Supreme Court

October Term, 1977

No. 77-610

COLUMBUS BOARD OF EDUCATION, et al.,
*Petitioners,*
vs.

GARY L. PENICK, et al.,
*Respondents.*

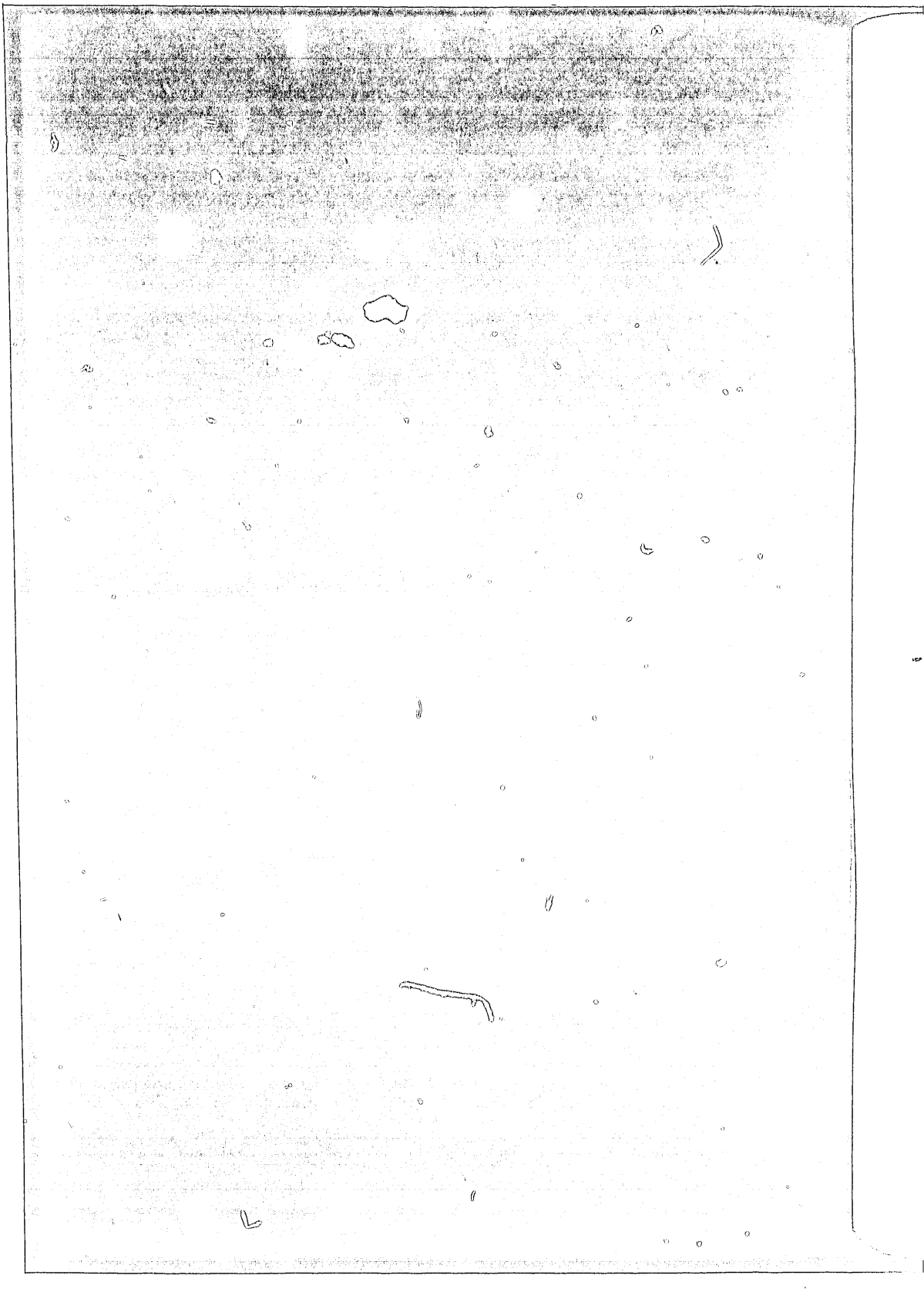
*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

BRIEF FOR THE PETITIONERS


EARL F. [illegible]
CURTIS [illegible]
WILLIAM J. [illegible], Jr.
FOSTER, WINGET, MOORES & ARTHUR
37 West Broad Street
Columbus, Ohio 43215
Telephone:
(614) 227-2000

SAMUEL H. [illegible]
37 West Broad Street
Columbus, Ohio 43215
Telephone:
(614) 227-2000
*Attorney for Petitioners*

*Of Counsel*



## TABLE OF CONTENTS

## TABLE OF CONTENTS (Continued)

## TABLE OF CONTENTS (Continued)

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES (Continued)

## TABLE OF AUTHORITIES (Continued)

## TABLE OF AUTHORITIES (Continued)



### RULES



### OTHER AUTHORITIES

## TABLE OF AUTHORITIES (Continued)

In The

# Supreme Court of the United States

October Term, 1978

No. 78-610

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

vs.

GARY L. PENICK, et al.,
*Respondents.*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The July 14, 1978 opinion of the United States Court of Appeals for the Sixth Circuit [Pet. App. 140-207] is reported at 583 F.2d 787. The March 8, 1977 liability opinion of the United States District Court for the Southern District of Ohio [Pet. App. 1-86] is reported at 429 F. Supp. 229. The District Court's October 4, 1977 memorandum and order [Pet. App. 125-137], imposing a systemwide desegregation plan, is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on July 14, 1978. The petition for a writ of certiorari was timely filed on October 11, 1978, and was granted on January 8, 1979. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Fourteenth Amendment to the United States Constitution, Section 1.

> ". . . . nor shall any such State . . . deny to any person within its judisdiction the equal protection of the laws."

B. Ohio Revised Code, Chapter 33:

> § 3313.48 Free Education to be Provided; Minimum School Year
>
> "The board of education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof. . . ."

## QUESTIONS PRESENTED

1. In a school desegregation case, where mandatory segregation by law has long since ceased, does the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceed the equitable jurisdiction of a federal court where the court has failed to determine how much incremental segregative effect discrete and isolated segregative acts had on the racial composition of the individual schools within the system at the time of trial, as

compared to what the racial composition would have been in the absence of such acts?

2. May a federal court employ legal presumptions, in combination with evidence of discrete and isolated constitutional violations, to justify a systemwide statistical racial balance remedy, where (i) there is no evidence of a causal connection between those unconstitutional actions and the existence of other racially imbalanced schools, (ii) there is a high degree of residential segregation, and (iii) the systemwide remedy would not be warranted by the incremental segregative effect of the identified violations?

3. May a federal court infer segregative intent from the mere assignment of students to schools nearest their homes pursuant to a longstanding, statutorily required and educationally sound neighborhood school policy, where the foreseeable effect of such assignment, because of segregated housing patterns in the urban school district, is to cause some schools to be racially imbalanced?

4. Where there was no direct proof that segregation of students was a factor which motivated the decisions of school officials, may a federal court infer segregative intent solely from evidence that a collateral foreseeable effect of the decisions made would be to continue or increase statistical racial imbalance within schools when the same decisions would have been made for educational and administrative reasons?

## STATEMENT OF THE CASE

### A. Prior Proceedings

This is a school desegregation case involving the public school system of Columbus, Ohio. The original complaint was filed on June 21, 1973, seeking declaratory and injunctive relief concerning an $89.5 million school con-

struction and improvement program. [A. 5-12.][1] The plaintiffs, 14 black and white students and their parents, alleged that the Columbus Board of Education, its individual members, and its Superintendent (hereinafter collectively referred to as the "Columbus Board") had, by virtue of the United States Constitution and certain Board resolutions, a legal obligation of affirmative integrative action in the expenditure of the construction funds. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1343(3) and (4). After the plaintiffs had withdrawn their motion for a preliminary injunction and filed one amended complaint, a second amended complaint was filed on October 22, 1974. [A. 15-30.] The second amended complaint was styled a class action, and it alleged that the Columbus Board had intentionally segregated the public schools by creating and maintaining a neighborhood school policy notwithstanding a segregated housing pattern in the city, by using optional attendance areas, by segregating teachers and principals, and by failing to desegregate. The second amended complaint also named the Ohio State Board of Education and its Superintendent of Public Instruction as defendants and alleged that they were liable for failing to bring about the desegregation of the Columbus public schools.

A motion to intervene was filed by NAACP lawyers on February 5, 1975, on behalf of 11 other black and white students and their parents. [A. 32-43.] The complaint in intervention contained essentially the same allegations as the second amended complaint and sought the systemwide

---

[1] "A. ....." references are to the two volume appendix. "Pet. App. ....." references are to the appendix filed with the petition for certiorari. References to parts of the record not included in the appendix will be designated "R. ....." for citations to the liability trial transcript. Exhibits will be designated "Px ....." for plaintiffs' exhibits, and "Dx ....." for defendants' exhibits.

desegregation of the Columbus public schools. The district court granted the motion to intervene, certified the case as a class action, and designated one of the NAACP lawyers as lead counsel for the entire plaintiff class. [A. 43-46, 50.]

The district court ordered that the trial be bifurcated into separate liability and remedy proceedings. 429 F. Supp. at 264. [Pet. App. 68.] The issue of liability was tried in 36 trial days from April 19 to June 17, 1976. On March 8, 1977, the district court issued its liability opinion and order, including findings of fact and conclusions of law, concluding that the Columbus public schools were unconstitutionally segregated. *Penick v. Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977). [Pet. App. 1-86.] The court enjoined the Columbus Board and the State Board from discriminating on the basis of race in the operation of the Columbus system, and ordered both defendants to formulate and submit proposed systemwide desegregation plans. The court, on its own motion, certified its findings of liability for an immediate appeal under 28 U.S.C. § 1292(b). The judgment was entered on March 9. [Pet. App. 87.]

In accordance with the district court's order, the Columbus Board of Education formulated and submitted a systemwide desegregation plan on June 10, 1977, reserving all rights to appeal. The State Board filed a plan on June 14, 1977. Shortly thereafter, this Court announced its decisions in three major urban school desegregation cases: *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (June 27, 1977); *Brennan v. Armstrong*, 433 U.S. 672 (June 29, 1977); and *School District of Omaha v. United States*, 433 U.S. 667 (June 29, 1977). In all three cases, lower court decisions mandating systemwide remedies were vacated and remanded with the direction that the courts below determine the incremental segregative effect of any unconstitutional school board actions and that they formulate remedies limited to the correction of that effect.

Prompted by these decisions, the Columbus Board, on July 8, 1977, filed an amended desegregation plan designed to racially balance the specific schools identified in the Court's liability decision as being involved in the constitutional violations found.[2] Hearings on all of the plans submitted by the defendants began on July 11, 1977. At the start of the remedy hearings, both the Columbus and State Boards moved the district court to make the determination of incremental segregative effect required by this Court's decisions in *Dayton, Brennan* and *Omaha,* before it proceeded to fashion a remedy. [A. 53-63, 715-30.] The Court denied these motions [A. 740-41.]

On July 29, 1977, the district court issued its order rejecting the desegregation plans formulated by the Columbus and State Boards and ordered development of a new systemwide racial balance remedy plan. [Pet. App. 97.] As it did with its liability decision, the district court certified its July 29 order for interlocutory review.

On August 31, 1977, the Columbus Board, as directed, filed a desegregation plan which conformed to the requirements of the district court's July 29 order that every school in the Columbus system be racially balanced. On October 4, 1977, the district court entered an order approving the plan and ordering that it be implemented in September, 1978. [Pet. App. 125.] A judgment to that effect was entered on October 7. [Pet. App. 138.]

The Columbus Board of Education took interlocutory appeals under 28 U.S.C. § 1292(b) from the liability order and judgment and from the July 29, 1977 interim remedy

---

[2]The district court entered a Memorandum and Order on July 7, 1977, granting leave to file the amended plan. [Pet. App. 90.] Although it permitted the plan to be filed, the district court stated its opinion that this Court's decisions in *Dayton, Brennan* and *Omaha* had no effect on this litigation, and that "systemwide liability is the law of this case pending review by the appellate courts." [Pet. App. 95.]

order. The Sixth Circuit granted the Board's petitions for permission to appeal. [A. 51-53, 176.] The Board also appealed the final October 4 remedy order and judgment. [A. 177.] The three appeals were consolidated in the court of appeals and argued on February 15, 1978.

On July 14, 1978, the court of appeals entered an opinion and judgment affirming the district court's orders and judgments with respect to the Columbus Board, but remanded the case for additional and more detailed findings pertaining to the motivation for the State Board's failure to cause desegregation of the Columbus public schools, and the effect of any such failure "as suggested in *Dayton.*" [Pet. App 140, 200-207.]

On August 11, 1978, Mr. Justice Rehnquist stayed the Sixth Circuit's mandate and the execution and enforcement of the judgments, pending the timely filing of a petition for a writ of certiorari. ___ U.S. ___, 58 L.Ed. 2d 55. [Pet. App. 217.] The petition was timely filed on October 11, 1978, and was granted on January 8, 1979. Under the terms of Mr. Justice Rehnquist's order, the stay remains in effect pending the issuance of the mandate of this Court.

**B. The Columbus City School District**

In 1976, the year in which this case was tried, the Columbus City School District's enrollment was 95,998 students, making it the second largest school district in Ohio in student enrollment. The system was organized into 123 elementary schools (grades K-6), 26 junior high schools (grades 7-9), three junior-senior high schools (grades 7-12), 13 senior high schools (grades 10-12), and five special schools. Except for the special schools and five alternative or magnet elementary schools, all schools served neighborhood attendance areas.

The racial composition of the total student enrollment in 1975-76 was 67.5% white and 32.5% non-white. Almost

all of the non-white students in the Columbus system are black students. Since Columbus schools were constructed and are operated under the neighborhood school concept, the racial compositions of the schools reflected the residential patterns of Columbus. The Columbus Board of Education has, however, implemented various voluntary educational programs and student transfer plans to improve racial balance and to provide every student with an opportunity for integrated educational experiences.

The racial compositions of the student enrollments varied greatly among the 170 schools operated by the Columbus public schools in 1975-76, as is shown in the 1975-76 HEW Civil Rights Survey. [A. 745-50 (Px 11).] For example, the racial compositions of the three junior-senior and thirteen senior high schools as shown in the survey were:

| School | % Black Enrollment |
|---|---|
| Briggs | 16.1 |
| Brookhaven | 13.3 |
| Central | 30.2 |
| East | 99.0 |
| Eastmoor | 36.6 |
| Independence Jr-Sr | 12.4 |
| Linden | 89.5 |
| Marion-Franklin | 44.0 |
| Mifflin Jr-Sr | 62.6 |
| Mohawk Jr-Sr | 72.7 |
| North | 18.5 |
| Northland | 6.8 |
| South | 45.1 |
| Walnut Ridge | 7.4 |
| West | 16.0 |
| Whetstone | 3.9 |

Although most schools in the Columbus system have racially mixed student bodies, the lower courts applied a strict statistical definition in characterizing schools as "white schools" or "black schools." The district court's formulation of the definition was as follows:

> "The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools."
> 429 F. Supp. at 268-69. [Pet. App. 78.]

The "statistical variance" or "range" adopted by the district court was ± 5% for the period 1950-57, ± 10% for 1957-64, and ± 15% for 1964-75. The court of appeals concurred with the use of the statistical measure. 583 F.2d at 799-800. [Pet. App. 160-162.] Under this analysis, any school with a black student population outside of a range of 17.5% to 47.5% was "racially identifiable." Schools with racial compositions greater than 82.5% white were characterized as "identifiably white" or "white schools." Schools with racial compositions greater than 47.5% black were characterized as "identifiably black" or "black schools." As will be demonstrated later, the lower courts predicated their judgments of systemwide liability, and the imposition of a systemwide statistical remedy, on the Columbus Board's failure to balance all "racially identifiable" schools.

To put the organization and racial composition of the Columbus public schools at the time this case was tried in 1976 into a proper perspective, it is helpful to review the dynamic growth of the school system in enrollment and geographic area, the racial characteristics of residential patterns in the City of Columbus, the school system's long-standing adherence to a neighborhood school policy, and the Columbus Board's efforts to encourage integration and better racial balance in the schools through voluntary programs consistent with the neighborhood school concept. With such a perspective, this brief will then discuss the evidence of school board actions which the plaintiffs claimed had been motivated by discriminatory intent, and the district court's findings of isolated instances of discriminatory action.

### 1. *Growth in Enrollment and Geographic Area*

As the district court recognized, 429 F. Supp. at 236-37 [Pet. App. 11], it would be impossible to evaluate the record in this case without an appreciation of the tremendous growth of the City of Columbus and its school system within the past 25 years, and the impact of this growth upon the decisions of those officials responsible for providing a quality education to students within the system.

The City of Columbus increased markedly in geographic size and population during the period 1950-1975. As a result of an aggressive annexation policy, the area of the city grew from 40 square miles in 1950 to over 173 square miles in 1975. 429 F. Supp. at 237. [Pet. App. 12; A. 752-766 (Px 63); A. 238-39.] The extensive and continuous expansion by annexation during this period was unique among eastern and midwestern cities. [A. 238-41, 296-98.] Dr. Karl Taeuber, an urban sociologist called as an expert witness by the plaintiffs, characterized this growth as "unusual," and acknowledged that, with the sole

exception of Dallas, Texas, no other city experienced greater growth by annexation during this period. [A. 297-98; 307-8.]

As a result of annexations, increased birth rates, and in-migration, the population of the City of Columbus grew dramatically during the same period. This growth is illustrated by the following table:

COLUMBUS, OHIO
Population 1940 - 1970

| Census Year | Total Population | Increase Since Prior Census | Increase Since Prior Census |
|---|---|---|---|
| 1940 | 303,087 | 15,523 | 5.3% |
| 1950 | 375,901 | 69,814 | 22.8% |
| 1960 | 471,316 | 95,414 | 25.4% |
| 1970 | 539,677 | 68,361 | 14.5% |

429 F. Supp. at 237. [Pet. App. 12; Px 253, 254, 255, 256.]

This population growth was also unique, since most large midwestern and eastern cities lost population during the same period.

Because of the high birth rate [A. 755 (Px 63); A. 238-39.], Columbus school enrollments grew even faster than the general population during this period. Enrollments increased from 46,352 in 1950-51 to 83,631 in 1960-61, and to 110,725 in 1971-72. 429 F. Supp. at 237. [Pet. App. 12; Px 63, p. 44, Px 4-10; A. 745-50 (Px 11).][3] Enrollments then gradually declined to 95,998 at the time of trial. 429 F. Supp. 237. [Pet. App. 12; A. 745-50 (Px 11).]

[3]The average rate of growth was 3,700 students per year in the 1950s, and 2,700 per year in the 1960s. This rapid rate of growth required the addition of an average of 100 classrooms per year for the period 1950-1970.

As a result of the Columbus Board's policy of making school district boundaries coterminous with the city boundaries, the school district's annexations kept pace with those of the city and contributed to the growth in size and population of the school system. While most of these annexations involved new residential areas, or undeveloped land ready for new housing, the school district also acquired developed areas which had school facilities already in place. In 1956, the Scioto Trail and Sharon elementary schools were acquired in separate annexations. [Dx C-72, p. 40.] In January, 1957, the entire overcrowded Marion-Franklin Local School District, located immediately south of the Columbus district, was merged into the system. As a result, the system acquired the Clarfield, Fornof, Heimandale, and Smith Road elementary schools, Beery Junior High School, and Marion-Franklin High School. [Dx C-72, p. 40; Px 62, p. 48.] On December 30, 1957, following a municipal annexation, the school system acquired the Courtright elementary school from the Whitehall school district. [Dx C-72, p. 40.] In 1968, Columbus acquired the Homedale elementary school from the Worthington school district. [A. 363-64.] By 1968, only a few of the areas annexed to the city had not been incorporated into the school district. [A. 764-66 (Px 63, p. 18-19).]

