There is no question that the first Dunbar High School was intended to be and was in fact a black high school. One of the difficulties inherent in the concept of "incremental segregative effect" is the necessity to explore the "alternate universe theory", i.e., what would have happened if Dunbar had not been maintained with a district-wide enrollment. By 1940 the population surrounding Dunbar was 60% to 70% black. By 1950 it was 80% to nearly 100% black. By 1960 almost all of West Dayton was predominantly black. (Defendant's Exhibit BY) While the effects of the Board's segregative acts may have lingered into the 1940's, the ever-increasing black population in West Dayton would have resulted in Dunbar being virtually all black by 1960 even if it had had its own attendance zone. As the West Side Reorganization made apparent, nothing short of transporting students into or out of Dunbar could have integrated the school.

The effects of the Board of Education's segregative acts in 1933 were totally subsumed in the effects of five to six decades of housing segregation in which the Board played no part. We agree with Mr. Robert Rice, a Dayton historian, that "Dunbar High School,

Roosevelt High School, in particular, became all black due to the segregated housing patterns". (T.R.2 — 380)

The Court concludes that the relationship between the Board's past segregative acts and the all-black status of Dunbar High School in 1962 has "become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." *Keyes, supra* at 211.

The record does not reveal any segregative intent as to the site selection or setting of attendance boundaries for the new Dunbar High School. (T.R.1 — 1812) [8]

The Board of Education followed its customary policy of locating the school where it was needed, at the best available price for the land, and without regard to what the racial composition of the school would be. The fact that housing was built around the school, and that the racial composition of that housing was the same as the rest of the area around it, were events beyond the control of the Boar[illegible]

The preponderance of evidence does not show any incremental segregative effect from the building and operation of the old Dunbar High School, nor any segregative intent in the building of the new Dunbar High School.

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[8] A review of the testimony including that of Mrs. Miley Williamson, Executive Secretary of the Dayton Chapter of the NAACP, (T.R. 2-384-401), indicates at most an honest difference of opinion upon a subject open to such difference. In addition to acquiescing finally to the site, Mrs. Williamson made no mention of any alternative to the proposed site which was presented to the Board in 1959.

2. Patterson Cooperative High School

In 1954 Patterson Co-op opened as a three-year work-study vocational high school with open enrollment. (T.R.1 — 1739). From 1954 to 1968, the school was under capacity, and as of 1963 had a black enrollment of only 1.8% (Defendant's Exhibit CU) Patterson Co-op's first black teacher was not hired until the early 1960's and its first black counselor was not hired until 1968 or 1969. (T.R.1 — 1748-1749) Students for the school were recruited by teams of counselors who spoke to ninth grade classes in all of the high schools. Beginning in 1965 efforts were made to recruit more black students. (T.R.1 — 1739-1740).

In 1968 Patterson Co-op became a four-year high school, and its selection process was altered. Each elementary school's eighth grade class was alloted 8% to 10% of the total enrollment of Patterson's ninth grade class. (T.R.1 — 1055; 1742) In the 1967-68 school year, Patterson's black enrollment increased to 12.8% (T.R.1 — 1251; Defendant's Exhibit AR) In 1970 objective criteria were incorporated into the selection process. The process was further refined in 1971-72, when the students were selected by a lottery system. (T.R.1 — 1056; 1744).

The preponderance of evidence does not suggest that school officials intentionally discouraged black students from attending Patterson nor that they were systematically excluded from the selection process prior to 1965. Mr. French noted that Patterson Co-op had difficulty in the "early days". But Mr. Nelson Whiteman, Principal of Patterson Co-op, indicated that students were not discouraged from enrolling in the school because of this problem. (French Deposition page 51; T.R.1 — 1763)

The racial imbalance which existed prior to 1965 was totally eliminated by 1972.

III

SITE SELECTION, SCHOOL ADDITIONS, TRANSPORTABLE SCHOOLS, AND SCHOOL UTILIZATION

The plaintiffs have contended throughout this litigation that the Board intentionally located schools where they would become all-black or all-white when they opened or as time passed. As was noted by Dr. Foster, from 1950 to 1972 some 24 new schools were opened by the Dayton Board of Education. Of these 24, 22 opened with 90% or more black or white enrollments; seven schools opened with 90% or more black students; six schools opened with 90% or more white students; and nine schools opened with 90% or more white students, but by 1972 were between 17.7% and 96.7% black. (T.R.1 — 1420-1424)

In addressing this question the Court notes that the process of site selection and enrollment projection was a most imprecise science in the Dayton school system. It approached the level of haphazard in some instances. It was a basic policy to locate schools where the children already lived or were expected to live. Enrollment projections were developed through the use of plat maps obtained from city planners, through information received from public housing authorities, and through guess work as to how an area might develop. (T.R.1 — 1783-1785; Curk Deposition at page 9-13)

After deciding that a new school was needed, school officials attempted to build it within walking distance of a projected development and on the most inexpensive land

they could find. They also worked closely with the city recreation department so that schools could be situated near playgrounds and parks. (T.R.1 – 1785-1786; 1821)

The defendants presented evidence that racial considerations played no part in the site selection for any of the schools built since 1950. That evidence stands virtually undisputed by the plaintiffs. Only the site selections for the following schools have been substantially put into question:[9]

A. Roth High School

When this school opened in 1959 it had a racial mix of 25% black and 75% white. According to Mr. Curk, an effort was made to draw its attendance boundaries in such a way that the school would be integrated. (Curk Deposition at page 52) By 1968 the school remained integrated with a 53.5% black enrollment. (Plaintiff's Exhibit 130C)

Roth High School was apparently built to relieve an expected over capacity in the high schools on the West Side, and to serve the residential area which was expanding at the western limits of the district. The particular site for the school was dictated by land costs. (T.R.1 – 1813-1814)

Dr. Foster correctly noted that the anticipated overcapacity of Roosevelt never materialized. (T.R.1 – 1596) At the time, however, the school district was in a period of growth and an area close to Roth was marked for annexation by the City of Dayton. (Defendant's Exhibit B; T.R.1 – 1790-1791) Although this area was not annexed, the Court cannot say that the Board's expectations were so unreasonable as to bring the defendants' explanation for the

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[9] The question of the site selection for the new Dunbar High School has already been treated, *supra*.

school site into question. Whatever effect Roth High School may have had in taking white students out of Roosevelt became academic by 1969, since by that time both schools had become entirely black.

While Dr. Foster never intimated that Roth High School was intended to be an all-black high school, he employed his most acute hindsight in suggesting that one large school built halfway between where Roth and Meadowdale are presently located might have avoided the problem. (T.R.1 – 1601; 1697) Ironically, had that suggestion been followed the school might very well have been built in the vicinity of what is now a predominantly black residential area. *See* Defendant's Exhibit BY.[10]

The preponderance of evidence shows neither segregative intent, nor incremental segregative effect, nor any reasonable alternative to the site of Roth High School.

B. Gardendale, Highview and Miami Chapel

It is undisputed that there were three legitimate reasons for building Gardendale: First, it was intended to house the district's program for mentally retarded students; Second, it was built to relieve overcrowding at Westwood; and Third, it was built in anticipation of the annexation of the Townview area. (T.R.1 – 1608-1609; 1790-1791; Curk Deposition at page 91)

Plaintiffs' sole argument as to this school was that it opened with a low black enrollment. The Court finds no

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[10] The location of Roth High School typifies the classic dilemma faced by a Board of Education. If a school is located within the area it is intended to serve, the Board will be accused of creating "a black school." If it is located adjacent thereto and the area becomes black, the Board will be accused of creating a "holding pattern" to contain blacks.

