SUPREME COURT, U.S.
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna
Brinkman, et al.,

(Additional Respondents Inside Cover)

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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by their Mother and Next Friend, Arva Montague;

Debbora Mitchell,
by her Father and Next Friend, John Mitchell;

Robbin J. Kent, Michael J. Kent and Leslie A. Kent,
by their Father and Next Friend Henry K. Kent;

Claudius R. Walker, Fredrica M. Walker and Bernice L. Walker, by their Father and Next Friend, C. R. Walker, Jr.;

Rubin Attila Jackson and Lahmarie Jackson,
by their Mother and Next Friend, Winona Jackson;

National Association for the Advancement of Colored People;

John J. Gilligan, Governor of the State of Ohio, etc.;

William J. Brown,
Attorney General of the State of Ohio;

Ohio State Board of Education

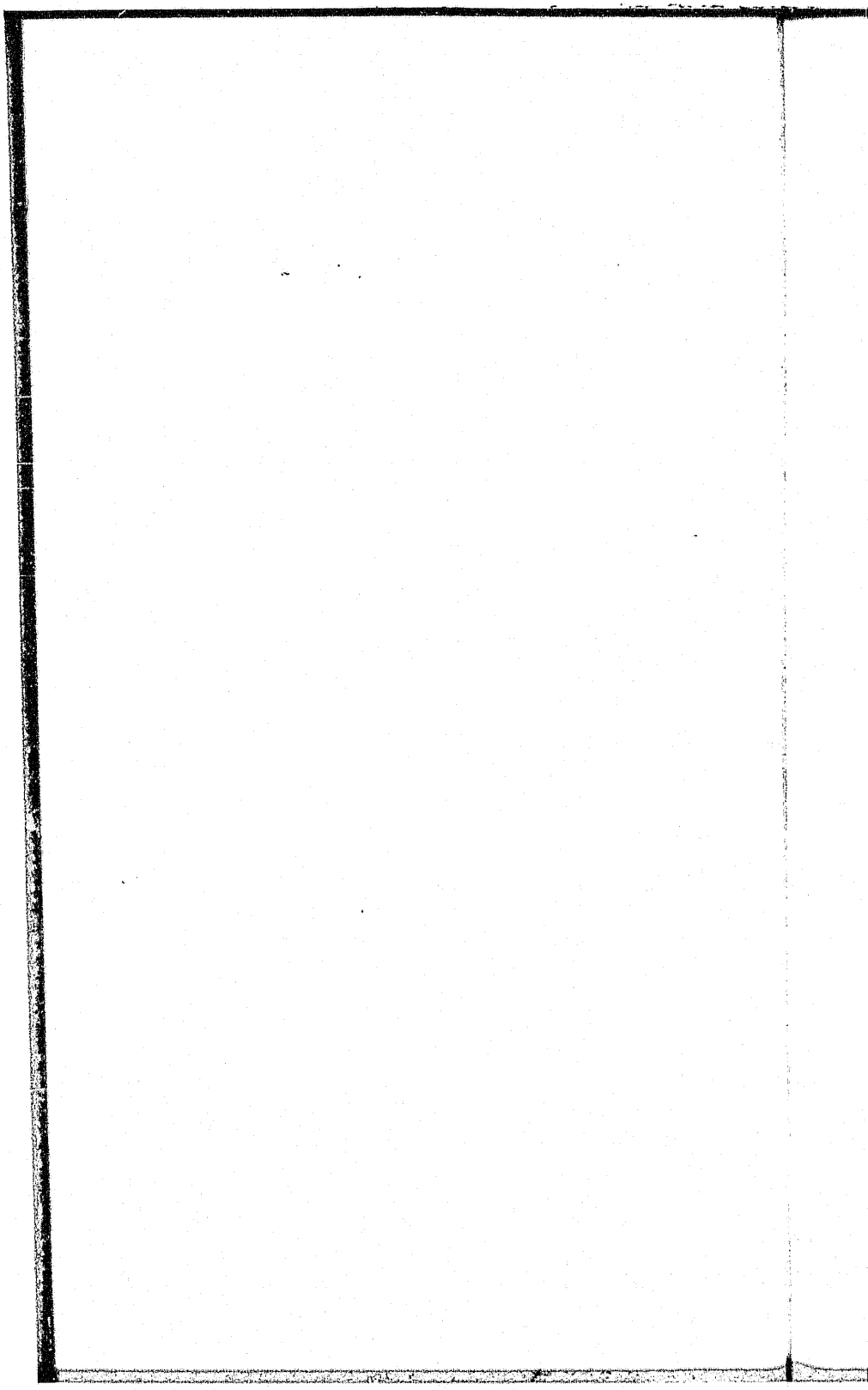
Martin W. Essex, Superintendent of Public Instruction,
Ohio Department of Education;

Terry Lawson;

Leo A. Lucas;

Jane Stenzer;

Wayne M. Carle,
Superintendent of Dayton School District.



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SUPREME COURT OF THE UNITED STATES

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PATTY BRINKMAN and
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Dayton Board of Education; an individual Board member, William E. Goodwin; and two former Board members, Josephine Groff and James D. Hart, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 27, 1978.

I. OPINIONS BELOW

The opinion of the Court of Appeals, entered on July 27, 1978 and not yet reported (*Dayton IV*), appears in the appendix to this petition (App. 189a) as does the unreported opinion of the District Court which was entered on December 15, 1977 (App. 142a).

The June 27, 1977 opinion of this Court remanding the action to the District Court is reported at 433 U.S. 406 (1977) (*Dayton*). The three previous opinions of the Sixth Circuit in *Brinkman* v. *Gilligan* are reported at 539 F.2d 1084 (1976) (*Dayton III*), *vacated and remanded sub nom., Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977); 518 F.2d 853 (1975) (*Dayton II*); and 503 F.2d 684 (1974) (*Dayton I*).

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

A. In A School Desegregation Case Is A Finding Of A Systemwide Violation Justified By The Application Of Judicially Created Presumptions Of Systemwide And Continuing Intent And Effect To Proof Of Isolated Segregative Practices That Had Been Eliminated From The School System Long Before Suit Was Filed?

B. Is The Effect Of Board Actions, Viewed Under A Natural And Foreseeable Result Test, Sufficient To Establish Segregative Intent In A School Desegregation Case?

C. Once Constitutional Violations Have Been Established In A School Desegregation Case, Is The Imposition Of A Systemwide Racial Balance Plan Justified In The Absence Of Proof That Such A Plan Reasonably Approximates The

Racial Distribution Of School Population That Would Have Occurred In The Absence Of Such Violations?

D. Is The Imposition Of Any Remedy In A School Desegregation Case Justified In The Absence Of Proof That Any Of The Plaintiffs Bringing The Action Had Been Injured Or That The Action Is Maintainable As A Class Action?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To the United States Constitution, Section 1:

". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 28:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

C. United States Code, Title 42:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

D. Ohio Revised Code, Chapter 33:

§ 3313.48 Free Education To Be Provided; Minimum School Year.

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will

be most convenient for the attendance of the largest number thereof.

V. STATEMENT OF THE CASE

The history of this litigation during the period from its inception on April 17, 1972 until the decision rendered by this Court on June 27, 1977 is set forth in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 97 S.Ct. 2766 (1977) (*Dayton*). On remand, pursuant to this Court's directive, the District Court conducted evidentiary hearings which commenced on November 1, 1977. Considering all of the evidence presented at the various trials and hearings of this action in the light of the principles established by this Court, the District Court concluded that the plaintiffs had failed to establish a right to relief. On December 15, 1977 it accordingly entered an order dismissing the plaintiff's complaint (App. 188a).

The District Court based its order on a detailed series of findings of fact and conclusions of law (App. 142-188a). In considering historical isolated incidents of constitutional violations it found that there was no proof of any incremental segregative effect from such actions (App. 147-149a). Existing racial imbalance was not found to be a result of any intentional segregative act or acts on the part of the Dayton Board, but rather the simple reflection of residential living patterns in the geographic area served by the school system (App. 149-150a).

Faculty assignment and hiring practices were reviewed. While such practices involved purposeful separation of teachers by race until 1951, all vestiges of these earlier practices had disappeared by 1969 – some three years before this litigation was instituted (App. 153a). Moreover, these earlier practices were specifically found not to have had any incremental segregative effect (App. 154a). The Trial Court, on the basis of the evidence, found that racial identifiability of

schools was determined by their student composition and not by faculty assignment (App. 153-154a).

Attendance zones were held not to have been created with any discriminatory intent (App. 155a). Transfer policies were found to be non-discriminatory with the exception of a practice of transfers involving Shawen Acres Orphanage students — a practice which ceased in the early 1950's and which was held not to have had any incremental segregative effect (App. 158-159a). Site selection, construction, uses of portables and school utilization practices were found not to have involved any intent to discriminate and not to have had any incremental segregative effect (App. 173-180a).

Although Dunbar High School was established as a voluntary black school in 1933, the census data established that Dunbar would have been all black by 1960 even if it had not been a school for voluntary attendance (App. 169-171a). Establishment of the old Dunbar High School was accordingly held not to have had any incremental effect on the situation existing in the school system when suit was filed in 1972. The Trial Court further found that there was no segregative intent with respect to the creation of the new Dunbar High School in 1962 (App. 171a).

The one adverse finding made in the previous decision of the District Court — the maintenance of optional attendance zones between contiguous schools throughout the district — was reexamined in the light of additional evidence presented at the hearings following the remand. The evidence demonstrated neither segregative intent nor segregative effect in the establishment and maintenance of optional zones (App. 162-169a).

As was confessed by one of the experts called by the plaintiffs at the post-remand hearings, the Dayton Board had really done nothing to separate the races for at least two decades before this case came to trial (TR. 2: 1027). As an official of the plaintiff NAACP admitted, the worst thing that can

be said in retrospect about the Dayton schools is that they reflect the racial imbalance of the geographic neighborhoods they serve (TR. 2: 1036-1042a).

After the dismissal of their complaint, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. On January 16, 1978 the Sixth Circuit issued a stay order holding in effect pending appeal the systemwide racial balance plan which had been imposed prior to this Court's decision in *Dayton*. On June 27, 1978 the Sixth Circuit reversed the District Court's dismissal of the case, and it entered a final order reinstating the systemwide racial balance plan (App. 217a). Applications for a stay were denied, and students in the Dayton system are still being transported to distant school buildings under a plan that cannot stand under the facts presented and the constitutional principles applicable to those facts.

VI. REASONS FOR GRANTING THE WRIT

In its prior opinion this Court expressed the view that, while this case raises issues important to the law of desegregation, it "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." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 2770 (1977). That statement was not only accurate; it was prophetic. Indeed, it is necessary to broaden the statement at this point to encompass the allocation of functions between the Supreme Court and the courts of appeals as well as between the courts of appeals and the district courts.

Having been reversed by this Court, the Sixth Circuit proceeded at its first opportunity to ignore and distort the constitutional principles which have been carefully delineated by this Court and to construct a whole new jurisprudence of desegregation. If each of the circuits in our federal system

is free to rewrite the law applicable to desegregation cases according to its own independent concept of what that law should be, there is no reason for this Court to grant a writ of certiorari. If inferior federal courts lack the right to secede from the federal judicial system, however, then a writ of certiorari must be granted in order to permit this Court to eradicate the doctrinal aberrations that have been devised by the Sixth Circuit with the aim of achieving a desired result of systemwide racial balance without regard to the facts determined by the District Court or to the law determined by this Court.

A. The Sixth Circuit's Adoption Of Legal Presumptions Of Systemwide And Continuing Segregative Intent And Effect From Isolated Practices That Existed Before Brown I And That Had Been Eliminated Long Before Initiation Of This Desegregation Action Is In Conflict With Keyes.

The efforts of the Sixth Circuit to rewrite the law of desegregation in this action have already elicited the following comments from one Justice of this Court:

> ". . . The Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion."
>
> ". . . The Sixth Circuit . . . evidenced an unduly grudging application of *Dayton*."
>
> "The Sixth Circuit is apparently of the opinion the presumptions in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*."

Columbus Board of Education v. *Penick*, No. A-124 (S.Ct.

filed August 11, 1978, J. Rehnquist, on application for stay). Since the author of these words was also the author of this Court's opinion in *Dayton*, his interpretation of that opinion should be accorded considerable weight. An analysis of the ways in which the Sixth Circuit has distorted and displaced prior applicable decisions of this Court should justify Mr. Justice Rehnquist's prediction that at least four justices would vote to grant certiorari in this action.

1. The Sixth Circuit Adopted An Erroneous Standard Of Assessing Evidence In Desegregation Cases When It Attached A Pivotal And Determinative Significance To Conditions In 1954.

At the core of the Sixth Circuit's decision is an adoption of what might be called the "poison in the well" theory. If there were any segregative practices extant in a school system in 1954 when this Court's historic decision in *Brown* v. *Board of Education* was rendered, an affirmative duty arose on the part of the school board to achieve a racial balance of students throughout the system. Judicially created presumptions of systemwide and continuing intent and effect may then be applied to place upon the board a burden of proof that can only be satisfied by a showing that it had achieved a racial balance of students throughout the system at the time suit was filed. If such a balance has not been achieved by board action, the only way of removing the poison from the well is by imposing such a balance by a federal court decree.

This novel approach was first suggested in the amicus brief filed by the Department of Justice in *Dayton*, and it was picked up by the plaintiffs in the oral arguments presented in that case. It was tacitly rejected by this Court in *Dayton*, and it represents a complete inversion of prior decisions of this Court. In order to establish *de jure* segregation, the plaintiffs in this case or any other case are required to prove a current condition of segregation resulting from intentional

state action. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 205 (1973). Historical background is relevant only to the extent it sheds light on the question whether a current condition of state-imposed segregation exists. *Ibid.*

The cart-before-the-horse approach of the Sixth Circuit is in direct conflict with this Court's opinion in *Keyes*. Whether suit is filed in 1964, 1974 or 2054, the focus of judicial attention should be on the conditions existing at the time of suit rather than ten, twenty or one hundred years earlier. By shifting the focus from present to past and with the aid of unsupported presumptions that pre-*Brown I* acts affected the entire system, the Sixth Circuit concluded that the Dayton Board was operating a dual system in 1954 and was under a duty to desegregate its schools for the following twenty-four years (App. 194a, 205a, 213a). This conclusion was further exacerbated by the reviewing court's imposition on the defendant board of the burden of proving the negative propositions not only that all of its post-1954 acts were free of segregative intent, but also that the racial imbalance existing when suit was filed in April of 1972 was not caused by unlawful segregative design (App. 205-206a).

It is tempting to engage in a quarrel over the Sixth Circuit's analysis of the pre-1954 evidence. For example, it is difficult to square the label "dual system" with a situation which involved in 1954 some fifty per cent of black students attending racially mixed rather than all black schools (See Deft's Exhibit AU). It is the doctrinal aberration created by the Sixth Circuit, however, which compels the attention of this Court and justifies the granting of a writ of certiorari in this case. The rule of *Keyes* should not be subverted, and historical background should not be transmogrified into a determinative focus in order to produce a desired result through artificial presumptions and shifting burdens.

2. The Sixth Circuit Adopted An Erroneous Standard Of Assessing Evidence In Desegregation Cases When It Applied Artificial Presumptions Of Intent And Effect To Impose An Impossible Burden Of Proof On The School Board In The Absence Of A Showing That At The Time Of Suit There Was Purposeful State-Imposed Segregation In A Substantial Portion Of The School System.

Having abandoned the doctrinal focus on a current condition of state-imposed segregation in favor of its "poison in the 1954 well" theory, the Sixth Circuit proceeded to make two other fundamental errors which serve to make a decision in favor of a school board impossible in this or any other case. These errors will be analyzed in detail in succeeding sections of this petition. They require mention here because of the role they play in creating the artificial presumptions and reversed burdens which are the props on which rest the Sixth Circuit's findings on liability.

First, the Court rendered "effect" synonymous with "intent" insofar as determining the presence of constitutional violations is concerned. Next, it expressed the view that the Dayton Board in 1954 had an affirmative duty not simply to remedy the effects of past segregative practices, but "to diffuse black and white students throughout the Dayton school system" (App. 212a).