Effective July 1, 1971, the entire Mifflin Local School District was transferred to the Columbus District. At that time Mifflin served some 3,300 students at South Mifflin, Cassady and East Linden elementary schools and at Mifflin Junior-Senior High School. [A. 363.] Prior to the transfer, the Mifflin school system was extremely overcrowded, was financially unable to provide a quality education, and had lost its accreditation from the North Central Association of Schools. [A. 237-38, 690-92; R. 5587; Px 360, pp. 6-7.] Also in 1971, the State Board approved the transfer of 14 parcels of land to the Columbus school district from seven sur-

rounding school districts. [A. 688-89, 690-92.] Although some were delayed by litigation, all of the transfers were effective as of July 1, 1976, following a decision of the Ohio Supreme Court. [A. 363-64.] *In re Proposed Annexation by the Columbus City School District*, 45 Ohio St. 2d 117, 341 N.E. 2d 589 (1976). The area transferred from the Westerville school district alone included over 2,600 students in 1976. [A. 690-91.]

The phenomenal growth in the school district's area and population prompted the district court's conclusion that rapid growth "[o]bviously . . . demanded new school facilities and placed pressures upon the school officials seeking to provide quality school facilities for expanding enrollments in a continually enlarging geographic area." 429 F. Supp. at 237. [Pet. App. 12.]

### 2. *Residential Patterns*

While an understanding of the tremendous growth of the city and school system is critical to an evaluation of this case, it is also necessary to consider the characteristics of that growth and the residential mosaic into which it developed.

Although the overall population of Columbus grew at a rapid rate from 1940, the black population increased at an even greater rate. In 1940, 11.7% of the population was black. During the next 30 years, total black population nearly tripled, and in 1970 was 18.5% of the total Columbus population. 429 F. Supp. at 237. [Pet. App. 12; Px 253-256.] The black student composition of the Columbus schools, always well in excess of the percentage of blacks in the general population, grew at a steady rate to 29% of total enrollment in 1970, and to 32.5% in 1975. *Id.*

As in most large cities in the United States, the black residential population of Columbus is concentrated within

a geographically contiguous area.[4] In 1970, 71% of the black population resided within 23 contiguous census tracts located in the east central area of Columbus. 429 F. Supp. at 237. [Pet. App. 13; A. 249; Px 349.] The degree of residential racial imbalance in Columbus was statistically demonstrated by Dr. Taeuber's computation of a "segregation index" to measure and illustrate the relative degree of separation or non-dispersal of black and white residents. 429 F. Supp. at 258. [Pet. App. 56-57; A. 282-83.]

Dr. Taeuber computed the following residential segregation indices for Columbus:

| | |
|---|---|
| 1940 | 87.1 |
| 1950 | 88.3 |
| 1960 | 85.3 |
| 1970 | 84.1 |

429 F. Supp. at 258. [Pet. App. 57; A. 283.]

[4]According to the plaintiffs' expert, Dr. Taeuber, all cities in the United States are residentially segregated. Dr. Taeuber was quoted as follows by Mr. Justice Powell in his separate opinion in *Keyes v. School District No. 1*, 413 U.S. 189, 223 n. 9 (1973) (Powell, J., concurring and dissenting):

> "As Dr. Karl Taeuber states in his article, Residential Segregation, 213 Scientific American 12, 14 (Aug. 1965):
>
> > 'No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand, and in cities that are progressive in their employment practices and civil rights policies as well as those that are not.'
>
> In his book, Negroes in Cities (1965), Dr. Taeuber stated that residential segregation exists 'regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation and discrimination.' Id., at 36."

An index of "0" would mean that every city block had the same proportion of black and white residents, while an index of "100" would indicate that each city block had either all white or all black residents. The index, of course, measures only statistical dissimilarity, and is incapable of indicating the cause of residential racial separation. [A. 229.]

Dr. Taeuber testified that the development of segregated housing patterns depends upon a "myriad" of facts and circumstances, and that patterns will vary among localities. [A. 306, 307.] However, Dr. Taeuber testified that the causes of segregated residential patterns could be grouped into three categories: choice, economics, and discrimination. [A. 300.] The choice factor relates to common cultural, religious, and language traditions, and patterns of life. Consequently, the large in-migration of blacks to the cities after World War II was characterized by the movement of new black residents to established black residential areas, not unlike the pattern seen for European immigrants to this country's cities in the late 19th and early 20th centuries. [Tr. 285-86, 304, 1749.]

Dr. Taeuber recognized economics as a major cause of residential segregation, but noted that there is a high degree of residential segregation even among blacks and whites of comparable income.[5] [A. 289-94.]

Within the third general category, discrimination, Dr. Taeuber acknowledged a recent article in which he listed

---

[5]Dr. Taeuber has estimated that economic constraints account for from 20 to 25 percent of housing segregation. TAEUBER, PATTERNS OF NEGRO-WHITE RESIDENTIAL SEGREGATION 18 (Rand Corp. paper #4288, 1970). Others have estimated the economic factor to account for between 40 and 50 percent of residential segregation. PASCAL, ECONOMICS OF HOUSING SEGREGATION 177-78 (Rand Corp. research memo #5510, 1967). *See*, Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, 73 n. 29 (1978).

all of the discriminatory practices he considered responsible for residential segregation.[6] Noticeably absent from Dr. Taeuber's list was any reference to school construction or assignment policies.

The plaintiffs introduced a large volume of evidence concerning a number of the discriminatory housing practices as they occurred in Columbus. However, there was no evidence that Columbus school officials participated in these practices, or even had any knowledge of them, and the district court made no findings which implicated school officials in connection with any of these actions.

Nonetheless, the plaintiffs attempted to shift the responsibility for residential segregation onto school officials through the testimony of Martin Sloane, who offered his opinion that there was a "reciprocal effect" between racially imbalanced schools and the racial character of the neighborhood. [A. 339-41.] Mr. Sloane, a lawyer, was unqualified by education or experience to offer such an opinion, and offered no empirical evidence to support his general observation. Specifically, he made no study of

---

[6]The nine practices listed were: (1) racially motivated site selection and assignment policies of public housing authorities; (2) racially motivated site selection, financing, sale and rental policies of FHA and VA; (3) racially motivated site selection, relocation and redevelopment policies of urban renewal programs; (4) zoning and annexation policies; (5) restrictive covenants; (6) policies of financial institutions that discourage prospective developers of racially integrated private housing; (7) policies of financial institutions that allocate mortgage funds and rehabilitation loans to blacks only if they live in black areas; (8) practices of the real estate industry such as limiting the access of black brokers to realty associations and multiple-listing services, refusal by white realtors to co-broker on transactions that would foster racial integration, block-busting and panic selling, racially identifying vacancies overtly or by nominal codes, steering, and penalizing brokers who attempt to facilitate racial integration; and (9) racially discriminatory practices by individual homeowners and landlords. [A. 300-302.]

conditions in Columbus, and admitted he had no previous contact with the city. [A. 326.]

3. *Neighborhood School Policy*

The Columbus Board of Education, as required by Ohio law, has consistently adhered to a neighborhood school policy since before 1900.[7] In Columbus, the essence of the neighborhood school policy has been to assign students to schools within a reasonable distance of the students' residences, so that the vast majority can walk to school. [A. 227-28, 576-77, 625-29.] The success of this policy is illustrated by the fact that less than 10 percent of students in the Columbus system were required to be transported for safety and distance reasons in 1975-76. [A. 233-34.]

In pursuit of this policy, school attendance area boundaries are designed so that students are within walking distance of their schools. [A. 227-28, 625-28.] Boundaries are therefore defined on a geographical basis, and take into account natural barriers such as rivers, superhighways, and major thoroughfares. [A. 227.] At the elementary level, boundaries are based upon a walking distance of three quarters of a mile. Junior high boundaries are based upon a one and one-half mile walking radius, and senior high areas are based upon a two mile radius. 429 F. Supp. at 238. [Pet. App. 14.]

The neighborhood school policy, as pursued in Columbus, has many benefits. It provides for schools convenient

---

[7]Section 3313.48, OHIO REVISED CODE, requires Ohio school boards to provide free education to students residing within their districts "at such places as will be most convenient for the attendance of the largest number thereof." The Sixth Circuit has interpreted this statute to require Ohio boards of education to adhere to a neighborhood school policy. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

to the home and parents so that a good relationship can be established between school and home, and parent-teacher communications can be improved. By reducing time and distance of travel to a minimum, it also reduces the cost of transportation.[8] [A. 228.]

4. *Voluntary Efforts to Improve Racial Integration*

Employment of a neighborhood school policy in a residentially segregated setting necessarily results in some schools which are racially imbalanced. However, in the past 10 years, the Board has sought to increase racial balance in the schools without departing from the basic neighborhood school policy. Since 1967, the Board has taken racial balance into account when redrawing attendance boundaries, and has pursued an open enrollment plan. 429 F. Supp. at 239. [Pet. App. 16; Px 197; R. 1007-08, 5179.] In April, 1973, the Board adopted the "Columbus Plan." Under the Plan, students may transfer to other schools in the district to improve racial balance or to take advantage of unique educational programs. 429 F. Supp. at 239. [Pet. App. 17-18; Px 82; R. 717-723.] Since 1975, transportation has been provided for full-day racial balance transfers. *Id.* Magnet schools and city-wide career centers have been established, all of which had integrated enrollments when this case was tried. 429 F. Supp. at 239-40. [Pet. App. 18; A. 745-50 (Px 11).] As a result of these programs and policies, the Columbus Public Schools are substantially more balanced racially than the general population. The dissimilarity indices computed by Dr. Taeuber for the schools demonstrated that the school population is substantially more integrated than the residential population of Columbus. [A. 802 (Px 505).]

---

[8] OHIO REVISED CODE § 3327.01 requires school boards to provide transportation to students in grades K-9 who live more than two miles from school.

## C. School Board Actions Alleged to be Unconstitutional

As has already been demonstrated, the period 1950-1975 was one of phenomenal growth for the Columbus school system. This rapid growth in area and population put extreme pressures on school officials to continue to provide quality facilities and education for Columbus students.

The great majority of the thousands of administrative actions challenged as intentionally discriminatory by the plaintiffs were undertaken in direct response to the pressures imposed by the rapid growth of the school system. Expanding enrollments during this period required the construction, on average, of over 100 new classrooms each year, while educational improvements such as reduced class sizes, larger libraries, expanded vocational programs, and programs for the handicapped simultaneously reduced existing capacities or required new classrooms. School officials were also required to use various temporary measures to provide adequate facilities until permanent capacity was constructed, including boundary adjustments, rental facilities, transportation, and extended sessions. Yet, even while employing an erroneous standard for proof of discriminatory intent, the district court found only a few isolated actions during this period to be intentionally discriminatory.

### 1. *School Construction*

In the period 1950-1975 the Columbus Board constructed 103 new school buildings and over 145 additions to buildings to meet growing enrollments within an expanding geographic area. Before constructing new school facilities, the Columbus Board sought the expert assistance and recommendations of the Bureau of Educational Research, a unit of the College of Education of Ohio State University. The Bureau prepared detailed studies of school plant needs in 1950, 1953, 1955, 1958, 1963 and 1968. [Px

59, 60, 61, 62, 63, 64.] As noted by the district court, the Bureau studied and reported on community growth characteristics, educational programs, enrollment projections, the system's plan of organization, the existing plant, and the financial ability of the community to pay for new school facilities. 429 F. Supp. 237-38. [Pet. App. 13-14.] The Bureau then made specific recommendations for the size and location of new schools and additions to existing schools. *Id.* The district court found these studies to be "comprehensive, scientific and objective." 429 F. Supp. at 237. [Pet. App. 13.]

The Ohio State University building studies did not make racial compositions of schools or neighborhoods a factor in the process of identifying building needs and making recommendations. [A. 577.] Data concerning racial compositions of schools and neighborhoods were not even collected. [A. 598-99.] The plaintiffs' expert, Dr. Gordon Foster, agreed that race was not a factor in the studies and recommendations of the Bureau. [A. 541.]

The evidence showed that the Bureau's recommendations were followed by the Columbus Board in the construction of new schools and additions, and in the location of new sites, with the exception of the recommendations contained in the 1968 study, which could not then be implemented because the 1968 school building bond issue was rejected by the voters. The district court found that "[s]chool construction of new facilities and additions to existing structures were accomplished in substantial conformity with the Bureau's periodic studies and recommendations." 429 F. Supp. at 238. [Pet. App. 14.]

In 1972, a building study was undertaken for the Board by a large-scale community task force known as Project UNITE. 429 F. Supp. at 239. [Pet. App. 16.] The Project UNITE building report recommended a specific construction program similar to that recommended in Ohio State's 1968 Report. [Px 219.] The recommendations were adopted by the Board, and implemented with funds

generated from an $89.5 million bond issue passed in November, 1972. [A. 661-62, 674-82.]

A table listing each school in the system at the time of trial, its construction date, and the reference to the specific recommendation for construction of the school by the Bureau of Educational Research or by Project UNITE, has been compiled from the various building studies and is included at the conclusion of the brief.

As the district court recognized, the selection of sites for new schools involved weighing numerous complicated factors. 429 F. Supp. at 241. [Pet. App. 20.] In selecting school sites, the Columbus Board considered the following factors:

1. Location of existing buildings;
2. Land use pattern, including the actual and proposed development of the community;
3. Availability of satisfactory land, including size, shape, contour and related characteristics;
4. Availability of basic services such as gas, water, street, storm sewer and sanitary sewer;
5. Traffic patterns, natural boundaries and related factors and the future development of appropriate attendance areas;
6. Desirable size of schools, including the type of outdoor facilities desirable for the school and community;
7. Short-range, intermediate-range and long-range site and construction plans for the district;
8. Economic factors, including initial cost and development costs.

[A. 684-85.]

As has already been noted, since 1967 the Board has made it a policy to also evaluate, as an additional factor, the degree to which the site enhances the probability of providing a racially balanced school population. Even so, as the district court recognized, opportunities to enhance

racial balance through site selection were limited, noting that such opportunities existed only "in those areas of the city where the population shifts from one race to another." 429 F. Supp. at 243. [Pet. App. 25.]

Although the district court stated that in "some instances" new schools could have been sited with an integrative, rather than a segregative effect, the court could find fault with the site selection and boundaries of only two new schools, out of a total of 103 constructed during the period 1950-1975. Although the plaintiffs also challenged a great number of school building additions as segregative, the district court made no finding that any of the 145 additions were racially motivated. Thus, out of 248 separate construction projects completed during a 25 year period, almost all of which were done exactly as recommended by the Ohio State University consultants, the district court made adverse findings with respect to only two new school projects.

The first of these was Sixth Avenue, an elementary school primary center (grades K-3) constructed in 1961. The construction and site of this primary school, as well as its grade organization and size, were recommended in the 1959 Ohio State University building study. The site was located in a highly developed area of the city, where pupil density had increased rapidly since 1957. [A. 751 (Px 62, p. 58).] The nearby Weinland Park and Second Avenue schools were already severely overcrowded. Although eight rooms had been added to Weinland Park in 1957, its 1960-61 enrollment was 174 students over capacity. [Px 1; Px 22; Px 35; Px 62, p. 50.] Although four rooms had been added to Second Avenue in 1957, its 1960-61 enrollment was 108 over capacity. [Px 1, Px 22; Px 35; Px 62, p. 50.]

When the Sixth Avenue School opened in 1961-62, it drew students in grades K-3 from a portion of the former Weinland Park attendance area and a small section of the Second Avenue attendance area. The school was located

in the center of its attendance area, thus making it accessible to students without the necessity of transportation. [Px 258D.] Students in the Sixth Avenue attendance area in grades 4-6 continued to attend Weinland Park. [A. 320.]

Even with the opening of Sixth Avenue, the student population in the Sixth Avenue-Weinland Park-Second Avenue area continued to exceed capacity. In the 1961-62 school year, when Sixth Avenue opened, all three schools had enrollments that significantly exceeded their capacities. [Px 1.] The opening enrollment of Sixth Avenue was 40 students over capacity. [Px 1; Px 64.]

During the time that Sixth Avenue was operated, it had a predominantly black student enrollment. However, Sixth Avenue was closed in 1973, and its students were reassigned to Weinland Park and Second Avenue, with the result that both schools had racially balanced enrollments at the time the case was tried. 429 F. Supp. at 242. [Pet. App. 23-24; A. 745-50 (Px 11).] The Sixth Avenue building has since been used as a teacher resources center.

The second school construction project faulted by the district court was Gladstone Elementary. The construction of Gladstone was specifically recommended in the 1963-64 building study by Ohio State, to be located near Gladstone Avenue and 24th Avenue to provide classroom space for rapid enrollment increases in the area. [A. 766-67 (Px 64, p. 65).] Nearby Duxberry Park Elementary was severely overcrowded, being 350 students over capacity in 1964-65. [Px 1; A. 766-67 (Px 64, p. 65).]

When Gladstone opened in 1965-66, its attendance area was the western portion of the former Duxberry Park attendance area. The Gladstone area was bounded on the east by the Pennsylvania Railroad, on the south by 17th Avenue, on the west by Cleveland Avenue, and on the north by Maynard Avenue. [Px 258G.] The railroad divided the Gladstone area from the Duxberry Park attendance

zone, so that children west of the railroad no longer had to be transported to Duxberry or to cross the railroad.

The district court speculated that if Gladstone had been constructed north of the site recommended by Ohio State University, and if attendance boundaries had been redrawn for several surrounding schools, the result might have been an integrative effect on Hamilton, Duxberry, and Gladstone. Even if this were so, however, the expanding black population in this northeast area, acknowledged by the district court, 429 F. Supp. at 241 [Pet. App. 21-22], would have made this effect only temporary. As indicated in the 1975-76 HEW enrollment survey, by October, 1975, the enrollments of Hamilton, Duxberry, and Gladstone had each become predominantly black. [A. 745-50 (Px 11).] Nearby Linden Elementary, which the district court noted to have been 100% white in the early 1960s, 429 F. Supp. at 242 [Pet. App. 22], had become racially balanced (31.3% non-white) by the 1975-76 school year. [A. 745-50 (Px 11).]

The only other school construction project mentioned in the district court's opinion was Innis Road Elementary, which opened in 1975. Neither the construction nor the site selection of this school was criticized by the district court. Rather, the court drew an inference of segregative intent from the Board's decision not to pair Innis with Cassady Elementary.[9]

The 1972 Project UNITE Building Report recommended the construction of a new elementary school near Cleveland Avenue and Innis Road. [Px 219, Summary of

---

[9]"Pairing" is the combination of two schools' attendance areas with contrasting racial compositions. Students in the combined area attend one or the other school depending upon the grade level of the student. The result is that both schools have student bodies with substantially similar racial compositions. See, e.g., *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 409 n. 3 (1977).

