IN THE SUPREME COURT OF THE UNITED STATES

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WILFRED KEYES, et al.,

Petitioners,

v. : No. 71-507

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.,

Respondents.

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Washington, D. C.
Thursday, October 12, 1972

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES M. NABRIT, III, ESQ., 10 Columbus Circle, New York, New York 10019, for the Petitioners.

GORDON G. GREINER, ESQ., 500 Equitable Building, Denver, Colorado 80202, for the Petitioners.

WILLIAM K. RIS, ESQ., 1140 Denver Club Building, Denver, Colorado 80202, for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in No. 71-507, Keyes against the School District of Denver.

Mr. Nabrit, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES M. NABRIT, III, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. NABRIT: Mr. Chief Justice, and may it please the Court:

The Keyes case is here on writ of certiorari to review a judgment of the Tenth Circuit which in part affirmed and in part reversed an order requiring limited desegregation measures in the public schools of Denver, Colorado. Petitioners' submission is that the Denver system has violated the constitutional rights of Black and Hispano children to equal protection of the laws and that the court below should have required a more comprehensive plan to desegregate the schools and otherwise eliminate discrimination.

Although the case comes from a state which had no statutory dual system, we see the case not as involving so-called de facto segregation issues but rather as one with segregation practices of the kind the Court has been dealing with in the cases since Brown against the Board of Education. Both courts below agree with us that the Denver School Board engaged in deliberate segregation practices in shame and

subterfuges, to use the words of the Tenth Circuit, to segregate. But the courts below failed, we think, to accord the full remedy to which the petitioners are entitled.

Q The courts below, both of them, as I understand it, thought that so far as the core area of Denver went, it was de facto and not de jure segregation. Am I mistaken about that?

MR. NABRIT: No, that is correct. My task in the argument is to discuss the issues in part one of our brief dealing with racial segregation, the issues you refer to, Mr. Justice Stewart. And Mr. Gordon Greiner will speak next to discuss whether the operation of inferior schools for Black and Hispano children also violates the Equal Protection Clause and requires relief.

Q Assuming no de jure segregation; is that correct? That branch of the argument.

MR. NABRIT: We think that either ground, segregation or inequality, is sufficient to justify an order to desegregate the schools, and argue also that both grounds together justify such a complete remedy. After I briefly talk about the facts about the extensive nature of pupil and faculty segregation in the Denver schools, I shall argue as my first argument that if we draw only on the findings and conclusions of the district judge, which were affirmed on appeal, the findings, if you please, of de jure segregation,

the term that the courts below use, that Denver has in fact pattern, practice, and policy of racial segregation in the schools which has affected a large and significant part of the school system, not just a few schools, not just an isolated or de minimis discrimination but a general pattern.

I will argue that because the violations found below were systemwide, the remedy should have been aimed at all of the segregated schools.

MR. CHIEF JUSTICE BURGER: Mr. Nabrit, before you proceed further, I overlooked announcing that Mr. Justice Thurgood Marshall is unavoidably absent this morning attending a family funeral, and he reserves the right to participate in the case on the basis of all the records and arguments that are recorded.

MR. NABRIT: My second argument will be that the facts found below require a conclusion that illegal segregation was considerably more widespread in the system than the courts below held. In that portion of the argument I will concentrate on the Manual School as a case study to discuss the questions about the burden of proof, what constitutes a prima facie discrimination, and the like. And also becuase of the really social importance of Manual High School as the keystone of the segregated system, sitting atop a theatre pattern involving all the poor elementary schools, 11 elementary schools with 3,800 Black pupils in 1968 feeding

into this segregated high school.

Q Does the record in this case show the composition of the school board? Was it biracial?

MR. NABRIT: The school board during the relevant years had one black member, Mrs. Noel, and she was the member who initiated the three desegregation resolutions in 1968.

Q What size was the school board? How many members?

MR. NABRIT: The school was composed of seven elected members.

Q How many?

MR. NABRIT: Seven elected members.

Q Then there was an election, which is material to this case.

MR. NABRIT: Mrs. Noel was not--

Q No, but there was--that is what caused the rescission of the plan, was it not, the election?

MR. NABRIT: Yes, the spring of 1968.

Q Right.

MR. NABRIT: The board members run citywide. They do not have districts there. They are elected at large in the school district.

When the case began, the separation of Blacks and Whites in the system really was very intense. Although only

14 percent of the 96,000 pupils were Black, the vast majority were concentrated in a few schools. Mr. Greiner is pointing at a 1968 elementary school zone map in which we have shaded in dark blue the zones of ten elementary schools with from zero to nine percent white populations.

Q Mr. Nabrit, give me again the figure on the overall balance picture, the overall composition of the entire area as to Mexican-Americans--

MR. NABRIT: Fourteen percent Negro, 20 percent Hispano, and 65 percent Anglo. At the bottom of page seven in our brief you will see the detailed statistics, Mr. Chief Justice.

In these ten schools shaded in blue we find two-thirds of the Black elementary pupils, more than 5,500 of them, going to school with only 150 White pupils, less than one-half of one percent. Another 15 percent of the Black pupils attend the other seven schools outlined in green on the map, which are from 10 to 19 percent Anglo, and most of those schools toward the west, a majority Hispano. So, the form segregation takes is either all Blacks, it is either Blacks separated from Whites by being an all-Black school or Blacks being separated from Whites by being in schools with Hispano. And the secondary schools had, at the outset of the lawsuit, a similar racial concentration; four-fifths of the Blacks at three junior high schools with four percent of the

Anglos, 91 percent of the Blacks at two high schools, Manual and East, and the other 200 Black high school pupils spread out in seven schools with 13,000 Whites.

As to faculty concentration and segregation, Judge Doyle found that this was part of the pattern. He found that the tendency to concentrate minority teachers in minority schools helped, in his words, seal off these schools as permanent segregated schools. And he found that the reason for the concentration of Blacks and Hispanos in minority schools was, and I quote, "because of concern over a possible lack of acceptance by the White community and because of a fear of lack of support by some faculties and principals." So, for as many as ten years after Brown, all the Black and Hispanic teachers in the system were assigned only to the schools where Black pupils were concentrated. And the figures on the faculty concentration patterns, set out in detail on pages 12 and 13 of our brief, note particularly the overall small proportion of Black and Hispano teachers. The Black teachers were only seven percent and the Hispanos only two percent in 1968. Of course, in the earlier years there were many fewer such teachers. So, when you see a school with 50 percent Black faculty in a system with only seven percent Black teachers, you can see what is going on.

And I might say at this point, it seems to me that

The Tenth Circuit's reversal of Judge Doyle's faculty desegregation injunction most clearly departs from this Court's holdings in Swann and the other cases. The Tenth Circuit held that this admitted pattern of racial faculty assignments was justifiable, because when they began it, the former superintendent Oberholtzer said that they wanted role-models for Black pupils in the Black schools, but that of course had nothing to do with Judge Doyle's finding that they were excluding Black faculty from the White school.

To begin my first argument, as I said, for the purposes of the Court's argument we accept as correct the ruling of both courts below on the facts and the law about school segregation in Denver. The courts below found segregation illegal only when the plaintiffs were able to prove that the school board's explanation and justification for segregatory acts were "a sham and a subterfuge concealing odious intent." This was the high standard, the difficult burden, that the Tenth Circuit said plaintiffs had to meet. And even with this excessively strict burden, plaintiffs had to satisfy both courts below that the Denver system deliberately segregated eight schools attended by 37 percent of all the Black pupils in the school system.