See Foster Testimony (T.R. 1 1600-1601)

significance to this fact, particularly since Gardendale was 72.3% black in 1971-72. (Defendant's Exhibit CU)

Plaintiffs have urged the same argument as to Highview which was 1.7% black when it opened in 1951. Dr. Foster contended that had Highview's boundaries been moved north, it would have opened as an integrated school and would have stabilized the area. (T.R.1 — 1615-1620) As was previously noted, Highview was included in the West Side Reorganization. Part of the reason it became virtually all-black a few years later was because of an attempt to integrate and "stabilize" the schools in that area.

As for Miami Chapel, while Mr. John W. Harewood, former Assistant Superintendent in Charge of Administration, objected to its construction in its present location, he conceded that it was built there to relieve overcrowding in other existing schools and to accommodate the needs of students living in the area. (T.R.2 — 545-547)

A preponderance of the evidence does not establish segregative intent in the site selections of these three schools.

C. The Primary-Elementary Campuses

As a matter of Board policy, all of the primary schools in the district are placed next to elementary schools primarily because the site is already there and is convenient to the students. (T.R.1 — 1793)

Dr. Foster indicated that in his experience this campus set-up has been used as a segregative device. While this may have been true in other districts which Dr. Foster has examined, no evidence has been presented which indicates that that was the case in Dayton. Jackson Primary was built because of the expansion of a housing project near the school. (T.R.1 — 1832) The site for the Jefferson Primary was hotly disputed. Some school officials wanted it located on ten acres of land with recreational facilities in

the southwest portion of the attendance area. This site was rejected for integrative reasons. (T.R.1 – 1795-1797) Mr. Harewood urged that it be located on a site near Princeton Park to the north of the present site. (T.R.2 – 506) The Jefferson Primary was finally placed next to the elementary.

The preponderance of evidence does not establish a segregative intent in utilizing primary-elementary campuses.

C. Additions and Portables

From 1950 to 1972 ninety-five school additions were constructed. Of those ninety-five, seventy-eight were made to schools which had a student population of 90% or more black or white. (T.R.1 – 1548) As with new schools, classrooms were added as they were needed and were used to accommodate growth in lieu of changing attendance zones. (T.R.1 – 1814) Portables were also used on a limited basis where schools were overcrowded. In 1972 eleven portables were located at four schools, two of which were predominantly white and two of which were predominantly black. (T.R.1 – 1444-1445) The fifteen other portables used between 1966 and 1972 were similarly distributed. (T.R.1 – 1447)

While Dr. Foster noted that additions and portables are sometimes used as segregative devices, he offered no specific instances of such a use with an intent to segregate in the Dayton system.

D. School Utilization

Plaintiffs have cited a number of schools which were under-capacity by 1972, particularly schools in the northern part of the district, such as Hickorydale, Horace Mann, Meadowdale, Shoup Mill, Valerie, and Meadowdale High School. (T.R.1 – 1828-1847)

As has already been noted, site selection in the Dayton school system was done on a very unsophisticated basis and some errors in judgment were inevitable. One example is Shoup Mill School, located at the northernmost part of the district. According to Mr. Curk, that school was built on the expectation that the open land immediately to the south would be developed. It was developed, but into apartments and not houses. The expected number of students for the school never really materialized. (Curk Deposition at page 25) It should also be noted that all but one of the schools listed above opened prior to 1964, the peak year of the school system's enrollment. Between 1964-65 and 1972-73, the total enrollment in the system dropped from 60,633 to 50,802 and the percentage of black enrollment increased from 31.1% to 44.6%. (Plaintiffs' Exhibits 1002; 1003)

Plaintiffs contend that the school system should have transported students from such overcrowded schools as McFarland and Jefferson to schools in the northern part of the district which were operated at less than capacity. Citing the Touche-Ross study of the school system made in 1972, plaintiffs also contend that older schools should have been closed and students reassigned to promote integration. (T.R.1 – 1440-1443)

While it may have made economic sense for the Dayton school system to close schools, the wisdom of the decision not to do so is not before the Court. Our inquiry is directed to the question of whether the school board was purposefully maintaining older schools in order that they would remain all-black or was purposefully maintaining schools at under-capacity in order that they would remain all-white. No evidence has been presented to indicate that such was the case. Again the plaintiffs have failed to sustain their burden of proof under the Supreme Court's Order of Remand.

The preponderance of the evidence does not establish segregative intent in the utilization of schools.

E. The basic assertion throughout this portion of plaintiffs' case appears to be that the defendants had a duty to put schools not where the children were, but where the children should be, and that by not putting schools where children should be, the defendants have engaged in intentionally segregative acts. This was the heart of Dr. Foster's and Mr. Harewood's testimony on this question. (T.R.1 — 1425; T.R.2 — 498-500)

Dr. Carle suggested that the school system had the power and duty to deny schools to a developer whose housing subdivision was not integrated. (T.R.2 — 112) Presumably, under this argument the Board of Education also should not provide schools for public housing projects which were not integrated. Plaintiffs argued strenuously that the rental of space for kindergartens or primary grades in *de jure* segregated housing projects during the 1940's made the school system a partner in the public housing authority's wrongful acts. (T.R.1 — 150-170; 209) They have intimated that schools such as Miami Chapel and Jackson Primary should not have been built in close proximity to the housing projects they served, but rather should have been built somewhere else.

There is language in *Swann* v. *Board of Education of Charlotte-Mecklenburg*, 402 U.S. 1, 20-21 (1972) which notes the correlation between school locations and segregated housing patterns. It must, however, be considered in light of the remand in this case, which requires a showing of segregative intent as a prerequisite to imposing a remedy. Nothing in *Swann* relieves the plaintiffs of the burden of proving that school officials intended their site selections to have a segregative effect on the school population and

housing patterns, and that the site selections did in fact have such a segregative effect.

Neither in 1972 nor in 1977 have plaintiffs shown that school authorities conspired with public or private developers to make the West Side all black, that they intentionally established black schools to further this goal, that they established all-white schools on the school district periphery to impact black children into the West Side, or that they closed schools which were becoming integrated. Plaintiffs instead have relied entirely upon the *theoretical* effect of the defendant's policies to show segregative intent. The Court emphasizes "theoretical" because there is an absence of evidence showing the actual effects of the defendant's site selection process on housing patterns.

This is a critical distinction that must be recognized. Plaintiffs now bear a burden of demonstrating "any action . . . which was intended to and *did in fact* discriminate . . ." *Dayton Board of Education* v. *Brinkman*, *supra*, Slip Opinion at page 13, emphasis added.

The preponderance of evidence does not establish that defendants' policy of site selection, construction of additions, use of portables, or school utilization had a segregative purpose or that such policy had an incremental segregative effect upon minority pupils, teachers, or staff.

ACTIONS OF THE BOARD OF EDUCATION 1967 - 1972

In dealing with the question of Board action in December, 1971 and January, 1972, the Supreme Court made the following observation:

> The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman*

v. *Mulkey*, 387 U.S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:

> 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is *inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took*. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Comillion* v. *Lightfoot*, 364 U.S. 339 (1960). *If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation*. If the Board was under such a duty, then the recission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the recission *ipso facto* is an independent violation of the Constitution. 503 F.2d 684, 697.

Dayton Board of Education v. *Brinkman*, Slip Opinion at page 7 (emphasis added)

In order to evaluate the significance of the actions of the Board of Education, the Court deems it necessary to trace the history leading up to those actions in somewhat greater detail than was done in the Order of February 7, 1973.

