ORIGINAL

In the

Supreme Court of the United States

COLUMBUS BOARD OF EDUCATION, ET AL.,	)	
Petitioners,	)	
v.	)	No. 78-610
GARY L. PENICK, ET AL.,	)	
Respondents.	)	

Washington, D. C.
April 24, 1979

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COLUMBUS BOARD OF EDUCATION, ET AL., Petitioners, v. GARY L. PENICK, ET AL., Respondents.	No. 78-610

Washington, D. C.

Tuesday, April 24, 1979

The above-entitled matter came on for argument at 10:11 o'clock a.m.

BEFORE:

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

APPEARANCES:

SAMUEL H. PORTER, ESQ., Porter, Wright, Morris & Arthur, 37 West Broad Street, Columbus, Ohio 43215; on behalf of the Petitioners

THOMAS I. ATKINS, ESQ., Atkins & Brown, 10 Post Office Square, Boston, Massachusetts 02109; on behalf of the Respondents

DREW S. DAYS, III, ESQ., Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D. C.; as amicus curiae

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 arguments first this morning in No. 78-610, Columbus Board of Education v. Penick.

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

ORAL ARGUMENT OF SAMUEL H. PORTER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case involves the application of presumptions of intention in order to extrapolate a judgment of system-wide liability and the imposition of a system-wide racial balance remedy from conduct where a system-wide racial balance remedy is not warranted by the incremental segregated effects of the identified constitutional violations.

I wish to make at the outset a brief statement, an overview of the Columbus Public School System and the remedy that the court ordered in this matter before I go to a discussion of the specific errors. Initially, I would like to point out that the Ohio State Board of Education was a party below and has filed a brief concurring with the petitioners' view, and their position is fully supportive of ours and we in turn are supportive of what they have to say and we recommend that brief to the Court.

The Columbus Public School System is the fourtennth largest city school system in the United States. And like most school systems, during the fifties and sixties it went through an enormous period of growth. In 1950, it had a school enrollment of about 46,000 students. In grow to 1971 with about 110,000. At the same time, its area increased from some 45 square miles to 170 square miles, one of the largest growths that took place anywhere in this country.

QUESTION: Are the boundaries of the school district coterminous with the boundaries of the city of Columbus?

MR. PORTER: Not entirely, Mr. Justice Stewart. There are some exceptions that took place by virtue of some legislation in 1958 which made at that time they did not have to follow each other. They are for the most part, however, particularly since the Ohio Supreme Court in 1956 ordered or approved a transfer of a number of pieces to the city of Columbus that had been authorized by the Ohio State Board of Education, so that they are at this time for the most part contiguous, but not entirely.

During this period of time, the school system added 103 school buildings and they added 145 additions to various facilities, some old and some that were built during that time. So at the time of trial, the system

consisted of 170 school buildings, with 97,000 students, approximately 67 percent white and approximately 32 percent non-white.

QUESTION: That adds up to 99 percent.

MR. PORTER: 67.5 white and 32.5 non-white. There are very few others. There are a few but they are insignificant.

QUESTION: Well, what are they if they are not white or non-white?

MR. PORTER: They are non-white. In the early seventies and the late sixties, the Columbus Public School System set out on a system that was designed to bring about voluntary integration of its school system, and it entered into what it refers to and what is described in the court's opinion as the Columbus Plan of Racial Transfers. They also set about a program of magnet and alternative schools, a series of career centers that are located throughout the system, and they attempted to with new attendance areas to improve racial balance. All of these things were expanded each year during the 1970's. And although there is not racial balance within the Columbus Public School System, and was not at the time of trial, all, virtually all schools were racially mixed and the balance within the schools of Columbus, their racial balance was superior or a better balance than that which existed within the residential

patterns of the City of Columbus at that time.

All schools at the time of trial had balanced faculties. On March 8, 1977, the District Court found that the entire Columbus Public School System was unlawfully segregated and based on this general conclusion of system-wide liability, and without determining the incremental segregative effect, ordered a system-wide racial balance remedy, and they did this in spite of the fact that they had determined at the same time that it would not have been possible to have had within the public school system of Columbus without any act of unconstitutional conduct a racially balanced system, and that is part of the lower court's findings.

QUESTION: Mr. Porter, don't you think that the District Court's findings are pretty well insulated from review by the language from Judge Edwards' opinion of the Court of Appeals of the Sixth Circuit in this case which is at page 199 of the petition, where he says if the detailed findings in this paragraph tracking the language of the Dayton case -- and he is referring to the District Court's post-Dayton opinion -- cannot appropriately be applied from the District Judge's post-Dayton opinion, and we think they can and should be, we now enter these findings as the findings of this Court based upon the 6,600 pages of evidence in the record made before

the District Court.