Our brief at pages 17 and 18 breaks down those figures in detail, identifies the schools and the percentages. The eight schools found deliberately segregated below enroll

a fourth of the Black elementary children, 68 percent of the Black junior high school children, and 45 percent of the Black senior high school children. And our argument is that properly analyzed, the holdings below show that Denver did have a pattern and practice of systematic discrimination which justified relief at all the segregated schools.

Judge Doyle found in general that the Denver School Board had a ten-year segregation policy, and he said this several different places in his opinion in several different ways. But it is not just a question of numbers or the percentage of Black pupils in the system affected by these findings. It is not just a question of how many schools that are involved. It is a question of policies. And the findings of deliberate implication include policy decisions about all kinds of questions. There were such things as the location of new schools, the place or the size of schools, the location of additions, the fixing of attendance boundary lines, use of optional zones, the use of mobile classrooms, the faculty segregation policy, which obviously had systemwide implications, and the rescision of the three integration resolutions in the spring of 1969.

Let me give two examples of how Judge Doyle's findings about northeast Denver really implicate more than just the schools in northeast Denver.

Q Implicate more than what?

MR. NABRIT: More than just the local schools involved in the northeast part of town.

One of the findings by Judge Doyle was that the Board placed 28 mobile classrooms up in the northeast part of Denver Mr. Greiner is pointing at. And Judge Doyle found--and the quotations that set out numbers are at page 25--that the placement of these mobile classrooms was used to keep Blacks confined in the Black schools and out of the White schools.

Q Could you have identified for me what is referred to as the core city on that map? Right in the left part of the blue area.

MR. NABRIT: Manual High School is in the center there, and the so-called Five Points area referred to in the opinion is just this side of Manual.

Q Where is the Park Hill area?

MR. NABRIT: Barrett School, Stedman School, Hallett School, the schools that are so frequently mentioned in the opinion, are these three, and it was held that the policy was to prevent Park Hill and Philips--to keep those schools majority white, while these schools turned Black.

Q What is the significance of the difference between blue and green shaded areas?

MR. NABRIT: Under 10 percent Anglo and 10 to 20 percent White. All these schools are.

At the same time these mobile units were placed in these Park Hill area schools, the northeast Denver schools, in the southwest part of the city a new neighborhood was annexed into the school system which later became the trailor area, which had 700 children and no school down there. And so instead of building mobile units at the two nearby schools, Sabin and Ford, the Board instituted a policy of busing these Anglo children ten miles across to the southwest part of the city to University Park, Asbury, and Cory.

And another example is the Montbello area, a newly developed area out beyond the airport in the northwest corner. And that area had no junior high school. Those pupils were bused past the black schools, Smiley and Cory, all the way to the west part of town over at Lake Junior High School.

I did not really finish the trailor example. When trailor school was opened and freeing 700 spaces in the southeast area, even though the Board said it had a policy of using transportation to promote integration, it did not use those spaces to relieve the overcrowding and to remove the mobile units; that is what part of the rescision controversy was about. Simply removing mobile units to reassign children in overcrowded Black schools to other neighborhoods.

Q How many students in the entire area are in so-called mobile or part of schools which are temporary that you know of?

MR. NABRIT: The finding was that there were 28 mobile units in all of northeast Denver and at an average of 30 pupils a classroom, I suppose, something like that, maybe a little less than 30.

Q That would fluctuate quite rapidly, would it not?

MR. NABRIT: Yes, yes. In the neighborhood of 800 or perhaps more.

We think that proving a policy and pattern of illegal segregation, and it is obviously not practical in a brief oral argument to really get into all the evidence of a trial that took more than 20 days, but that the findings do probably show such a policy. In other race discrimination fields, most notably involving exclusion of Blacks from jury service, the courts regard a prima facie case as proved when there is shown to be a general pattern of exclusion and that there has been an opportunity to discriminate. And Alexander against Louisiana last term exemplifies that type of approach. And we think that something, not identical but some sort of simpler approach to the development of a prima facie case, is obviously necessary in this field.

The Fifth Circuit's recent decisions and bank

decisions in the Austin, Texas and Corpus Christi case reject this idea which is advanced by the brief of the United States and the briefs of the school board in this case that it is necessary to prove segregation by proving a discriminatory act at every single school in a system. The Fifth Circuit points out that such a rule has never been argued by the Government before in the whole history of school cases. It was not long ago that the United States was pioneering statewide school desegregation cases against Alabama and Georgia, and this new notion that you have to prove school by school is a plain reversal of what Judge Wisdom said was the tried and true method of proving school segregation, namely, proving pattern.

The proponents of the school-by-school approach must know that they are demanding the impossible, that such a rule would virtually immunize most school segregation from challenge. I mean, school boards do not keep records very long on these issues. And in this case there were not even any maps of attendance zones in Denver prior to 1960, and they had to be reconstructed by very laborious and pains-taking process, and basic figures, statistics, about the racial composition of schools, that sort of thing, were not available for many relevant years.

Our second argument is that the pattern of segregation was even wider than the courts below actually

held because of some of the legal rulings. We think that the evidence shows that Manual High School, Manual Training High School, was in the classic pattern of, to use the words of Swann, a school that was established for one race, set up for minority group pupils and planned as such.

In that point in our brief, the Solicitor General supports our contention that New Manual was established as a minority school with explicit racial considerations. The little booklet which is excerpted in the record, published by the school board when Manual was being planned, Plaintiffs' Exhibit 356, makes it obvious that Manual really was planned for Black and Hispano students, as does the testimony by the then superintendent, Mr. Oberholtzer. The booklet said in essence that Manual School was going to be different--back in the early 1950's before Brown was planned--Manual was going to be different, the people were building a school to replace an older building. They had special problems. They were designing a--they had a long history of the racial composition in the school, how it had gradually changed from White to a majority Black and Hispano and that--so that because of Manual's different population, they were planning a different curriculum there.

Judge Doyle condemned a similar planning of a school at Barrett after Brown, for some reason he focused on the fact that Manual was planned before Brown as a minority

school, and we think that is the wrong point. That even though what the school board was doing did not violate the law of the land back before Brown, they nevertheless were engaging in explicitly racial considerations, and that Brown applies just as much here as it does in states which had segregation laws.

There really is not time to go into the evidence about Manual about the subsequent boundary changes. But it is sufficient to say that Judge Doyle never found that these boundary changes were justified or had any real basis as he did about some other boundary changes, but only that he applied some sort of a notion about the burden of proof, which we think and argue in more detail in our brief miscast the burden of proof.

A point not made very clearly in the brief is the integral relationship of Manual atop a feeder pattern of 11 elementary schools in the core area, plus Cole Junior High School, which feed pupils into Manual. Segregating Manual, establishing it as a Black school atop all these schools feeding into it obviously is going to have an influence on those other schools. A white person living in one of these feeder schools who wanted to avoid for his child this school which the board had set up as the minority high school is obviously induced to move out of the feeder school area. If you are interested in what the percentages

are, if you add Manual and its feeder pattern to the northeast Denver schools, then you really do have 74 percent of the Blacks in the school system involved in illegal segregation.

