IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARK BRINKMAN, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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PRELIMINARY STATEMENT

Petitioners predicate their application for certiorari on hyperbole and erroneous *dictum* about this case in *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 3089 (U.S. Aug. 11, 1978) (Rehnquist, J., in Chambers). The truth of the matter is that petitioners seek the substantial overruling of, at least, *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); and *Green* v. *County School Bd.*, 391 U.S. 430 (1968).

In its careful and comprehensive opinion in *Brinkman* v. *Gilligan*, 6th Cir. No. 78-3060 (July 27, 1978) (*Brinkman IV*) (Pet. App. 189a-217a), the court below engaged in a straightforward application, to largely undisputed

evidence, of *Keyes; Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *Swann; Green; Brown* v. *Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*). The court of appeals concluded that plaintiffs had overwhelmingly proved their case that, as of the time of initial trial, the Dayton public schools had long been and still were intentionally segregated by race on a systemwide basis necessitating a systemwide remedy. The court found that the district court's contrary findings were not supported by the evidence but instead were clearly erroneous. While acknowledging that the Dayton schools, unlike their "southern" counterparts, were not segregated by state statutory and constitutional law, the court below found that the evidence unmistakeably showed that deliberately segregative policies and practices of Dayton school authorities had accomplished the same system of racially dual schooling as the "southern" segregation laws. Accordingly, the court held petitioners to the remedial obligations imposed by the "southern" cases (e.g., *Swann* and *Green*) and made binding on such *de jure* segregated systems by *Keyes*. A fair reading of the court of appeals' opinion reveals nothing more. The writ of certiorari should therefore be refused.

COUNTERSTATEMENT OF QUESTION PRESENTED

The issue in this case always has been and is:

> Whether the systemwide racial segregation of pupils in the Dayton public schools existing at the time of initial trial was caused by the intentionally segregative policies and practices of the Dayton Board of Education?

COUNTERSTATEMENT OF THE CASE

The Relevant Opinions

In its June 27, 1977, opinion in this case, *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406 (1977), this Court focused on the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system" (*id.* at 409), rather than review the entire record evidence of racial discrimination in order to determine its legal significance. For purposes of its analysis, the Court accepted the limited and ambiguous findings of the district court, which the Court determined related only to optional zones for three high schools, a violation "only with respect to high school districting." *Id.* at 413. Recognizing the as yet not fully reviewed but extensive record evidence of alleged intentional segregation, the Court noted that "this is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the" Dayton Board. *Id.* at 418. The Court therefore remanded to the district court "for the making of more specific findings" (*id.* at 419), but directed the systemwide plan to remain in operation in order to permit appropriate judicial review by the district court and the court of appeals. *Id.* at 421.

In arriving at this result, the Court was critical of the ambiguity and lack of specificity in the previous findings and conclusions of the district court (*id.* at 412-13, 419); and the Court was even more critical of the limited appellate review accorded by the court of appeals in its previous opinions, which "neither" held "that the findings of the District Court [were] clearly erroneous" nor "that the District Court . . . misapprehended the law." *Id.* at 417-18. Thus, the Court noted that the court of appeals in *Brinkman I* (503 F.2d 683 (6th Cir. 1974)) "did discuss at length what it described as 'serious questions' as to

whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included" in the violation determination, but that in reserving decision on these issues the court of appeals had "neither upset the factual findings of the District Court nor . . . reversed the District Court's conclusions of law." *Id.* at 416. The Court also noted that *Brinkman I* "considered at somewhat greater length than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the Board's [more recent desegregation] resolutions and the subsequent rescission of those resolutions." *Id.* at 415-16. But "this consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no fact-finding of its own based on evidence adduced before the District Court." *Id.* at 416.

Pursuant to this Court's mandate, the court of appeals remanded the case to the district court for further proceedings. 561 F.2d 652 (6th Cir. 1977). The District Court conducted an additional evidentiary hearing and, on December 15, 1977, issued its "Findings of Fact and Conclusions of Law." Pet. App. 142a-88a. The District Court began its opinion by correctly noting: "The course of this protracted litigation has been marked by conceptual differences not only as to the facts, but as to the legal significance of those facts." Pet. App. 143a. The court then proceeded to perpetuate the dichotomy by making clearly erroneous fact findings, applying the wrong legal standards for intent and causation, and misallocating the burdens of proof. The court resolved all ultimate factual issues against plaintiffs in argumentative fashion and conclusory terms; subsidiary findings on many important factual issues were omitted entirely or were ambiguous. The facts were compartmentalized into rigid

categories, and each category was analyzed in isolation from the record as a whole. In the many instances in which it would have been a palpable falsehood to hold even that plaintiffs had failed to prove subjective racial animus on the part of the school authorities, the court refused to find racial intent at all, holding instead that such pervasive actions had "no incremental segregative effect" (*e.g.*, Pet. App. 154a), or that plaintiffs "failed to meet the remedial portion of their burden of proof." *E.g.*, Pet. App. 149a. The district court thus concluded that there were no constitutional violations requiring correction and dismissed the complaint in its entirety. Pet. App. 188a.

Obedient to this Court's mandate in *Dayton*, the court of appeals fully reviewed (for the first time) all major factual and legal disputes between the parties. *Brinkman IV*, *supra*, Pet. App. 189a-217a. The court reversed all aspects of the district court's judgment. The court found that the trial judge had both misapprehended and misapplied the law. *See, e.g.*, Pet. App. 192a, 194a, 199a-205a, 210a-211a, 214a-16a. Moreover, as a review of Chief Judge Phillips' careful and thoughtful opinion reveals, calm scrutiny of the record evidence convinced the court of appeals that the trial court's dispositive findings of both subsidiary and ultimate fact were not just the by-products of fundamental legal blunders, they were also clearly erroneous standing alone. *See, e.g.*, Pet. App. 194a, 196a, 199a, 202a, 210a, 211a, 211a-12a, 213a. That critical, sustained look at the record, combined with the reasoned application of settled law, caused the court of appeals to reach the following conclusions: at the time *Brown I* was decided the Dayton Board was operating an explicitly dual school *system* (Pet. App. 194a-205a); that thereafter the Board, instead of dismantling the across-the-board impact of its deliberately segregative policies, intentionally continued, compounded, perpetuated and expanded the dual system so that, at the time of initial trial in 1972, the *entire* system was *de jure* segre-

gated (Pet. App. 195a-96a, 197a-200a, 206a-14a); that the only meaningful remedy for this intentional systemwide segregation is a plan of systemwide desegregation.[1] Pet. App. 214a-17a. Accordingly, the court of appeals ordered continuation of the systemwide desegregation plan which has been in operation since September 1976. Pet. App. 217a.

The Facts

Between 1912 and 1951-52, the Dayton Board devised and carried out a number of racially discriminatory policies and practices which both mistreated black students and faculty and caused them to be confined to segregated black schools; concomitantly, white teachers and pupils received favored treatment, and they were accommodated in reciprocally-maintained segregated white schools. These policies and practices included:

- the humiliating operation of all-black classrooms within, and in an outbuilding in back of, the Garfield school; the refusal to allow black students to attend white classes at Garfield, and the ultimate overnight conversion of Garfield into an officially-designated blacks-only school;
- the racially dual policy of *never* allowing black teachers to teach white pupils, always assigning such teachers only to all-black classes and/or

[1] The court of appeals properly performed its normal appellate function to review the evidence and factual findings pursuant to the "clearly erroneous" standard of Rule 52(a), Fed.R.Civ.P., as enunciated for school cases by this Court's decision in *Dayton*, 433 U.S. at 409-10, 417-18. This Court, of course, normally "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In the event, however, that any member of this Court wishes to evaluate the contrasts between the court of appeals' exposition of record evidence and that of the district court, we attach as an appendix to this brief a detailed comparison of the largely undisputed facts with the district court's opinion. That comparison demonstrates that the trial court's opinion is incredible, and that Chief Judge Phillips' opinion for the court of appeals is sound beyond doubt.

schools, accompanied by "free transfer" policies to keep all nearby white pupils and all white teachers out of blacks-only classes and schools;

- the overnight conversions, in response to a growing black population, of Willard and Wogamon schools into official blacks-only schools and the concomitant transfer of white students and teachers out of these designated black schools;
- the construction and operation on a city-wide basis of Dunbar as a blacks-only high school with, of course, an all-black staff, accompanied by pupil-assignment and counselling techniques designed to channel black students into Dunbar;
- cooperation by contract with public housing authorities to have children educated on a completely segregated basis in public housing space officially and explicitly earmarked according to race;
- the transportation of black orphanage children past white schools across town to the blacks-only schools;
- a variety of within-school racially discriminatory practices—requiring black children to sit in the back of the class, not letting them participate in "white" activities (e.g., being an angel in a school play), segregated athletic competition, segregated showers, locker rooms and swimming pools, and the like—which further branded black people as unfit for association with whites in the public schools.

These facts, and supporting citations to the undisputed record, are detailed in the appendix hereto, pp. 2a-10a, *infra*, and the court of appeals found the facts essentially as set forth above, Pet. App. 195a-201a.

By 1951-52, the last year before *Brown* for which pupil racial data were made available by the Board, about 54% of the black children and *all* of the black teachers were

in the four official blacks-only schools; 83% of the white children were in virtually all-white (90% or more) schools taught entirely by white teachers. It was not against the law for blacks and whites to go to school together in Dayton, but it clearly was the official educational policy that learning in all of the public schools should take place on a racially segregated or otherwise racially discriminatory basis.[2] At the time of *Brown* the Dayton Board was operating a dual school system. Pet. App. 201a-205a.

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[2] From 1951-52 through the time of *Brown*, the "explicit segregation policy" (Pet. App. 195a) was "effectively continued in practice" (Pet. App. 196a) by the Board, although in somewhat different garb in view of the continuing protests from the black community. For example, the Board adopted a "new but equally unacceptable policy" (Pet. App. 195a n.11) for teacher assignment that told black teachers they could teach white children only if white parents were willing, and told white teachers not to worry, that they would *not* be assigned against their will to black schools. *Id.* Simultaneously, the Board added black portions of the attendance areas of the three blacks-only elementary schools to the adjacent "mixed" schools (which already had substantial black enrollments); the Board unmistakably converted these adjacent schools into "colored" schools by (a) creating intentionally segregative optional zones (Pet. App. 209) in the white residential areas of these adjacent schools (as a substitute for the former "free transfer" policy) to allow whites to avoid these newly designated blacks-only schools; and (b) the traditional means for earmarking schools according to race (Pet. App. 196a-197a), i.e., the assignment of black teachers for the first time to these adjacent schools but *not* to the white schools of the system. *See also* pp. 11a-12a, *infra*. Pursuant to the Board's intentionally segregative policies with respect to school construction and site selection (Pet. App. 210a-212a), the Board built a new elementary school on the same site as a blacks-only public housing project and assigned a virtually all-black student body and staff (Pet. App. 195a-196a). *See also* pp. 11a-12a, *infra*. And the Board, of course, maintained Dunbar as a city-wide blacks-only high school with respect to both students and staff. Pet. App. 200a. As of the time of *Brown*, then three-fourths of all black pupils in Dayton attended these schools officially designated by the Board for blacks-only, and an even greater percentage of white students attended virtually all-white schools. *See* pp. 9a-10a, 15a-17a, *infra*.