MR. PORTER: If the question, Mr. Justice Rehnquist -- and I am not sure that I understand it -- if the question is is that an appropriate finding of system-wide liability by the Court of Appeals, it is our position that it is not. If the question is are we raising at this time or attacking the findings by the District Court with respect to specific violations, no, we are not, we are assuming that those findings were correct. What our position is that they were isolated findings and that they cannot support a system-wide remedy. And we go further and say that the Sixth Circuit, that Judge Edwards cannot overcome the failure to make specific findings simply by making the statement that he does make. We believe that he is required under the Dayton case to make specific findings of fact and then determine the incremental segregative effect.

The order that the District Court, the order of desegregation which the District Court approved ordered the reassignment of some 42,000 school children. It ordered the transportation for racial balance of 37,000. It required the purchase of some 213 buses, with using those buses plus the old fleet, it requires four starting times and four ending times during the day. And this was done, as I said, even though the court had found that if

the Columbus system had never acted improperly, the racial balance would not be accurately reflected within the system.

The District Court recognized in his March 8, 1977 opinion that racial imbalance was due to the residential patterns within the City of Columbus. We believe that the question that is presented here is where there is no history of absolute segregation, whether compelled by statute or otherwise, and the system serves urban areas with large and highly concentrated black populations, where there is substantial residential segregation, can you under those circumstances use standards and presumptions in order to arrive at a system-wide remedy.

The first and most obvious error was that the court, the lower courts failed to determine the current incremental segregative effect in the manner required by Dayton I. The second was that the lower courts concluded that Columbus was a dual system through the improper use of legal presumptions and shifting burdens of proof. And, third, the lower courts applied an erroneous standard for determining segregative intent.

We believe that Dayton I sets forth the required approach that federal courts must take in the trial of school desegregation cases. The first step is to make a factual determination of whether there were specific instances where the school board tended to and did in

fact discriminate against minorities. And if such constitutional violations are ascertained, then the court must determine the current incremental segregative effect of these violations on the present racial school population. The incremental effect is to be measured by comparing the present racial distribution in the schools to what it would have been if the constitutional violations had not occurred.

QUESTION: Mr. Porter, I take it your argument is that this should be done even if there is a supportable finding of a system-wide violation?

MR. PORTER: Yes, because, Mr. Justice, because simply the statement that there is a finding of system-wide is meaningless by itself. It is our position that it is necessary to make a determination of what was the effect of those violations presently, and what is the incremental segregative effect and what is necessary in order to eliminate it.

QUESTION: Would you make the sme argument if there was a de jure case such as the Swann case? Are you asking us to reconsider Swann, in other words?

MR. PORTER: We believe that Swann and Green are remedy cases, they are de jure. We believe in those cases that you are dealing solely with remedy. Here the question is first violation.

QUESTION: But my question was assuming that you

had a supportable finding of a system-wide violation, that was my question.

MR. PORTER: You could very well be required, the courts could very well be required to make a finding of effect, present effect. For example, suppose the system has gone through desegregation, suppose it has gone through racial balance and it in fact is racially balanced, such as in Pasadena, and it is raciall balanced, and then it gets out of balance. The question becomes whether or not it is a duty and obligation and so forth, and it would be our position that before you could you would have to make the determination.

QUESTION: Let me put the question a little differently. Suppose you have two cases, one a de jure case and another a de facto case in which there is admittedly a system-wide violation, and in both cases it would be rather for the -- there had never been any violation at all, you wouldn't have total integration. Would you say the remedy authorized in Swann is appropriate or inappropriate? Or would you say there is a difference between the two cases?

MR. PORTER: If I followed it -- and I may have lost it, I beg your pardon -- we feel that there is a difference. We think you have to make findings. We don't think that you can get to a question of whether or

not there is system-wide violation, whether there is de jure or whether there is tate imposed constitutional violations throughout the system without making the types of factual determinations that Dayton would seem to indicate.

QUESTION: Thank you.

QUESTION: Did the court in Dayton order racial balance in every single school pursuant to some formula

MR. PORTER: No, Mr. Justice Powell, not in Dayton.

QUESTION: I'm sorry, I was thinking about Swann. I got the cases confused. You were talking about Swann. In Swann, was there any comparable order to the order in Columbus?

MR. PORTER: I am not sure. I'm sorry, I don't recall. I know very well what this Court said about Swann.

QUESTION: I am talking about Swann.

MR. PORTER: Swann.

QUESTION: Yes.

MR. PORTER: This Court discussed it as a starting point for the fashioning of a remedy, and we have no problem with that. What we say is that you can't get to the scope of the remedy until you determine what the magnitude of the wrong is, and you can't supply the wrong or its magnitude simply by the statement that it is a dual

system or that it is system-wide. That is our position.

And I might say that in studying the lower court's opinions, one has to be very careful because it is obvious after a reading or two that segregation is related to a high degree within those opinions to racial imbalance and the two we would suggest are not the same, but they are treated to a high degree the same.