If segregative practices in 1954 impose an affirmative duty to diffuse black and white students throughout a school system, then it is obvious that anything less than such a diffusion can only be the result of a breach of that duty. If "effect" is synonymous with "intent," then such a breach must be considered intentional. Since the duty to diffuse applies to the entire system, every act or omission is presumed to have a systemwide effect. The school system is perceived

as a seamless web which vibrates in all its reaches whenever any part is touched. Thus, the fact that there were four all black schools in 1954 is presumed to have a segregative effect on all schools in the system.

The fact that black and white students were not diffused throughout the system creates a presumption of continuing effect. Since "the relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system" as defined by the Sixth Circuit, a finding of segregative practices with effects that lingered in 1954 shifts the burden of proof to the School Board regardless of what the situation may have been eighteen years later when suit was filed. (*See* App. 202-205a). The burden becomes one of demonstrating diffusion. It cannot be satisfied in this or in any other desegregation case because the demographics of population distribution will simply not produce such a diffusion.

The judicial manipulation of isolated and long-abandoned segregative practices into a conclusion of a current systemwide constitutional violation defies common sense and conflicts with the controlling decisions of this Court. A presumption may be defined as an inference as to the truth of a proposition based on probable reasoning in the absence of actual proof or disproof. It serves no other purpose in the determination of litigation, and if it is not based on probable reasoning it does not deserve to be adopted as a presumption.

To conclude, as does the Sixth Circuit, that intent and effect are synonymous does not accord with probable reasoning; the surgeon does not intend to kill the patient who dies while undergoing the operation that carries a risk of mortality. To conclude, as does the Sixth Circuit, that every isolated segregative act has a systemwide and continuing effect does not accord with probable reasoning; much of the historical evidence in this case was buried beyond the reach of memory until dredged up by the plaintiffs for forensic purposes. To

conclude, as does the Sixth Circuit, that in the absence of constitutional violations black and white students would be diffused throughout the Dayton school system does not accord with probable reasoning; indeed, the record contains evidence indicating that the distribution of students that existed in the system when suit was filed would have been the same even if every action of the Board in the last seventy-eight years had been racially neutral by 1978 standards.

The "presumptions" employed by the Sixth Circuit are not "presumptions" in the legal sense of that term; they are simply artificial tools employed to rationalize a desired result. Unless this Court accepts jurisdiction, a precedent will have been established which not only conflicts with the leading desegregation decisions issued by this Court, but also requires with scant regard for evidence a finding of constitutional violations in any school desegregation case that could conceivably be filed anywhere in this country.

B. The Use Of A Natural And Foreseeable Result Test To Determine Segregative Intent Conflicts With Washington v. Davis, Arlington Heights And Dayton.

The Sixth Circuit's decision in this case is not only in direct conflict with this Court's decision in *Keyes;* it is also in direct conflict with this Court's decisions in *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977).

In remanding *Dayton* this Court specifically directed the District Court to make new findings in light of the discriminatory intent requirements set forth in those decisions. 433 U.S. at —, App. at 136-137a. In compliance with this remand order, the District Court made a detailed analysis of intent as it related to the various Board policies and practices (App. 142-

186a). The Sixth Circuit rejected these findings and instead premised its findings of segregative intent upon a presumption of segregative purpose arising from a natural, probable and foreseeable result test (App. 203-204a, 213a).

Common sense dictates the rejection of such an approach to resolving a question of segregative intent. The approach reflects the "Alice in Wonderland" logic that "justifies" the plaintiffs' argument that since it is foreseeable that whites will leave a school system unless they have no means of escaping a racially mixed school situation, any act of a school board less than achieving racial balance throughout the entire system is an intentional act of segregation. Building a school in a black area is an intentional segregative act since the school will serve a predominately black population; building a school in a white area is an intentional segregative act since the school will serve a predominately white population; building a school in a racially mixed area is an intentional segregative act since the existence of such a mix will encourage whites to leave the area. Under the plaintiffs' and the Sixth Circuit's view, any act on the part of the Board that falls short of systemwide racial balance is by definition an intentional segregative act. Common sense demurs.

The decisions of this Court in *Washington* v. *Davis* and *Village of Arlington Heights* likewise reject the "effect" test which the Sixth Circuit has attempted to engraft upon the law in this area. In *Washington* v. *Davis* the primary controlling issue in cases of this nature was defined as "purpose or intent to segregate"; "intent" was equated with "state contrivance to segregate" and "a purposeful device to discriminate." 426 U.S. at 240, 246. In *Arlington Heights* this Court elaborated upon its prior decisions by expressly setting forth guidelines for the determination of the crucial issue of intent to segregate. Conspicuously absent was any reference to a natural, probable and foreseeable result test. 429 U.S. at —, 97 S.Ct. at 564. Finally, the foreseeability test utilized by the Sixth Circuit in this action is in direct conflict with

this Court's implicit rejection of such a test in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976).

It is impossible to square the Sixth Circuit's decision in *Dayton IV* with these decisions. This Court should not sit idly by while an inferior appellate court proceeds blandly to rewrite an entire body of law and to overrule from below applicable decisions of this Court in order to secure what is deemed a socially desirable result.

C. The Imposition Of A Systemwide Racial Balance Plan In The Absence Of Proof That Such A Plan Reasonably Approximates The Racial Distribution Of Student Population That Would Have Occurred In The Absence Of A Constitutional Violation Is Contrary To The Holdings Announced In Dayton.

While the Sixth Circuit's handling of the issue of constitutional violations in this case is marked by clear-cut conflicts with and novel departures from prior decisions of this Court, its handling of the issues of causation and remedy presents an even more striking conflict with the precise mandate of this Court in its prior consideration of this litigation. The mandate in *Dayton* was concise and unambiguous:

> "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."

433 U.S. at —, 97 S.Ct. at 2775. The Sixth Circuit proceeded

past what can only be considered a complete misreading of the term "incremental segregative effect" to reach a totally different concept of remedy.

1. The Sixth Circuit Misconstrued The Requirement Of Establishing Incremental Segregative Effect In Desegregation Cases And Misplaced The Burden Of Proof On That Issue.

In addressing the subject of remedy the Sixth Circuit quotes the very passage we have just quoted from *Dayton*, and then proceeds to redefine "incremental" in terms of its seamless web presumption of systemwide and continuing effects instead of in terms of the increment or difference between the racial separation that would have occurred in the absence of constitutional violations and the racial separation that has occurred in the presence of such violations.

> "The word 'incremental' 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."

(App. 214-215a).

This Court described a result; the Sixth Circuit describes a process. If the Sixth Circuit has correctly stated the meaning this Court intended to convey by the words "incremental segregative effect," those words – which seemed so clear when issued in 1977 – contained hidden ambiguities that require a gloss in 1978. If the Sixth Circuit has misconstrued this Court's meaning, that misconstruction must be corrected before it serves further to distort the law in this area.

The Sixth Circuit's conception of "incremental effect" as describing a process rather than a result was a natural offshoot of the artificial presumptions it employed in considering the violation side of the case. Indeed, its discussion of the alleged error of the District Court in allocating the burden of proof on the issue of incremental segregative effect to the plaintiffs works a fusion between the violation stage and the remedy stage of the case. *See* App. 216a. It reasserts its view that once segregative practices are found to have existed in 1954 there is a "presumption that the current racial composition of the school population reflects the systemwide impact of those violations" (App. 216a). The obvious corollary to this presumption is a presumption that but for a systemwide impact of violations there would have been a homogenous distribution of black and white students throughout the system.

Leaving aside the problem that these are artifical concepts created to justify an end rather than logical inferences based on reasonable probability, we can see that the Sixth Circuit's approach cuts across both issues of remedy and violation. If the defendant is required to rebut the systemwide impact presumption, he should also be required to rebut the corollary presumption that without such systemwide impact the distribution of black and white students would have been uniform throughout the system.

Once again the Sixth Circuit has carried the law of desegregation through the looking glass. The issues of violation and of remedy are to be given separate consideration under the mandate of this Court. Just as a plaintiff in a tort case must in the first instance carry the burden of establishing both negligence and causation, the plaintiff in a case of this nature must in the first instance carry the burden of establishing both constitutional violations and the incremental segregative effect of those violations. The burden-shifting principles established in *Keyes* do not extend to the remedy stage of the case, and the language of this Court in *Dayton* certainly phrases the burden of establishing incremental segregative effect as a plaintiff's burden.

Once the question of incremental segregative effect has been reached, a constitutional violation has of necessity been found to exist. If this Court intended to place the burden of proof on the defendant instead of on the plaintiff, it would have phrased the task in terms of demonstrating that the racial distribution of the school population would not have been significantly different in the absence of the violation. Instead, the task was phrased in the positive terms of showing the incremental segregative effect of the violations on the racial distribution of the school population as presently constituted. Thus, while this Court did not specifically address the placing of the burden of proof in *Dayton* beyond saying that "[i]t is for the finder of fact to make the complex factual determinations in the first instance," its phrasing of the nature of the task is in terms of an affirmative plaintiff's burden rather than a negative defendant's burden. This placement of the burden of proof is likewise in accord with the traditional principles governing non-desegregation cases.

2. The Sixth Circuit Adopted An Erroneous Remedial Standard Which Imposes Upon A School Board An Affirmative Duty To Diffuse Black And White Students Throughout The School System Without Regard To The Distribution Of Students That Would Have Taken Place In The Absence Of Constitutional Violations.

In its rush to place what it deems sociological desirable ends ahead of constitutional means, the Sixth Circuit did little more than shove aside the questions of proximate cause implicit in this Court's analysis of the issue of incremental segregative effect. In its entanglement with result-oriented presumptions, it also ignored the plain implications of that issue for remedy determination. Once constitutional violations with a lingering

effect in 1954 are found – and in view of the seamless web theory of systemwide and continuing effects, almost any pre-1954 violation will produce such a finding – nothing short of a systemwide racial balance plan will suffice as a remedy.

What happened to the careful weighing of the difference between what is and what would have been and the "complex factual determinations" contemplated by this Court in *Dayton*? They simply disappear in the Sixth Circuit's presumption that present racial imbalance is a reflection of the systemwide impact of constitutional violations. In the Sixth Circuit's view any school system which is free from the taint of segregative acts would reflect a racial balance of students uniformly throughout its schools. Perhaps the most telling phrase in the entire opinion of the Sixth Circuit is its indication that the existence of the effects of past segregative practices in 1954 gives rise to "an affirmative duty" on the part of the School Board "to diffuse black and white students throughout the . . . school system" (App. 212a). If such is the duty, it can hardly be satisfied by anything less than such a diffusion, and the only appropriate remedy is the achievement of approximate racial balance of students through mandatory busing.

Such, however, is not the duty as defined by *Dayton* and prior decisions of this Court. The imposition of a systemwide racial balance plan in the absence of any evidence to suggest that the Dayton system would have been integrated to such an extent if no constitutional violations had ever occurred is in direct opposition to the reasoning expressed in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976). As stated in *Austin*, which was cited with approval in *Dayton*, there must be evidence "in the record available to us to suggest that absent those constitutional violations the . . . school system would have been integrated to the extent contemplated by the plan." *Ibid.*

In this case no such evidence exists. The Trial Court held that the preponderance of the evidence did not establish that

any of the actions of the Dayton Board had any incremental segregative effect. This holding was supported by the uncontroverted demographic and historical evidence that the racial composition of the Dayton schools has been consistent with the residential pattern of the school district and that the optional attendance zones which were created by the Board had no incremental segregative effect.

In the face of this evidence and in spite of the guidelines carefully delineated by this Court in *Dayton*, the Sixth Circuit simply presumed that but for constitutional violations the Dayton system would have been racially balanced. In accordance with this irrational presumption, it simply reinstated the systemwide, racial balance plan (App. 217a). It thus added another error to the conflicts between its reasoning and the constitutional principles established by the controlling decisions of this Court.

D. Imposition Of A Remedy Where There Is A Failure To Prove Standing Is Contrary To Established Judicial Precedent.

At every stage of this litigation from the time it was filed in April of 1972, the Dayton Board has asserted its denial that the plaintiffs have any standing to sue. This issue was raised in *Dayton*. Presumably, the remand for the taking of additional evidence was intended to give the plaintiffs another opportunity to rectify this defect. As in the prior evidentiary hearings, however, no plaintiff testified at the remand hearing and there was no evidence introduced at that hearing to establish that any plaintiff or any member of the class which he or she reportedly represented was excluded from any school in the Dayton system on account of race. This hiatus in the proof is fatal. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

There is no evidence anywhere in the records of this action that any of the plaintiffs sustained any injury or that any of them was deprived of any constitutional right. In the absence of any such evidence, the plaintiffs have no standing, and they cannot prevail in this action. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94 (1974).

The propriety of this action under Rule 23 of the Federal Rules of Civil Procedure is dependent upon proof by the individual plaintiffs that they are members of the class they purportedly represent. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). It is also dependent upon certification by the district court of this suit as a class action. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Neither of these requirements was met.

The record in this case is completely devoid of any testimony whatsoever that any of the plaintiffs were children or parents of children who are or were or would be attending any school within the Dayton school system or that any of them resided within the geographic boundaries of the Dayton system. There is no evidence that any of the plaintiffs are members of the class that was allegedly, directly or indirectly, excluded from any school because of their race. In the absence of such proof, this action cannot be maintained as a class action. *Davis* v. *Schultz*, 453 F.2d 497 (3rd Cir. 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

In addition to the failure of the plaintiffs to establish that any of them was a member of a class he or she purportedly represented, there was no determination by the District Court that this action was maintainable as a class action. This failure, in and of itself, defeats the right of the plaintiffs to maintain the action as a class action.

VII. CONCLUSION

Something is obviously wrong when two courts, purporting to follow the same specific guidelines, reach diametrically opposed results. The Sixth Circuit, in reversing the District Court's outright dismissal of the plaintiffs' complaint, says that the District Court "misunderstood" this Court's mandate. Mr. Justice Rehnquist, in examining the Sixth Circuit's reinstatement of a mandatory racial balance busing plan affecting every school and every student in the system, suggests that the misunderstanding came at the appellate level. It is clear that someone has misconstrued the principles which this Court has attempted to establish. We respectfully submit that it is equally clear that a failure of this Court to resolve the resulting confusion will lead to further doctrinal aberrations in an area of law that directly affects the daily lives of a large percentage of the population of this country.

An analysis of the Sixth Circuit's opinion in this case reveals it as little more than a compendium of conflicts with the controlling decisions of this Court in *Dayton*, *Arlington Heights*, *Washington* v. *Davis*, *Austin* and *Keyes*. The District Court, pursuant to the plain mandate placed before it, first attempted to determine whether there is in the Dayton school system a current condition of racial separation caused by intentional segregative acts of the Dayton Board. It then proceeded to determine how much incremental segregative effect, if any, was caused by such acts, as compared with the conditions of racial separation that would have occurred in the absence of those acts. The factual determinations may have been complex, but they were honestly and objectively made and thoroughly grounded with supporting references to the record.

The Sixth Circuit rejected this approach and analysis. Instead of focusing on current conditions, it focused on 1954 and concluded as a matter of doctrine that if the school system reflected any effect of segregative practices at that time,

the School Board had from that time forward an affirmative duty to diffuse black and white students throughout the system. The only way of discharging that duty would be to demonstrate that a systemwide racial balance of students exists; the obvious remedy for anything less than such a diffusion is the accomplishment of such a diffusion by judicial decree. Against this doctrinal framework, the task of making complex factual determinations is replaced by the shifting of impossible burdens to the school board and the substitution of presumptions for proof. It is presumed that the intent of actions is the same as their effect; it is presumed that any action has systemwide and continuing implications; it is presumed that racial imbalance is a result of segregative acts; it is presumed that in the absence of segregative acts racial balance would occur. On this procrustean bed the facts in any desegregation case are easily stretched to achieve the predetermined result and remedy.

We respectfully submit that the Sixth Circuit has abandoned the constitutional principles established by this Court and substituted for those principles a novel and different law of desegregation. The desirable sociologic end is, in the Sixth Circuit's view, clear, and any doctrinal means to achieve that end is justified. When the means to the end becomes rewriting the law as imposed by the Supreme Court and rewriting the facts as found by the Trial Court, however, the jurisprudential result is chaos!

The District Judge in his conscientious and consistent effort to apply the law to the facts of this case has thus far succeeded only in demonstrating the impossibility of serving two quarreling masters. His judgments have now been reversed on four successive occasions, three times by the Sixth Circuit when he followed the legal doctrines established by this Court and once by this Court when he followed the mandate of the Sixth Circuit. This is a situation of judicial turmoil that should not be condoned.