In the post-*Brown* era the Board perpetuated and expanded the segregated system it had created. The racially dual faculty policy continued in raw form and substantial practice until HEW intervention in 1969 resulted in an agreement requiring faculty desegregation over a two-year period; but even under that agreement remnants of the old policy were still present at the time of trial. Pet. App. 195a-96a, 206a-07a; pp. 18a-21a, *infra*. The Board expanded the use of optional attendance zones—which had their race-oriented origins as a substitute for the "free transfer" policies previously used to "protect" whites from the designated black schools (*see* note 2, *supra*)—into a number of new areas which had substantial segregative impact. Pet. App. 209a-10a; pp. 23a-27a, *infra*. In addition, the Board resorted to a variety of other deviations from "geographic zoning" or the "neighborhood school" concept—grade reorganization; curriculum, hardship and disciplinary transfers; tuition assignments; "intact" busing; and Freedom of Enrollment transfers—virtually whenever the need arose for perpetuation of the segregated system. Pet. App. 212a-13a; pp. 34a-39a, *infra*. The Board's brick-and-mortar practices had an even more devastating segregative impact. Almost without exception, under the Board's intentionally segregative policies all new schools and additions to existing schools were constructed on a uniracial basis, literally sealing up the dual system extant at the time of *Brown*. Pet. App. 210a-12a; pp. 30a-32a, *infra*. One of the more blatant examples of official racial discrimination in the areas of school construction, location and utilization involves the events attending the "closing" of the old blacks-only Dunbar High School in 1962: the old Dunbar building was converted into an elementary school (renamed McFarlane) with attendance boundaries drawn to take in most of the black students previously attending the blacks-only Willard and Garfield schools, which were simultaneously closed; McFarlane opened with an all-

black faculty and an all-black pupil population; at the same time, the Board constructed a new Dunbar High School, located in a black neighborhood far from white residential areas, opened with a virtually all-black student body and faculty. Pet. App. 207a, 210a-12a; pp. 31a-32a, *infra*. All in all, of 24 new schools constructed between 1950 and the time of trial, 22 opened 90% or more black or 90% or more white; 78 of some 86 additions of regular classroom space were made to schools 90% or more one race at the time of expansion (only 9 additions were made to schools less than 90% black or white); and, the intentionally segregative nature of these practices was highlighted by the coordinate assignment of staffs to these new schools and additions tailored to the racial composition of the pupils. Pet. App. 210a; p. 31a, *infra*. These policies and practices were supplemented by segregative grade structure reorganization and creation of five middle schools. Pet. App. 212a-13a; pp. 34a-35a, *infra*. This history culminated with the 1972 rescission of a 1971 Board-adopted plan of systemwide desegregation; the rescission undid operative administrative action to dismantle the dual system and reimposed segregation on a system-wide basis. *See* pp. 40a-44a, *infra*.

The Board was operating a dual system at the time of trial. Pet. App. 213a-14a. This intentional segregation extended throughout the system, and could only be eradicated by an across-the-board plan of desegregation. Pet. App. 214a-17a.

REASONS FOR DENYING CERTIORARI

The petition for certiorari is understandably long on rhetoric and short on substance. The only reason this case has been around for so long is because plaintiffs-respondents have heretofore been unable to obtain a full review by the court of appeals of the district court's mishandling of the case. In its 1977 opinion, this Court

directed a cure for that defect, and the court of appeals has obeyed that directive. As the sound opinion below demonstrates, it is the *facts* which prevent petitioners from winning this case, and no amount of inflated discourse (Pet. 8, *et seq.*) about the use of "legal presumptions of intent to extrapolate system-wide violations from . . . 'isolated' instances," *Columbus Bd. of Educ.* v. *Penick*, 47 U.S.L.W. 3089, 3090 (Aug. 11, 1978) (Rehnquist, J., in Chambers), can change this conclusion. Because one member of this Court already has been induced into a misreading of the opinion below, however, we respond to each of the arguments advanced by petitioners in support of certiorari.

1. The Board argues that the court below attached pivotal significance to the situation extant in 1954, and that it penalized the Board in the present for isolated discrimination of the distant past for which, petitioners imply, the Board long ago repented. Pet. 9-10. In contrast, as we have shown in the Statement of the Case, pp. 6-8, *supra*, and as revealed in detail in the opinion below, the pre-1954 acts of discrimination were not mere anecdotes: they were systemic in nature, they directly segregated three-fourths of the pupils and virtually all of the teachers pursuant to explicit policies of apartheid, and they infected the entire system with the message of official racial discrimination. The court of appeals held that these facts, virtually all of them undisputed, constituted a dual school system in Dayton at the time of the *Brown I* decision and that thereafter the Board was under the same constitutional duty to eradicate all vestiges of state-imposed segregation which *Brown II* and its progeny imposed upon Dayton's "southern" counterparts. Pet. App. 194a-205a. If *Keyes* (which held that the case for finding a "northern" dual system could be made out on the basis of inferences drawn from intentionally segregative conduct affecting a considerably smaller portion of the system than that involved here)

means anything, it means that the court of appeals merely applied settled precedent in making this determination.

But neither plaintiffs' case nor the court of appeals' opinion stopped here. The court below was explicitly cognizant of its duty to determine the degree of intentional segregation in the Dayton system *at the time of trial. See* Pet. App. 205a-14a. The court of appeals did not close its eyes with the last page of the pre-*Brown* record; it did not leap from the 1954 facts to a present-day systemwide remedy. Rather, the court looked to the past for the simple reason that, in Justice Jackson's words, "present events have roots in the past, and it is quite proper to trace currently questioned conduct backwards to illuminate its connections and meanings." *United States* v. *Oregon State Med. Soc.*, 343 U.S. 326, 332 (1952). This is what *Keyes* (413 U.S. at 211-12) and *Swann* (402 U.S. at 20-21, 28) are all about. The pre-*Brown* record in this case was resorted to by the court of appeals only because "it illuminates or explains the present and predicts the shape of things to come." *United States* v. *Oregon State Med. Soc.*, *supra*, 343 U.S. at 333. With that understanding, the court reviewed the evidence of what happened in Dayton following *Brown* and found only one permissible conclusion: the Board effectively continued its explicit policy of segregation to perpetuate and augment the dual system right up to the time of trial. Pet. App. 205a-214a. There is, therefore, no merit to petitioners' contention that "historical background . . . [was] transmogrified into a determinative focus in order to produce a desired result through artificial presumptions and shifting burdens." Pet. 10.

2. The Board argues, in a related fashion, that the court of appeals misapprehended the legal significance of the *Brown* violation. Pet. 11-13. This argument is based almost entirely on the Board's description of its pre-*Brown* conduct as consisting only of "isolated and long-abandoned segregative practices. . . ." Pet. 12. As we

have shown, and as the court of appeals held, this description is invalid; the Board's intentionally segregative pre-*Brown* policies extended to all reaches of the school system. The evidence of systemwide intentional segregation—a dual system resulting from practices of the Board implementing its explicit policy of segregation—is overwhelming. As the Attorney General told the Court when this case was last here: "This case presents as clear an example of pervasive discrimination prior to *Brown* as the Court is likely to find in a State in which discrimination was not required by statute." Brief Amicus Curiae for the United States at 23. It is these overpowering facts, not the use of reasonable presumptions, which compel the judgment below. In the face of these facts the Board could not and did not present any evidence to rebut the conclusion that the Board operated a dual school system in 1954.[3] The court of appeals' decision was no more than a literal application of *Keyes*.[4]

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[3] Without citation to any opinion below or any part of record, petitioners nevertheless make the naked assertion that "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." Pet. 13. One need only review the specific acts of systemwide discrimination detailed in the court of appeals' opinion to recognize the absurdity of the argument that the segregation in the Dayton schools at the time of *Brown* adventitiously came about. Petitioners have not come forward with one bit of credible evidence showing that any school in the system in 1954 was *not* infected by the Board's pervasive policies of intentional segregation.

[4] It is thus difficult to comprehend the Board's assertions that the court below "rendered 'effect' synonymous with 'intent' insofar as determining constitutional violations is concerned." Pet. 11; *see also id.* at 12. The court did no such thing. The court's holding that "at the time of *Brown I*, defendants were *intentionally* operating a dual school system . . ." (Pet. App. 194a (emphasis added)), was based on the numerous repeated, undenied and system-wide policies of intentional segregation reflected by the record.

3. Petitioners next argue that the court of appeals "premised its findings of segregative intent upon a presumption of segregative purpose arising from a natural, probable and foreseeable result test." Pet. 14. This also is inaccurate. While the court did make passing reference to the so-called "natural, probable and foreseeable result" test (Pet. App. 203a-04a),[5] the court's judgment rests independently and firmly on the direct record evidence of explicit discrimination. This is not a case in which any part of the judgment is based on circumstantial evidence alone. The court found as fact that the Board operated a dual system in 1954 and that thereafter the Board intentionally expanded that system (Pet. App. 213a):

> Upon consideration of the record, the conclusion is inescapable that, rather than eradicate the system-wide effects of the dual system extant at the time of *Brown I*, defendants' racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton. Thus, defendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools . . . and, in addition, have committed affirmative

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[5] The presumption of segregative intent arising from school board actions that naturally, probably and foreseeably result in segregated schools is evidentiary only and is rebuttable upon a showing that such segregation stems from the consistent application of racially neutral policies. The test has been utilized by every circuit that has considered the question in light of *Keyes*, *Washington* v. *Davis*, *Arlington Heights* and *Dayton*. *See, e.g.*, *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir. 1978); *United States* v. *Board of School Comm'rs of Indianapolis*, —— F.2d —— (7th Cir. 1978); *United States* v. *School Dist. of Omaha*, 565 F.2d 127 (8th Cir. 1977) (*en banc*), *cert. denied*, —— U.S. —— (1978); *United States* v. *Texas Educ. Agency*, 564 F.2d 162 (5th Cir. 1977), *rehearing denied*, 579 F.2d 910 (5th Cir. 1978); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir.), *cert. denied*, —— U.S. —— (1977).

acts that have exacerbated the existing racial segregation.

4. Finally, petitioners argue (Pet. 15-20) that the court of appeals imposed a systemwide remedy without properly determining the "incremental segregative effect" of the Board's constitutional violations. The quoted phrase has become a talismanic cry for the Dayton Board in its efforts to justify the current segregation without regard for its causes and the Board's choice not to come forward with any affirmative evidence to show that its systemwide segregative purpose has had lesser impact than intended. In assessing the appropriate scope of remedy, however, the court of appeals correctly understood its precise duty under the decisions of this Court. "The purpose of the remedy," said the court, "is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations." Pet. App. 214a. Petitioners do not contend, nor could they, that this is not the law.

What really aggrieves petitioners, then, is the refusal of the court below to approve, in the teeth of the systemwide violation found, the "two errors [committed by the district court] in its approach to this inquiry." Pet. App. 215a. The first error corrected by the court of appeals was the fact that, contrary to the explicit holding in *Keyes*,[6] the district court "individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence." The second error—"allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific in-

[6] "We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." 413 U.S. at 200.

cremental effect of that discrimination" (Pet. App. 216a) —also was correctly found by the court to be in conflict with *Keyes*' explicit holding that the wrongdoer bears the burden of proving that his illegal conduct caused no harm, or caused less harm than intended. *See* 413 U.S. at 211 n.17, 213-14.[7] Petitioners were given the opportunity to show that their systemwide violations had less than systemwide impact, but the court found that they had not made such a showing. Pet. App. 216a-17a. And the Board's petition for review here similarly fails to identify a single school which the Board suggests has not been affected by its systematic policies of racial discrimination. Throughout this litigation we have challenged petitioners to come forward with such proof, but they have knowingly declined the challenge, preferring instead to take an all-or-nothing approach in the hope that this Court will abandon precedent and require plaintiffs to shoulder the burden of proving each specific element of constitutional injury at each school at each moment in time. Petitioners have the right to select this tactic, but, having so elected, petitioners' refusal to submit evidence and argument on their remedial burden should not redound to their benefit.

Unless the Court is inclined to overrule prior decisions, the petition for certiorari herein presents no issue worthy of review.

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[7] This is the ordinary rule. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 286-87 (1977); *Arlington Heights*, 429 U.S. at 270-71 n.21; *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 771-73 (1976); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575 (1972)); *Swann*, 402 U.S. at 26; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969); *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Paper Co.* v. *Paterson Paper Co.*, 282 U.S. 555 (1931).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

The Dayton School District: General Geography and Demography

As reflected in the report (A.106-07)[1] of the Master previously appointed by the district court, the city of Dayton has a population of 245,000 and is located in the east-central part of Montgomery County in the southwestern part of the State of Ohio, approximately 50 miles due north of Cincinnati. The Dayton school district is not coterminus with the city; some parts of the school district include portions of three surrounding townships and one village, while some portions of the city are included in the school district of three adjacent townships. The total population residing within the Dayton school district boundaries is 268,000; the school pupil population is 45,000, about 50% of whom are black. Prior to implementation of the desegregation plan now in effect, the vast majority of black and white pupils had separately attended schools either virtually all-white or all-black in their pupil racial composition. *E.g.*, A.25-26; S.Ct.A.311-

[1] *Appendix Citations.* "A.—" citations are to the Appendix filed in the court of appeals, which consists of four photocopied volumes (I-IV) of consecutively paginated materials (pp. 1-1128) (numbered in the bottom right-hand corner of each page) specifically designated for this appeal, cited herein in the form "A.000," and one printed volume (V) (which is the exhibit volume of the appendix used in this Court when the case was last here) paginated 311-606, which is cited herein in the form "S.Ct.A.000." (A few relevant documents are contained in the Appendices to Plaintiffs-Appellants' Motion For Stay and Injunction Pending Appeal, filed in the court below, which will be referred to as "Stay App.")