QUESTION: Mr. Porter, along the lines of Justice Stevens' question, on page 73 of the appendix to your petition, which has Judge Duncan's opinion, he says that the finding of liability in this case concerns the Columbus School District as a whole, actions and omissions by public officials which tend to make black schools black necessarily have the reciprocal effect of making white schools whiter. Do you think he would have found a system-wide violation if there had just been segregation in one school?

MR. PORTER: I don't know how to answer that, Mr. Justice Rehnquist. I think that the lower court, the trial court felt that there were specific acts of unconstitutional conduct, and I think he thought that they were those ten or eleven which he identified, and I think that he felt that there was racial imbalance throughout the system, and I think that he felt that there was an obligation to remove that racial imbalance, particularly

because he found that there was a dual school system in 1954. And he really runs down two tracks at the same time. One is the dual school system, which he finds, required the dismantling, the second is a separate line of specific unconstitutional violations after 1954, and he puts them all together. I don't know that I can answer your question.

QUESTION: But don't you detect at least from that part of his opinion that he perceived a ripple effect from any unconstitutional act of segregation that would eventually have made its effect felt throughout the system?

MR. PORTER: Well, he may have, although I don't think the record would support it. But I would point out that if that is so, that is the very reason that you need to go to look to the effect to see what is the scope of the remedy that is going to be required in order to rectify whatever that wrong was.

I might add with respect to reciprocal, the reciprocal effect, there is very, very little in the record on reciprocal effect. I think the only testimony in the record was from Mr. Sloan who said he had never studied the Columbus system and he talked about it in a general way. Dr. Taeuber may have mentioned it. The principal emphasis on reciprocal effect comes in the appendix to the respondents' brief which was, of course,

not part of the record in this case.

I would like to talk just briefly I think about the matter of presumptions. Before I do, I would like to point out what the system looked like in 1976 at the time of trial with regard to the violations that had been found by the District Court, and there are some 11 or 13, depending on how you count them.

There was a group of so-called black schools enclave which he found had been created prior to the Second World War or over a period of years. Three of those schools -- three of the five remained in 1976, and they housed 3 percent of the black students within the Columbus Public School System. He found that there were two sites which he felt were unconstitutionally selected. One of them had been eliminated in 1973, with an integrative effect. One of them remained, and it was surrounded by black schools.

There were three optional zones which he talked about. Two had been eliminated in the early sixties, one in 1975, so that there were none at the time of trial, and the one in 1975 involved two youngsters and they went to racially balanced schools. There were two so-called discontiguous zones, one of which had been abolished in 1963, and one of which he stated or the inference is from his statements and the exhibits will show was integrative in

1968.

And finally there was the so-called pairing of Innis and Cassady, where the school board and the court disagree, and Innis at the time of trial was racially balanced.

Now, these are the violations, and that is all they were and --

QUESTION: Do you concede that these were constitutional violations?

MR. PORTER: We think that the evidence fully supported, Your Honor, a finding to the contrary, but we are not here to argue whether he was right or wrong. That is what we have and our position is that he took that and then used it to make presumptions of system-wide liability and --

QUESTION: So for the purposes of this case in its present posture, do you acknowledge that they were constitutional violations?

MR. PORTER: For the purposes of this case and this argument, we will not take issue with those findings.

QUESTION: And there were how many, three?

MR. PORTER: Over the 75 years, there are 11 or 13 findings or specific instances, depending on how one counts them. I think that is accurate. They are set forth in our brief and they are discussed in detail within the

brief. And the point that we want to make is that you can't -- I would point out that the record and his opinion does not support the proposition that they are examples. They are not examples, and his opinion is clear that they are not examples. They were his findings of fact.

QUESTION: They were the sum total.

MR. PORTER: They are the sum total, and this is the springboard for the moving of some 37,000 people and racially balancing 170 schools and --

QUESTION: And racial segregation in public schools has been illegal under the law of Ohio since, what, the 1880's?

MR. PORTER: About 1887, and I think the Court had found that this chool system racially balance beginning in 1881.

QUESTION: I thought it found that as far back as 1954 the Columbus School System was segregated. Judge Duncan found that as a fact, didn't he?

MR. PORTER: Mr. Justice Marshall, that is what he found. He also stated --

QUESTION: Well, would you say that statement is not true?

MR. PORTER: The question I was addressing was the --

QUESTION: You said that there wasn't any

segregation in Columbus since 1880. Isn't that what you said?

MR. PORTER: My response --

QUESTION: If you didn't, I misunderstood you. I thought that is what you said.

MR. PORTER: My response to Mr. Justice Stewart was that the Columbus Public School System was in an integrated system in 1881 and, as stated by Judge Duncan in his opinion and order, that condition continued until the early 1900's. It was his view then that there was a departure about 1905 or 1906 which at that time resulted in the establishment of what he found was the creation of a black school.