During the late 1960's the Board of Education was under almost constant pressure from community groups to relieve the racial imbalance existing in the schools. (T.R.I — 986-987) In 1967 the Board resolved that it would seek to end racial imbalance in the schools, and established the Citizens Advisory Council to investigate the problem. As a reaffirmation of intent, Dr. Carle issued a statement to the Board of Education in August of 1968 noting the

earlier efforts of the Board to integrate and setting forth positive goals for the future. With the HEW Compliance Report (Plaintiff's Exhibit 11A) and the report of the Citizens Advisory Council, (T.R.1 – 2018), the pressure on the Board intensified.

In November of 1969 four new members were elected to the Board. At least two of these new members ran on the ticket of Serving Our Schools Committee which was pledged to neighborhood schools and against transportation of students to achieve racial imbalance (sic). The rest of that year was marked by constant strife among the members of the Board as to what steps should be taken. (T.R.1 – 1044-1047)

At the same time, the school system was in financial trouble and numerous attempts to pass operating levies failed. On October 26, 1970 all of the members of the Board signed the following resolution: "There will be no forced busing during the term of the administration of the current school board unless it is so ordered by lawful authority". (Joint Exhibit II) As two witnesses who were on the board at that time explained, the purpose of this resolution was solely to pass a school levy. The effort failed and the November, 1970 levy was defeated. (T.R.1 – 2032; T.R.2 – 449-452)

In January of 1971 another resolution was issued which stated that there was no alternative to the neighborhood school concept. (Defendant's Exhibit BU) Again, the purpose of this resolution was to generate support both for a bond issue and for a levy to be presented in the November, 1971 election. (T.R.2 – 454-456)

Caught between the political equivalent of Scylla and Charybdis the Board continued to wrestle with the issue of racial imbalance. In December of 1970 the Board held a public hearing on this question. (T.R.1 – 2066) In

January and March of 1971 the Board called upon the state Department of Education for assistance. (T.R.1 – 2069) On April 29, 1971 the Board established a citizens committee known as the Committee of 75. (Plaintiffs' Exhibit 9)

Predictably, desegregation was a hotly contested issue in the school board election of November, 1971. One incumbent and two new members were elected to the three available seats. The election gave the neighborhood school forces a majority on the Board. (T.R.1 – 1130-1134; T.R.2 – 245)

Those election returns set in motion the following sequence of events. On December 2, 1971 the Committee of 75 made its report to the Board. Mr. Leo Lucas, President of the Board at that time, asked Dr. Carle and his staff to prepare resolutions which would implement the recommendations of the Committee of 75. (T.R.1 – 1135; 1142) On the following Monday morning, December 6, 1971, Dr. Carle and his staff met to consider a draft of the resolutions prepared by Dr. Carle. Mr. Louis Lucas, plaintiff's attorney in this case, also participated in this meeting at the request of Mr. Leo Lucas. (T.R.1 – 1151-1152) Dr. Carle apparently had also consulted Dr. Foster prior to this time, (T.R.1 – 1155) and later that evening a "social affair" was held at Mr. Leo Lucas' house at which Mr. Louis Lucas, Mr. Richard Austin, Mrs. Jane Lois Sterzer, Mrs. Miley Williamson, and other members of the NAACP were present. The only board members present were Mr. Lucas and Mrs. Sterzer. (T.R.1 – 1158-1159) Dr. Carle's testimony indicates that he had had other conversations with Mr. Louis Lucas concerning "the status of desegregation litigation around the country", and wished to have him review the resolutions so that they would be "legally in harmony with the status of desegrega-

tion as it existed in the country at that time". (T.R.1 — 1159-1160) The legal effect of the resolutions possibly being rescinded at a later time apparently was also discussed. (T.R.1 — 1160)

The three resolutions were submitted to the Board on December 8, 1971. (T.R.2 — 246-248; Plaintiff's Exhibits 7A, 7B, 7C) With the exception of Mr. Leo Lucas and Mrs. Jane Sterzer, no member was consulted about the resolutions prior to their submission to the Board. They were approved at the December 8th meeting and a motion for reconsideration was immediately raised. (T.R.1 — 1174) The Court notes that this is the same Board which two years before pledged "no forced busing" during its term, and less than one year before had seen no alternative to neighborhood schools. (T.R.1 — 1120-1121; 1124-1125)

Almost immediately after the resolutions were passed, Dr. Carle contacted Dr. Gordon Foster to develop a plan for implementation of the resolutions. Dr. Foster came to Dayton on December 10th and a plan was prepared by the end of December. (T.R.1 — 1169) In the meantime the Board met on December 16th and December 30th in an attempt to resolve the motion for reconsideration of the resolutions. (T.R.1 — 1165)

On January 3, 1972, hours before the first meeting of the newly-constituted Board, Dr. Carle met with the news media and announced that Dr. Foster's plan, which would involve the potential transportation of in excess of 22,000 students, had been adopted and would be implemented. (T.R.1 — 1177; 1175) Later that day the Board rescinded the resolutions of December 8th.

The Court does not believe that violations of the United States Constitution can be manufactured by political or legal maneuvering. Surely the gravity of school desegrega-

tion cannot turn on such intrigue. The Court finds that while the Board of Education accepted a moral obligation to attempt to relieve racial imbalance in the schools, it was not under a constitutional duty to reorganize the entire structure of the school system so that "no building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole". (Plaintiff's Exhibit 7C) Since the Court finds that the Board was not under a constitutional duty to take its initial action, "the rescission of the initial action in and of itself cannot be a constitutional violation." *Dayton Board of Education* v. *Brinkman*, Slip Opinion at page 6, *quoting Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974).

V

EVENTS OCCURRING AFTER 1976

In the most recent hearing on this case plaintiff cited three additional indicia of alleged segregative intent on the part of the Board of Education.

The first involves a suspension and expulsion of students occurring since this Court's Order of March 23, 1976. Plaintiffs have presented evidence which indicates that for the school year 1976-77, 1,910 white students were suspended or expelled while 3,499 black students were suspended or expelled. (T.R.2 — 339) No evidence was presented to indicate that black students were being discriminated against in the enforcement of school rules or that disproportionate numbers of black students were being suspended or expelled from formerly all-white schools.

Second, plaintiffs assert that there are insufficient numbers of blacks in the central office of the school administration. The testimony of Mr. Jerry Steck indicates to the contrary, since the proportion of blacks, exclusive of cleri-

cal people, has gone from 23.7% in 1973 to 40% in 1976. (T.R.2 – 563)

Finally, plaintiffs have raised a question concerning the administration of the pairing plan for high schools. That there has been a misunderstanding regarding this Court's Order of March 23, 1976 is clear; what is not clear nor proved is that such Order was deliberately misunderstood. There is no evidence to indicate that the racial distribution in the high schools violates this Court's Order. Accordingly, plaintiffs have not sustained their burden of proof as to these three allegations.

VI

CONCLUSION

A. The Order of February 7, 1973 Revisited

In the review of this case the Court has re-examined with care its previous findings and the evidence supporting them.

The events of the ensuing five years and the evidence presented in November of 1977 have not materially altered the validity of those findings: There are many racially imbalanced schools in the Dayton school system; acts of intentional segregation by the Dayton Board of Education ended over twenty years ago; the Dayton Board of Education created optional attendance zones that had a potential segregative effect; the Dayton Board of Education rescinded resolutions that would have corrected racial imbalance.

To the foregoing plaintiffs have added little. Evidence of segregative intent and incremental segregative effect has not been supplied. Accordingly, the Court must find that plaintiffs have failed to meet their burden of proof as now imposed by the Supreme Court of the United States.

That this conclusion differs from the one reached in 1973 is less a function of change in view and more a function of change in standard.