Original Record Citations. Plaintiffs' trial exhibits are designated in the form "PX——" and defendants' trial exhibits in the form "DX——." Original transcript citations are in the following forms: "R.I. 000" refers to the 20-volume transcript of the November 1972 trial; "R.II. 000" to the February 1975 remedial hearing; "R.III. 000" to the December 1975/January 1976 remedial hearing; and "R.IV 000" to the 4-volume transcript of the November 1977 remand hearing.

315 (PX 2A-2E), 502-506 (PX 100A-100E), 588-589 (DXCU).

The Dayton District is bisected on a north/south line by the Great Miami River. Historically, the black population has been concentrated in the south-central and southwest parts of the city, primarily on the west side of the Miami River and south of the east-west Wolf Creek. *See* S.Ct.A.577-79 (1940, 1950 and 1960 census tract maps). The black population continues to be concentrated in the southwest quadrant, but there is now also a substantial black population in the northwest quadrant across Wolf Creek. Extreme northwest Dayton and most of the city east of the Miami River are and have been heavily white in residential racial composition. *See* S.Ct.A.580 (1970 census tract map).

Geographically and topographically there are no major obstacles to complete desegregation of the Dayton school district. A.61. The Master determined that where pupil transportation is necessary, the maximum travel time would be about twenty minutes. A.108. As found by the Board's experts, due to the compact nature of the system, "the relative closeness of the Dayton Schools makes long-haul transportation[,] an issue in many cities[,] moot here." R.III. 111.

The Pre-Brown Dual System

In 1887 the state of Ohio repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children. 85 Ohio Laws 34. That statute was sustained the following year by the Supreme Court of Ohio. *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888). The laudable goals of that legislation were not attained in Dayton until implementation of the desegregation plan now in effect at the start of the 1976-77 school year.

The facts of racial segregation in the Dayton public schools, as revealed by the record before the Court, begin in 1912.[2] In that year school authorities assigned Louise Troy, a black teacher, to a class of all-black pupils just inside the rear door of the Garfield school; all other classes in this brick building were occupied by white pupils and white teachers. About five years later, four black teachers and all of the black pupils at Garfield were assigned to a four-room frame house located in the back of the brick Garfield school building with its all-white classes. Shortly thereafter, a two-room portable was added to the black "annex" making six black classrooms and six black teachers located in the shadow of the white Garfield school. A four-room "permanent" structure was later substituted (about 1921 or 1922), and eight black teachers were thus assigned to the eight all-black classrooms in the Garfield annex. A.320-25.[3]

About 1925 school authorities learned that two black children, Robert Reese and his sister, had been attending the Central school under a false address, even though they

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[2] Many of the facts set forth in this Appendix were admitted by all Dayton Board defendants in their responses to plaintiffs' pre-trial Requests for Admissions, served on October 13, 1972. The Superintendent and three Board members filed responses separate from those of the Board and its four "majority" members. *See* A.109-38. These facts were also the subject of extensive and largely uncontroverted evidence at trial.

[3] In 1917 the black classes in the black annex at Garfield contained about 50 black children per room. A.322. Thereafter, Mrs. Ella Lowrey, a black teacher for several decades in the Dayton system, taught a class of 42 black children when white teachers inside the brick building had classes of only 20 white pupils. A.325-26.

Mrs. Lowrey's service began in 1916 and continued through 1963, with several years' interruption at various times. In her words, "doing 40 years service in all in Dayton, . . . I never taught a white child in all that time. I was always in black schools, black children, with black teachers." A.333. (At one time during this early history prior to 1931, one black teacher, Maude Walker, taught an ungraded class of black boys at the Weaver school. All other black teachers in the system were assigned to the black annex at Garfield. *f* 3.)

lived near the Garfield school. They had accomplished this subterfuge by walking across a bridge over the Miami River. A.281.[4] The Reese children were ordered by school authorities to return to the Garfield school, but their father refused to send them to the black Garfield annex. Instead, he filed a lawsuit in state court seeking a writ of mandamus to compel Dayton school authorities to admit children of the Negro race to public schools on equal terms with white children. A.280-83. In a decision entered of record on December 24, 1925, the Court of Appeals of Ohio denied a demurrer to the mandamus petition. This decision was affirmed by the Ohio Supreme Court and Dayton school authorities were specifically reminded that state law prohibited distinctions in public schooling on the basis of race. *Board of Education of School District of City of Dayton* v. *State ex rel. Reese*, 114 Ohio St. 188, 151 N.E. 39 (1926).

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[4] During this time, there apparently were some other black children also in "mixed" schools. For example, Mrs. Phyllis Greer attended "mixed" classes at Roosevelt high school for three years prior to 1933. A.252-53. But even when they were allowed to attend so-called "mixed" schools, black children were subjected to humiliating discriminatory experiences within school. At Roosevelt, for example, black children were not allowed to go into the swimming pool and blacks had separate showers while Mrs. Greer was there (A.253); while Robert Reese was at Roosevelt, there were racially separate locker rooms and blacks were allowed to use the swimming pool, but not on the same day whites used it. A.284. At Steele High School, black children were not allowed to use the pool at all during this period. A.886-87. Even in the "mixed" classrooms black children could not escape the official determination that they were inferior beings because of the color of their skin. Mrs. Greer vividly remembers, for example, "when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, . . . that even though I was a good student I was not to sit in front of the class because most of the colored kids sat in the back." A.254. And she remembers with equal clarity that, while in the second grade at Weaver, she "tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge of the play indicated that I could not be an angel . . . because there were no colored angels." A.251.

Following this state court decision Robert Reese and a few of his black classmates were allowed to attend school in the brick Garfield building, but the black annex and the white brick building were otherwise maintained. Black children were allowed to attend classes in the brick building only if they asserted themselves and specifically so requested. A.327-28. Otherwise, they "were assigned to the black teachers in the black annex and the black classes." A.328.[5]

The black pupil population continued to grow at Garfield, and another black teacher was hired and assigned with an all-black class placed at the rear door of the brick building. A.328-29. In 1932 or 1933, Mrs. Lowrey (*see* note 3, p. 3a, *supra*), was also placed in the brick building, again with an all-black class "in a little cubbyhole upstairs," making ten black teachers with ten black classes at Garfield. A.329-31. Finally, around 1935-36, after most of the white children had transferred out of Garfield, school authorities transferred all the remaining white teachers and pupils in the brick building to other schools and assigned an all-black faculty and student body to Garfield. A.260-61, 329-31; S.Ct.A.524 (PX 150 I); PX 155 (faculty directories).[6]

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[5] During the pendency of the Reese case, the eight black teachers assigned to the Garfield annex were employed on a day-to-day basis because school authorities did not know whether the black teachers were going to be in the Dayton system after the lawsuit. Black teachers would not be needed if the courts required the elimination of all-black classes, since the Board deemed black teachers unfit to teach white children under any circumstances. A.326-27.

[6] Throughout this period and until 1954, black children from a mixed orphanage, Shawen Acres, were assigned across town to the black classes in the black Garfield school, while the white orphan children were assigned to nearby white classes and white schools. A.215-16, 250, 1034, 1036-37. This practice was terminated following the *Brown* decision in 1954 at a time when the black community in Dayton was putting pressure on the school administration to stop mistreating black children. S.Ct.A.483 (PX 28).

But the black pupil population was growing during these years, and even the conversion of Garfield into a blacks-only school was not sufficient to accommodate the growth. So, with the state court decision in the *Reese* case now eight years old, the Dayton Board converted the Willard school into a black school. The conversion process was as degrading and stigmatizing as had been the creation and maintenance of the Garfield annex and the ultimate conversion of the brick Garfield into a black school. In the 1934-35 school year, six black teachers (who were only allowed to teach black pupils) and ten white teachers had been assigned to the Willard school. In September of 1935, all white teachers and pupils were transferred to other schools, and Willard became another school for black teachers and black pupils only. A.260-61; S.Ct. A.524 (PX 150 I); PX 155 (faculty directories).

At about this same time, the new Dunbar school, with grades 7-9, opened with an all-black staff and an all-black student body. S.Ct.A.524 (PX 150 I).[7] The Board resolution opening Dunbar stated that grades 7 and 8 were to be discontinued at Willard and Garfield[8] and "that attendance at the . . . Dunbar School be optional for all junior high school students of the 7th, 8th, and 9th grade levels in the city." A.429; S.Ct.A.539 (PX 161A). Of course, this meant only all *black* junior high students, since Dunbar had an all-black staff who were not per-

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[7] Mr. Lloyd Lewis, who was present at its inauguration, testified that the Dunbar school "was purposely put there to be all black the same as the one in Indianapolis [the Crispus Attucks school, *see United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971)] that I had left." A.546, 1048-50, 1083-86. Dunbar was also excluded from competition in the city athletic league until the late 1940's, thereby requiring Dunbar teams to travel long distances to compete with other black schools, even those located outside the state. A.254, 297-98, 316.

[8] These two black elementary schools served grades 7 and 8, whereas the system prior to 1940 was otherwise generally organized on a K-6, 7-9, 10-12 grade-structure basis. A.811.

mitted by Board policy to teach white children. A.260, 429; PX 155 (faculty directories).

Within a very short time, grades 10, 11 and 12 were added to the black Dunbar school. Then in 1942, just two years after the Dayton school authorities had reorganized to a K-8, 9-12 grade structure, the Board again assigned the seventh grades from the all-black Willard and Garfield schools to the all-black Dunbar school. A.429; S.Ct.A.520 (PX 161B). Black children from both the far northwest and northeast sections of the school district traveled across town past many all-white schools to the Dunbar school. A.268, 478-79, 632-33. Many white children throughout the west side of Dayton were assigned to Roosevelt high school past or away from the closer but all-black Dunbar high school.[9] Although some black children were allowed to attend Roosevelt, those who became "behavior problems" were transferred to Dunbar. A.255-56. And other black children from various elementary

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[9] Prior to 1940, no high schools had attendance boundaries. A.824. The black Dunbar school was located in close proximity to the Roosevelt high school which, although it always had space, apparently had too many black children. Along with Steele and Stivers, these high schools were located roughly in the center of the city and served high school students throughout the city. (In addition, the Parker school had been a city-wide single-grade school which served ninth graders. A.855-56. In 1940 attendance boundaries were drawn for the high schools with the exception of Dunbar and a technical school (whoe name varied), both of which long thereafter remained as city-wide schools. *See* p. 25a n.20, *infra*, and accompanying text.

Dunbar continued until 1962 as a city-wide all-black high school. In that year the Dunbar building was converted into an elementary school (renamed McFarlane) with attendance boundaries drawn to take in most of the students previously attending the all-black Willard and Garfield schools, which were simultaneously closed. McFarlane opened with an all-black faculty and all-black pupil population. At the same time, a newly-constructed Dunbar high school opened with both assigned faculty and students over 90% black. S.Ct.A.315 (PX 2E), 316 (PX 4), 508 (PX 130C); A.139-42 (PX 3), 574-75.

schools were either assigned, channeled, or encouraged to attend the black Dunbar high school. A.547-49; R.I. 573.[10]

Even these segregative devices were not sufficient to contain the growing black population. So between 1943 and 1945, the Board, by way of the same gross method utilized to convert the Willard school into a black school, transformed the Wogaman school into a school officially designated unfit for whites. White pupils residing in the Wogaman attendance zone were transferred by bus to other schools, to which all-white staffs were assigned. By September 1945 the Board assigned a black principal and an all-black faculty with an all-black student population to the Wogaman school. A.255, 298; S.Ct.A.524 (PX 150 I); PX 155 (faculty directories).