QUESTION: And in 1954 it was segregated?

MR. PORTER: In 1954, it was the lower court's view that there were five schools which constituted an enclave in the center of the city which were the result of unconstitutional --

QUESTION: Is it true or not that Judge Duncan said, "The Columbus public schools were openly and intentionally segregated on the basis of race when Brown was decided in 1954." Isn't that what he said?

MR. PORTER: Yes, Your Honor, it is. The Columbus Public School System was not a dual school system in 1954, and it was not a dual school system in 1976.

There was substantial racial mixing within the Columbus Public School System in 1976. If one will look at our brief, for example, there are some 13 high schools in existence at that time, half of which were within the plus or minus 15 percent of the racial balance requirement of Judge Duna, half of the Columbus Public School high schools, and several of them are within a point or two, and it is our position that under those circumstances you do not have a dual school system and you cannot use simply the phrase "you have system-wide liability dual school system" as a jumping off point for ordering the reassignment of 42,000 people. And we think that Dayton is correct. We do not believe it is inconsistent with Keyes, which I obviously am not going to get to, but we think that the presumption in Keyes is not inconsistent with Dayton. The presumption deals with intent, it deals with violation, and there was no finding, no finding of a substantial effect on the Columbus Public School System in 1976 of any violation. And it is our view that under those circumstances the District Court should not have ordered the remedy that he ordered.

There is a third matter that appears in our brief, it deals with segregative intent. We believe that the wrong standard was used. We think that --

QUESTION: That is in determining whether or not

there was a constitutional violation --

MR. PORTER: Yes, sir.

QUESTION: -- any constitutional violations. But you told us I thought that for purposes of this argument you acknowledge that there were at least some constitutional violations.

MR. PORTER: That is correct, Mr. Justice Stewart. But five or six or eight or ten in a system of 170 square miles does not constitute a dual school system, and it was used -- it was then used by the District Court and the Court of Appeals for the purpose of equating whether or not the acts of the school system tended to or did in fact improve racial balance, and we suggest and argue to this Court that that is not the appropriate way of going about it, that obviously the school system, the neighborhood school system is going to reflect the housing patterns of the community. Some will be balanced, some will not be, some will be close, and so forth.

I would like to conclude simply by asking this Court or pointing out to the Court, I guess more accurately, that in Ohio there are about six school cases going, Cleveland, Columbus, Dayton, Cincinnati, Akron, and Youngstown. They are in various stages. Several have been tried. Two have reached one result in the District

Court. Two have reached another result. And we think that before a school system which is insolvent is asked to go through massive relocations and massive reassignments, that there should be -- the District Court should be required to make very definite specific findings, and they should be required to make the type of inquiry that Dayton I calls for. If it isn't Dayton I, with all due respect, then it should be something else, but it should not be sufficient -- it should not be sufficient to simply say in broad generalities that a condition exists, you go out and remedy it.

There are many, many, many remedies, some of which look to racial balancing. This remedy was obviously of racial balance, was the only thing considered by the District Court, and it was the only thing considered by the Court of Appeals, and we would suggest that it is inappropriate and that in order to deal with this type of situation, at least in the State of Ohio, specific instructions from this Court as to what the trial courts should do and the type of findings that they should make, we would suggest to this Court would be very helpful.

I wish to thank you for the opportunity to appear here.

MR. CHIEF JUSTICE BURGER: Mr. Porter, thank you.

Mr. Atkins.

ORAL ARGUMENT OF THOMAS I. ATKINS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to begin by simply stating what the respondents seek from this Court. We ask that this Court sustain the finding made by the District Court below and the Court of Appeals that indeed under the controlling legal principles heretofore announced a dual system existed in Columbus at the time of the Brown decision from this Court, and that the existence of that dual system imposed an affirmative duty under Green, and we ask this Court on its review of the record, as the District Court below and the Court of Appeals below, to find default by the local officials in carrying that affirmative responsibility, a failure to dismantle the dual system. We ask this Court to reject the petitioners' proposition that you can treat a system-wide cancer such as segregation with a band-aid, and insteed to remain true to its holdings in Brown, in Green, in Swann, in Keyes, in Milliken, and we believe in Dayton, that where a system-wide violation has been shown to exist only a system-wide remedy is capable of correcting the condition that offends the Constitution.

QUESTION: Mr. Atkins, you speak of the Court remaining true to its teachings in Dayton, and I would like

to ask you about a finding of Judge Duncan and then ask you about some language from Dayton on page 58 of the appendix in Judge Duncan's opinion. He says in the middle of the paragraph there, in the interaction of housing the schools operates to promote segregation in each, it is not now possible to isolate these factors and draw a picture of what Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required. And then compare that with our language in Dayton, if violations are found the District Court and the Court of Appeals must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, and when that distribution is compared to what it would have been in the absence of such constitutional violation. Don't you detect some inconsistency there?