B. **Recommendation:**

Although this Court must now decline to impose a legal duty upon the Board of Education in the absence of a constitutional violation, it does likewise decline to relieve the Board of Education of its moral obligation accepted in 1967 to reduce the racial imbalance in the Dayton schools. The means of accomplishing this are at hand. The Board may continue with paired schools, it may provide for transportation of students, or it may institute its already existing plan for magnet schools.

There is now a clear choice available to both sides: This decision can be either a beginning or an ending. If a decade of community controversy and five years of expensive, time-consuming, and devisive litigation are not enough, further excursions through the federal court system are available. Litigation, however prolonged, is not an end in itself. It is intended to settle disputes not perpetuate them. This Court's opinion in February, 1973 ended with these words: "We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education for all children entrusted to its care without distinction or bias or partiality.".

If this Court can do no more than to remind the parties of their obligation, it should do no less than to urge an alternate disposition of this dispute.

CONCLUSIONS OF LAW

A. This Court has jurisdiction over this matter under 28 U.S.C. § 1343.

B. Acts of intentional segregation which ended in excess of twenty years ago are not constitutional violations in the absence of a showing of an incremental segregative effect thereof.

C. A policy of establishing and maintaining neighborhood schools is not in and of itself a constitutional violation.

D. Unless a Board of Education is under a constitutional duty to take certain action, a rescission of such action is not in and of itself a violation of plaintiffs constitutional rights.

E. Racial imbalance in a school system is not in and of itself a constitutional violation.

F. There is a burden upon plaintiffs to establish by a preponderance of evidence both a segregative intent and an incremental segregative effect in order to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs have failed to meet this burden of proof as to each allegation discussed in this Order. In view of the foregoing, the complaint herein is hereby DISMISSED. Each side shall bear its own costs.

LET JUDGEMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

P. OPINION OF COURT OF APPEALS DATED JULY 27, 1978

(Filed July 27, 1978)

No. 78-3060

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARK BRINKMAN, et al.,
Plaintiffs-Appellants,
v.
JOHN J. GILLIGAN, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge, LIVELY, Circuit Judge, and PECK, Senior Circuit Judge.

PHILLIPS, Chief Judge.

For the fourth time this court is called upon to review the protracted proceedings of this action brought by plaintiffs[1] to obtain relief from alleged unconstitutional segregation of the Dayton public schools resulting from actions by defendants.[2] Reference is made to the previous decisions of this

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[1] Parents of children attending schools operated by the defendant Board of Education (hereinafter Board) filed this action on April 17, 1972 alleging that defendants were responsible for operating a racially segregated school system in violation of the fourteenth amendment and Federal civil rights statutes, 42 U.S.C. §§ 1981, 1983-88, 2000d.

[2] Defendants included the Dayton Board of Education, its superintendent and individual members, and the governor, attorney general, State Board of Education, and superintendent of public instruction of the State of Ohio. Appellants have not sought any relief against the State defendants on the present appeal. "Defendants," as used in this opinion, refers to the local defendants.

court for a detailed recitation of facts and issues. *See Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (*Brinkman III*), *vacated and remanded sub nom., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir. 1975) (*Brinkman II*); *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*).

In its initial opinion filed February 7, 1973, the district court found that racially imbalanced schools, optional attendance zones, and the rescission by the Dayton Board of Education (hereinafter Board) of three resolutions calling for racial and economic balance in each public school were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In *Brinkman I*, *supra*, 503 F.2d 684, this court affirmed the holding of the district court that the Dayton public schools were unlawfully segregated by race and also reviewed four school practices[3] which allegedly maintained and expanded the segregated school system. This court determined that at that time it was unnecessary to consider whether these four practices should be included as part of the constitutional violation in view of the conclusion that the remedy ordered by the district court was inadequate "considering the scope of the cumulative violations." *Id.* at 704.

Following remand, this court again rejected the desegregation plan adopted by the district court on the grounds that the plan failed to eliminate the "basic pattern of one-race schools" and the "continuing effects of past segregation" throughout the Dayton school system. *Brinkman II*, *supra*, 518 F.2d at 857. We again remanded the case to the district court with the following instructions:

On remand we direct that the court adopt a systemwide

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3 These practices are in the areas of faculty and staff assignment; school closing and site selection; grade structure and reorganization; and pupil transfers and transportation. The district court did not include any of these practices within its finding of a cumulative constitutional violation.

> plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. *Id.* at 857.

After evidentiary hearings and the appointment of a master, the district court ordered the implementation of a systemwide desegregation plan for the 1976-77 school year subject to flexible guidelines.[4]

In *Brinkman III, supra,* 539 F.2d 1084, this court approved the systemwide plan which thus became operative for the 1976-77 school year. Subsequently, the Supreme Court vacated the judgment[5] of this court and ordered that the case be remanded to the district court for further proceedings. *Dayton Board of Education* v. *Brinkman, supra,* 433 U.S. 406 (1977). The Supreme Court directed that the district court:

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[4] The plan required that the racial distribution of each school be brought within 15 percent of the black-white population ratio of Dayton which was 48 percent black and 52 percent white. In its order of December 29, 1975 the district court stated:

> In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.
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> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
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> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

JA-I at 55. [Citations to the record are to the joint appendix (JA) and the volume of the appendix (*e.g.*, -I) unless otherwise noted].

[5] The Supreme Court, however, directed that the plan approved by this court in *Brinkman III* should remain in effect for the 1977-78 school year "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion."

> first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff.
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> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. (citations omitted). 433 U.S. at 420.

On remand, the district court conducted evidentiary hearings November 1-4, 1977, and in its decision issued December 15, 1977, held that:

> [T]here is a burden upon plaintiffs to establish by a preponderance of evidence *both* a *segregative intent and an incremental segregative effect in order to establish a violation* of the Equal Protection Clause of the Fourteenth Amendment. (emphasis added) JA-I at 104.

Pursuant to this misunderstanding[6] of the Supreme Court's mandate, the district court individually examined each alleged constitutional violation both for segregative intent and incremental segregative effect. The district court concluded that plaintiffs had failed to meet this burden of proving a constitutional violation and dismissed the complaint. Following the filing of this appeal, this court on January 16, 1978 ordered defendants "to cause said system-wide desegregation plan to remain in effect pending appeal, or until further order of this court."

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[6] *See* note 36, *infra*, and accompanying text.

Appellants and the United States as amicus curiae (hereinafter collectively referred to as appellants) contend that various findings of fact and conclusions of law of the district court are both clearly erroneous and are based upon incorrect legal standards. They urge this court to address the legal and factual issues previously reserved in *Brinkman I, supra,* 503 F. 2d 684 and to find that the alleged constitutional violations have a systemwide impact which requires reinstatement of the systemwide remedy approved by this court in *Brinkman III, supra,* 539 F.2d 1084. Appellants raise four principal assignment of error. First, they contend that the district court misinterpreted the legal relevance of the Board's conduct prior to the time of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) (*Brown I*), and that the district court's finding that "[a]t no time . . . did defendant maintain a dual system of education"[7] was either based upon the application of incorrect legal standards or was a clearly erroneous factual finding. Appellants argue that as a result of these errors, the district court ignored the principle that if the Board was operating a dual school system at the time of *Brown I,* or at any time thereafter, it subsequently had an affirmative duty to eliminate the systemwide effects of its prior acts of segregation. Second, appellants argue that the district court erred in applying improper legal standards for determining segregative intent. They assert that the district court both failed to utilize the established burden-shifting principles in determining whether various practices were the product of segregative intent and disregarded the established legal standards for determining segregative intent. Third, appellants contend that the district court erred in failing to apply the presumption and burden-shifting principles concerning causation and the impact of unconstitutional conduct. Finally, appellants assert that the district court misallocated the burden of proof on the issue of the incremental segregative effect of the alleged constitu-

[7] Order of March 10, 1975, JA-I at 38.

tional violations. They argue that the district court erred in holding that plaintiffs were required to demonstrate both the existence of racial discrimination and the specific effects of that discrimination.