Building and Site Needs, p. 23.] This area was in the former Mifflin Local School District which had been transferred to the Columbus district in 1971. 429 F. Supp. at 248. [Pet. App. 35.] Cassady Elementary School, which had come into the Columbus system as a part of this transfer, was extremely crowded [A. 237-38], and Innis was constructed to relieve this overcrowding. As recommended in the Project UNITE Building Report, Innis was built to the north and west of Cassady near Cleveland Avenue and Innis Road. The school opened in 1975. 429 F. Supp. at 248. [Pet. App. 36.]

In establishing the attendance area for the new Innis school, the Board was presented with two alternatives. The first alternative was to pair Innis and Cassady, making Innis a grades K-3 primary center and Cassady a grades 4-6 intermediate center, with the two schools serving the combined two-school attendance area. Under this proposal, black enrollments in each of the two schools were projected to be between 50 and 60 percent.[10] [Px 468.] However, the pairing of the schools would have required additional transportation because of the large size of the combined attendance area.

The second alternative was to assign to each school a separate neighborhood attendance area consistent with the

---

[10]In fact, had the pairing proposal been adopted, and the reassignment of students had occurred in 1975-76, *both* Innis and Cassady would have been "black schools" under the standard of racial identifiability employed by the district court. 429 F. Supp. 268-69. [Pet. App. 78-79.]

An examination of the enrollment and racial composition of the two schools in 1975-76 indicates that, if the two attendance areas were combined, there would have been a total of 1158 black and white students in the combined attendance area. [A. 745-50, (Px 11).] Of these students, 701, or 60.5% would have been black. If black students were evenly dispersed into both schools, each would have had a black student composition of 60.5% -- both "black schools" under the district court's definition.

Board's neighborhood school organization. Under this alternative, both schools would retain the grades K-6 elementary organization. The Board chose not to pair the schools.

There was ample justification for the Board's choice. The pairing alternative would have required additional transportation, and would have required a departure from the K-6 organization which then prevailed in every elementary school in the system, with the exception of Colerain school which is a crippled children center for grades K-3.

2. *Pupil Assignment*

a. *Optional zones*

During the period of enormous enrollment growth in the system, the Columbus Board employed a number of optional attendance zones.[11] Dr. Fawcett, Columbus superintendent from 1949-1956, and President of Ohio State University from then until 1972, testified that because of rapid enrollment growth, the school system tried to keep some flexibility in adjacent school boundaries to alleviate overcrowding. Optional zones were used for this purpose, as well as for safety or distance reasons. Optional zones were also used to phase in new secondary schools, one grade each year. [A. 633-36.] Dr. Fawcett testified that optional zones, which were always between adjacent districts, had no racial significance. [A. 576.] Only four optional zones remained in 1975-76, and these were scheduled to be discontined with the opening of four new high schools in September 1976. [R. 694-95.]

Of the 41 optional zones which were in existence for various lengths of time during the period 1955-1975, the

[11]An optional zone is an area in which students may opt to attend a specific school other than the one which otherwise serves that area. The student has a choice as to which of two or more schools to attend. 429 F.Supp. at 269 [Pet. App. 80.] See also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 412 n. 8 (1977).

plaintiffs' expert, Dr. Gordon Foster, found only 11 which he believed had "racial implications," (*i.e.*, had a possible impact upon the statistical racial composition of schools) based entirely upon his analysis of census data.[12] The dis-

---

[12]In 1955-56, there were 26 optional zones in existence, 19 at the elementary level, three at the junior high level, and four at the senior high level. [Px 61, figs. 2, 3, 4.] Dr. Foster's analysis of census data indicated only a few of these to have had possible "racial implications."

The Franklin-Roosevelt option, established in 1955-56 and discontinued in 1960-61, was a one block area along the south side of the primarily commercial Main Street for about 18 blocks. [A. 461-62.] The area was not heavily populated. The non-white composition of many of the blocks was not reported in the census data because of so few units. [Px 255.] Blacks and whites resided in the zone in 1950 and 1960. [Px 250; Px 251; Px 254; Px 255.] The census data, however, only give the number of housing units occupied by non-whites. They do not give any information about the actual number of non-white persons or, more importantly, the number of non-white or white school age children in the block. [Px 254; Px 255.]

The downtown optional zone encompassed the central business district of Columbus. [Px 61, fig. 2; A. 478-79.] The zone had been a neutral or optional zone for a long time. [A. 483.] It continued until 1975 in one form or another with students in the area having the choice of attending any of from four to seven schools. Some of the schools were predominantly white, some were predominantly black, and some were about equal. [A. 480-83.] The census data show a mixed population in the area in 1940, 1950, 1960 and 1970. [Px 253-256; A. 479-80.] Dr. Foster believed this zone had racial implications because "ordinarily" whites choose to go to predominantly white schools. But there is no evidence that occurred. Moreover, there is no evidence that the Columbus Board intended to segregate by means of this option. The black students in the area could also choose to attend any of the predominantly white schools involved, which choices would have had an integrative effect. [A. 535-37.]

There was no reliable evidence that any of the other options discussed by Dr. Foster (Highland-West Mound; Highland-West

(Footnote 12 continued on page 28)

trict court, however, found only a few of these to be intentionally discriminatory.

The district court first discussed the "near-Bexley" optional zone which was in effect from 1959-1975 on the east side of Columbus. The option permitted students in this predominantly white area to attend elementary, junior and senior high schools which were "whiter" than those

---

(Footnote 12 continued)

Broad; Pilgrim-Fair) were purposely designed to segregate students. However, the district court drew an inference of segregative intent from the creation of the two Highland optional zones. These zones are discussed further in the text at pp. 29-31, *infra.*

A total of 15 optional zones were established in the period 1957-75. Of these, Dr. Foster again found only a few to have had a possible racial effect.

The option between Central and North high schools, created in 1960-61, was not racially motivated. [Px 258C; Px 305.] Central has never been a majority black school. In 1964, Central was 27 percent black and North was 7 percent black. [Px 12.] This optional area is about equidistant from these two schools. In 1975-76, Central was 30.5 percent black and North was 18.5 percent black. [A. 745-50 (Px 11).] The option did not have any racial effect.

The option established in 1962 between East and Linden-McKinley was not racially motivated. [Px 258E; Px 307.] The area had a low density population and included a railroad yard. [R. 3696-97.] The optional area was formerly in the East High School attendance area. [Px 306; 307.] The optional area was predominantly black in the 1960 census. [Px 255, 251, 306, 307.] In order to attend East High, students in the area had to cross a railroad yard. [A. 466-67.] Thus, the option allowed students to avoid a hazard. If black students in the area opted to attend Linden, this optional area had integrative effects. [Px 12.] There was no evidence of racial intent or effect in this option. [Px 258E; Px 306; Px 307; R. 3696-3699.]

Dr. Foster also found a racial effect from the creation of an optional zone which the district court named the "near-Bexley option." The evidence concerning this option is discussed in the text at pp. 28-29, *infra.*

they would otherwise have attended.[13] 429 F. Supp. at 244-45. [Pet. App. 28.]

Although there was no direct evidence of segregative motivation in the establishment of this option, the district court found that it was not created for racially neutral reasons. Even if this were conceded, however, the evidence established the absence of any current segregative effect. The record indicates that only one or two students in the area were enrolled in the Columbus Public Schools. [A. 770 (Px 140).] Furthermore, with the exception of Fairmoor Elementary, all schools at the receiving end of the option were racially balanced.[14] This optional zone was terminated at the end of the 1974-75 school year. [A. 450.]

The district court also found that the creation of two optional zones on the west side of Columbus "had a substantial and continuing segregative impact" on four elementary schools. 429 F. Supp. at 245-47. [Pet. App. 29-33.]

The first optional zone discussed by the court was established in 1955, and was terminated in 1957. It permitted students in a portion of the Highland Elementary attendance area to attend either Highland or West Broad. Although no enrollment data by race was available for these schools during the time the option was in existence, the court concluded that West Broad was predominantly black on the basis of Dr. Foster's interpolations from census data and the 1964 racial composition of both

---

[13]Students in the option area would normally have attended Fair Avenue Elementary (96.7% black in 1974-75), Franklin Junior High (93.7% black) or East Senior High (98.9% black). The option permitted attendance at Fairmoor Elementary (4.6% black), Eastmoor Junior High or Johnson Park Junior High (45.3% black and 26.7% black, respectively) and Eastmoor Senior High (34.9% black). [A. 776-86 (Px 383).]

[14]*See* n. 13, *supra.*

schools.[15] Census data indicated that the option area was predominantly white in residential population. 429 F. Supp. at 245. [Pet. App. 30-31.] The optional zone was eliminated in 1957, and the area was permanently reassigned to West Broad. 429 F. Supp. at 246. [Pet. App. 30.]

Another optional zone involving Highland was created in 1955, and was terminated in 1961. 429 F. Supp. at 246. [Pet. App. 31-32.] This option permitted students residing in a portion of the Highland attendance zone to attend West Mound Elementary. Relying on census data, the court concluded that the optional zone was predominantly white, and that it permitted students to attend the "whiter" West Mound.

The Court acknowledged that Highland was overcapacity during this period [A. 472], that West Mound was undercapacity, and that the option eased the capacity problem. 429 F. Supp. at 246. [Pet. App. 31-32.] Nonetheless, the court speculated that the capacity problem might have been alleviated by choosing a "blacker" optional zone, or by completely redrawing attendance boundaries for Highland, West Broad, West Mound, and Burroughs.

---

[15]A large portion of the statistical evidence relied upon by Dr. Foster was derived from the interpolation of census data. It is simply not possible to interpolate census data between the ten year census periods without risking sizeable error. This is particularly true in a city like Columbus where there were rapid changes in area, population, and racial composition in the periods between censuses. See *Castenada v. Partida*, 430 U.S. 482, 506-7 (1977) (Burger, C.J., dissenting). Statements in the record concerning the probable racial compositions of neighborhoods served by various schools must therefore be read with a great deal of caution.

Statements concerning the probable racial composition of various schools prior to 1964 must also be discounted, since enrollment data was not recorded by race prior to that time, when HEW first required such data to be recorded and reported.

Although the Court found that the use of these optional zones "had a substantial and continuing segregative impact upon these four west side schools," 429 F. Supp. at 247 [Pet. App. 33], this conclusion is not borne out in the enrollment statistics. In 1975-76, both Burroughs (11.2% black) and West Mound (13.9% black) had substantial black student enrollments. [A. 745-50 (Px 11).] West Broad's black enrollment increased from no black students in 1964, to 17 black students in 1975-76. 429 F. Supp. at 247. [Pet. App. 32; A. 745-50 (Px 11).] Highland's non-white enrollment *decreased* from 75% in 1964 to 67.1% in 1975-76. *Id.*

b. *Discontiguous attendance areas*

During the period 1957-70, the Columbus Board created 11 discontiguous attendance areas.[16] Most of these had been discontinued by the time the case was tried.

Generally, these zones were small, geographically isolated areas, where enrollments were too small to justify a separate school. Students residing in these areas were therefore transported to a nearby school with available space. [A. 621-23.]

Of the eleven discontiguous areas, the district court found racial effects from only two.[17] The first of these was

---

[16]Under the definition employed by the district court, a discontiguous attendance area is an attendance zone from which the student resident must cross another attendance area to reach his assigned school. 429 F. Supp. at 269. [Pet. App. 80.]

[17]The record clearly indicates the absence of discriminatory intent or effect in the creation and operation of the other nine zones. The Barnett Elementary discontiguous zone was extremely isolated and students residing there will always have to be transported. Students were transported to Barnett, the only nearby school which was accessible and had available capacity. [R. 5383-87.] The Binns zone was not actually discontiguous, and the students residing there could walk to Binns. Binns had capacity for these students, and their assignment had no racial effect. [R. 5387-

(Footnote 17 continued on page 32)

the Moler discontiguous zone, established in the 1963-64 school year. 429 F. Supp. at 247. [Pet. App. 33-34.] The zone consists of five streets in an isolated area, from which it will always be necessary to transport students. [A. 624-25.]

This isolated area was annexed from the Marion-Franklin district in 1957, and until 1963 the students were transported to the Smith Road school. [Px 247; Px 248; Dx C-72.] Smith Road was overcrowded during that period, and when Moler opened in 1963 the students in the area were assigned and transported to the Moler school because it had space. In 1963, all other nearby schools were overcrowded. Alum Crest was overcrowded, Watkins was overcrowded, Clarfield was overcrowded, and Koebel

---

(Footnote 17 continued)

5388.] The assignment of students from a discontiguous zone to Medina Junior High was justified by capacity problems, and had an integrative effect. [A. 623-24; 745-50 (Px 11).] The discontiguous area assigned to Oakmont elementary was geographically isolated, so that students residing there will always have to be transported. There was no racial effect since all nearby schools were predominantly white. [A. 745-50 (Px 11).]

Students in the Sharon discontiguous area were transported to that school for safety reasons. [R. 5392-93.] There was no racial effect since all schools in the area were predominantly white. [A. 745-50 (Px 11).] The Berwick discontiguous area existed only during the period 1959-1961, and was assigned to Berwick because of capacity problems at other nearby schools. [Px 258; Px 62; Px 64; Px 22; Px 258E.] The North Linden school served two discontiguous areas in 1961-62. [Px 258D.] Students were reassigned to Forest Park Elementary upon its completion in 1962. [Px 258E.] Two small discontiguous areas were assigned to Linden Elementary, one in 1957, and one in 1959. [Px 258, 258B.] Both areas were permanently reassigned to Duxberry when it opened in 1959, and were contiguous to the Duxberry attendance area. [Px 258B, Px 258C.] Two small discontiguous zones were assigned to Northridge Elementary, one in 1957-59 and the other in 1959-60. [Px 258, 258A, 258B.] Both areas were subsequently reassigned to other schools with contiguous attendance zones. [Px 258B, 258C.]

had not been built. Moler was the closest school with space to house these students. [Px 2; Px 64, pp. 55-57.]

The district court relied on the testimony of Mr. Leon Mitchell, principal at Alum Crest in 1966-67 and 1967-68, in reaching the conclusion that Alum Crest had space for these students in those two years. Mr. Mitchell testified that it was his recollection that in those years his school had 11 teachers and only 210 students, and that he thought Alum Crest had space to house the transported students whom he identified as predominantly white. Mr. Mitchell's recollection concerning enrollments at Alum Crest in 1966 and 1967 was not accurate. In 1966-67, Alum Crest's enrollment was 251. [Px. 1.] In 1967-68, the enrollment was 279. *Id.* The capacity was 261. [Px 63, p. 68.] Moreover, Mr. Mitchell pointed out that enrollments changed rapidly at Alum Crest because of high mobility. [R. 6247.]

Even if the assignment of students in this discontiguous zone to Moler had an incidental racial effect from 1963 to 1968, the evidence is clear that there was no segregative effect at the time the case was tried. The discontiguous area has had a substantial black population since 1970, and its assignment to Moler since that time has had an *integrative* effect. [A. 745-50 (Px 11).] If these students had been assigned to Alum Crest at the time of trial, it would have compounded the racial imbalance at that school. [A. 745-50 (Px 11); Px 252; Px 255; Px 256.]

The other discontiguous zone which was found to have had a racial effect was the Heimandale discontiguous attendance zone. 429 F. Supp. at 247-48. [Pet. App. 34-35.] The zone was already in existence when this area was annexed from the Marion-Franklin district in 1957, and was terminated in 1963. This zone encompassed a three street area within the Heimandale attendance area, from which students were assigned to Fornof Elementary, the next adjacent attendance area. [R. 289-293.]

During the school years 1957-58 through 1962-63, Heimandale and Fornof were at or over capacity. [Px 62,

p. 26; Px 64, p. 32.] In 1963, a six room addition was completed at Heimandale and the discontiguous zone was terminated with the reassignment of students to Heimandale. [Px 22; Px 35; Px 258F; Px 266.] The fact that the establishment of this zone had no segregative effect at the time this case was tried is apparent from Heimandale's racially balanced enrollments since 1964.[18]

c. *Other pupil assignment practices*

The district court's discussion of the Board's post-1954 pupil assignment practices was confined to those specific instances discussed above. Although the plaintiffs challenged thousands of other board decisions, the district court either made no findings, or explicitly found the plaintiffs' evidence to be unconvincing.

*Rental Facilities.* The plaintiffs claimed that instances where rental facilities were temporarily used to relieve overcrowding were motivated by a segregative purpose. The Board offered evidence that demonstrated a complete absence of any segregative purpose. [A. 607-12, R. 5294-5322.] The rental facilities were needed at various times during the period 1957-1971 because of overcrowding or because a new school had not been completed on schedule. In all instances, the rented space was as close as possible to the school involved and was usually at a church because of strict building safety codes and school requirements. [R. 5294-96; Px 358.] The district court made no findings that any of the rentals were motivated by segregative intent.

---

[18] The racial composition of Heimandale was 40 percent black in 1964 and 1965, and 30 percent black in 1966. [Px 12.] At the time of trial, Heimandale was racially balanced under the court's definition, with a black student composition of 35.9 percent. [A. 747 (Px 11).]

*Boundary Changes.* Because of the severe overcrowding at schools and the construction of 103 new schools and 145 school building additions, the school system was required to make many school boundary changes each year. The construction of a new school building, depending on its location, could require changes to the boundaries of one, two, three or more existing schools. For example, in 1966, 57 separate school attendance areas were affected by boundary adjustments. [Px 258; Px 258I; R. 5407-08.]

Although the plaintiffs originally claimed that nearly all boundary changes were motivated by segregative intent, Dr. Foster did not analyze boundary changes. [R. 3681.] The Columbus Board nevertheless offered evidence describing in detail the process involved in establishing and changing school attendance areas. This evidence established that school boundary changes were based upon rational school administrative concerns. Boundary changes were designed to conform to the neighborhood school policy and took many relevant factors into account, including walking distances, density of student population, size of schools, geographical and man-made barriers, student safety, and, since 1967, racial balance. [A. 625-32.]

With the exception of boundary changes associated with the specific actions discussed in its liability opinion, the district court made no finding of discriminatory intent or effect with respect to boundary changes.

*Transportation For Overcrowding.* The plaintiffs also challenged the temporary transportation of classes from an overcrowded school to the nearest school with available space to relieve severe overcrowding. The Board submitted overwhelming evidence that justified this practice as educationally and administratively sound and non-discriminatory. [A. 612-21.] The district court found no discriminatory intent or effect with respect to this practice.

*Extended Sessions.* The plaintiffs also challenged the use of extended school days and double sessions to relieve overcrowding in the early 1970s. The evidence demonstrated that these measures were educationally and administratively sound practices to cope with extreme overcrowding and were not racially motivated. [R. 5312-18.] Again, the district court made no finding that this practice was discriminatorily motivated or had a discriminatory effect.

*Student Transfers and Assignment.* The district court found that the plaintiffs' challenge of student transfers for medical, babysitter, disciplinary and other reasons did not "bear sufficient impact to be helpful in the resolution of the issues." 429 F. Supp. at 240 n.2. [Pet. App. 20 n.2.] The defendants' evidence established that these practices were administered in a racially neutral manner. [R. 4587-4600.]

### 3. *Professional Staff*

The plaintiffs also attempted to show that the Columbus Board had intentionally discriminated against blacks in its employment practices. However, the district court placed only limited reliance on this evidence in drawing an inference that certain board actions in the past had been discriminatorily motivated. The evidence established that the Board's employment practices at the time this case was tried were nondiscriminatory.

