89-1290

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT R. FREEMAN, *et al.*,
Petitioners,

v.

WILLIE EUGENE PITTS, *et al.*,
Respondents.

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

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February 12, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a school district is barred from obtaining a finding of unitariness with respect to student assignments solely because other aspects of the school district's operations, such as faculty assignments, have not simultaneously achieved unitary status for a period of three years.

2. Whether a formerly *de jure* school district, which achieved effective desegregation in student assignments in 1969 by closing its black-only schools and adopting a court-ordered neighborhood school plan, is nevertheless obligated to remedy the segregative effects of massive demographic changes that occurred over the past 20 years which were completely beyond the school district's control.

LIST OF PARTIES

In addition to the parties listed in the caption, the following persons, members of the DeKalb County Board of Education, are additional petitioners:

Lyman Howard
Norma Travis
Phil McGregor
Donna Wagner
Elizabeth Andrews

The following persons, as individual representatives of the class of minor plaintiffs, are additional respondents:

Victor Martin
Kelvin Henderson
Felicia Henderson
Alfred Henderson
Orma Henderson
Alfredia Henderson
Patricia Joyce Reeves
Anthony Reed
Cecilia Searcy
Ned Stone
Becky Stone
Joy Becker
Bridget Becker
Sandra Becker
Monica Rocker
John Johnson
Devett Smith
Frankie Prather
Princess Mills
Mark Anthony Wharton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

TABLE OF AUTHORITIES—Continued

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Robert R. Freeman, *et al.*, the members of the DeKalb County Board of Education ("the Board") and representatives of the DeKalb County School System ("DCSS"), hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 887 F.2d 1438 (11th Cir. 1989). The district court's memorandum opinion and order of June 30, 1988 (App., *infra*, 25a-72a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on October 11, 1989. App., *infra*, 1a-24a. Rehearing was denied on November 13, 1989. App., *infra*, 83a-84a. The

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

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT

1. DeKalb County, Georgia, which surrounds the cities of Atlanta and Decatur to the north, east and south, is a predominately urban and suburban region with a population of more than 450,000. App., *infra*, 38a. The DeKalb County School System ("DCSS") presently serves almost 80,000 students in more than 90 schools and is the largest school district in the state. App., *infra*, 3a. In 1968, black students constituted approximately 6% of the DCSS student population; as of 1986, black students constituted 47% of that population. App., *infra*, 4a, 74a.[1]

Prior to the 1966-1967 school year, the DCSS had maintained dual attendance zones for blacks and whites. In the 1966-1967 school year, the DCSS replaced the dual zones with a system of geographic zones and a "freedom of choice" transfer plan. However, that "system had no significant impact on the former de jure black schools." App., *infra*, 33a. In 1968, this Court held in *Green* v. *County School Bd.*, 391 U.S. 430, 440 (1968), that if a freedom of choice plan "fails to undo segregation, other means must be used to achieve this end." (quoting *Bow-*

[1] The most recent school board report to the district court, dated December 12, 1989, shows that the student population consists of 57% black students. Hispanic and Oriental students comprise an additional 7% of the student population.

man v. *County School Bd.*, 382 F.2d 326, 333 (4th Cir. 1967).

Almost immediately after that decision, the respondents, certain black school children in DeKalb County and their parents, filed this class action in the United States District Court for the Northern District of Georgia on behalf of all black school children in the county. App., *infra*, 25a. The complaint alleged that the DCSS operated a racially segregated school system. App., *infra*, 26a; *Pitts* v. *Cherry*, Complaint, No. 11946, at ¶ 9-10 (N.D. Ga. July 5, 1968). Following the filing of this action, the DCSS immediately and "voluntarily undertook to work with the Department of Health, Education and Welfare (HEW), to develop a final and terminal plan of desegregation." App., *infra*, 26a. Less than one year after the filing of the complaint, after full briefing and hearings, the district court entered its desegregation order. App., *infra*, 33a, 74a. That order "abolished the 'freedom of choice' plan and implemented a single neighborhood school attendance policy." App., *infra*, 33a, 8a. In addition, "[a]ll of the remaining de jure black schools from the previous dual system were closed." *Id.* at 33a.[2]

After the district court's initial desegregation order, the case remained largely inactive until 1975, app., *infra*, 8a, when respondents sought certain modifications in the operation of the school system, including the majority-

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[2] The 1969 order was derived, in large part, from the form decree set forth by the old Fifth Circuit (*i.e.*, the court as constituted before it was split into the Eleventh and Fifth Circuits) in *United States* v. *Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967). Consequently, certain portions of the order were irrelevant to the situation in DeKalb County. For example, the requirement that certain special programs be instituted at former all-black schools (app., *infra*, 81a-82a) had no application in DeKalb County because all formerly all-black schools were closed.

to-minority ("M-to-M") program,[3] the assignment of staff and the drawing of certain school attendance zones. App., *infra*, 26a n.1. In response, the district court ordered certain adjustments in its outstanding injunction, including a requirement that the M-to-M program be revised to provide free transportation. App., *infra*, 8a. The court also created a court-appointed Bi-racial Committee to oversee "proposed boundary line changes, school openings and closings, and the M-to-M program." App., *infra*, 4a, 8a, 26a. Between 1977 and 1979, the DCSS also filed several motions in the court seeking relatively minor modifications of the 1969 decree. App., *infra*, 8a.[4] For the most part, however, the district court "has rarely been asked to intervene" in the operation of the school system and the "parties have worked together in the best interest of the [DCSS]." App., *infra*, 26a.

In 1983, the respondents returned to the district court contending, in part, that "the DCSS's proposed expansion of predominately white Redan High School" would have

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[3] Under this voluntarily implemented program, students may transfer from schools in which their race is a majority to schools in which their race is a minority. App., *infra*, 4a.

[4] In 1977, the court approved the Board's boundary line change for one of the elementary schools, after determining, following full briefing and hearing, that the proposed change met constitutional standards. App., *infra*, 26a n.1. In 1978, the district court denied the Board's request to exclude kindergarten and special education programs from the M-to-M program. *Id.* In 1979, the Board—at the request of the Bi-racial committee—moved to amend the M-to-M program so that only those schools whose percentage of black students did not exceed system-wide percentages of black students would be eligible to receive transfers of black students. The "Bi-racial Committee had suggested that such a limitation might help stop white flight from transitional schools and neighborhoods." *Id.* The district court, however, concluded that the shifting racial composition in certain schools in the southern portion of the county "was caused by the changing complexion of the neighborhoods, rather than the effect of the M-to-M program," *id.* at 27a n.1, and accordingly denied the motion.

a segregative effect (app., *infra*, 8a) and seeking an injunction to halt the expansion. In the course of ruling on that motion, the district court made a finding that "the DCSS achieved unitary status." App., *infra*, 9a. The court reasoned that, based on that observation, there was no basis for ordering the additional relief sought by respondents, because "the school board's decision to build the addition to Redan was not motivated by unlawful racial considerations." *Pitts* v. *Freeman*, No. 11946, Mem. Opinion (2/22/84), at 8 (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976)); see app., *infra*, 8a-9a.

On appeal, a panel of the Eleventh Circuit reversed, holding that the district court erred in declaring the DCSS to be a unitary system without following the established procedure of providing respondents with notice and a hearing on that issue. *Pitts* v. *Freeman* (*Pitts I*), 755 F.2d 1423, 1426 (11th Cir. 1985); see app., *infra*, 9a.[5] The court of appeals also held that until the DCSS "achieves unitary status" under appropriate standards, the DCSS has a continuing "affirmative duty" to solve its overcrowding "in such a way that it furthers desegregation . . . ." *Id.* at 21a, 9a. "In light of the [petitioners'] affirmative duty to desegregate," the panel concluded that "it was error for the district court to hold that the [DCSS's] planned expansion of Redan High School could be enjoined only if it was motivated by discriminatory intent." 755 F.2d at 1427.[6]

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[5] The old Fifth Circuit applied a "three year rule" which required that the district court retain jurisdiction over a school desegregation case for a period of no less than three years. This rule also required that even after three years, the case could not be dismissed without notice to plaintiffs and opportunity for them to show cause why the court should retain jurisdiction. See *Youngblood* v. *Board of Pub. Instruction*, 448 F.2d 770 (5th Cir. 1971).

[6] On remand, the district court concluded that petitioners' plans concerning Redan High School would "foster integration and accom-

2. On January 16, 1986, the petitioners filed in the district court a motion for a declaration that the DCSS had achieved unitary status and for final dismissal of the case. App., *infra*, 27a. The court conducted a three-week trial on those issues. App., *infra*, 9a. In its June 30, 1988 opinion, the district court stated that while the "meaning of unitary status has not been clearly defined by the Supreme Court," app., *infra*, 27a, the decision in *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968), generally is looked to for the "six pertinent areas [to] examine in deciding whether a school system has met its burden of abolishing the former dual system." App., *infra*, 29a.[7]

With respect to the "primary" *Green* factor, school assignment, the district court found—and the respondents conceded—that "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools of DeKalb County." App., *infra*, 33a; see *id.* at 35a (Respondents "concede that th[e] action" of closing *de jure* black schools and the implementation of a neighborhood school plan "effectively desegregated the DCSS for a period of time"). Respondents also conceded that the subsequent "resegregation" of many DCSS schools was "the result of demographic shifts" in the population of the county. *Id.* at 34a.[8] The district court concluded

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modate educational needs" while respondents' proposed alternatives would "increase segregation." *Pitts* v. *Freeman*, No. 11946, Mem. Opinion (10/31/85), at 19. Accordingly, the court denied respondents' motion to enjoin implementation of the plan. *Id.*

[7] "These areas include: [1] student assignment, [2] faculty [3] staff, [4] transportation, [5] extracurricular activities, and [6] facilities." App., *infra*, 29a. At the request of the parties, the court also considered "quality of education." *Id.*

[8] "Between 1975 and 1980, approximately 64,000 black citizens moved into southern Dekalb County, most moving from the City of Atlanta." App., *infra*, 38a. At the same time, approximately 37,000 white residents moved from southern DeKalb County. *Id.* "As a result of these demographic shifts, the population of the northern half of DeKalb County is now predominately white and the southern

that petitioners' conduct in no way contributed to the resegregation of the schools. *Id.* at 45a.

The district court then reviewed the steps taken by the DCSS in response to the trend towards "resegregation" caused by demographic changes in the county (app., *infra*, 39a-41a) and the conflicting expert testimony on the question whether the petitioners had done everything they reasonably could to promote desegregation in the schools. App., *infra*, 41a-45a. Based on "the evidence presented at the hearing" and its conclusion that the petitioners' experts were more "reliable," the court found that "the DCSS has done everything that was reasonable under the circumstances to achieve maximum practical desegregation in DeKalb County." App., *infra*, 44a.[9]

In sum, with respect to student assignment, the district court concluded:

> The DCSS has become a system in which the characteristics of the 1954 dual system have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by defendants or their predecessors.

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half of DeKalb County is predominately black." *Id.* Black enrollment in the school system also increased dramatically: for example, between 1976 and 1986, DCSS experienced an enrollment decline of 16% at the high school level while the number of black students rose by 119%. App., *infra*, 38a-39a. These dramatic "demographic shifts have . . . had an immense effect on the racial compositions of the DeKalb County Schools." *Id.*

[9] Although petitioners had not "implement[ed] *all* programs" to combat the segregation caused by shifting residential patterns that were belatedly identified by respondents at the hearing on unitary status, the district court rejected the proposition that the DCSS "neglected its constitutional duty to eradicate the vestiges of the former dual system." App., *infra*, 46a. Indeed, the court found:

> the segregation that occurred in DeKalb County would have taken place at approximately the same speed whether or not [petitioners] had implemented the desegregative tools described by [respondents].

Id.

App., *infra*, 47a. Thus, the "defendants have fulfilled their constitutional obligations in this area." App., *infra*, 48a.

With regard to the other *Green* factors, the district court also found that the "DCSS is a unitary system with regard to the areas of student assignments, transportation, physical facilities, and extra-curricular activities." App., *infra*, 71a. However, the court found that the percentages of minority faculty and staff in certain individual schools were out of balance with system-wide percentages of minority faculty and staff. App., *infra*, 48a-60a. Accordingly, the court ordered the DCSS to develop a plan to reassign faculty until "the school staffs (faculty and administrators) of all schools vary from the system-wide minority staff average by no more than 15% . . . ." App., *infra*, 58a. "This plan should also equalize the number of teachers with advanced degrees and more experienced teachers among the types of schools." App., *infra*, 71a.[10] Thus, the district court denied the petitioners' motion to dismiss the case in its entirety, holding that petitioners would have to "comply" with the court's specific requirements concerning faculty, staff and per pupil expenditures before the court would finally declare that the school system had achieved full

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[10] With regard to the district court's requirement that petitioners bear the burden of proving that "all students in the DCSS are receiving a quality education" (app., *infra*, 60a)—a non-*Green* factor—the court praised the "innovative" successes of the DCSS but expressed "great concern" over the "differential" in per-pupil expenditures in various schools. The court cited evidence that in "type I" schools (which had been majority white over the last decade), expenditures per pupil were $2,833. In "type II" schools (which have undergone a transition from majority white to majority black over the last decade), expenditures per pupil were $2,540. In "type III" schools (which had been majority black over the last decade), expenditures per pupil were $2,492. App., *infra*, 65a, 70a. Thus, in response to this evidence, the court ordered the DCSS "to attempt to equalize per pupil expenditures among the types of schools during the 1988-89 school year." App., *infra*, 72a.

unitary status with respect to all of the *Green* factors. *Id.* at 72a.

3. The court of appeals reversed. The Eleventh Circuit first held that the trial court had erred in determining the DCSS's unitary status "incrementally" by considering each *Green* factor separately. According to the court,

> a school system does not achieve unitary status until it [simultaneously] maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities, and facilities.

App., *infra*, 24a.

In so holding, the court of appeals specifically "reject[ed] the First Circuit's ruling [in *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987)] which permits school systems to achieve unitary status incrementally" (app., *infra*, 15a), reasoning simply that "[a] school system achieves unitary status or it does not." *Id.* at 16a. Thus, under the Eleventh Circuit's approach, the lower court's findings of unitary status in the areas of transportation, extracurricular activities and facilities would remain open to reexamination. App., *infra*, 17a n.10.

With respect to the district court's holding on student assignment, the Eleventh Circuit did not reverse, as clearly erroneous, the district court's finding that the school system had in no way contributed to the "resegregation" of the schools. App., *infra*, 18a. Instead, the court of appeals held that, as a matter of law, DCSS retained responsibility for any resegregation in student assignment (due to demographic shifts in the county) until unitariness had been achieved in all categories of the school system:

> [A] school system that has not achieved unitary status must take affirmative steps to gain and main-

> tain a desegregated student population. The DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status.

App., *infra*, 19a.

The court of appeals specifically rejected the argument that a federal court could not "hold [a school system] responsible for segregation not 'caused' by its dual system." *Id.* According to the Eleventh Circuit, the Board's original success in desegregating the DCSS (and the subsequent "cause" of any trend towards resegregation) should not have been considered by the district court:

> The fact that the DCSS achieved racial parity in the area of student assignment . . . does not demonstrate that it fulfilled its duties to achieve maximum possible desegregation and to avoid the reestablishment of a dual system.

App., *infra*, 20a. Because the "affirmative duty" created by the original violation remained in force, the court "reject[ed] the district court's refusal to require the DCSS to eradicate segregation caused by demographic changes." App., *infra*, 20a.[11]

In conclusion, the court of appeals called upon the "district court [to] increase its involvement in this case . . . ." App., *infra*, 22a. It warned that

> [t]o comply with our mandate, the DCSS's actions "may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some." The DCSS must consider pairing

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[11] The court of appeals also chastised petitioners for basing their claim of unitary status on a showing of "racial parity," *i.e.*, racial balance in student assignments:

> Just as the [respondents] cannot base a claim of segregation on any particular degree of racial balance, the DCSS cannot support a claim of desegregation with racial percentages.

App., *infra*, 21a n.13.

> and clustering of schools, drastic gerrymandering of school zones, and grade reorganization. The DCSS and the district court must consider busing—regardless of whether the [respondents] support such a proposal.

App., *infra*, 23a (citations omitted). Thus, the court of appeals "order[ed] the district court to require the DCSS to prepare and file a plan in accordance with [its] opinion in the shortest reasonable time." App., *infra*, 24a.[12]

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit has decided two issues of fundamental and recurring importance concerning the scope and limits of federal court authority to achieve desegregation of the public schools. First, the court's holding that "unitary status" is achieved with respect to *any Green* factor only when all aspects of a school system are maintained in some undefined level of racial balance for a predetermined period of time gives rise to an acknowledged conflict with the decision of the First Circuit in *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987). Such a holding also undermines the authority of *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 436 (1976), in which this Court held that a school board's failure to comply with a desegregation plan with respect to faculty hiring and promotion "did not undercut" the achievement of unitary status in student assignment.

Second, the Eleventh Circuit's holding that petitioners "must take affirmative steps to gain and maintain a desegregated student population"—despite the fully supported finding by the district court that the "resegregation" resulted solely from demographic shifts completely

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[12] Petitioners do not seek review of the adverse lower court rulings regarding teacher assignments and resource allocation. Instead, in reports to the district court dated September 29, 1989 and August 3, 1989, the DCSS has shown what it believes to be full compliance with the district court's outstanding orders in these areas.

beyond petitioners' control—conflicts with this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971). *Swann* specifically noted that school boards have no obligation to "make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial segregation through official action eliminated from the system." The holding of the court of appeals undermines the basic remedial principle that while the Constitution requires the dismantling of dual school systems, it does not mandate racial balance in the schools. *Milliken* v. *Bradley*, (*"Milliken I"*), 418 U.S. 717, 740-741 (1974). By significantly expanding federal authority to order state and local officials to remedy *de facto* segregation, the holding also undermines the role of federalism as a significant limitation upon a federal court's equitable authority.