Q Are the feeder schools all over the city?

MR. NABRIT: The feeder schools for Manual are Mitchell, Gilpin, Swansea, Harrington, Columbine, Ebert, Whittier, Crofton, Eleria, Garden Place, and Wyatt.

I would like to conclude by re-emphasizing the passage in Swann which points out that school authorities' decisions about construction, location, site of school, and what kind of policy of pupil assignment there will be, will determine the racial composition of the student body in each school in the system. It is the school board's decisions that determine the racial composition. They define the neighborhoods for--the neighborhood school policy. They constantly redefine what the neighborhoods are. So that at the very least, our submission is, where a school district is found to be engaged in using shams and subterfuges, the burden shifts to the board to show that schools which look in every respect like the schools they have found to be illegally segregated except that they have some rational explanation, are justified by some compelling interest of the state and that the state's interests could not have been served by less segregatory results.

Denver had integration alternatives at every step

and always rejected them and chose segregation.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nabrit.

Mr. Greiner.

ORAL ARGUMENT OF GORDON G. GREINER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GREINER: Mr. Chief Justice, and may it please the Court:

My argument will consider the issue of Denver's provision of inferior schools and schooling for minority children who are Black or Hispano, and the provisions of superior schools and schooling for Anglo children, as constituting a denial of equal protection under the 14th Amendment.

That was the finding and holding of the trial court below in this case, after considering comparative evidence of tangible educational inputs and outputs, as well as evidence of the perceptions of principals, teachers, pupils, and the community in and about the schools.

Mr. Nabrit has already covered many of the policies and practices of the respondents which created and contributed to the racially identifiable isolated status of these schools. The segregated condition which resulted from those actions is also relevant to the question of education inequality. But I will consider here only other practices and policies which also contributed to the inferior status

on the schools as educational institutions.

Q I understand that your argument would stand independently of any evidence of de jure segregation.

MR. GREINER: That is correct, Your Honor. We are not at all dependent upon the finding of any quality as being premised on Brown's equation of de jure segregation--

Q And by de jure I, of course, include action by the school board.

MR. GREINER: Certainly, certainly. But that is right.

Q Your argument is quite apart from any evidence of that.

MR. GREINER: The argument stands alone: that is correct.

Q Are you suggesting by that argument that perhaps there was a non-compliance with Plessy v. Ferguson independent of Brown?

MR. GREINER: Quite true, Mr. Chief Justice, that is right. And I would like--part of my argument will present some of the types of disparities in the allocations of resources to these schools which we believely clearly violates every holding of this Court since Plessy.

I would also like to cover the second point of my argument, the contention that any coeducation for minorities in racially identifiable inferior schools denies equal

protection. And, finally, that the trial court formulated a remedy for these unequal and disparate conditions which met the standards of thoroughness, efficiency, fairness, and rapidity, while focusing only upon those characteristics of the system which he felt led to the violation as he perceived it.

With regard to the schools in question, the minority schools are shown on the map. There are 27 of them to which some 20,000 minority children are assigned. Each of these schools has annual enrollments of from 29 to only 1 percent. The red dots on the map represent those with an Hispano enrollment or a Black enrollment in excess of 70 percent.

Q Let me have that again. Which colors?

MR. GREINER: The red dots are schools that have either 70 percent Black or 70 percent Hispano. The blue dots are some additional schools which we feel should also be covered by the findings of violation, and are equally entitled to the remedy, whose racial composition shows a combined 70 percent or more Negro-Hispano enrollment.

These schools have over 40 percent of the Hispano students in Denver and over 86 percent of the district's Negro students, but only 5 percent of the districts Anglo students. There are 22 elementary schools, four junior high schools, and Manual Training High School involved here.

Considering what these schools were like, Mr. Nabrit has described how the administration refused to transport Anglos into these schools and how they refused to reassign minority children out of them. I would like to tell you a little bit about what the record and findings below tell us about the conditions of these schools.

The minority student in Denver found himself assigned to a school which had twice as many brand new teachers, twice as many probationary teachers, and only half as many teachers with ten or more years experience as compared with the predominantly Anglo schools in the district. This was the result of the administration's own policies regarding the assignment of new teachers in the district as well as the Board's policies regarding teacher transfers whereby teachers were accorded preference based upon seniority so that as soon as a teacher had some seniority in a school, she would then be first in line eligible for transfer out.

Q Is this in the employment contract of the teachers?

MR. GREINER: Yes.

Q Is that a result of collective bargaining?

MR. GREINER: Prior to 1966, the contract provided that teachers assigned to a school, new teachers, had to remain in the school for at least their three-year

probationary period. After 1966, the district even abandoned that requirement, and we contend that that even further contributed--

Q I know, but was this a result of collective bargaining?

MR. GREINER: Yes, it was.

Q That gave transfer options to the more senior teachers.

MR. GREINER: That is true, but it was not an absolute right. The Board retained the power to both initiate and disapprove of transfer requests under the standard of whatever they felt was best for the interests of the school district. However, the evidence here shows that the Board and the school administration never exercised that power toward the goal of either stabilizing the teaching staffs in these schools or raising the level of teacher experience in them.

Q Could the school board refuse to transfer for any reason?

MR. GREINER: If in their judgment it was not in the best interests of the district; that was the standard.

Q Then the union contract provision did not mean very much; is that your argument?

MR. GREINER: Even if it met something, certainly there was sufficient power reserved to the school administration

to take some kinds of affirmative action to remedy the situation that existed in these minority schools, both with regard to trying to improve the level of experience there as well as trying to reduce the rate of turnover there.

Judge Doyle, in considering the turnover rate in these minority schools, found that it was so high that it was actually disruptive of the educational process going on in those schools. And he also found that this constant flight of teachers out of these schools contributed to the aura of inferiority which surrounded the school and reinforced the student's perceptions that somehow his school was a place of less choice.

With regard to achievement data, the administration refused to disclosed comparative by-school achievement data for over 20 years. It failed not only to disclose it to the community but even refused to disclose it to members of the board of education as well. While the predominantly Anglo schools were achieving on the basis of national averages at or above the 60th percentile in general, the minority schools were only achieving at around the 20th percentile. The administration nevertheless praised the high achievement in the Anglo schools and the low achievement in the minority schools in exactly the same glowing terms. We recorded some instances of this in our brief.

This unearned praise by the school administration

both obfuscated the disparity in minority achievement and, we maintain, also created and reinforced teachers' acceptance of low achievement as not only the inevitable but appropriate result of these minority schools.

The evidence shows that the administration set uniformly low expectancy standards with regard to achievement in these minority schools. In our brief at pages 50 and 51 in footnote 57, we show 14 of the schools, all with established expected achievement levels set at a uniform 23 percentile. At the same time, the school district was setting expectancy at about the 50 to 70 percentile range in the predominantly Anglo schools.

Because they had been conditioned by the administration's expectancy standards, the minority student found that his teachers did not expect very much of him, that he was neither challenged nor motivated to do better; although he did not do very well, he always seemed to be passed from grade to grade.

Q I suppose the expectancy was based on experience in those schools, right?

MR. GREINER: No. The expectancy, according to the school district, was based upon a calculation of, I believe the term was, the inner quartile distribution of IQ scores for the particular class at that particular school.

Q Not on the experience of previous years.