Still other official devices were used to keep blacks segregated in the public schools. One such device, resorted to regularly during the 1940's and early 1950's, was to cooperate with and supplement the discriminatory activities of Dayton public housing authorities. Throughout this period, racially-designated public housing projects were constructed and expanded in Dayton. A.194-95, 198-203; S.Ct.A.510 (PX 143 B). In 1942, the Board transferred the black students residing in the black De-Soto Bass public housing project to the Wogaman school (S.Ct.A.540 (PX 161 B)), and a later overflow to the all-black Willard school, rather than other schools that

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[10] The most effective means of forcing black children to attend the blacks-only Dunbar, of course, was the psychological one of branding them unsuited for association with white children. *See* note 4, *supra*. As Mr. Reese testified, he "chose" Dunbar over Roosevelt after suffering the humiliation of being assigned to separate locker rooms, separate showers, and separate swimming pools at Roosevelt: "I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt . . . You couldn't segregate me at Dunbar." A.284. Similarly, Mrs. Greer testified: "I went to Dunbar because I felt that if there was going to be—if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices." A.253.

were equally close (A.257-58), while transferring white students from the white Parkside public housing project to the McGuffey and Webster schools and the eighth grades from those schools to the virtually all-white Kiser school. S.Ct.A.540. Then in the late 1940's and early 1950's, the Board leased space in white and black public housing projects for classroom purposes, and assigned students and teachers on a uniracial basis to the leased space so as to mirror the racial composition of the public housing projects. A.202-03; S.Ct.A.513-23 (PX 143 J).

By the 1951-52 school year (the last year prior to 1964 for which enrollment data by race is available), the Dayton Board was operating what any informed person would immediately recognize as a dual school system. During that year there were 35,000 pupils enrolled in the Dayton district, 19% of whom were black. There were four all-black schools, officially designated as such: Willard, Wogaman, Garfield and Dunbar. These schools had all-black faculties and (with one exception, an assignment made that school year) *no* black teachers taught in any other schools. A.139 (PX 3). In addition, there were 22 white schools with all-white faculties and all-white student bodies. And there was an additional set of 23 so-called "mixed" schools, 7 of which had less than 10 black pupils and only 11 of which had black pupil populations greater than 10% (ranging from 16% to 68%). S.Ct.A.506 (PX 100E). These latter schools were generally located in the area surrounding the location of the four designated all-back schools. These few schools with substantial racial mix, however, were marked by patterns of racially segregative and discriminatory practices within the schools, and, with the one exception noted above, none had any black teachers. Eighty-three percent of all white pupils attended schools that were 90% or more white in their pupil racial composition. Of the 6,628 black pupils in the system, 3,602 (or 54%) attended the four all-black schools with all-black staffs; and another 1,227 (or

19%) of the system's black pupils were assigned to the adjacent schools which were about to be converted into "black" schools (*see* note 11, *infra*, and accompanying text). Thus, 73% of all black students attended schools already or soon to be designated "black." S.Ct.A.312 (PX 2B), 506 (PX 100E).

[*DISTRICT COURT'S OPINION*

(Pet. App. 147a-49a, 151a-52a, 153a, 158a-59a, 169a-71a)

The subsidiary facts set forth above are not in dispute. Many of them are the subject of findings below, and while others (*e.g.*, the *Reese* litigation, the conversion of Garfield, Willard and Wogaman into blacks-only schools, and the specifics of the Board's entanglement with public housing discrimination) were ignored by the district court, the district court's opinion does not conflict with these undisputed facts. Thus, the district court finds that "public housing was strictly segregated according to race" (Pet.App. 147a-48a); that the Board segregated many black children and discriminated against the few others who attended predominantly white schools in accordance with "an inexcusable history of mistreatment of black students" (Pet.App. 149a); that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative" (Pet.App. 153a); that the discriminatory transfer of black children from Shawen Acres Orphanage to the blacks-only Garfield School was "arguably . . . a purposeful segregative act" (Pet.App. 159a);* and that "the first Dunbar High School was intended to be and was in fact a black high school." Pet.App. 170a. To the extent that the court's failures to mention some of the other uncontradicted facts set forth above might be read as adverse findings on these points, then such findings are clearly erroneous. But the district court's principal error is its refusal to view the facts set forth above in the

aggregate (rather than pepper them throughout the opinion as though they were each unrelated to the other) and conclude that the Board was operating a basically dual school system. That conclusion is compelled by these facts; the court's refusal to draw that conclusion was clearly erroneous.**]

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* To the extent that the phrasing of this finding might be read to imply that these facts "arguably" do *not* show purposeful segregation, the implication is plainly erroneous. The only facts and conclusions permissible on the record are those set forth in note 6, p. 5a, *supra*.

** The court's conclusions about the post-*Brown* history of Dunbar high school (Pet. App. 170a-71a) which are inconsistent with those set forth in note 9, p. 7, *supra*, at dealt with at pp. 31a-32a, *infra*.

In December 1952 the Dayton Board confronted its last pre-*Brown* opportunity to correct the officially-imposed school segregation then extant. Instead, the Board acted in a manner that literally cemented in the dual system and promised racially discriminatory public schooling for generations to come. What the Board did is referred to in the record as the West-Side reorganization, and it involved a series of interlocking segregative maneuvers.

At this time, the Board was under pressure, as its records reflect, from "the resistance of some parents to sending their children to school in their district because it is an all negro [*sic*] school." S.Ct.A.499 (PX 75). In response, the Board constructed a new all-black school (Miami Chapel) located near the all-black Wogaman school and adjacent to the black DeSoto Bass public housing project; Miami Chapel opened in 1953 with an all-black student body and an 85% black faculty. S.Ct.A.316 (PX 4). The Board altered attendance boundaries so that some of the children in the four blacks-only schools were reassigned to the four surrounding schools with the next

highest black pupil populations; and, through either attendance boundary alterations or the creation of optional zones, it reassigned white students from these mixed schools to the next ring of whiter schools. A.589-91, 609-24, 732-34; PX 123.[11] And the Board began to assign black teachers to these formally mixed schools, thereby confirming their identification as schools for blacks rather than whites. A.613-14, 139-42 (PX 3).

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[11] The boundaries of the black Garfield and Wogaman schools were retracted, thereby assigning substantial numbers of black children to the immediately adjacent ring of "mixed" schools with the highest percentage of black pupils: Jackson (already 36% black in the 1951-52 school year), Weaver (68% black), Edison (43% black), and Irving (47% black). S.Ct.A.506 (PX 100E).

Jackson and Edison were re-zoned to include more black students, and their outer boundaries were effectively contracted through the creation of "optional zones" (Jackson/Westwood and Edison/Jefferson) so that white residential areas became effectively detached from Jackson and Edison and, for all practical purposes, attached to the next adjacent ring of "whiter" schools. Thus, the Board brought blacks in one end and allowed whites to escape out the other in these "transition" schools. The Board also created optional zones (Willard/Irving, Willard/Whittier and Wogaman/Highview, as well as an option between the new Miami Chapel and Whittier) in white residential areas contained within the boundaries of the original four schools for blacks only, so that whites could continue to transfer out of these all-black schools. A.589-91, 609-24. Prior to 1952 whites had been freely allowed to transfer to "whiter" schools, but such transfers were abolished in 1952. A.618; S.Ct.A.482 (PX 28). Optional zones were thus substituted for the prior segregative transfer practice. (The optional-zone technique is discussed in greater detail at pages 23a-27a, *infra.*)

During this period the Board also created another optional attendance zone affecting Jackson; this zone was instituted in an area of the Jackson zone containing the Veteran's Administration Hospital, and allowed whites to attend Residence Park, which at that time was all-white. A.585-87; S.Ct.A.506 (PX 100E). This option is discussed further at note 22, *infra.* Additionally, the Board during this period created the optional zone between Roosevelt (31.5% black) and Colonel White (100% white A.592-93; S.Ct.A.506 (PX 100E). The immediate and long-range racial significance of this option is discussed in greater detail at pp. 25a-26a, *infra.*

[*DISTRICT COURT'S OPINION*

(Pet.App. 155a-57a)

Incredibly, the district court concluded that the West-Side reorganization "was an experiment in integration" and, inconsistently, that "[i]ts purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet.App. 155a. These conclusions are clearly erroneous, arrived at only through the most selective and argumentative reading of the record imaginable. For example, the district court cites the testimony from the latest hearing of former Superintendent Wayne Carle in support of the proposition that the West-Side reorganization was an "experiment in integration." While Dr. Carle's testimony is not absolutely free of ambiguity, taken as a whole it is impossible to characterize his views as being that the events of 1952 were integration-oriented. But the district court does not take the testimony as a whole; rather, the court relies on five pages of the transcript (A.938-42) which the court obviously selected as being most supportive of its desired version of events. The court ignores altogether the very next two pages (A.943-44) in which Dr. Carle emphasizes that "you can't operate part of the system on a segregated basis without signalling that the rest of the system is on a segregated basis" (A.933); "The action that was taken there was that nothing was done to eliminate the segregation that already existed in the three schools whose boundaries were changed" (A.944); and that if the Board had *truly* adopted a policy of *real* desegregation and "that were communicated to the community, I suspect it might have a much different effect than minor boundary changes involving schools that remain all black" (A.944). These points are unassailable, but by ignoring them the district court had just begun to err. These basic errors were compounded three-fold: first, by ignoring further testimony from Dr. Carle pointing

out that a central part of the West-Side reorganization was its use of supportive segregative devices such as assigning black teachers to the schools adjacent to the four blacks-only schools (A.1011-12), accompanied by the creation of optional attendance zones (A.1014-15); second, by concluding that "[t]he events of 25 years ago, I suspect, would not affect any student in school at the moment and might not even have affected his parents" (A.1013) (statement of the court)*; and third, by refusing to allow Dr. Carle to answer the question, "In light of those two factors [assignment of black teachers and creation of optional zones], Dr. Carle, do you have a view as to the intention of the Board insofar as whether or not there was an intention to establish these [schools adjacent to the blacks-only schools] as the next black schools in Dayton" (A.1016). The court refused to allow the testimony (A.1016-17). Thus, the court relies on the testimony of a witness to support a conclusion drawn by the court but with respect to which the court would not allow the witness to testify! The court made other comparable errors in drawing its conclusions about the West-Side reorganization.** Its treatment of this issue, insofar as inconsistent with the facts and conclusions we have set out above, should be disregarded as clearly erroneous.]

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* The court's quoted view seems to be that the only harm in segregation occurs at the time of initial imposition, and that subsequent generations have nothing to complain about—a view that is foreclosed by *Brown*.

** For further example, the court cited Dr. Gordon Foster's testimony for the proposition that the West-Side reorganization was intended as an "experiment in integration . . . to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet. App. 155a, citing A.625. This is not an accurate representation of Dr. Foster's testimony, but rather a highly selective reading which distorts both the sum and the substance of the record. For the twenty-five previous pages of transcript, Dr. Foster had detailed, as summarized above (*see* note 11 and p. 12a, *supra*), the large numbers and variety of segregative de-

vices utilized by the Dayton Board in the West-Side reorganization. At A.624 Dr. Foster concluded this testimony as follows:

> the effect was clearly one of locking in and freezing this configuration including these schools into an all-black situation.

There can be no mistake as to the objective meaning of this twenty-five pages of testimony, and of Dr. Foster's conclusion, or the objective fact that the Board's actions in this reorganization were intentionally segregative, whatever the Board's *stated* intent.

Thereafter, at A.624-29, the court engaged Dr. Foster in a colloquy ranging from "tipping points" to the "alternatives" to the West-Side reorganization available to the Board. At several points in this colloquy, it is clear that Judge Rubin is not satisfied, for example, when Dr. Foster debunks "tipping points" (A.626-29), or suggests limited actions which the Board might have taken to show that its actual purpose was at least racial nondiscrimination, rather than segregation, in a difficult situation of a school district with a prior history of segregation and a community undergoing racial change. A.626. But what apparently peeved the district judge the most was Dr. Foster's evaluation of the ineffectiveness of even such limited alternatives (which the Board, of course, eschewed in its segregative reorganization) in the context of a dual school system (A. 625, 628-29):

> The problem, as I [perhaps the most experienced and respected professional with respect to accomplishing actual school desegregation in the country] see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.
>
> * * * *
>
> I think the only secure solution and the only safe solution is to dissestablish a dual structure in the entire system so that whites [who may wish to] flee . . . meet the same situation wherever they go.