1. It is well-established that the constitutional violation in a "dual" school system may be found to permeate "every facet of school operations," including (1) student assignment, (2) faculty, (3) staff, (4) transportation, (5) extracurricular activities and (6) facilities. See *Green* v. *County School Bd.*, 391 U.S. 430, 435 (1968). Accordingly, a federal court's responsibility in remedying a violation and bringing a school system into "unitary" status also must focus on each of these distinct factors. See, *e.g.*, *Milliken* v. *Bradley*, (*Milliken II*) 433 U.S. 267, 282-83 (1977); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-19 (1971); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969). The important question presented here is whether, in measuring the success of a remedy, the court properly may consider the attainment of unitary status "incrementally," *i.e.*, with respect to each discrete aspect of the school system. The Eleventh Circuit now has flatly rejected an incremental approach, holding that a school district may be deemed "unitary" only if it demonstrates "racial equality" in all six *Green* factors *at the same*

time for a period of at least three years. App., *infra*, 24a.

In so holding, the Eleventh Circuit expressly "reject[ed] the First Circuit's ruling [in *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987)] which permits school systems to achieve unitary status incrementally." App., *infra*, 15a.[13] *Morgan* involved an appeal from several district court remedial orders, including an order which required the Boston School Board to "*maintain* specific racial mixes in the city's schools, much like the balances they ha[d] been required to *achieve* during the 12 years in which the district court actively controlled the desegregation process." 831 F.2d at 317. The defendants in *Morgan*—like petitioners—objected to that order on the ground that, in the area of student assignments, Boston schools had achieved unitary status years before the order was entered. *Id.* ("pupil assignments were as much in conformity to the court's desegregation plan as could ever practically be expected"). Although the First Circuit agreed that unitary status had been achieved with respect to pupil assignments, it also noted that overall "'unitariness' (*i.e.*, complete desegregation) in *all* aspects of the Boston schools has not yet been achieved." *Id.* at 318.

Thus, the court confronted the "threshold question" of whether "the failure of the Boston system to have reached unitariness in areas other than student assignments (such as in faculty hiring) provides justification for the district court to continue to impose its specific student assignments plan." *Id.* According to the First Circuit,

> [u]nder the Supreme Court's decision in [*Spangler*, 427 U.S. 424 (1976)], we believe the answer to this question is clearly "no."

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[13] The First Circuit's approach gives recognition to the fact that unitariness is "less a quantifiable 'moment' in the history of a remedial plan than it is the general state of successful desegregation." *Morgan*, 831 F.2d at 321.

Id. Thus, the First Circuit concluded that its "primary inquiry" was not (as the court below held) the "overall" success of the plan but rather "whether unitariness has been reached *in the area of student assignments* itself." *Id.* (emphasis in the original); see *United States* v. *Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987) (expressly agreeing with *Morgan* analysis); *Keyes* v. *School Dist. No. 1*, No. 85-2814, 1990 Westlaw 5661 (10th Cir. Jan. 31, 1990) (same).

In reaching this decision, the First Circuit placed heavy reliance on this Court's decision in *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976). In *Spangler*—as in the decision below and in *Morgan*—initial implementation of a desegregation plan had effectively remedied the racial imbalance in student assignments. 427 U.S. at 435 ("no one contests that [the plan's] implementation did 'achieve a system of determining admission to the public schools on a nonracial basis' "). Nevertheless, the district court had imposed an obligation on defendants to continue race-based student assignments to ensure that there would be no school in the district "with a majority of any minority students." *Id.* at 429.

In reversing that order, this Court recognized that "[i]t may well be that [defendants] have not yet totally achieved the [entirely] unitary system contemplated by [*Swann*]." *Id.* at 436. "There has been, for example, dispute as to [defendants'] compliance with those portions of the plan specifying procedures for hiring and promoting teachers and administrators." *Id.* Nevertheless, the Court stated that the lack of unitary status as to some *Green* factors "does not undercut the force of the principle underlying . . . *Swann*." 427 U.S. at 436 (quoting *Swann*, 402 U.S. at 31-32 (court's equitable authority ended when racial discrimination through official action had been eliminated)).

This Court specifically noted the argument of counsel for the original plaintiffs in *Spangler* who insisted that

> the District Court's perpetual 'no majority of any minority' requirement was valid and consistent with *Swann*, at least until the school system achieved 'unitary' status in all other respects such as the hiring and promoting of teachers and administrators.

427 U.S. at 438 n.5. Although the Court concluded that those "arguments [we]re not properly before" the Court, because the "case is moot with regard to these plaintiffs," the Court nevertheless observed that the argument had "little substance." *Id.*[14]

Thus, the Eleventh Circuit's holding with respect to "incremental unitariness" directly conflicts and is inconsistent with the decision of another court of appeals and with the most directly applicable decisions of this Court. Moreover, the decision below unjustifiably promotes the "interminable pendency of school desegregation litigation . . . [which] is precisely what was condemned in *Pasadena*." *Board of Educ. of Valdosta, Georgia* v. *United States*, 439 U.S. 1007 (1978) (Rehnquist, J., dissenting from denial of certiorari). Indeed, the Eleventh Circuit's pronouncement of a new standard of "unitariness" comes more than 20 years after implementation of the remedial plan which "result[ed] in the desegregation of the schools of DeKalb County." See app., *infra*, 33a; App., *infra*, 35a.

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[14] In concluding that *Spangler* "does not support an incremental approach to school desegregation cases," app., *infra*, 16a, the court below limited *Spangler* to its facts, stating that "[i]n *Spangler* the Court simply refused to approve the [school system's] rigid requirement that no minority comprise a majority of any school population." *Id.* The court below also pointed out that a student law review note had "criticiz[ed] [the] *Morgan* court for 'wrongly citing [*Spangler*] for [the] proposition that a district court may confer unitary status on pupil assignments even if other facets of the school system retain discriminatory vestiges." App., *infra*, 16a-17a (citing Note, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation*, 97 Yale L.J. 1173, 1191 n.104 (1988)).

To be sure, a school board operating an unconstitutionally segregated system has an affirmative obligation to remedy all vestiges of past discrimination. But that principle does not require the concomitant rule that a school board must bring all facets of its school system into balance simultaneously before any amount of judicial supervision can be eliminated. The rule allowing incremental unitariness not only recognizes the practical difficulties of desegregating a large school system, but also respects the "vital national tradition" of local school board autonomy by returning control to the board as quickly as circumstances justify. See *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977). In sum, the question of the proper steps to take in deciding whether to terminate a federal court's supervision of local school decisionmaking is a matter of conflicting opinion among the courts of appeals and of tremendous practical importance to school boards.

2. It is a long-settled principle that, in formulating a remedy in a school desegregation case, "the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16; see *Milliken II*, 433 U.S. at 280 ("the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation"); *Milliken* v. *Bradley* ("*Milliken I*"), 418 U.S. 717 (1974). "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken II*, 433 U.S. at 282; see also *Spangler*, 427 U.S. 424. These "limits" on federal court authority "are in part tied to the necessity of establishing that school authorities have in some manner *caused* unconstitutional segregation." *Spangler*, 427 U.S. at 434 (emphasis added); see *Dayton*, 433 U.S. at 420 (desegregation remedy must focus on the "incremental segregative effect" of specific constitutional violations, *i.e.*, the

extent of segregation caused by the violations); see *Milliken I*, 418 U.S. at 746; *Milliken II*, 433 U.S. at 280.

These same principles—that derive from core notions of federalism—should apply in determining whether a remedy has been successful in eliminating the effects of the intentionally segregative conduct, thereby freeing a school district from federal court supervision in areas in which the remedy has been successful. Although "[t]his Court has not considered seriously the relationship between the resegregation problem and desegregation decrees," *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 448 (1980) (Powell, J., dissenting), at the very least, *Spangler* stands for the proposition that "causation" remains a crucial requirement in determining whether a local school board is responsible for "resegregation" that occurs after successful implementation of a remedial order.

In *Spangler*, this Court held that where a remedial order has "established a racially neutral system of student assignment," 427 U.S. at 434, the district court "exceeded its authority" in continuing to "require annual readjustment of attendance zones" to maintain racial balance in student assignment. *Id.* at 435. The Court emphasized that the order imposed by the district court exceeded its authority because there was no causal link between "a constitutional violation" and the "judicially order[ed] assignment of students on a racial basis." *Id.* at 434. The Court quoted from *Swann*:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

Spangler, 427 U.S. at 436 (quoting *Swann*, 402 U.S. at 32). Because the district court in *Spangler*—like the

district court in this case[15]—already had "implemented a racially neutral attendance pattern in order to remedy" the constitutional violation that had been found, the district court "had fully performed its function" (*id.* at 437) and its responsibilities for that portion of the case were discharged. *Id.*

In holding that "a school system that has not achieved unitary status must take affirmative steps to gain and maintain a desegregated student population" (app., *infra*, 19a), the decision below is in conflict with this Court's decision in *Spangler*. More broadly, in rejecting the proposition that the federal courts could not "hold [the DCSS] responsible for segregation not 'caused' by its dual system" (app., *infra*, 19a), the Eleventh Circuit's decision has read the "causation" requirement of *Swann*, *Milliken* and *Spangler* out of the remedial stage of school desegregation litigation, replacing it with a form of strict liability.[16]

The decision below also is in conflict with the decisions of those courts of appeals that recognize that implementation of an effective desegregation decree shifts the burden to the plaintiffs to prove that any segregation that subsequently results was caused by intentionally

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[15] In the decision below, as in *Spangler*, all parties concede "[t]he fact that the DCSS achieved racial parity in the area of student assignment" at the time that it closed the *de jure* black schools and implemented a strict neighborhood attendance policy. App., *infra*, 20a.

[16] According to the Eleventh Circuit, the Board's original success in desegregating the DCSS (and the subsequent "cause" of any trend towards resegregation) were simply irrelevant to the legal inquiry that should have been undertaken by the district court:

> The fact that the DCSS achieved racial parity in the area of student assignment . . . does not demonstrate that it fulfilled its duties to achieve maximum possible desegregation and to avoid the reestablishment of a dual system.

App., *infra*, 20a.

segregative conduct on the part of the school board. As the Fifth Circuit has noted,

> continuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable.

Overton, 834 F.2d at 1176.[17] The court below, in ordering the school board to remedy the lack of racial balance caused by demographic changes, has done exactly what the Fifth Circuit warned against: it has substituted racial balance rather than the "undoing" of unlawful segregation as the baseline of the remedial order.[18]

Despite the Eleventh Circuit's understandable desire to "protect" the goal of an integrated student body,

> accommodation of federal superintendence and federalism will not tolerate the idea that although the wrong is righted, the magnitude of the past wrong

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[17] The Fifth Circuit stated that the desire to press for remedies beyond the segregation caused by the constitutional violation "rests upon a fear that the fourteenth amendment, proscribing as it does only purposeful discrimination, inadequately protects desegregation gains . . . ." *Overton*, 834 F.2d at 1176. The Eleventh Circuit's insistence that the school board achieve "maximum possible desegregation" by "eradicat[ing] segregation caused by demographic changes" (app., *infra*, 20a) reflects precisely such a fear.

[18] The Eleventh Circuit's rejection of any inquiry into the causal relationship between current racial inbalance and the prior *de jure* segregation also is in conflict with the Tenth Circuit's unitariness standard. See *Brown* v. *Board of Educ.*, No. 87-1668, slip op. at 22 (10th Cir. 1989) (in determining unitary status, the "school district must show that no causal connection exists between past and present segregation . . . ."); *id.* at 26A ("the school board . . . bears the burden of proving that current racial disparities in the school system are not the result of the prior segregated school system"). Of course, the district court in this case found that the DCSS has satisfied precisely that burden of proof.

> nonetheless justifies perpetuation of a federal order limiting the ambit of a school district's self-goverance.

Overton, 834 F.2d at 1177. The standard adopted by the court below simply fails to recognize that "[i]t is state government that [the court was] asked to enjoin" and that, "having righted the wrong, the limits [the court should] impose on the state can be drawn no more tightly than the limits of the Constitution." *Id.*

This Court has not directly addressed the question of the standard to be applied in determining whether a former "dual system" has achieved unitary status. Nevertheless, the decisions of this Court indicate that school authorities have to satisfy the court that their [current] racial composition is not the result of present or past discriminatory action on their part." *Swann*, 402 U.S. at 26; *see Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 211 n.17 (1973) (school authorities' burden "to show that current segregation is in no way the result of those past segregative actions"). Where, as here, this burden is met, school authorities have no further "duty" to remedy a lack of racial balance due to demographic factors. See *Swann*, 402 U.S. at 28 ("[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis"). In sum, the decision below is contrary to the basic principles of desegregation remedies set forth in the decisions of this Court and therefore warrants this Court's review.

At bottom, the rule imposed by the Eleventh Circuit necessarily will lead to unfortunate diversions of energy and scarce resources by numerous school boards. Instead of being able to concentrate their remedial efforts in those areas where vestiges of the dual school system remain, school systems are forced to undertake a potentially never-ending effort to obtain a "perfect" racially-balanced solution—a solution that "may be unattainable in the

context of the demographic, geographic, and sociological complexities of modern urban communities." *Estes*, 444 U.S. at 448 (Powell, J., dissenting). Because of the large number of school districts, especially in the Eleventh Circuit, that remain under federal court supervision,[19] it is vital that this Court consider whether a school system "in which the characteristics of [a] dual system have been eradicated" (app., *infra*, 47a) nevertheless can be ordered to undertake potentially extraordinary remedial actions in order to ensure a better racial balance in the schools.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 1990

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[19] According to the most recent figures available, 353 school districts nationwide are currently operating under court-ordered desegregation plans. Nearly one-third of those (105) are located in the Eleventh Circuit. Sizeable though these numbers are, they understate the magnitude of the impact of the decision below because they include only those cases in which the federal government has participated. Consequently, they do not include the many desegregation actions, such as this one, which involve only private plaintiffs. See U.S. Department of Justice, Educational Opportunity Litigation Section, *Case Load List* (May 1988).

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 88-8687

WILLIE EUGENE PITTS, a minor by his mother and next friend, MRS. ANNA MAE PITTS, VICTOR MARTIN; a minor, by his father and next friend ROBERT L. MARTIN; KELVIN, FELICIA, ALFRED, ORMA, and ALFREDIA HENDERSON, minors, by their mother and next friend, REBECCA HENDERSON, PATRICIA JOYCE REEVES, a minor, by her mother and next friend, MRS. ROSA LEE REEVES; ANTHONY REED and CECILIA SEARCY, minors, by their mother and next friend, MRS. JUANITA SEARCY; NED and BECKY STONE, minors, by their father and next friend, ALFRED E. STONE, JR.; JOY, BRIDGETT and SANDRA BECKER, minors, by their father and next friend, LOUIS E. BECKER; MONICA ROCKER, a minor, by her father and next friend, ARTHUR "ROCK" ROCKER; JOHN JOHNSON and DEVETT SMITH, minors, by their mother and next friend, MS. EUNICE A. SMITH; FRANKIE PRATHER, a minor, by guardian and next friend, CYNTHIA SCOTT, and her father and next friend, MAJOR SCOTT; PRINCESS MILLS, a minor, by her father and next friend, ROGER MILLS; MARK ANTHONY WHARTON, a minor, by his mother and next friend DORIS PATILLAP; and all others similarly situated,

Plaintiffs-Appellants,
Cross-Appellees,

ANN T. JOHNSON,
Intervening Plaintiff,

versus

ROBERT FREEMAN, Superintendent, LYMAN HOWARD, NORMA TRAVIS, and PHIL MCGREGOR, DeKalb County Board of Education Members,

Defendants-Appellees,
Cross-Appellants.

No. 88-8775

WILLIE EUGENE PITTS, *et al.*,
Plaintiffs-Appellants,
Cross-Appellees,

versus

ROBERT R. FREEMAN, *et al.*,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(October 11, 1989)

Before FAY and HATCHETT, Circuit Judges, and ALLGOOD*, Senior District Judge.

HATCHETT, Circuit Judge:

In 1985, in this case, we stated:

> The district court['s] . . . characterization of the DeKalb County School System as unitary was error. As the defendants suggest, it is possible that the district court did not intend its use of the word 'unitary' to be equated with the unitary status that requires dismissal of the action. The court may have been stating merely that a constitutionally acceptable desegregation plan was implemented in 1969 thus making the school system unitary in some respects. Yet the district court committed error by applying the wrong standards of proof when it proceeded to require the plaintiffs to prove discriminatory intent, a requirement that ordinarily would be

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

> appropriate only after a finding of full unitary status.
>
> Until the DeKalb County School System achieves unitary status, it has an affirmative duty to eliminate the effects of its prior unconstitutional conduct. The United States Supreme Court has held that a previously segregated school system is under an 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'

Pitts v. Freeman, 755 F.2d 1423, 1426 (11th Cir. 1985) ("*Pitts I*") (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979) and *Green v. County School Board*, 391 U.S. 430, 437-38 (1968)). Despite our admonishments, the district court ruled that the DeKalb County School System ("DCSS") is under no affirmative duty to take steps to desegregate an acknowledged segregated system in the area of student assignment because the DCSS closed all of its de jure black schools in 1969. Although we affirm the district court's ultimate conclusion that the DCSS has not yet achieved unitary status, we reverse the district court's ruling that the DCSS has no further duties in the area of student assignment.

I. FACTS

A. Racial Composition of the DeKalb County School System

1. Students

The DeKalb County School System ("DCSS") serves 79,991 students in more than 90 schools.[1] Black students

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[1] The district court and the parties agreed to use September, 1986, as a cut-off date for statistical information. Statistics concerning white students include non-black minority students. Non-black minority students constitute less than 1-percent of the DCSS student population.

constitute 47-percent of the DCSS population. Despite the system's racial balance, 50-percent of the black students attend schools with black populations of more than 90-percent. Similarly, 27-percent of the DCSS's white students attend schools with white populations of more than 90-percent.[2] The DCSS operates a segregated school system.