#### a. *Hiring and assignment of teachers*

Although the Board had always employed black teachers, it began, with the superintendency of Dr. Fawcett in 1949, to increase the number of black teachers through active recruiting. [A. 574-75, R. 4729-38, 4745, 4897, 5690, Dx C-63.] The Board has been successful in its efforts, despite the keen competition for a decreasing number of

black teacher graduates [R. 4735-36], and the shortage of black graduates with special skill certification. [R. 4750-54, Dx C-100.] The percentage of black teachers in the system was increased from 9.7% in 1964 to 17.5% in 1975 through an aggressive minority recruiting program. [Px 15; Dx C-63; R. 703-710; R. 4744-54.]

Although most black teachers were assigned to predominantly black schools in the pre-1950 period, this also began to change with Dr. Fawcett's superintendency. [A. 575.] By 1973 there were only 27 schools with all white teaching staffs. [R. 5700.] On July 10, 1973, the Columbus Board concluded a conciliation agreement with the Ohio Civil Rights Commission. [Px 229.] Although the Board denied that its past hiring and assignment practices had been discriminatory, it nonetheless agreed to hire and assign black teachers in a manner which would insure racially balanced faculties in all schools in the system beginning in September 1974. While the plaintiffs attempted to show non-compliance with the agreement, the district court held that it ". . . cannot find, as plaintiffs urge, that the Columbus defendants have failed to comply with the consent order and have down-graded efforts to recruit black faculty and administrators. The effort to comply with the consent order appears to be substantially successful; also, the effort to recruit black teachers appears to have been sincere and reasonable." 429 F. Supp. at 260. [Pet. App. 59.] Thus, the Columbus public schools have had racially balanced teaching faculties in each school since before the filing of the second amended complaint in October 1974.

b. *Hiring and assignment of administrators*

The evidence established that the Columbus Board has initiated an affirmative recruitment and assignment program for administrators, and has actively sought to assign all administrators on a non-discriminatory basis.

The hiring of administrators has been accomplished primarily through a cadet principal program, which trains teachers for administrative positions. [R. 4384-86.] Since 1969, 44 percent of the cadet appointments have been black teachers. [Dx C-57.] Since August 1, 1971, over 30 percent of the new administrator appointments have been black. [Dx C-117.]

With respect to assignment of black administrators, there have been differences of opinion among black leaders as to whether black administrators should be assigned to predominantly black schools. Plaintiffs' own expert, Dr. Robert L. Green, and a local NAACP leader, Mr. Clarence Lumpkin, have advocated such a policy. [R. 569, 2544.] Nonetheless, the Columbus Board has taken steps to improve the racial balance of administrative staffs through the assignment of black administrators to majority white schools. [R. 713-714, 5731-32], and white administrators have been assigned to majority black schools. [Px 410B.] Since 1973, the Board's employment practices with respect to administrators have been governed by the terms of the Ohio Civil Rights Commission conciliation agreement. [Px 229.]

c. *Other employment practices*

Plaintiffs also sought to establish discrimination in the hiring and assignment of substitute teachers and non-professional staff. The district court found this evidence to be unconvincing:

> "Evidence was introduced in attempt to prove or disprove racial preferences in student transfers, assignment of non-teaching and non-administrative employees, assignment of students and substitute teachers and special education programs. The plaintiffs' proofs regarding these matters do not bear suf-

ficient impact to be helpful in the resolution of the issues.

It is noted that the assignment of non-professional staff is racially suspect; however, the Court does not find sufficient nexus between that fact and the issues being litigated, and it is not a part of the factual setting from which the Court draws conclusions against defendants."

429 F. Supp. at 240 n.2. [Pet. App. 20, n. 2]

4. *Pre-1954 History of the School System*

The plaintiffs relied heavily on evidence concerning events which occurred prior to 1950 in support of their claim of a current condition of racial segregation in schools. The historical evidence was of two types. Witnesses Helen J. Davis, Barbee Durham, and Lucien Wright testified about personal experiences prior to 1950. [A. 177-91, 194-203, 357-75; 2037-2052.] Witnesses Myron Seifert and W. A. Montgomery did not testify from first-hand knowledge, but mainly read from newspaper accounts or other compilations of events, most of which concerned the period 1900-1940. [Px 351; A. 254-79, 364-91.] There was no statistical evidence concerning the racial composition of the schools prior to 1954, because enrollment data was not required by the Federal government to be recorded by race until 1964.

Given the hearsay nature of the documentary evidence, and the subjective quality of the remainder, the plaintiffs' evidence of practices prior to 1954 had little probative value. Furthermore, although some of the incidents described by these witnesses were reprehensible, there was no attempt to demonstrate a current impact on the racial composition of schools in the Columbus system. Nonetheless, the district court relied heavily on this evidence in reaching a judgment of systemwide liability in this case. 429 F. Supp. at 234-36. [Pet. App. 7-11.]

**D. The District Court's Liability Decision**

The keystone of the district court's March 8, 1977 liability decision was the significance which the court attached to the pre-1954 history of the public school system. Although the court conceded there was "substantial racial mixing of both students and faculty in some schools" in 1954, it found that certain board actions which occurred prior to 1943 had led to the creation of five predominantly black schools on the near east side of Columbus. The trial court found that the existence of these five schools at the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) compelled the conclusion that there was not a "unitary school system" in Columbus in 1954. 429 F. Supp. at 234-36. [Pet. App. 7-11.]

This finding by the district court is critical to an understanding of the balance of the court's opinion, because of the standard of liability applied by the district court to all post-1954 decisions by the school board. The court concluded that its finding of a non-unitary school system in 1954 imposed an affirmative duty on school officials to take action "to correct and prevent the increase in racial imbalance." 429 F. Supp. at 255. [Pet. App. 50-51.] The court found that the imposition of this duty on the defendants justified drawing an inference of segregative intent "from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance." 429 F. Supp. at 241. [Pet. App. 20.] As will be demonstrated in the Argument portion of this brief, the district court's conclusions here were erroneous, both legally and factually.

Applying this standard of proof to post-1954 school construction, the court made a generalized finding that "in some instances the need for school facilities could have

been met in a manner having an integrative rather than a segregative effect." 429 F. Supp. at 243. [Pet. App. 25.] Nonetheless, the court found only two specific instances where an integrative opportunity was not pursued.[19]

In addition to its school construction findings, the district court found only isolated specific actions from which it could infer segregative intent. These actions were (1) the rejection of a proposal to pair the Innis Road and Cassady elementary schools,[20] (2) the creation of the "near-Bexley" and Highland-West Broad-West Mound optional attendance zones,[21] and (3) the creation of the Moler and Heimandale discontiguous attendance areas.[22]

The court also made a generalized finding that segregative intent could be inferred from the mere continuance of a "non-racially motivated" neighborhood school policy with knowledge of segregated housing patterns. 429 F. Supp. at 254-55. [Pet. App. 48-49.]

The district court determined that these findings justified a judgment of "systemwide liability." In so finding, however, the court made no attempt to compare the racial composition of the schools in 1976 with what the racial composition would have been in the absence of the specific constitutional violations found. To the contrary, the district court found that:

> "[i]t is plainly the case in Columbus that had school officials never engaged in a single segregative act or omission, the systemwide percentage of black students would nevertheless not be accurately reflected in each and every school in the district."
>
> 429 F. Supp. at 267. [Pet. App. 74.]

---

[19]These instances were the construction of the Sixth Avenue and Gladstone elementary schools. *See* pp. 22-24, *supra.*

[20]*See* pp. 24-26, *supra.*

[21]*See* pp. 28-31, *supra.*

[22]*See* pp. 31-34, *supra.*

Indeed, the district court also found that no "reasonable action by school authorities could have fully cured the evils of residential segregation." 429 F. Supp. at 259. [Pet. App. 58.] Nevertheless, by imposing a statistical racial balance remedy upon the Columbus school system, and without determining what, if any, racial imbalance today was proximately caused by discriminatory school board action, the district court forced the school system to "fully cure the evils of residential segregation" in Columbus.

**E. Remedial Proceedings**

As directed by the district court, the Columbus Board prepared and filed, on June 10, 1977, a systemwide desegregation plan, reserving its rights to appeal and to contest the imposition of a systemwide remedy. After this Court's decisions in *Dayton, Brennan* and *Omaha,* the Columbus Board sought leave to file a more limited remedy plan designed to racially balance all predominantly black schools cited in the district court's liability opinion as being involved in constitutional violations. On July 7, 1977, the district court granted leave to file the amended plan, but opined that *Dayton, Brennan* and *Omaha* had no effect on this litigation. [Pet. App. 90.] Thus, the hearings scheduled for the week of July 11, 1977, were to proceed on the assumption that "systemwide liability is the law of this case pending review by the appellate courts." [Pet. App. 95.]

At the start of the remedy hearings, the Columbus Board of Education made written and oral motions to the district court requesting that it determine the incremental segregative effect of the constitutional violations identified in the March 8 liability opinion. The State Board of Education joined in the motions. [A. 53-63, 715-30.] The district

court summarily overruled the motions, and refused to determine incremental segregative effect. [A. 740-41.]

On July 29, 1977, the district court rejected all proposed plans of desegregation presented by the Columbus and State Boards, and ordered development of another plan to desegregate "the entire Columbus school system." [Pet. App. 111.] The court found the Columbus Board's original submission of June 10 unacceptable because it did not racially balance 22 predominantly white schools on the periphery of the system. The State Board's June 14 submission was rejected because of educational and logistical shortcomings. [Pet. App. 106.] The Columbus Board's July 8 post-*Dayton* submission was rejected as constitutionally unacceptable because it "falls far short of providing a reasonable means of remedying the systemwide ills." [Pet. App. 100.]

The district court's July 29 order approved the "numerical face" of an early planning exercise by the school administration staff which had developed school pairings to racially balance each school to within ± 15% of the 32.5% mean black student enrollment in the district. The court pointed out that this racial balance approach "would desegregate all schools, would avoid claims that some but not all share the burden of a remedy, and would not leave 22 school areas to which white flight may be precipitated." [Pet. App. 105.] The court then proceeded to order development of a new systemwide plan to "legally desegregate the entire Columbus school system under the principles set out in this order." [Pet. App. 111.] Under that order, it was clear that the district court required a statistical racial balance remedy designed to balance each of the system's 170 schools.

As directed, the Columbus Board formulated and filed, on August 31, a new systemwide desegregation plan which satisfied the district court's requirement of statistical

balance in each school.[23] On September 26-27, 1977, the Court conducted a hearing on the new plan, but confined the scope of the hearing to questions concerning the cost and availability of transportation equipment and whether the elementary school implementation should be delayed until September 1978. [A. 173-75.]

On October 4, 1977, the district court entered an order that the new systemwide remedy plan be implemented in September 1978. [Pet. App. 125.] In addition, the court ordered that, on or before October 19, 1977, the Columbus Board commence the bidding process under Ohio law for the acquisition of transportation equipment necessary to implement the plan. The court's order also required the Columbus Board to file, by November 9, a report concerning the desegregation budget, a progress report on Phase I preparatory efforts, notification of commencement of the transportation equipment acquisition process, and a progress report and timetable for activities in preparation for implementation of the desegregation plan. [Pet. App. 136-37.]

The desegregation remedy ordered by the court was extensive. The plan employed pairing and clustering techniques, boundary changes, grade level reorganizations, and school closings, in order that every school in the sys-

---

[23]Although the Board developed and submitted the plan in accordance with the court's remedy directives, the Board in no way approved of the racial-balancing provisions of the plan and reserved its right to appeal all orders requiring implementation of the plan or any part of it. The Board has persistently contended that a systemwide racial balance remedy is not constitutionally required in this case. The Columbus Board believed, however, that if any such plan was to be ordered, its staff had the ability and expertise to design the most reasonable form of such plan for its school system. The alternative was to permit the court to choose a plan prepared by someone unfamiliar with the school system.

tem be racially balanced to within ± 15% of the system's overall racial composition. [A. 68-71.] This massive reorganization involves the reassignment of over 42,000 school children [A. 148], the alteration of the grade organization of nearly every elementary school in the system [A. 122-36], the closing of thirty-three school buildings, with 11 of the buildings to be reopened under alternate organizations [A. 72-73], and the reassignment of teachers, staff, and administrators. Under the desegregation plan, a total of 50,949 students would be required to be transported by bus, or 33,216 more students than the system expected to transport in 1977-78. [A. 148.] About 37,000 students would be transported solely to achieve racial balance. These transportation requirements demanded 213 additional 65-passenger school buses to augment the system's existing bus fleet. [A. 151.] Even with the additional equipment, the plan contemplates four different school schedules so that each bus could make an average of three trips each morning and afternoon. [A. 150.]

Implementation of the plan was projected to be extremely costly, an additional financial burden on a school system whose financial resources were already insufficient to maintain its educational operations. [A. 171-72.] At the time of the district court hearings on the plan, the Board estimated a total desegregation plan cost for the 1978-79 school year of $12.3 million. [A. 171.]

On October 19, 1977, the Columbus Board commenced the bidding process for the 213 new buses and related equipment, as ordered by the district court. The process was completed on December 6, 1977, when the Columbus Board authorized the issuance of purchase orders and the award of contracts totaling $3.5 million.

On November 9, 1977, the Board filed the detailed progress report and revised budget ordered by the district court on October 4. The revised budget estimated total

desegregation costs through the 1978-79 school year to be $13 million.[24]

**F. The Court of Appeals' Judgment**

The United States Court of Appeals for the Sixth Circuit affirmed both the liability and remedy judgments of the district court against the Columbus Board, but remanded the case for additional findings concerning the liability of the State defendants. *Penick v. Columbus Board of Education,* 583 F.2d 787 (1978). [Pet. App. 140.]

As was the case with the district court's liability findings, the court of appeals' affirmance was founded upon the conclusion that a "dual school system" existed in Columbus in 1954, and that "under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for 24 years." 583 F.2d at 787. [Pet. App. 160.] With that finding as its predicate, the court of appeals approved and adopted the standard of liability which the district court had applied to all post-1954 actions of the Columbus Board. That standard of liability was that any action taken by the board which did not have the effect of eradicating racial imbalance was unconstitutional *per se*:

> "[T]he District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil assignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. *On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation.*"
>
> 583 F.2d at 800 (emphasis added). [Pet. App. 165.]

[24]The Columbus Board's post-October 4 submissions to the district court were included in a supplemental record certified to the court of appeals by the clerk of the district court, and became a part of the record on appeal.

Although it found the existence of racial imbalance in Columbus schools to be a sufficient ground for affirmance, the court of appeals also commented upon the post-1954 history of the school system, quoting extensively from the district court's liability opinion.

With respect to school construction, the appellate court found that statistics alone, indicating that 87 of 103 new schools opened "racially identifiable" under the district court's definition, and that 71 of the 87 were still "racially identifiable" at the time of trial, "requires a very strong inference of intentional segregation." 583 F.2d at 804. [Pet. App. 173.]

With respect to the remainder of the post-1954 events described by the district court, the appellate court characterized them as "isolated in the sense that they do not form any systemwide pattern" of segregation. 583 F.2d at 805. [Pet. App. 175.]

Despite the fact that the district court explicitly refused to make the mandatory *Dayton* inquiry into the incremental segregative effect of the violations which it had identified, the appellate court found that the district court's pre-*Dayton* liability findings were sufficient, by employing a presumption that "[s]chool board policies of systemwide application necessarily have systemwide impact." 583 F.2d at 814. [Pet. App. 198.] Through the use of this presumption, and without reference to any record evidence of systemwide impact, the appellate court found that the violations discussed by the district court "clearly" or "of course" had a systemwide impact. *Id.*

The court then went on to hold that even if the district court's findings were insufficient under *Dayton*, it would supplement those findings with its own generalized finding of "systemwide impact," but again without any reference to evidence in the record which would support such a conclusion. 583 F.2d at 814. [Pet. App. 199.] The court of appeals, like the district court, made no attempt to compare the racial distribution of the Columbus school

population as presently constituted to what that distribution would have been in the absence of the constitutional violations it had found.

Having supplied a generalized finding of systemwide liability, the court of appeals devoted only two short paragraphs to the question of the validity of the extensive desegregation remedy ordered by the district court, and affirmed the district court's remedy judgment. 583 F.2d at 818. [Pet. App. 207.]

## SUMMARY OF ARGUMENT

1. The courts below violated this Court's explicit instructions in *Dayton*, *Brennan*, and *Omaha* by refusing to make the required factual determination concerning the current incremental segregative effect of the remote and isolated constitutional violations described in their opinions, and by refusing to tailor a remedy confined to the correction of that effect. Instead, both courts imposed a systemwide statistical racial balance remedy which goes far beyond the correction of any current effect which is discernible from this record of the limited violations found. Furthermore, in imposing a remedy which requires a strict racial balance in every school, the courts below have violated the explicit directions of *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *See* pp. 52-67, 79-81, *infra*.

2. The factual inquiry required by *Dayton* was avoided through the employment of a legal presumption that remote and isolated constitutional violations had a current systemwide effect. The key to this approach was the lower courts' misinterpretation of *Keyes v. School District No. 1*, 413 U.S. 189 (1973), to authorize a presumption that, because of the existence of five predominantly black schools within the Columbus system in 1954, the entire system was "dual" when this Court decided *Brown*

*v. Board of Education,* 347 U.S. 383 (1954). Both courts found that this conclusion justified a further presumption that the current condition of racial imbalance in the system was attributable to intentional acts of school officials. This "fruit of the poisonous tree" analysis violates the requirement of *Keyes* that plaintiffs must prove a condition of intentional segregation at the time of trial, and directly contravenes the mandate of *Dayton* by substituting legal presumptions for the required detailed factual inquiry into incremental segregative effect. *See* pp. 67-79, *infra.*

3. In reaching their judgments of liability, both courts employed a "foreseeable effect" standard, permitting discriminatory intent to be inferred solely from evidence that official actions had a disproportionate impact. Both courts held that such a standard justified drawing an inference of segregative intent from the Board's adherence to a neighborhood school policy in a system with racially imbalanced residential patterns. By equating intent with disproportionate impact, both courts violated *Washington v. Davis,* 426 U.S. 229 (1977), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). *See* pp. 81-90, *infra.* The inference of segregative intent drawn from the adherence to a system of neighborhood schools not only violates *Washington v. Davis* and *Arlington Heights,* but also attributes to school officials the responsibility for imbalanced residential patterns, contrary to *Austin Independent School District v. United States,* 429 U.S. 990 (1976), and *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976). *See* pp. 91-95, *infra.*

## ARGUMENT

In reviewing the voluminous record, the extensive opinions below, and the closely drawn legal arguments of the parties, it is easy to become bogged down in a morass of detail and to lose sight of the fundamental legal and public policy question which is presented in this case. That

single question is whether the social harms which are perceived to flow from racially imbalanced residential patterns can logically be attributed to the fault of elected local officials responsible for the operation of our public schools, and whether the burden of correcting these harms should be placed on their shoulders and on the shoulders of schoolchildren, their parents, and taxpayers.

Although both courts below purported to carefully weigh the extensive evidence and to apply complex and sophisticated legal principles to arrive at a logically defensible judgment, it is plainly apparent that the conclusions reached below can be defended only through the application of legal fictions to broad factual generalizations which are not supported in the record evidence.

If the approach to the adjudication of school desegregation cases adopted by the courts below is not clearly rejected by this Court, any urban school system serving a community with racially imbalanced residential patterns may be presumed to be in violation of the equal protection clause and under a constitutional duty to achieve a strict racial balance in every school in the system. Such an outcome is inevitable, since the uncontrolled use of legal presumptions of intent and effect adopted below results in an affirmative constitutional duty to racially balance all schools.