Viewing Dr. Foster's testimony as a whole, therefore, the district court engaged in much more than just a clearly erroneous selective reading of the record in suggesting that this expert believed the Board's purpose was integrative rather than segregative; it is also a gross misrepresentation, both of Dr. Foster's opinion and the uncontroverted, objective evidence.

The staff aspect of state-imposed segregation—i.e., assignments of Board employees on a racial basis "pursuant to an explicit segregation policy of the Board,"

Brinkman I, 503 F.2d at 697—also underwent a slight change in policy. Prior to this time, as previously noted, the Board would not allow black teachers to teach white children under any circumstances; black teachers were assigned only to all-black schools, and white teachers were assigned only to white and "mixed" schools. Accordingly, in the 1951-52 school year, the Board substituted a new, but equally demeaning, faculty assignment policy (S.Ct.A.481 (PX 21)):

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

This faculty policy, incredibly, was contained in a statement of the Superintendent disavowing the existence of segregated schools in the Dayton district.[12]

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[12] In 1954 the Superintendent made a further statement, which included the following: "All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools." S.Ct.A. 482 (PX 28). As we have seen (*see* note 11, *supra*), however, the elimination of free transfers was accomplished by a new device, optional zones, which served the same purpose of allowing whites to avoid attendance at black or substantially black schools.

The Superintendent's 1954 statement also contains the following (S.Ct.A.483):

> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro [*sic*]

[*DISTRICT COURT'S OPINION*

(Pet.App. 151a-53a)

The district court correctly concluded that "until 1951 Board's policy of hiring and assigning faculty was purposefully segregative." Pet.App. 153a. But the court attempts to ameliorate the harsh racism of the 1951-52 policy change by characterizing it as a "policy of dynamic gradualism" (*id.*) which "was substantially implemented during the 1950's and 1960's." *Id.* at 152a. The policy itself, quoted above, speaks louder and clearer than the district court's ameliorative efforts, which are clearly erroneous. The court also erred in not recognizing the Board's faculty policies as the hallmark of the Dayton-style dual system. (The court's continuing errors, with respect to post-*Brown* faculty-assignment practices, are treated at pp. 18a-21a, *infra.*)]

At the time of the Supreme Court's May 17, 1954 decision in *Brown* v. *Board of Education*, therefore, Dayton school officials were operating a racially dual system of public education. This segregation had not been imposed by state law; indeed, it was operated in open defiance of state law.

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population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro [*sic*] schools is more difficult than the problem of introducing negro [*sic*] teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro [*sic*] teacher.

As we shall also show (*see* pp. 18a-21a, *infra*), this race-based assignement of faculty continued for almost two more decades as a primary device for earmarking schools as intended for blacks or whites.

[*DISTRICT COURT'S OPINION*:

The district court did not specifically speak to this concluding point, but obviously would have reached the clearly erroneous conclusion that the Board was not operating a basically dual system. The facts and their meaning are as we have described them.]

Continuation of the Dual System After Brown

1. *Faculty and Staff Assignments*

The Board continued to make faculty and staff assignments in accordance with the racially discriminatory policy announced in 1951 (*see* pp. 16a-17a, *supra*) at least through the 1970-71 school year. A.901-03, 909-12, 1006-9, 1010-11, 1060-61, 1099-1112. For example, in the 1968-69 school year, the Board assigned 633 (85%) of the black teachers in the Dayton system to schools 90% or more black in their pupil racial compositions, but only 172 (9%) of the white teachers to such schools. The Board assigned only 72 (9%) of the black teachers to schools which were 90% or more white, but 1,299 (70%) of the white teachers were assigned to such schools. S.Ct.A.320 (PX 5D).

Prior to the 1968-69 school year, the Board maintained teacher applications on a racially separate basis. Once teachers were hired, their records were kept on various racial bases which were used to segregate teachers and schools. Substitute teacher files were color-coded by race and substitutes assigned on a racially dual basis. And the Board restricted the hiring, transfer, and promotion of black teachers primarily to black or "changing" schools while white assignments or transfers to these schools were discouraged. A.223-30, 261-66, 139-42 (PX 3), 337-53, 286-92, 362-66, 368-76, 377-84. Principals, as-

sistant principals, counselors, coaches and other clerical and classified personnel were assigned on an even more strictly segregated basis. A.540-41; S.Ct.A.486 (PX 42). Thus, from at least 1912 through 1968 the assignment of personnel in the Dayton school system fit perfectly the classical mold of state-imposed segregation: such assignments mirrored the racial composition of student bodies at new schools and additions,[13] and continued to correspond to the racial identity of those schools already all-black or in transition.[14] White teachers similarly were assigned in disproportionate numbers to the predominantly white schools.[15] It was therefore possible at any

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[13] The Board assigned faculty members to these new schools and additions so as to reflect the pupil racial composition at opening, thereby tailoring them as "black" or "white" in accordance with the Board's policy. A.644, 800; S.Ct.A.316-17 (PX 4).

[14] In the 1963-64 school year, for example, the Board assigned 40 of 43 new full-time black teachers to schools more than 80% black in their racial compositions. S.Ct.A.319 (PX 5A). Although somewhat less obvious, this practice was equally effective in identifying the formerly mixed schools as changing or black by assigning more than token black faculty only to these schools and thereafter assigning increasing numbers of black teachers only to these schools. A.139-42 (PX 3), 234-46, 407. As articulated by Mrs. Greer, a long-time black student, teacher and administrator in the system (*see* note 4, *supra*, p. 4a), the assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools being designed to be black, because black staff increased as black student bodies increased." A.271. As Board member Leo Lucas put it, race-oriented faculty-assignment practices "manifest the intent of the Board" and have a "spill-over" effect on all aspects of school operation. A.1061.

[15] Thus, for example, in the 1968-69 school year, the Board continued to assign new teachers and transfers according to the following segregation practice (S.Ct.A.319 (PX 5A)):

	Schools with predominantly white student enrollment	Schools with predominantly black student enrollment
Black Teachers	40	95
White Teachers	223	64

[Footnote continued]

time during this period to identify a "black" school or a "white" school anywhere in the Dayton system without reference to the racial composition of pupils.

In November of 1968 the United States Department of Health, Education and Welfare [hereinafter, "HEW"] began an investigation of the Dayton public schools to determine whether official policies and practices with respect to race were in compliance with Title VI of the Civil Rights Act of 1964. By letter of March 17, 1969, the acting Director for the Office of Civil Rights of HEW notified the Dayton Superintendent (and the chief state school officer) that "[a]n 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." S.Ct.A.415 (PX 11A). Following this determination the Dayton Board agreed with HEW to desegregate all 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" (S.Ct.A.416 (PX 11F)), in accodance with the principles set forth in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). At that time, the Dayton professional staff was approximately 70% white and 30% black; the Board-HEW agreement required complete staff desegregation by September 1971. S.Ct.A.417. Nevertheless, by the time of trial in November 1972, it was still possible to identify many schools as "black schools" or "white schools" solely by the racial pattern of staff assignments.[16]

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[15] [Continued]

As the former Superintendent testified, "it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools." A.540.

[16] The manner in which the Board's assignment of its professional staff at the high school level, for example, still served to racially identify schools, although considerably less dramatically than prior to the 1971-72 school year, is demonstrated by a table set out in

No non-racial explanation for the Board's long history of assigning faculty and staff on a racial basis is possible.[17] Nor can the impact of this manifestation of state-imposed segregation on student assignment patterns be minimized. While that effect is not precisely measurable, it is so profound that it could not have been eliminated merely by desegregating faculties and staffs.[18] Such racial assignment of staff is also "strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. . . ." *Kelley* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

[*DISTRICT COURT'S OPINION*

(Pet.App. 151a-54a)

The district court conceded that "remnants of the old [explicitly racial] policy [of assigning black teachers only

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Brinkman I, 503 F.2d at 698. Moreover, classified personnel (e.g., secretaries, clerks, custodians and cafeteria workers) continued to be assigned on a racially segregated basis. A.541.

[17] School officials, of course, had absolute control over the placement of their employees. Consequently, the Board's historic race-oriented assignments of faculty members intentionally earmarked schools as "black" or "white." A.642-43.

[18] Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, described how such faculty-assignment practice "facilitates the pattern of segregation" (A.246) in these terms (A.234):

> 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 white.

See also A.642-44, 1061-64, 1099-1112.

to teach black children], such as discouraging black teachers from going to all-white schools. . ., and assigning black substitute teachers to black schools. . ., did continue to appear after 1960," but the court argued that "the [1951-52] policy of dynamic gradualism was substantially implemented during the 1950's and 1960's." Pet.App. 152a. This latter conclusion is not clearly erroneous only if it is read as recognizing that the Board's emphasis was on the gradualism, in the words of its 1951-52 policy (*see* p. 16a, *supra*) of "not attempt[ing] to force white teachers [into black schools], against their will," and of "introduc[ing] negro [*sic*] teachers, gradually, into [white] schools . . . where there is evidence that such communities are ready to accept [them]." The facts set forth above are not disputable, and the district court's effort to set a tone different from those facts is clearly erroneous. Also plainly erroneous is the court's implicit effort to find support for its tone in the fact that "by 1969 the Dayton school system had the most black educators and the second highest percentage (24.4%) of black educators of the twenty largest systems in the State of Ohio." Pet.App. 152a.* Similarly erroneous is the court's finding that "vestiges of the Board's earlier illegal practices were evident until approximately 1963[, b]ut by 1969 all traces of segregation were virtually eliminated." Pet.App. 153a; *but see* notes 15 & 16, pp. 19a-21a, *supra*.**

Finally, the court committed a fundamental error of both logic and fact in failing to recognize the obvious relevance of the Board's race-based faculty policies to the question of the Board's segregative intent with respect to other areas of school administration affecting pupil attendance patterns. Thus, to argue, as the court does, that faculty segregation has no impact because in each instance "the school was already identifiable as being black because of the racial population of the students" (Pet.App. 153a), not only is factually untrue***, but it also fails to give faculty-segregation practices their due

weight of "hav[ing] the clear effect of earmarking schools according to their racial composition." *Keyes*, 413 U.S. at 202. *See, e.g.*, notes 14 & 18, pp. 19a & 21a, *supra*. This "clear effect" may not be quantifiable with mathematical precision, but it is substantial in any realistic sense. The district court's contrary conclusions are clearly erroneous.]

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* This argument is specious. In school systems in almost every state which had explicit segregation laws the proportionate number of black teachers was as substantial as in Dayton. And as in Dayton, the "southern" districts also assigned pupils and teachers to schools, in the words of *Brinkman I*, "pursuant to an explicit segregation policy." 503 F.2d at 697. Thus, the presence of a substantial number of black teachers may in some cases be evidence of nondiscriminatory hiring; in others, it is the legacy of an explicitly dual system of hiring and assigning teachers on a racial basis, as in Dayton.

** Also wrong is the idea that HEW's intervention in 1969 was "edg[ing] the legal limit." *Id. See* note 30, p. 41a, *infra*. As former Superintendent Carle pointed out, HEW actually acquiesced in the Board's desire to delay by allowing the Board a two-year period within which to achieve compliance. A.1010-11.

*** For example, in 1962 when the Board converted the old Dunbar into McFarlane elementary and opened the new Dunbar High School, virtually all-black faculties and virtually all-black student bodies were *simultaneously* assigned to these schools. *See* pp. 31a-32a, *infra*. Faculty- and student-assignment practices operate hand-in-glove, a point so obvious it is difficult to understand how the district court missed it.

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2. *Optional Zones and Attendance Boundaries*

We have already shown how the Dayton Board utilized optional zones and attendance boundary manipulation as segregative devices in connection with the 1952 West-Side reorganization (*see* note 11, p. 12a, *supra*). There are additional examples of both practices which stand on their own as segregation techniques.

Optional zones are dual or overlapping zones which allow a child, in theory, a choice of attendance between

two or more schools. A.562. Yet, the criteria stated by the Board for the creation of both attendance boundaries and optional zones are precisely the same: they constitute merely a type of boundary decision and serve no other educational or administrative purpose. A.544, 683-84. Optional zones have existed throughout the Dayton school district and apparently have been created whenever the Board is under community pressure which favors attendance at a particular school or disfavors attendance at a particular school. A.600, 844-45. Other than for such purely "political" reasons, there is no rationale which supports the establishment of an optional zone rather than the creation of an attendance boundary, which is a more predictable pupil-assignment device (A.685); and optional zones are at odds with the so-called "neighborhood school concept." A.7.