MR. GREINER: Not on the actual experience in the schools, that is correct.

I would like to go on to our second point concerning the law which we believe should apply to this case. While trial court did not find it necessary to hold either that the segregation of these schools or their educational inequalities were the product of racial prejudice or odious intent, he nevertheless recognized them to be the direct effect of state action, and held that its effect discriminated against Blacks and Hispanos by denying them an equal opportunity for an education.

Thus, our case is very similar to such long-standing precedents as Sweatt v. Painter when the Court was determining whether white and black facilities were substantially equal under the old Plessy doctrine. The factors considered by this Court included the reputation of the school, the overall quality of the institution as to faculty and facilities. And even as recently as this Court's decision in Swann, the Court pointed as a substantive constitutional violation of equal protection to disparities where schools do not have like qualities, facilities, or staffs. This, we maintain, is exactly the kind of case found and proved below.

I would like now to pass on to the question of the appropriateness of the remedy which was finally put together

by Judge Doyle after a separate four-day hearing on relief. I would like to remind the Court that historically since Brown II, the Court has looked to and relied upon the trial court's exercise of discretion in fashioning appropriate remedies in school cases and has consistently resisted efforts to limit the tools available to the trial court in formulating an effective remedy.

In this case, Judge Doyle was faced with the practical problem of curing a multitude of inequalities of input, environment, and output as thoroughly, efficiently, and promptly as possible. Here he did not take any doctrinaire approach but carefully put together a varied remedy based on the realities of the characterists and the violations as he perceived them. This broad choice of remedy was made after a special four-day hearing in May where, in the court's words, the crucial factual issue considered is whether compensatory education in a segregated setting is capable of bringing about the necessary equalizing effect or whether desegregation and integration are essential to improving the schools in question and providing equality.

This was not, as applied by the Solicitor General's brief, a decision made in a vacuum; because the trial court had before it a detailed plan of the board of education, submitted under Resolution 1565, which was premised on the

very same types of special and compensatory programs in the segregated schools which the United States contends here would have been an acceptable alternate remedy. But the evidence presented at this hearing on relief established that minority achievement is improved in an integrated, heterogeneous environment, that attitudinal disparities and disadvantages, such as teacher expectancy, teacher dislike for the segregated school, and so forth, are only corrected through a combined program of integration, desegregation, and then a compensatory program in the integrated environment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greiner.

Mr. Ris.

ORAL ARGUMENT OF WILLIAM K. RIS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. RIS: Mr. Chief Justice, and may it please the Court:

I have listened with interest with respect to some of the facts that have been related to the Court and would direct the Court's attention to the basic fallacy that some of the facts related extend many years back, prior to the trial of this case or the conditions that existed as of the time of the trial. Both Mr. Nabrit and Mr. Greiner have related facts that would indicate on the face that we have a static situation and had a static situation for a

considerable period of time, when that is not the case whatsoever with respect to the Denver background. And this will necessitate going into some additional facts and figures with respect to Denver itself and the school district.

Denver is a home-rule city under the Colorado Constitution. It has the basic area, there are many suburbs around it. But Denver itself at the time of the trial consisted of an area of about 100 square miles. That had increased roughly 40 percent after World War II by reason of annexations to the city from the surrounding area. Under the Colorado Constitution, the school district for the City and County of Denver had exactly the same boundaries as the City and County itself. And, until very recently, the school board had absolutely no say-so as to what areas would be brought into the school district. If the City and County of Denver wanted to annex, it came in whether the school district wanted it or not. Very recently that has been changed, but the change is so recent as not to be contributory.

The school board itself, as has been indicated, is an elective body, seven members; it has been for some period of time. The general area of Denver, with the recent annexations, is shown on this exhibit. As indicated on the other exhibit, this was the so-called core city area, the business district being downtown and the so-called Five Points

area being to the north and east of that area of the downtown area.

Prior to World War II, it is true that the Black population was well concentrated in the Five Points area. After World War II, a completely different situation existed and expanded, and this requires again some population figures. In 1940, the population of Denver was 322,000. In 1970 at the time of the trial, it was 515,000, or an increase of 40 percent.

In comparison to this increase of 40 percent, the Black population in 1940 was 7,300. It increased, it just doubled, in the ten years between 1940 and 1950, and the great bulk of this increase was after World War II, so that as of the 1950 census, the Black population was 15,000, an increase of 100 percent.

Q Would the school population correlate pretty well with the total population?

MR. RIS: No, sir, the school population went up during the same period, Mr. Justice Potter, because of the basic increase in post-War babies with which we are all familiar. So, the school population between 1940 and 1970 has just about doubled, whereas the city population--

Q Went up by 40 percent.

MR. RIS: Forty percent, yes, sir. So, that made a whale of a difference. Then the Black population itself

doubled again between 1950 and 1960, another 15,000, from fifteen to thirty thousand; and another 17,000 between 1960 and 1970. So that between 1940 and 1970 when the city population was increasing 40 percent, the Black population increased over 600 percent.

The Hispano population, we do not have comparable figures, because the 1940 census and the 1950 census did not separately count and tabulate the Hispanos as a group. They were merely listed under Anglo. So, all we have insofar as census figures are concerned, in 1960 there were 60,000 in the city and in 1970 86,000. So, numerically they were greater than the Blacks but not increasing in the same proportions and progression.

Q Were Hispanos identified only by their names?

MR. RIS: Spanish surname is probably the best way of identification, and I think that is still true.

Q Is that the way they have been identified in this case?

MR. RIS: Insofar as the school district figures are concerned in this case, they were identified in this one fashion. Shortly after school opened in the fall, a call would go out to the principals to report back Anglos, Negroes, Hispanos, and Orientals. The principal would ask the teachers, "Just give me a count of what you think is in

"your room," and then that would be assembled by a school and transmitted in. It is a rather nebulous type of thing, because we have Hispanos obviously ethnic who have names Smith or Brown, and we also have non-Hispanos who are named--

Q Rodriguez.

MR. RIS: Right, exactly. So, it is rough, but the school district during the years that it did keep this type of census followed just that pattern.

So far as the U. S. census, I cannot answer. I just do not know.

As a result of this influx, though--and this is where we get into a very flexible type of situation--this is City Park, this square. It is about a mile square. Manual High is right here. Cole Junior High just to the north of Manual. This is the so-called Five Points area. And until after World War II, the Black population was quite well restricted. There were some exceptions, of course. With the large number of people coming in--and also I think that there is one thing that had a great influence on this, and that was the Colorado Supreme Court decision which just plain said in 1957 that private racial covenants and deeds were void and not enforceable; it even went further than this Court in holding that be void at that time.

So, beginning in the late forties when the population influx began, York Street, which is just on the

east edge of City Park as of 1950--and this is again roughly but as best as we can depict it--became the easterly boundary for the Black population. Between 1950 and 1960, it extended from west to east and again to the north of City Park, so that what previously was basically a White residential area became the reverse. And in that particular area, for example, in 1940 there were only 86 Black citizens in that particular area. In 1950 it was 898. But it jumped in the next ten years to 1960 to 8,700, just to the north of the Park. And in 1970 at the time of trial, it was up to 10,500. So that by 1960 the Black population had generally moved and acquired substantial property in this area.