The DCSS maintains several programs to combat segregation. First, the DCSS maintains a Minority-to-Majority program ("M-to-M" program) that permits students to transfer from schools in which their race is a majority to schools in which their race is a minority. Approximately 4,500 students, almost all black, participate in the M-to-M program. Second, the DCSS maintains a magnet school program that includes a performing arts program, two science programs, and a foreign language program. The DCSS plans to add at least five more programs, including two occupational education centers. Third, the DCSS maintains a court-appointed biracial committee to review proposed boundary line changes, school openings and closings, and the M-to-M program.

2. Faculty and Staff

a. Administrators

Black persons constitute approximately 30-percent of DCSS elementary school administrators (principals, assistant principals, and lead teachers). Yet, black administrators constitute less than 10-percent of the administrators in majority white schools. Conversely, black administrators constitute 60-percent of DCSS administrators in schools with black populations of more than

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[2] In addition, 62-percent of the DCSS's black students attend 30 schools with black populations at least 20-percent higher than the system average. Fifty-nine percent of its white students attend 37 schools with white populations at least 20-percent higher than the average.

81-percent. Additionally, the DCSS assigns 13 of 18 black elementary school principals to schools in which the black student population is more than 90-percent.

At the high school level, the DCSS employs 27-percent black administrators. The percentage of black administrators at each school rises according to the size of the black student population. In majority white high schools, black administrators constitute only 22-percent of the administrators. In high schools with black student populations between 41-percent and 80-percent, black administrators constitute 45-percent of the administrators. In high schools with black student populations of more than 81-percent, black administrators constitute more than 63-percent of the administrators. In addition, the DCSS assigns 4 of 5 black high school principals to schools with black student populations of more than 95-percent.

b. Teachers

Black teachers constitute approximately 27-percent of DCSS faculty. Yet, 17 school faculties deviate by more than 10-percent from the system average.

The DCSS maintains a transfer program for experienced teachers. Teachers with more than 3 years experience at one school may request a transfer to another school. During the 1986-87 school year, 182 teachers requested transfers. The DCSS granted 83 requests. The district court found that the transfer program deterred the DCSS from achieving racial equality among its faculty.

3. Educational Resources

a. Faculty Experience

The district court found that the DCSS assigns experienced teachers and teachers with graduate degrees in a racially imbalanced manner. The district court presented this fact by grouping DCSS schools into three categories: (1) Type I schools (majority white students during last ten years); (2) Type II schools (changed from

majority white students to majority black students during last ten years); and (3) Type III schools (majority black students during the last ten years). The following charts demonstrate the racial skew:

Average Number of Years Teaching

ELEMENTARY SCHOOLS	Fall 1984	Fall 1985	Fall 1986
Type I (majority white)	9.55	10.22	9.79
Type II (white to black)	6.45	6.90	6.36
Type III (majority black)	5.24	5.46	5.19
HIGH SCHOOLS			
Type I	7.99	8.74	8.90
Type II	6.83	7.14	7.08
Type III	5.34	5.68	4.91

Percentage of Teachers with Graduate Degrees

	ELEMENTARY SCHOOLS	HIGH SCHOOLS
Type I	75.76	76.05
Type II	61.84	64.34
Type III	52.63	64.32

b. Per Pupil Expenditures

Using 1984-1985 school year figures, the district court also found that the DCSS spends more money per white student than it spends per black student. The following chart demonstrates the racial imbalance:

Per Pupil Expenditures

Type I	$2,833
Type II	$2,540
Type III	$2,492

B. Racial Composition of DeKalb County

Between 1950 and 1986, DeKalb County grew from 77,000 to 450,000 residents. This growth proceeded in a racially-skewed fashion. Black residents moved primarily to south DeKalb County and white residents moved primarily to north DeKalb County. For example, between 1970 and 1980, north DeKalb County's non-

white population increased 102-percent to 15,365. South DeKalb County's non-white population, however, increased 661-percent to 87,583. In addition, between 1975 and 1980, 37,000 white residents moved from south DeKalb County to neighboring counties.[3]

DeKalb County's demographic changes affected the DCSS. Between 1976-1986, the DCSS elementary school population declined 15-percent. During the same time, however, black elementary student enrollment increased 86-percent. At the high school level, DCSS enrollment declined 16-percent while black enrollment increased 119-percent.

II. PROCEDURAL HISTORY

A. The DCSS Prior to 1969

Historically, the DCSS segregated its schools and programs according to law. In 1966, the DCSS replaced its dual system with a "freedom of choice" plan. Under the freedom of choice plan, a number of black students attended formerly de jure white schools. A majority of black students, however, still attended de jure black schools.[4]

In 1968, the Supreme Court decided *Green v. County School Board*, 391 U.S. 430 (1968). The Court held: " 'Freedom of choice' is not a sacred talisman . . . . [I]f it fails to undo segregation, other means must be used to achieve this end." *Green*, 391 U.S. at 440 (quoting *Bowman v. County School Board*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)). Within two months, a class of black students ("the plaintiffs") filed this action against the DCSS.

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[3] When describing DeKalb County's overall population, the parties distinguished between "whites" and "non-whites." The parties included non-black minority individuals in the non-white category.

[4] In 1968, the DCSS closed Bruce Street High School, one of two de jure black high schools.

B. History of this Litigation

On June 12, 1969, the district court entered an order that abolished the freedom of choice plan, enjoined the DCSS from discriminating on the basis of race, and required the DCSS to eliminate the vestiges of its dual system. The court further ordered the DCSS to close all remaining de jure black schools and to establish a neighborhood school attendance policy. The district court retained jurisdiction to ensure that the DCSS complied with its order. The DCSS closed all de jure black schools.

The case remained inactive until 1975, when the plaintiffs complained that the DCSS violated the 1969 plan. In 1976, the court ordered the DCSS to modify its M-to-M program by providing students with free transportation and to reassign faculty and staff matters to approximate system-wide racial percentages. Additionally, the district court created the bi-racial committee referred to earlier in this opinion.

Between 1977 and 1979, the DCSS filed three motions in the district court, seeking approval of several plan modifications. In 1977, the district court approved a boundary line change for Flat Shoals Elementary School. In 1978, the district court refused to exclude kindergarten and special education programs from the M-to-M program. In 1979, the district court refused to modify the M-to-M program by restricting black student transfers to schools with black populations less than the system average.

In 1983, the plaintiffs returned to the district court contending, in part, that the DCSS improperly limited M-to-M transfers to predominately white Lakeside High School and that the DCSS's proposed expansion of predominantly white Redan High School would perpetuate segregation. The district court ordered the DCSS to accept additional black students in the M-to-M program at Lakeside High. The district court ruled, however, that the DCSS did not maintain a discriminatory "intent"

in deciding to expand Redan High. The district court concluded that the DCSS achieved unitary status. The plaintiffs appealed. In 1985, this court reversed and remanded the case. *Pitts I*, 755 F.2d 1423 (11th Cir. 1985). The *Pitts I* court first held that the district court improperly declared that the DCSS achieved unitary status without notifying the plaintiffs and conducting a hearing. *Pitts I*, 775 F.2d at 1426 (citing *United States v. Texas Education Agency*, 647 F.2d 504, 509 (5th Cir. Unit A 1981), *cert. denied*, 454 U.S. 1143 (1982); *Lee v. Macon County Board of Education*, 584 F.2d 78, 81 (5th Cir. 1978); *Youngblood v. Board of Public Instruction*, 448 F.2d 770, 771 (5th Cir. 1971)). The court then held that the district court erred by considering the DCSS's intent when it analyzed the Redan expansion. The court stated that the DCSS possessed "an affirmative duty to solve the Redan High School overcrowding problem in such a way that it furthers desegregation and helps eliminate the effects of the previous dual school system." *Pitts I*, 755 F.2d at 1427.

On January 16, 1986, the DCSS filed a motion in the district court seeking final dismissal. In July, 1987, the district court conducted a three-week trial to determine whether the DCSS had achieved unitary status. In October, 1987, the plaintiffs filed two motions for supplemental relief based, in part, on testimony adduced at trial.

On June 30, 1988, the district court entered an order denying the DCSS's motion for dismissal. The district court ruled that the DCSS would not achieve unitary status until it filed a report that presented a plan sufficient to meet the dictates of *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (in banc) (requiring racial equality in the assignment of teachers and principals), *rev'd per curiam on other grounds*, 396 U.S. 290, *cert. denied*, 396 U.S. 1032

(1970).[5] The district court ruled that the DCSS would comply with *Singleton* when all schools possessed minority staffs within 15-percent of the system average. The court also ordered the DCSS to equally distribute its experienced teachers and teachers with advanced degrees and to equalize expenditures among black and white students. The district court refused, however, to impose additional duties on the DCSS in the areas of student assignment, transportation, and extracurricular activities. The court denied the plaintiffs' motion that asked the court to require the DCSS to file a separate junior high school plan.

On July 13, 1988, the plaintiffs filed a motion asking the district court to reconsider its decision not to impose additional duties on the DCSS in the area of student assignment. The plaintiffs also asked the court to reconsider its decision not to require the DCSS to file a junior high school plan. On August 11, 1988, the district court denied the plaintiffs' reconsideration motion.

On September 9, 1988. the district court certified "any issue" of its June 30, 1988 order for interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) (West Supp. 1989). Both parties appealed. On October 21, 1988, this court permitted the appeals to proceed.[6]

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[5] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (in banc), the Eleventh Circuit adopted all Fifth Circuit decisions rendered before October 1, 1981, as binding precedent.

[6] The parties filed identical appeals, asserting that 28 U.S.C.A. § 1292(a) (West Supp. 1989) provided an appeal by right. After this court permitted the section 1292(b) appeals to proceed, the parties moved to consolidate the appeals. The court assigned Case No. 88-8775 to the section 1292(b) appeals and No. 88-8687 to the section 1292(a) appeals. Because we accepted jurisdiction pursuant to section 1292(b), we need not determine whether the parties properly appealed pursuant to section 1292(a).

III. CONTENTIONS OF THE PARTIES

The plaintiffs contend that the district court erroneously dismissed the DCSS from court supervision in the area of student assignment. The plaintiffs also contend that the district court erred by concluding that the DCSS could satisfy *Singleton* while allowing minority faculties to deviate by 15-percent from the system average.

The DCSS contends that it will achieve unitary status when it complies with *Singleton*. The DCSS also contends that it satisfied its duties relating to student assignment when it complied with the district court's 1969 order and closed all de jure black schools. The DCSS takes the position that it did not "cause" resegregation and that it possesses no duty to take affirmative action to desegregate. The DCSS further contends that the district court erred by ruling that it failed to equally distribute educational resources.

IV. ISSUE

Whether the DCSS will achieve unitary status when it complies with the district court's orders regarding faculty and staff assignment and resource distribution.

V. DISCUSSION

A. Standard of Review

We review the district court's specific remedial orders regarding faculty and staff assignment and resource distribution for an abuse of discretion. *Lee v. Anniston City School System*, 737 F.2d 952, 955 (11th Cir. 1984). "A declaration that a school has achieved unitary status is . . . subject to review under the clearly erroneous standard." *Jacksonville Branch, NAACP v. Duval County School Board*, No. 88-3803, slip op. 4282, 4289 n.3 (11th Cir. Sept. 15, 1989); *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. Unit A 1981), *cert. denied*, 454 U.S. 1143 (1982).

B. Achieving Unitary Status

In *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("*Brown I*"), the Supreme Court pronounced "that in the field of public education the doctrine of 'separate but equal' has no place. . . . [S]uch segregation is a denial of the equal protection of the laws." One year later, the Supreme Court ruled that federal courts could assert equity jurisdiction to assure that school boards carried out the dictates of *Brown I*. *Brown v. Board of Education*, 349 U.S. 294, 300-01 (1955) ("*Brown II*"). As the Court stated in *Green v. County School Board*, 391 U.S. 430, 437-38 (1968):

> *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for successful resolution. School boards . . . [were] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

District courts should not abdicate jurisdiction until a school board achieves "unitary status." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971); *Pitts I*, 755 F.2d at 1426.

1. Defining Unitary Status

A school system achieves unitary status when it no longer discriminates between school children on the basis of race. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1414 (11th Cir. 1985) ("*Georgia NAACP*"); *Pitts I*, 755 F.2d at 1426; *Lee v. Macon County Board of Education*, 584 F.2d 78, 81 (5th Cir. 1978). A school system "no longer discriminates between school children on the basis of race" when it affirmatively eliminates *all* vestiges of its dual system. *Columbus Board of Education v. Penick*, 443

U.S. 449, 458 (1979) (school board under "continuous constitutional obligation to disestablish its dual school system"); *Swann*, 402 U.S. at 15 ("the objective today remains to eliminate from the public schools all vestiges of state-imposed segregation"); *Green*, 391 U.S. at 437-38 (school board charged with affirmative duty to eliminate racial discrimination "root and branch"). *See Georgia NAACP*, 775 F.2d at 1413 n.12 (school system achieves unitary status when it eliminates vestiges of prior discrimination and operates a non-segregated system for a period of several years).[7] The district court erred by concluding that "there is no binding precedent in this circuit which articulates a precise definition for "unitary status and by following the non-binding definition of unitary status in *Brown v. Board of Education*, 671 F.Supp. 1290 (D. Kan. 1987) (*"Brown III"*). *Pitts v. Freeman*, No. 11946 at 3 (N.D. Ga. June 30, 1988).

2. Applying the Definition of Unitary Status

Appellate courts have provided district courts with little guidance regarding how to determine whether a school system has achieved unitary status. *See* Note, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation*, 97 Yale L.J. 1173, 1190 (1988) (no guidelines exist for determining when school systems achieve unitary status); Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 Harv. L.Rev. 653, 662 (1987) ("The Supreme Court has not, however, announced any set list of the conditions a district court judge must observe in a formerly dual school system before declaring that it is unitary."). The district court considered six

[7] The *Georgia NAACP* court set forth separate definitions for a "unitary school system" and for "unitary status." We reject this labeling system. Instead, we use the word "unitary" only when referring to the status that a school board must achieve to be freed from district court jurisdiction.

factors set forth in *Green*: student assignment, faculty, staff, transportation, extracurricular activities, and facilities.[8] *Green*, 391 U.S. at 435. A review of these six factors constitutes the best approach for determining whether a school system has eliminated the vestiges of a dual system. Therefore, we hold that district courts should review the six *Green* factors to determine whether a school system has achieved unitary status. If the school system fulfills all six factors *at the same time* for several years, the court should declare that the school system has achieved unitary status. If the school system fails to fulfill all six factors at the same time for several years, the district court should retain jurisdiction.[9]

Before applying the *Green* factors to the DCSS, we make three related conclusions.

First, the *Green* factors are not entirely synonymous with the vestiges of past discrimination. State-imposed segregation affected society much more than any set of judicially-created factors can measure. As Chief Justice Warren stated in *Brown I*:

> To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

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[8] The district court also considered a seventh factor: "quality of education." We conclude that the *Green* Court intended quality of education to be considered in conjunction with each of its six enumerated factors. *See Green*, 319 U.S. at 435 (describing the six factors as comprising "every facet of school operations"). In this case, the district court should consider the distribution of educational resources in relation to the area in which the school system applies the resource.

[9] By holding that the system must fulfill the *Green* factors "for several years," we mean a period of not less than three years. *See* Youngblood v. Board of Public Instruction, 448 F.2d 770, 771 (5th Cir. 1971).

Brown I, 347 U.S. at 494. An analysis of the *Green* factors simply provides a method for determining whether a school system has eliminated all vestiges of past discrimination while, at the same time, providing district courts with a degree of certainty. Application of the *Green* factors does not strip a district court of its responsibility and ability to consider unique circumstances in each school system. *See Keyes v. School District No. 1*, 413 U.S. 189, 224 n.10 (1973) (Powell, J., concurring in part and dissenting in part) (cautioning courts to refrain from formulating "hard-and-fast rules" in school desegregation cases). The *Green* factors approach is a means towards an end. By requiring its use, we simply recognize that district courts cannot consistently apply a standardless test.

Second, our ruling that school boards must comply with the six *Green* factors simultaneously does not expand federal court equity jurisdiction beyond the scope of a school board's constitutional violation. *See Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977) ("*Milliken II*"). School boards violated the Constitution by operating dual systems. To remedy this violation, they must eliminate *all* of the dual system's vestiges. Because these vestiges encompass more than the *Green* factors, a district court can order relief relating to *any* factor until a school system achieves unitary status. The factors operate, in part, as an indicator of more intangible vestiges. Our conclusion is fully consistent with the Supreme Court's statement that: "[t]he district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques . . . ." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1970) (citing *Swann*, 402 U.S. at 22-31).

Third, we reject the First Circuit's ruling which permits school systems to achieve unitary status incremen-

tally. *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987). *Cf. United States v. Overton*, 834 F.2d 1171, 1176 n.17 (5th Cir. 1987) (citing *Morgan* when discussing a post-unitary school system); *Lee v. Macon County Board of Education*, 681 F. Supp. 730, 738 (N.D. Ala. 1988) (praising *Morgan*, but recognizing that it does not constitute Eleventh Circuit law). A school system achieves unitary status or it does not. We will not permit resegregation in a school system that has not eliminated all vestiges of a dual system. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979) (school boards possess affirmative responsibility to see that pupil assignment, school construction, and abandonment practices do not reestablish the dual school system); *Columbus Board of Education*, 443 U.S. at 460 (district court must ensure that school board actions "do not serve to perpetuate or reestablish the dual school system"); *Swann*, 402 U.S. at 21 (school systems may not perpetuate or reestablish dual system; "district courts should retain jurisdiction to assure that these responsibilities are carried out").