In many instances in Dayton optional zones were created for clear racial reasons, as, for example, in the West-Side reorganization, while in other instances the record reveals no known reason for their existence. But even in these latter instances some optional zones have had clear segregative effects. From 1950 to the time of trial, optional zones existed, at one time or another, between pairs of schools of substantially disproportionate racial compositions in some fifteen instances directly effecting segregation at some 21 schools.[19] In addition, at

[19] The West-Side reorganization in 1952-53 (*see* note 11, p. 12a, *supra*) involved six optional areas with racial implications: Willard-Irving, Jackson-Westwood, Willard-Whittier, Miami Chapel-Whittier, Wogaman-Highview, and Edison-Jefferson. A.589-91, 609-24. Other optional zones with demonstrable racial significance at some time during their existence include the following: Three optional zones between Roosevelt and the combination Fairview-White; two optional zones between Residence Park and Adams; and optional zones between Westwood and Gardendale, Colonel White and Kiser, Fairview and Roth, Irving and Emerson, Jefferson and Brown, and Jefferson and Coracll Heights. A.591-601, 604-05, 691-709; PX 47-51.

the high school level, Dunbar remained in effect a city-wide optional zone for blacks only through 1962 when it was converted into an all-black elementary school (A.574-75, 632-34) (*see* p. 31a, *infra*); and Patterson Co-op remained a city-wide and, through the 1967 school year, virtually all-white optional attendance zone.[20] In conjunction with the attendance-area high schools, these two special high schools operated as city-wide dual overlapping zones contributing to the pattern of racially dual schools at the high school level throughout the district. *See* A.632-34, 636-38; R.I. 1056-57.

Actual statistics on the choices made by parents and children in four optional areas are available. In each instance the option operated in the past, and in three instances at the time of trial, to allow whites to transfer to a "whiter" school. For example, in the Roosevelt-Colonel White optional area (which was carved out of Roosevelt originally about 1951-52 when the Board was creating optional areas between various West-Side elementary schools (*see* note 11, p. 12a, *supra*), from the 1959-60 school year through the 1963-64 school year a cumulative total of 1,134 white but only 21 black students attended Colonel White. S.Ct.A.464 (PX 15A1).[21] Testi-

[20] The city-wide Patterson Co-op operated in a more subtle segregative fashion than did Dunbar. In 1951-52, Patterson had no black students and no black teachers (S.Ct.A.507 (PX 130B)); by 1963 its student body and faculty were only 2% black (S.Ct.A.508 (PX 130C)); and by 1968 the pupil population rose to 18.3% black and the faculty to 3.5% black. S.Ct.A.509 (PX 130D). Students were admitted to Patterson through a special process involving co-ordinators and counselors, none of whom were black prior to 1968. A.755-58. Patterson has over the years served as an escape school for white students residing in black or "changing" attendance zones, particularly Roth and Roosevelt. R.I. 1056-57.

[21] At the November, 1977 hearing the Board presented a witness who had conducted a statistical analysis of this optional area and argued that it was having an integrative effect by 1970 because blacks in the zone were attending Colonel White. A.975-80. This witness conceded, however, that he was only looking at the effect on

mony from a Dayton school administrator indicates that from 1957 through 1961, although this optional area was predominantly white, black students who lived in the area attended Roosevelt which had become virtually all-black (Colonel White was 1% black). A.388-89. The Roosevelt yearbook for 1962 shows that only three white seniors from the optional area attended the black high school. S.Ct.A.462 (PX 15A). As Mrs. Greer testified, this optional area did "an excellent job of siphoning off white students that were at Roosevelt." A.269.[29]

Although many of these still-existing optional zones had already fulfilled their segregative purpose by the time

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the "white" school (Colonel White) and not the "black" school (Roosevelt); the true picture, therefore, was that in 1970 317 white students used the optional zone to avoid attending Roosevelt, which was thereby made 100% black rather than the 87% black it would have been without the racial option. A.991-95. This impact, of course, was in accord with the historic purpose and function of optional zones in Dayton. *See* note 11, p. 12a, *supra*.

[29] As another example, the Colonel White-Kiser option acquired its racial implications after its creation in 1962 with the racial transition of the Colonel White school, to which the Colonel White-Roosevelt option contributed in no small measure. At its inception and for several years thereafter, when both schools were virtually all-white, most children in the White-Kiser option area chose White. As Colonel White began to acquire more black students, whites chose Kiser more often until in the 1971-72 school year, no white children chose the 46% black Colonel White school, while 20 chose the 6% black Kiser school. S.Ct.A.465 (PX 15B1), 554 (DX AI(b)).

The rebuttal figures provided by the defendants on the Residence Park-Jackson optional area (see note 11, p. 12a, *supra*) are equally instructive, because the figures relate to a time when the optional area did not even exist by reason of the construction of the virtually all-black Carlson school and its assumption of the old Veterans Administration optional area as its regular attendance zone. S.Ct. A.586 (DX CO), 587 (DX CP). In any event, defendants' exhibit shows that from 1957 through 1963 no children from the former V.A. optional area attended Jackson, while 32 whites (and 8 blacks) attended Residence Park. In the 1957-58 school year, Residence Park was basically white and Jackson was black. A.220, 585-87. (By 1963, however, Residence Park had become 80% black. S.Ct.A.508 (PX 130C).)

of trial, over time they clearly contributed substantially to and facilitated school segregation. Moreover, even by the time of trial several of these optional areas continued to permit whites to escape to "whiter" schools, thereby further impacting the black schools and precipitating additional instability and transition in residential areas.[23]

Formal attendance boundaries, in conjunction with optional zones, have also operated in a segregative fashion; and in some instances firm boundaries were also drawn along racial lines.[24] An example is the boundary separating Roth and Roosevelt which was drawn in 1959. Roth took almost all the white residental areas on the far west side of Dayton from Roosevelt. At its opening, Roth

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[23] From 1968 through 1971, when Roosevelt was a 100% black school, for example, 375 white children from Roosevelt-Colonel White optional area attended Colonel White. S.Ct.A.464 (PX 15A1). Throughout its life, then, this option has allowed very substantial numbers of white children to avoid attending Roosevelt. By 1968, however, and not atypically, the optional area had undergone significant racial change and substantial numbers of black children were also attending Colonel White. S.Ct.A.462-63 (PX 15A), 464 (PX 15A1). Plaintiffs' expert, Dr. Foster, explained how optional attendance areas facilitate both educational and racial segregation:

> [T]he short term effect . . . is to allow whites to move out of a school assignment that is becoming black . . . [A.604].
>
> [G]enerally where you have an optional zone which has racial implications, you have an unstable situation that everyone 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 . . . [T]hese [optional areas in Dayton] accelerated and precipitated further segregation . . . [A. 601].

[24] In some instances, and in addition to the official optional zones, attendance boundaries have not been enforced for white children when assigned to black schools. For example, a pupil locator map made to assist in developing a middle school plan in the 1970-71 school year showed that many white children assigned by their attendance zone to the predominantly black Greene school were actually attending predominantly white schools located on the other side of Wolf Creek. A.469-70. A similar situation existed in the Carlson area. *See* note 22, p. 26a, *supra*.

had only 662 pupils, while Roosevelt's enrollment dropped by 602. Coupled with the exodus of whites out of Roosevelt through the Colonel White-Roosevelt optional areas, almost all whites were thereby transferred out of Roosevelt by Board action, in short order converting Roosevelt into a virtually all-black school. A.630-31; PX 48 & 46. (And, of course, the designation of Roosevelt as a black school was evidenced, in the traditional way, by assigning ever-increasing numbers of black teachers to the school. A.139-42 (PX 3).)

At about this same time, Meadowdale high school also opened, but as a virtually all-white school. S.Ct.A.317 (PX 4). Opportunities were available for the placement of such high schools and use of the excess capacity or the redrawing of the boundaries of Roth, Roosevelt, Stivers, Fairview and Meadowdale in order to accomplish desegregation. But school authorities selected the alternatives that continued rather than alleviated the extreme racial segregation at the high school level. A.737-41, 581-82, 630-31; PX 6. This pattern was capped in 1962 when a new Dunbar high school opened with a virtually all-black faculty and a defined attendance zone that produced a virtually all-black student body. At the same time the Board converted the old Dunbar high school building into an elementary school (renamed McFarlane), whose newly-created attendance zone took in most of the students in the zones for the all-black Willard and Garfield schools, which were closed. *See* note 9, p. 7a, *supra*, and pp. 31a-32a, *infra*.

Finally, the Board also persistently refused to redraw boundaries between, or pair, contiguous sets of schools which had been, and were at the time of trial, substantially disproportionate in their racial compositions. Examples of such contiguous pairs include Drexel (8% black) and Jane Adams (79% black); McGuffey (42% black) and Webster (1% black) or Allen (1% black);

Irving (99% black) and Emerson (9% black); Whittier (99% black) and Patterson (0% black). PX 68, 62. Such alternatives to segregation—many of which were recommended by subordinate school administrators and even the Ohio State Department of Education (A.309-12; S.Ct.A.419-55 (PX 12))—were rejected by the Board.

[DISTRICT COURT'S OPINION

(Pet.App. 155a, 159a, 162a-69a, 170a, 174a)

The court's unsupported summary conclusion that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation" (Pet.App. 155a), is clearly erroneous, as the evidence set forth above demonstrates. Examples of similar errors include the conclusion that no segregation intent was involved in the redrawing of Dunbar's high school zone in 1962, as well as the boundary changes attendant upon conversion of the old Dunbar into McFarlane elementary. Pet.App. 159a. Viewed in their historical context (which of course the district court does not do) there is no alternative but to conclude that these changes were carried out with plain old-fashioned segregative intent. Similar clear error occurred with respect to the court's evaluation of the Roosevelt boundary change which accompanied the 1959 opening of Roth High School (Pet.App. 174a) as demonstrated by the factual discussion at pp. 27a-28a, *supra.*

The court's conclusions that optional zones, including the city-wide high school options, had neither segregative intent nor effect (Pet.App. 162a-69a), also are clearly erroneous. Here as elsewhere the court commits threshold error in not analyzing the optional zones in light of their genesis in the early 1950's when they were deliberately

initiated for demonstrably segregative ends. *See* pp. 11a-12a, *supra*.* In proper context, therefore, many optional zones in the Dayton district were instituted for racial reasons, and over time they had a significant racial impact which preserved, perpetuated and exacerbated intentionally-imposed systemwide segregation. The court's contrary conclusions are manifestly erroneous. The facts and their true meaning are as we have set them out above.]

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* Optional or dual overlapping zones were the mainstay of the "southern" style of dualism. *See Green*, 391 U.S. at 432.

Such options are a classical segregation device which the courts have found prevalent in the "northern" cases as well. *See, e.g., United States* v. *School District of Omaha*, 521 F.2d 530, 540-43 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975), and cases cited; *Bradley* v. *Milliken*, *supra*, 484 F.2d at 232-35, and cases cited. Judge Wisdom has correctly described this device as "unadulterated segregation." *United States* v. *Texas Educ. Agency*, 457 F.2d 848, 867 (5th Cir. 1972).