Now we come into the Park Hill area which you get to the east and extends from Colorado Boulevard, which is the main north-south thoroughfare, a six-lane main highway, and extends on out to the airport. Those of you who have been to the airport, as you come in, you come right down 32nd Avenue Parkway right through that area. It was a typical middle class White neighborhood, single-family dwellings, except for Monaco Parkway which had more expensive and upper middle class neighborhoods. And then after 1960, the movement went forward so that the 1960 census showed in the Park Hill area there were only about 500 Black citizens. In 1966, a private census taken by one of the plaintiffs'

experts, showed that there were 12,000 in the Park Hill area; 12,000 Blacks had moved in. And by 1970, the time of the trial, the census--we did not have the census at that time but it has been determined since and it is in our brief--was 18,500.

So, we have a school board at this time with a school district which had neighborhood school subdistricts for all of the elementary, junior high and high schools set up. And these schools in the Park Hill area, for example, and in the area directly north of City Park, the boundaries were established. But, as the Black population moved in, another thing occurred. There were more children per family. The families were about 25 percent larger, and in some instances families were doubling up in a single residential unit, so that there became a very tight situation and overcrowding in this area. And that led to an area directly north of City Park where something had to be done, and it was at that point that Barrett School was built, and it was planned at a time when there were no figures as to exactly what the population was by race or ethnic origin in this area. But, nevertheless, they went ahead, as Judge Doyle found, knowing that it was in a transition stage, and ultimately it became--I think it opened 70 percent Negro and very shortly was nearly 100 percent, not quite. And that is the history of Barrett.

At the same time, they had another situation over in southwest Denver, and they built a school over here at exactly the same time to take care of the overcrowding in this overcrowded area, the same size, the same plan and all. But, nevertheless, this was following the neighborhood school pattern that always existed. And, yes, there were new boundaries set up for Barrett, but that was merely to cut out from the other surrounding schools that were overcrowded and to supply a school here.

We got into a big argument in the district court as to why it did not extend across Colorado Boulevard. I will not go into all the details on that, but the principal one being that--two things. One, the traffic hazard itself, which we are all aware of in setting school boundaries. But the second major thing, from our standpoint, is that regardless of the way the population actually moved, that at the time of the trial, ten years after the school opened, it was all Black anyway. So, it had no causal relationship, building in that spot, because of the normal neighborhood progression thereafter.

This was the Park Hill situation over a period of ten years and what they tried to do about it. At the same time, these schools were becoming crowded. You had some talk about mobile units. A mobile unit is a temporary unit that is brought in, but it is not merely a trailer. It is on

foundations with its own plumbing, heating, air conditioning. So, it is not a second-class facility at all. The evidence was that the administration tried to find out from the parents what did they want. Did they want the children bused out or did they want them in mobile units? In one school, for example, the parents voted for mobile units. In another school they voted for busing out, and that is what they got in each instance.

But over the same period of time--well, maybe I had better go back and talk about Manual for just a moment.

Q Mr. Ris?

MR. RIS: Yes, sir.

Q Before you move on, you mentioned busing. Does the record show how many elementary school children in Denver are being bused from their respective neighborhoods?

MR. RIS: Prior to the court's order in this case?

Q Yes.

MR. RIS: Yes, sir, it does. I cannot tell you just exactly what it is off the top of my head. It is in the record, in the brief. The main problem being that by reason of large annexations in southwest Denver--mean, in southeast Denver and southwest Denver, plus this Montbello area that was indicated, there was no money for new construction and they were busing children into other schools. And so there was a very substantial number being bused during the same

period.

If I may also reply to one point that Mr. Greiner made, that they were busing in from Monthello and past Cole and so forth over to Lake; Lake had some facilities, some capacities, and that is why they were bused over. The whole argument in the trial court was what constituted capacity. The plaintiffs took the position that all you did was take the number of rooms in a school, multiply it by 30, and that gave you the capacity, and that was a rule of thumb that the schools used just in determining how much capacity they had generally.

But as Superintendent Oberholtzer testified--and he was superintendent for 20 years, 1947 to 1967, and he was the one who gave the basic history of this period--he said that the reason they were busing children past some of the minority schools was because they were trying to reduce the pupil per room capacity in those schools, and they had extra teachers, they had paraprofessionals, there was a lower pupil-teacher ratio, and it was by reason of these special plans in these minority schools that they had a lower number of pupils per room, that instead of being given credit for it, they were being damned for it on a mathematical basis, in effect. And that is where we get into some of these capacity problems. It has to be looked at in the context in which these schools were being utilized at that time.

Q Was there any affirmative pairing of White and Black schools for the purpose of busing from one neighborhood to another?

MR. RIS: No, sir, there was not. The sole reason for busing was due to overcrowding in some schools; and in most instances, in the large, large percentage of busing that was going on was because of no schools in the particular areas. There had been a bond issue in 1967, for example, which had gone down to defeat. And although during the 20-year period of Dr. Oberholtzer's tenure they had spent over a hundred million dollars in new school construction, that does not mean only schools but additions and remodeling and so forth, and they built over a hundred new schools or additions to schools, nevertheless, with this rapid increase, the doubling of the school population in 20 years, they just could not keep up with it. And then when they got whipped on the bond issue, there was nothing to do except keep busing until there finally were funds available for new construction.

If I may go back just for a moment to New Manual, Manual High School was a school in the core area. It was not always a Black school. At one time it had a racial mixture of Anglos and Hispanos and Negroes and Orientals. There was a small percentage of Orientals in that particular part of the city. The school was an old one. And so when it came time to

reconsider what was to be done in the early fifties, they decided that they would try to reconstruct a new school on the same site. So, they acquired adjacent land and ultimately built a school on the adjacent land and then tore the old school down.

Q Mr. Ris, is Manual an arts high school or a vocational?

MR. RIS: Justice Brennan, it was recently called a manual training high school because it originally was intended apparently to give a considerable amount of vocational training. This was before the New Manual was built. And that was actually its name. And probably it had an aura of a non-academic type of school. But it was a high school offering all of the high school curricula, plus these other vocational courses.

When it came time to construct New Manual, the school district went overboard on what it was going to do in trying to build a school that would take care of the needs of the pupils in that area. And that is one of the arguments that is made in the plaintiffs' brief, that the school district has not done. But here they were trying to do exactly that to find out what the particular needs of these pupils were, what these children needed over the long haul for their own benefit and considering their own circumstances. And it is true that it was a low socio-economic area, and not

too many of these children went on to college, but they needed special attention, and this is what the administration was trying to do.

Q It was an area high school always, was it not?

MR. RIS: Yes.

Q I mean, the high schools as well as the elementary and junior high schools have been neighborhood schools in Denver.

MR. RIS: Yes, sir, throughout the city. This is true in every area, not merely in the core city area but no matter where you go.

Q How many high schools were there?

MR. RIS: There were originally five, North, East, South, West and Manual. And now there are nine.

Q And of the five, Manual was the only one which was predominantly non-Anglo?

MR. RIS: Non-Anglo, yes, sir. At the time that Manual was in the planning stage, so they could determine how big to make it and what kind of facilities to provide. Whether it should provide shops or what type of shops and so forth, they got out a brochure, they sought suggestions of the community, had many meetings, and it was a wide-open discussion with the administration and the Board as to what they were going to do. And, as a result of this, they finally decided on the new school and what it was to offer.