The DCSS asserts that Supreme Court authority permits it to achieve unitary status incrementally. Contrary to the DCSS's assertion, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) does not support an incremental approach to school desegregation cases. In *Spangler*, the Court simply refused to approve the Pasadena School Board's rigid requirement that no minority comprise a majority of any school population. *Spangler*, 427 U.S. at 432 ("All that is now before us are the questions of whether the District Court was correct in denying relief when petitioners in 1974 sought to modify the 'no majority' requirement as then interpreted by the District Court."). *See* Note, 97 Yale L.J. at 1191 n.104 (criticizing *Morgan* court for "wrongly citing [*Spangler*] for proposition that a district court may confer unitary status on pupil assignments even if

other facets of the school system retain discriminatory vestiges").

C. Applying the *Green* Factors

1. Transportation, Extracurricular Activities, and Facilities

The district court concluded that the DCSS fulfilled its constitutional duties in the areas of transportation, extracurricular activities, and facilities. Neither party appeals these rulings; therefore, those rulings are not before us.[10]

2. Faculty and Staff

The former Fifth Circuit held that "principals, teachers, teacher-aides and other staff who work directly with children at school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students." *Singleton*, 419 F.2d at 1217-18. School systems, therefore, maintain legal responsibility for the allocation of minority faculty and staff. School systems and district courts must focus on minority ratios in *each* school. *Singleton*, 419 F.2d at 1218. The district court concluded that the DCSS failed to comply with *Singleton*. Specifically, the district court ruled that the DCSS would not satisfy *Singleton* until each school's minority staff ratio varied from the system average by no more than 15-percent. The court adopted this 15-percent guideline from its 1976 order.

Only the plaintiffs appeal the district court's *Singleton* ruling. The plaintiffs argue that the district court erred by permitting a 15-percent variance in each school. The plaintiffs cite two cases in which courts approved plans that permitted deviations of less than 10-percent.

[10] These matters may be considered the next time the district court considers whether the DCSS has achieved unitary status.

See Tasby v. Estes, 517 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975); *Smith v. Concordia Parish School Board*, 445 F.2d 285 (5th Cir. 1971). The DCSS, however, argues that a 15-percent deviance rule does not constitute error. The DCSS points to a non-binding case in which a court approved a 15-percent deviance in some of a system's schools. *See United States v. Texas Education Agency*, 679 F.2d 1104 (5th Cir. 1982).

We hold that the district court's *Singleton* order did not constitute an abuse of discretion. Our holding does not establish 15-percent as the standard for all cases; we merely find no abuse of discretion on the facts of this case. Accordingly, we affirm the district court's decision permitting the DCSS to comply with *Singleton* when each school's minority staff varies from the system average by no more than 15-percent. We stress, however, that under this circuit's definition of unitary status, the DCSS must simultaneously comply with *Singleton* and the other *Green* factors for several years before it will achieve unitary status.

3. Student Assignment

In recent years, the DCSS student population has become increasingly segregated. The district court, however, refused to hold the DCSS responsible for this segregation because "no evidence [exists] that the school system's previous unconstitutional conduct may have contributed to this segregation." *Pitts v. Freeman*, No. 11946 at 25.

The plaintiffs argue that the DCSS never achieved a constitutionally-sufficient level of desegregation. The plaintiffs argue that until the DCSS achieves unitary status, it must affirmatively move toward the maximum practical level of desegregation. The plaintiffs also argue that demographic shifts do not excuse the DCSS's resegregation.

The DCSS argues that it fulfilled its duties in the area of student assignment when it closed all de jure black schools following the district court's 1969 order. The DCSS argues that the district court properly refused to find it responsible for segregation caused by demographic changes.

We hold that a school system that has not achieved unitary status must take affirmative steps to gain and maintain a desegregated student population. The DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status.[11] Accordingly, we reverse the district court's conclusion that the DCSS fulfilled its constitutional obligations in the area of student assignment.

a. Closing De Jure Black Schools

The DCSS has a continuing constitutional duty to achieve the greatest possible degree of desegregation and to prevent re-segregation. *Columbus Board of Education*, 443 U.S. at 460 (school board cannot "perpetuate or reestablish the dual school system"); *Davis*, 402 U.S. at 37 ("make every effort to achieve the greatest possible degree of actual desegregation"); *Green*, 391 U.S. at 440 ("continuing duty to take whatever action might be necessary"). The district court must continue to impose this duty on the DCSS until it removes *all* vestiges of the dual system.

The DCSS asserts that the district court could not hold it responsible for segregation not "caused" by its dual system. The DCSS cites *Milliken II*, 433 U.S. at 282 to support this assertion. We reject the DCSS's reading of *Milliken II*. The *Milliken II* Court did not require causation between each *Green* factor and a dual system. Rather, the *Milliken II* Court stated that "fed-

[11] Segregated housing patterns are not new to the South. Certainly, lower federal courts have been aware of housing patterns since the 1954 *Brown* decision.

eral-court decrees must directly address and relate to the constitutional violation itself. . . . [F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or that does not flow from such a violation . . . ." *Milliken II*, 433 U.S. at 281-82. As we stated earlier, the DCSS violated the Constitution by operating a dual system. Under *Milliken II*, federal court orders may address *all* vestiges of that system Student segregation, prior to achieving unitary status, indicates that vestiges remain. Therefore, the DCSS must continue to work toward desegregation until it removes all vestiges. The fact that the DCSS achieved racial parity in the area of student assignment on the day it closed the de jure black schools does not demonstrate that it fulfilled its duties to achieve maximum possible desegregation and to avoid the reestablishment of a dual system.

b. Demographic Changes

We also reject the district court's refusal to require the DCSS to eradicate segregation caused by demographic changes. As the former Fifth Circuit stated in *Lee v. Macon County Board of Education*, 616 F.2d 805, 810 (5th Cir. 1980):

> Not until all vestiges of the dual system are eradicated can demographic changes constitute legal cause for racial imbalance in the schools. . . . Notwithstanding the school authorities' apparent good faith attempt to desegregate in 1970, the system has never achieved unitary status. . . . Consequently, the school board in Tuscaloosa is still under an affirmative duty to dismantle the dual system, regardless of current housing patterns. (Citing *Flax v. Potts*, 464 F.2d 865, 868-69 (5th Cir.), *cert. denied*, 409 U.S. 1007 (1972)).

We rejected a similar "demographics" argument in *Pitts I*. In *Pitts I*, the DCSS planned to accommodate

white population growth in the Redan High School area by building an additional facility. The district court accepted the DCSS's plan, finding that the DCSS simply planned to build a school where students lived and that a discriminatory intent did not motivate the DCSS's actions. We noted the discriminatory effect of the proposed Redan expansion and held that "[u]ntil the DeKalb County School System achieves unitary status, it has an affirmative duty to eliminate the effects of its prior unconstitutional conduct." *Pitts I*, 755 F.2d at 1426. We repeat what we said in *Pitts I*: The DCSS has not achieved unitary status; consequently, its affirmative duty remains in force.[12]

c. Racial Quotas Are Not Required

In concluding that the DCSS failed to fulfill its constitutional duties regarding student assignment, we recognize that the Constitution does not require "any particular degree of racial balance or mixing." *Swann*, 402 U.S. at 24. *See Milliken II*, 433 U.S. at 280 n.14; *Spangler*, 427 U.S. at 434.[13] Accordingly, we do not require

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[12] *See* Note, Unitary School Systems and Underlying Vestiges of State-Imposed Segregation, 87 Colum. L. Rev. 794, 808-09 (1987) (suggesting that residential segregation may itself be a vestige of a dual system and stating that "residential segregation as a vestige of unconstitutional school segregation may become the last barrier to widespread declarations of unitariness"). *See also Swann*, 402 U.S. at 20-21 ("People gravitate toward school facilities just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on the composition of inner-city neighborhoods.").

[13] This principle further undercuts the DCSS's argument that it fulfilled its duty to desegregate when it closed the de jure black schools. Just as the plaintiffs cannot base a claim of segregation on any particular degree of racial balance, the DCSS cannot support a claim of desegregation with racial percentages. "Substance, not semantics, must govern" school desegregation cases. *Swann*, 402 U.S. at 27.

the DCSS to impose racial quotas in its schools. We do require, however, that the DCSS move *toward* the maximum possible level of desegregation. In direct conflict with Supreme Court authority and orders of this court, the DCSS claims no responsibility for student segregation based on its 1969 action of closing de jure black schools. The district court must increase its involvement in this case to ensure compliance with our order and the Constitution. The district court should require the DCSS to submit timely plans, establish firm deadlines, and require progress reports.

d. The Junior High School Plan

The district court denied the plaintiffs' motion to compel the DCSS to file a junior high school plan because it concluded that the DCSS achieved maximum practical desegregation before the 1986-87 school year. Because we reverse the district court's conclusion that the DCSS achieved maximum practical desegregation, we order the district court to reconsider the plaintiffs' motion.

D. Distribution of Educational Resources

The district court ordered the DCSS to assign experienced teachers and teachers with advanced degrees equally between primarily black and primarily white schools. The district court also ordered the DCSS to equalize per pupil expenditures. The DCSS appeals this portion of the district court order, arguing that the district court improperly assigned it the burden of proof.[14]

To the extent that the district court required the DCSS to allocate educational resources in a race-neutral fashion,

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[14] The DCSS's burden of proof argument rests on the notion that they did not "cause" the resource inequity. We rejected this argument when we discussed student assignment. The DCSS "caused" all vestiges of the dual system by operating that system. Until the DCSS achieves unitary status it must continue to work toward eliminating *all* vestiges of the dual system.

we affirm. We note, however, that the district court based its conclusion on an improper premise: that the DCSS may properly operate a segregated school system prior to reaching unitary status.[15] Under our holding, the DCSS must desegregate its students. When the system desegregates, most schools will no longer be racially identifiable and the DCSS will be unable to distribute resources in a racially imbalanced fashion.

E. Disposition

For many years, the DCSS planned, contributed to, and directly caused racial segregation in its schools. By operating a dual system, the DCSS affected the "hearts and minds" of its students and may have contributed to the housing patterns that today "cause" school segregation. *Swann*, 402 U.S. at 20-21; *Brown I*, 347 U.S. at 494. The law requires that the DCSS achieve unitary status. The DCSS, however, refuses to take affirmative action and seeks to justify its inaction with frivolous and long-rejected arguments.

To comply with our mandate, the DCSS's actions "may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some." *Swann*, 402 U.S. at 28. The DCSS must consider pairing and clustering of schools, drastic gerrymandering of school zones, and grade reorganization. *See Swann*, 402 U.S. at 27-28. The DCSS and the district court must consider busing—regardless of whether the plaintiffs support such a proposal. The DCSS's neighborhood plan is not inviolable. *See Davis*, 402 U.S. at 28. The

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[15] We are not faced with the question of whether a school system may constitutionally operate a system that is in fact segregated after the system has achieved unitary status, or whether "the spirit of *Brown*" would provide a cause of action for a new set of plaintiffs. *See Pitts I*, 755 F.2d at 1426 (district court may consider discriminatory intent only after a school system achieves full unitary status).

DCSS's M-to-M program and magnet program do not alone suffice to desegregate the schools. We note that the M-to-M program is not likely to desegregate white schools. Without extensive expansion, the magnet school programs are not likely to materially desegregate the system.[16]

After twenty years of court supervision, the DCSS continues to operate racially identifiable schools. The DCSS has never achieved unitary status and it retains the duty to eliminate all vestiges of the dual school system.

IV. CONCLUSION

We hold that a school system does not achieve unitary status until it maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. The DCSS has not achieved unitary status. We affirm the district court's conclusion that the DCSS failed to fulfill its duties in the areas of faculty and staff. We reverse the district court's conclusion that the DCSS fulfilled its duties in the area of student assignment. Accordingly, we order the district court to require the DCSS to prepare and file a plan in accordance with this opinion in the shortest reasonable time.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[16] The magnet programs are voluntary and part-time, attracting less than 1-percent of the system's students.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 11946

WILLIE EUGENE PITTS, *et al.*

versus

ROBERT FREEMAN, *et al.*

ORDER

[Filed June 30, 1988]

The DeKalb County School System (DCSS) was historically segregated by law. "Dual" school systems were maintained in the County, one for black students and another for white students. In 1954, the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), signaled the end of dual systems with its pronouncement that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495. The Supreme Court's decision imposed upon all school systems, which were maintaining dual systems at that time, the duty to dismantle the dual system, avoid the reestablishment of the dual system, eliminate the vestiges of the dual system and replace the dual system with a system in which all students, regardless of their race, are provided the same educational opportunities.

In 1968, the plaintiffs, certain black school children in Dekalb County and their parents, filed this class action on behalf of all black school children in Dekalb County claiming that the defendants had operated a racially segregated school system in violation of the United States Constitution. After this action was filed, the DCSS voluntarily undertook to work with the Department of Health, Education and Welfare (HEW), to develop a final and terminal plan of desegregation. In June, 1969, the court entered a consent order which approved the proposed plan and enjoined the defendants from discriminating on the basis of race in operating the DCSS. The court maintained jurisdiction over the case to implement its order. In the two decades that this case has been pending, the court has rarely been asked to intervene.[1] Both parties have worked together in the best interest of the school system.

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[1] There was no significant action in this case until September, 1975. At that time, plaintiffs sought to have the DCSS declared out of compliance with the 1969 order. Plaintiffs challenged the M-to-M program, assignment of staff, and changes in attendance zones. In 1976, the court entered an order requiring the DCSS to modify the M-to-M program to provide free transportation, to reassign faculty and staff to approximate the system-wide percentages, and created a Bi-racial Committee to oversee future boundary line changes, the M-to-M program, etc.

In 1977, the DCSS requested the court to approve a boundary line change for Flat Shoals Elementary School. After a hearing, the court held that the school's plan met constitutional standards and approved it.

In 1978, the DCSS filed a motion asking that kindergarten and special education programs be excluded from the M-to-M program. The court denied the motion.

In 1979, the DCSS, at the Bi-racial Committee's request, moved the court to amend its 1976 order to modify the M-to-M program, such that the only schools that would be eligible to receive transferring blacks would be those schools whose black populations did not exceed the system-wide percentage of black students. The Bi-racial Committee had suggested that such a limitation might help stop white flight from transitional schools and neighborhoods. The court denied modification of the order, finding that the tran-

On January 16, 1986, the defendants filed a motion for final dismissal. The defendants seek a declaration that the DCSS has achieved unitary status. When a federal court maintains jurisdiction over a school desegregation case, the school system must show that it is unitary before it can be dismissed from court supervision. *Green v. County School Board*, 391 U.S. 430, 439 (1968).

The meaning of unitary status has not been clearly defined by the Supreme Court. As there is no binding precedent in this circuit which articulates a precise definition for the term,[2] this court will use the definition

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sition of the southern schools was caused by the changing complexion of the neighborhoods, rather than the effect of the M-to-M program.

In 1983, the plaintiffs sought supplemental relief. Plaintiffs alleged that the DCSS had conspired to limit M-to-M transfers to Lakeside High School, that Knollwood Elementary School had been improperly expanded, and that Redan High School was also improperly increased. Plaintiffs later dropped their claim as it concerned Knollwood Elementary School. Separate hearings were held on the Lakeside and Redan issues. With regard to the Lakeside High School issue, the court ruled against the defendants. The court held for the defendants on the Redan issue. Although the court's first order on the Redan issue was reversed by the Eleventh Circuit, the order issued by this court following remand also held for the defendants. The parties did not appeal that order.

[2] In Georgia State Conference of Branches of the NAACP v. Georgia, 775 F.2d 1403, 1413 n. 12 (11th Cir. 1985), the court noted "[s]ome confusion has been generated by the failure to adequately distinguish the definition of a "unitary" school system from that of a school district which has achieved "unitary status . . . . [A] unitary school system is one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years. A school system which has achieved unitary status is one that is not only unitary but has eliminated the vestiges of its prior discriminaiton and been adjudicated as such through the proper judicial procedures. Unfortunately, the terminology used to refer to these concepts is not universal."

espoused by Judge Rogers in *Brown v. Board of Education* (Brown III), 671 F. Supp. 1290, 1292-93 (D. Kan. 1987), to determine whether the defendants have met their burden of proof. The following principles for determining unitary status were set forth in that case. First, "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). No one plan can achieve unitary status in all school districts.

The court also must be mindful that it is only segregation caused by the intentional segregative acts of the defendants that comprise the constitutional violation in this case. "De facto segregation (segregation caused by private choice) and segregation caused by authorities other than those sued in this case, are not part of the constitutional violation. . . ." *Brown III*, 671 F. Supp. at 1292 (citing *Keyes v. School District Number 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)).

Because separate but equal schools violate the Constitution, the racial mix of students in a school is an important factor. The Court has emphasized on many occasions that while racial mix is important, racial balancing is not required. *E.g. Swann v. Board of Education*, 402 U.S. 1, 24 (1971). Even the existence of a small number of one race or virtually one race schools is not necessarily violative of the Constitution. *Id.* at 26.

In *Brown III*, Judge Rogers further recognized that "[s]egregative motive or the absence of such intent is relevant but not controlling in determining unitariness. 'The measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.' *Dayton II*, 443 U.S. at 538." *Brown III*, 671 F. Supp. at 1293.

In the *Brown III* opinion, Judge Rogers summarized by stating that a school system that has obtained unitary status is "one in which the characteristics of the 1954 dual system either do not exist or, if they exist, are not the result of past or present intentional segregative conduct of the defendants or their predecessors." *Id.* This court finds the definition of unitary status articulated by Judge Rogers to be the clearest and most serviceable definition of that term espoused by any court. It combines all of the essential requirements from the Supreme Court opinions with a workable standard for a court to apply to the facts of a given case.