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3. *School Construction, Closing and Site Selection*

The Board's school-construction, school-closing and site-selection policies and practices over the past two decades failed to alleviate the condition of state-imposed segregation extant at the time of *Brown*. To the contrary, the Board's policies and practices in these areas impacted the dual system and literally sealed it in. In the period of expansion of the school system from the late 1940's to the mid-1960's, the overwhelming majority of new schools and additions to schools were located by the Board in either virtually all-black or virtually all-white areas, and attendance boundaries were drawn or maintained so that new schools and expansions of existing facilities opened as virtually one-race schools. A.562-71, 649-50; R.IV. 512-14. Of 24 new schools constructed between 1950 and the present, 22 opened 90% or more black or 90% or more white. A.562-63; S.Ct.A.316-17 (PX 4). During

the same expansion period, additions to existing facilities followed the same pattern. Seventy-eight of some 86 additions of regular classroom space, for which racial compositions are known, were made to schools 90% or more one race at the time of the expansion; only nine additions were made to schools less than 90% black or white. A.649-50. The race-based nature of these practices is made crystal clear by the coordinate assignment of professional staffs to these schools and additions tailored to the racial composition of the pupils. S.Ct.A.316-17 (PX 4); A.644, 794-96, 800, 924-25, 926-28, 1018-19.[25]

A few examples will suffice to illustrate the racial underpinnings of this complex process. For example, in 1962 the Willard and Garfield schools, previously designated for blacks only, were closed and the old blacks-only Dunbar high school building was converted into McFarlane elementary. Most of the children from the Willard and Garfield attendance areas were simply assigned to the McFarlane school which opened, certainly to no one's surprise, with an all-black pupil population and an all-black faculty. Some children from the Willard and Garfield areas were also assigned to the all-black Irving and Miami Chapel elementary schools. At the same time, a newly

[25] Plaintiffs' expert, Dr. Gordon Foster, testified that such school construction patterns "by and large . . . took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them." A.734. Mr. Bagwell, the Dayton Board's chief rebuttal witness with respect to school construction, admitted that "in effect then, when you . . . put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school. . . . So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be . . . creating a hundred percent black school unit." A.799. The same is true with respect to the virtually all-white or all-black primary units, as well as one-race additions. A.582, 951-53, 1087-93. And the placement of portable classrooms also operated to seal in the racial patterns. A.575-80.

constructed Dunbar high school, located in a black neighborhood at the farthest corner of the school district away from substantial white residential areas, opened with a virtually all-black student body and faculty. *See* note 9, p. 7a, *supra;* A.574-75, 632-34, 1034-35, 1038-39, 1041-42, 1051-57, 1093-98. Thus, a major new element was added to the dual system and, although there was some juggling within, the color line was expanded and reinforced.

A final example, presenting the converse of the above examples, relates to the Board's failure to utilize excess capacity to the maximum efficiency as pupil populations declined by over 10,000 following their peak year in the mid-1960's. Even conservative estimates at the time of trial indicated that the Board could have closed down 9 or 10 average-size elementary schools. A.571-75; S.Ct.A.489-98 (PX 56). Such closings would have presented the Board with substantial opportunities to accomplish significant savings in costs, and at the same time accomplish substantial desegregation.[26] But rather than closing selected black and white schools and reassigning pupils to accomplish actual desegregation, the Board elected the more costly segregative option of keeping these under-utilized schools open and maintaning their racial identity.

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[26] There would be substantial cost savings with respect to such closings, even if substantial pupil transportation were required to accomplish school desegregation conveniently and safely for the children. According to the Board, the average yearly per pupil transportation cost on Board-owned buses is $50.00, while the average yearly per pupil cost for simply maintaining a pupil space in a school is $140.00. (Nos. 33 & 33A of plaintiffs' Requests for Admissions (served October 13, 1972), admitted by both the Board and the Superintendent and Board minority. A.119, 132, 136.)

[*DISTRICT COURT'S OPINION*

(A.87-89, 90-97)

The district court acknowledged the segregative pattern of the Board's school construction/site selection practices (A.90), which from an administrative perspective "approached the level of haphazard in some instances." *Id.* at 91. The court concluded, however, that plaintiffs had not shown that the Board's practices of "site selection, construction of additions, use of portables, or school utilization had a segregative purpose or that such policy had an incremental segreative effect upon minority pupils, teachers, or staff." A.97. With respect to the question of segregative intent, the court's conclusion is unsupportable. The court is able to arrive at this conclusion with a straight face only by treating these practices in a context completely removed from the Board's systematic pre-*Brown* practices of building and converting schools for black students and black teachers only, by not recognizing how much the post-*Brown* patterns of faculty assignments to new schools bespoke unmitigated segregative intent, and further by avoiding the obvious facts, such as the construction of the new Dunbar (and the interrelated closing of Willard and Garfield, and the conversion of the old Dunbar into McFarlane), which are inexplicable except in terms of race. In this more complete context (a context which the court studiously refused to deal with*), the finding of no segregative intent is clearly erroneous. Even more astounding is the court's conclusion that none of these practices had segregative effect! This conclusion is contrary to the court's own subsidiary findings (*e.g.*, A.90), and contrary to sound reason. Given the opinion's repeated conclusions that nothing the Board did had a segregative effect, a stranger to the district court's conduct in this case would no doubt be puzzled, if not flabbergasted, as to why the Dayton schools were almost totally

segregated at the time of trial. These "findings" also are wholly in error.]

* The court insisted on wearing blinders to the extent of refusing to allow a plaintiffs' witness to testify about matters occurring prior to 1954. A.1026. Having thus frustrated and limited the witness, the court then proceeded, in unsportsmanlike fashion, to rely upon him for a finding adverse to plaintiffs (A.88), as well as to the record as a whole.

4. *Grade Structure and Reorganization*

As previously noted, the Board persistently refused to alter grade structures by pairing schools to accomplish pupil desegregation. *See* p. 32a, *supra*. Likewise, the differential grade structure involved in the construction of primary units, and the grade organizations of the Dunbar high school (prior to 1962) and the Patterson high school (prior to 1968-69 school year) have perpetuated and compounded school segregation. *See* notes 8, 9 & 20, pp. 6a-7a & 25a, *supra*.

The Board acted in similar fashion in the 1971-72 school year when it reorganized the grade structures of some 20 elementary schools from K-8 to K-5, 6-8. This grade reorganization program presented an important opportunity for the Board to accomplish substantial desegregation by judicious selection of sites, alterations of feeder patterns, and the establishment of the new attendance zones for both the middle (6-8) and elementary schools (K-5) affected. S.Ct.A.376-87 (PX 10). Yet, in the face of recommendations from the State Department of Education of alternatives for accomplishing substantial desegregation, and the development of a pupil locator map so that there could be no doubt about the racial impact of its actions, the Board implemented a plan which reimposed segregation at three middle schools and their feeder elementaries, increased racial segregation at another middle school, and accomplished some desegregation at the

fifth middle school. S.Ct.A.453-54 (PX 12). The Board's actions thus resulted in "increasing or maintaining segregation as opposed to availing the opportunity of decreasing it." A.646. The Ohio State Department of Education was of a similar view; it notified Dayton school authorities that the middleschool reorganization program "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." S.Ct.A.454 (PX 12).

[*DISTRICT COURT'S OPINION*

(Pet. App. 157a-58a)

The district court concluded that the grade-structure reorganization accompanying the creation in 1971 of five middle schools was not a result of segregative intent. This conclusion might not be clearly erroneous if the facts had arisen in a school system with no history of intentional segregation. But these events occurred in Dayton, and even the Ohio State Department of Education could not avoid the conclusion that the Board was up to its same old segregative tricks. The district court's contrary finding is clearly erroneous.]

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5. *Pupil Transfers and Transportation*

Prior to the West-Side reorganization in 1952 (*see* pp. 11a-12a, *supra*), the Dayton Board regularly transferred (and provided transportation where necessary to) white children from the attendance areas of black schools, past or away from other all-black schools to "whiter" schools. A.861-63. Thereafter, the Board utilized optional zones to provide white children with an equally effective means of

transferring out of the core black schools to "whiter" schools. *See* note 11, p. 12, *supra*. And the city-wide Dunbar and Patterson high schools operated in similar fashion. *See* notes 9 & 20, pp. 7a & 25a, *supra*.

In addition, curriculum, hardship and disciplinary transfers have functioned in many instances to assign white children from black schools to "whiter" schools. A.390-93, 355, 356-57. Two prime examples are the use of curriculum transfers by white students under the Freedom of Enrollment plan (A.356-57), and the emergency transfers of students in 1969 involving the Roth and Stivers high schools. A.638-40; S.Ct.A.469-70, 474 (unmarked exhibits). This latter incident takes on additional significance because it occurred in connection with the only time prior to trial that the Board redrew an attendance boundary to accomplish desegregation. This was accomplished by adding some of the all-black Roosevelt and Dunbar attendance areas to the predominantly white Stivers high school. A.486-89. In the very first year following this realignment, racial problems at Stivers, as well as at the predominantly black Roth, led to the transfer of 34 black students out of Stivers to the all-black Dunbar or Roosevelt schools, and 36 white students out of Roth to the virtually all-white Meadowdale, Stivers, Kiser and Fairview high schools. None of the white children transferred were assigned to black schools; and none of the black children transferred were assigned to white schools. A.491-98.

Overall, hardship, emergency and special education transfers were also carried out in such a way as to reflect and reinforce the underlying racial duality in pupil assignments. A.639. During the 1972-73 school year, for example, 266 (or 70%) of the 377 black children transferred were assigned to black schools, and 155 (or 91%) of the 171 white children transferred were assigned to white schools. S.Ct.A.379-80 (PX 16F).

Throughout the post-*Brown* period, non-resident pupils attending the Dayton system on a tuition basis were assigned in a similar racially dual fashion: white pupils were assigned to white schools (A.473-74), and black pupils were assigned to black schools. R.I. 579-80. The assignment practices relating to several hundred white high school pupils from Mad River Township, who attended the Dayton system on a tuition basis throughout the 1950's, is illustrative. These students were assigned to the virtually all-white Stivers, Kiser, Wilbur Wright, and Belmont high schools. When the Board felt there might be capacity problems at the schools, the Board did not consider assigning these non-resident pupils to the black Dunbar, Roosevelt or Roth high schools, which had ample space. Instead, the Board notified the Mad River Township school district that space would be unavailable for these tuition pupils in the 1960s. A.473-77, 857-60; S.Ct.A.475 (unmarked exhibit). In all of the various forms of pupil reassignment, it was the unbroken practice of the Board *never* to reassign white pupils to identifiably black schools. A.474.

An additional, classical segregation technique utilized by the Dayton Board was "intact" busing. There are two examples. First, in 1963 white children from the Ruskin school were transported intact (*i.e.*, teacher and class as a unit) into separate one-race classes at the racially mixed Central school. A.304-05. The second instance occurred in 1968 when the black Edison School was partially destroyed by fire. These black children were transported to a number of white schools throughout the city. But they remained as segregated as if they had been transferred to all-black schools, because they were accommodated in the white transferee schools in separate intact classes. A.301-03, 421-23.[37]

[37] Significantly, intact busing was not the Board's first alternative with respect to reassigning the Edison children. As Assistant Super-

Thus, for several decades Dayton school authorities have transported children for a variety of reasons. But, with only a few hard-fought exceptions, children have never been transported in such a fashion as to accomplish desegregation; with singular consistency, the Dayton

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intendent Harewood, the first black in the Board's central administration, recounted the incident, the first proposal under consideration was to house these black children in neighborhood churches. This proposal was abandoned only under pressure from Mr. Harewood, who pointed out that there were vacant classrooms in other schools in the city. Then, without further consultation with Mr. Harewood, the decision was made to transport self-contained black units into the white schools. A.301-03. The next fall, the new Superintendent of Schools ordered that the "intact" aspect of these reassignments be terminated. Upon later examination, however, he found that the black children were still being segregated within the white schools under somewhat more subtle "tracking" procedures, and he again ordered that the children be fully integrated. A.423-24. Thus, only through pressure from a new Superintendent and from Mr. Harewood was the "intact" brand of racial discrimination terminated, and the Edison children integrated into the white schools to which they had been reassigned.

Also at this time, predominantly black groups of children from the over-crowded Jefferson school were assigned by non-contiguous zoning to a number of white schools. A.397, 399; PX 122. These small amounts of actual, although only one-way, desegregation were short-lived, however. Instead of expanding the use of these desegregative alternatives, the Edison and Jefferson reassignments were terminated for the 1971-72 school year and the black children were resegregated into the rebuilt black Edison school (and by then, the black McFarlane middle school), and the black Jefferson school. A.465. The segregative effect of these reassignments is shown by the following chart comparing the percentage of blacks in the receiving white schools (*see* PX 122) in the 1970-71 school year to that existing in the 1971-72 school year:

School	% Black 1970-71	% Black 1971-72
Ft. McKinley	9.6	1.6
Loos	9.5	6.0
Horace Mann	11.1	0.7
Shiloh	7.4	0.9
Shoup Mill	13.9	1.4
Velerie	20.0	13.5

Board's transportation practices have maintained, reinforced and/or exacerbated racial segregation.[28]

Finally, the Board's Freedom of Enrollment policy, as it existed at the time of trial, was, at best, a washout as a desegregative technique. Under this policy, students residing in an attendance area were given first priority to attend that school; second priority was given to students requesting transfer to a school for a specially available course; and the third priority was given to children requesting transfers and whose enrollment would improve the racial balance in the receiving school. S.Ct.A.466-67 (PX 16B). The first priority merely froze in the pattern of segregation which began two-thirds of a century ago. The second priority actually contributed to school segregation because it was used by whites to transfer from black schools to white schools. A.356.[29] Under the third priority, 459 black children transferred in the 1972-73 school year to white schools, thereby accomplishing some actual desegregation; but only one white child, formerly in a parochial school matriculating into a 54.3% black high school, made a racial balance transfer. S.Ct.A.478 (PX 16D); A.639. Hence, transfers under the Freedom of Enrollment policy were exclusively one-way—i.e., some

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[28] Although transportation has been used only twice (*see* note 27, *supra*) for desegregation purposes, pupil transportation has not been an uncommon event in Dayton. For many years white children in the far northwest, northeast and southeast areas of the system were transported to white schools in those areas (A.440), and, of course, black orphan children were transported all the way across town to the all-black Garfield school (*see* note 6, p. 5a, *supra*).