MR. ATKINS: No, I do not, Mr. Justice Rehnquist. I read page 58 of the District Court's opinion to be simply another way of saying what this Court said in Swann in addressing the question of the permissible scope of transportation as a remedial implement, and it said we cannot precisely define for every case how much will be permissible. It is not possible to do. The District Court, after sitting through a trial with 70 witnesses, over 700

exhibits and nearly 7,000 pages of transcript, said what I have seen on the basis of the entire record before me is segregative intent specifically carried out through active actions of the public officials with an impact which is system-wide in scope. Here he speaks specifically to the interaction between the school segregation the petitioners caused and the housing segregation in the neighborhoods around the schools. He says here, as he does at other points throughout his opinion, far from the schools being segregated because the neighborhoods were segregated, the neighborhoods are in part segregated because they segregated the schools. I don't find any inconsistency here and in this Court's teaching in Dayton where it calls for the most careful kind of scrutiny of the violations being urged upon the District Court by whoever comes to it seeking relief.

We believe and we think the record shows that the District Court was very, very careful in evaluating that record. It fully credited the evidence offered by the defendants. It examined it carefully, it made in many instances, as they have cited, statements about that evidence. It found by the clear convincing weight of all of the evidence before it, including their evidence, that there was system-wide segregation and that the segregation was not advantageous.

QUESTION: Well, what do you think the court meant by "system-wide segregation"? It certainly wasn't the sort of system that you had in many southern states at the time of Brown I where races were forbidden to attend the same school by law.

MR. ATKINS: I think the court recognized, as this Court did in Keyes, that state action can take place either by the passage of a law in a legislature or by the action of a school official imbued with the power of the state constitution and legislature. It found in this case, as in Keyes, that the state action which offended the Constitution were the specific policies which pre-1954 created the five black schools overnight in several instances, which had a specific policy of assigning all the black faculty only to the black schools which, as my brother counsel fails to point out to the Court, when this Court found construction violations that created a black school, it was also finding, as this Court has noted, a reciprocal effect necessarily upon the white schools whose boundaries were changed to accommodate the warehouse being built for black students.

QUESTION: But supposing that just happened once, just one site selection taken place where they deliberately segregated intent on the part of one, do you think that would justify a finding of system-wide segregation in a

school system the size of Columbus because of the ripple effect?

MR. ATKINS: No, Mr. Justice Rehnwuist, respondents are not so arguing because we think that is not common sense.

QUESTION: Well, then what --

MR. ATKINS: We think that a finding of a single violation with a single school, even taking into account whatever reciprocal effects might have been, would certainly not justify a system-wide remedy and we are not arguing that here. That is not the facts here.

QUESTION: Then what -- there is some intermediate finding, and I think everybody concedes --

MR. ATKINS: Yes.

QUESTION: -- that the District Court has to make between a single segregated act and the imposition of a system-wide remedy. What factors does the District Court consider in making that finding?

MR. ATKINS: I think the District Court and the Court of Appeals, if I might say, each wrestled with that problem, as indeed this Court has wrestled with it. It is not an easy determination to make. Part of what goes into making that determination is for the court to evaluate the intent of the policymakers, because if the court finds that what they set out to do, what they intended to do

was in every instance possible to segregate on the basis of race, the fact that they may have been incompetent and therefore unsuccessful in some instances is not exculpatory. That is a factor to be considered. The court has to consider whether the racial segregation in a particular school is the result of patterns over which the school official did not have control and could not be thought reciprocally to have impacted. Housing is such one instance, where it can be shown their policies of segregation did not either precede or go lock-step with segregative policies on the part of the other state in-power people such as realtors or licensed people such as brokers. That is a factor to be taken into account.

This Court specifically noted that it took into account the Columbus officials' system-wide policy with respect to what to do with black children in the pre-1954 era. And the answer was clear, as the record shows, put them in black schools wherever possible. It said it considered the system-wide policy as related to faculty, a policy which started at least as early as the beginning of the century and which lasted at least as long as 1974 when they couldn't do it any more because the state said stop.

QUESTION: As I understand it, this lawsuit was brought in, what, 1976?

MR. ATKINS: '73.

QUESTION: '73.

MR. ATKINS: The trial was 1975-76.

QUESTION: And the basis for the lawsuit was and had to be a claim that the Columbus School Board was then violating the law of the state of Ohio and the Constitution of the United States by maintaining a dual school system, i.e., a school system, some schools for Negroes and other schools for white people. Is that it? That was the claim, wasn't it?

MR. ATKINS: That was essentially the claim, yes, Your Honor.

QUESTION: And at that time how many all-white or all-black schools were there in the system?