Upon a review of the entire record, the arguments of counsel, and upon consideration of the legal and factual issues previously reserved by this court in *Brinkman I, supra*, 503 F.2d 684, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra*, 539 F.2d 1084, should be reinstated. The record demonstrates conclusively that at the time of *Brown I*, defendants intentionally operated a dual school system and that subsequently, defendants never fulfilled their affirmative duty to eliminate the systemwide effects of their prior acts of segregation. To the extent that any findings of fact and conclusions of law of the district court are to the contrary, they are either clearly erroneous, Rule 52 FED. R. CIV. P., or are incorrect as a matter of law.

I. Pre-Brown violations

This court previously reviewed defendants' purported intentional segregative acts alleged to have occurred prior to 1954 and concluded that "the Dayton school system has been and is guilty of de jure segregation practices"[8] which constituted a "basically dual system,"[9] at the time of *Brown I*. Although we believe this finding to have been implicit in the previous decisions of this court, we now expressly hold that at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary[10] is clearly erroneous,

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8 *Brinkman II, supra*, 518 F.2d at 854.

9 *Brinkman I, supra*, 503 F.2d at 697.

10 *See* note 7, *supra* and accompanying text.

Rule 52, FED. R. CIV. P., and is based upon both a failure to attribute the proper legal significance to the evidence of pre-*Brown I* violations and upon various errors of law.

Our review of the record reveals that as of the 1951-52 school year – the last period prior to *Brown I* for which racial statistics were compiled – the Dayton school board pursued an overt policy of faculty segregation and, through a variety of measures, endeavored to segregate pupils on a racial basis. Defendants admitted that prior to 1951 the board forbade the assignment of black teachers to white or mixed classrooms "pursuant to an explicit segregation policy."[11] The district

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[11] *Brinkman I, supra*, 503 F.2d at 697. Defendants admitted that:

> 9. Not until 1951 did the Board of Education adopt a policy of assigning any black citizen to teach in white or mixed classrooms.

See Answers to Plaintiffs' Request for Admissions filed by defendants Dayton Board of Education, Josephine Groff, James D. Hart and William E. Goodwin (hereinafter Board admissions), admission 9, JA-I at 128; Answers to Plaintiffs' Requests for Admissions filed by defendants Dr. Wayne M. Carle, Superintendent of Schools, and Jane Sterzer (hereinafter Carle admissions), admission 9, JA-I at 135. *See generally* Plaintiffs' Exhibits (hereinafter PX) 100 A-E, JA-V at 502-06; PX 29, JA-V at 484-85.

In 1951-52, the Board substituted the following new but equally unacceptable policy:

> The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.
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> The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.
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> PX 21, JA-V at 481.

Cf. Cooper v. *Aaron*, 358 U.S. 1 (1958) (community attitudes no justification for segregation).

Superintendent Carle admitted that:

> 11. About 1951 the Board announced a policy, again for the first time, of introducing white teachers in schools having Negro population; on November 30, 1954, only 8 full or part-time white teachers, or 0.6% of the 1409 white teachers were in these situations. Defendant French at that time as Superintendent attributed such lack of success to the reluctance of white teachers to teach in the black schools; moreover, it was then the District's policy and so remained until the late 1960s, not to assign or reassign white teachers to black schools against their will. Even into the late 1960's white teachers often were

court found that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative."[12] A review of the record establishes to our satisfaction that the assignment of faculty was purposefully segregative;[13] but contrary to the finding of the district court, we found in *Brinkman I, supra,* 503 F.2d at 697-98 that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." To the extent that the finding of the district court is contrary to the conclusion of this court, it is clearly erroneous.

The undisputed evidence reflects that during the 1951-52 school year, the faculty at the four 100 percent black schools (Garfield, Dunbar, Willard, and Wogamon) was 100 percent black whereas with one exception,[14] the faculty at all other schools in the system was 100 percent white.[15] Defendants further admitted that as of 1954, 91.4 percent of the 162 non-travelling black teachers were assigned to schools with all black student populations.[16] Thus, at the time of *Brown I,* it was possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.

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not hired or refused employment or were assigned to predominately white schools in the District because of the availability of teacher openings in the suburban, all white schools, the personal beliefs and behavior of white applicants, and the policies and practices of the District.

Carle admission 11, JA-I at 135. The Board also admitted the above statement in substantial part. *See* Board admission 11, JA-I at 128-29.

12 Opinion of December 15, 1977, JA-I at 73.

13 *See, e.g.,* testimony of Dr. Wayne Carle, quoted in *Brinkman I, supra,* 503 F.2d at 699.

14 The sole exception apparent from the record was one black teacher who was assigned during the 1951-52 school year to teach black students at a school with a 67.6 percent black enrollment — the highest black enrollment less than 100 percent. *See* PX 3, JA-I at 139; PX 100E, JA-V at 506; PX 130B, JA-V at 507.

15 *See* PX 100E, JA-V at 506; PX 130B, JA-V at 507.

16 *See* Board admission 10, JA-I at 128; Carle admission 10, JA-I at 135.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), the Supreme Court stated:

> Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.[17]

The district court, however, failed to attribute the proper legal significance to the deliberate policy of faculty segregation adopted and applied by defendants.

The purposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices. The record reflects that in the 1951-52 school year, 77.6 percent of all students attended schools in which one race accounted for 90 percent or more of the students and 54.3 percent of the black students were assigned to the four schools that were 100 percent black.[18] We recognize that racial imbalance in student attendance patterns is not in itself a constitutional violation. *See Dayton Board of Education* v. *Brinkman, supra,* 433 U.S. at 413, 417 (1977); *Washington* v. *Davis,* 426 U.S. 229, 240 (1976); *Keyes* v. *School District No. 1,* 413 U.S. 189, 198 (1973). However, such racial imbalance does assume increased significance in the historical context of repeated intentional segregative acts by the school board directed at the four schools which were 100 percent black in 1954. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). Defendants contend that such evidence of pre-*Brown I* constitutional violations is irrelevant, or, alternatively,

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[17] *See United States* v. *Board of School Commissioners of Indianapolis, Indiana,* 474 F.2d 81, 87 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973).

[18] *See* PX 2B, JA-V at 312; *Brinkman I, supra,* 503 F.2d at 694.

that the effects of any past intentional segregative actions have become attenuated in the ensuing years. These contentions are wholly without merit. First, with respect to evidence of pre-*Brown I* constitutional violations, the Supreme Court noted in *Keyes, supra*, 413 U.S. at 210-11 that:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'

Second, with respect to the question of attenuation, defendants have failed to meet their burden of proving that the effects of any past intentional actions have become attenuated. *Keyes, supra*, 413 U.S. at 211.

Garfield school was the site of intra-school racial segregation which began in 1912 and was ruled illegal by the Supreme Court of Ohio in *Board of Education of School District of City of Dayton* v. *State ex rel. Reese*, 114 Ohio St. 188, 151 N.E. 39 (1926).[19] Defendant Wayne Carle, Superintendent of the Dayton schools, admitted, however, that racial segregation continued virtually unabated at Garfield after the *Reese* decision,[20] and that during the 1930s, white students who lived in the Garfield attendance area were permitted to transfer to predominantly white schools.[21] As a result of the

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[19] Defendants admitted that:

> 1. In 1918 defendant Dayton Board assigned 4 black teachers to a frame two-story house which was converted to a school building for black students and which was located immediately behind the Garfield school, a brick building. All white children and all white teachers were assigned to the brick building; only black teachers and black students were assigned to the frame structure.