The attitude of the Sixth Circuit toward the developing law

in northern desegregation cases has been apparent since Judge Edwards' emotional concurring opinion was issued on a remand of the Detroit case in 1975:

> "I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to reveal how deeply I disagree with the decision which we are enforcing."

Bradley v. *Milliken*, 519 F.2d 679, 680 (6th Cir. 1975). In a remarkable opinion, he went on to declare that any distinction between northern cases and southern cases was "a formula for American apartheid" and this Court's decision in the *Bradley* case was more "fraught with disaster for this country" than any Supreme Court decision since the *Dred Scott* case. It appears that in *Dayton IV* this shout of resistance has taken the more subtle, though still rebellious form of reworking constitutional doctrines to assure that federal courts achieve the same sociologic result in states which had no statutory or constitutional mandate for segregated schools as occurred in southern states where such mandates existed.

Unless this Court is willing to delegate the rewriting of constitutional law to intermediate appellate courts on a circuit-by-circuit basis, it should feel compelled to grant certiorari in this case and analyze the doctrinal changes that are being wrought by the Sixth Circuit. Those changes do not affect simply the Dayton school system. The issue goes far beyond Dayton, although the Dayton system has by reason of the Sixth Circuit's resistance to the principles established by this Court bled through six years of litigation that can only be perceived as bewildering by the public eye.

The Columbus case has been determined by the Sixth Circuit according to the same novel standards and either is or will be before this Court on a petition for a writ of certiorari. The Cleveland case has been briefed and argued before the Sixth Circuit and is presently awaiting decision. Other desegrega-

tion cases are pending in the district courts of the circuit, and the district judges to whom those cases are assigned require guidance in view of the obvious conflicts between the pronouncements of this Court and those of the Sixth Circuit.

Without clarification by this Court the new doctrines which have been created in the Sixth Circuit may spread to other circuits as well. It was necessary to remand systemwide desegregation plans for analysis in terms of *Dayton* standards in both the Eighth Circuit and the Seventh Circuit. *School District of Omaha* v. *United States*, 433 U.S. 677 (1977); *Brennan* v. *Armstrong*, 433 U.S. 672 (1977). There has been a continuing willingness in several circuits to replace the *Arlington Heights* standards for determining intent with effect. *See, e.g., United States* v. *School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), *cert. denied*, — U.S. — (1978); *N.A.A.C.P.* v. *Lansing Board of Education*, 559 F.2d 1042, 1047 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Hart* v. *Community School Board*, 512 F.2d 37, 51 (2d Cir. 1975). *But see Soria* v. *Oxnard School District Board of Trustees*, 488 F.2d 579, 585 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1975).

This Court has not held that mandatory busing to achieve a systemwide balance of black and white students is required in any situation where present racial imbalance is coupled with evidence of the existence of pre-1954 segregative practices. Yet such a holding is the result required in any desegregation case if the theories promulgated by the Sixth Circuit are to prevail. Present students would be penalized for violations by past school boards despite the fact that no student affected by such violations is currently attending any school in the district. Nothing in the Constitution, in principles of equity or in prior decisions of this Court can be deemed to justify or rationalize such a result.

This case, therefore, does not simply demand a restatement of established principles; it requires the curbing of new doc-

trines that threaten to sweep the law of desegregation from the constitutional moorings which this Court has established.

For all these compelling reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. DISTRICT COURT'S FEBRUARY 7, 1973 FINDINGS OF FACT AND OPINION OF LAW.

(Filed February 7, 1973)

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

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

FINDINGS OF FACT AND MEMORANDUM OPINION OF LAW

This is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education. This Court has proper equity jurisdiction under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; see *Brown* v. *Board of Education,* 347 U.S. 483, 495 (1954); 349 U.S. 294,, 300-301 (1955), and under 28 U.S.C.A. §§ 1981 and 1983, 42 U.S.C.A. § 1343.

This matter is before the Court upon the briefs, stipulations and exhibits presented by the respective parties; and upon the record adduced during expedited hearing conducted by

Court from November 13 through December 1, 1972. The limited question before the Court at said hearing was whether acts by the defendant Dayton School Board have created segregated educational facilities in violation of the Equal Protection Clause.

Having carefully examined the evidence presented, the Court, pursuant to Rule 52(a), Fed. R. Civ. P., enters the following findings of fact and memorandum opinion of law.

I

FINDINGS OF FACT

A. Historical Perspective

(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system.[1] 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 high schools in the 1930's and 1940's and

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[1] Section 3313.48, Ohio Revised Code, provides in relevant part that:

> "[t]he Board of Education of each city . . . shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof . . ."

This has been the law of Ohio since February 22, 1887, when it was enacted by 85 Ohio Laws 34. The statute was upheld and enforced in 1888 by the Supreme Court of Ohio in *Board of Education* v. *State*, 45 O.St. 555, as follows:

> "Section 4008 having been repealed by the Act of the General Assembly passed February 22, 1887 (84 Ohio Law 34), separate schools for colored children have been abolished and no regulation can be made under 4013 that does not apply to all children, irrespective of race or color:"

the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.[2]

Prior to *Brown*, however, physical isolation of black students ended, swimming pools were no longer restricted, and black athletic teams competed on an equal basis with all other Dayton High Schools.

While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. The practices of the Dayton School Board were also, during that period, in contravention of Ohio law as cited in n.1, *supra*. Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

(2) Not to be dismissed on a *deminimus* theory are the practices of the Dayton School Board with regard to the hiring and placement of its teachers. In the past thirty-odd years three separate policies have been followed. Until the decade of the 1930's, there was little, if any, hiring of black teachers. Those who were hired were used in instruction of predominately black classes. During and following World War II the black population of Dayton substantially increased. Black teachers were hired in greater number, although such teachers did not teach in schools which were predominately white. While there is no direct evidence that black teachers were forbidden to teach white children at any school, in practice few actually did. Some evidence consistent with the assumption that black educators and black principals would be more understanding, sympathetic, and inspiring to black students has been suggested to the Court.

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[2] For a period in the 1930's and 1940's, the Shawen Acres Orphan Home sent its black and white wards to different schools. Some white children of medical personnel of the Veterans Hospital in Dayton were bused by the hospital to "white" schools. The Dayton School Board, while not initiating these practices, condoned and assisted them.

In the 1951-52 school year, the policy of assigning black teachers only to black schools ended and black teachers were gradually assigned to white or mixed schools. 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.

By 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. In the fall of 1971, pursuant to an agreement with the Department of Health, Education & Welfare (H.E.W.), the Dayton Board of Education commenced assigning faculty in such a manner that the ratio between black and white teachers in each school substantially reflected the ratio between black and white teachers in the system as a whole. Pursuant to this agreement the teaching staff of the Dayton Public Schools became and still remains substantially integrated.

By 1969 the Dayton School Board employed more black teachers than any other of the 20 largest school districts in Ohio. At that time 28.6% of all teachers were black while 38.3% of all students were black. For the school years 1971-72 and 1972-73, blacks comprised 38% of the non-teaching, non-administrative personnel employed by the Board of Education. Employment of blacks in other positions such as skilled craftsmen, however, remains substantially below the percentage of black students population or the percentage of black teachers and black administrators.

(3) In 1933, the Paul Lawrence Dunbar High School was established. Dunbar High School was intended to be, and did in fact became, a black high school, with an all black teacher and pupil population. At the time of its creation, there were no school attendance zones in Dayton and students were permitted liberal transfers. Attendance at Dunbar was voluntary.

In the 1940's and early 1950's, after reorganization into a K-8, 9-12 grade structure, high school and elementary school

attendance zones were established and encorced in Dayton. Dunbar continued to exist as a city-wide all-black high school until it closed in 1962.

B. The Dayton Public School System Today

(a) Racial Imbalance

(4) The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census.[3] Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school. See Appendix A, *post* at 15.

(b) Attendance Zones

(5) There has been presented no evidence of boundary changes that would channel blacks or whites into specific schools or would restrict blacks from attending any school. Where construction of new schools has required boundary changes, they have been rational, reasonable and within the sound discretion of the Board of Education. No irregular school zones have been created, white students have not been bused past black schools to white schools, nor have black students been bused past white schools to black schools.

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[3] The 1970 census for the city of Dayton indicates 71 census tracts, 45 with a black population of less than 15%, eight with a black population between 15% and 85%, and six with a black population of 85% to 100%.

While the Dayton School District is not geographically identical to the city limits of the City of Dayton, the variations are non-significant in the context of the areas' black-white population.

(6) The Dayton School District contains 57 elementary school attendance areas. No evidence has been presented of gerrymandered boundary lines and the attendance districts are regular in shape. Boundary line changes have occurred only when new schools were constructed for the purpose of relieving overcrowding in existing ones. See Appendix A, *post*, at p. 15.

(7) The middle school program was established on January 4, 1971. Middle schools consist of grades 6, 7 and 8. The middle school program has to date been only partly effectuated in the Dayton system. Elementary schools (kindergarten through eight) are still in operation as well as primary schools (kindergarten through five), and middle schools (six through eight). At the present time there are five middle schools in Dayton: Cornell Heights, Longfellow, MacFarlane, Whittier, and Orville Wright. For the racial compositions of these schools, see Appendix A, *post*, at p. 15.

Attendance boundaries for the middle schools were established in September, 1971, and have neither segregative nor integrative effect.

(8) There are presently eleven high schools in Dayton, ten of which have specific attendance areas. The eleventh, Patterson Co-op High School, enrolls students from the entire district for its vocational education program. The black percentage of attendance at Patterson High School has increased due to an altering of recruitment techniques, from 2.0% in 1963 to 32.9% in 1972. No evidence has been presented that under the present selection system the admision of blacks is denied or discouraged or that the system is segregative in effect.

Dayton has constructed five high schools since 1954 and has altered attendance zones where necessary to accommodate the overcrowding of existing high schools. Other than such alterations, no attendance zone boundaries have been changed. No evidence of the establishment of high school boundary lines for the purpose of creating white high schools and black high schools has been presented.

(c) Site selection and construction

(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 60 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of "building schools where children are, or where they are expected to be." New construction of elementary schools was largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominantly white and schools in black neighborhoods which remain predominantly black.

(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Constructions of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of white attending such schools.

Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion.

(d) Optional zones

(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished. See Appendix B, *post* at 16.

The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional 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 of these zones, 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.

(e) Freedom of Enrollment

(12) By two separate actions the Board of Education has established a "freedom of Enrollment" policy. On May 29, 1969, action was taken whereby the parents of a pupil in good standing in the Dayton Public School District could request

assignment of the pupil to any school building within the district where space was available to accommodate him. Three priorities were established.

(1) Students residing within the attendance area of a school building shall have first priority to assignment to that building.

(2) Students meeting the requirements for a course available only in the particular building shall have second priority for attendance in that building;

(3) A student desiring enrollment in any building for whatever reason shall have third priority in that building, providing his enrollment will contribute to improved racial balance in that building.

The action of May, 1969, further provided that transportation would be the responsibility of the parents.

On January 3, 1972, the Board of Education resolved to continue the Freedom of Enrollment policy with the exception that the Superintendent and his staff were directed to develop and submit before the start of the second semester of the 1971-72 school year a plan providing for the free transportation of the students participating in such program. Such free transportation was adopted by the Board prior to the filing of the complaint herein.

(13) Applications for transfer and dispositions thereof during the school years 1969-1970, 1970-71, 1971-72, 1972-73, are set forth in Appendix C, *post*, at 17. There is no evidence that the Freedom of Enrollment system has been unfairly operated or that black students have been denied transfers because of their race. There is evidence that the capacity of transferee schools has been underestimated and that projections of future enrollment are substantially overestimated. A neutrally administered freedom of enrollment system might in the future reduce somewhat racial imbalance and remove community perception of "black" and "white" schools. However, as the Freedom of Enrollment system is presently constituted, its input towards that goal has been slight. Requests for

transfer have at no time exceeded 1.5% of the total student enrollment.

C. School Board Action — December, 1971 January, 1972

(14) At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was reelected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called "lame ducks," who would not be members of the Board after December 31, 1971.

The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. These resolutions, which are set forth in part in Appendix D, *post*, at 18-22, were adopted by the Dayton School Board by a vote of 5-2.

Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on

December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a recission of the previous action.

The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, — F.Supp. — (S.D. Ohio E.D. 1972). The recission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A.6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A.6 1971).

OPINION

An examination of the decisional law of this circuit does not provide an identifiable category for the Dayton Public School System. Ohio law, unlike the law of many Southern states, has never mandated the separation of the races in public school; to the contrary, since 1887 it has specifically prohibited this practice. See n.1, supra. The Dayton system is a square peg for the round holes of Memphis, Knoxville, and other southern cities.[4] It is, however, also a round peg

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[4] Compare, for example, the intransigence of the Nashville School Board in *Kelley* v. *Metropolitan County Bd.*, —— F.2d —— Nos. 71-1778 & 79 (C.A. 6 May 30, 1972). See also *Northcross* v. *Board of Education of Memphis*, 420 F.2d 546 (C.A.6 1970), *aff'd.* 397 U.S. 232 (1970); 444 F.2d 1179, 1184 (C.A.6 1971); *Goss* v. *Board of Education of Knoxville*, 301 F.2d 164 (C.A.6 1962); 305 F.2d 523 (C.A.6 1962); 406 F.2d 1183 (C.A.6 1969); 444 F.2d 632 (C.A.6 1971); *motion for implementation order denied*, 403 U.S. 956 (1971); *Robinson* v. *Shelby County Board of Education*, 442 F.2d 259 (C.A.6 1971); *Mapp* v. *Board of Education of City of Chattanooga*, —— F.2d —— (C.A.6 October 11, 1972), *rehearing en banc granted* —— F.2d —— (C.A.6 1972).

for the square hole that is Cincinnati in *Deal* v. *Board of Education.*[5] In *Deal,* which dealt with an urban school system organized under the laws of Ohio, there was no finding that the actions of the school board had contributed in *any* fashion to the segregation of the Cincinnati public schools. We have not found the *Keyes* situation of the transfer of whites to remaining predominately white schools.[6] We have not found the *Bradley* altered attendance zones or the transfer programs that allowed whites to escape from identifiably black neighborhood schools.[7] We have not found the *Davis* pattern of racial discrimination.[8]

What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education, supra.*

We do not hold that a school board may not in its wisdom determine to establish 'neighborhood schools." *Gilliam* v. *School Board of Hopewell,* 345 F.2d 325; *Deal, supra*; *Goss, supra.* But an "optional attendance zone" is a limitation upon this

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[5] 369 F.2d 55 (C.A.6 1966); 419 F.2d 1387 (C.A.6 1969), *cert. den.* 402 U.S. 962 (1971).

[6] *Keyes* v. *School District No. 1,* 303 F.Supp. 279, 289 (D.C. Colo. 1969); 313 F.Supp. 61, 90 (D.C. Colo. 1970), *aff'd. in part, rev'd. in part,* 445 F.2d 990 (C.A.10 1971), *cert. granted* —— U.S. —— (1972).

[7] *Bradley* v. *Milliken,* 338 F.Supp. 582 (E.D. Mich. 1971), *aff'd.* —— F.2d ——, Nos. 72-1809, 72-1814 (C.A.6 Dec. 8, 1972), *rehearing en banc granted* —— F.2d —— (C.A. 6, Jan. 16, 1973). See also *Clemons* v. *Board of Education of Hillsboro,* 228 F.2d 853 (C.A.6 1956).

[8] *Davis* v. *School District of Pontiac,* 443 F.2d 573 (C.A.6 1971), *cert. den.* 404 U.S. 913 (1971).

concept and if carried to an ultimate conclusion, effectively destroys it. If a school board elects to use the neighborhood school concept, it must do so fully and completely. Where there are hazards, natural or artificial, it must so adjust the boundaries in order to protect the children it intends to educate. It may not employ optional zones either to destroy or dilute the neighborhood school concept.

In addition, there appear to be aspects of the system which may in the future become segregative in effect unless steps are now taken that will retard these undesirable tendencies. Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board, we hold that these must be refashioned in such manner as to avoid such future racially disharmonious potential.

Accordingly, the Dayton School Board is hereby instructed to prepare and present to this Court within sixty (60) days a plan that will accomplish the following:

(1) Abolish all optional attendance zones presently remaining within the Dayton school system;

(2) Restate the priorities for high school attendance in the freedom of enrollment plan in order that no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers;

(3) Maintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district.

(4) Establish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District.