The opinions of the courts below illustrate the need for explicit guidelines from this Court to limit school desegregation remedial orders to the correction of segregation caused by school officials and not that caused by others. The lower federal courts must be instructed that in both the liability and the remedy phases of school desegregation litigation, they are not to forsake factfinding, properly supported and justified by a reasoned statement of legal principles, in favor of what they may find to be more fair or socially desirable, based only upon idealistic generalizations. However well-intentioned, federal courts

have no general jurisdiction to restructure public education. Under the aegis of constitutional authority and with the improper use of presumptions, the federal courts are doing just that. Large urban school districts are being forced to restructure their entire school systems, to transport students away from their nearby neighborhood schools, and to use scarce financial and human resources to implement ambitious racial balance remedies. This is seen as wasteful by taxpayers, undesirable and threatening by parents whose children are forced to participate in these massive relocations, and counterproductive by many educators.[25]

This Court should therefore correct the substantial legal errors committed by the courts below, and set forth explicit standards confining equitable remedial decrees to the correction of the demonstrated effects of specific unconstitutional conduct on the part of school officials.

In requesting this relief, the petitioners are not asking this Court to authorize a retreat from the constitutional principle that equal educational opportunity may not be denied on the basis of race. Neither are we asking the Court to sanction a retreat by government from its moral obligation to strive to improve the status and condition of minority citizens. Rather, we are asking that decisions concerning the manner in which these goals are to be accomplished should be left to elected local school officials and to their constituents, and that federal judicial intervention into this province of the community should be

---

[25]*See, e.g.*, N. St. John, School Desegregation: Outcomes For Children (1975); Kirp, *Politics and Equal Educational Opportunity: The Limits of Judicial Involvement*, 47 Harv. Educ. Rev. 117 (1977); Kirp, *School Desegregation and the Limits of Legalism*, 47 The Public Interest 101 (1977); Armor, *The Evidence on Busing*, 28 The Public Interest 90 (1972); Armor, *The Double Double Standard: A Reply*, 30 The Public Interest 119 (1973); Glazer, *Is Busing Necessary?* 53 Commentary 39 (March, 1972).

confined to cases where constitutional violations have been clearly proven, and then only to the extent necessary to remedy the effect of those violations.

## I. IN A SCHOOL DESEGREGATION CASE, WHERE MANDATORY SEGREGATION BY LAW CEASED LONG AGO, A FEDERAL COURT IS WITHOUT JURISDICTION TO IMPOSE A REMEDY WHICH EXCEEDS THAT NECESSARY TO CORRECT THE CURRENT INCREMENTAL SEGREGATIVE EFFECT OF SPECIFIC CONSTITUTIONAL VIOLATIONS.

The decisions of the courts below reflect a flagrant disregard for three controlling principles which govern and delimit the remedial jurisdiction of federal courts in equal protection cases. The first and foremost of these is that the nature or effect of the violation determines the scope of the remedy. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1977); *Milliken v. Bradley,* 433 U.S. 267, 280 (1977) (*Milliken II*); *Austin Independent School District v. United States,* 429 U.S. 990, 995 (1976) (Powell, J., concurring); *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 433-34 (1976); *Hills v. Gautreaux,* 425 U.S. 284, 293-94 (1976); *Milliken v. Bradley,* 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971).[26] In other words, the purpose of equitable

---

[26]The Congress has also clearly articulated this principle in legislation:

> "[I]n formulating a remedy for a denial of equal educational opportunity, or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."
>
> Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. § 1712.

relief is to restore the plaintiff to the position in which he would have been but for the defendant's misconduct. *Dayton, supra,* 433 U.S. at 420; *Milliken II, supra,* 433 U.S. at 280; *Milliken I, supra,* 418 U.S. at 746.

The second controlling principle ignored by the courts below is that principles of federalism restrict the extent to which federal courts may intrude upon local governmental processes. *Milliken II, supra,* 433 U.S. at 280-91; *Hills v. Gautreaux, supra,* 425 U.S. at 293-96; *Milliken I, supra,* 418 U.S. at 749; *Wright v. Council of City of Emporia,* 407 U.S. 451, 471-83 (1972) (Burger, C.J., dissenting). This principle is especially applicable to cases dealing with public schools, as this Court has "firmly recognized that local autonomy of school districts is a vital national tradition." *Dayton, supra,* 433 U.S. at 410. See also *San Antonio School District v. Rodriquez,* 411 U.S. 1, 50 (1973). "It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton, supra,* 433 U.S. at 410.

The third controlling principle violated by the courts below concerns the limited role of the courts in our system of government. Courts do not fashion public policy, and cannot act in an administrative or legislative capacity. *Milliken I, supra,* 418 U.S. at 744; *Gilligan v. Morgan,* 413 U.S. 1, 8 (1973). "Remedial judicial authority does not put judges automatically into the shoes of school authorities whose powers are plenary." *Swann, supra,* 402 U.S. at 16.

Adherence to these principles is critical when a federal court is not asked simply to render judgment in favor of one private party against another, but is asked to restructure the administration of the public school system of a large city. *Dayton, supra,* 433 U.S. at 410. Consequently, this Court has required that, in such a case, the scope of

the remedy must be confined to the correction of the incremental segregative effect of specific constitutional violations on the part of school officials.

### A. The Courts Below Improperly Imposed a Systemwide Remedy Without Determining the Incremental Segregative Effect of the Violations Found.

Three months after the district court entered its liability judgment in this case, this Court decided three important cases in which it gave explicit instructions to the lower federal courts concerning the manner in which liability is to be determined and a remedy fashioned in a school desegregation case. *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977); *Brennan v. Armstrong,* 433 U.S. 672 (1977); *School District of Omaha v. United States,* 433 U.S. 677 (1977). In the lead case, *Dayton,* the Court stated:

> "The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, *must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.* The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."
>
> *Dayton Board of Education v. Brinkman,* 433 U.S. at 420. (Emphasis added.)

...s directed in *Dayton*, the trial court must first determine whether there were specific instances in the operation of the school system where school officials had acted with an intent or purpose to discriminate against minority pupils, teachers, or staff. Once these discrete acts of intentional discrimination have been ascertained, the court must then determine the incremental segregative effect of these acts on the current racial distribution of the school population. That effect is to be measured by comparing the present racial distribution in individual schools within the system to that which would have existed but for the specific acts of discrimination. The formulation of a remedy is then to be confined to the correction of that effect. Only if the current impact on the racial composition of schools is systemwide in scope may the remedy be systemwide, and if there is no current effect there can be no remedy.

An examination of the district court's liability opinion discloses that this was not the manner in which the district court arrived at its judgment in this case. Although the court discussed a few discrete instances of school board action which it characterized as being intentionally discriminatory, there was no attempt to determine the incremental segregative effect of these actions on the current racial distribution within the school system. Instead, the court premised its judgment of systemwide liability on a presumption of systemwide impact.

Although the court conceded that racially imbalanced schools were caused primarily by racially imbalanced residential patterns, it made no attempt to determine what portion, if any, of that racial imbalance could be traced to specific unconstitutional acts of school officials. In fact, the court found that no "reasonable action by the school authorities could have fully cured the evils of residential segregation." 429 F. Supp. at 259. [Pet. App. 58.] More importantly, it concluded that:

> "It is plainly the case in Columbus that had school officials never engaged in a single segregative act or

> omission, the system-wide percentage of black students would nevertheless not be accurately reflected in each and every school in the district."
>
> 429 F. Supp. at 267. [Pet. App. 74.]

In view of these findings, it would seem that the court would have made some attempt to find what portion of this racial imbalance was properly attributable in fact to unconstitutional acts by the school board. Yet the court admitted that no such attempt had been made, and stated that none was required. When viewed in the light of this Court's subsequent opinion in *Dayton,* this statement is particularly revealing:

> "The interaction of housing and 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 would have looked like today without the other's influence. I do not believe such an attempt is required."
>
> 429 F. Supp. at 259. [Pet. App. 58.]

Such an attempt *is* required by this Court's decision in *Dayton,* which mandates a detailed factual inquiry into the current effect of specific acts of discrimination by school officials, thereby sorting out that portion of racial imbalance in schools proximately caused by school officials from the portion of racial imbalance attributable to housing patterns and the discriminatory acts of others. Although perhaps a "difficult task . . . [n]onetheless, that is what the Constitution and our cases call for." *Dayton, supra,* 433 U.S. at 420.

Admittedly, the district court did not have the benefit of the explicit instructions of *Dayton* when it rendered its liability decision in this case. Until *Dayton,* no opinion of this Court set explicit guidelines concerning the permissible scope of a remedy in school systems "where manda-

tory segregation by law of the races in the schools has long since ceased."[27] *Dayton, supra,* 433 U.S. at 420.

Yet, despite the fact that *Dayton* set forth such guidelines, the district court continued to adhere to the theories which it had adopted in its liability opinion. Although both the Columbus and State defendants requested the court to make the inquiry mandated by *Dayton* [A. 53-63, 715-30], the court summarily overruled the motions. [A. 740-41.]

In the district court's eyes, there was no conflict between its approach of using presumptions to extrapolate systemwide violations from a few isolated events, and the guidelines set down in *Dayton.* In its July, 1977 order [Pet. App. 90-96] granting the Board leave to file its post-*Dayton* amended desegregation plan, the court stated:

> "In my view, the hope that the Dayton case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried."
>
> [Pet. App. 93.]

To the extent that *Dayton* was viewed as inconsistent with the theories applied in its liability opinion, the district court sought to distinguish *Dayton* on the basis that it was not applicable to cases where there is a generalized conclusion of systemwide liability, regardless of the nature and extent of the underlying constitutional violations. [Pet. App. 94-95.]

---

[27]Although *Keyes v. School District No. 1,* 413 U.S. 189 (1973), did not involve a school system with statutorily mandated segregation, it did not address the question of remedy. *Milliken v. Bradley,* 418 U.S. 717 (1974), did speak to the question of remedy, but only in a limited context, holding that a metropolitan remedy could not be imposed where suburban school districts had not been implicated in the constitutional violation.

The district court's attempt to confine the principles of *Dayton* to cases where there was no finding of systemwide liability clearly contradicted this Court's decisions in *Brennan v. Armstrong*, 433 U.S. 672 (1977), and *School District of Omaha v. United States*, 433 U.S. 667 (1977), decided two days after *Dayton*. In both cases, the lower courts had made unambiguous findings of systemwide liability, and had ordered systemwide remedies.[28] Despite these findings by the lower courts, this Court vacated the judgments and remanded the cases with the direction that the *Dayton* guidelines be adhered to.

Although *Brennan* and *Omaha* indicated that *Dayton* could not be distinguished on the grounds asserted by the district court, the court attributed no significance to these decisions. Instead the trial court stated that the "Seventh and Eighth Circuit Courts of Appeal, and perhaps ultimately the Supreme Court, will decide whether the cases

---

[28]In *Brennan*, the district court found intentional segregation in the "entire" Milwaukee school system and that Milwaukee officials had operated a "dual" system. *Amos v. Board of Directors*, 408 F. Supp. 765, 821 (E.D. Wis. 1976). The Seventh Circuit affirmed the finding of systemwide liability. *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976). Thereafter, the district court ordered implementation of a systemwide desegregation plan. *Armstrong v. O'Connell*, 427 F. Supp. 1377 (E.D. Wis. 1977). Despite the finding of systemwide violations, this Court vacated and remanded the liability judgments with the direction that the mandatory *Dayton* inquiry be made. 433 U.S. 672.

In *Omaha*, the district court had ordered a systemwide desegregation plan in conformity with an earlier decision by the Eighth Circuit, 521 F.2d 530 (8th Cir. 1975), finding extensive constitutional violations which created systemwide liability. 418 F. Supp. 22 (D. Neb. 1976). The plan was affirmed by the court of appeals. 541 F.2d 708 (8th Cir. 1976). Despite the unambiguous finding of the courts below that the violation was "systemwide," this Court vacated the judgments and directed the courts below to conduct the *Dayton* inquiry. 433 U.S. 667.

cited by the Supreme Court [*Washington v. Davis, Village of Arlington Heights,* and *Dayton*] have any impact upon the Omaha and Milwaukee litigation." [Pet. App. 93-94.]

The district court then went on to impose a remedy which requires that every school within the system be racially balanced to within 15 percentage points of the overall systemwide racial composition. Despite the court's earlier finding that schools would not have been racially balanced even had the defendants not committed a single constitutional violation, 429 F. Supp. at 267 [Pet. App. 74], it nonetheless required a remedy to achieve that effect. By the district court's own admission, the scope of the remedy clearly exceeded any possible effect of the violation found.

In view of the clear conflict between the district court's decisions and the opinions of this Court in *Dayton, Brennan,* and *Omaha,* the minimal obligation of the Sixth Circuit on appeal would have been to vacate the judgments and remand the case with instructions that the district court adhere to the guidelines mandated in *Dayton.* Instead, the court of appeals affirmed the judgments below in an opinion which sought to avoid the clear mandate of *Dayton* through a tortured legal analysis employing presumptions, shifting burdens of proof, and a contrived definition of "incremental segregative effect."

The court of appeals first constructed a garbled definition of "incremental segregative effect" which effectively negates the principles of *Dayton.* While the court admitted that *Dayton* requires that incremental segregative effect be determined "by judging segregative intent and impact as to each isolated episode," it then went on to contradict itself by stating that there is no requirement that each "episode" be judged "solely upon *its* separate impact upon the system." 583 F.2d at 813-14. [Pet. App. 197.] It was upon this latter pretext that the court appar-

ently believed it could assign systemwide significance to isolated instances.[29]

The second vehicle employed by the court to circumvent *Dayton* was to invent a presumption that "school board policies of systemwide application necessarily have systemwide impact." 583 F.2d at 814. [Pet. App. 198.] Thus, the appellate court sought to avoid the requirement of *Dayton* that the impact of official action be "established by factual proof," 433 U.S. at 410, and that the trier of fact must make "complex factual determinations" on this issue. 433 U.S. at 420.

The final means used by the appellate court in its attempt to circumvent the requirements of *Dayton* was to enter a general finding of systemwide impact "as the findings of this court." 583 F.2d at 814. [Pet. App. 199.] As was the case with the appellate court's employment of a presumption of systemwide impact, this "finding" was unsupported by any reference to the record evidence. It was clearly not the type of "complex factual determination" required of the finder of fact by *Dayton*, and lacks the

---

[29]In its decision in the companion case from Dayton, No. 78-627, the Sixth Circuit further explained its definition of the concept of incremental segregative effect:

> "[w]e are convinced that the term 'incremental segregative effect' used by the Supreme Court in the *Brinkman* decision, was not intended to change the standards for fashioning remedies in school desegregation cases . . . . The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, *even if minor in itself*, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution."
>
> *Brinkman v. Gilligan*, 583 F.2d 243, 257 (6th Cir. 1978) (emphasis added). [Pet. App. 244-45.]

specificity required by Rule 52, Fed. R. Civ. P.[30] Indeed, as will be demonstrated *infra*, the record in this case cannot support a conclusion of a current systemwide impact. Instead, the Sixth Circuit's decision was a rather transparent attempt to avoid a remand to the district court for the factual determinations which it had failed to make.

Petitioners recognize their contention that the Sixth Circuit evaded its responsibility in this case, and that it intentionally sought to circumvent the binding decisions of this Court, is a serious allegation. However, it is not made irresponsibly. The Sixth Circuit's decisions in this case, and in the companion case from Dayton, clearly indicate that the appellate court has adopted an errant interpretation of this Court's decisions in *Dayton, Brennan* and *Omaha*. By presuming that remote and isolated acts have a current systemwide impact, the Sixth Circuit has substituted presumptions for the "complex factual determination" required by *Dayton*.

Therefore, since the mandatory inquiry has not been conducted, the judgments below should be reversed; or they should be vacated, and the case remanded directly to the district court with the direction that it identify the incremental segregative effect of specific constitutional

---

[30]The attempt to make the necessary "complex factual determination" was also clearly outside the proper scope of appellate review. If the appellate court felt that the trial court failed to make adequate findings under Rule 52, Fed. R. Civ. P., it should not have attempted to make these findings itself, but should have reversed, or vacated the judgment and remanded the case for additional findings by the trial court. *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); 5A Moore, *Federal Practice*, ¶¶ 52.06[2], 52.11[4] (1977); 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2577 (1971). Civil rights cases do not present an exception to this general rule. See, e.g., *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975); *Davis v. Board of School Commissioners*, 422 F.2d 1139 (5th Cir. 1970).

violations and limit the remedy to the correction of that effect.

### B. The Scope of the Systemwide Remedy Exceeds any Possible Incremental Segregative Effect of the Violations Found.

The failure of the courts below to make the required determination of incremental segregative effect led to the imposition of a remedy which far exceeds any possible effect of the violations found by the district court. Indeed, the application of the *Dayton* standard to the record evidence conclusively demonstrates the absence of any current effect.

#### 1. *The Remote and Isolated Violations Found by the Courts Below Have No Current Systemwide Effect.*

A review of the decisions below will reveal that the judgment of systemwide liability in this case was founded upon only a few specific instances where Columbus school officials were found to have acted with intent to discriminate. To summarize, these instances are:

(a) the creation prior to 1943 of five predominantly black schools on the near east side of Columbus;

(b) site selection and construction of the Sixth Avenue and Gladstone elementary schools;

(c) the rejection of a proposal to pair the Innis Road and Cassady elementary schools;

(d) the creation of the "near-Bexley" and Highland-West Broad-West Mound optional attendance zones; and

(e) the creation of the Moler and Heimandale discontiguous attendance areas.

Because of the district court's failure to make the required inquiry into the incremental segregative effect of these actions at the time of trial, there are no factual findings in either opinion below which identify their current impact. In fact, there is no evidence in this record that *any* of these past instances have a current impact.

a. Although intentionally discriminatory actions by predecessor boards of education during the period 1909-1943 may have had the immediate impact of causing the student bodies of five schools to be predominantly black, the racial composition of those schools at the time of trial cannot be logically attributed to the lingering effects of school board actions which occurred during that period.[31]

These schools were located at the very core of Columbus' concentrated black residential population in 1943, in 1954, and at the time of trial. Even if a single act of discrimination on the part of school officials had never occurred, the residential areas served by these schools would still be overwhelmingly black today. The schools are so distant from areas of significant white population that they cannot be racially balanced without extensive transportation.

It is therefore illogical to conclude that the present racial makeup of these schools can be said to have been "caused" by school officials. The record simply does not support the claim that black students in these schools would have attended racially balanced schools but for the

---

[31]Only three of the schools identified by the district court were still being operated at the time this case was tried: Champion, Pilgrim, and Garfield. Felton elementary school was closed in 1974. 429 F. Supp. at 260 n.4. [Pet. App. 60 n.4.] Mt. Vernon was closed in 1954, and its students transferred to the new Beatty Park elementary school. [R. 4356.] All of these schools had racially balanced faculties at the time this case was tried.

segregative acts of school officials.[32] *Spangler, supra,* 427 U.S. at 434-36; *Milliken I, supra,* 418 U.S. at 756 n.2 (Stewart, J., concurring); *Swann, supra,* 402 U.S. at 31-32.

b. The record demonstrates that the site selection and construction of both Sixth Avenue and Gladstone elementary schools were not discriminatorily motivated, but were undertaken in conformity with recommendations of the Bureau of Educational Research of Ohio State University, in order to serve expanding enrollments in the area. *See* pp. 22-24, *supra.* Yet even if it is assumed that these acts were intentionally discriminatory, the record and the district court's findings demonstrate the *absence* of a current effect.