See Board admission 1, JA-I at 125; Carle admission 1, JA-I at 134.

[20] *See* Carle admission 2(b), (c), JA-I at 134.

[21] *See* Carle admission 2(d), JA-I at 134.

actions of the Board, Garfield became all black in student enrollment in 1936 and, at approximately the same time, an all black faculty was assigned to the school.[22] Thereafter, Garfield was maintained as an all black school.

The district court found that Dunbar high school intentionally had been established as a district-wide school for only black students with an all black faculty and a black principal.[23] The record reveals that black students throughout Dayton automatically were assigned or otherwise were induced to attend Dunbar and that, in many instances, black students crossed attendance boundaries to do so.[24] Defendants further admitted that until approximately 1947, Dunbar was not allowed to participate in the city athletic conference and consequently, Dunbar athletic teams played other all black high schools from other cities.[25] Defendants also admitted that until several months after the decision in *Brown I*, black children were transported by bus from an orphanage past white schools to Dunbar.[26] The district court found that this practice was "arguably . . . a purposeful segregative act."[27] To the extent that this finding implies that this practice was *not* purposefully segregative, it is clearly erroneous.

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[22] *See* PX 150I, JA-V at 524; JA-II 260-61, 329-31.

[23] Opinion of February 7, 1973, JA-I at 3; Opinion of December 15, 1977, JA-I at 88. *See* Board admission 7(a), JA-I at 127; Carle admission 7(a), JA-I at 135.

[24] *See* JA-II, 268, 478-79; JA-III, 547-49, 632-33.

[25] *See* Board admission 7(f), JA-I at 128; Carle admission 7(f), JA-I at 135.

[26] *See* Carle admission 7(d), JA-I at 125; Board admissions 7(d) 31A, JA-I at 127, 131. The Board has adopted conflicting positions with respect to the termination of this practice. In admission 7(d), *supra*, the Board states that "this policy terminated as of 1950." In admission 31A, however, the Board states that "this practice stopped in 1954." Other evidence in the record establishes without question that this practice was not discontinued until September 1954. *See* PX 28, JA-V at 483.

[27] Opinion of December 15, 1977, JA-I at 78.

Defendants assert that since attendance at Dunbar was voluntary, there is no justification for finding that the establishment and operation of the school constituted intentionally segregative acts. This argument misses the point entirely. First, until at least as late as 1952, the option of attending Dunbar was available only to blacks since, pursuant to school board policy, whites could not be taught by Dunbar's all black faculty. Second, the record reflects that many black children were automatically assigned or otherwise encouraged to attend Dunbar regardless of choice.[28] Finally, the record indicates that the "choice" of attending Dunbar, in many instances, may have been merely a less drastic alternative than attending other schools which practiced intra-school segregation and discrimination.[29]

In this manner and through these procedures, the Board intentionally operated Dunbar as an all black school until it was closed as a high school in 1962. The operation of Dunbar clearly had the effect of keeping other high schools throughout the district predominantly white during those years.[30]

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[28] *See* JA-II at 479; JA-III at 547-49.

[29] *See* JA-II at 253, 284; testimony of Dr. Wayne Carle, Joint Appendix vol. 4, at 1518a-19a filed in *Brinkman I, supra.* The relevant colloquy between counsel and Dr. Carle is as follows:

> Q. Dr. Carle, I think you perhaps misunderstood my question. I am talking about Dunbar in its earliest stage. There was testimony from black witnesses that they 'chose Dunbar,' and I asked you in the context of the pupil assignment practices whether or not such a choice is a free choice as if in the case of Roosevelt students were subject to discriminatory practices [sic].
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> A. I wouldn't rate it as a free choice since social pressures are so persuasive and subtle and young people so impressionable and peer influence so all-encompassing. That choice would be almost absent as I would understand it.

[30] The Supreme Court in *Keyes* v. *School District No. 1, supra,* 413 U.S. at 201, (1972) stated that:

> A practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.

See JA-III at 634.

The record reflects that during the early 1940s, the student body of Wogamon elementary school became predominantly black in part because the Board permitted white students to transfer to predominantly white schools.[31] In June 1945, Wogamon closed with an all white staff and reopened in September 1945 with an all black staff and a black principal.[32] Wogamon subsequently became and presently is an all black school. Similarly, the record reflects that in the 1930s the Willard school became predominantly black due to increased black enrollment and the transfer of white students. The record indicates that in 1934, Willard school had a 50 percent black student body and a faculty which was 38 percent black. The following year, however, the student body became approximately 95 percent black with an all black faculty.[33] By 1947, Willard was 100 percent black in student enrollment and subsequently it has remained a one race school.

Additional evidence also establishes that prior to 1954, the Board pursued a policy of racial separation. Defendants admit that until approximately 1950, "separate facilities, including separate swimming pools and locker room facilities were maintained at Roosevelt [school] for black and white students."[34] In addition, during the late 1940s and early 1950s, defendants operated one race classrooms in officially one race housing projects which the district court found were "strictly segregated according to race."[35]

Upon a review of this evidence, the relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system in violation of

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[31] *See* Carle admission 4(a), JA-I at 134.

[32] *See* PX 150I, JA-V at 524.

[33] *Id.*

[34] *See* Board admission 7A(a), JA-I at 128; Carle admission 7A(a), JA-I at 135.

[35] Opinion of December 15, 1977, JA-I at 67. *See* PX 143B, JA-V at 510-12; PX 161B, JA-V at 540; JA-I at 194-206.

the Equal Protection Clause of the fourteenth amendment. In *Keyes* v. *School District No. 1, supra,* 413 U.S. 189, the Supreme Court held that in order to establish a violation of the fourteenth amendment in school desegregation cases where no statutory dual system has ever existed, plaintiffs must demonstrate purposeful state imposed segregation in a substantial portion of the school system.[36]

In *Brinkman II, supra,* 518 F.2d at 854, this court held that defendants had been guilty of *de jure* segregative practices. There is ample evidence to support the finding that at the time of *Brown I* defendants were carrying out "a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities."[37] As noted previously, at the time of *Brown I,* approximately 54.3 percent of the black pupils in the Dayton school system were assigned to four schools that had all black faculties and student bodies. In *Keyes, supra,* 413 U.S. 189, the finding that the Denver school board was guilty of intentional segregative acts with respect to schools attended by only 37.69 percent of Denver's black students was sufficient to constitute the entire school district a dual system. The finding of the district court that defendants never had operated a dual school system[38] is clearly erroneous and is based upon misconceptions of the applicable law.

The district court erred both in failing to accord the proper legal significance to the facts extant at the time of *Brown I* and in failing to apply the appropriate presumption and burden-shifting principles of law. The district court failed to attribute the proper legal significance to the deliberate

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36 Contrary to this clear standard, the district court held that plaintiffs must establish both segregative intent and incremental segregative effect in order to establish a constitutional violation. *See* note 6, *supra,* and accompanying text.

37 *Keyes* v. *School District No. 1, supra,* 413 U.S. at 201.

38 *See* note 7, *supra,* and accompanying text.

policy of faculty segregation which, at the time of *Brown I*, made it possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.[39] The district court also failed to attribute the proper legal significance to the evidence that at the time of *Brown I*, Garfield, Willard, Wogamon and Dunbar schools were deliberately segregated or racially imbalanced due to the actions of defendants. These facts were sufficient to constitute a prima facie violation of the fourteenth amendment under the rule of *Swann, supra*, 402 U.S. at 18[40] and to shift the burden of proof to defendants. The district court also misconstrued the proper approach for determining discriminatory purpose and intent which may be inferred from objective circumstantial evidence[41] and through the use of reasonable presumptions.[42] This court stated in *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) that:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. (citations omitted).