MR. ATKINS: I must -- in attempting to respond to that -- complete the answer I didn't want to fully give when you were asking the question. The claim in its totality was that the school officials in Columbus had set out on a deliberate policy to segregate the students by race and that that included pre-Brown segregation and specific maintenance of the segregated system after Brown. At the time of trial --

QUESTION: But the gist of the lawsuit had to be that at the time of the lawsuit --

MR. ATKINS: That's correct.

QUESTION: -- the School Board of Columbus was

maintaining a school system that was illegal incidentally, under the law of Ohio, and also most relevantly here under the Constitution of the United States as of the time the lawsuit was filed. Isn't that correct?

MR. ATKINS: That's correct.

QUESTION: Didn't it have to be that?

MR. ATKINS: And we believe the conclusion reached by the court, both courts below, was that because of --

QUESTION: First of all, would you answer before you get too far away from my question --

MR. ATKINS: Yes.

QUESTION: -- how many schools at that time were all one-race schools?

MR. ATKINS: All one-race schools, I don't know the specific number. That was not the claim made by the plaintiffs, that they were all one-race schools.

QUESTION: Well, if it is a dual school system, I should suppose that would be rather relevant evidence. I mean if the claim was that --

MR. ATKINS: The evidence was before the court and it is in this record before the Court in the appendices. I don't happen to recall the specific number of schools, but the claim made by the plaintiffs was that the system was segregated because the number of specific segregative actions taken by the defendants unremedied infected a

substantial portion of the Columbus School System at the time of trial. That was the claim, and it was a claim which on the basis of the record evidence before it, the court credited it. We believe the evidence in this case will support a finding that -- and the brief sets it out more fully than I will attempt to do here -- at least 77 specific constitutional violations affecting at least 149 schools during the period of time covered by the court's analysis. This was not a case of isolated instances.

QUESTION: But the relevant time was the time when the lawsuit was filed.

MR. ATKINS: I understand.

QUESTION: And the claim had to be as of that time --

MR. ATKINS: Yes, sir.

QUESTION: -- the Columbus School Board was administering an officially segregated system.

MR. ATKINS: I understand. And at the time of trial --

QUESTION: And I would suppose that evidence quite relevant to that was how many schools as of that time were all white or all black.

MR. ATKINS: The evidence at the time of trial showed, as I recall the statistics, that 70 percent of the black students then in Columbus elementary schools were in

schools which had been mentioned by record evidence before the District Court as having been specifically impacted by segregative activity.

QUESTION: Of course, that doesn't answer my question at all, does it?

MR. ATKINS: I have already answered the question to the extent I can.

QUESTION: You don't know.

MR. ATKINS: As I say, I don't know the specific number of schools.

QUESTION: All right.

MR. ATKINS: But that information was before the courts below, as it is here. We find the effort by the petitioners to suggest that this Court should disregard the remedial principles that have so clearly and we think consistently set forth to be a claim which should be rejected, a plea which should be rejected by this Court. We believe the record shows that both the District Court and the Court of Appeals, with full regard to the teachings of this Court, evaluated the evidence to determine first the scope of impact from the violations which had been committed, secondly, the extent to which the defendants carried the burden this Court has imposed to show that other segregation which existed was not also the result of their impermissible activity and, third, to articulate a remedial

plan formulated by the defendants capable of addressing the full reach of the violation. We believe that has happened and we think the efforts on the one hand to characterize the record as a record showing only isolated instances, on the other hand to ignore the substantial basis for the District Court's finding of a pre-Brown dual system to ignore the continuing segregative activity this Court, the courts found below to have been carried out by these defendants specifically through the use of optional zones and discontiguous areas, not solely the use of construction but including that, by the faculty and administrative assignment policies they created and carried out, we believe on that record the remedy ordered below is appropriate and we ask this Court to affirm that remedy and to permit the students in Columbus to receive for the first time in a century fully adequate and fully constitutional education in the public school systems, because the record is clear. If you don't permit that to happen, the petitioners will ceratinly not make it happen.

We have no place to go from here. We cannot go back there expecting a difference from the pattern of behavior which has up to this point been proven and found. And we ask this Court, we are approaching the 25th anniversary of the Brown decision, in Columbus it hasn't meant a thing and we ask this Court to send Brown to Columbus.

I thank you very much.

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

Mr. Days.

ORAL ARGUMENT OF DREW S. DAYS, III, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

Before I turn to matters that I want to specifically address in my argument, I would like to try to answer Mr. Justice Stewart's question with respect to the state of segregation at the time that this case was brought to trial.

At the time of trial, the statistics reflect that the district was 32 percent black, 70 percent of the black children attended schools that were 80 percent or better and 50 percent of the schools were 90 percent of one race or the other. So there was a high degree of racial segregation.

QUESTION: That really doesn't answer my question either, does it?

MR. DAYS: Well, I was simply trying to assist the Court based upon --

QUESTION: The schools that were involved in Brown v. Board of Education were all black schools and all white schools officially, weren't they?