In *Green*, the Court delineated six pertinent areas that courts should examine in deciding whether a school system has met its burden of abolishing the former dual system. These areas include: student assignment, faculty, staff, transportation, extracurricular activities and facilities. The parties have requested that this court review one other area, quality of education, when determining if these defendants have met their burden of proof regarding whether the DCSS is now a unitary system. The court agrees that quality of education should properly be addressed.

The court held a hearing on the motion for final dismissal (or declaration of unitary status) on July 6-22, 1987. On November 22, 1987, after the parties had submitted their post-trial briefs and proposed findings of fact and conclusions of law, the court heard closing arguments on this motion. Earlier, plaintiffs filed motions for supplemental relief and to compel the DCSS to file a junior high plan. The court deferred ruling on those motions until it addressed the motion for final dismissal. All three motions are now ripe for decision.

STUDENT ASSIGNMENT

Much of the evidence submitted during the hearing on the motion for unitary status properly concerned student assignment. Indeed, the separation of the races is the

primary indicator of a de jure segregated school system. Plaintiffs accurately stated this court's duty, with regard to this issue, in their proposed findings of fact and conclusions of law at pages 54-55. Plaintiffs stated "[t]he court's task, in reviewing Defendants' progress in these areas, is to determine whether the remedies implemented by the Defendants have been effective in dismantling the old dual system. If they have, then the system should be declared unitary; if they have not, then further relief must be ordered so that the duty to desegregate is fully and finally discharged. *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1434 (5th Cir. 1983); *Lee v. Macon County Board of Education*, 616 F.2d 805, 808-09 (5th Cir. 1980). See also *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971)."

DEFENDANTS' CONTENTIONS

The DCSS' position in this motion for unitary status is that it fulfilled its duty regarding student assignment in the 1969-70 school year when it closed the remaining de jure black schools and reassigned all students to their neighborhood schools under a bona fide neighborhood attendance plan. The DCSS argues that this action placed all students in the attendance zones they would have occupied in the absence of the constitutional violation. Although the DCSS concedes that the school system has undergone some resegregation since the implementation of the plan and the filing of the instant motion, the DCSS contends that shifting demographic factors and other factors beyond the DCSS' control caused this resegregation and that the DCSS is not legally responsible.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend that the DCSS has the continuing duty to combat all resegregation until this court declares that the DCSS has achieved unitary status. Their goal was to produce evidence showing that the implementation of the 1969 order did not eradicate all of the vestiges

of the prior dual system, and that the DCSS missed opportunities to fulfill its affirmative duty to eradicate all of the vestiges of the former dual system.

To support their argument that the implementation of the 1969 order did not desegregate the DCSS, plaintiffs asked the court to examine the resegregation that has occurred in the DCSS. Plaintiffs improperly place great emphasis on the concept of racial balance[3]. Plaintiffs point to these 1986-87 school year statistics: (1) 47% of the students attending the DCSS are black; (2) 50% of the black students attended schools that were over 90% black; (3) 62% of all black students attended schools that had more than 20% more blacks than the system-wide average; (4) 27% of white[4] students attended schools that were more than 90% white; (5) 59% of the white students attended schools that had more than 20% more whites than the system-wide average; (6) of the 22 DeKalb County high schools, five have student populations that are more than 90% black, while five other schools have student populations that are more than 80% white; and (7) of the 74 elementary schools in the DCSS, 18 are over 90% black, while 10 are over 90% white.

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[3] In *Swann*, the Court emphasized that racial balance is not the test of an unitary system.

> 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. . . . 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, 402 U.S. at 24.

[4] For purposes of this order all white and minority students other than blacks will be referred to as whites. There was no evidence presented that at the time this action was instigated that non-black minority students composed even one percent of the student population of the DCSS. Thus, 94.4% of the students attending the DCSS in 1969-70 school year were white.

Plaintiffs also contend that the DCSS missed opportunities to fulfill its duty regarding student assignments. Plaintiffs' primary evidence in this regard was the testimony of Dr. Robert Dentler[5] about the DCSS' failure to take advantage of certain desegregative tools: (1) the DCSS did not subdistrict, that is, the DCSS did not break this large county into subdistricts and racially balance all of the subdistricts; (2) the DCSS did not expend sufficient funds to target minority learning opportunities; (3) the DCSS did not put in place community advisory mechanisms bearing on equalization of treatment, other than the bi-racial committee that was established by the court; (4) the DCSS could have modified the old "freedom of choice" plan to use it for desegregative purposes; (5) the DCSS could have clustered schools, placing children at different grade levels in different schools; thus, establishing a feeder pattern; (6) the DCSS could have used magnet schools earlier than DCSS chose to use them; and (7) the DCSS could have used urban to suburban exchanges of students. (Transcript Vol. IX at 43-47)

While the DCSS had an affirmative duty to eradicate the vestiges of the former dual system during this period, it is undisputed that plaintiffs did not seek court intervention to require the DCSS to implement any of the desegregative tools described above. In fact, plaintiffs did not seek further judicial intervention in this case until 1975, long after plaintiffs claim that other desegregative tools should have been utilized by the DCSS. Even then, the plaintiffs did not seek implementation of the changes that they now seek.

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[5] Dr. Dentler was qualified as an expert in the areas of student assignment, educational administration, staff desegregation, program development and evaluation, specifically in the areas of desegregation, demographics, human relations and transportation. (Transcript Vol. IX at 12-13)

DISCUSSION

Prior to the 1966-67 school year, the DCSS maintained dual attendance zones for both blacks and whites. Beginning with the 1966-67 school year, DCSS replaced the dual zones with a system of geographic zones with a "freedom of choice" transfer plan. While this plan resulted in a number of black students attending de jure white schools, the system had no significant impact on the former de jure black schools. The majority of black students still attended the de jure black schools. While neutral on its face, the "freedom of choice" plan did not dismantle the dual systems. In *Green v. County School Board*, 391 U.S. 430 (1968), the Supreme Court held that "in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself. . . . Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board." *Id.* at 440-42.

Within two months of the Supreme Court's decision in *Green*, the plaintiffs filed this action. By order of June 12, 1969, the consent desegregation plan for DCSS was implemented. That order was designed to be a final and terminal plan for desegregation. The order abolished the "freedom of choice" plan and implemented a single neighborhood school attendance policy. All of the remaining de jure black schools from the previous dual system were closed. In 1969, the school population of DeKalb County consisted of 74,741 students of which 3,754, or 5.6% were black.

Plaintiffs concede that "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools of DeKalb County. . . ." (Plaintiffs' trial brief at 7) The court agrees with plaintiffs' concession. Plaintiffs further contend that the DCSS has become resegregated and that the defendants are responsible for that segregation. While the court agrees that the DCSS has

become largely resegregated since the 1969-70 school year, the court does not find that the defendants are legally responsible for the resegregation.

Plaintiffs concede that the racial segregation in DeKalb County is the result of demographic shifts. In fact, plaintiffs' leading expert, Dr. Dentler, testified that "there were profound changes taking place demographically [from 1969 until 1986 in DeKalb County]." (Transcript Vol. IX at 38) Plaintiffs' correctly contend that not "until all vestiges of the dual system are eradicated can demographic changes constitute legal cause for racial imbalance in the schools." *Lee v. Macon County Board of Education*, 616 F.2d 805, 810 (5th Cir. 1980) (citing *Flax v. Potts*, 464 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1007 (1972)). Plaintiffs seemingly further contend, however, that until the school system is declared unitary, not all vestiges of the former dual system will be eradicated. Such a contention, of course, is erroneous. It is axiomatic that all vestiges of a dual system must be eradicated at a point in time before the school system is declared to have unitary status or the school system must be declared to have achieved maximum possible desegregation.

It is clear that the simple act of implementing a constitutionally accepted plan does not make a school system desegregated. *United States v. Texas Education Agency*, 647 U.S. 504 (5th Cir. 1981) (Unit A), *cert. denied sub nom., South Park Independent School District v. United States*, 454 U.S. 1143 (1982) (citing *Henry v. Clarksdale Separate School District*, 579 F.2d 916, 921 (5th Cir. 1978)); *see Thompson v. Madison County Board of Education*, 496 F.2d 682 (5th Cir. 1974). At points in their briefs, the defendants seemingly make the argument that such an implementation does relieve the school system of its affirmative obligations. To the extent that the defendants arguments can be read as supporting this con-

tention, the court rejects their arguments. This court is mindful of the Fifth Circuit's guidance in *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5th Cir. 1971), that "'[o]ne swallow does not make a spring.'"

The court will now examine the evidence presented at trial concerning the vestiges of the former dual system after the desegregation order was implemented in this case. When the June, 1969 order was initiated, all children were assigned to their neighborhood school. As the court noted above, plaintiffs concede that this action effectively desegregated the DCSS for a period of time. The evidence that plaintiffs presented at the hearing which tends to show that the implementation of the June, 1969 order did not effectively desegregate all of the schools for a time period was presented by Roger Mills. Mr. Mills has been involved with this case in several different capacities. His initial involvement was as a named plaintiff in 1974, he subsequently became involved as co-counsel, and later served as a member of the bi-racial committee. He testified that "there were two schools that were majority black despite the implementation of the court order. The first school was Terry Mill Elementary School which was 76 percent black, and the second school was Stoneview Elementary which was 51 percent black." (Transcript Vol. VII at 190)

The court will accept the witness' contentions regarding these schools, because plaintiffs' exhibit number 95, which contained the same information, was admitted into evidence. The court notes, however, that plaintiffs did not show that Mr. Mills had a basis for personal knowledge of the school system during the 1969-70 school year. Mr. Mills did not enter this case until 1974, and he testified that he moved into DeKalb County on January 1, 1974. (Transcript Vol. VII at 188).

The court has some concern that two of the formerly de jure white schools were majority black at the time the desegregation plan for DeKalb County was implemented.

The court views one race schools in the DCSS, both now and then, with suspicion. "The existence of a small number of one race, or virtually one-race, schools [however] within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann*, 402 U.S. at 26. The court was presented with no evidence that these schools are a vestige of the dual system. The evidence presented at the hearing showed that demographic shifts in the Atlanta Metropolitan Area began in the 1950s. In the 1950s, the population of DeKalb County was basically white; but as more and more blacks moved into the Atlanta Metropolitan Area, the rapidly growing black population began to move into the southwest DeKalb County area. The area surrounding Terry Mill School was one of the first areas to be effected by a rapid shift in the minority population.

Dr. David Armour testified about why Terry Mill was a majority black school at the time the desegregation plan was implemented in DeKalb County. Dr. Armour is an expert in the areas of the educational and social effects of desegregation plans, including academic achievement; the effects of demographics on school enrollment trends; the evaluation of alternative desegregation plans; the causes of residential segregation; assignment of faculty and staff in school desegregation plans; research methods and survey methods; and statistical analysis of data. Armour testified that in 1966 Terry Mill had only two black students, and 590 white students. By 1967, due to the population shifts of black residents from the City of Atlanta into DeKalb County, 23% or 140 out of 613 students at the school were black. In 1968, when the plan was adopted, the percentage of blacks and whites was equal. By 1969, when the plan was implemented, the percentage of black students at the school was 76%. (Transcript Vol. V at 120-21)

There was no evidence presented that the former dual system in any way contributed to the rapid racial transition of that school. Nor was there evidence that a for-

merly de jure black school was located within that area. Terry Mill was, of course, a formerly de jure white school. For these reasons, the court cannot find that the prior unconstitutional acts of the defendants were responsible for the high percentage of minority students in Terry Mill School in 1969.

The court is not as concerned with the racial imbalance in 1969 in the Stoneview Elementary School. The racial mix at that school was practically 50-50. There was only one percent more black students in the school than white students. That mix represents perhaps the ideal racial integration situation. Practically equal numbers of black and white children attended school together. The court notes that, unlike the majority of the County, this area has been characterized as a stable integrated area since the inception of the integration plan. The racial mix of the same school in the 1986-87 school year, according to plaintiffs' evidence, was 53% black.

There was insufficient evidence presented to this court from which it can make a determination, as defendants urge, that the implementation of the 1969 order resulted in full eradication of the vestiges of the dual system that would entitle them to a declaration of unitary status on this issue. While the court is satisfied that the two majority black schools that were in place when the order took effect in the 1969-70 school year are not vestiges of defendants' prior unconstitutional conduct, there was insufficient evidence presented about how long the school system remained relatively desegregated before demographic changes had the effect of resegregating certain schools. There is considerable evidence that the defendants actions in 1969 resulted in elimination of most of the vestiges of segregation. The achievement of unitary status in the area of student assignment cannot be hedged on the attainment of such status for a brief moment. For this reason, the court finds it necessary to examine the actions of the DCSS over the last two decades.

HISTORY OF THE DEMOGRAPHIC CHANGES IN DEKALB COUNTY

A true understanding of the problems and successes of the DCSS cannot be found without an examination of the demographic changes experienced by DeKalb County in the period between 1969 and 1986. DeKalb County has experienced phenomenal growth since 1950. In 1950, the County's population was a mere 77,000. By 1985, the population was in excess of 450,000.

In 1970, there were 7,615 non-whites[6] living in the northern part of DeKalb County and 11,508 non-whites living in the southern part of the county. By 1980, there were 15,365 non-whites living in the northern part of DeKalb County and 87,583 non-whites living in the southern portion. Between 1975 and 1980, approximately 64,000 black citizens moved into southern DeKalb County, most moving from the City of Atlanta. Meanwhile, approximately 37,000 white residents moved from southern DeKalb County to surrounding counties, mostly Gwinnett County. While there was some growth of the white population in southern DeKalb County from 1950 until 1975, in northern DeKalb County, the number of whites grew tremendously during that period.

As the result of these demographic shifts, the population of the northern half of DeKalb County is now predominantly white and the southern half of DeKalb County is predominantly black. Evidence presented at the hearing indicates that racially stable neighborhoods are not likely because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a racial 50%-50% mix. (Transcript Vol. V at 53) The demographic shifts have also had an immense effect on the racial compositions of the DeKalb County schools. From the period of 1976-1986, at the elementary level, the DCSS experienced an

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[6] In this context, the evidence presented to the court distinguished between whites and non-whites, that is, minority students including non-blacks.

enrollement decline of 15%, and within this change, an increase in black student enrollments of 86%. At the high school level, during the same period, DCSS experienced an enrollment decline of 16%, while the number of black students rose by 119%.

STEPS TAKEN BY THE DCSS TO COMBAT DEMOGRAPHIC CHANGES

Since 1976, a bi-racial committee, appointed by the court, has reviewed all proposed boundary line changes, all proposed school openings and closings, and the M-to-M program. Since the implementation of court-ordered desegregation in this case, there have been approximately 170 boundary line changes. Dr. William Clark, an expert in the areas of urban geography, demographic processes, statistics methodology, housing patterns and survey analysis, testified that the boundary line changes had no significant impact on the school populations, given the tremendous demographic shifts that were taking place at the same time. He opined that if no boundary lines had been changed, the shifting demographics still would have resulted in a significant increase in black population in many schools, especially those located in the southwest DeKalb area. Although the defendants' evidence showed that three boundary changes had at least a partial segregative effect, Dr. Clark testified, and this court finds, that even if a boundary change might have had a short-term effect on segregation, in the long run these boundary changes did not have a significant impact on the racial mix of the school populations. (Transcript Vol. I at 73-74)

To combat the shifting demographics, the DCSS voluntarily implemented a Minority-to-Majority program[7] in the 1972 school year. Using approximate numbers, 4,500

[7] The M-to-M transfer policy allows a student to transfer from a school in which his race was in the majority to one in which his race was in the minority.

students of the 72,500 enrolled in the DCSS in the school year 1986-87 participated in that program. Participation has grown steadily in the program over the last decade at the rate of about 500 students per year. (Transcript Vol. V at 61) Dr. Armour testified that the impact of the M-to-M students goes far beyond the number of students transferring under the program. He testified that at the receiving school approximately two white students for every black student is exposed to an integrated learning experience. (Transcript Vol. V at 61-62) Thus, approximately 19% of the students attending the DCSS had an integrated learning experience as a result of this program.

In the 1980s, the DCSS also instigated a magnet school program in schools located in the middle of the County. The location of these programs in the middle of the County is of critical importance for desegregative purposes. As was discussed above, the southern half of the County is predominately black, while the northern half of the County is predominately white. Only special academic programs located in schools in the middle of this rather large county have much potential for attracting both black and white students.

The magnet school programs in effect at the time of the hearing include: a performing arts program at Avondale High School; the Scientific Tools and Techniques program at Fernbank Science Center; a science program for gifted and talented elementary children at Snapfinger Elementary School; a foreign language program at Briarcliff High School. At the hearing, Dr. Robert Freeman, Superintendent of the DCSS, testified that the DCSS also had plans to maintain programs at three other schools as magnet programs: the open campus located at Briarcliff; the Occupational Educational Center North; and the Occupational Educational Center Central. The DCSS has two other magnet programs on the drawing board: a school for the gifted and talented at Kitt-

ridge Elementary School and a program for four-year-olds at Evansdale Elementary School. The DCSS also operates a number of integrated experience programs: the writing center programs for both fifth and seventh graders that are racially controlled; the driving range school is racially controlled; summer school programs are racially controlled as much as possible; and a racially controlled dialectical speech program was to be implemented in the 1987-88 school year.

HAS THE DCSS ACHIEVED MAXIMUM DESEGREGATION?

The Court has examined the efforts that plaintiffs contend defendants should have taken to achieve unitary status in the area of student assignment, the steps that the DSCC has taken to accomplish their goal, the dynamics of the changing demographics, and the effects of the changing demographics on student attendance. With these factors in mind, the court must decide if the defendants have accomplished maximum practical desegregation of the DCSS or if the DCSS must still do more to fulfill their affirmative constitutional duty.