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[39] *See* notes 16-17, *supra*, and accompanying text.

[40] *See* note 17, *supra*, and accompanying text.

[41] *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977); *Washington* v. *Davis*, 426 U.S. 229, 241-42, 253 (1976).

[42] *See Keyes* v. *School District No. 1*, 413 U.S. at 201-13; *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1046-47 (6th Cir.), *cert. denied* 434 U.S. 997 (1977); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

Accord, Arthur v. *Nyquist*, 573 F.2d 134 (2d Cir. 1978); *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1047-48 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bronson* v. *Board of Education*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Hart* v. *Community School Board of Education*, 512 F.2d 37 (2d Cir. 1975). The evidence clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school system. The district court, moreover, failed to recognize the teaching of *Keyes*, *supra*, 413 U.S. at 208, that:

> [A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.

The district court erred in failing to shift the burden of proof to defendants.

A review of the entire record indicates that defendants have not established that the character of the school system extant in 1954 was the result of racially neutral acts. We emphasize that defendants' intentional segregative practices cannot be

confined in one distinct area.[43] To the contrary, defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system. There is no doubt that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra*, 413 U.S. at 203, and that the effect of the operation of this dual school system was to maintain other schools in the district as predominantly white.[44]

II. Post-Brown violations

The district court's error in failing to find that defendants were operating a dual school system at the time of *Brown I* resulted also in its failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination. In *Brinkman I, supra*, 503 F.2d at 704, this court stated:

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities 'automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.' *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693.

Thus, for 24 years defendants have been under a constitutional duty to desegregate the Dayton public schools. *See Penick* v. *Columbus Board of Education*, — F.2d —, Nos.

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[43] The Dayton school system is not divided into "separate, identifiable and unrelated units." *Keyes* v. *School District No. 1*, 413 U.S. at 203 (1972). *Compare Keyes*, in which defendants were found guilty of following a deliberate segregation policy at schools attended by 37.69 percent of Denver's black student population with the instant case in which defendants' purposeful segregative acts affected at least 54.3 percent of Dayton's black student population.

[44] *See* note 30, *supra*.

77-3365-66, 3490-91, 3553 (6th Cir. July 14, 1978) slip opinion at 21. The district court specifically found that "with one exception . . . no attempt was made to alter the racial characteristics of any of the schools" and that the one exception "was in fact a failure."[45] The district court, however, neither charged defendants with the affirmative duty to eliminate the effects of their discrimination nor did it place upon the Board the burden of proving that it had done so. The evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case. In addition, the record discloses post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I.*

A. Faculty and student assignment practices

In *Brinkman I, supra,* 503 F.2d at 697-98, this court found that defendants "effectively continued in practice the racial assignment of faculty through the 1970-71 school year."[46] This finding is supported by substantial evidence on the record.[47] The finding of the district court to the contrary[48] is clearly erroneous. Rule 52, FED. R. CIV. P. The district court also erred in failing to attribute the correct legal significance to the persistently discriminatory faculty assignment practices as a component of the Board's perpetuation of the dual system extant at the time of *Brown I.* Moreover, the district court

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45 Opinion of December 15, 1977, JA-I at 70, 76.

46 For a detailed discussion of the Board's post-*Brown I* faculty assignment practices, see *Brinkman I, supra,* 503 F.2d at 697-700.

47 *See, e.g.,* JA-II 418; JA-III 644-45; PX 4, JA-V 316-17; PX 5A, JA-V 319; PX 5D, JA-V 320; PX 130C, JA-V 508; PX 130D, JA-V 509; board admissions 8, 12-18, JA-I 128-29; Carle admissions 8, 12-18, JA-I 135.

48 Opinion of December 15, 1977, JA-I at 73.

again failed to recognize this proof of continuing purposeful segregative acts as an element of plaintiffs' prima facie case.[49] The effect of having established this prima facie case should have been to shift to the Board the burden of rebutting the presumption that other practices likewise were undertaken with segregative intent.

For example, in 1962 the Willard and Garfield schools, previously operated for blacks only, were closed and the all black Dunbar high school building was converted into McFarlane elementary school. Most of the children from the Willard and Garfield attendance areas simply were assigned to the McFarlane school which opened with an all black student body and an all black faculty. Some children from the Willard and Garfield areas also were assigned to the all black Miami Chapel and Irving elementary schools. Simultaneously, the new Dunbar high school opened with a virtually all black student body and faculty. Defendants should have been required to rebut the reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual school system extant at the time of *Brown I*.

This error was compounded by imposing upon plaintiffs the additional burden of proving specific causal relationships between the widespread faculty segregation practices and the substantial student segregation existing at the time of trial.

Nowhere in the record do defendants convincingly demonstrate that the systemwide student racial imbalance characteristic of the Dayton public school system since at least the time of *Brown I* likewise was not the product of segregative acts. *Keyes, supra,* 413 U.S. at 210. "[I]t is not enough . . .

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[49] *See* note 17, *supra,* and accompanying text. Even at the time this action was instituted, it was possible to identify a "black school" in the Dayton school system without reference to the racial composition of the students.

that school authorities rely upon some allegedly logical, racially netural explanation." *Id.* Defendants here have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Id.* The Court in *Keyes* noted further that:

> [I]f respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.
>
> *Id.* at 211.

Defendants have failed to establish that their prior segregative acts did not create or contribute to the current segregated condition of the Dayton schools.

In *Brinkman I, supra*, 503 F.2d at 694-95, this court stated that:

> Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 per cent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. 'Virtual one race schools' refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.
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> In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils 42.7

per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

Every school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

Nowhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts. As the Supreme Court noted in *Swann, supra*, 402 U.S. at 26, there is a presumption against schools that are "substantially disproportionate in their racial composition" in school systems with a history of segregation, as in Dayton.[50]

The conclusion that the maintenance of persistent racial imbalance in the Dayton schools was not merely adventitious is bolstered by defendants' use of optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause.[51] In 1973, the district court determined that some optional attendance zones had been created intentionally for racially segregative purposes and that the zones had demonstrable racial effects.[52] These findings of fact

[50] In *Keyes, supra*, 413 U.S. at 211, the Supreme Court explicated the reasons supporting this presumption as follows:

> [A] connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

[51] *See Brinkman I, supra*, 503 F.2d at 695-96.

[52] Opinion of February 7, 1973, JA-I at 5-6.

were affirmed by this court in *Brinkman I, supra,* 503 F.2d at 696, and are supported by substantial evidence. Nevertheless, following remand from the Supreme Court, the district court repudiated these findings, concluding that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation"[53] and that the zones had no segregative effect.[54] In reaching these clearly erroneous findings of fact, the district court once again failed to recognize the optional zones as a perpetuation, rather than an elimination, of the existing dual system; failed to afford plaintiffs the burden-shifting benefits of their prima facie case; and failed to evaluate the evidence in light of tests for segregative intent enunciated by the Supreme Court, this court and other circuits in decisions cited in this opinion.

B. School construction and site selection

The evidence of record establishes that of 24 new schools constructed between 1950 and the time this action was instituted, 22 opened 90 percent or more black or white.[55] During the same period, 78 of the 86 additions of classroom space for which racial compositions are known were made to schools 90 percent or more one race.[56] Coupled with these practices were some instances of the coordinate racial assignment of professional staffs to these schools and additions on the basis of the racial composition of the pupils served by the schools.[57] This court noted in *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1056 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977) that "[s]chool contruction which promotes

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53 Opinion of December 15, 1977, JA-I at 75.