The foregoing enumerated specifics shall be considered as a minimum. The plan submitted by the defendant Board shall

in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 402 U.S. 33 (1970).

Irrespective of the determination of this Court there will remain in the city of Dayton a substantial black population entitled as a matter of law to equality in education, housing, and job opportunity. No peaceful community can consist of two separate societies viewing each other with mistrust and suspicion from ever higher walls of separation. Education has been historically in our country and remains to this day, one of the primary means of overcoming barriers of class, status and occupation.

A court can only enjoin upon a school board its legal duty. It cannot reach the infinitely more sensitive moral obligation that defies legal measurement. We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education equally for all children entrusted to its care, without distinction or bias or partiality.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A, FEBRUARY 7, 1973 FINDINGS OF FACT RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools – % Black:

1. Jane Addams	81.7	27. Jackson Primary	98.8
2. Allen	0.6	28. Jefferson Ele.	60.1
3. Belle Haven	5.0	29. Jefferson Primary	57.1
4. Belmont	0.0	30. Kemp	0.0
5. Brown	0.6	31. Lewton	0.0
6. Carlson	99.0	32. Lincoln	0.0
7. Cleveland	0.0	33. Loos	4.6
8. Drexel	5.7	34. Horace Mann	0.2
9. Eastmont	0.0	35. McGuffey	14.4
10. Edison	97.3	36. McNary Park	99.4
11. Emerson	6.8	37. Meadowdale Ele.	8.0
12. Fairport	0.1	38. Miami Chapel	99.9
13. Fairview Elementary	1.7	39. Patterson-Kennedy	0.0
14. Ft. McKinley	0.0	40. Residence Park Ele.	98.8
15. Franklin	0.0	41. Residence Park Pri.	99.3
16. Gardendale	28.5	42. Ruskin	7.0
17. Gettysburg	5.2	43. Shiloh	0.1
18. Gorman	21.1	44. Shoup Mill	7.1
19. U.S. Grant	0.1	45. Louise Troy	100.0
20. Grace A. Greene	96.8	46. Valerie	7.5
21. Hawthorne	0.0	47. Van Cleve	1.1
22. Hickorydale	6.6	48. Washington	19.4
23. Highview	97.0	49. Weaver	99.9
24. Huffman	0.0	50. Webster	0.0
25. Irving	99.0	51. Westwood	99.4
26. Jackson Elementary	99.1	52. Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle schools – % Black:

1. MacFarlane 99.6
2. Whittier 99.3
3. Cornell Heights 80.5
4. Longfellow 64.1
5. Orville Wright 8.1

High Schools – % Black:

1. Dunbar 100.0
2. Roosevelt 100.0
3. Roth 95.8
4. Colonel White 54.6
5. Patterson Co-op 32.9
6. Fairview 24.1
7. Stivers 14.0
8. Meadowdale 10.6
9. Kiser 9.8
10. Wilbur Wright 9.2
11. Belmont 5.2

APPENDIX B TO FEBRUARY 7, 1973 FINDINGS OF FACT
EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population At date of creation	1972-73
Elementary schools:			
1. Belle Haven/	1955	0.0	17.7
Fort McKinley		0.0	2.6
2. Residence Park/	1954	a.	100
Jane Addams		29.3 b.	78.7
3. Westwood Ele./	1952	0.0	99.7
Jackson Ele.		35.9	99.9
4. Lincoln/	1957	0.0	0.6
HoraceMann		0.0	3.1
5. Cleveland/	1956	0.0	0.8
Belmont Ele.		0.0	9.4
6. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
7. Eastmont	1957 c.	0.0	0.7
Lewton		0.0	5.8
High schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Roosevelt/	1951	31.5	100.0
Colonel White	extended 1958	0.0	54.6
3. Kiser/	1962	2.7 c.	9.8
Colonel White		1.1 c.	54.6
4. Wilbur Wright/	1956	2.2 b.	9.2
Belmont High		0.0	5.2

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

APPENDIX C TO FEBRUARY 7, 1973 FINDINGS OF FACT
FREEDOM OF ENROLLMENT APPLICATIONS

	1969-70 1970-71	1971-72	1972-73
White applications	133	78	47
Black applications	695	757	741
Totals	828	835	788
White approvals	50	39	23
Black approvals	421	460	460
Totals	471	499	483
White disapprovals	83	76	15
Black disapprovals	274	260	187
Totals	357	336	202
White disapprovals (Lack of classroom space)	16	8	12
Black disapprovals (Lack of classroom space)	164	174	166
Total disapprovals (Lack of classroom space)	180	182	178

APPENDIX D TO FEBRUARY 7, 1973 FINDINGS OF FACT RESOLUTIONS OF THE DAYTON SCHOOL BOARD

At the December 8, 1971, meeting of the Dayton School Board, the following three resolutions were passed, each by a 5-2 vote:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions

of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U.S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.
2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.
3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

* * *

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement

of quality education for all pupils, black and white, rich and poor, and,

5. That this Board view the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:
   Governor of the State of Ohio
   President of the State Board of Education
   Speaker of the Ohio House of Representatives
   President of the Ohio Senate
   Montgomery County Members of the Ohio General Assembly and United States Congress.
   Montgomery County Commissioners
   Dayton City Commissioners
   Montgomery County Council of Governments
   City Plan Board
   Miami Valley Regional Planning Commission
   Miami Valley Regional Transit Authority
   Metropolitan Housing Authority
   Apartment Owners Associations
   Area Progress Council

Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representative East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association
Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency
Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to dis-establish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton public schools, and,

WHEREAS, this inequality exists as a result of the acts and omissions of the Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendant during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

e. Desegregation is to be completed by September, 1972.

f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criterial in c. above.

g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

B. DISTRICT COURT'S JULY 13, 1973 SUPPLEMENTAL OPINION ON REMEDY.

(Filed July 13, 1973)

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

Civil No. 72-137

MARK BRINKMAN, et al,

Plaintiffs

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al,

Defendants

SUPPLEMENTAL ORDER ON REMEDY

Pursuant to order of this Court dated February 7, 1973, the defendant School Board of the City of Dayton has submitted a desegregation plan for consideration. A separate plan has been submitted by the minority members of the Dayton School Board, as has one by the Dayton Classroom Teachers' Association, whose motion to file as amicus curiae in this matter is hereby GRANTED. Exhaustive memoranda have likewise been filed by interested parties. The matter is now before the court for determination.

The plan submitted by the defendant Board contains eleven points: Four are directed to the specific requirements imposed by this Court and seven are in response to the Court's sugges-

tion that additional action be undertaken. Such additional action was not specifically mandated by the Court. We do, however, note our disappointment at the limited nature of Points V through XI. While defendant School Board can assert that it was not required by the Court to go as far as it has, a response can be made with equal accuracy that the community relies on the elected members of the School Board to approach the present problem in a sensitive and understanding fashion. The Board's proposals, unfortunately, do not convince us that they have completely attained this desired goal.

We turn to the four points of the plan required by the Court's order. Point I eliminates the optional zones and their attendant segregatory effects. Point III provides for non-racially based faculty assignment practices. Point IV provides for the proper hiring policies of classified personnel. Points I, III and IV are in accord with the requirements of the Court's previous order and as to them, the plan of defendant School Board of the City of Dayton is hereby APPROVED.

Point II, however, which deals with Freedom of Enrollment Priorities, does not entirely meet the required standards. It will be conditionally accepted for elementary schools and middle schools for the school year 1973-74. It will not be accepted for the high schools.

As to the Dayton high schools, the Board is hereby directed to achieve the following:

(1) Any student eligible to attend a Dayton public high school may attend any high school within the Dayton Public School district, provided that students presently enrolled in high schools shall have first priority to complete their education therein.

(2) Each incoming ninth grade class and all vacancies in the tenth, eleventh and twelfth grade classes Where there is insufficient capacity for all pupils seeking admission, a random selection plan shall be used.

(3) Only insufficient capacity shall be deemed reason to exclude any applying pupil.

(4) Transportation shall be the responsibility of the Board of Education for all students eligible and approved for transfer outside of the attendance area of such students' residences.

The defendant Board of Education will submit to this Court within thirty (30) days of the date of this Order a revised plan to comply with the above. Included in such plan will be a listing of the pupil capacity by grade of each of the high schools within the Dayton Public School District. Plaintiffs will be granted an opportunity to present evidence as to such capacity. The foregoing admission plan shall not apply to the Patterson-Stivers Vocational High School.

There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.

The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plaintiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor.

This supplemental Order has been delayed pending study of the decision of the Supreme Court of the United States in *Keyes* v. *School District No. 1, Denver, Colorado*, — U.S. —, 42 U.S.L.W. 5002 (June 21, 1973). The *Keyes* case dealt, for the first time, with a large northern city whose school

system had never been operated under mandatory segregation laws, but which had nevertheless acted in a way that helped create a racially segregative system. It is significant both as a major landmark in the continuing definition of the Equal Protection clause within the context of school desegregation that began with *Brown* v. *Board of Education*, 347 U.S. 483 (1954); and as an indication of the views and attitude of the present Supreme Court. It will of necessity have a major impact upon the future direction of the public school systems in the United States including the one in Dayton, Ohio.

The concurring opinion of Justice Powell must rank among the clearest and most logical explications of a most troubling and difficult subject. This court proposes to follow the rationale set forth by Justice Powell. We place the burden upon the Board to comply to the fullest extent possible with the views stated therein. We place particular significance on the following statement of Justice Powell:

> "The Term, 'integrated school system,' presupposes, of course, a total absence of any laws, regulations or policies supportive of the type of 'legalized' segregation condemned in *Brown*.
>
> "A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to: (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instructions and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close to old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

This Court likewise adopts as its guiding definition the following statement from Justice Powell:

> "An integrated school system does not mean, and indeed could not mean, in view of the residential patterns of most of our major metropolitan areas, that *every school* must in fact be an integrated unit. A school which happens to be all or predominately white or all or predominately black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."

Keyes v. *School District No. 1, Denver, supra,* 41 U.S.L.W. at 5012.

Relating the standards established by Justice Powell to the Dayton situation, the Court has found that appropriate steps to integrate faculties and administration have been instituted and will be continued. There has been and there will be an increasing level of transportation of students for the purpose of promoting integrative opportunities through the Freedom of Enrollment priorities.

There is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration. However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.

The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

These are long range goals and a further opportunity should be given to the Dayton School Board in which to plan and implement them. Accordingly, while this Court is most re-

luctant to continue a "federal receivership" of the Dayton School System, see *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5022 (Rehnquist, J. dissenting), it would seem that a proper disposition of this problem requires a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose. Therefore, as to these long-range criteria, the Court will re-examine the Dayton School System at the end of academic year 1973-74 and determine, at that time, whether or not additional judicial action is required.

Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of the public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5018-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C.A.6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated school systems.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

C. COURT OF APPEALS' AUGUST 20, 1974 OPINION.

(Filed August 20, 1974)

Nos. 73-1974-75

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants-Appellees.

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellees,

v.

DAYTON BOARD OF EDUCATION,
Defendants-Appellants.

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

Before PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. This is a school desegregation case directed against the public school system of Dayton, Ohio. For the reasons set forth below, we affirm in part and remand the case to the District Court for further proceedings.

Plaintiffs-appellants are black and white Dayton parents who bring this class action on their own behalf, on behalf of their minor children, and on behalf of all others similarly situated.

In addition, the National Association for the Advancement of Colored People (NAACP) joined as a party plaintiff. The complaint named the Governor of Ohio, the Attorney General of Ohio, the Ohio State Board of Education, the Superintendent of Public Instruction of the Ohio Department of Education, the Dayton Board of Education, the six individual members of the Dayton Board and the Superintendent of the Dayton School District as parties defendants.[1] The Dayton Board of Education has cross appealed.

I. Chronology of Proceedings

In their complaint filed on April 17, 1972, appellants sought, *inter alia*, an injunction enjoining the Dayton defendants from continuing their allegedly unconstitutional policy of operating the public schools in Dayton in a manner that perpetuated racial segregation. The complaint further averred numerous racially discriminatory practices for which the State defendants had allocated educational resources.

The complaint was filed in the United States District Court for the Southern District of Ohio, Eastern Division, which is located at Columbus, Ohio, rather than in the Western Division at Dayton (the situs of the subject schools) on the basis that the State defendants were domiciled in Franklin County (Columbus). Motions to dismiss for failure to join necesary parties and for improper venue and alternative motions to transfer the action to the District Court at Dayton were filed by the State defendants, the Dayton Board of Education and three individual Dayton Board members. On June 22, 1972, the District Court overruled the motions to dismiss for improper venue and denied the motions to transfer, but did not

[1] Hereinafter, the Governor, Attorney General, State Board of Education, and the Superintendent of Public Instruction will sometimes be referred to collectively as the "State defendants." Hereinafter, the Dayton Board of Education, its members, and its Superintendent sometimes will be referred to collectively as the "Dayton defendants."

rule on the motion to dismiss for want of necessary parties. Thereafter, on July 24, 1972, the Dayton defendants and the State defendants filed their answers denying the material allegations of the plaintiffs' complaint.

In accordance with the proposed order of procedure, an expedited hearing before District Judge Carl B. Rubin, was conducted from November 13 through December 1, 1972, limited to the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education. On February 7, 1973, the District Court filed its Findings of Fact and Memorandum Opinion of Law in which it found that (1) racially imbalanced schools, (2) optional attendance zones, and (3) rescission by the Dayton Board of Education of three resolutions calling for racial and economic balance in each school in the Dayton system were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In its February 7, 1973, decision, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Board's Freedom of Enrollment program so that racial transfers would take precedence over curriculum transfers, (3) maintain faculty assignment practices so that each school would continue to reflect the approximate ratio of the total black to white faculty in the Dayton system, and (4) establish hiring practices that would enable the clerical and maintenance personnel employed by the Board to approximate the proportion of black-to-white population existing within the Dayton system. The District Court further stated that the foregoing elements "shall be considered as a minimum" and that the plan to be submitted by the Board should otherwise conform in all respects to the requirements of law, citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

In compliance with the February 7, 1973, order of the District Court, the Dayton Board on March 19, 1973, submitted

a desegregation plan to the District Court. This plan contained eleven points which are summarized below:

I. Elimination of Optional Zones – eliminated optional attendance zones for elementary and high school students.

II. Freedom of Enrollment Priorities – revised the system's Freedom of Enrollment program in accordance with a specified set of priorities.

III. Faculty Assignment Practices – provided that faculty assignments for each school in the system should reflect the ratio of white to black faculty in the entire system.

IV. Hiring Policies for Classified Personnel – provided that blacks would be hired for classified positions, e.g. clerical, custodial and food service staff, to reflect the proportion of the black-to-white population residing within the Dayton School District.

V. Science Environmental Program – proposed the establishment of a city-wide elementary science program guided by a trained staff working at four centers. The program was to be mandatory and children were to be bused to produce a racial mix that approximates the ratio between black and white students in the system as a whole.

VI. Patterson-Stivers Vocational High School – combined two existing vocational schools into a new unified cooperative school with a district-wide attendance area.

VII. The Musical Stereopticon – formed an elementary and high school band orchestra and chorus on an all-city basis.

VIII. Integrated Athletics – required schools that have no minorities on their teams to schedule schools that do have minorities represented. High school schedules were to be administered by a central athletic office to insure that racial isolation did not exist.

IX. Minority Language Program — required all classroom teachers and administrators at the elementary school level to participate in a series of in-service workshops on linguistic differences that exist in American English.

X. Living Arts Center — created departments in art, creative writing, dance and drama to permit studets, teachers, and parents to expand their knowledge in these areas.

XI. Control Centers — created rumor control centers, school guidance centers, and area learning centers to create a more secure climate for quality education in the school system.

In addition to the plan submitted by the Dayton Board, separate plans were submitted to the District Court by the minority members of the Dayton Board and the Dayton Classroom Teachers' Association. The Board minority submitted its more comprehensive plan because it believed that the plan of the Board majority would maintain the status quo and hence did not comply with the February 7, 1973, order of the District Court to conform in all respects with *Swann, supra,* and *Davis supra.* Further, the plaintiffs-appellants filed objections to the plan of the Board majority primarily on the grounds that the majority plan "froze in" the present unconstitutional system of segregation and would fail to eliminate racialy identifiable schools when other alternative remedies, such as busing of children to other schools, were available.