Most of plaintiffs' efforts to convince this court that defendants must do more to fulfill their constitutional duty centered on Dr. Dentler's testimony about what desegregative tools were at the defendants' disposal during the time that the resegregation of the County was taking place. Dr. Dentler summarized his testimony in this manner:

> The [DCSS] is racially imbalanced, it has schools that are extremely isolated racially, that continue to be identifiably black and identifiably white. It has failed to comply even in the broadest interpretation I could make with the single standard on certificated stat [sic]. It does not have a bi-racial committee which engaged [sic] in advising and guiding on desegregated strategies and race relations. It has an

> M-to-M program which has done about as much as it can do, which is very little, to desegregate the system. It has the barest bones beginnings of magnet programs, affecting in my count about 500 students at present, and there are some good ideas going, but they have a very long way to go, and they are in shortfall right now.
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> So even on my briefest list, this district is segregated and has not offset the vestiges of discrimination as they impact on the child's daily learning experience, and that's the essence of the school treatment. It's not a unitary district, and its got some exciting good intentions which I have tried to note and honor, but . . . they don't bear on this assessment.

(Transcript Vol. IX at 123-24)

To rebut this evidence, the defendants presented the testimony of Dr. Christine Rossell, an expert in the areas of evaluation of alternative desegregation plans, the design and implementation of desegregation plans, the effect of desegregation plans on learning, the effect of desegregation plans on demographics and statistical analysis of data. When asked whether she agreed with Dr. Dentler that the DCSS did not properly respond to the population shifts occurring during the 1970s and 1980s, Dr. Rossell testified:

> I am sure that [the DCSS] could have done something to make marginal adjustments, but these trends are so massive that [the DCSS] could only have had a marginal effect. The basic trend was racial transition, blacks moving from Atlanta into DeKalb County, and . . . there is nothing that would have changed that basic factor.

(Transcript Vol. XI at 85) When asked whether magnet schools would have worked in the mid-1970s, the period of time when Dr. Dentler advocates that such pro-

grams should have been started in the DCSS, Dr. Rossell testified that all studies available at that time, concerning the effectiveness of magnet programs, indicated that magnet programs were not very effective. (Transcript Vol. XI at 86-87)

To rebut Dr. Dentler's testimony that the M-to-M Program as implemented in the DCSS is ineffective, Dr. Rossell testified that, in 1987, the M-to-M transfers will reduce "racial imbalance by 18 percentage points if you use the index of dissimilarity comparing blacks to non-blacks, by 20 percentage points if you use the relative exposure index comparing blacks to non-blacks. That is a fairly large reduction in racial imbalance." (Transcript Vol. XI at 87) Dr. Rossell further testified that the magnet programs and integrated learning experience programs implemented by the DCSS have had positive effects on desegregation and racial exposure. (Transcript Vol. XI at 95).

Once again this court is faced with the "battle of the experts." The testimony of the opposing experts in this case is so contradictory that to accept the testimony of plaintiffs' experts necessitates that the court discredit most of the testimony of the defendants' experts, and vice-versa. Faced with this decision, the court finds the evidence presented by the defendants' experts to be more reliable on this issue. The defendants' experts were more familiar with the DCSS. They had spent more time than plaintiffs' experts in the DCSS, learning about the inner workings of the DCSS and its problems and successes, rather than treating the DCSS as a hypothetical situation. The court notes that Dr. Walberg, Dr. Armour, Dr. Rossell and Dr. Clark are leading experts in their respective fields and all have had considerable experience in the desegregation area.

Plaintiffs' desegregation expert, Dr. Dentler, did not base his testimony on an empirical study of the school

system. Due to his lack of personal knowledge of the DCSS, he was forced to treat the DCSS as a hypothetical situation. Based upon data made available by the school system, his testimony centered on the failure of the DCSS to achieve racial balancing. The court found more compelling testimony about what is being and can be done to improve the quality of education for all students and achieve maximum practical desegregation at the same time.

Based upon the evidence presented at the hearing, the court finds that the DCSS has done everything that was reasonable under the circumstances to achieve maximum practical desegregation in DeKalb County. Plaintiffs request the court to go back in time and ask the question "what if the defendants had tried this then?" That time has passed. While there may be some case authority for approaching desegregation cases in that manner, this court will not dwell on what might have been, but what else should be done now. "At any time, more could have been done to achieve racial balance in the schools. But, it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday." *Brown III*, 671 F. Supp. at 1309.

Although the defendants might have been able to do something more to maintain desegregation while the dramatic population shifts were occurring, the court, based on the evidence presented at the hearing and the court's long involvement[8] in this case, finds that defendants' actions achieved maximum practical desegregation from 1969 to 1986. The rapid population shifts in DeKalb County were not caused by any action on the part of the DCSS. These demographic shifts were inevitable as the result of suburbanization, that is, work opportunities arising in DeKalb County as well as the City of Atlanta,

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[8] The undersigned was assigned to this case on January 8, 1981, approximately twelve years after its filing. Prior to that time, Judge Newell Edenfield supervised this case.

which attracted blacks to DeKalb; the decline in the number of children born to white families during this period while the number of children born to black families did not decrease; blockbusting of formerly white neighborhoods leading to selling and buying of real estate in the DeKalb area on a highly dynamic basis; and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. (Transcript Vol. IX at 33) There is no evidence that the school system's previous unconstitutional conduct may have contributed to this segregation. This court is convinced that any further actions taken by defendants, while the actions might have made marginal adjustments in the population trends, would not have offset the factors that were described above and the same racial segregation would have occurred at approximately the same speed.

This court does not dismiss lightly plaintiffs allegations that the defendants could have done more to desegregate the DCSS. "The failure to take desegregative action by a district that had an affirmative duty to desegregate should be carefully examined by the court. If a district has consistently dragged its feet on desegregation then the vestiges of the segregated system may remain." *Brown III*, 671 F. Supp. at 1308. Although the plaintiffs, defendants, and the HEW all consented to the June, 1969 order implementing a race-neutral neighborhood school system, the Court later made it clear in *Swann* and *Green* that such plans would not satisfy the duty to desegregate unless it did effectively desegregate the system. Even though a student assignment plan may be racially neutral, unless the former vestiges have been removed, a race-neutral plan can perpetuate the former dual system.

To reiterate, this court finds that the implementation of the June, 1969 order eradicated most of the vestiges of the former dual system. Defendants' efforts to deseg-

regate this system did not end there, however. When faced wth rapid resegregation of the system, the DCSS implemented both a M-to-M program and a magnet program. Both of these programs were implemented without the prompting of this court or the plaintiffs. Both of these programs have achieved a degree of success in desegregation and racial exposure.

Although defendants did not implement all programs described as permissible in *Swann*, this court cannot find that it neglected its constitutional duty to eradicate the vestiges of the former dual system. The great weight of the evidence indicates that the segregation that occurred in DeKalb County would have taken place at approximately the same speed whether or not defendants had implemented the desegregative tools described by plaintiffs. While racial mixture is a proper goal of a formerly segregated school system, there is no constitutional right for any student to attend a school having any particular degree or racial balance or mixing." *Milliken v. Bradley* (Milliken II), 433 U.S. 267, 280 n. 14 (1977); *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 434 (1976). At this juncture, the court is convinced that, absent massive bussing, which is not considered as a viable option by either the parties or this court, the magnet school program and the M-to-M program, which the defendants voluntarily implemented and to which the defendants obviously are dedicated, are the most effective ways to deal with the effects on student attendance of the residential segregation existing in DeKalb County at this time.

Based upon the dramatic effect the implementation of the June, 1969 order had on eradicating the vestiges of the prior dual system, the DCSS' continuing efforts to battle resegregation by implementation of voluntary M-to-M and magnet school programs, the absence of any persuasive evidence indicating that the actions of the DCSS in any way promoted the resegregation that occurred in the County, and the evidence that indicates

that other efforts by the DCSS would not have effectively stopped or even slowed the rapid demographic changes that brought residential segregation to the County, this court finds that the DCSS has achieved maximum practical desegregation as of the 1986-87 school year. The goal in desegregation cases is to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *United States v. DeSoto Parish School Board*, 574 F.2d 804 (5th Cir. 1974), *cert. denied*, 439 U.S. 982 (1978). The DCSS has become a system in which the characteristics of the 1954 dual system have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by defendants or their predecessors. *Brown III*, 671 F. Supp. at 1293.

Plaintiffs argue that further desegregation may be accomplished by, *inter alia*, establishing a magnet school program or grade reorganization plan, such as a comprehensive junior high school plan. The court agrees with plaintiffs contentions in this regard. As the court discussed above, the defendants are obviously dedicated to the magnet program and the court does not find that court supervision is necessary to insure that magnet programs are used to bring about maximum practical desegregation.[9]

The court is concerned that the defendants are not seizing the opportunity of implementing a junior high program to bring about further desegregation, if possible. The parties agreed that in the area of student assignment, the cut-off date for evidence in this area would be the 1986-87 school year. All evidence presented to the

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[9] In the defendant's post-trial brief at page 36, defendants state: "[a]s the court heard, Defendants remain committed to providing all students the opportunity for an integrated education, and will continue to devote significant resources to the M-to-M program, integrated experience programs, and magnet programs with or without court supervision."

court indicates that the DCSS obtained maximum practical desegregation through that cut-off date. Thus, the defendants have fulfilled their constitutional obligations in this area. For that reason, the court denies the motion of plaintiff to compel the defendants to file a junior high plan.

STAFF ASSIGNMENTS

The assignments of both teachers and principals have been challenged in this case as violative of the dictates of *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970). The court will first address the issue as it concerns teachers.

While the DCSS maintained a dual system, only black teachers were hired to teach black students in all-black schools, and only white teachers were hired to teach in the all-white schools. Of course, a segregated faculty is vestige of the former dual system, and all school systems that maintained a dual ystem have the affirmative duty to eradicate this vestige. As long as schools have faculties that are identifiably of one race, it is unlikely that the schools will be able to successfully assimilate students of another race.

Plaintiffs do not contend that the defendants have not fulfilled their constitutional obligation with respect to hiring and retaining minority faculty. The proper gauge of the defendants' conduct in respect to hiring minority teachers is the racial composition of a district's teacher work force as compared to the racial composition of the qualified public school teacher population in the relevant labor market. *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977); *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133, 1137-38 (5th Cir. 1981) (Unit A). Plaintiffs concede that defendants have actively recruited qualified black applicants, and that the result of their efforts has allowed the defendants to hire a significant number of black teachers, even

though the number of black students graduating from colleges in the United States with bachelor degrees in the field of education has declined since 1975 and is still decreasing. While the state-wide average percentage of black teachers within a school system was 21% in 1986, the DCSS percentage was 26.92%. In the last five years, the DCSS has continuously employed a greater percentage of black teachers, than was the state-wide average. The court notes that the DCSS has an equally exemplary record in retention of black teachers.

Plaintiffs do contend, however, that the defendants have not complied with one of *Singleton's* requirements. *Singleton* pronounced three governing principles with respect to faculty employment practices during the desegregation process. Plaintiffs challenge only the first pronouncement, that is, plaintiffs contend that the defendants have failed to follow the requirement that "principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students." *Id.* at 1217-18.[10] The court agrees that the defendants have not complied with *Singleton* with regard to assignment of minority faculty.

The court notes, that in 1976, while Judge Newell Edenfield supervised this case, the defendants were found to be out of compliance with the first *Singleton* requirement. In his order of November 3, 1976, Judge Eden-

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[10] The other two requirements of *Singleton* follow. *Singleton* prohibits a school system from discriminating in the hiring, assignment, promotion, pay; demotion or dismissal of faculty members and staff. Finally, *Singleton* requires that in school districts in which the process of desegregation effects a reduction in the number of teachers or other professionals employed by the district, the school district must select the staff members to be dismissed or demoted on the basis of valid non-discriminatory reasons. 419 F.2d at 1218.

field made the following findings of fact and conclusions of law on this issue:

> The court finds that the defendants have not taken adequate steps to utilize reassignment of teachers to reduce the racial identifiability of faculty in accordance with the standard set out in *Singleton v. Jackson Municipal Separate School District, supra.* In *Singleton,* the Court of Appeals for the Fifth Circuit held that in order to reduce racial identifiability of a faculty, staff should be assigned so that the ratio of black to white teachers in each school is "substantially the same" as the ratio throughout the entire system. 419 F.2d at 1218.
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> Defendants ask that the court compare the facts in the instant case with *Ellis v. Board of Public Instruction of Orange County,* 423 F.2d 203, 205 (5th Cir. 1970), where the court found the school system to be in compliance with *Singleton,* despite the existence of racial ratios in individual schools twelve percentage points higher than the racial ratio of the entire school system. While the court is aware of the problems inherent in requiring that the teachers at any school be maintained at an exact arbitrary racial ratio, [cite] the current 40-48% of black teachers in some of the more predominantly black elementary schools does not even "approximate" the 15% system-wide ratio [cite].
>
> A significant reason for the wide disparity in the racial ratios amongst schools in DeKalb County is the reliance on the replacement process, and the avoidance of reassignments to even out the distribution of faculty. The court finds that this system does not comply with the *Singleton* standard, nor with this court's 1969 order which required reassignment of teachers to eliminate the effects of the dual school system. Accordingly, reassignment of

> teachers must be utilized to make the racial ratio of the faculty in individual schools truly substantially similar to the system-wide ratio. [cite]

Order of November 3, 1976 at 15-16.

There was no evidence presented at the hearing that after Judge Edenfield issued the order referenced above that the defendants reassigned their teachers to make the racial ratio of the faculty in individual schools truly substantially similar to the system-wide ratio. All evidence indicates that the DCSS has continuously relied upon the replacement process to achieve *Singleton* requirements and avoided using mandatory reassignment. The result of this policy is that defendants have never satisfied their duty to comply with *Singleton*.

Defendants argue that if the court views the system as a whole they have complied with *Singleton*. Defendants contend that plaintiffs improperly look at particular schools. Defendants obviously misread the requirement of *Singleton* in this regard. The pertinent language from that opinion follows:

> For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers *in each school*, and the ratio of other staff *in each*, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the *entire school system*.

419 F.2d at 1218 (emphasis added). The proper focus for both the court and the parties are whether individual schools deviate substantially from the system-wide average.

Plaintiffs presented evidence that in the 1984-85 school year, seven schools deviated more than 10% from the system-wide average of 26.4% minority teachers in the elementary schools and 24.89% minority teachers in the high schools.

School	% Black Students	% Black Faculty	% Deviation
Briarlake Elem	17.1%	14.29%	−12%
Chapel Hill Elem	96.9%	38.89%	+12.5%
Gresham Park Elem	98.2%	39.29%	+13%
Kelley Lake Elem	98.7%	38.46%	+12%
Leslie Steele Elem	99.0%	37.04%	+11%
Wadsworth Elem	95.5%	47.83%	+21.5%
Gordon High	99.4%	39.22%	+14.4%

For the 1985-86 school year, the system-wide percentage teachers rose to 26.7% minority teachers in the elementary schools and 26.36% in the high schools. The evidence shows that the number of schools deviating more than 10% from the system-wide average rose also.

School	% Black Students	% Black Faculty	% Deviation
Briarlake Elem	18.9%	13.79%	−13%
Hightower Elem	18.2%	12.50%	−14%
Kingsley Elem	2.8%	16.67%	−10%
Medlock Elem	34.4%	15.79%	−11%
Chapel Hill Elem	97.5%	41.46%	+15%
Sky Haven Elem	98.0%	39.13%	+12.5%
Leslie Steele Elem	99.2%	39.29%	+12.5%
Wadsworth Elem	96.7%	41.67%	+15%
Gordon High	99.6%	39.58%	+13%
Walker High	99.0%	41.27%	+14.5%

In the 1986-87 school year, the numbers increased again. During that year 15 elementary schools and 2 high schools fell outside the 10% range. Again, the ratio of minority faculty rose, reaching 27.3% in the elementary schools and 25.95% in the high schools.

School	% Black Students	% Black Faculty	% Deviation
Hooper Alex. Elem	94.0%	37.5%	+10.2%
Austin Elem	1.1%	13.33%	−14%
Chapel Hill Elem	98.5%	39.53%	+12%
Gresham Park Elem	98.0%	43.75%	+15.5%
Hightower Elem	30.5%	15.0%	−12%
Kelley Lake Elem	98.8%	46.67%	+19.5%
Kingsley Elem	2.9%	15.38%	−12%
Meadowview Elem	82.4%	42.31%	+15%
Oakcliff Elem	14.9%	17.14%	−10.2%
Sky Haven Elem	97.3%	40.43%	+13%

Smoke Rise Elem	12.9%	13.51%	−14%
Leslie Steele Elem	99.6%	37.93%	+10.5%
Terry Mill Elem	98.4%	47.06%	+20%
Toney Elem	97.7%	38.46%	+11%
Wadsworth Elem	96.8%	40.0%	+13%
Columbia High	98.4%	36.0%	+10.1%
Redan High	33.2%	15.71%	−10.2%

Although the DCSS is not legally responsible for where black and white families chose to live in DeKalb County, the law of this circuit makes it legally responsible for the allocation of minority teachers. Defendant offers two excuses for its failure to achieve perfect *Singleton* compliance. First, defendant argues that competition among local school districts is very stiff and that it is difficult to attract and keep qualified teachers if the DCSS requires that the teachers work far from their homes. The former Fifth Circuit Court of Appeals rejected a similar argument in *United States v. DeSoto Parish School Board*, 574 F.2d 804 (5th Cir.), *cert. denied*, 439 U.S. 982. In *DeSoto*, the court said:

> Pointing to the difficulties DeSoto Parish faces in competing with nearby, wealthier school systems in attracting and keeping qualified teachers, the board asserts that measures such as reassignment to achieve compliance with *Singleton* will lead to large numbers of faculty resignations. The fear of faculty resistance to desegregation measures, like the fear of community resistance, cannot be allowed to defeat an effective desegregation plan in favor of a plan that is unlikely to achieve a unitary system.