Sixth Avenue was closed in 1973, and its students were reassigned to Weinland Park and Second Avenue elementaries. Both of these schools had racially balanced enrollments at the time of trial. [A. 745-50 (Px 11).]

Any balancing effect which might have resulted in 1965 from constructing Gladstone in the area recommended by the district court would have been only temporary, due to the expanding black population in the area. By 1975, the enrollments of Gladstone and surrounding schools had become predominantly black, reflecting the expansion of

---

[32]The development in Columbus of a core of predominantly black schools and an expanding residential core of black population is not unlike the genesis of a similar situation, although on a larger scale, in Detroit, described by Mr. Justice Stewart as "caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears." *Milliken I, supra,* 418 U.S. at 756 (Stewart, J., concurring). "The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist." *Id.* As was the case in *Milliken I,* no record has been made in this case which shows that the present racial composition of these core schools is attributable to intentionally segregative acts by school officials.

the black residential population to the northeast. [A. 745-50 (Px 11).] Nearby Linden elementary, which the district court noted to have been 100% white in the early 1960s, had become racially balanced by 1975. [A. 748 (Px 11).] All of these schools had racially balanced faculties by 1975. [A. 789-96 (Px 385).] The record therefore indicates the absence of any current incremental segregative effect with respect to these schools.

c. The rejection of the proposal to pair Innis and Cassady was not racially motivated. *See* pp. 24-26, *supra*. Again, however, even presuming that the rejection of the pairing alternative was intentionally discriminatory, intervening demographic trends in the area would have made the pupil population over 60 percent black in the combined attendance area. The result of the pairing alternative would have been the creation of two "identifiably black" schools. The rejection of the pairing alternative resulted in only one school being identifiably black, while the other was racially balanced. *See*. p. 25 n. 10, *supra*.

d. Although the Board did not intend to discriminate in the creation of the "near-Bexley" and Highland-West Broad-West Mound optional zones, even if these acts were intentionally discriminatory, the evidence fails to demonstrate any significant impact at the time of trial. Only one or two public school students resided in the near-Bexley zone at the time of trial [A. 770 (Px 140)], and the schools which they attended under the option were for the most part racially balanced. *See* p. 29 n. 13, *supra*. Assuming that these students would have elected to attend the predominantly black public schools to which they would have been assigned in the absence of the option, their presence in these schools would have had only a minimal effect on the schools' racial composition. *Id.*

e. The evidence clearly established the non-racially motivated reasons behind the creation of the Moler and

Heimandale discontiguous zones. *See* pp. 31-34, *supra.* Again, however, even if it is assumed these actions were intentionally discriminatory, the record indicated the absence of any current effect. The Moler zone had an integrative effect at the time of trial. *See* p. 33, *supra.* The Heimandale zone was discontinued in 1963, and Heimandale has had racially balanced enrollments ever since. [A. 778 (Px 383).]

In addition to the evidence concerning these specific schools, there was also other substantial evidence which demonstrates the absence of current segregative impact. For example, as a result of the 1973 Ohio Civil Rights Commission conciliation agreement, all Columbus schools had integrated faculties at the time of trial. The racial balance transfer provisions of the Columbus Plan, along with integrated career and vocational programs, had substantially improved racial balance in many schools by the time this case was tried. The school segregation indices prepared by Dr. Taeuber indicate that the Columbus Public Schools, as a whole, were becoming more racially balanced in the years prior to trial, and that they were significantly more integrated than the Columbus residential population as a whole. [A. 802 (Px 505); A. 283, 309.]

Therefore, even if the isolated actions cited in the district court's liability opinion were conceded to be intentionally discriminatory, the evidence overwhelmingly supports the conclusion that there was no current impact or effect of these actions on the racial composition of schools in the system at the time of trial. Despite the evidence of no current effect, however, and despite the concession that Columbus schools would not be racially balanced even in the absence of constitutional violations, the courts below imposed a remedy which requires each school in the system to be racially balanced to within a statistical range of the system's overall racial composition.

The conclusion is therefore inescapable that the scope of the remedy imposed exceeds any possible current incre-

mental segregative effect which may have been established in this record.

2. *The Imposition of a Systemwide Racial Balance Remedy Cannot be Based Upon a Presumption of a Causal Connection Between Remote and Isolated Acts and Current Racial Imbalance.*

The foregoing discussion demonstrates that there was no factual foundation for the conclusion of the lower courts that there was a systemwide effect of the identified constitutional violations. In the absence of factual support, therefore, the courts below resorted to conclusive presumptions of systemwide effect in an attempt to justify the imposition of a systemwide racial balance remedy. The employment of such presumptions is unfounded in this record, unsupported by any decision of this Court, and clearly contradicts *Dayton's* requirement that the imposition of desegregation remedies be supported by factual proof of intent and current effect.

a. *The presumption of systemwide impact cannot be supported by merely characterizing the system as "dual" in 1954.*

The first justification advanced by the courts below for the employment of a presumption of systemwide impact in this case was the district court's characterization of Columbus as a "dual" system at the time this Court decided *Brown I* in 1954. In the district court's view, after *Brown I* the Columbus school officials had an affirmative duty to racially balance all schools:

> "Since the 1954 *Brown* decision, the Columbus defendants or their predecessors were adequately put on notice of the fact that action was required to correct and to prevent the increase in racial imbalance."
> 429 F. Supp. at 255. [Pet. App. 50-51.]

Any board decision thereafter which did not have the effect of alleviating racial imbalance was held to be a violation of that duty, and the continued existence of racially imbalanced schools up to the time of trial was

viewed as conclusive proof that the defendants had not discharged their constitutional duty to eradicate racial imbalance. For example:

> "The Court has found that the Columbus Board of Education has never actively set out to dismantle this dual system." 429 F. Supp. at 260. [Pet. App. 61.]
>
> "They have repeatedly failed to seize opportunities, large and small, which would have promoted racial balance in the Columbus Public Schools." 429 F. Supp. at 264. [Pet. App. 69.]

The district court therefore adopted the standard of liability applicable to cases involving former statutorily segregated school systems, by presuming that all racial imbalance throughout the school system was caused by intentionally discriminatory official action. The court of appeals affirmed the application of this standard of liability.[33]

In cases where there has been a long history of consistent adherence to a system of statutorily mandated segregation, it has been presumed that there is a causal connection between intentional discrimination and a current condition of racially imbalanced schools. See, e.g., *Wright v. Council of the City of Emporia,* 407 U.S. 451, 462 (1972). However, in a school system "where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists, but that it was brought about or maintained by intentional state action." *Keyes, supra,* 413 U.S. at 198. No presumption of causation is permitted in such cases. The Court reaffirmed and refined this principle in *Dayton* by holding that in school systems "where mandatory segregation by law of the races in the schools has long since ceased," plaintiffs are required to prove *both* discriminatory intent *and* current incremental segregative effect. *Dayton, supra,* 433 U.S. at 420.

---

[33]In its decision in the companion case from Dayton, the Sixth Circuit stated that this duty was "to diffuse black and white students throughout the Dayton school system." *Brinkman, supra,* 583 F.2d at 256. [Pet. App. at 242.]

Since no statutory dual system existed in Columbus,[34] the courts below were required to adhere to the principles of *Keyes* and *Dayton* by requiring proof of intentional acts of discrimination and the current incremental segregative effect of those acts, rather than presuming a causal connection between remote and isolated instances and a current condition of racial imbalance.

The record and the district court's own findings are also clear that the Columbus Public Schools did not operate the factual equivalent of a statutory dual system in 1954. Relying heavily on historical evidence of questionable probative value,[35] the district court found that certain Board actions prior to 1943 led to the creation of five schools which remained predominantly black at the time *Brown I* was decided. Even so, the court conceded that there was "substantial racial mixing of both students and faculty" in other Columbus schools at the same time. 429 F. Supp. at 236. [Pet. App. 10.] The record also demonstrates that affirmative action was taken as early as 1949 to integrate student bodies and teaching faculties, to select black teachers for the cadet principal program, and to recruit black teachers. [A. 573-75.]

The district court's findings and the record evidence therefore clearly establish that the condition of racial imbalance in schools in 1954 in no way approached the absolute racial separation which existed in statutory dual sys-

[34]Since 1887, an Ohio statute has required the assignment of students to public schools without regard to race. 84 Ohio Laws 34; *Board of Education v. State*, 45 Ohio St. 555, 16 N.E. 373 (1888); *Board of Education v. State*, 114 Ohio St. 188, 151 N.E. 39 (1926). *See* 429 F. Supp. at 235. [Pet. App. 8.] See also *Dayton Board of Education v. Brinkman*, 433 U.S. at 410 n. 4.

[35]This evidence consisted of a paper on the history of the schools, old newspaper articles, and the personal experiences of a few witnesses. Much of the documentary evidence, especially the newspaper articles, was inadmissible hearsay. Nonetheless, the district court admitted it under the exception to the hearsay rule for "ancient documents." FED.R.EVID. 803(16).

tems. The characterization of the system as "dual" in 1954 is simply not founded in fact.

There was also no effort by either the plaintiffs or the district court to demonstrate the relevance of conditions as they existed in 1954 to the question of whether the Columbus schools were unconstitutionally segregated at the time this case was tried in 1976. Indeed, it would be impossible on this record to demonstrate a causal connection because of the evidence of a myriad of intervening events and forces which are responsible for the current racial composition of the school system. These factors include the phenomenal growth of the school system's student population, the fourfold growth in geographic size through annexation, and the growth of the black population. There are also intervening forces of economics, personal choices and other demographic factors which have created the current residential mosaic in Columbus. Finally, there are the intervening effects of the discriminatory practices of federal agencies, realtors, lending institutions, and other private actors. These intervening forces clearly have negated, diluted, or totally obscured any possible contemporary effect of isolated actions of predecessor school boards in the remote past.

Remoteness in time may not make these past actions any less intentional, *Keyes, supra,* 413 U.S. at 210-11, but remoteness in time, especially when combined with significant intervening demographic forces, certainly makes the conclusion of a causal relationship more tenuous. *Dayton, supra,* 433 U.S. at 410-11; *Spangler, supra,* 427 U.S. at 434-36; *Swann, supra,* 402 U.S. at 31-32.

b. *The presumption of systemwide impact cannot be supported by a retroactive application of Keyes to the system as it existed in 1954.*

In the absence of any factual evidence of a causal connection, both courts below resorted to the use of presumptions founded upon a misapplication of this Court's decision in *Keyes.* Both courts believed that, by applying the

*Keyes* presumption to the school system *as it existed in 1954*, the system could be characterized as dual, and the requirement of proof that a current condition of intentional segregation existed at the time of trial could be abandoned.

The language in *Keyes* which was claimed to support such an approach reads:

> "... where plaintiffs prove that school authorities have carried out a *systematic program of segregation* affecting a *substantial portion* of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system."
>
> *Keyes, supra,* 413 U.S. at 201. (emphasis added.)

This language was acknowledged by the Sixth Circuit as "the legal predicate for the District Judge's finding of a dual system" in 1954. 583 F.2d at 799. [Pet. App. 160.]

Nonetheless, whatever can be said about the evidence concerning the state of the Columbus school system in 1954, the courts below committed a fundamental legal error in applying the *Keyes* presumption *retroactively*. If the employment of such a presumption retains any viability after *Dayton*,[36] it is clear that both *Keyes* and *Dayton*

---

[36]The Court's insistence in *Dayton* upon factual proof of current segregative effect, and its criticism of the "fruit of the poisonous tree" approach, certainly calls into question the continued viability of the *Keyes* presumption:

> "This emphasis on actual proof of the demographic effects caused within a district by a constitutional violation clearly marks the demise of the *Keyes* presumptions, which allowed a court to assume that all incremental segregation in a district resulted from the board's intentional constitutional violation."
>
> Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies,* 72 Nw.U.L.Rev. 382, 404 (1978).

(Footnote 36 continued on page 72)

would require that the presumption be applied to the facts *as they exist at the time of trial.* Neither *Keyes,* nor any other decision of this Court, has authorized the retroactive application of this presumption.

In *Keyes,* the Court insisted upon proof of a current condition of segregation brought about or maintained by intentional state action. In finding such a condition to exist in Denver at the time of trial, the Court relied on recent practices of the school authorities in the Park Hill area of Denver. There was no attempt by this Court, nor by the lower courts, to rely on events in the remote past in reaching the conclusion that the Park Hill schools were segregated at the time of trial[37].

If there was ever any doubt whether this Court might approve a retroactive application of the *Keyes* presumption to conditions existing in 1954, that doubt was clearly removed by *Dayton.* Despite the fact that such a rationale

---

(Footnote 36 continued)

While the lower courts in this case relied on the *Keyes* presumption in order to avoid the factual inquiry mandated by *Dayton,* we do not believe it is necessary to ask the Court to explicitly overrule *Keyes* in this respect. As the discussion in the text demonstrates, it is clear that the factual pretext for triggering the *Keyes* presumption was never established in this case.

[37]The *Keyes* complaint was filed in June, 1969. In authorizing a presumption of a dual system at the time of trial, this Court relied upon proof of "an unconstitutional policy of deliberate racial segregation" in the Park Hill district over the period 1960-1969, and placed primary emphasis on the rescission in 1969 of a plan to desegregate the Park Hill schools. 413 U.S. at 191-93, 198-200.

Likewise, there is no discussion in the decisions of the court of appeals, 445 F.2d 990 (10th Cir. 1971), or of the district court, 313 F.Supp. 61 (D. Colo. 1970), of any event occurring prior to 1960 with respect to the Park Hill schools. Although the district court referred to two pre-1954 instances in another section of the city, 313 F.Supp. at 69-70, 72-73, it found these actions not to constitute violations of the constitution.

was expressly urged on the Court as a basis for upholding the systemwide liability and remedy judgments in that case, this Court insisted upon proof, not presumption, of current incremental segregative effect.[38]

The proper focus of the inquiry in this case should therefore have been upon the Columbus school system as it existed in fact at the time of trial in April 1976, not as it may have been presumed to exist in 1954. The significance of the schools cited by the district court thereupon shrinks to an imperceptible level. At the time of trial, only three of these schools (Champion, Garfield and Pilgrim) still existed. *See* p. 63 n.31, *supra.* They were located in the center of the city's black residential population, far from schools with any significant white enrollment. Only approximately three percent of the total black student population attended these schools [A. 745-50 (Px 11)], and all of them had integrated teaching faculties.[39] [A. 789-99 (Px 385).] There was therefore no credible evidence that the racial composition of these schools at the time of trial was the result of a "systematic program of segregation," and it was clear that conditions

---

[38]The application of the *Keyes* presumption to the 1954 Dayton school system was urged by the respondents in that case to support their argument that the system was "dual" in 1954, and that the responsibility for the current condition of racially imbalanced schools could therefore be attributed to the Dayton school officials without further proof. *Dayton, supra,* Brief for Respondents at 58-71. The Department of Justice advocated the same approach. Brief for United States as Amicus Curiae at 23-33. This rationale was also the subject of extensive discussion at oral argument. Tr. of Oral Arg. at 5, 10-17. Yet, despite the fact that this rationale was urged upon the Court in clear and certain terms, it was effectively rejected by the Court's insistence upon factual proof of current effect.

[39]In *Keyes,* 38 percent of Denver's black student population attended the Park Hill schools, 413 U.S. at 199, and the schools had segregated teaching staffs. 413 U.S. at 200.

in these schools did not affect "a substantial portion of the students, schools, teachers, and facilities" in the Columbus school system at the time of trial. *Keyes, supra,* 413 U.S. at 201.

Consequently, the presumption of systemwide impact employed by the lower courts cannot be supported by characterizing the Columbus system as "dual" in 1954, or at the time of trial.

c. *The presumption of systemwide impact improperly attributes responsibility for residential racial imbalance to school officials.*

The presumption that remote and isolated acts of the Columbus Board caused the current condition of racial imbalance in schools contradicts the fact, conceded by the plaintiffs' witnesses and the district court, that the primary cause of racially imbalanced schools is racially imbalanced residential patterns for which school officials cannot be held responsible. As this Court noted in *Swann,* however, a school desegregation case "can carry only a limited amount of baggage." *Swann, supra,* 402 U.S. at 22. The objective is to assure that school authorities do not exclude pupils from schools on the basis of race; "it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." *Id.,* at 23.

In *Austin Independent School District v. United States,* 429 U.S. 990, 994 (1976), Mr. Justice Powell noted that

> "The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pres-

sures and voluntary preferences are the primary determinants of residential patterns."

The evidence adduced at the trial in this case demonstrates that the forces described by Mr. Justice Powell are the principal causes of racial imbalance in the Columbus public schools.

Dr. Karl Taeuber, the plaintiffs' expert witness, testified extensively concerning the causes of residential segregation. Although he acknowledged that a "myriad" of factors [R. 1831] influence housing patterns, he testified that they could be grouped into three categories: choice, economics, and discrimination.

The choice factor pertains to the tendency of citizens of common national or ethnic origins to form homogeneous residential patterns. [A. 285-86, 304.] See also, *Austin*, *supra*, 429 U.S. at 944 n. 5 (Powell, J., concurring). Economic factors play a major role, accounting for up to 50 percent of residential patterns. *See* p. 15 *supra*, and n. 5. As Mr. Justice Powell observed to be the case in *Austin*, these two factors are also the primary causes of residential segregation in Columbus.

In addition to these factors, discrimination may influence residential patterns. Within the area of discrimination, Dr. Taeuber recognized numerous practices and policies of the real estate industry, financial institutions, federal and state government, and private individuals, all of which contribute to residential segregation. *See* pp. 15-16 and n. 6, *supra*. A major part of the plaintiffs' evidence in this case concerned such practices. [*See, e.g.*, A. 243-51, 294-95, 325-42.] Nonetheless, there was no probative evidence concerning the impact of decisions by school officials on housing patterns. Discrimination by school officials was not one of the nine factors listed by Dr. Taeuber as responsible for segregated residential patterns,

and there was no probative evidence directly implicating school officials in the discriminatory practices of others.[40]

Nonetheless, the court found that school board actions had an impact on housing in an indirect manner, finding "a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves" 429 F. Supp. at 259. [Pet. App. 57.] However, there was absolutely no empirical evidence that such an effect occurs in Columbus, or anywhere else for that matter. Instead, the court relied upon the testimony of Martin Sloane, a lawyer who was general counsel for the National Committee Against Discrimination in Housing. [A. 325.] Although the bulk of his testimony related to discriminatory practices by FHA, VA and other federal agencies, Mr. Sloane also expressed an opinion that racial identification of a school as white has a reciprocal effect on its neighborhood. [A. 339-42.]

There are a number of reasons why Mr. Sloane's testimony is of no probative value, and fails to support the district court's finding concerning reciprocal effect. In the first place, Mr. Sloane possessed no qualifications as an expert in demographics, urban planning, geography, or sociology. While his experience and education may have qualified him to testify concerning discrimination in federal housing programs, he was not qualified to express an opinion on residential patterns in general, which another of plaintiffs' witnesses pointed out were attributable to choice, economics, and other types of discrimination. Mr. Sloane conducted no studies in general, nor of Columbus in particular, to support his conclusion. [A. 326.] Furthermore, his

---

[40]The district court made only one finding concerning the Board's involvement with such practices, and that was to reject the plaintiffs' contention that the construction of a school in an area formerly covered by racially restrictive covenants implicated the defendants in an act of housing segregation. 429 F. Supp. at 243. [Pet. App. 25.]

opinion concerning reciprocal effect was in answer to a hypothetical question which assumed schools were constructed in areas covered by racially restrictive covenants [A. 339-41], yet the district court found that such a practice by school officials could not be considered to be intentionally discriminatory. 429 F. Supp. at 243. [Pet. App. 25.] Mr. Sloane was unable to explain why schools actually built in areas which were formerly covered by racially restrictive covenants actually had predominantly black or racially balanced student bodies. [A. 343-44.]