On July 13, 1973, after considering the three desegregation plans before it, the District Court issued its Supplemental Order on Remedy. The District Court essentialy accepted the plan of the Board majority except that the Dayton Board was ordered to submit a freedom of choice plan for the Dayton high schools. The District Court, however, expressed its "disappointment at the limited nature of Points V through XI"

of the plan of the Board majority, and stated that the desired goal was not attained completely by the majority plan.

The District Court then stated:

> "There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.
>
> "The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plainiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor."

The District Court concluded its July 13, 1973, order as follows:

> "Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5013-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C. A. 6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

> "The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 at pages 15-16.
>
> "It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated schools systems."

Following the July 13, 1973, order of the District Court, the plaintiffs-appellants in a letter dated July 26, 1973, reminded the District Court that by its own order of procedure evidence with respect to the metropolitan and state aspects of the controversy had been excluded from the earlier hearing. On August 10, 1973, the Dayton Board submitted a revised plan incorporating the court's freedom of choice plan for the Dayton high schools. The plaintiffs-appellants filed their notice of appeal from the two orders of the District Court on July 23, 1973. The Dayton Board cross appealed from those orders on August 13, 1973.

Thereafter, on September 25, 1973, the Dayton Board moved this court to dismiss the pending appeal of the plaintiffs-appellants for want of jurisdiction on the ground that no final order had been entered by the District Court. In an unreported order filed on January 17, 1974, this court denied the Dayton Board's motion to dismiss, saying:

> "Said motion to dismiss is hereby denied, it appearing to the court that the District Judge's supplemental order on remedy, dated July 13, 1973, approves a proposed desegregation plan with added instruction as to how it is to be carried into effect, and hence, appears to be in the nature of a temporary injunction under 28 U.S.C. § 1292(a)(1) (1970)."

We have heard oral arguments and the case is now before the court for decision.

II. Historical Background of School Segregation in Dayton

Ohio law has long mandated an integrated public school system. Ohio Revised Code, § 3313.48, provides in relevant part:

> "The board of education, of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

This has been the law of Ohio since February 22, 1887, when it was enacted by 84 Ohio Laws 34. That statute was upheld by the Supreme Court of Ohio in 1888 in *Board of Education* v. *State*, 45 Ohio St. 555, 556, 16 N.E. 373, in which the court stated:

> "[S]ection 4008 having been repealed by the act of the general assembly passed February 22, 1887 (84 Ohio L. 34), separate schools for colored children have been abolished and no regulation can be made under section 4013, that does not apply to all children irrespective of race or color."

Further, the District Court made the following historical determination, that is not challenged on appeal, as a finding of fact:

> "(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system. 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 high schools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." (Footnotes omitted.)

The physical segregation into separate buildings of pupils and teachers by race was ruled illegal in *Board of Education of School District of City of Dayton v. State, ex rel. Reese*, 114 Ohio St. 188, 189, 151 N.E. 39 (1926).

In 1956, following *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Ohio Attorney General ruled that the Ohio State Board of Education had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, by the State Board to local school districts which segregated pupils on the basis of race in violation of *Brown*. Despite protests over the past twenty years from the Dayton branch of the NAACP and others, the Dayton Board has maintained a system wherein the great majority of schools today have student populations which are racially imbalanced. The State Board of Education has permitted this system to continue with a steady flow of state and federal money.

On March 17, 1969, the Acting Director of the Office for Civil Rights, United States Department of Health, Education and Welfare (HEW), notified the Dayton School authorities that, as a result of a compliance review conducted by federal officials, his office had concluded that the Dayton school district was not complying with Title VI of the Civil Rights Act of 1964. In particular, the Acting Director stated:

> "An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderence of Negro pupils, and only 14 percent of teachers

of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.

"The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendence ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 percent of the total enrollment.

"Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system."

On June 7, 1971, the Ohio State Department of Education presented a series of recommendations to the Dayton Board on how to achieve constitutionally required desegregation. In its letter conveying the recommendations, a State Department of Education report stated:

"As the resolution of April 29, 1971 (of the Dayton Board), admitted, 'the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exists.' Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.

"Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative

duty to comply with the Constitution; that is, as the Supreme Court has stated, 'to eliminate from the public schools all vestiges of state-imposed segregation.'"

In particular, the State Department report was especially critical of the process of conversion to feeder and middle schools, stating that the following seemed 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.

"If what appears to be happening with middle schools is in fact happening, then Dayton has only added 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."

Although the recommendations of the State Department were not complied with in full, the State Board of Education continued to aid in financing the operation of Dayton schools.

Finally, pursuant to the resolution of the Dayton Board passed at its April 29, 1971, meeting, the President of the Dayton Board appointed a broadly representative committee to evaluate and advise the Board on plans to reduce racial isolation and improve educational opportunities in Dayton. This committee became known as the Committee of 75, although its membership was later expanded to include eleven students. At its first meeting, on August 30, 1971, the Committee was charged as follows by the Board President:

"We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

"It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

"You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your point. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

"If there be a fear that you are here to architect a master plan for 'busing' — 't'ain't true.' You are here in an attemp to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate."

After several months of study, the Committee of 75 issued its report in the late fall of 1971. The report recognized the

Dayton Board's casual responsibility for the condition of segregation and the imperative need to end one race schooling, and suggested the following tentative approaches to accomplish desegregation in the Dayton school system:

"1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

"2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.

"3. We must resolve now as a total community to end inferior segregated education once and for all.

"4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.

"5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.

"6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.

"7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.

"8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing (to) stifle such dialogue.

"9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.

"10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by continuing attention to curricula, buildings, and in-service training."

The report of the Committee of 75 concluded as follows:

"*Summary.* The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap."

Thereafter, at its regular meeting on December 8, 1971, the Dayton Board of Education passed three resolutions in response to the report of the Committee of 75. The first resolution provided, in part, as follows:

"WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

"1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design

of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions or inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

"2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

"3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

"4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society."

The second resolution passed by the Dayton Board at its December 8, 1971, meeting requested the assistance of the state and federal governments in desegregating Dayton public schools. The third resolution declared the Board policy to be that each school in the system should enroll pupils in a manner

which substantially reflected the racial and economic characteristics of the district as a whole and directed the school superintendent to implement a plan of desegregation according to the following guidelines:

"a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

"b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

"c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

"d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

"e. Desegregation is to be completed by September, 1972.

"f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

"g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy."

Each of the three Board resolutions passed by a 5 to 2 vote after a motion to table the resolution had failed by a 4 to 3 vote.

Subsequently, on January 3, 1972, the newly constituted Dayton Board, the composition of which had been changed by the local elections of November 1971, officially rescinded the three resolutions passed by the prior Board at its December 8, 1971 meeting. The rescission of the three resolutions occurred by votes, respectively, of 4 to 3, 4 to 2, and 4 to 2. The effect of the rescissions was to reinstate the existing attendance zones and the system's Freedom of Enrollment program for

the 1972-73 school year. The present action was filed on April 17, 1972.

III. The Constitutional Violations Found by the District Court

The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of the three resolutions. These were held by the District Court to be "cumulatively in violation of the Equal Protection Clause." Further, the District Court stated that the rescission of the resolutions "constituted an independent violation" of the constitutional rights of the black minority in Dayton.

We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence. Fed. R. Civ. P. 52(a). However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution.

(A) Racially Imbalanced Schools

The District Judge made the following finding of fact:

> "The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census. Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school." (Footnote omitted.)

With respect to this finding of fact, the District Judge appended the following chart which graphically demonstrates the racial imbalance in Dayton's sixty-eight public schools.

RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1.	Jane Addams	81.7	27.	Jackson Primary	98.8
2.	Allen	0.6	28.	Jefferson Ele.	60.1
3.	Belle Haven	5.0	29.	Jefferson Primary	57.1
4.	Belmont	0.8	30.	Kemp	0.0
5.	Brown	0.6	31.	Lewton	0.0
6.	Carlson	99.0	32.	Lincoln	0.0
7.	Cleveland	0.0	33.	Loos	4.6
8.	Drexel	5.7	34.	Horace Mann	0.2
9.	Eastmont	0.0	35.	McGuffey	14.4
10.	Edison	97.3	36.	McNary Park	99.4
11.	Emerson	6.8	37.	Meadowdale Ele.	8.0
12.	Fairport	0.1	38.	Miami Chapel	99.9
13.	Fairview Ele.	1.7	39.	Patterson-Kennedy	0.0
14.	Ft. McKinley	0.0	40.	Residence Park Ele.	98.8
15.	Franklin	0.0	41.	Residence Park Pri.	99.3
16.	Gardendale	28.5	42.	Ruskin	7.0
17.	Gettysburg	5.2	43.	Shiloh	0.1
18.	Gorman	21.1	44.	Shoup Mill	7.1
19.	U.S. Grant	0.1	45.	Louise Troy	100.0
20.	Grace A. Greene	96.8	46.	Valerie	7.5
21.	Hawthorne	0.0	47.	Van Cleve	1.1
22.	Hickorydale	6.6	48.	Washington	19.4
23.	Highview	97.0	49.	Weaver	99.9
24.	Huffman	0.0	50.	Webster	0.0
25.	Irving	99.0	51.	Westwood	99.4
26.	Jackson Ele.	99.1	52.	Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle Schools – % Black:

1. MacFarlane 99.6
2. Whittier 99.3
3. Cornell Heights ... 80.5
4. Longfellow 64.1
5. Orville Wright 8.1

High Schools – % Black:

1. Dunbar 100.0
2. Roosevelt 100.0
3. Roth 95.8
4. Colonel White 54.6
5. Patterson Co-op .. 32.9
6. Fairview 24.1
7. Stivers 14.0
8. Meadowdale 10.6
9. Kiser 9.8
10. Wilbur Wright 9.2
11. Belmont 5.2

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 percent 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.

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.

(B) Optional Attendance Zones

The District Judge made the following finding of fact:

> "(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished.
>
> "The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth

zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional 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 of these zones, 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."

The testimony of Dr. Gordon Foster, Director of the Florida School Desegregation Consulting Center at the University of Miami, indicates that the Colonel White-Roosevelt optional attendance area is almost a classic example of segregation practice:

"Q Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the ultilization of optional attendance zones?

"A Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

"In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White."

Further testimony of Dr. Foster demonstrates the deleterious effect that the optional attendance zones had on school integration in Dayton:

"Q In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

"A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

"Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

"A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available."

We conclude that the District Court correctly found that the optional attendance zones used in Dayton were an element of the cumulative violation of the constitutional rights of the appellants.

(C) Rescission of the Board's Resolutions

The District Judge rendered the following as a finding of fact:

"At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues

at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was relected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks,' who would not be members of the Board after December 31, 1971.

"The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. . . .

"Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a rescission of the previous action."

From this finding of fact, the District Judge concluded:

"The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire*

v. *Cashman*, —— F.Supp. —— (S.D. Ohio E.D. 1972). The rescission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A. 6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A. 6 1971)."

The passage of the three resolutions and their subsequent rescission by a Board of a different composition are factual matters about which there is no dispute. As hereinbefore stated, the record amply supports the District Judge's findings that racially imbalanced schools and optional attendance zones were elements of the cumulative violation of the appellants' constitutional rights. Accordingly, when the Dayton Board at its December 8, 1971, meeting passed resolutions designed, among other things, to eliminate racial imbalance and optional attendance zones in Dayton schools, it was acting in a manner consistent with its constitutional duties. Therefore, the rescission by a subsequent Board of these resolutions designed to carry out the Board's constitutional duties was an element of the cumulative violation of the appellants' constitutional rights as guaranteed by the Equal Protection Clause of the Constitution.

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.

In view of our conclusion in this case that the rescission was a part of the cumulative violation of appellants' constitutional rights, we find it unnecessary to pass on the question of whether the rescission by itself was a violation of those rights.

We affirm the District Court's holding that racially imbalanced schools, optional attendance zones, and the Board's rescission of the three resolutions are cumulatively in violation of appellants' rights guaranteed by the Equal Protection Clause.

IV. Other Alleged Constitutional Violations

On appeal, the appellants raise at least four other school practices which purportedly maintained and expanded the basically dual school system inherited at the time of *Brown*. These practices are in the areas of (A) staff assignment, (B) school construction, (C) grade structure and reorganization, and (D) transfers and transportation. The District Judge did not include any of these practices within his finding of cumulative violation of the appellants' constitutional rights.

(A) Staff Assignment

The record reveals that prior to the 1951-52 school year the Dayton Board basically assigned all black teachers only to schools with all black pupils and all white teachers to schools with predominantly white student bodies pursuant to an explicit segregation policy of the Board. In 1951-52, the Board introduced a new policy ostensibly to integrate the faculties, but which effectively continued in practice the racial assignment of faculty through the 1970-71 school year.

In a letter dated March 17, 1969, the Acting Director of the Office of Civil Rights of HEW notified the Dayton Board that "an analysis of the data obtained during the (compliance) review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff."

Other relevant portions of this letter are contained in Section II of this opinion. Following receipt of the letter, the Dayton Board negotiated with HEW and agreed to desegregate its staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" in accordance with the principles of *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). Thereafter, the Dayton Board realigned its school staffs for the 1970-71 school year.

The appellants admit that progress has been made with respect to eliminating segregative staff assignment, but allege that the agreement with HEW has not been fulfilled in that vestiges of the former practices persist which continue to identify schools as "black schools" or "white schools." As an example, at the high school level, the following table was presented by the appellants to demonstrate how Board assignment of its professional staff still served to identify schools as "black schools" or "white schools" in 1971-72 (w means white, b means black):

	Pupil % Black	*Faculty % Black*	*Principal*	*Coaches*
Belmont	5.2	23.1	w	10w, 2b
Wilbur Wright	9.2	28.5	w	10w, 3b
Kiser	9.8	20.1	w	10w, 2b
Meadowdale	10.6	23.5	w	13w, 3b
Stivers	14.0	32.4	w	10w, 4b
Fairview	24.1	29.8	w	10w, 5b
Col. White	54.6	32.0	w	9w, 6b
Roth	95.8	43.5	b	9w, 7b
Roosevelt	100.0	47.4	b	8w, 8b
Dunbar	100.0	50.3	b	7w, 9b

The witness Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, testified as follows:

"Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

"Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

"MR. GREER: Objection, your Honor.

"THE COURT: Overruled.

"A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

"Q. Dr. Green, you did examine the '68-'69 statistics for the Dayton School System, is that correct?

"A. Yes.

"Q. And did you in examining the data note any correlation between the pupil composition of black or white and the faculty composition black or white?

"A. Yes, I did, Mr. Lucas.

"Q. Do you have an opinion whether this is isolated instances of correlation or is there any systematic pattern to it?

"A. There seems to be a systematic pattern as it relates to black teachers and the racial composition of schools vis-a-vis black youngsters and white youngsters being essentially placed in schools that are predominantly white."

The witness Dr. Foster testified as follows:

"Q. . . . In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

"MR. GREER: Objection.

"THE COURT: Overruled.

"A. Well, my opinion is that this policy and practice before the change we assume took place, especially since it is in a northern district, would indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

"Q. Is it also an annual option that the school Board has?

"A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

"But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place."

Dr. Wayne M. Carle, Superintendent of Schools in Dayton at the time of the trial, testified as follows:

"BY MR. LUCAS:

"Q. Would you answer my preliminary question, then. Did you agree with the HEW conclusion that there was purposeful faculty and staff segregation in the Dayton School System?

"MR. GREER: We would object to this, your Honor, as it simply asks a self-serving conclusion of the witness.

"THE COURT: I am going to overrule your objection. You may answer.

"A. There is no question but what that was so.

BY MR. LUCAS:

"Q. Now, Doctor, I think you stated that there had been substantial faculty desegregation. Has there also been staff desegregation and, if you will, limit it to what you have defined as line personnel, principals, assistant principals?

"A. There has been considerable desegregation of administrative staff, but there still is a high correlation between the race of pupils and the race of the administrator.

• • •

"Now, today the percentage of black administrators is around 32 or 33 percent, as I recall. That indicates less discrimination in promotion, since there is more relationship between the percentage of teachers, which now is perhaps 34 or 35 percent, and administrators. But I am saying that with respect to their assignment, and particularly at the high school level, there is an almost perfect correlation between the race of the principal and the predominating race in the school. All four black high schools, for example, have black principals. All the other high schools have white principals. So that that considerable vestige of segregation still has not been eliminated. There would be other instances, if you just scan the statistics, in which previously all black or nearly black staff similarly have weighted errors in them, that

is, the error is still in the direction of the previous discrimination. If the staff previously were 70 percent and now should be, let's say, 30 percent black, it may still be 40 percent because of difficult factors in resolving it.