54 *See generally* JA-I at 81-91.

55 *See* PX 4, JA-V 316-317; JA-III 562-63.

56 JA-III at 649-50.

57 *See* PX 4, JA-V 316-17; JA-III 644, 794-96; JA-IV 927-28.

racial imbalance or isolation is an important indicium of a *de jure* segregated school system." *See Oliver* v. *Michigan State Board of Education, supra,* 508 F.2d at 184. *See generally United States* v. *School District of Omaha,* 521 F.2d 530, 543-46 (8th Cir. 1975), *cert. denied,* 423 U.S. 946 (1976). In the face of this, the district court failed to infer purposeful segregation from this pattern of school construction which unmistakeably increased or maintained racial isolation.[58] Again the district court failed to recognize that plaintiffs had established a prima facie constitutional violation which shifted the burden of proof to defendants. Instead, the district court concluded that plaintiffs had failed to show that defendants' site selection and construction practices "had a segregative purpose or . . . had an incremental segregative effect upon pupils, teachers, or staff."[59] These findings of fact are infected by legal error and are clearly erroneous. As detailed previously, the post-*Brown I* practices of racially motivated faculty assignments to new schools bespeaks a concomitant segregative intent in the location of new schools and additions. Nowhere in the record have defendants established that their school construction and site selection practices and the simultaneous racially motivated assignment of teachers were the product of racially neutral policies. Defendants have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes supra,* 413 U.S. at 210.

The district court's conclusion that defendants' school construction and site selection practices had no segregative effect

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[58] We note that:

> While it is true that a court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregated patterns exist in fact. The inference is permissible, not mandatory. (emphasis in original).

Higgins v. *Board of Education,* 508 F.2d 779, 793 (6th Cir. 1974).

[59] JA-I at 97.

likewise is clearly erroneous. Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices. As noted previous, at the time of the initial hearings in this case, approximately 80 percent of all classrooms in the Dayton school system were virtually one race. On the basis of the evidence of record, the conclusion is inescapable that defendants' school construction and site selection practices were segregative in effect.

C. Grade structure and reorganization

Appellants' principal objection in this area is to the establishment in the 1971-72 school year of a middle school system which allegedly had a segregative effect. In a report issued in 1971, the Ohio Department of Education characterized the middle school system as the apparent addition of

> one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur.
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> PX 12, JA-V at 454.

The report further opined that:

> Of the five sets of schools currently involved in the process of conversion to feeder and middle schools, the following seems to be occurring:
>
> 1. two sets of schools will be totally black;
> 2. racial isolation will actually be increased in one set of schools; and
> 3. only in the Dayton View area, which was previously integrated, could conversion to middle schools

> possibly result in reduction of racial and economic isolation and insulation.
>
> *Id.*

Unrebutted testimony concluded that the effect of the middle school system was to increase or maintain segregation rather than to eradicate it in accordance with defendants' affirmative duty to disestablish the dual system.[60] The district court found that the middle schools had both "a segregative effect and an integrative effect."[61] Nevertheless, the district court concluded that plaintiffs had failed to establish segregative intent in the establishment of the middle schools. This finding is questionable in light of plaintiffs' convincing demonstration that the natural, probable, and foreseeable result of the establishment of the middle schools was an increase or perpetuation of segregation. The district court failed to recognize the middle school system as one of the areas in which defendants failed to disestablish Dayton's dual school system.

Upon consideration of the record, the conclusion is inescapable that, rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I*, defendants' racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton. Thus, defendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools, *Penick* v. *Columbus Board of Education*, *supra*, slip opinion at 21, and, in addition, have committed affirmative acts that have exacerbated the existing racial segregation. The remedy directed in this opinion is made neces-

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[60] *See* JA-III at 646.

[61] Opinion of December 15, 1977, JA-I at 77.

sary by: (1) the failure of defendants to disestablish the pre-1954 segregated school system; and (2) post-1954 acts of systemwide impact which have contributed affirmatively to the continuation of a segregated system.

III. Remedy

In *Dayton Board of Education* v. *Brinkman, supra,* 433 U.S. at 420, the Supreme Court stated that upon finding a constitutional violation:

> [T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much *incremental segregative effect,* these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes,* 413 U.S. at 213.
>
> (emphasis added).

Contrary to the conclusion of the district court,[62] we are convinced that the term "incremental segregative effect" used by the Supreme Court in the *Brinkman* decision, was not intended to change the standards for fashioning remedies in school desegregation cases. *Penick* v. *Columbus Board of Education, supra,* slip opinion at 12, 58; *NAACP* v. *Lansing Board of Education,* — F.2d —, (No. 76-2005 6th Cir., Feb. 8, 1978), *cert. denied,* — U.S. —, 46 U.S.L.W. 3787, (June 27, 1978). The purpose of the remedy is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations. The word "incremental"

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[62] *See* JA-IV at 909; opinion of December 15, 1977, JA-I at 103.

merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is "incremental" in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.

The district court committed two errors in its approach to this inquiry. First, it individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence. In *Keyes, supra,* 413 U.S. at 200, the Court stated:

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes 'an affirmative duty to effectuate a transition to a racially nondiscriminatory school system,' *Brown* v. *Board of Education,* 349 U. S. 294, 301 (1955) (*Brown II*), see also *Green* v. *County School Board,* 391 U. S. 430, 437-438 (1968), that is, to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15 (1971).

The district court's act by act approach is no more valid than the school by school approach rejected in *Keyes.* As this court noted in *Penick, supra,* slip opinion at 58:

> *Dayton* does not . . . require each of fifty segregative practices or episodes to be judged solely upon *its* sepa-

> rate impact on the system. The question posed concerns the total amount of segregation found – after each separate practice or episode had added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood.

Secondly, the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination. Where plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations. *See Keyes, supra*, 413 U.S. at 211 n. 17. Nowhere in the record have defendants rebutted this presumption. Since the district court failed to apply the proper legal standards, we independently consider the incremental segregative effect of defendants' most egregious practices. In so doing, we are mindful that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra*, 413 U.S. at 203. First, the dual school system extant at the time of *Brown I* embraced "a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities"[63] of the Dayton schools, and, thus, clearly had systemwide impact. *See Penick* v. *Columbus Board of Education, supra*, slip opinion at 59-60. Secondly, the post-1954 failure of defendants to desegregate the school system in contravention of their affirmative constitutional duty obviously had systemwide impact. *Id.* at 60-61. The impact of defendants' practices with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clear-

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[63] *See* note 37, *supra*, and accompanying text.

ly was systemwide in that the actions perpetuated and increased public school segregation in Dayton.

We hold further that each of defendants' policies and practices detailed in this opinion added an increment to the sum total of the constitutional violations.

Finding that the constitutional violations before the court have a systemwide impact, *Brinkman, supra,* 433 U.S. at 420, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, should be reinstated. This remedy is "tailored to undo the violations of plaintiffs' constitutional rights . . ." and is "designed to redress" the effect of the violations found. *NAACP* v. *Lansing Board of Education,* — F.2d —, *supra,* (No. 76-2005, 6th Cir. Feb. 8, 1978), *cert. denied,* — U.S. —, 46 U.S.L.W. 3787 (June 27, 1978). The decision of the district court is reversed. It is ordered that the desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, be and hereby is reinstated and shall remain in effect during the 1978-79 school year. Plaintiffs-appellants shall recover the costs of this appeal from the Dayton Board of Education. The case is remanded to the district court for further proceedings not inconsistent with this opinion.