Ohio law requires that local school authorities make transportation available, and the Dayton Board so acts, for students who are assigned to schools beyond a prescribed distance from home. A.432, 440, 866-67.

[29] In the 1972-73 school year, for example, 22 of 23 white students transferring under the Freedom of Enrollment policy were transferred to white schools. S.Ct.A.478 (PX 16D).

blacks and some whites transferring to white schools—and had a negligible if not retrogressive impact on the racially dual pattern of pupil attendance.

[*DISTRICT COURT'S OPINION*

(Pet.App. 160a-62a)

Even if the approach of the district court is followed and the above facts are assessed in total ignorance of the remainder of this massive record, the conclusion would seem inescapable that many of these instances reflect subjective racial malevolence on the part of the school authorities. The district court not only ignores the whole record, however, it also ignores many of these facts; as to others, the court summarily concludes that the evidence reflects nothing more than strict racial neutrality. By themselves and in the context of the other widespread discrimination of record, the facts described above are further evidence of the intentional discrimination which infected the Dayton school system at the time of trial. The court's refusal to so conclude is clearly erroneous.]

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6. *The Board's Recission of Its Affirmative Duty*

As reflected in the foregoing pages, black citizens of Dayton have been thwarted in their attempts to end state-imposed racial segregation in their public schools. Even aggressive action, such as that taken by Robert Reese's father when he went to court in 1926 to challenge intentional efforts to segregate his children, was effectively blunted by Dayton school authorities committed to separation of the races. *See* pp. 3a-5a, *supra*. During another period of active unrest, 1951-52, the Board imposed the

West-Side reorganization and a new racially discriminatory faculty-assignment policy. *See* pp. 11a-12a, 15a-17a, *supra*. The black community's repeated protests following *Brown* to the continued segregation also were turned aside. *See* S.Ct.A.358-59, 456-57, 459-61. By the late 1960's, however, those who objected to state-imposed school segregation began to gain allies, both in the white community in Dayton and among state and federal agencies. As previously noted (*see* page 20a, *supra*), HEW conducted a Title VI compliance review in 1968 and forced the Board in 1969 to agree to end its racially dual faculty-assignment practices. HEW had also noted the "substantial duality in terms of race or color with respect to distribution of pupils in the various schools . . ." (S.Ct.A. 415), but the agency did not pursue this concern with similarly aggressive action.[30]

Also during these years, the Dayton Board, in the 1971 words of the State Department of Education, "passed various and sundry resolutions . . . designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools." S.Ct.A.423. But these were just words and informal ones at that. As the State Assistant Superintendent for Urban Education noted at the same time, there was a definite need for action and not just words. S.Ct.A.422.

On April 29, 1971, the Board requested assistance from the State Department of Education's Office of Equal Educational Opportunities to provide technical assistance

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[30] As is commonly known, from the frequent judicial declarations on the subject, HEW has generally failed to fulfill its Title VI obligations with respect to pupil desegregation in both the North and the South. *See, e.g., Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*); *Brown* v. *Weinberger*, 417 F.Supp. 1215 (D.D.C. 1976). And it has not been notably aggressive even with respect to faculty segregation. *See Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974).

in the development of alternative desegregation plans. The Board also authorized its President to appoint a committee of community representatives to assist and advise the Board in connection with such proposed plans. S.Ct.A.354-55.

The State Department of Education responded by assembling a team of consultants and specialists to evaluate data and make recommendations. Their recommendations were submitted to the Dayton Superintendent on June 7, 1971. S.Ct.A.419-55. The State Department advised the Dayton Board of its constitutional and other legal obligations (S.Ct.A.435) (emphasis in original):

> 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."

The State Department then turned its attention to a list of alternatives, and urged the Dayton Board to shoulder its constitutional obligations *now* (S.Ct.A.441) (emphasis in original):

> *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could choose to make only the slightest mandated changes, and to utilize the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of school-children, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

The State Department concluded by recommending "a comprehensive plan" that would be a "constitutionally valid and inoffensive, educationally sound, and morally proper" approach for "the Dayton Board of Education, acting as an agency of Ohio State Government. . ." to take. S.Ct.A.444.[31]

The Board-appointed advisory committee of community representatives became known as the "Committee of 75." In his charge to the Committtee, the Dayton Board President stated: "We have admitted that the district is guilty of procedures which have led to the racial isolation of school children." S.Ct.A.356. The Committee issued its report in the fall of 1971. The Report of the Committee of 75 (S.Ct.A.345-69) also urged the Board to adopt a comprehensive plan and joined the State Department in emphasizing "that time for a change in Dayton has run out! We must act now." S.Ct.A.369.

On December 8, 1971 the Dayton Board of Education, for the first time ever, responded with meaningful action. It first "recognize[d] and admit[ted] 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. . . ." S.Ct.A.321. The Board then adopted a program of actual systemwide desegregation and directed the Superintendent to implement such a new pupil-assignment policy for the 1972-73 school year. The new policy consisted of two principal

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[31] Under the terms of Opinion No. 6810, issued by the Ohio Attorney General on July 9, 1956, the State Department of Education has the primary affirmative duty to see that local school districts comply with their Fourteenth Amendment obligations with respect to public schooling. S.Ct.A.597-606.

parts: first, the existing attendance zones and the Freedom of Enrollment policy[32] were abrogated effective September 1, 1972; second, in their stead, a new pupil-assignment policy was adopted, the goal of which was that no school would have a racial composition "substantially disproportionate to the district as a whole." S.Ct.A.329. Pursuant to the Board's directions, the Superintendent of Schools adopted a plan for Fall 1972 prepared by Dr. Gordon Foster and others of the Title IV Florida School Desegregation Consulting Center of the University of Miami. S.Ct.A.370-414.

On January 3, 1972, however, a newly-constituted Dayton Board[33] rescinded the prior Board's action of December 8, 1971, refused to consider the plan adopted by the Superintendent, reinstated the Freedom of Enrollment policy and reimposed the segregated attendance zones. S.Ct.A.331-53.[34] The Board thus intentionally reinstated systemwide segregation of the public schools.

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[32] The Board's Freedom of Enrollment policy was adopted in 1969. S.Ct.A.466-67. It had a very negligible, one-way desegregative effect (*i.e.*, a few black students transferring to white schools), but white students did not transfer to black schools. S.Ct.A.478 (PX 161D). As the Superintendent testified, "the pattern, . . . has been pervasive down through the years, that no white students, regardless of from where they came, or the purpose, were assigned to black schools." A.474. *See also*, pp. 39a-40a, *supra*.

[33] Three new members of the seven-member Board had been elected the previous November to take office in January.

[34] By its actions, the new Board made it clear to the Superintendent that he would not be permitted to exercise his independent authority over the assignment of pupils (*see* Ohio Rev. Code § 3319.01) to implement the desegregation plan. A.425, 929-30. The statute just cited vests the local Superintendent of Schools with the responsibility to "assign the pupils of the schools under his supervision to the proper schools and grades," except with respect to the assignment of pupils to schools outside their school districts of residence, where board approval is necessary.

[DISTRICT COURT'S OPINION

(Pet.App. 180a-85a)

The court ignored altogether the findings of the Committee of 75, the State Department of Education, and HEW, as well as the admissions of the Board itself, that the Board was responsible—*i.e.*, had caused—the serious racial segregation of the schools then extant. These findings and admissions of public agencies and their appointed representatives are highly probative; indeed, in the context of this record they are eminently correct. The district court clearly erred in not assigning weight to, and in refusing to adopt, these findings and conclusions. As a consequence, or perhaps independently, the court also erred in failing to conclude that the rescission was itself an act of intentional systemwide segregation. The court is clearly mistaken in its apparent conclusion that the Board's December 8, 1971 decisions aimed at curing admitted acts of segregation constituted an effort to "manufacture" a constitutional violation "by political or legal maneuvering." Pet.App. 184a.* The Board's December 8, 1971 decision to desegregate the system was the considered product of determinations that affirmative remedial action was required to comply with the Board's constitutional obligations. When the new Board voted on January 3, 1972, to rescind this desegregation program and reinstate segregation across the board, it did more than simply make a different judgment about appropriate educational policy. It deliberately turned back the clock in a demonstrably segregative fashion. And it did so without offering any evidence to show that the uniform conclusions of HEW, the Ohio State Department of Education, the Committee of 75, and the 1971 Board and Superintendent of Schools, were either precipitous or incorrect. The rescission thus intentionally reimposed segregation on a system-wide basis. It was a purposeful act of racial discrimination infecting the entire system

and again communicating a policy of segregation to all of Dayton's citizens. The district court thus came somewhat closer to the correct analysis in its 1973 opinion (A.6). The court's present failure to adopt the factual analysis set forth above is clearly erroneous.]

* Here the district judge appears to be relying upon his personal "views as to the obligations and the legal representation of public bodies, and it does not include in my opinion the discussion with non-representing attorneys . . ." R.IV. 250 (statement of the court); *see also id.* at 248-50. These views (contrary to those held by the judge in 1972, when he considered these matters irrelevant, *see id.* at 250; A.451-53) have to do with the fact that prior to the December 8, 1971, resolutions, Superintendent Carle and some of the Board members met with several persons on different occasions who were knowledgeable about school desegregation in the United States. The judge seemed particularly upset that one of these persons was an attorney, Louis R. Lucas, who subsequently represented (and still does) the plaintiffs in this litigation. Regardless of Judge Rubin's personal views, Dr. Carle was clearly correct in claiming the right to do as he and the Board members did: "We had virtually every month or so been consulting with people who were involved with desegregation and/or legal aspects of desegregation around the country, and this was just one more opportunity to expose myself to a person who had good deal of experience in the field." R.IV. 249. There is no rule in Ohio or anywhere else prohibiting public officials from talking to knowledgeable lawyers, if they are able to find any.

At the time of trial, the Dayton school district was segregated by race, as it always had been. In the 1971-72 school year (when the complaint was filed), there were 69 schools in the Dayton district; 49 of them had student enrollments 90% or more one race (21 black, 28 white). Of the 54,000 pupils enrolled, 42.7% were black; 75.9% of all black students were assigned to the 21 black schools. S.Ct.A.314 (PX 2D).[35] Thus, although the system was

[35] In 1972-73 there were 68 schools, of which 47 were virtually one-race (22 black, 25 white). Fully 80% of all classrooms were virtually one-race. (Of the 50,000 pupils in the district that year, 44.6% were black). S.Ct.A.311 (PX 2A).

larger, it was basically the same dual system that existed at the time of *Brown* (*see* pp. 2a-18a, *supra*).[36]

Every school which was 90% or more black in 1951-52 *or* 1963-64 *or* 1971-72, and which was still in use at the time of trial (1972-73 school year) remained 90% or more black. Of the 25 white schools in 1972-73 (*see* note 35, *supra*), all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52. S.Ct.A.315 (PX 2E). *See also Brinkman I*, 503 F.2d at 695.

[*DISTRICT COURT'S OPINION*

(Pet.App. 149a-50a)

These basic facts are not disputed—not even by the district court.]

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[36] It was also the same one that existed in the 1963-64 school year (the first year after *Brown* for which racial data is available). In that year there were 64 schools in the Dayton system, of which 57 had student enrollments 90% or more one race (13 black, 44 white). Of the 57,400 pupils in the district that year, 27.8% were black. Yet 79.2% of all the black pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in such one-race schools. S.Ct.A.313 (PX 2C).