"In all cases, or probably in all cases, that error or that difference is still weighted to the previously fully segregated pattern, so that it is very difficult I think, to understand the depth of segregation. It is so pervasive that its vestiges are difficult. These are two areas in which that is very obvious."

(B) School Construction

The District Judge did not include the Dayton Board's school construction practices within the cumulative violation because he found the underlying motives behind such construction to be racially neutral, rendering the following as a finding of fact:

"(c) Site selection and construction

"(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 69 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of 'building schools where children are, or where they are expected to be.' New construction of elementary schools are largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominately white and schools in black neighborhoods which remain predominately black.

"(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Construction of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of whites attending such schools.

"Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion."

On appeal, the appellants contend that there is substantial evidence in the record to support their claim that the Dayton Board's practices in school construction had a segregative effect and contributed substantially to the alleged present duality in pupil assignment. The record reveals that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid 1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas. Of 24 new schools constructed between 1950 and the present, 22 opened 90 per cent or more black or white. The following table contains some examples:

High Schools	*Date of Opening*	*% Black at Opening*	*% Black Pupils 1972-1973*
Patterson	1954	0.0	32.9
Belmont	1956	0.0	5.2
Meadowdale	1960	0.0	10.6
Dunbar	1962	92.3	100.0

Elementary Schools			
Orville Wright	1952	0.0	8.1
Miami Chapel	1953	100.0	99.8
Horace Mann	1954	0.0	3.1
Bell Haven	1954	0.0	17.1
Hickorydale	1957	0.0	32.5
Meadowdale Elem.	1957	0.0	12.6
Louise Troy (Primary)	1957	100.0	99.1
Shoup Mill	1958	0.0	3.8
Carlson	1958	95.0	99.0
Jackson Primary	1960	99.9	99.7
McNary Park (Primary)	1964	100.0	100.0
Res. Park (Primary)	1966	96.5	100.0
Valerie	1966	0.0	24.0

On the issue of school construction practices, Dr. Foster testified as follows:

"Q. Dr. Foster, would you at this point tell me if you made an inquiry into the question which I think related to the construction issues of site selection?

"A. Yes.

"Q. And what was that inquiry?

"A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of

the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

"Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

"Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a matter reflective of segregation practices in your experience?

"A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

"Q. What effect does this have on the existing racial concentrations?

"A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated."

Based on this evidence, the appellants dispute the District Court's conclusion that the Dayton Board's school construction practices were not a part of the cumulative violation. The appellants contend that on facts similar to those presented in this case the Supreme Court in *Swann, supra,* 402 U.S. at 20-21, found major constitutional violations on which a District Court could fashion a remedy.

(C) Grade Structure and Reorganization

The appellants' primary objection in this area is to the establishment of a middle school system in the 1971-72 school

year which allegedly had a segregative effect. Dr. Foster testified as follows:

> "My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it."

Further, after the establishment of the new middle school structure, the Ohio State Department of Education gave the following advice to Dayton school authorities:

> "If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

The District Court found that the boundaries established for the middle schools in September 1971 had "neither segregative nor integrative effect." The appellants submit that this finding means, under applicable legal standards, that the Board acted unconstitutionally to maintain segregation in the face of an opportunity to accomplish substantial desegregation. The appellants assert that the action of the Dayton Board was intentional because the Board was aware of desegregation alternatives but instead choose a plan whose predictable impact was not to further integrate the Dayton school system.

(D) Transfers and Transportation

Finally, the appellants contend that transfer and transportation practices of the Dayton Board, which might have held promise to accomplish further desegregation, have operated to maintain segregation and further earmark schools as "black"

or "white." In support of this contention, the appellants cite evidence that curriculum, hardship and disciplinary transfers have operated frequently to assign white children from "black schools" to "whiter schools" and black children from "white schools" to "blacker schools." Further, there is evidence in the record revealing that the Board assigned tuition pupils from outside the district on a dual basis; white pupils were assigned to white schools and black pupils were assigned to black schools.

The testimony of John Harewood, Assistant Superintendent of Dayton schools in charge of administration, reveals two instances in which children were bused "intact" with the effect of segregating children on a racial basis in separate classrooms within schools. In 1963, white children from Ruskin School were transported intact to separate classes in the mixed Central School. In the spring of 1968, some of the black children from Edison School, which had been partially destroyed by fire, were similarly segregated within a number of white schools throughout the city.

The District Court's only conclusion in the area of transfer and transportation practices was with regard to the school system's Freedom of Enrollment program. The District Court required that program be revised for Dayton high schools so that transfers for purpose of improving racial balance take precedence over curriculum transfers.

On the basis of the evidence adduced, the appellants' legal argument in this area is that the transfer and transportation practices of the Dayton Board had the "clear effect of earmarking schools according to their racial composition" which is proscribed by *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 202 (1973).

(E) Conclusion as to Other Alleged Constitutional Violations

As hereinabove indicated in Section IV of this opinion, the appellants have raised serious questions with respect to wheth-

er the District Judge's failure to include these four school practices within the cumulative violation was supported by substantial evidence. In view of our holding in Section V hereof, we conclude that it is unnecessary at this stage to pass on whether the District Judge's findings of fact with respect to these four school practices is supported by substantial evidence.

V. Remedy

As more fully described in Section I hereof, the District Court ordered the Dayton Board of Education to submit a desegregation plan that conformed to all requirements of law. Subsequently, the four-member majority of the Dayton Board submitted an eleven point plan characterized by the appellants as a "free choice plan." Other plans were submitted to the District Court by the three-member minority of the Dayton Board and Dayton Classroom Teachers' Association. Without holding a hearing on the remedy issue, the District Court approved the plan of the Dayton Board majority with one modification.

The appellants' primary contention on appeal is that the desegregation plan approved by the District Court is inadequate to remedy the cumulative violation found by the District Court. We agree.

On receipt of the Board majority plan, the District Court was obliged "to assess the effectiveness of . . . [the] proposed plan in achieving desegregation . . . . in light of the circumstances present and the options available in each instance." *Green* v. *County School Board,* 391 U.S. 430, 439 (1968). The appellants assert that the circumstances present here, namely a cumulative violation, required a remedy of "all-out desegregation." *Keyes, supra,* 413 U.S. at 214. The appellants further assert that the plan of the Board minority would accomplish such "all-out desegregation" and that therefore we should remand this case to the District Court with instructions that it order the plan of the Board minority implemented.

Today we simply hold that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations. The case is remanded to the District Court for proceedings to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra,* and *Swann, supra.* This holding does not necessarily require the District Court to implement the plan of the Board minority, but "all vestiges of state-imposed segregation," *Swann, supra,* 402 U.S. at 15, must be eliminated.

In formulating a desgregation plan, the District Court of course will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley,* — U.S. — (No. 73-434, July 26, 1974), reversing *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. *in banc* 1973).

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. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-13.

VI. Other Directions on Remand

In its Supplemental Order on Remedy, dated July 13, 1973, the District Court suggested that its disposition of the case appeared "to require the dismissal of those non-Dayton defendants." We disagree with this suggestion as to the State defendants.

The District Court is directed to keep the State defendants as parties to this action. Although, according to the District Court order of procedure, evidence as to a state violation was supposed to be excluded from the initial trial, the follow-

ing evidence was adduced: The Dayton school district is chartered by the Ohio State Department of Education, and without such a charter, the district would be without power to operate and could not receive state aid. Ohio Revised Code, §§ 3301.16 and 3317.01. Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools. Finally, during the years in question in this case, the Dayton school district was denied any allocation of state funds for pupil transportation, although such funds were made available to most suburban and rural school districts in the state.

VII. Other Issues

Several other issues were presented which do not now require discussion. All contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit.

VIII. Conclusion

The District Court's holding of a cumulative violation of the appellants' constitutional rights, as contained in its Findings of Fact and Memorandum Opinion of Law dated February 7, 1973, is affirmed.

Since we conclude that the remedy prescribed by the District Court is inadequate, the case is remanded to the District Court with directions to revise and supplement its order of July 13, 1973, entitled "Supplemental Order on Remedy," so as to formulate, in accordance with the guidelines hereinabove set forth, a desegregation plan for the Dayton school system and for other proceedings to that end not inconsistent with this opinion.

D. DISTRICT COURT'S JANUARY 7, 1975 ORDER RELATING TO SUBMISSION OF PLAN.

(Filed January 7, 1975)

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

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter comes before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit and following informal conferences called by the Court limited to one attorney for the plaintiffs and one attorney for the defendants. The Court would be remiss if it did not recognize the contributions of plaintiffs' attorney, Louis Lucas, and defendants' attorney, David Greer, whose research, counsel and suggestions materially assisted the Court in the preliminary phase of this matter.

Based upon such conferences, the controlling decisions in this Circuit, and the state of the law on the subject as announced by the Supreme Court of the United States, the Court concludes that it is now appropriate to deal with

specific plans. The parties, including the plaintiffs, the defendant Board of Education of Dayton, and the Board of Education for the State of Ohio will confer and prepare plans either jointly or separately for submission to this Court which will accomplish the following ends and satisfy the requirements set forth in the opinion of the United States Court of Appeals for the Sixth Circuit, 503 F.2d 684 (1974).

In the twenty years that have elapsed since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), large numbers of American cities have faced the problem that now confronts Dayton and have adopted varying methods to solve it. Able, conscientious, and knowledgeable experts in this field have developed. Departments of government, both state and national, are anxious to assist. The experience of other cities and the available experts should be consulted by the parties in the ultimate solution of this problem. Such devices as "pairing" of schools, "clustering" of schools, alterations of attendance boundaries, "magnet" schools, feeder patterns, increasing school capacity, new construction and voluntary transfers, should all be considered. No known desegregation device should be overlooked. The proposals of the Board of Education, both those presented in response to this Court's Order of February, 1973, and those suggested in the informal discussions above referred to should not be abandoned. The thought and planning that preceded these proposals should not be ignored. These proposals have not been considered unresponsive; they have been considered insufficient. They do represent a base for further expansion.

The Court draws particular attention to the proposal of the Dayton School Board to construct magnet schools in the downtown area. It may well be that further development of this concept might achieve the desired goals as to high schools on a voluntary basis.

The Dayton freedom of enrollment program should not be abandoned. It, too, may contribute in great measure to a solution of the problem.

Deliberately absent from the foregoing suggestions is that of transporting students to accomplish racial balance. It does

not require much wisdom or foresight to recognize that this coercive solution is the least satisfactory. The Court will consider transportation of students only as a last resort and only after careful inquiry has established that no other solution exists.

One word of admonition: This is not a problem that will disappear by itself. It is concerned with basic constitutional rights that every public official, including this Court, is sworn to uphold.

In February of 1973, this Court observed that no peaceful community could long exist where two separate societies viewed each other from ever higher walls of suspicion and distrust. The tragic events of the past three months in the city of Boston, Massachusetts, have confirmed this observation with distressing consequences.

With full respect for the Board's knowledge and ability; with full recognition of its representative responsibilities; and with full faith in its dedication and good will, the Court now requests the Board of Education to report upon the months of study and planning that have been completed as they relate to a solution of the problem herein.

The Board of Education will submit its plan to the Court on or before February 1, 1975. A completed plan will be made available for public inspection on or before January 20, 1975. Should it appear necessary, hearings on such plan and any other submitted by interested parties will be held on or before February 15, 1975.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

E. DISTRICT COURT'S MARCH 10, 1975 ORDER ADOPTING PLAN OF DAYTON BOARD OF EDUCATION.

(Filed March 10, 1975)

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

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter is before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit. In accordance therewith this Court on January 7, 1975, directed the School Board of the City of Dayton to submit a plan of desegregation by February 1, 1975 consistent with such Order of Remand. Subsequently, plaintiffs also filed a plan and a hearing on both was held February 17, 19, and 20, 1975.

I. Basis of Court's Consideration

In order to place this Court's consideration of any remedial plan in a proper context certain introductory observations should be made:

1. All desegregation efforts must be tested initially against the principle that separate facilities limited to blacks and whites are forbidden;[1]

2. Racial balance, i.e., a reflection of the district percentages in each school is not a Constitutional right equivalent to the principle above enunciated;[2]

3. It is not the function of district courts to operate public school systems, to determine social values, or to engage in restructuring of communities, personal attitudes, or sociological benefits, except as these matters may bear upon Constitutional rights.[3]

To the foregoing the court would add the following which

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[1] "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"; Brown v. Board of Education, 347 U.S. 483 (1954) (Brown 1).

[2] *Swann v. Board of Education*, 402 U.S. at page 24:

"If we were to read the holding of the District Judge to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

See also: Milliken v. Bradley, —— U.S. —— (1974), 94 S.Ct. 3112 at p. 3125.

"The failure of an educational agency to attain a balance on the basis of race, color, or sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of laws." 20 U.S.C. § 1704.

[3] "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a Constitutional violation, however, that would not be within the authority of a federal court." Swann v. Board of Education, supra.

may be deemed findings of fact whether implicit in or explicated by previous opinions of this Court.

1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.

2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

3. Overt evidences of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.

II. Duty of District Courts

With the determination that acts of segregation did occur it is now necessary to examine the duty imposed upon this Court under such circumstances. While there is a variation in the description of such duty, this Court elects to be guided in this matter by the following: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* (Brown II), 349 U.S. 294.

There is, however, a final admonition in *Swann* that bears careful attention: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education, supra* at p. 16.[4]

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[4] A subsequent determination by the Supreme Court of the United States in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) holds there is broad discretionary power granted to trial courts in shaping equity decrees. Lemon, it should be pointed out, is not a school desegregation case.

Two events that bear upon the scope of appropriate remedy have occurred since August 20, 1974, the date of the appellate holding in this case. These events may well have changed both "the nature of the violation" and the "scope of the remedy." They require further discussion.

First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*[5]

Section 1701 declares it to be the policy of the United States that:

"1. All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), — F.2d — (1974). The Court in *Higgins*

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[5] The effective date of the above act is said to be, "On and after the sixtieth day after August 21, 1974."

followed *Deal* v. *City of Cincinnati Board of Education*, 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

If the nature of the violation determines the scope of the remedy, it becomes critical to determine whether or not there is an unremedied district-wide segregative act. This Court found in its Order of July 13, that specific segregative acts, since eliminated; the existence of optional attendance zones, now eliminated; and conditions of racially imbalanced schools together required action by the federal courts.

We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis.[7] We do deal with a system that has in the past permitted segregative practices to exist. The issue, therefore, is whether a plan intended to improve the educational opportunities for all students without a school-by-school restructuring basis is appropriate. This Court holds at this time that it is.

III. Plaintiffs' Plan

The plaintiffs have urged upon this Court a plan which will assign students among the Dayton schools in a black/white

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[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court. See footnote 7 *infra*.

[7] The only district-wide action of the defendants involved the rescission of resolutions in January of 1970. The United States Court of Appeals dealt with the issue as follows:

"We hold that the findings of fact upon which the District Court based its conclusion of accumulative violations are not clearly erroneous but to the contrary are amply supported by the evidence. Fed. R. Civ. P. 52A. However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution. *Brinkman* v. *Gilligan*, 503 F.2d 684 at 693.

ratio approximating the district-wide ratio for such schools with a variation of 15%, plus or minus, from the mean.[8] To accomplish this, the plaintiffs would create "clusters" of elementary schools, additional middle schools, and redistricted high schools. The term "cluster" is taken to mean a group of schools, usually more than two, within a common attendance district to which students will be sent irrespective of proximity to their place of residence.[9] Plaintiffs' plan is a comprehensive one; it was carefully prepared and well-presented. It will do what the plaintiffs urge must be done. It is not intended to, nor will it, in and of itself, provide alternate educational programs or seek innovative learning experiences. In the plaintiffs' view, these are obligations of any school board irrespective of the integration or segregation of the schools. Since this question is not before the Court, it will not be ruled upon.

In the Order of Remand by the United States Court of Appeals for the Sixth Circuit, the following appears:

"In formulating a desegregation plan, the District Court, of course, will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley*, — U.S. —, 94 S.Ct. 3112 (1974)."