As I say, they opened in the same location; the old school had closed, the new school opened in the same location, same boundaries. And when it opened, as the evidence shows, it had 41 percent Anglo, 28 percent Black, 24 percent Hispano, and 8 percent Oriental, which is just a good solid racial mix. And so it was not 99 percent Black. It was not 99 percent Hispano or anything of the sort.

Q It was the only high school that had a majority non-Anglo?

MR. RIS: At that time, yes, sir.

Q Was there any high school among [illegible] five or presently among the nine that was at the other end of the spectrum in its orientation, that was a college preparatory school?

MR. RIS. Basically, yes, sir.

Q One or more than one?

MR. RIS: The main one--well, it would be more than one actually. There would be George Washington High School and then Abraham Lincoln, Southeast, George Washington here and then Thomas Jefferson clear down here. Economically the low medium incomes are in the core city and Hispano area; there is no question about it. The higher incomes--

Q Are in the south.

MR. RIS: --are in the south and southeast, yes. And there are more children who go to college, for example,

from those schools, no question about it.

Q And those schools too, even though they were high schools, they were neighborhood schools?

MR. RIS: Yes, sir.

Q There was no opportunity for a young man or woman interested in getting a college preparatory oriented high school education who lived in the core area and going to one of these schools, there was no opportunity at all; is that right?

MR. RIS: Initially there was not. Manual offered a full curriculum for college prep.

Q Yes, I understand that.

MR. RIS: And then later on and before trial, after 1964, there was a gradual evolution on transfers. First there was called limited open enrollment in 1966. And then by 1968 there was a voluntary open enrollment which allowed any child in any school in which he was a majority to transfer to a minority school, with transportation provided, and that has been true since '68. But historically that was not true.

So, basically then the Board constructed to meet the need, as one Board member testified--two of them, as a matter of fact. We had a need in this neighborhood and we built a school in the neighborhood and just followed the same neighborhood pattern in the others in Manual and went ahead

and did what seemed the best thing for the kids in that community and without modifying the neighborhood school pattern.

The three resolution bit, if I may get onto that particular point, as a result of the influx into the Park Hill area, these grade schools were fast becoming imbalanced Black, not question about it. So, we had Barrett, the new school that was constructed, Stedman, and Hallett. Then those three fed into Smiley Junior High. At no time was there any change of boundaries at Smiley Junior High, even though it became Black by reason of the population moving in. But as a result of this impact of the Blacks moving into the Park Hill area, there was a concern and the Board took cognizance of it. Mrs. Rachel Noel, a Black member of the Board and a very competent woman, was the main focus on this; and, as a result of various resolutions, they finally got to the point where the superintendent was asked to prepare a plan to attempt to control the racial imbalance in Park Hill. And that is where we get into the three resolutions.

Of the various schools, it related to only four predominantly Black schools, Barrett, Stedman, Hallett, and Smiley Junior High. And as a result of these schools, there would be a change of boundaries within the subdistricts so that they would no longer be completely contiguous around the school, and they would be moved out to some of the

predominantly Anglo schools, and some of those children moved in by similar changes as to Barrett and Stedman and their feeder, Smiley. As to Hallett, they went into a different plan, and they tried to go into a voluntary plan whereby children particularly from the southeast would be induced to transfer into Hallett voluntarily and Hallett children out. So, basically, insofar as mandatory really was concerned, it applied only to the three schools. And then there were some compensatory education features tied into that.

Q That transportation you just alluded to would be something less than ten miles, I would assume?

MR. RIS: Yes, sir.

These resolutions were adopted during the spring of the year, January to April, roughly. There was a school board election in May. The new members took office in June. So, instead of a four-three majority one way on mandatory busing of these children out from these three schools, there was a four-three the other way; and they rescinded the resolution as to the mandatory busing out, substituted a voluntary plan to correct this imbalance or attempt to correct it, and retained the other features of the plan. And, as the superintendent testified, he said this is merely the beginning, this is merely the first step in a test to see what we could do on this imbalance in the

area and also, secondly and just as important, to see whether busing out and changing schools would affect the achievement of these pupils, because he said he was not convinced and the state of educational social science, nobody had any empirical evidence to say whether it would or would not. And so this was his first step to try to see what could be done in this regard. And so it was not an absolute thing; it was merely one step in the developing educational program which he had recommended to the Board. And when they took the mandatory part out of it and substituted busing, it did not change anything except that one phase of it. And also what is most important is that not a child had been bused up to this point, nobody had been moved out and so they were being moved back, and there was nothing that had been done except some preliminary planning to implement the superintendent's recommendations before the rescission was made.

So, it is not the type of situation whereby children were in one school and being moved back into a minority school and by reason of their race.

As to the inputs and outputs, let me comment on that briefly.

Q By input you mean expenditure and by output you are talking about performance?

MR. RIS: Results, yes, sir. Before I get onto

that, I am jumping a little too fast here. Insofar as the entire school system is concerned, Judge Doyle, the district judge, made one finding that just stands out head and shoulders above everything else in the record, and he stated, quote, "It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin," and this remark was being made as to the entire district.

Q Where were you reading from?

MR. RIS: I was just reading from my notes here, Your Honor. But--

Q Do not take the time now.

MR. RIS: It is on page 67A of the Appendix to the petition proceeding at the very bottom.

He goes on and says: "It should be emphasized here the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to a neighborhood school unless it is necessary to bus him to relieve overcrowding." And that was the fasic fact-finding insofar as de jure segregation is concerned and the allegations that they made. The court found that insofar as the traditional, classic type of de jure segregation, the dual system, that just did not apply to the Denver area.

The court also referred to a couple of small

boundary changes at Smith and Mallett a block wide and eight blocks long, for example, in 1962 and 1964, in which we merely referred to those as being some evidence of intent going to the rescission of the three resolutions in 1969.

When it came to the Court of Appeals, the Court of Appeals never ruled on the rescission as being a violation or non-violation. The Court of Appeals merely said, "Well, Barrettwas built where it was, and the boundary changes on these other two schools constitute a segregatory act."

Again, getting back to the basics as to what constitutes a constitutional violation, there has to be a state act and there has to be a causal relationship. But the whole history of this after '62 and '64 was that this whole area became so concentrated with Blacks that there is absolutely no causal relationship in the record and cannot be under the facts and figures as to that particular item.

Q As I understand what the Court of Appeals did, as you just said, was not to decide whether or not the rescission was itself a violation. But, putting that question to one side, simply said that the original plan was an effective remedy; is that not what the Court of Appeals did?

MR. RIS: I am sorry, I did not follow you in the last part, Your Honor.

Q The Court of Appeals did not pass and did not

decide on whether or not the rescission was by itself a constitutional violation. Why did the Court of Appeals feel that they did not have to pass on that?

MR. RIS: They said, "Well, we find that there is already a violation by reason of the boundary changes here, for example, and the construction of Barrett." But they neglected to--

Q And approved the district court's remedy in that area.

MR. RIS: Yes, sir, they did.

Q That is what I thought.

MR. RIS: But for a different reason, and I apologize for misnaming you before, Your Honor.

Q In effect, they said that even though the repeal of the rescission resolution might not be an act of segregation by itself by reason of the previous situation, the situation demanded a remedy and the remedy that the district court adopted saying go forward with the resolution before rescission was an appropriate remedy.