MR. DAYS: That's correct.

QUESTION: Were there any of these in Columbus?

MR. DAYS: There were virtually all black schools in Columbus at the time of trial.

QUESTION: Were there any of the kind that were dealt with in Brown v. Board of Education?

MR. DAYS: I would think not because of the record in this case which is that there was no state statute in effect at the time.

QUESTION: That is what I am asking you, what does the record show in this case.

MR. DAYS: The record in this case shows that it was not the type of complete segregation that was in effect in --

QUESTION: And that was what was involved in the Brown case.

MR. DAYS: That's correct.

QUESTION: And you would agree, I suppose, General Days, would you not, that it is pretty well established that what the Constitution requires is a school system that is racially neutral, that no child and no parent of that child has any constitutional right to attend a particular school with any particular race or racial balance?

MR. DAYS: That's correct, Your Honor. I think it is also helpful to understand that while there were

some schools in the district at the time of trial that were majority black and majority white, they reflected a continuation of a pattern that was in effect in 1954 when the court found that five schools were 100 percent all black not only in terms of their student body but their faculty.

QUESTION: I suppose if you went back to 1854 you could find that there were no schools for Negroes at all.

MR. DAYS: I think that is part of the --

QUESTION: And that all the schools were 100 percent white.

MR. DAYS: I think that the information with respect to the condition of the schools in 1954 reflects the fact that there was an express constitutional responsibility on the part of the board as of 1954 to try to dismantle a system that was for all intents and purposes dual, given the totality of the circumstances.

But what I would like to turn to is really --

QUESTION: Mr. Days, before you get to that, you did mention teachers.

MR. DAYS: Teachers.

QUESTION: Weren't all Negro teachers exclusively in Negro schools?

MR. DAYS: That's correct. I think there was one exception.

QUESTION: And is that why the suit was brought?

MR. DAYS: No, not at the time the suit, in 1954. But of course, at the time that this suit was filed, the Columbus School Board had not dismantled the system that involved racial assignment of teachers. It was not until 1974, a year after the suit was filed, that the Columbus School Board finally started assigning teachers not based upon their race but based upon neutral principles.

In our view, the Court of Appeals correctly applied the principles of Dayton in view of its determination that a system-wide violation existed. And Mr. Porter has indicated here today that he accepts those findings for purposes of this argument. Therefore, Columbus is a remedy case.

In holding that judicial remedies must be addressed to the incremental segregated effects of a school board's discriminatory policies, Dayton I did not establish new principles, we would argue. Rather, it reiterated the settled precept that a remedy must be tailored to cure the condition that offends the Constitution by eradicating the effects of that violation.

When there have been only isolated and spradic acts of school board discrimination affecting a limited number of schools or students, a similarly limited remedy is appropriate. This is what we understand to be the

teaching of Dayton.

On the other hand, where there has been a general policy of discrimination in the operation school system as a whole, pervasively eliminating whatever opportunities existed for substantial racial integration, a system-wide remedy will generally be required.

QUESTION: Mr. Days, what factor does the court consider or what findings ought it to make in distinguishing between the two types of cases that you have just described?

MR. DAYS: Mr. Justice Rehnquist, I think that is an issue that was not directly addressed in the Dayton decision. It does not address what we think is the central issue here which is the proper allocation of the burden of proof at the remedial stage when a court must enter a decree that delineates the discriminatory patterns, root and branch. We think that based upon the teachings of Swann and Keyes the burden of showing to what extent the system-wide remedies inappropriate falls upon the school board. Keyes and Swann established that there is a rebuttable presumption that school board practices that have been system-wide have a system-wide effect. It presumes that the discriminatory practices have achieved their full potential in the school system.

QUESTION: Regardless of the presumptions, what

is the issue?

MR. DAYS: What is the issue?

QUESTION: Yes.

MR. DAYS: It seems to me that the issue has to be a showing by the school board of ways in which its own discriminatory pattern did not in fact have an impact upon specific schools or specific areas of a system, but that burden falls upon the school board.

QUESTION: Well, do you say that if you proved even one isolated segregated instance that that would shift the burden to the school board in a school district of 176 schools like this, to show that none of the others have been affected?

MR. DAYS: We do not contend that.

QUESTION: Well, where is the tipping point?

MR. DAYS: Well, the tipping point is when the court finds that there is a system-wide violation, that is where the discriminatory practices infect the entire system.

QUESTION: And what questions does it ask itself to make that determination?

MR. DAYS: Well, I would suggest, Mr. Justice Rehnquist, that it is not for the court to ask questions of itself, it is for the school board to make showings of ways in which, for example, the racial assignment of

faculty did not have an impact upon certain schools.

QUESTION: But you have said if there is just one school and one isolated thing, the burden doesn't shift, it is not up to the school board.