Id. at 817. The court is not unsympathetic to the difficulties that the DCSS faces in this regard; however, the law of this circuit requires the DCSS to comply with *Singleton*'s requirements now.

The DCSS maintains a transfer program. Under this program, if a teacher has taught at the same school for a period of three years, the teacher may request a transfer to another school. (Defendants' exhibit 83) The pre-

dominant reason given by both black teachers and white teachers when requesting transfers is that they have a desire to work closer to their residence. This allows the teacher to coordinate classroom activities with community and civic activities and alleviates travel inconvenience. (Transcript Vol. II at 19-22) The court notes that since DeKalb is such a large and densely populated county, the ability to work close to home can save an individual significant daily travel time. While the number of transfer requests received by the County is relatively high, the number of transfer request that are granted is relatively low.[11] Since the teachers' requests are to transfer to schools near their home, however, the transfers that are granted deter the DCSS from achieving its *Singleton* goal.[12]

Plaintiffs further contend that the DCSS' placement of principals violates *Singleton*. Plaintiffs do not contend that the DCSS has failed to fulfill its constitutional obligation concerning the hiring and retention of minority administrators. As in the faculty area, the DCSS has an exemplary record in hiring and maintaining minority professional staff. Blacks now compose 26.5% of the administrative staff of the DCSS. Blacks are represented

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[11] At the high school level in the 1986-87 school year, 79 requests were made. Seventy of the requests were made by white teachers, and 9 by black teachers. Of the 79 requests, 26 were granted, 24 to white teachers and 2 to black teachers. At the elementary level, 103 requests were made, of which 57 were granted, 40 to white teachers and 17 to black teachers.

[12] Defendants argue that they achieved *Singleton* compliance in every school at some point in time over the course of this case; therefore, it has been relieved of its constitutional burden. It would be ludicrous for this court to accept such an argument. Acceptance of compliance with *Singleton* under that argument, would permit situations such as a school system having 20% of its schools in compliance with *Singleton* during a particular year would achieve *Singleton* compliance even though the other substantially deviated from the system-wide ratio, as long as the other 80% eventually complied with *Singleton*.

throughout all levels of the administrative structure of the DCSS.

Plaintiffs' concern about the assignment of principals is that principals are assigned in a manner such that the number of black principals at a school is a strong indication of the black student population of that school. The court must agree.

This court does not consider the evidence of principal assignments in a vacuum, however. In *United States v. South Park Independent School District*, 566 F.2d 1221 (5th Cir. 1978), *cert. denied*, 454 U.S. 1143 (1982), the court briefly considered the allegation of the plaintiff that principals were assigned based upon the race of the individuals involved. The court stated: "We are not ready to hold that each particular level of employment in a school system must have a particular racial composition. At the same time, however, we also recognize that in a community individuals might attach a certain degree of importance to the position of principal, and that it would be unconstitutional for a school district to assign principalships based upon the race of the individuals involved." *Id.* at 1226.

In *Singleton*, the court did not differentiate between teachers or principals, but required that all "staff who work directly with the children at school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students." *Singleton*, 419 F.2d at 1218. The principals and assistant principals are only two of the members of a schools staff that interact on a daily basis with the children. *Singleton* requires that the staff be considered as a whole. When the evidence concerning both teacher and principal deviations are considered, the need for further action by the defendants to comply with *Singleton* becomes obvious.

Construing the evidence presented by the parties concerning the assignments of principalships, the court finds

the majority black schools have a high percentage of black principals assigned to them, while the majority white schools have a deficient percentage of black principals assigned to them. Plaintiffs' evidence focuses on the 1985-86 school year. There was no evidence presented that the 1985-86 school year was an anomaly. Plaintiffs showed that during the 1985-86 school year, five of the 22 high school principals, and 18 of the 74 elementary school principals were black. Of those black principals, four of the five black high school principals were assigned to schools that have student populations of over 95% black. Only one of the five high schools with black student populations over 90% had a white principal.[13] Thirteen of the 18 black elementary school principals were assigned to schools at which the black student population exceeded 90% black. Conversely, only four of the elementary schools with black student populations over 90% had a white principal. (Plaintiffs exhibit 3)

There is also an obvious racial skew in the total number of administrators (principals, assistant principals, lead teachers) at the majority black schools. The court will first examine the elementary schools during the 1985-86 school year. At this time the system-wide average of black administrators at the elementary school level was 30.1%. In the 43 majority white schools the number of black administrators were less that 10%. In the 11 schools in which the black student population ranged between 41% and 80%, the number of black administrators increased to approximately 38.5%. In the 20 schools in which the black student population was greater than 81%, the percentage of black administrators increased to 60%.

At the high school level, the racial skew of administrators was equally as startling. The system-wide average

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[13] Gyuri Nemeth, who testified during the July, 1987 hearing, is a white principal at majority black Walker High School (now McNair Senior High).

of black administrators at the high school level was 27.2%. In the 12 schools that were majority white, the percentage of black administrators was only approximately 22%. In the schools that had black student populations ranging from 41% to 80%, the percentage of black administrators was roughly 45%. In the majority black schools with black student populations of over 81%, the percentage of black administrators increased to 63.2%.

The court also analyzed an exhibit presented by defendants which depicted the race and sex of all in-school administrators for the 1987 school year. At the elementary school level, 27 out of the 77 elementary schools had black principals. In the 27 schools in which the principal was black, 60% of the in-school administrators were black. At the high school level, only four of the twenty-nine high schools had black principals. In those four schools, 75% of the in-school administrators were black.

Such obvious deviations between percentage of black administrators in the majority black schools cannot satisfy the *Singleton* requirements. Again the court rejects any contention by the defendants that if a particular school met the *Singleton* requirement at one time, the DCSS is relieved of the *Singleton* requirement as to that school. At a minimum, *Singleton* contemplates an initial reassignment of staff that will achieve a system-wide balance of minority staff and then a neutral maintenance program afterwards.

Defendants complain that this court has not given the DCSS guidance on what acceptable deviation from the system-wide average would comply with the *Singleton* requirement of "substantial compliance." This court has endeavored to be flexible by not setting a certain percentage deviation that will satisfy *Singleton* in this district. The court, however, will comply with the defendants request for guidance by establishing an iron-clad rule. This court will adopt as this rule the previous guid-

ance established by Judge Edenfield in the November 3, 1976 order. When the school staffs (faculty and administrators) of all schools vary from the system-wide minority staff average by no more than 15%, the DCSS will have obtained substantially compliance with *Singleton*. Any school that deviates by more than 15% will presumptively be a violation of *Singleton*. Absent extenuating circumstances justifying deviations of more than 15%, the court will not find *Singleton* compliance until all school staffs fall within the established parameters. At trial, the defendants did not offer an explanation for the existing substantial deviations.

This court will maintain jurisdiction over this case at least through September, 1988. Before that time period ends, the DCSS will have the option of implementing a plan that will achieve compliance with *Singleton* and submitting a report showing that they have so complied to the court. Due to the late date of this order, if compliance with *Singleton* within that short period of time will be unduly burdensome on the DCSS, the DCSS may file a report with this court in September, 1989 showing that it has achieved compliance with *Singleton*. It would appear that such compliance will necessitate reassignment of both teachers and principals.

While this court shares the concern of other courts of requiring strict mathematical ratios, as the former Fifth Circuit recognized in *DeSoto*, such ratios are necessary "as a starting point in eliminating the vestiges of segregation in . . . faculty assignment. . . . Moreover, *Singleton* does not require that such ratios be maintained permanently; rather, it 'contemplates an initial reassignment so that the racial ratio at every school reflects the system-wide ratio, followed by the utilization of a nondiscriminatory hiring, firing, and assignment policy thereafter.'" *DeSoto*, 574 F.2d at 819 (quoting *United States v. Wilcox County Board of Education*, 494 F.2d 575, 580 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974)). Achiev-

ing compliance with *Singleton* should not be difficult for the DCSS in the area of faculty assignment. In their brief, the defendants argue that any "school's faculty could be brought into line with a narrowly construed racial balance standard by moving, at most, two or three teachers." (Defendants' post trial brief at 50)

PHYSICAL FACILITIES, TRANSPORTATION, & EXTRA-CURRICULAR ACTIVITIES

The defendants achievement of unitary status in the areas of physical facilities, transportation and extra-curricular activities were not contested by the plaintiffs. The court agrees with plaintiffs' concession that the defendants have fulfilled their constitutional obligations in these areas and that no further relief is required.

Although the parties have stipulated that some clubs meet at certain receiving schools of the M-to-M program before the M-to-M buses arrive in the morning, plaintiffs do not contend that further relief is needed in the areas of transportation and extracurricular activities. It appears that this problem was brought to the courts attention to alert the court that the DCSS does not have a perfect record in the area of transportation and extra-curricular activities. Transportation must be provided for M-to-M students. The activity buses provided by the DCSS are more than adequate to provide all students with an opportunity to participate in extracurricular activities. The time for the club meetings are set by the students not the DCSS. The DCSS provides activity buses late into the night, and will provide bus service for only one student, if necessary. The court finds that the DCSS provides opportunities to all students, including M-to-M students, to participate in a wide range of extra-curricular activities without regard to race.

The plaintiffs also have some concern about overcrowding in the southern schools. Plaintiffs claim that portable classrooms are used more in the majority black schools

than the majority white schools. All evidence at the hearing on this motion, indicated that the DCSS has a race-neutral policy with regard to the use of portable classrooms. The DCSS is constantly attempting to deal with the growing population of southern DeKalb County by building new schools and adding permanent additions to existing schools.

QUALITY OF EDUCATION

The court considers this area of dispute to be of utmost importance. The crux of the Supreme Court's decision in *Brown* was that the maintenance of separate but equal facilities for black students did not assure that black children obtained a quality education. Although quality of education is not one of the six classic areas of inquiry in school desegregation cases[14], the defendants did not protest litigation of this area. The defendants acknowledge that a school system that is not fulfilling its obligation of providing quality education to all school children should not be entitled to unitary status.

The parties contest who should bear the burden of proof on this issue. As the defendants concede that this area of inquiry is important to a determination of whether the DCSS has achieved unitary status, the court finds that defendants should properly bear the burden of showing that all students in the DCSS are receiving a quality education.

Plaintiffs concede that the DCSS is a wonderfully innovative system.[15] (Transcript Vol. I at 101) Plaintiffs

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[14] Plaintiffs contend that quality of education can be considered a part of the facilities area, one of the six areas specified in *Green* as a proper area of inquiry for the purposes of deciding if a school system has obtained unitary status. The court finds that the labelling of the dispute concerning quality of education is irrelevant.

[15] The court was impressed by the number of innovative programs implemented by the DCSS. Examples of these innovative programs include: (1) effective schools program (a program initi-

contend, however, that defendants have racially skewed the provision of certain education resources, such that black students are not given an equal educational opportunity in the DCSS. In particular, plaintiffs argue these tangible factors have been skewed: (1) teachers with advanced degrees; (2) more experienced teachers; (3) per pupil expenditure; (4) number of library books per student; and (5) that there is higher teacher turnover in the black schools. Plaintiffs seemingly argue that a prima facie showing that these resources are skewed is sufficient for the court to find that the DCSS has not achieved unitary status. Defendants, how ... focus on the effect such factors have had on educati ...gains by black students. It is the defendants contention that the black students in the DCSS have made greater advances educationally than white students. The parties difference of opinion on what factors influence quality of education make it difficult for the court to compare the voluminous data presented on this issue. In effect, the parties com-

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ated in 12 majority black schools to focus the resources of the school system on schools that will benefit most significantly); (2) parenting programs (providing parents with techniques and methodologies to help their children achieve in school); (3) lead teacher for student services (lead teachers work with individual students to improve their self-concept; they work with teachers to develop alternative strategies for working with children of various backgrounds; and they work with parents to help them facilitate the education of their children); (4) human relation supplements (a program instigated in the receiving schools of the M-to-M program, the goal of the program is to improve race relations); (5) homework helpline (provides immediate help for students and parents who are encountering difficulties in the completion of homework); (6) adopt-a-school (designed to use the resources of businesses to enhance education by encouraging companies to adopt a school and become its benefactor); (7) staff development programs; (8) latchkey program (in conjunction with the local YMCA, the DCSS provides a program for parents who cannot afford private day care services); (9) remedial education programs (e.g., a partially state-funded program for students in grades 2-5, who are half a year or more below grade level in reading); and (10) the writing-to-read program.

pare apples and oranges and ask this court to decide which is better.

Both the allocation of educational resources and the achievement of students are interrelated issues that must be examined to determine whether black students are receiving the same quality education as white students. The court will first examine the evidence presented by the defendants concerning achievement of black students in the DCSS.

The focus of the DCSS evidence on this issue was that it offered the same educational opportunities to all students. The DCSS presented extensive evidence about the uniformity of its curriculum in all schools. The DCSS requires teachers to prepare lesson plans that conform to the curriculum. (Transcript Vol. VI at 85-91) Defendants' expert Dr. Walberg spent a considerable amount of time in the DCSS examining the curriculum and the conformity of the various schools to the curriculum. Based upon his examination of the DCSS, Dr. Walberg testified that "the District provides an exceptionally effective educational program. It provides a uniform curriculum, and it provides equality of educational opportunity in the schools. The District . . . provides continuous progress mastery learning. I think this is an exceptionally effective program. They do this by aligning the curriculum and the tests, by concentrating very heavily on academic learning. They use curriculum guides. They have in my opinion very careful lesson plans and extraordinary attention to the match of the total district curriculum to what the lesson plans are in fact. In most cases, although there are some exceptions to this, the teachers actually have those lesson plans in their classes and they are teaching them pretty much on task." (Transcript Vol. IV at 91) [16]

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[16] Plaintiffs attempted to prove that the curriculum of the predominately black schools was not the same as the predominately white schools by presenting the evidence of a M-to-M student,

The court found particularly significant the evidence that black students who have been in the DCSS for two years achieve greater gains than white students on the Iowa Tests of Basic Skills (ITBS). The DCSS compared students who entered the DCSS in 1985 and took the ITBS for the first time in the 1985 school year then took the ITBS when it was administered in 1987. Although whites scored higher than blacks on the test, the percentage gain of black students was significantly greater than white students. The students who were selected for the comparison were 546 white students and 778 black students. In 1985, the average score for white students was 73.3%, while their score increased to 80.5% in 1987, a difference of 7.2%. For black students, the average score for the 1985 exam was 40.8% and their score increased to an average score of 51.2% in 1987, a difference of 10.4%. The fact that blacks score lower than whites cannot be attributed in any way to the DCSS. These students all entered the DCSS in 1985. The black students entering the schools system scored lower than entering white students. The progress of the black students and the white students can be attributed to the DCSS. It is significant to this court that black students, many of whom attend majority black schools made greater gains on this test than the white students, many of whom attended majority white schools. (Defendants' exhibit 114).

Norma Denise Jones, who testified that another transfer student did very poorly while he attended Lakeside High School through the M-to-M program, but when he transferred back to his home school he did very well. Defendants successfully rebutted this testimony with the testimony of Melvin Johnson, the assistant superintendent for area one (an area in southern DeKalb County). Mr. Johnson testified that the transcript of the student in question showed that the students grades were substantially the same at both the M-to-M receiving school and the students' home school. (Transcript Vol. XI at 25-27)

The latest results from the ITBS that were available before the hearing establish that both black and white students who have been totally educated in the DCSS score higher on the ITBS than students who entered the DCSS in the year of the test. Again black students score lower on the ITBS as a group than white students. (Defendants' exhibit 115)

Black students in the DCSS also are more successful than other black students nationally on the Scholastic Aptitude Test (a college entrance examination test), while white students in the DCSS scored below the national average. The information on the SAT presented to the court was for the 1984-85 school year. (Defendants' exhibit 119)

The evidence presented to this court shows that the socio-economic status of a child affects his potential for academic success to a much greater extent than racial exposure. In fact, much of the evidence presented to this court showed that racial exposure did not effect a child's academic success. There was considerable testimony on that subject. (testimony of Walberg in unnumbered volume of the transcript at 40-62, and testimony of Dr. Rossell in Vol. XI at 99-100) The court found the evidence presented in this regard to be compelling.

Several of the defendants' exhibits illustrated this point as well. Defendants' exhibit 137 shows that black children entering kindergarten score much lower on the California Achievement Test than white students. Of course, only the child's home environment, including socio-economic factors, could bear on a child's achievement at that point in a child's academic development.

Both black and white students who are participants in the free and reduced lunch program score lower on the ITBS than students who are not on the free and reduced lunch program. (Defendants' exhibit 117) The type dwelling in which a child lives is predictive of scores on

the ITBS. Children living in single family dwellings score highest, followed by children who live in condominiums, duplexes, apartments, mobile homes, while children who live in institutions have the lowest scores. The exhibit further showed that a greater percentage of white students than black students live in single family dwellings and condominiums. (Defendants' exhibit 112)

Defendants' exhibit 110 shows that students who come from professional homes (that is, a home in which at least one parent is a professional) score highest on the ITBS. These students are followed by children from two-parent homes. The lowest achievers are from single-parent households. A much higher percentage of black children come from single-parent homes than white children.