MR. RIS: Yes, sir, they used the same remedy but never actually ruled on the rescission itself as being a constitutional violation, yes, sir.

Throughout the whole discussion on this when we were talking about Manual, talking about these little boundary changes and so forth, our principal complaint about

the court's findings and the plaintiffs' position is that the causal relationship is still absent in the evidence and therefore as to the first cause of action, as we pointed out, there was insufficient evidence to find a constitutional violation there.

As to the second cause, we get into the neighborhood school situation and the equality of educational opportunity. The counsel says they are relying solely on Plessy here, so I will take them at their word on that.

What is equality of equal education? I am not prepared to answer that as to give a definition of it. What is equal justice? A person is entitled to counsel in a court when he is charged with a crime. As this Court has ruled, if he appeals and has not the funds, he is entitled to the transcript. So, insofar as providing resources are concerned, that is something the courts have taken cognizance of. So far as guaranteeing results, that is something else again. And when we are talking about equality of educational opportunity, too often those two things are confused. And if Plessy is what they are relying on, what do we have here? In a typical Plessy situation you have unequal allocation of buildings, of equipment, of supplies, of transportation, of teachers, and so forth. What were the findings here?

At the trial there was a great attempt to show that the buildings were inadequate in the core city schools.

They had smaller acreage. They only had 1.3 as compared to 1.1. That is not the exact figures but that is comparable to it. The trial court found in favor of the defendants that particular issue on the buildings, and the court held that by reason of the evidence that there were new additions to the older buildings, that they were remodeled and they had adequate modern lighting, modern seating and so forth, that there was no unreasonable allocation there. There was no evidence of any inadequacy in any of the equipment or in any of the supplies. There was no discrimination in transportation of the people who had to be transported. They were all transported in the same buses. There was no discrimination in the extra-curricular activities, in the sports program, insofar as the allocation of monies was concerned. The only evidence was that these schools were allocated a greater amount than the other schools. This included not federal funds and state funds, but they did have a greater allocation of money.

Q When you say "they," you mean the schools--

MR. RIS: I mean the core city schools, yes, sir. The schools with the lowest achievement results. So that basically the only thing that the trial court came up with at all was a matter of teachers, teacher experience.

Every teacher in Colorado has to be a college graduate, have a degree, be licensed by the state, and even

the trial court did not find that there was such a disparity here between the teachers. He commented on it as an indicium, is what the trial court used all the way through, various indicia of inferiority, some of which were resources complained of by the plaintiffs and others were the achievement results, for example, and the dropout rate. That has to be kept in mind, that some are causes potentially and some are effects. But the teachers was the only thing that the district court even alluded to as an indicium of inferiority in the schools. And the Court of Appeals held that that was not such a substantial factor as to constitute an unequal resource being furnished. And even the evidence itself does not support that.

Dr. Coleman, for example, stated that the experience of teachers was far overrated.

Q Whose witness was he?

MR. RIS: The plaintiffs' witness, Your Honor.

Q He is the one whose testimony is footnoted in the opinion with reference to the difficulties of--well, go on, I do not want to hold up your argument.

Q Mr. Ris.

MR. RIS: Yes, sir.

Q You referred to the input of financial resources. Are data available in the record as to per pupil cost in these schools on a separate basis, or is that

maintained only on a systemwide basis?

MR. RIS: I am trying to think of what exhibit might be available to disclose that.

Q I do not want to interrupt you. I thought you might recall.

MR. RIS: No, I do not believe there is on proved pupil or even a per school basis. It is the general testimony, and I am not sure we have any statistics in the record.

Q Is there a specific finding on that?

MR. RIS: On that? No, sir, there is not a specific finding to the contrary, and that was the sole evidence.

Q In other words, Judge Jormaly [?], no finding either way the per capita expenditure was greater or less?

MR. RIS: He found inferiority--

Q In totality.

MR. RIS: --in totality. But the only thing that he referred to specifically, insofar as allocation of resources, was the younger teachers, less experienced teachers. And beyond that there was talk about dropout rates, lower achievement scores and so forth.

On achievement scores, of course, as the Attorney General's brief points out, he took the achievement scores, he took the fact of racial imbalance, and put the two

together but without any evidence, without any finding, of causal relationship.

Q Mr. Ris, did he not also suggest, am I wrong, that at least some of the buildings, that they were older and inferior?

MR. RIS: They found expressly, Justice Brennan, that it was not a substantial factor and not a really material factor. He expressly--I cannot at the moment point out exactly where in his findings--

Q Do not bother.

MR. RIS: That is in his findings.

Q He had something about the--

MR. RIS: Yes, sir

Q --disparity and equality of the--

MR. RIS: He expressly finds that it was not a substantial contributory factor to inferiority.

Q As I recall, one of the pundits, expert witnesses, said that the age of buildings has relatively little, if anything, to do with performance of students; is that right?

MR. RIS: I think that is correct. I am trying to think of which one it was--Dr. Coleman again, counsel tells me. Insofar as the other factors on relationship, the plaintiffs relied on various experts, Dr. Dan Dodson who was the only expert to testify at the hearing on the merits,

then at the hearing on the remedies, Dr. Coleman, Dr. O'Reilly, and Dr. Sullivan were called in, all of whom had no knowledge whatsoever of the Denver situation. They had never studied the Denver situation. They had no statistics on Denver. They were talking merely as educators or sociologists or psychologists from other parts of the country, one originally from Berkeley who has gone to Massachusetts, another psychologist from New York State Board of Education, and of course the eminent Dr. Coleman. Again, insofar as finding a privation between racial imbalance and educational achievement, the record insofar as any provable evidence is concerned is just completely silent.

Dr. Coleman was of the opinion that it was basically a cultural deprivation in the lower socio-economic family groups and neighborhoods and that only to the extent that minorities were found in those particular areas was there any relationship at all. But he was looking solely at the family background and the cultural background of those children. And Dr. Dodson went on at great length about various attitudes of community, of teachers and pupils and parents and so forth, not with any relationship to the Denver situation, just generally as a sociologist might do. And again a complete lack of causal relationship.

Dr. O'Reilly, who was called on rebuttal by the

plaintiffs in the remedy hearing pointed out that this whole matter of educational equality is a very unsettled field. He said many years of experimentation would be necessary to slowly and carefully identify and develop a program to try to remedy this. It is an educational process. So, so far as the corollary schools, we have a finding by the court, the trial court, which is not attacked here, that it is not a balanced situation, no Brown constitutional violation, by reason of the evidence concerning the so-called inputs or the allocation of resources, except of the teachers, and even the Court of Appeals saw that there was no Plessy violation.

So, what do we end up with? We end up with an educational problem that the educators have no answer for. The state of the science is not such that a district court can decree you shall do this, that, and the other thing. But it is something, as Dr. O'Reilly said and as Dr. Gilberts, superintendent of schools, says it has to be worked out over a period of time; and we suggest to the Court that this is something that is being done, has to be done, but it is not a constitutional violation to be remedied. It is an educational problem which must be handled at the local level, and it is something that is beyond the competence of the federal judiciary.

The educators, with all their know-how, are having

a hard enough time and certainly it is not something that can be decreed, such as furnishing counsel, furnishing transcripts, furnishing people facilities of a physical nature.