MR. DAYS: That's right, because by definition if it is an isolated violation, then one can easily determine, a court can easily determine what the remedy will be.

QUESTION: So at what point does the burden shift?

MR. DAYS: The burden shifts when there is an establishment of a system-wide violation. I think if we look at the record in this case, where the court pursued questions of whether faculty assignments were discriminatory, whether siting policies were discriminatory, whether optional zones and discontiguous zones were discriminatory. Once it arrived at a judgment that the system was segregated, then the burden shifted to the school board, and in determining what constitutes a system-wide violation courts really have to look to the decisions of this Court.

We think that it is appropriate after Dayton to continue to believe that the burden for showing the incremental segregative effects should fall upon the school board. If there is a risk of uncertainty, it should not be borne by the victims of the legal action. This is particularly applicable in cases such as this where

plaintiffs seek to vindicate rights that are at the core of the Fourteenth Amendment. The victims of purposeful school segregation are entitled to a remedy that eliminates the effects of discrimination, root and branch, and clearly a system-wide remedy would achieve that end because it would remove the racial identifiability of the dual system. But it would also visibly rectify the stigma of inferiority which is indeed the product of pervasive violations.

If a school board wishes to contend that a less inclusive decree would purge all taints of its proven system-wide racial discrimination, it has the burden of showing exactly what that limitation entails. In this case, the Columbus Board did not carry this burden. As the trial court stated, the defendants had ample opportunity at trial to show if they could that the admitted racial imbalance of Columbus Public Schools is a result of social dynamics or of the acts of others for which defendants owed no responsibility. This they did not do.

In our estimation, given the establishment of a system-wide violation and the failure on the part of the Columbus School Board to show why that system-wide violation did not warrant a system-wide remedy --

QUESTION: General Days, Judge Duncan said he wouldn't even attempt to consider the influence of housing. What other social dynamics could the school board have

called to his attention?

MR. DAYS: Judge Duncan, when he issued the statement that Your Honor quoted earlier, was of course operating without the guidance of Dayton. That was a March opinion and, of course, Dayton came down several months later. After the Dayton decision came down, I think the trial court understood that there might be a variety of considerations, but the school board had that burden and I think that, as this Court has indicated in Swann, where there are certainly one-race schools that remain after there has been a showing of a violation, the school board has to come forward and show why those one-race schools do not reflect the continuation of the dual system.

I think what this Court's decisions have indicated is that these types of decisions have to be made on an ad hoc basis, on a case by case basis, given the circumstances of that case.

QUESTION: Didn't Swann also make clear, very clear that there was no constitutional requirements of racial balance to reflect the communities?

MR. DAYS: That's correct.

QUESTION: And we said in Swann that if that is what we found, we would have reversed.

MR. DAYS: That's correct.

QUESTION: We would have disproved what the District Court did.

MR. DAYS: That is what Swann says, Your Honor.

MR. CHIEF JUSTICE BURGER: Your time is expired, Mr. Days.

MR. DAYS: Thank you, Your Honor.

QUESTION: Mr. Days, could I ask you one more question. The government has briefed both of these cases together and can we assume from that and from the comment on page 44 of your brief that you don't regard it as significant that Judge Duncan's findings were affirmed by the Court of Appeals and Judge Reubens' were reversed?

MR. DAYS: I think there is a significance, Your Honor, but I don't think one that should have great consequence, because I think in the Dayton case the Court of Appeals had had a great deal of experience with the facts, had gone through the record on several occasions. So to the extent that the Court of Appeals made factual determinations itself, I believe that those findings should be upheld by this Court.

QUESTION: Is there some authority around for Courts of Appeals entering their own findings when they set aside District Court findings, finding them unsupported as clearly erroneous?

MR. DAYS: Mr. Justice White --

QUESTION: Is there some authority for that?

MR. DAYS: I don't have that authority at the tip of my tongue, Mr. Justice White, but I think as a general matter Courts of Appeals would remand for further determinations using proper principles, but I think it is not unusual nor irregular for a Court of Appeals under the circumstances of a case such as this to make its own determinations.

QUESTION: Can you suggest any one case in which that has been done, Mr. Days?

MR. DAYS: Well, I recabl that in the Fifth Circuit Court of Appeals, in the Austin case, at several earlier stages, the Court of Appeals made its own determinations based upon the record facts that were available to it. So we don't have a Court of Appeals either there or here making determinations outside the record, but simply drawing from the record facts that types of deductions that the case law warrants.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

Mr. Porter, you have two minutes left.

ORAL ARGUMENT OF SAMUEL H. PORTER, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. PORTER: Yes, Your Honor. Imay have created some confusion. We are not accepting the statements of the

District Court concerning system-wide liability nor the need for system-wide remedy, simply those violations for the purposes. That is all I have.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:10 o'clock a.m., the case in the above-entitled matter was submitted.)

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