Finally, even if it is assumed that there is a reciprocal effect between the racial composition of schools and residential patterns, one would expect that in Columbus the effect was beneficial. Dr. Taeuber's indices demonstrated that the Columbus Public Schools have consistently been more racially balanced than the residential population. If the racial composition of schools is assumed to have an impact on residential racial balance, one would therefore expect that schools have an integrative effect on residential patterns in Columbus.

Nonetheless, the existence of racial reciprocity between schools and neighborhoods has no factual or scientific foundation,[41] and has not been established in this record. In fact, the record discloses several instances which provide a factual foundation for the rejection of the reciprocal effect theory. For example, the reciprocal effect theory presumes, as did plaintiffs' witness Dr. Foster, that altering attendance boundaries or changing feeder patterns in a manner which racially balances a school has a stabilizing effect on the surrounding neighborhood. The Columbus Board's experience with Southmoor Junior High,

---

[41]Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, 83 (1978). In this article, Professor Wolf reviews the academic literature and the results of numerous experiments and studies, with the conclusion that there is no scientific foundation for the reciprocal effect theory.

however, demonstrates that the theory is not supported in fact.

The selection of the site and the drawing of attendance boundaries for Southmoor was a deliberate effort to insure that the school would have a racially balanced student body. As a result of the site selection and attendance area, Southmoor opened in 1968 with a 33.5 percent black student body. [A. 784, (Px 383).] The Board was commended for this integrative step, and Dr. Foster agreed that the school was well sited. [Px 194, p. 20; R. 3709.] However, as the residential population in the area became increasingly black, Southmoor became increasingly black, and by 1975 it had become an "identifiably black" school. [A. 746 (Px 11), A. 784 (Px 383).] Racially balancing Southmoor in 1968 was therefore ineffective to halt the demographic forces which were making the neighborhood increasingly black. Consequently, there was little, if any, reciprocal or stabilizing effect of this school on the neighborhood which it served.[42]

Although this Court has suggested that practices such as discriminatory school site selection and closing, and the assignment of students on a racial basis, "may" promote segregated residential patterns, *Swann, supra,* 402 U.S. at 20-21, or "may have a profound reciprocal effect on the racial composition of residential neighborhoods," *Keyes, supra,* 413 U.S. at 202, it has never accorded the reciprocal effect theory any legally presumptive weight, nor has it ever adopted a theory that school officials are responsible for residential patterns as a matter of law. Indeed, since Mr. Justice Powell's concurring opinion in *Austin,* this Court has clearly rejected the contention that school officials can be held responsible for segregated residential

---

[42]There have been numerous studies and natural experiments which demonstrate that the Board's experience with Southmoor was not an aberration. *See* Wolf, *supra,* n. 40 at 67-68.

patterns. *Dayton, supra,* 433 U.S. 416; *Spangler, supra,* 427 U.S. at 434-36.

Consequently, it was improper for the courts below to invent a presumption of systemwide impact which places upon school officials the responsibility for racially imbalanced residential patterns.

### C. The Lower Courts Exceeded Their Remedial Jurisdiction in Imposing a Remedy which Requires the Racial Composition of Every School in the System to be Brought Within a Statistical Racial Balance.

The district court's order of July 29, 1977 [Pet. App. 97] rejected the desegregation plans proposed by the Columbus Board because they did not racially balance all the schools in the Columbus system, but approved the "numerical face" of a planning exercise which developed school pairings to racially balance each school to within ± 15% of the 32.5% mean black enrollment in the district, noting that it "would desegregate all schools." [Pet. App. 105.][43]

In directing the Columbus Board to develop and submit a new proposed desegregation plan, the court insisted that the plan "must legally desegregate the entire Columbus school system under the principles set out in this order." [Pet. App. 111.]

In view of the court's objections to a plan which allowed "racially identifiable" schools to remain, the Columbus Board realistically concluded that the plan to be developed and submitted to the court must eliminate all racially identifiable schools, or be rejected by the district court. The Board also recognized that a plan drafted by

[43]The district court's liability opinion characterized all schools outside of the 32.5% ±15% range as "racially identifiable". 429 F. Supp. at 268-69 [Pet. App. 78-79.] The district court adhered to this definition at the remedy phase, and rejected both plans proposed by the Board because they left some "racially indentifiable" schools. [Pet. App. 99-105.]

its professional staff, who were intimately familiar with the organization and administration of the schools in the Columbus system, would be preferable to one drafted by the district court. Consequently, the Board authorized the development and submission of such a plan. The plan was filed on August 31, 1977. [A. 64-172.]

Even though the Board authorized the formulation of this plan, it strenously objected to the theory that the correction of any current incremental effect of past intentional discrimination required that each school in Columbus be brought to within the statistical racial balance sought by the district court, and in submitting the plan specifically reserved its rights to appeal.

After hearings confined to questions concerning date of implementation and the cost and availability of transportation equipment, the district court ordered that the plan be implemented in September, 1978. [Pet. App. 125.] The remedy ordered by the district court requires that each school within the Columbus system be brought within 32% ± 15% measure of racial balance. Although the Columbus Board strenously objected to this requirement on appeal, the Sixth Circuit affirmed the plan with no discussion of its racial balance features.

According to the district court's own admission, Columbus schools would not be racially balanced today had school officials never committed a single discriminatory act. Consequently, a remedy which requires such a result exceeds that which is necessary to correct the current incremental segregative effect of past discriminatory acts, and clearly violates the rule of *Dayton.*

Even prior to *Dayton,* however, this Court consistently disapproved of desegregation remedies which required a statistical racial balance to be achieved in every school. See, e.g., *Spangler, supra,* 427 U.S. at 424, *Swann, supra,* 402 U.S. at 23-24; *Milliken I, supra,* 418 U.S. at 740-41. See also, *Spencer v. Kugler,* 404 U.S. 1027 (1072).

In *Swann,* the Court stated:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."
>
> *Swann, supra,* 402 U.S. at 24.

The judgments below impose a remedy which achieves the *exact result* criticized by the Court in *Swann,* and therefore must be reversed.

## II. PURPOSE OR INTENT TO DISCRIMINATE MAY NOT BE INFERRED SOLELY FROM EVIDENCE THAT THE DISPROPORTIONATE IMPACT OF OFFICIAL ACTION WAS FORESEEABLE.

Prior to this Court's decision in *Keyes,* there was some confusion in the lower courts concerning the question of whether, in the absence of statutorily mandated segregation, it was necessary for plaintiffs to prove that a current condition of racially imbalanced schools was caused by intentionally discriminatory acts of school officials. However, in *Keyes* the Court made it clear that such proof was required:

> ". . . in the case of a school system . . . where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional state action."
>
> *Keyes, supra,* 413 U.S. at 198.

Immediately after the Court's decision in *Keyes,* however, a conflict developed among the circuits concerning the manner in which plaintiffs could meet their burden of proof on the intent issue. The Ninth Circuit required proof that the defendant's acts were actually motivated by

an invidiously discriminatory purpose, and rejected the approach of drawing an inference of segregative intent solely from evidence that the defendant's acts had a foreseeably disproportionate impact. See *Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District,* 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees,* 488 F.2d 579 (9th Cir. 1973), *cert. denied,* 416 U.S. 951 (1974). A number of other circuits, however, held that discriminatory intent could be inferred solely from evidence that the disproportionate impact of official action was foreseeable. See, e.g., *Hart v. Community School Board,* 512 F.2d 37, 51 (2d Cir. 1975); *Oliver v. Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 936 (1975).

Even after this Court's decisions in *Washington v. Davis, Austin,* and *Arlington Heights,* a number of appellate courts have continued to adhere to the foreseeable effect test. See, e.g., *Arthur v. Nyquist,* 573 F.2d 134 (2nd Cir. 1978); *United States v. Texas Education Agency,* 564 F.2d 162 (5th Cir. 1977), *reh. denied,* 579 F.2d 910 (1978); *United States v. Board of School Commissioners of Indianapolis,* 573 F.2d 400 (7th Cir. 1978); *United States v. School District of Omaha,* 565 F.2d 127 (8th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978).

After acknowledging the conflict among the circuits, 429 F.Supp. at 253 n. 3 [Pet. App. 46 n.3], the district court in this case concluded that it was bound by the decision of the Sixth Circuit in *Oliver, supra,* and adopted the foreseeable effect approach to its evaluation of the record evidence.

The foreseeable effect test was articulated in two alternative forms by the district court. The first was that if the Board acted with knowledge or reason to know that a collateral effect of its action (whether desired or not) was to maintain or increase racial imbalance, the court could draw an inference of segregative intent:

> "The intent contemplated as necessary proof can best be described as it is usually described—intent embodies the expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions."
>
> 429 F. Supp. at 252. [Pet. App. at 44-45.]

The alternative formulation of the foreseeable effect theory adopted by the court was that if the Board was presented with two alternative courses of action, one of which would have an integrative effect and one which would have the effect of maintaining or increasing racial imbalance, the failure to choose the integrative alternative justified drawing the inference of segregative intent:

> ". . . I am constrained, from certain facts which I believe to be proved, to draw the inference of segregative intent from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance."
>
> 429 F. Supp. at 240. [Pet. App. 19-20.][44]

---

[44]At least one commentator has recognized that the two formulations adopted by the lower courts in this case are improper under *Washington v. Davis* and *Arlington Heights*:

> "Some courts and commentators thought that the tort law intent standard – that an actor, here the decisionmaker, intends the probable, natural, or foreseeable consequences of his decision – applied in the equal protection context. [Citations omitted.] Since the village was probably aware of the consequences of its refusal to rezone, *Arlington Heights* seems to preclude this interpretation. In any event, it would generally amount to the impact test rejected by *Washington v. Davis* . . ."
>
> "Other commentators have suggested that a decisionmaker would violate the intent standard of *Washington v. Davis* if

(Footnote 44 continued on page 84)

The court then applied this concept of intent to its review of the post-1954 actions of the defendants, but found that it could draw an inference of segregative intent with respect to only a few specific actions. As a general matter, however, the court also found that it could infer segregative intent from the defendants' adherence to a neighborhood school policy in the face of residential racial imbalance. All of these findings were adopted by the Sixth Circuit.

The approach adopted by the lower courts to the question of proof of an invidiously discriminatory purpose amounted to the adoption of an "effect" standard – that an act would be presumed to be intentionally discriminatory if it had a racially disproportionate impact. The only apparent qualification to the "effect" test which the lower courts adopted was to engraft onto it a requirement that the actor must know or have reason to know that the effect might result. However, the adoption of the "effect" test, even with the qualification as to knowledge of the actor, was improper under this Court's decisions in *Washington v. Davis, Austin Independent School District v. United States,* and *Village of Arlington Heights,* all of which require proof of discriminatory motive beyond mere proof of a racially disproportionate impact.

In *Washington v. Davis,* 426 U.S. 229 (1977), the Court held that official action which has a racially disproportionate impact does not violate the equal protection clause unless it is also discriminatorily motivated. Although the Court did not elaborate upon the manner in which

---

(Footnote 44 continued)

> it chose a more segregative measure over an alternative that served its purpose equally well . . . [T]he propriety [of such a standard] is questionable. And *Arlington Heights* seemed to preclude this interpretation of *Washington v. Davis* as well." *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 166-167 n. 33 (1977).

such a motive must be proven, it did reject the practice of inferring such an intent or motive from the impact of governmental action in the absence of other relevant facts from which such an intent or motive could be inferred:

> "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another . . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule [citation omitted], that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."
>
> *Washington v. Davis, supra,* 426 U.S. at 242.

The first indication that the Court would apply *Washington v. Davis* in a manner rejecting the "foreseeable effect" standard of intent came in *Austin Independent School District v. United States,* 429 U.S. 990 (1976). In a brief memorandum opinion, the Court vacated and remanded "for reconsideration in light of *Washington v. Davis*" a decision of the Fifth Circuit Court of Appeals which had employed the foreseeable effect test to impose liability upon a school district which followed a neighborhood school assignment policy in a residentially segregated community.[45]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), the Court elaborated on its holding in *Washington v. Davis* and established the manner in which discriminatory intent or purpose must be proven.

---

[45]The offending language which Mr. Justice Powell's concurring opinion quoted from the court of appeals' decision is strikingly similar to a question posed and answered by the district court in this case. *See* pp. 91, 94, *infra.*

First, the Court made clear that a plaintiff claiming that government action was discriminatory had the burden of proving that the action was discriminatorily *motivated.* Although discrimination need not be the "dominant" or "primary" purpose for official action, it must be "a motivating factor" in the decision. 429 U.S. at 265-66. Demonstrating that an invidious discriminatory purpose was a motivating factor, "demands a sensitive inquiry into such circumstantial or direct evidence of intent as may be available." 429 U.S. at 266. While disproportionate impact may provide a "starting point," the cases in which it is determinative are "rare."[46] Otherwise, the Court must look to other evidence, such as

(1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;

(2) the specific sequence of events leading up to the challenged decision;

(3) departures from the normal procedural sequence;

(4) substantive departures, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached;

(5) the legislative or administrative history of a decision, especially contemporary statements by members of the body, minutes of its meetings, or reports; and

---

[46]The only case where impact alone is sufficient is where the statistical evidence indicates a disparity or disproportionate impact so stark as to make it impossible to explain other than by reference to an invidiously discriminatory purpose. *Arlington Heights, supra,* 429 U.S. at 266. See also *Castenada v. Partida,* 430 U.S. 482 (1977); *Washington v. Davis, supra,* 426 U.S. at 242; *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

(6) the direct testimony of the actors concerning the purpose of their actions.

429 U.S. at 267-68.

A review of the opinions of the lower courts in this case will disclose that those courts based their conclusion of discriminatory intent solely upon circumstantial evidence of disproportionate impact. In most instances, the only evidence adduced by the plaintiffs was Dr. Foster's unreliable statistical analysis of census data, which he believed to indicate a racially disproportionate impact. The district court's discussion of the construction of Sixth Avenue and Gladstone elementaries, the "near-Bexley" and Highland optional zones, and the Heimandale discontiguous zone, is based entirely upon such a statistical analysis. The discussion of the Moler discontiguous area and the Innis-Cassady alternatives makes only limited mention of any evidence other than bare statistics. The Sixth Circuit's discussion of school construction policies is based entirely upon the statistic that 87 of 103 new schools opened with "racially identifiable" enrollments under the district court's statistical measurement. A review of the record will disclose little, if any, of the other types of evidence required by *Arlington Heights* supporting the inference of segregative intent drawn by the lower courts.

Indeed, all of the direct evidence on the intent issue established the *absence* of an invidiously discriminatory purpose in the particular school board actions faulted by the courts below for their disproportionate impact. For example, there is ample direct evidence that these particular actions were prompted by a desire to alleviate overcrowding in particular schools, or by an unwillingness to depart from the longstanding neighborhood school policy:

(1) The school construction program was undertaken to meet the demands of a rapidly expanding school population in a growing geographic area.

Schools were constructed in "substantial conformity" with the "comprehensive, scientific, and objective" Ohio State University studies. Racial factors were not among the criteria employed by the University or the Board. *See* pp. 19-22, *supra*. The construction and siting of both the Sixth Avenue and Gladstone elementary schools were specifically recommended by the Ohio State studies as necessary to serve growing student populations in both areas. *See* pp. 22-24, *supra*.

(2) Optional zones were used to provide flexibility in school boundaries to meet rapidly growing enrollments, for distance and safety reasons, and to phase in new secondary schools. These zones had no racial significance. The Highland-West Broad-West Mound optional zones were established for these reasons. *See* pp. 26-31, *supra*.

(3) Discontiguous attendance areas were small, geographically isolated, and had student populations too small to justify a separate school. They were assigned to nearby schools which were easily accessible and had available capacity. Both the Moler and Heimandale zones met these neutral criteria. Furthermore, the Heimandale zone was established by the Marion-Franklin school district before the area was transferred to Columbus in 1957, and its discontinuance by the Columbus Board in 1963 had an integrative effect. *See* pp. 31-34, *supra*.

In each of these instances, the evidence clearly established the non-discriminatory purpose of the decision in a manner which would foreclose any finding that it was motivated by an invidiously discriminatory purpose. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 179-80 (1977) (Stewart, J., concurring).

Furthermore, it is only common sense, and sound evidentiary reasoning, that if the Board of Education is

shown by direct evidence to be motivated by an *integrative* purpose at a certain point in time, a court cannot logically make a finding that contemporaneous actions were motivated by an invidiously discriminatory purpose, based entirely upon a mere inference drawn from their disproportionate impact. The fact that there was evidence of contemporaneous integrative actions by the Columbus Board therefore precludes drawing an inference of segregative intent from the impact of other actions.[47]

Consequently, it was a clear violation of *Washington v. Davis* and *Arlington Heights* for the courts below to draw an inference of segregative intent from certain actions by school officials solely because the disproportionate impact of those actions may have been foreseeable. Under *Arlington Heights*, the plaintiffs were re-

---

[47]For example, in drawing an inference of segregative intent solely from an incidental effect of the rejection of the Innis-Cassady pairing proposal in 1975, the Court ignored contemporaneous evidence of integrative actions to promote racial balance through new school attendance areas and the Columbus Plan programs. In 1975-76, the attendance area for the new Briggs High School was drawn so that Briggs and West High School would have integrated student bodies representative of the western area of the district, and both had 16% black students in that year. [A. 745 (Px 11.).] The new attendance area for Independence Junior-Senior High School, in the system's far east area, was also drawn in 1975 so that the school had an integrated 12.4% black student population. [A. 745 (Px 11).]

Similarly, in the siting of the new Southmoor Junior High School in 1968, the Board made a specific effort to draw the new attendance zone so that Southmoor would open with an integrated student body. It opened racially balanced at 33% black. [Px 4.] The Ohio State University Advisory Commission commended the Board for this integrative act. [Px 194.] This direct evidence of integrative intent was totally ignored, however, when the Court drew an inference of segregative intent from the mere existence of the Moler discontiguous zone in 1968.

quired to introduce other direct and circumstantial evidence establishing an invidious discriminatory purpose on the part of school officials. It is also clear from *Arlington Heights* that mere proof of disproportionate impact is insufficient to make out a prima facie case of intentional discrimination, justifying a shift in the burden of going forward to the defendants.[48] Other evidence is required in order to make the required "threshold showing." 429 U.S. at 271 n. 21.

By inferring an invidiously discriminatory purpose from the foreseeable impact of certain actions of the defendants, the courts below therefore adopted an "effect" test of discriminatory intent. The courts were concerned only with the disproportionate impact of certain decisions, and failed to require the plaintiffs to prove that the decisions were discriminatorily motivated. Since the adoption of such an "effect" or "impact" test clearly violates the rule of *Washington v. Davis* and *Arlington Heights,* the judgments below should be reversed.

---

[48]Assuming that such a prima facie case had been made out here, the burden would have shifted to the defendants to show that the same decisions would have been made "even if the impermissible purpose had not been considered." 429 U.S. at 271 n.21. See also *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977).