The majority opinion by Chief Justice Burger includes the following: "Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated — in

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[8] According to the testimony the appropriate percentages of Black students for the year 1974-1975 are:

Elementary Schools	44.2%
Middle Schools	68.7%
High Schools	45.5%

[9] Portions of the record dealing with this transportation are included herein as Appendix A.

their view of what constituted desegregation — unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. . . . In *Swann* which arose in the context of a single independent school district the Court held, 'If we were to read the holding of the District Court to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse; 402 U.S. at 24.

The clear import of this language from *Swann* is that desegregation in the sense of dismanteling a dal school system does not require any particular racial balance in 'each school, grade or classroom.'" 94 S.Ct. at 3125.

It would seem, therefore, that whether the area in question is a single school district as in *Swann* or in multi-school districts as in *Milliken*, the obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan.

Accordingly, this Court holds that a comprehensive plan, such as plaintiffs suggest, is not required at this time. We hold also that plaintiffs' plan as presented is violative of the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.*, and particularly §§ 1713 and 1714.

IV. The Defendant's Plan

The defendant's plan was presented to the Court in a 17 page memorandum with a 26 page exhibit of tables and statistics and a 69 page appendix. It also contains much extraneous material. Only the "magnet" program and the "learning-centers" concept require comment.

A magnet high school[10] with programs not offered at home high schools and "satellite" magnet programs intended to attract students from their high schools and districts of resi-

[10] The term "magnet high school" is deemed to mean a school open to all students with programs sufficiently attractive that students will elect to attend. The Stivers-Patterson vocational complex is one example of a magnet school.

dence is proposed. If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both. Magnet schools are an acceptable desegregation device. 20 U.S.C. § 1713(f).

The magnet's schools are supplemented by "learning centers" for foreign languages and business education for 6th, 7th, and 8th grades; career motivation for 4th and 5th grades; science for 5th, 6th, 7th and 8th grades; and a science environmental center for the 6th grade.

Learning centers to which students are transported are integrative in concept. Plaintiffs assert that such transportation is also violative of 20 U.S.C. §§ 1713 and 1714 since it would require bussing of students to schools other than the school closest or next closest to his or her place of residence. We leave this argument for another day and another court. We hold only that the plan comports with the Congressional declaration of policy set forth in 20 U.S.C. § 1701.

The overall plan is desegrative in intent; it is not violative of *Brown* v. *Board of Education, supra,* and it does not appear to violate the mandate of the United States Court of Appeals for the Sixth Circuit so long as the following limitations are observed:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;

2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;[11]

3. The faculty assigned to all programs must reflect the racial percentages of faculty within the system as a whole;

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[11] See Footnote 9.

4. The amount of time of student assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

It is entirely possible that the proposed program will not attract an appropriate number of black and white students and might instead further segregate the Dayton school system. Because it is innovative, because it offers the opportunity for alternative quality education, and because it has been proposed by a board of popularly elected officials, the Plan should be given a fair trial. The Board's plan will be accepted provisionally for the school year 1975 – 1976. The provisional acceptance requires this Court once more to continue jurisdiction of this matter.

There is an omission in the comprehensive plan submitted by the defendants. It is not possible to determine whether the numerous desegregative techniques set forth in this Court's Order of January 7, 1975, have been fully investigated. It is not known, for example, whether adjustments of existing school attendance zones would reduce concentrations of black and white attendance. It is not known whether feasible pairing or clustering of schools could be accomplished without bussing violative of the Equal Educational Opportunities Act.

Accordingly, the defendants are directed to conduct such a study and to report to this Court on or before October 1, 1975, of the results thereof on a school-by-school basis. Further hearings will thereupon be held and an alternative plan consistent with the Equal Educational Opportunities Act will be established on or before January 1, 1976.

In the event defendants are unable by the methods approved in July of 1973 and those approved by this Order to accomplish what this Court deems to be adequate progress in complying with the Equal Educational Opportunities Act and the mandate of the United States Court of Appeals for the Sixth Circuit, such alternative plan will become effective for the school year beginning in September, 1976, and for all school years thereafter.

V. The Dayton School Board

The willingness of this Court to accept defendant's plan at this time is dictated in part by the attitude of the School Board in the City of Dayton. This Court has not been faced with the problems of Judge James B. McMillan who dealt with a recalcitrant school board in *Swann* v. *Charlotte Mecklenburg Board of Education, supra,* nor with those of Judge W. Arthur Garrity, Jr., who has dealt with a contumacious school board in Boston. Any reasonable plan submitted by a board which has demonstrated good faith is entitled in the first instance to careful consideration by a court and in cases of doubt to have such doubt resolved in its favor. Good faith is a two-way street.

VI. Progress of the Case

The pace at which desegregation cases proceed through the courts has been a source of concern by courts and a source of frustration for litigants.[12] It has frequently been observed that over 21 years has elapsed since *Brown* v. *Board of Education, supra,* and the problem appears far from solved. It can even be asserted that the magnitude of the problem has in fact increased in that time. To postpone yet again the ultimate determination of this matter may appear to the plaintiffs to be a further delay of their rights. A chronology of the significant

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[12] The complexities of school desegregation have resulted in the following instances of prolonged litigation:

a. *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* original District Court opinion, 186 F.Supp. 559 (1960), recent opinion of United States Court of Appeals for the Sixth Circuit, 444 F.2d 632 (1971);

b. *Kelly* v. *Board of Education of the City of Nashville* (subsequently Metropolitan County Board of Education of Nashville), original District Court opinion, 139 F.Supp. 578 (1956), recent opinion of the United States Court of Appeals for the Sixth Circuit, 463 F.2d 732 (1972).

c. "These appeals represent another installment of an already lengthy serial: 'The desegregation of the Memphis Public School System'. The initial chapter of this story was written in 1960 . . ." *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (1972).

dates in this proceeding might held to place the matter in its proper context.

This case was filed in May of 1972. It was heard on the merits in November of 1972.

A Findings of Fact and Memorandum Opinion of Law was filed in February of 1973. An Order imposing integrative remedies upon defendants was filed in July of 1973. During the school year 1973 — 1974 and 1974 — 1975 these remedies were in effect.

The Order of Remand by the United States Court of Appeals for the Sixth Circuit became effective in October of 1974. The Order herein will at the minimum be effective for the school year 1975 — 1976.

While this is hardly a model of speed and dispatch, it is consistent with the magnitude of the problem that must be solved.

In the mass of rhetoric, emotional outbursts, and demogoguery that have attended the progression of many school desegregation cases, a few voices have been heard to suggest a rule of moderation. One such by Senior Judge Clifford O'Sullivan of the United States Court of Appeals for the Sixth Circuit bears repetition:

> "The hope or dream that one day we will have become a people without any motivation borne of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what now remains of racial bias and prejudice."
> *Goss* v. *Board of Education of the City of Knoxville, Tennessee*, 444 F.2d 632 at 640.

VII. Conclusion

In view of the foregoing, the Court holds as follows:

1. The plan of the defendants as modified herein will have an integrative effect upon the Dayton school system and is provisionally adopted for the school year 1975 — 1976.

2. The plan of the plaintiffs is violative of The Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq., and imposes a burden upon the defendant school board beyond that which it is presently required to bear.

3. The state of the law in desegregation cases, the Order of Remand in this case, and the Congressional intent in the Equal Educational Opportunities Act, supra, do not require the adoption of a mathematical ratio plan wherein each school, grade or classroom of the district shall contain any particular balance of black and white students representative of the district as a whole.

4. Where the previous actions of a school board indicate only a difference of opinion on a subject concerning which reasonable minds may reasonably differ, bad faith will not be presumed and a proposal, although novel and untried, will be given an opportunity for success.

5. In view of the developments, subsequent to August 20, 1974, the Court is of the opinion that holdings herein regarding the Equal Educational Opportunities Act involve a controlling question of law as to which there is substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of the litigation. Accordingly, the Court does so certify in accordance with 28 U.S.C. § 1292(4)(b). An application for appeal in accordance with this determination shall not stay the proceedings in this Court.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A TO MARCH 10, 1975 ORDER

. . . after this matter was raised during the Louisville argument in the Sixth Circuit, and the Court's inquiry was whether or not the Act of Congress could overcome the constitutional provisions which were being enforced by the courts, and I think I had related that to the witness. I am not sure, but I was present when the Sixth Circuit asked that question, and that conformed with my earlier reading of the Broomfield Amendments which had a similar purpose but, however, had the same saving clause about the power of the courts is not impaired where necessary to remedy a constitution violation.

THE COURT: Well, we are not going to debate the constitutionality of an Act of Congress. I am concerned with the presentation of a plan where it is somewhat peripheral as to the consideration of this Act.

Mr. Greer, you may continue.

CONTINUATION OF CROSS EXAMINATION

BY MR. GREER:

Q. Yesterday, Doctor Foster, we discussed the schools that were left unaffected by your pairing and clustering at the elementary level, and the two examples of the contiguous pairing in your plan. Let's move on to the other nine clusters that comprise your elementary school plan. Each of those nine clusters involve a substantial amount of required bussing of school children to schools beyond those that are closest or next closest to their place of residence; isn't that correct?

A. I believe that is correct, yes.

Q. Let's look, for example, at cluster F of your group. A child in the Lewton school district which is in the eastern part of Dayton is required to spend grades 4 and 5 in Edison school which is on the west side of Dayton; is that not right?

A. That's right.

Q. And am I not also correct that the following schools are closer to the Lewton district: Eastmont, Grant which you are converting to a middle school –

A. Would you hold that just a minute so I can make a note of those?

Q. Sure.

A. All right. Between Lewton and Edison you are speaking of?

Q. That's correct.

A. And what are the schools again?

Q. Well, let me just list them off It would be Eastmont, Kemp, Washington which in your original plan you were going to close, Franklin, Cleveland, Belmont, Horace Mann and then another school that you are planning to turn into a middle school which is Ruskin, Huffman, Webster, Emerson, Patterson, McGuffey, Hawthorne which is your original plan was going to be closed, Irving and Whittier.

A. Well, if you are talking about a direct line between the two schools, you couldn't possibly get all those schools in between the two you are speaking of.

Q. My question wasn't phrased in terms of the way the crow flies. It is whatever schools are closer to the residence of a child living in the Lewton district, and all of those schools would be closer to that child's residence; isn't that true?

A. You mean as the crow flies?

Q. Let's get a lame crow and say going in any direction. Let's make an arc just so we know the distance of what is closer to a child living in the Lewton district.

A. It would say it generally might be true, but to say it was true, I would want to go to the map.

THE COURT: Why don't you do that, Doctor.

THE WITNESS: How many schools did you name altogether?

BY MR. GREER:

Q. Eighteen different schools.

A. All right.

Q. And the same type of situation, of course, would be true in that cluster with respect to students living in the Edison district who would be going over to the east end of Dayton in grades 1 through 3; isn't that true?

A. Yes.

Q. If we turn to cluster C, a child in the first or second grade at Eastmont would be required to be bussed beyond some seventeen or eighteen closer schools in order to attend classes at Highview; isn't that correct?

A. Yes.

Q. And vice versa the same kind of situation would be true for a child living in the Highview district during grades 3 to 5?

A. Yes.

Q. If we look on cluster I, the required bussing between Gardendale and Shiloh passes by ten school zones which are closer to the residences of the children in those two affected school districts; isn't that right?

A. Without counting them, I would believe that is probably accurate, yes.

Q. And without going through the tedium of each of these clusters, isn't it true that the same kind of cross-town required bussing affects students in 24 out of the 28 school zones that are paired or grouped in clusters under your proposal?

A. Again without counting, I would believe that would probably be accurate, yes.

Q. And you have before you the statistics, of course, as to the number of children enrolled in these various schools, don't you?

A. Yes.

Q. Am I not correct in each year something in the area of 9,000 students under your plan would be bussed beyond the second closest school to their place of residence?

A. Pardon me just a second.

Well. I don't get quite that many. At a quick count, I get something like 7,000.

Q. Does that comprise all of the students in these 24 out of 28 school Zones?

A. It would comprise the students in the clusters that you referred to, and our count should be the same because my counts were the same as your staff person that testified about students being bussed in the clusters.

Q. Right. What you just computed for me has been the nine out of the eleven clusters that we started talking about today?

A. That's correct.

F. COURT OF APPEALS' JUNE 24, 1975 OPINION.

(Filed June 24, 1975)

No. 75-1410

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, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. For a second time this court is called upon to review the constitutionality of a plan ordered by the District Court for the school system of Dayton, Ohio, to remedy cumulative constitutional violations found to exist in that school system. Reference is made to the previous decision of this court, reported at 503 F.2d 684 (6th Cir. 1974), for a detailed recitation of facts and issues.

By a statute enacted February 22, 1887, the State of Ohio abolished separate schools for white and Negro children. Nevertheless, the District Court found that the Dayton school system has failed in many particulars to meet the standards of Ohio law mandating an integrated school system and to comply with the equal protection clause of the fourteenth amendment. Segregative acts and practices were found to have occurred both before and after the decision of the Supreme

Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion and will not be repeated here. Suffice it to say that in our former opinion this court ruled that the findings of fact of the District Court as to unconstitutional practices on the part of Dayton School officials are not clearly erroneous, but to the contrary are supported by substantial evidence.

Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

We agreed with the District Court as to his findings of fact in our former opinion, but held the remedy ordered by that court to be inadequate, considering the scope of the constitutional violations. We remanded the case to the District Court with directions to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes*, *supra*, and in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In our former opinion we said:

> 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. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-213, 93 S.Ct. 2686. 503 F.2d at 704.

On remand the District Court required the plaintiffs and the Board of Education to submit plans. The plaintiffs' plan

was rejected. The Board's plan was adopted for the school year 1975-76 with minor modifications.

The present appeal is from the decision of the District Court implementing the Board's plan. The question on appeal is whether the Board's plan conforms to the mandate of this court in our decision reported at 503 F.2d 684. We hold that it does not.

The plan approved by the District Court contains some provisions which apparently might effect some improvements in the segregated conditions found to exist in this school system. Some of its key features are as follows:

1. The closing of Roosevelt High School, with its 100 per cent black enrollment. The students previously enrolled at Roosevelt High would be permitted to attend any high school of their choice.

2. Creation of a downtown magnet high school at the Central YMCA, with programs not offered at home high schools, to serve a maximum of 300 students at any one time, and satellite magnet programs intended to attract students from their high schools and districts of residence, which could serve not more than 375 students at any one time. The District Court said: "If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both." The students would remain in their assigned schools for all other instruction.

3. Creation of three magnet learning centers at which elementary students could participate in foreign language, career motivation, and business education programs. The three centers together would serve about 880 students, who would remain in their assigned schools for other instruction.

4. Expansion of science centers to accommodate additional elementary students. The centers would have a racially balanced enrollment, and attendance would be mandatory, but only ten percent of the student's total instruction time would be spent at the centers.

5. A new vocational school for high school students, known as Kiser Career Center, would be established. This school would have a balanced racial composition, serving 210 students on a free-choice basis.

6. Restructuring of Miami Chapel elementary school into an alternative elementary school with enrollment optional and on a full-time basis. Miami Chapel has a capacity of over 700 students, but the Board anticipates that the school as restructured will serve approximately 500 students. Miami Chapel presently is an all-black school serving 380 students, and there is some indication in the record that these students, if not admitted to the restructured school, will be assigned to the all-black Louise Troy or Wogaman schools.

7. Creation of a magnet alternative school for 150 intermediate grade level students in an attempt to keep potential drop-outs in school, without regard to race.

8. The freedom of enrollment and open enrollment programs put into effect earlier by the Board would be continued.

In approving this plan, the District Court added the following provisions:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;

2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;

3. The faculty assigned to all programs must reffect the racial percentages of faculty within the system as a whole;

4. The amount of time of students assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

This is essentially all the relief afforded by the District Court

for the 1975-76 school year. The court expressed uncertainty as to whether the plan would be completely effective and ordered the Board to develop and file a more comprehensive plan by January 1, 1976. The court stated that if the 1975-76 plan should prove to be ineffective, an alternate plan would be instituted for the school year beginning in September 1976.

The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

In the course of his opinion, the District Judge noted two events which have occurred since our first opinion in this case, both of which he thought supported the narrow remedy he ordered on remand.

The District Court said:

> First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*
>
> Section 1701 declares it to be the policy of the United States that:
>
> "1. All children enrolled in public schools are entitled

to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), 508 F.2d 779 (1974). The Court in *Higgins* followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court.

The Equal Educational Opportunity Act of 1974 by its terms does not prevent the District Court from carrying into effect

the previous mandate of this court. 20 U.S.C. § 1702(b) expressly provides:

> (b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.* (Emphasis supplied.)