So, basically on the one hand, we say there is no constitutional violation and therefore we have no remedy; and, even if there were a constitutional violation, it would be beyond the competence of the courts. Thank you kindly.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nis.

Mr. Nabrit, you have six minutes remaining.

ORAL ARGUMENT OF JAMES M. NABRIT III, ESQ.,

IN REBUTTAL

MR. NABRIT: Thank you, Mr. Chief Justice, and may it please the Court:

We see the whole case as a de jure case. I think that the relationship between our two arguments is very well illustrated by this Court's decision in 1965 in the case called Rogers against Paul. That was a case to desegregate an Arkansas school system, where the desegregation was proceeding at a grade or year level under the deliberate speed doctrine. And yet when Black pupils in the high school grades were able to demonstrate in this Court that they were unable to get classes and curricula in the Black school that were offered in the White school, this Court carved out an

exception to the deliberate speed doctrine and said under Brown or under Sweatt v. Painter or under a combination or a merger of the two theories, that this was a violation of equal protection which ought to be remedied by integration. The remedy in the Sweatt case was integration. The remedy in the Supial [?] case was integration. And it was not just based on some sort of theory of achievement, that Human Sweatt might graduate from law school and not be a good lawyer; the inequality was in the opportunity he had and the barriers put in front there.

So, we represent the constitutional rights and plainly there has been a deprivation for the student that finishes at the top of the class at Manual as well as the student that does not do well.

We think that for inequality, just as for segregation, that there should be no single doctrinaire remedy for inequality. And we noted earlier that sort of a proposition. But we urge that Judge Doyle was at least within his discretion in listening to this evidence and listening to the particulars of how the school board said they were going to remedy the inequality in concluding it will not hold water, it may be eye-wash. The way that seems most effective, most sure to accomplish equality, is to put the pupils in school together. And it was that sort of overall judgment we think Judge Doyle made.

About the question from the Court about the age of the buildings, what Judge Doyle said at page 61 in 313 Federal Supplement is. "However, we do not think that the age of a building and sice size are in and of themselves substantial factors affecting the educational opportunity offered at a given school. However, we do recognize that any schools which are segregated, have less experienced teachers, produce generally low-achieving students, the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school." Now, you are talking about a 19th century school. You are talking about schools buile in the last century in the core part of the city.

Mr. Justice Powell asked a question about the busing statistics. They are set out at page 26 of our brief. In addition, there are two maps in the original record, not printed maps but large maps which show the bus routes. They are Plaintiffs' Exhibits 390A and 390B. They show the pupils are criss-crossing the city.

There is one exhibit about Manual which is printed. It is this little booklet that the school board published before they set up the school. It shows what they were doing. It shows the establishment of a dual school. And these are only excerpts from the booklet printed here, but the whole booklet is in the record filed with the Clerk.

On this question of the rescission, no fancy constitutional theory is necessary to support Judge Doyle's conclusion that what this showed in the factual context of the case and the series of things that had gone on with relation to these schools was what Judge Doyle said was both a purpose and an effect to keep Black kids segregated up there in northeast Denver.

Q May I ask you a question at that point? I think I have had the same view that Justice Stewart expressed, that both of the courts below had found that the segregation in the core area was not the result of de jure state action. Let us assume for the moment that this Court concluded that it were bound by that finding. Would it be your position that this Court should then consider or reconsider whether or not the distinction between de jure and de facto segregation is now a valid one?

MR. NABRIT: Mr. Justice Powell, I would begin my answer by saying that--I would divide it into two parts. I would say first on the state action question, we agree entirely with the approach of the Solicitor General, that it is the state running the schools, that they determine the racial composition of the schools; so that the real question is whether or not there has been discrimination which violates the Constitution on this record. And I would say first that it is not necessary on the record to reach that

issue of whether or not segregation is illegal if there was no racial discrimination. But on that question I would think that certainly discrimination is inferable from the fact that both courts below agree to it, that there is a segregation pattern, that the school board does have all this opportunity and control, that there was widespread bias in the system, and because of the known inequality of the schools.

There is one absence in this record, and that is the absence of any evidence about an important factor, which is what caused the housing segregation, whether or not Government was responsible for that, and there are other cases being litigated, including some pending on certiorari here where that question has been addressed in evidence and there have been fact-findings by the courts on it. We do not think it is necessary to reach that--

Q There was no evidence of that in this record?

MR. NABRIT: That is correct. That was not litigated here, because we viewed the case as a de jure case.

Q I really do not understand your answer so far to Mr. Justice Powell's question. Let us assume that we accept the findings of two courts below that there was no de jure segregation in the core area of Denver. Those were the findings of two courts; is that correct?

MR. NABRIT: That was their holding, as we plainly

saw.

Q Let us assume that we accept that, because we have to or because we choose to; let us assume that we accept that. Then does this case present, as I understood Mr. Justice Powell's question, does this case present the issue about whether or not the distinction that the Court has previously made between de jure and de facto segregation is an invalid and unsupportable distinction?

MR. NABRIT: Faced with that decision, I would still argue that we should win the case. I would be willing to follow it out to its logical conclusion if I had to, that the inequality argument justifies relief without regard to that and, indeed, that the school board really does control the racial composition of schools as implied--

Q By its inaction in the face of changing neighborhood patterns, by its inaction in correcting predominantly non-Anglo schools, by abolishing the neighborhood school system, that that is enough to violate the Constitution by standing by and seeing these neighborhood shifts?

MR. NABRIT: I do not envision any realistic record as involving only inaction, but that certainly might be part of it. They make decisions--

Q We begin this question by assuming that they took no affirmative action to segregate. That is the basis

of Mr. Justice Powell's question, that there was no affirmative segregative action on the part of the school board in the core area.

MR. NABRIT: I think that as a matter of making a prima facie case of violation of the Constitution, the plaintiffs can do it by showing, whether it is a substantive rule or not I do not know--certainly in terms of making out a prima facie case of discrimination, plaintiffs can do it without showing what the Court of Appeals called odious intent. I do not know any other answer, Mr. Justice Stewart. I am not trying to evade the question. It is certainly open to the Court to reach the de facto issue here if it so chose. What we are urging is that it is not necessary. And if the Court found it necessary to reach that issue, then we would urge that in any event we should win the case, that whatever discriminatory intent--if discriminatory intent is necessary, then it is inferable; and we made out a prima facie case which requires that it be rebutted.

Q Mr. Nabrit, my understanding of Justice Stewart's and Justice Powell's question is, Supposing we reach a point where we find that discriminatory intent is not inferable with respect to the Court, then what do you ask us to do, to reconsider the distinction between de facto and de jure?

MR. NABRIT: I would argue the proposition. The

alternative is the question of proving a prima facie case and as a question of substantive law. I think the school board really did control the racial composition of the schools and that deliberate segregation is widespread. So that when you show evidence such as we have here, a situation, to use Judge Doyle's phrase, that looks just as if they deliberately segregated--and Judge Doyle said the results are just the same as if they had a segergation policy. But what I find here is that they had an explanation, a rational justification for this. I say that is not enough, that they have to have a compelling justification for producing this kind of segregatory result, whether with or without intent.

I hope that is a complete answer, and I know I have gone over my time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nabrit, Mr. Greiner, and Mr. Ris. The case is submitted.

[Whereupon, at 11:40 o'clock a.m., the case was submitted.]

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