The district court misunderstood the nature of this burden shifting principle. The burden on defendants would not be to prove that "the present admitted racial imbalance . . . would have occurred even in the absence of their segregative acts and omissions," 429 F.Supp. at 260 [Pet. App. 61], but only that the challenged decisions would have been made "even if the impermissible purpose had not been considered."

It is also clear that shifting the burden of proof in this manner only imposes upon the defendant the burden of going forward with evidence to rebut the plaintiff's prima facie case. The risk of nonpersuasion does *not* shift to the defendant, but remains with the plaintiff. Rule 301, FED. R. EVID. Apparently the district court misunderstood this principle.

## III. PURPOSE OR INTENT TO DISCRIMINATE MAY NOT BE INFERRED FROM ADHERENCE TO A NEIGHBORHOOD SCHOOL POLICY IN A DISTRICT WITH RACIALLY IMBALANCED RESIDENTIAL PATTERNS.

The most compelling example of the district court's abandonment of the intent requirement, through the employment of the foreseeable effect test, was the inference of segregative intent which it drew from the Board's adherence to a neighborhood school policy.

This explicit finding was contained in a question posed and answered in the district court's liability opinion:

> "If a board of education assigns students to schools near their home pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists?"
>
> 429 F. Supp. at 254. [Pet. App. 48.]

After stating that "a *majority* of the United States Supreme Court has not directly answered this question regarding non-racially motivated inaction," the district court answered the posed question in the affirmative. 429 F. Supp. at 255. [Pet. App. 48-49.] The Sixth Circuit approved, adding that the construction of new neighborhood schools, most of which were "racially identifiable" under the statistical measure adopted by the trial court, required "a very strong inference of intentional segregation." 583 F.2d at 804. [Pet. App. at 173.] Thus, under the foreseeable effect test, the mere continuance of the neighborhood school policy in Columbus, which the district court characterized as "non-racially motivated inaction," became the basis of a finding of unlawful segregation by the school board.

The lower courts' use of the foreseeable effect test to strike down the neighborhood school policy completely ignores the strong educational and public policy reasons for assigning children to schools located in their neighborhood. The purposes and benefits of the policy were forcefully articulated by Mr. Justice Powell in his separate opinion in *Keyes*:

> "Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest, and dedication to a public school may well run higher with a neighborhood attendance pattern."
>
> *Keyes, supra,* 413 U.S. at 246 (Powell, J., concurring in part and dissenting in part).

The United States Congress has declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." Equal Educational Opportunity Act of 1974, 88 Stat. 516, 20 U.S.C. § 1701. Moreover, the same statute provides that "the assignment by an educational agency of a student to the school nearest his place of residence . . . is not a denial of equal educational opportunity or of equal protection of the laws." 20 U.S.C. § 1705.

In addition to these strong public policy foundations, neighborhood schools have a statutory foundation in Ohio. Section 3313.48, OHIO REVISED CODE, requires school boards to:

> ". . . provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (Emphasis added)

The Sixth Circuit has held that this statute mandates Ohio school boards to construct schools in the neighborhoods where the children live. *Deal v. Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967).

The Columbus public schools have been operated as a neighborhood school system since before the turn of the century, and this experience has demonstrated the overwhelming benefits of the neighborhood school policy. The policy has provided the Columbus community with the best possible education that limited financial resources would allow, has kept transportation at a minimum, and has provided a sound foundation for parental and community support of the schools. *See* pp. 17-18, *supra.*

In view of the uncontradicted record evidence concerning the benefits derived from the neighborhood school policy in Columbus, and its strong legal and public policy foundations, the lower courts had absolutely no justification in finding that the maintenance of a system of neighborhood schools in a community with racially imbalanced residential patterns permitted an inference of segregative intent.

The trial court was correct that this Court has not yet directly confronted the question of whether segregative intent can be inferred from the mere adherence to a neighborhood school policy in a school system which is residentially imbalanced. In *Keyes,* the Court specifically reserved the question:

> "whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation."
>
> *Keyes, supra,* 413 U.S. at 212.

The Court's subsequent rejection of the "impact" test in *Washington v. Davis, Austin, Arlington Heights, Spangler,* and *Dayton,* however, now clearly requires that the ques-

tion reserved in *Keyes,* and the question posed by the district court in this case, be answered in the negative.

Particularly in *Austin,* the Court has indicated its negative answer to these questions. In *Austin,* the Court vacated and remanded, for reconsideration in light of *Washington v. Davis,* a Fifth Circuit decision which had explicitly relied on a foreseeable effect concept to draw an inference of segregative intent from the mere adherance to a neighborhood school policy. As the district court in this case had done, the Fifth Circuit held in *Austin* that:

> "[S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent."
>
> *United States v. Texas Education Agency,* 532 F.2d 380, 392 (5th Cir. 1976).

Mr. Justice Powell's concurring opinion in *Austin* correctly found that this holding adopted the "effect" test which the Court had rejected in *Washington v. Davis. Austin, supra,* 429 U.S. at 991 and n.1.

By holding that they could infer segregative intent from the use of a neighborhood school policy in Columbus, merely because it foreseeably resulted in racially imbalanced schools, the lower courts in the present case made precisely the same error which the Fifth Circuit made in *Austin.* In both cases, the courts failed to require proof of segregative intent, and elected instead to impose liability under an "effect" standard.

We urge the Court to explicitly answer the question reserved in *Keyes* in the negative, and to reject the inference of segregative intent which the lower courts drew from the maintenance of a neighborhood school policy in Columbus. Since it is an acknowledged fact that residential racial imbalance is a characteristic of nearly all urban

areas of the United States, if the decisions below are allowed to stand, no urban school system in this country can adhere to a neighborhood school policy without being presumed to be in violation of the equal protection clause.

## VI. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Petitioners respectfully request that the Court reverse the judgments below and direct that judgment be entered for Petitioners. In the alternative, Petitioners request that the Court vacate the judgments below and remand the case to the district court with the direction that it:

(a) determine and specify any acts by the Columbus Board which were intentionally discriminatory under the standards of *Washington v. Davis* and *Arlington Heights;*

(b) determine and specify any current incremental segregative effect of these actions on the racial composition of individual schools within the system, as required by *Dayton, Brennan,* and *Omaha;* and

(c) only if it finds that there were any intentionally discriminatory acts which have a current segregative effect, to formulate, with the assistance of the parties, a remedy confined to the correction of that effect.

Respectfully submitted,

EARL F. MORRIS
CURTIS A. LOVELAND
WILLIAM J. KELLY, JR.
PORTER, WRIGHT, MORRIS & ARTHUR
37 West Broad Street
Columbus, Ohio 43215
Telephone:
(614) 227-2000
*Of Counsel*

SAMUEL H. PORTER
37 West Broad Street
Columbus, Ohio 43215
Telephone:
(614) 227-2000
*Attorney for Petitioners*

Dated: February 22, 1979.

# TABLE OF SCHOOL BUILDINGS
# IN USE IN 1976

# SCHOOL BUILDINGS IN USE IN 1976 WITH REFERENCES TO DATES CONSTRUCTED AND STUDY RECOMMENDATIONS OF NEED FOR FACILITIES BUILT DURING 1950-76

| Name of School | Date Constructed | Recommendations of Need for Facilities Built During 1950-76* |
|---|---|---|
| ELEMENTARY | | |
| Alpine | 1966 | 1963 Study, #19, p. 65 |
| Alum Crest | 1961 | 1958 Study, #57, p. 64 |
| Arlington Park | 1957 | 1955 Study, #49, p. 64; #51, p. 64 |
| Avondale | 1891 | |
| Barnett | 1964 | 1958 Study, #39, p. 62 |
| Beatty Park | 1954 | 1950 Study, #2, p. 77; 1953 Study, p. 70 |
| Beaumont | 1957 | 1955 Study, #47, p. 64 |
| Beck | 1884 | |
| Bellows | 1905 | |
| Berwick | 1956 | 1955 Study, #22, p. 60 |
| Binns | 1957 | 1955 Study, #10, p. 58 |
| Brentnell | 1962 | 1958 Study, #23, p. 60 |
| Broadleigh | 1952-53 | 1950 Study, #14, p. 86 |
| Burroughs | 1921 | |
| Calumet | 1961 | 1958 Study, #10, p. 58 |
| Cassady | 1964 | [Annexed from Mifflin, 1971] |
| Cedarwood | 1965 | 1963 Study, #67, p. 70 |
| Chicago | 1897 | |
| Clarfield | 1926 | [Anexed from Marion-Franklin, 1957] |
| Clearbrook | 1957 | 1955 Study, #33, p. 61 |
| Clinton | 1904-22 | |
| Colerain | 1957 | 1955 Study, #37, p. 62 |
| Como | 1954-55 | 1953 Study, #19, p. 65 |
| Courtright | 1927 | [Annexed from Whitehall, 1957] |
| Cranbrook | 1957 | 1955 Study, #38, p. 62 |
| Crestview | 1915 | |
| Dana | 1911 | |

| Name of School | Date Constructed | Recommendations of Need for Facilities Built During 1950-76* |
|---|---|---|
| ELEMENTARY (Continued) | | |
| Deshler | 1953 | 1950 Study, #62, p. 98 |
| Devonshire | 1963 | 1958 Study, #22, p. 59;<br>1963 Study, #23, p. 66 |
| Douglas | 1976 | 1972 Project UNITE, p. 8 |
| Duxberry | 1959 | 1955 Study, #50, p. 64;<br>#51, p. 64 |
| Eakin | 1960 | 1958 Study, #29, p. 60 |
| East Columbus | 1920 | |
| Eastgate | 1954 | 1953 Study, #15, p. 64 |
| Easthaven | 1968 | 1963 Study, #44, p. 67 |
| East Linden | 1911 | [Annexed from Mifflin, 1971] |
| Eleventh | 1906 | |
| Fair | 1890 | |
| Fairmoor | 1950 | 1950 Study, #13, p. 85 |
| Fairwood | 1924 | |
| Fifth Avenue | 1976 | 1972 Project UNITE, p. 10 |
| Forest Park | 1962 | 1958 Study, #20, p. 59 |
| Fornof | 1925-27 | [Annexed from Marion-Franklin, 1957] |
| Franklinton | 1953 | 1950 Study, #10, p. 84 |
| Gables | 1976 | 1972 Project UNITE, p. 21 |
| Garfield | 1953 | 1950 Study, #44, p. 94 |
| Georgian Heights | 1959 | 1958 Study, #30, p. 61 |
| Gettysburg | 1969 | 1968 Study, #39, p. 82<br>1963 Study, #10, p. 64 |
| Gladstone | 1965 | 1963 Study, #20, p. 65 |
| Glenmont | 1952 | 1950 Study, #27, p. 90 |
| Hamilton | 1953 | 1950 Study, #24, p. 89 |
| Heimandale | 1955 | [Annexed from Marion-Franklin, 1957] |
| Heyl | 1910 | |
| Highland | 1894-1905 | |
| Homedale | 1923 | [Annexed from Worthington, 1956] |
| Hubbard | 1894 | |
| Hudson | 1966 | 1963 Study, #21, p. 65 |

| Name of School | Date Constructed | Recommendations of Need for Facilities Built During 1950-76* |
|---|---|---|
| **ELEMENTARY (Continued)** | | |
| Huy | 1955 | 1953 Study, #21, p. 65 |
| Indianola | 1904 | |
| Innis | 1975 | 1972 Project UNITE, p. 21 |
| Indian Springs | 1950 | 1950 Study, #26, p. 90 |
| James Road | 1952 | 1950 Study, #14, p. 86 |
| Kent | 1960 | 1958 Study, #49, p. 63 |
| Kenwood | 1962 | 1958 Study, #13, p. 58 |
| Kingswood | 1952 | 1950 Study, #12, p. 85 |
| Koebel | 1964 | 1963 Study, #64, p. 70 |
| Leawood | 1960 | 1955 Study, #27, p. 60 |
| Lexington | 1966 | 1963 Study, #22, p. 65 |
| Liberty | 1976 | 1972 Project UNITE, p. 21 |
| Lincoln Park | 1924 | |
| Lindbergh | 1958 | 1955 Study, #11, p. 58 |
| Linden | 1905, 1921 | [Annexed from Mifflin, 1971] |
| Linden Park | 1975 | 1972 Project UNITE, p. 21 |
| Livingston | 1901 | |
| Main | 1876-1906 | |
| Maize Road | 1960 | 1958 Study, #14, p. 59 |
| Marburn | 1960 | 1958 Study, #12, p. 58 |
| Maryland Park | 1958 | 1955 Study, #32, p. 61 |
| Maybury | 1964 | 1963 Study, #52, p. 68 |
| McGuffey | 1927 | |
| Medary | 1892 | |
| Milo | 1894 | |
| Moler | 1963 | 1963 Study, #62, p. 69 |
| North Linden | 1950 | 1950 Study, #23, pp. 88-89 |
| Northridge | 1956 | 1953 Study, #23, p. 66 |
| Northtowne | 1968 | 1963 Study, #17, p. 65 |
| Oakland Park | 1952 | 1950 Study, #24, p. 89 |
| Oakmont | 1966 | 1963 Study, #47, p. 68 |
| Ohio | 1893 | |
| Olde Orchard | 1965 | 1963 Study, #48, p. 68 |
| Parkmoor | 1966 | 1963 Study, #16, p. 64 |
| Parsons | 1960 | 1958 Study, #55, p. 64 |
| Pilgrim | 1922 | |

| Name of School | Date Constructed | Recommendations of Need for Facilities Built During 1950-76* |
|---|---|---|
| ELEMENTARY (Continued) | | |
| Pinecrest | 1959 | 1955 Study, #26, p. 60 |
| Reeb | 1904 | |
| Salem | 1962 | 1958 Study, #16, p. 59 |
| Scioto Trail | 1927 | [Annexed from Marion-Franklin, 1956] |
| Scottwood | 1957 | 1955 Study, #25, p. 60 |
| Second | 1874-1883 | |
| Shady Lane | 1956 | 1953 Study, #17, p. 64 |
| Sharon | 1947 | [Annexed from Worthington, 1956] |
| Shepard | 1906 | |
| Siebert | 1888-1902 | |
| Sixth Avenue | 1961 | 1958 Study, #11, p. 58 |
| Smith Road | 1915 | [Annexed from Marion-Franklin, 1957] |
| South Mifflin | 1952 | [Annexed from Mifflin, 1971] |
| Southwood | 1894 | |
| Stewart | 1874-1893 | |
| Stockbridge | 1959 | 1958 Study, #54, p. 64 |
| Sullivant | 1954 | 1950 Study, #11, p. 84 |
| Thurber | 1922 | |
| Trevitt | 1964 | 1958 Study, #37, p. 62 |
| Valley Forge | 1963 | 1958 Study, #15, p. 59 |
| Valleyview | 1957 | 1955 Study, #12, p. 58 |
| Walden | 1968 | 1963 Study, #18, p. 65 |
| Walford | 1961 | 1958 Study, #17, p. 59 |
| Watkins | 1961 | 1958 Study, #56, p. 64 |
| Wayne | 1968 | 1963 Study, #40, p. 67 |
| Weinland Park | 1952 | 1950 Study, #33, pp. 91-92 |
| West Broad | 1910 | |
| West Mound | 1952 | 1950 Study, #4, pp. 82-83 |
| Westgate | 1952 | 1950 Study, #5, p. 83 |
| Willis Park | 1958 | 1955 Study, #24, p. 60 |
| Windsor | 1959 | 1955 Study, #46, p. 64 |
| Winterset | 1968 | 1963 Study, #9, p. 64 |
| Woodcrest | 1961 | 1958 Study, #44, p. 62 |

| Name of School | Date Constructed | Recommendations of Need for Facilities Built During 1950-76* |
|---|---|---|
| JUNIOR HIGH | | |
| Barrett | 1898 | |
| Beery | 1956-57 | [Annexed from Marion-Franklin, 1957] |
| Buckeye | 1963 | 1958 Study, #77, p. 69 |
| Champion | 1909 | |
| Clinton Jr. | 1955 | 1953 Study, #46, p. 70 |
| Crestview | 1915 | |
| Dominion | 1956 | 1953 Study, #47, p. 71 |
| Eastmoor Jr. | 1962-63 | 1958 Study, #73, p. 68 |
| Everett | 1898 | |
| Franklin | 1898 | |
| Hilltonia | 1956 | 19.3 Study, #45, p. 70 |
| Indianola Jr. | 1929 | |
| Johnson Park | 1958-59 | 1955 Study, #56, p. 65 |
| Linmoor | 1957 | 1955 Study, #58, p. 66 |
| McGuffey | 1927 | |
| Medina | 1959-60 | 1955 Study, #59, p. 66 |
| Monroe | 1963-64 | 1958 Study, #71, p. 67 |
| Ridgeview | 1966 | 1963 Study, #69, p. 70 |
| Roosevelt | 1916 | |
| Sherwood | 1966 | 1963 Study, #82, p. 73 |
| Southmoor | 1968 | 1963 Study, #87, p. 73 |
| Starling | 1908 | |
| Wedgewood | 1965-66 | 1963 Study, #77, p. 72 |
| Westmoor | 1958-59 | 1955 Study, #55, p. 65 |
| Woodward Park | 1967 | 1963 Study, #72, p. 71 |
| Yorktown | 1967 | 1963 Study, #83, p. 73 |
| SENIOR HIGH | | |
| Beechcroft Jr.-Sr. | 1976 | 1972 Project UNITE, p. 21 |
| Briggs | 1976 | 1972 Project UNITE, p. 21 |
| Brookhaven | 1961-63 | 1958 Study, #61, p. 65 |
| Centennial | 1976 | 1972 Project UNITE, p. 21 |
| Central | 1924 | |
| East | 1922 | |

| Name of School | Date Constructed | Recommendations of Need for Facilities Built During 1950-76* |
|---|---|---|
| **SENIOR HIGH (Continued)** | | |
| Eastmoor | 1955 | 1953 Study, #48 and #51, p. 71 |
| Independence Jr.-Sr. | 1976 | 1972 Project UNITE, p. 21 |
| Linden McKinley | 1928 | |
| Marion-Franklin | 1952-53 | [Annexed from Marion-Franklin, 1957] |
| Mifflin Jr.-Sr. | 1924 | [Annexed from Mifflin, 1971] |
| Mohawk Jr.-Sr. | 1953 | 1950 Study, #7, p. 79 |
| North | 1924 | |
| Northland | 1966 | 1963 Study, #71, p. 71 |
| South | 1923 | |
| Walnut Ridge | 1961 | 1958 Study, #72, p. 68 |
| West | 1929 | |
| Whetstone | 1961 | 1958 Study, #60, p. 65 |

*THE RECOMMENDATIONS ARE ABBREVIATED AS FOLLOWS:

1950 Study: "A Re-Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, 1950. [Px 59.]

1953 Study: "A Further Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, May, 1953. [Px 60.]

1955 Study: "The 1955-56 Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, January, 1956. [Px 61.]

1958 Study: "The 1958-59 Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, July, 1959. [Px 62.]

1963 Study: "The 1963-64 Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, June, 1964. [Px 64.]

1968 Study: "The 1967-68 Study of the Public School Building Needs of Columbus, Ohio," by the Educational Administration and Facilities Unit, College of Education, The Ohio State University, March, 1969. [Px 63.]

1972 Project UNITE: "Report of the Buildings Search and Solve Team to the Project UNITE Steering Committee," March, 1972. [Px 219.]