We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case.

There could be no possible merit in the contention that the opinion of this court in *Higgins*, relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion. The law in the present case is embodied in the opinion of this court reported at 503 F.2d 684. Our previous opinion is not changed in any way by *Higgins*, which dealt with a different school system and a distinguishable factual situation.

Appellants have petitioned for summary reversal. Except for the time factor, we would be inclined to grant this relief. However, it obviously would be difficult if not impossible, in the limited time now available, for the District Court to formulate a comprehensive plan for the 1975-76 school term and to put it into effect in September 1975 without disruption of the large school system in the Dayton school district.

Instead of summary reversal, we remand this case to the District Court with directions to modify the plan previously approved for the 1975-76 school year so as to improve the racial

balance before September 1, 1975, in as many of the remaining racially identifiable schools in the Dayton system as feasible.

We further direct that black students who attended the Miami Chapel elementary school during the 1974-75 school year, and who are not assigned to the restructured Miami Chapel school, be assigned to other than all-black schools during the 1975-76 school year.

The District Court already has expressed an intention to adopt a revised and improved plan for the school year 1976-77. On remand we direct that the court adopt a system-wide 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 *Keys* 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.

This case is remanded to the District Court for further proceedings consistent with this opinion.

The mandate of this court on the present appeal will issue forthwith. The costs of this appeal are taxed against the Dayton Board of Education.

G. COURT OF APPEALS' JUNE 24, 1975 REMAND JUDGMENT.

(Filed June 24, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1410

MARK BRINKMAN, ET AL.,

Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

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

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from

the Dayton Board of Education the costs on appeal, as itemized below, and that execution therefore issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller
Chief Deputy

Issued as Mandate: June 24, 1975
COSTS: Amount to be determined later
Filing fee ----------$
Printing $
Total $

A True Copy.

Attest:

John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

H. DISTRICT COURT'S DECEMBER 29, 1975 ORDER.

(Filed December 29, 1975)

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.

ORDER

This matter is before the Court pursuant to Order of Remand by the United States Court of Appeals for the Sixth Circuit expressed in the following terms:

> We direct that the Court adopt a system-wide plan for the 1976-1977 school year that will conform to the previous mandate of this Court and the decisions of the Supreme Court in *Keyes* and *Swann*.[1]

Pursuant to such remand, defendant Dayton Board of Education and plaintiff NAACP presented plans to the Court. Testimony and evidence in support thereof was presented on December 8-9, 1975. A third plan based upon findings by the late Dr. Charles A. Glatt, Court-appointed expert, was presented by a group known as "Friends of Dr. Glatt" although no evidence or testimony accompanied such plan. The Court notes in passing the significant contribution of Dr. Glatt to this most complex problem.

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[1] *Brinkman* v. *Gilligan*, 518 F.2d 853 at 857.

A determination of this matter and its future progress will be considered under the following headings:

I. Standards of Examination

II. Master

III. Community Participation

IV. Conclusions of Law

I.

STANDARDS OF EXAMINATION

Given the predicate that the limited segregatory activities found by this Court in its Order of February 7, 1973, brings this matter within the ambit of *Swann*[2] and *Keyes*,[3] the remedy must be obvious. 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. No contrary remedial suggestion has been offered by any person or group. No authority has been found or cited that would justify any other disposition.

An analysis of the two plans submitted discloses more a difference of technique than a difference of result. In essence, the plaintiffs would pair and cluster existing elementary schools in a fashion to insure a racial balance approximating that of the school district as a whole with existing attendance zones of such schools remaining approximately intact. The existing

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2 *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1973).

3 *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

elementary schools would provide feeder patterns for the appropriate high schools. Under plaintiff's plan almost every student would at some time be transported to and from school.

Defendants' plan is based upon a series of choices to be made by parents which will provide educational alternatives.[4] Defendants have agreed that there is nothing inherent in their plan to prevent racial balancing appropriate to the district as a whole and it is in this context that such plan has been considered.

It would be foolish indeed to ignore the rhetoric that has accompanied twenty years of the school desegregation problem. The catch phrases, "forced busing," "quality education," "racial balance," and "white flight," have served as a form of shorthand mainly to obscure rather than to clarify the nature of the problem involved.

This Court's position and determination can best be understood by a reference to personal judicial philosophy as it bears upon the overall subject of educational racial discrimination.

I believe that it is not the function of the United States District Court to oversee the methods whereby children are instructed. I believe that it is not the function of the United States District Court to advance by judicial fiat any social philosophy, however benign. The temptation to do either or both has proved almost irresistible in the field of school desegregation.

The qualitative nature of education is a matter for local determination. The citizens of a school district are entitled to select, free from federal supervision, those elected representatives who in the citizens' collective opinion will best administer such school system. The citizens are entitled to determine the amount they are willing to pay for the educational

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[4] Counsel for the defendants has asserted that defendants have "submitted" a plan rather than "proposed" or "recommended a plan. In view of this Court's holding (page 8), the distinction appears irrelevant.

facilities they desire. It might appear that the foregoing statement is basic enough to be included in an eighth grade Government text. True. But the significance of this lesson apparantly has been lost upon those who ignore its validity. It is only when elected representatives deny equality of treatment that federal courts should intervene.

It can be urged with assurance that in a pluralistic society all children should be exposed at the earliest feasible time to children of other backgrounds. True. I agree that both the children and society itself will benefit. I do not agree, however, that a failure of exposure, in and of itself, amounts to a constitutional deprivation correctable only by the federal courts. In sum, there are aspirations of a peaceful and happy society that do not rise to a constitutional level and are not therefore attainable in a court of law.

Court deal with rights, not ethical behavior, not social accommodations, but rights, rights guaranteed by the Constitution of the United States. That is and should be the limit of our function.

In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

The defendants may adopt their own plan, may adopt the plaintiff's plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced: None is acceptable if not.

At this time the composition of the Dayton School District is approximately 48% black – 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegrated.[5] Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus.

There is a specific and limited exception from the foregoing that the Court will permit. Under the present system in force in Dayton, Ohio, students commence attendance at a specific high school in the tenth grade and remain there until graduation some three years later at the end of the twelfth grade. A high school is more than a collection of classrooms. It is an entity in which the students take deep pride. It is frequently the first and often the last educational entity with which students identify. There would appear to be something unfair in a situation that might destroy the continuity of athletic teams, student publications and activities. The one or two years already spent in a high school has created a loyalty that should be encouraged. There are all too few such institutions still remaining in our society today.

Limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school.

The Court notes the following language in *Swann*:

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[5] See Footnote 12, *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F.2d 779 at 787 (6th Cir. 1974).

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[6]

In a situation, however, where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

II.

MASTER

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary 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.

The logistics involved will be complex and time-consuming. The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53(c),

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[6] *Swann*, *supra* at page 24.

Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81-83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

III.

COMMUNITY PARTICIPATION

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order of this Court. Such a board composed of representative citizens of the community will be appointed for a period not to exceed three years. The Court will reserve the right to extend or to terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

IV.

CONCLUSIONS OF LAW

A.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated

system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

B.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system.

C.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

D.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

I. DISTRICT COURT'S DECEMBER 29, 1975 JUDGMENT.

(Filed December 29, 1975)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school. Where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary 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.

The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 55 (c), Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81 – 83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order. A board composed of representative citizens of the community

will be appointed for a period not to exceed three years. The Court will reserve the right to extend to or terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education*.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

Dated at Dayton, Ohio, December 29, 1975

JOHN D. LYTER, CLERK
/s/ Rebecca J. Ellis, Deputy

J. DISTRICT COURT'S MARCH 23, 1976 ORDER.

(Filed March 23, 1976)

No. C-3-75-304

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

MARK BRINKMAN, et al,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al,

Defendants.

ORDER

This matter is before the Court for consideration of the Master's report heretofore filed. Pursuant to the filing of such report a hearing was held March 22 and 23, 1976, in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure. At such hearing the parties were given an opportunity to present evidence and testimony.

Upon consideration of such report and the testimony and evidence presented, the Court is of the opinion that such report should be disposed of as follows:

I.

ELEMENTARY SCHOOLS

That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District by the device of pairing is in keeping with the mandate of the United States Court of Appeals for the Sixth Circuit and the order of this Court dated December 29, 1975. Accordingly, such pairing assignment is hereby adopted.

The Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975,[1] defendant may adopt either method.

The proposal of defendant Dayton Board of Education seeks a three-phase implementation over a three year period. In view of the mandate of the United States Court of Appeals for the Sixth Circuit, 518 F.2d 833 at 857, such "phase in" is hereby rejected.

Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II.

HIGH SCHOOLS

The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on pages 5 and 6 of such order, defendant may adopt either method of assignment.

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[1] "At this time the composition of the Dayton School District is approximately 48% black — 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegregated. Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus."

III.

MISCELLANEOUS

The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7 and 8" are hereby adopted.

Defendant's attention is directed again to the following portion of the order of December 29, 1975:

> "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV.

FURTHER PROPOSALS

The order of reference heretofore referred to directed the Master to report upon particular issues. Portions of the Master's report not dealing with those particular issues will be deemed personal recommendations of such Master and not requiring action by this Court.

This order is intended to be a final and appealable order and a determination pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit.

No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

It must be obvious to all parties concerned that the longer an opportunity is given for students, teachers and the community to understand a specific plan, the easier a transition period will be. In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted

but that insufficient time remains prior to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

V.

SUMMARY

Defendant has raised five objections to the report of the Master:

1. Pupil assignment should be made by the central administration;
2. Pupil assignment should be made in the spring of 1976;
3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
4. The Elementary School Plan should be a three-phase plan and
5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment.

The Court has disposed of such objections as follows: With the exception of Objection 4 which has been rejected, the defendant Dayton Board of Education may assign students by action of the central administration, may assign students this spring, may transfer elementary school students on an annual basis, and may assign high school students by geographic zones.

All of the foregoing being subject to the limitations of this Court's order of December 29, 1975.

All other questions still remaining before the Court, such as payment of attorney fees and the sharing of costs among the several defendants herein are hereby continued for further disposition.

IT IS SO ORDERED.

CARL B. RUBIN
United States District Judge

K. DISTRICT COURT'S MARCH 25, 1976 JUDGMENT.

(Filed March 25, 1976)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that upon the consideration of the Master's report and the testimony and evidence presented in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure, that such report should be disposed of as follows:

I ELEMENTARY SCHOOLS: That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District is hereby adopted. Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW); the Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, defendant may adopt either method. Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II HIGH SCHOOLS: The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV). Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on page 5 and 6 of such order, defendant may adopt either method of assignment.

III MISCELLANEOUS: The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7, and 8" are hereby adopted. Defendant's attention is directed again to the following portion of the order of December 29, 1975: "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted but that insufficient time remains prior to September 1, 1976, such

improvement may be adopted effective to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

The following objections were raised by Defendant and are disposed of as follows:

1. Pupil assignment should be made by the central administration;

GRANTED;

2. Pupil assignment should be made in the spring of 1976;

GRANTED;

3. Transfer of elementary students should be made on a yearly rather than on a semester basis;

GRANTED;

4. The Elementary School Plan should be a three-phase plan;

REJECTED;

5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment;

GRANTED;

THE FOREGOING BEING SUBJECT TO THE LIMITATIONS OF THIS COURT'S ORDER OF DECEMBER 29, 1975.

All other questions still remaining before the Court are hereby continued for further disposition.

APPROVED FOR ENTRY:

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

JOHN D. LYTER, CLERK
/s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

Dated at Dayton, Ohio, this
24th day of March, 1976.

L. DISTRICT COURT'S MAY 14, 1976 ORDER.

(Filed May 14, 1976)

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.

ORDER

This matter is before the Court on the motion of defendant Dayton Board of Education dated May 11, 1976, to modify the Report of the Master. Such motion is in six branches. The first five branches of such motion refer to matters that appear to be within the limits of modification set forth by this Court in its Order of March 23, 1976. Such five branches are hereby GRANTED.

The request in branch no. 6 is not within the permissive changes in the Order of March 23, 1976 and such branch of motion is hereby DENIED.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

M. COURT OF APPEALS' JULY 26, 1976 ORDER.

Decided and Filed July 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1854

MARK BRINKMAN, et al.,
Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN and DAYTON BOARD OF EDUCATION, et al.,
Defendants-Appellants.

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

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

PER CURIAM. The Dayton, Ohio Board of Education (the Board) appeals from a judgment of the district court entered on March 25, 1976 which implemented its desegregation order and judgment of December 29, 1975. This court has considered two previous appeals in this litigation and our opinions are published at 503 F.2d 684 (1974) and 518 F.2d 853 (1975). This court concluded that the desegregation order

from which the second appeal was taken (by the plaintiffs) was inadequate and we remanded the case to the district court with specific instructions, as follows:

> On remand we direct that the court adopt a systemwide 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. 518 F.2d at 857.

After considering a plan proposed by the plaintiffs and one "submitted" but not "proposed" or "recommended" by the Board, the district court filed an order and a judgment on December 29, 1975. The judgment provided, in part, as follows:

> A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*
>
> Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

The judgment also permitted high school students already enrolled at a particular school to graduate from that school regardless of attendance zone boundaries. The judgment contained guidelines to be followed "wherever possible for elementary 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.

Dr. John A. Finger, Jr. was appointed Master to establish attendance zones and a citizens board was authorized to monitor "the plan."

On March 15, 1976 the Master filed a report containing recommended desegregation plans for the elementary schools and the high schools of the Dayton system. The report contemplated achieving desegregation of the elementary schools by a combination of redefining attendance areas and the pairing of schools. Under the plan proposed for the high schools attendance zones would be the primary tool. In a judgment entered March 25, 1976 the district court adopted the portion of the Master's report dealing with the elementary schools and approved the Master's recommended zone changes. However, the Board was given the option of making annual exchanges between paired schools without a movement of teachers or semi-annual exchanges of both pupils and teachers as recommended by the Master. The judgment also permitted the Board to implement high school desegregation by employing an assignment program by specific attendance districts rather than following the Master's proposal of permitting school selection by students plus random assignments as necessary to achieve the mandated plus or minus 15% range. The court denied the Board's proposal for a three year phase-in of the elementary school plan.

The March 25 judgment contained this additional provision:

> IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

On appeal the Board argues that the remedy ordered by the district court exceeds the scope of the violations. It is argued that the district court has adopted a fixed percentage formula to achieve racial balance in the Dayton schools contrary to the holding of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Board relies particularly upon the Court's statement that the constitutional requirement for school desegregation does not mean that "every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

This court has previously held that the practices of the Dayton school system constituted de jure segregation, citing *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). *Brinkman, supra*, 518 F.2d at 854. Though this court ordered systemwide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. *Compare Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

The student composition of the Dayton school system is approximately 48% black and 52% white. Application of the district court's requirement that each school's ratio be within plus or minus 15% of the racial makeup of the system will permit black enrollments at particular schools to range between 33% and 63%. Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra*. The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options

granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Our conclusions are in accord with those of other courts of appeals which since *Swann* have approved desegregation plans requiring system-wide adherence, within an established percentage range, to the student racial composition of the district. *See, e.g., Morgan* v. *Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (U.S. June 10, 1976); *Harrington* v. *Colquitt County Board of Education,* 460 F.2d 193 (5th Cir.), *cert. denied,* 409 U.S. 915 (1972); *United States* v. *School District of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Keyes* v. *School District No. 1, Denver,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

The Board also argues that the district court based its judgment on a misconception of the constitutional requirements for a unitary school system. In its order of December 29, 1975, which discussed the provisions contained in the separate judgment entered the same day, the district court wrote —

> . . . it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all the facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of

past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

At oral argument counsel for the Board contended that there is implicit in the judgment of the district court a requirement for periodic changes in the Dayton plan to maintain the required racial mix and that this violates the rule enunciated by the Supreme Court in *Pasadena City Board of Education* v. *Spangler*, — U.S. —, 44 U.S.L.W. 5114 (U.S. June 28, 1976). The short answer to this argument is that the judgment directs no changes after the 1976-77 school year. The district court did not adopt *in toto* the Master's report in which there was speculation about the necessity for future adjustments in the plan. The *Spangler* decision held that after Pasadena had established a unitary school system the district court could not require annual adjustments in attendance zones to prevent the development of racially identifiable schools within the system, where subsequent changes in the racial mix are caused by factors for which the school authorities could not be considered responsible. The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests.

The judgment of the district court is affirmed.