The court will now consider the evidence presented by plaintiffs that certain of the resources of the DCSS are racially skewed. Plaintiffs presented evidence on these school treatment characteristics: (1) per pupil expenditure, (2) library books per student, (3) teacher experience; (4) teacher education; (5) teacher turnover; and (6) student retentions. Plaintiffs divided the schools into three different types for purposes of showing a comparison of the resources: (1) type I schools—schools that have been majority white over the last decade; 2) type II schools—schools that have undergone a racial transition from majority white to majority black over the last decade; and (3) type III schools—schools that have been majority black over the last decade. Plaintiffs then analyzed the data to determine if the differences were statistically significant. Under plaintiffs analysis, differences were considered statistically significant when there was less than a 5% probability that the pattern of data is happening by chance alone. (Transcript Vol. VIII at 12)

The plaintiffs presented the following data on teacher experience:

	Average Number of Years Teaching		
	Fall 1984	Fall 1985	Fall 1986
ELEMENTARY SCHOOLS			
Type I	9.55	10.22	9.79
Type II	6.45	6.90	6.36
Type III	5.24	5.46	5.19
HIGH SCHOOLS			
Type I	7.99	8.74	8.90
Type II	6.83	7.14	7.08
Type III	5.34	5.68	4.91

(Plaintiffs exhibits 97(a), (b) and c; 98(a), (b) and (c))

Using plaintiffs analysis, at the elementary level during both 1984 and 1985, all three types were statistically significant. In 1986, Type I differed significantly from Types II and III. At the high school level, Type I differed significantly from Type III for all three years.

With regard to graduate degrees held by the DCSS faculty during the 1986-87 school year, plaintiffs presented the following evidence:

	Percentage of Teachers Having Graduate Degrees	
	ELEMENTARY SCHOOLS	HIGH SCHOOLS
Type I	75.76	76.05
Type II	61.84	64.34
Type III	52.63	64.32

(Plaintiffs' exhibit 86 at 13-14, exhibits 99 and 100) At the elementary level, all three types are statistically significant from each other. At the high school level, Type I differed significantly from Types II and III.

The court is, of course, concerned by the differences between teacher experience and teachers with graduate degrees in the different "type" schools. The defendants concede that there are differences and both attempt to explain the differences away and argue that the differences should not matter because they do not affect a student's potential for academic success. While the court

does not find convincing the plaintiffs evidence that such skews affect students' learning potential, the court finds that any school system should consciously make efforts to assure that resources are distributed equally to all students. This includes insuring that all students are taught by well-educated, experienced teachers. A previous dual system has an additional burden of assuring that any school predominately attended by minority students is given the same, if not superior, resources. All evidence submitted by the defendants shows that, due to socio-economic factors, a black student's potential for academic success is less than a white student's potential; thus, making their need for "resources" greater.

Whether a racial skew of resources affects a child's learning potential is irrelevant to this court. Even before the Supreme Court's decision in *Brown*, the law required that minority students be given the same resources as white students. Accordingly, when the defendants revise their assignments of teachers and principals to meet the requirements of *Singleton*, they shall make the assignments in a manner that will equalize the experience and education of faculty and staff among the different "types" of schools.

The plaintiffs presented evidence and the defendants concede that the degree of teacher turnover is higher in the Type II and III schools than in the Type I schools. (Plaintiffs exhibits 101 and 102) Defendants presented evidence that steps are being taken to control the teacher turnover in the majority black schools. The DCSS has instigated a program in the majority black Columbia, Gordon, and Walker High Schools that requires teachers to teach only four classes per day as opposed to five. This program led to a tremendous decrease in the turnover of teachers at these schools. (Transcript Vol. I at 177-78, Vol. V at 183).

The court applauds the efforts of the DCSS to maintain its experienced teachers. The DCSS, like any other

school system, cannot control how many of its employees chose to leave the system to teach elsewhere or pursue other opportunities. For that reason, the court will not impose an obligation on the DCSS to slow teacher turnover in its majority black schools. The DCSS is obviously interested in this objective and will take all necessary steps without this court's intervention.

Plaintiffs also contend that the number of books per pupil in the DCSS is racially skewed among the "types" of schools. While there is a difference between the number of books in the "types" of schools, the court found the defendants explanation for this difference satisfactory. Several factors effect the number of library books in a particular school's library: (1) how often weeding (the removal of out-dated or duplicative material) occurs; (2) the shift of enrollment of a school (in the northern "type I" schools, population has decreased, while the southern "type II and type III" schools populations have increased); (3) how media resources are allocated by the media specialists of the different schools; and (4) the number of "lost" books at a particular school.

Defendants presented the testimony of Frank C. Winstead, the Director of Educational Media for the DCSS, and Helen Ruffin, the Library Media Specialist at Sky Haven Elementary school, a majority black elementary school. (Transcript Vol. X at 175-200) The testimony of these witnesses convinced the court that any skew of library books is a result of the four factors listed above and was not the result of purposeful conduct by the defendants. The court also does not find that the number of books in a library is indicative of the quality of the media materials available at the schools. There was insufficient evidence presented to this court to convince it that black students are in any way handicapped academically by the number of books per pupil in their school libraries.

Plaintiffs presented evidence that black students are not as academically successful on the California Achieve-

ment Test, have higher elementary failure rates, and are more often retained (not promoted) than white students. The defendants evidence showed the same results. Plaintiffs argue that their evidence proves that children assigned to majority black schools are denied equal educational opportunity. The court cannot accept this contention.

The parties do not dispute that black students, both in the DCSS and elsewhere, are not as successful generally in academics as white students. As the court discussed above, the court finds that socio-economic differences between the two groups influences academic success. The DCSS would not be acting in the best interest of black students by promoting them to a higher grade, until they have achieved a level of academic success that justifies the promotion.

Plaintiffs' arguments in this regard seem to hedge on the language of the June, 1969 order that required the DCSS to implement remedial educational programs for students attending or who have previously attended segregated schools to overcome past inadequacies in their education. (Order of June, 1969 at 11). It is undisputed that at the time of the unitary hearing, there were no children attending the DCSS who formerly attended a de jure black school before the implementation of the 1969 order. That order referred only to de jure segregated schools.

While there will always be something more that the DCSS can do to improve the chances for black students to achieve academic success, the court cannot find, as plaintiffs urge, that the DCSS has been negligent in its duties to implement programs to assist black students. The DCSS is a very innovative school system. It has implemented a number of programs to enrich the lives and enhance the academic potential of all students, both blacks and whites. Many remedial programs are targeted in the majority black schools. Programs have been implemented to involve the parents and offset negative

socio-economic factors.[17] If the DCSS has failed in any way in this regard, it is not because the school system has been negligent in its duties. Indeed, Dr. Edward Bouie, Sr., Associate Superintendent for Program Development and Staff Assessment, testified that the DCSS has implemented a total management system designed to focus on the achievement of children. He further testified that Dr. Freeman, the Superintendent of the DCSS, has instructed him that any program that can be found to improve student achievement, should be researched, piloted, and placed in the DCSS. (Transcript Vol. III at 41) The DCSS spends in excess of $12,500,000 of exclusively local funds on supplementary instructional personnel, such as contingency teachers, instructional lead teachers, lead teachers for student services, and remedial reading specialists. (Transcript Vol. III at 183-88) The court does not find that further court supervision is necessary to insure that the DCSS implements remedial programs to facilitate the potential for academic success by black students.

The last resource differential that the plaintiffs brought to this court's attention is that per pupil expenditures are higher in the Type I schools than in the Type II and III schools. This differential is of great concern to the court. In the 1984-85 school year, the expenditure per student in type I schools was $2,833, type II schools was $2,540, and type III schools was $2,492. Certain factors such as lower enrollment in the type I schools explains some of the difference in expenditures. While there was no compelling evidence presented that the amount of money expended per student results in a greater potential for academic achievement, this court is puzzled by the DCSS' practice of allocating what appears to be a larger percentage of its financial resources in the type I schools, when all evidence indicates that the needs of the type II and III schools are more significant. The DCSS shall endeavor to equalize spending among the three types of schools.

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[17] See footnote 15, supra.

The defendants argue that this court cannot properly order relief in the quality of education area because the prior constitutional violation did not extend into this area. The court finds this contention to be without merit. A district court properly has broad discretion in desegregation cases to order relief that will facilitate the speedy eradication of all vestiges of the former dual system. Improving the quality of education for all children, especially black children, is the underlying purpose of all desegregation cases.

SUMMARY

The DCSS is an innovative school system that has travelled the often long road to unitary status almost to its end. While much of the court's order was spent on problems that still exist in the DCSS, the court has continuously been impressed by the successes of the DCSS and its dedication to providing a quality education for all students within that system. As Judge Edenfield recognized in his order of October 6, 1977 in this case: "Quality educational systems are a fragile blessing, as many metropolitan areas have learned to their sorrow. When one is found it should not be harassed out of existence to satisfy fractional technicalities."

The DCSS has eliminated most of the vestiges of the former dual system. The court finds that the DCSS is a unitary system with regard to the areas of student assignments, transportation, physical facilities, and extracurricular activities. Before the court will declare that the DCSS has obtained unitary status, however, certain changes must be made. The DCSS shall have the option of either implementing a plan by September, 1988, or implementing such a plan by September, 1989, to achieve *Singleton* compliance with regard to both teacher and principal assignments. The DCSS shall file a report with this court detailing the plan. This plan should also equalize the number of teachers with advanced degrees and more experienced teachers among the types of schools.

The DCSS shall attempt to equalize per pupil expenditures among the types of schools during the 1988-89 school year. Within two months of the end of the 1988-89 school year, the DCSS shall file a report with this court showing per pupil expenditures among the various schools. For purposes of this report, the schools shall be grouped in the same manner as plaintiffs grouped them for purposes of the hearing held on this motion.

In 1976, this court established a Bi-racial Committee to give guidance to the DeKalb County School Board regarding certain decisions. The court finds based upon the evidence presented during the hearing that there is no longer a need for the committee. Not only is there now a black school board member, but blacks are well represented throughout the administrative levels of the DCSS, including the position of assistant superintendant. Accordingly, the DeKalb County Bi-racial Committee is hereby abolished. The DeKalb County School Board, of course, may establish its own bi-racial committee.

The court denies the motion of defendants to dismiss. While the court is satisfied that the DCSS is a unitary system with regard to the areas of student assignments, transportation, physical facilities and extra-curricular activities and will order no further relief in those areas, the defendants must comply with the dictates above before this court will declare that the DCSS has obtained unitary status. The court grants in part the motion of plaintiff for supplemental relief and denies the motion to require the defendants to file a junior high plan.

IT IS SO ORDERED this 30th day of June, 1988.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 11946

WILLIE EUGENE PITTS, *et al.*

vs.

JIM CHERRY, Superintendent of Schools, DeKalb County, Georgia; *et al.*

ORDER AND JUDGMENT

[Filed June 12, 1969]

This case began as an in-depth undertaking to desegregate the public schools of DeKalb County, including students, faculties, and school activities. Since some 75,000 students are involved, occupying 77 elementary schools, 20 high schools, and nine special schools, a number of problems were presented. Happily for our task however, at the very time the action was filed and since that time the DeKalb County Board of Education was and has been working with the Department of Health, Education and Welfare to come up with what was to be a final and "terminal" plan of desegregation, which plan was to go into effect not later than the 1969-70 school year and which was to cover all aspects of the County's desegregation problems. After the suit was filed a preliminary

hearing was held on October 11, 1968, at which time the plan proposed by the School Board had been given general approval by HEW, subject to one exception to which reference will presently be made. A second hearing was held on April 9, 1969, by which time the proposed plan was substantially complete, and at that time counsel for all parties indicated their general approval of the plan except as it related to the Robert Shaw Elementary School.

Since the overall plan appears to be satisfactory to the School Board, to HEW, and to the plaintiffs, it would serve no useful purpose to catalog its details here. The court therefore addresses itself to the one problem remaining open, viz.: the disposition to be made of the Shaw school, the plan proposed for that school being unsatisfactory both to HEW and to plaintiffs.

The school population of DeKalb County is roughly 94.4% white and 5.6% Negro, and at the heart of the entire problem were six schools, the populations of which were all predominantly Negro.[1] In brief, what the Board proposed with respect to all of these schools except Shaw, was to close them entirely and distribute their students among other schools in their respective neighborhoods. The plants of the closed schools would then be converted into special schools for advanced and retarded children, etc., on an integrated basis. With respect to the Shaw school, however, the Board proposed to retain it in operation, despite its predominantly Negro population. In support of this proposal the Board contended that housing and apartment developments in the neighborhood showed some promise of bringing more whites into the school area by September, 1969. They also promised to end a previously established policy permitting whites to

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[1] These schools were Bruce Street, Linwood, Victoria Simmons, County Line, and Robert Shaw, all of which were elementary schools, and Hamilton High School.

transfer out of the Shaw attendance area, so that between these two proposals it was hoped that the Shaw situation would remedy itself at or during the 1969-70 school year. It was also pointed out in support of this proposal that the school had a fine physical plant, an excellent faculty, a good PTA and very good community relations. Both HEW and the plaintiffs questioned this proposal as respects Shaw.

At subsequent hearings, held on April 30, 1969, and on May 28, 1969, evidence was taken as to the best disposition to be made of the Shaw school. Again all parties were in substantial agreement. Witnesses for the School Board admitted, for example, that their hopes for a racially balanced school population in the Shaw area were greatly optimistic, if not illusory. No single witness was of the opinion that the proposal advanced by the Board would or could put the Shaw school in compliance by the beginning of the 1969-70 school year. All parties, including counsel for plaintiffs and witnesses from the School Board and from HEW, did agree, however, that the Shaw school could be put in compliance in either one of two ways: (1) by abolishing the school and redistributing its population, as was being done with respect to the other five predominantly Negro schools, or (2) by either redrawing attendance lines or "pairing" Shaw with some other school so as to encompass larger white residential areas within its attendance zone. No one disputed or now disputes that either one of these proposals would bring Shaw into compliance.

The School Board still asks that it be allowed to retain Shaw in the hope that the population would balance itself, either at the beginning of or during the 1969-70 school year. The evidence, however, simply does not support this conclusion, and the court finds that the proposal by the Board to let the school continue on this basis is unsatisfactory. The only question presented, therefore, is which of the two workable alternatives shall be adopted.

Since either, under the evidence, will get the job done, the court concludes that as between closing the school on the one hand or redrawing its attendance lines or pairing it with another school on the other, the court should defer to the preference of the school authorities. HEW officials seem to feel that a redrawing of school lines would be the better solution. They agree, however, that under these circumstances the views of the School Board should be respected, and the Board prefers to close the school. In making this choice the Board contends, and the court agrees, that a redrawing of school lines in this area or a pairing of Shaw school with some other school, while bringing about desegregation on a temporary basis, would almost certainly lead to resegregation within one to two years by reason of the white population moving out of the area. The court concludes, therefore, that the only solution offering any promise of permanency is to close the Shaw school as the Board suggests and distribute its pupils among neighboring schools, and an order to this effect will be entered.

There may be other details in the overall DeKalb County plan which will require further attention of the court, but as of the moment, this concludes the only issue of any consequence now to be decided.

JUDGMENT

It is therefore CONSIDERED, ORDERED, ADJUDGED, and DECREED that the defendants, their agents, officers, employees, successors, and all those in active concert and participation with them, be and they are hereby permanently enjoined from discriminating on the basis of race or color in the operation of the DeKalb County school system. As set out more particularly hereinafter, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system.

I. SPEED OF DESEGREGATION

Commencing with the 1969-70 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II. PUPIL ASSIGNMENT

A. *Zones.* All students in the system shall attend classes at schools located within the zone where they reside. Said zones shall be drawn so as to disestablish the dual school system. For the 1969-70 school year, the zones in effect shall be those previously approved by the United States Department of Health, Education and Welfare. At all grades in schools within each zone, students will be assigned to home rooms and classes without regard to race.

B. *School Closings.* The following schools will be closed during the 1969-70 school year and thereafter until further order of the court: Robert Shaw elementary; Victoria Simmons elementary; County Line elementary; Lynwood Park elementary; Bruce Street elementary; and Hamilton High School. Students attending the schools to be closed will be placed in new attendance zones to be drawn without regard to race. The zones for all of the closed schools except Robert Shaw will be those previously filed with the court. The zone for Robert Shaw will be established no later than July 15, 1969, and submitted to the court. Defendants shall arrange for the conspicuous publication of a notice describing the new zones to be established in the newspaper most generally circulated in the community. Parents of children presently attending the schools to be closed shall be notified by letter of the new zone in which they reside. Such letters shall issue no later than July 20, 1969. Publicaton as a legal notice will not be sufficient. Copies of the notice must also be given to all radio and television sta-

tions located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Schools.

C. *Transfers.* No students will be permitted to transfer from schools within their attendance zones to other zones. Exceptions may be granted for non-racial reasons in the case of overcrowding, in the case of students who are physically handicapped and desire to attend a school designed for their special needs, and for students requiring a course of study not offered at the school serving their zone. However, if more than 30 students request transfer outside their zones to pursue a course of study, such transfers shall not be permitted; rather, a teacher or teachers shall be supplied within the zone to teach said courses.

D. *Overcrowding.* In case of overcrowding at any school, preference shall be given on the basis of proximity of the school to the homes of the students without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

III. CONSTRUCTION

To the extent consistent with the proper operation of the system, the County Board will, in locating and designing new schools, in expanding existing facilities, and in consolidating schools, do so with the objective of eradicating segregation and perpetuating desegregation.

IV. FACULTY AND STAFF ASSIGNMENTS

A. *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the old dual

system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on the desegregated faculty. The County Board will continue positive and affirmative steps to accomplish the desegregation of its school faculties and to achieve substantial desegregation of faculties in its schools for the 1969-70 school year notwithstanding teacher contracts for 1969-70 may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The County Board shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in school.

B. *Dismissals.* Teacher and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the court, serving copies upon opposing counsel, within five days after such dismissal, demotion, etc., as proposed.

C. *Past Assignments.* The County Board shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

V. REPORTS

A. On June 10 of each year, beginning in 1970, defendants will submit a report to the court and serve copies on opposing counsel, showing the number of teachers by schools, grade (where appropriate), and race they anticipate will be employed for the fall quarter or semester. Within one week after the day classes begin for the fall quarter or semester in 1969 and each succeeding year defendants will submit a report to the court and serve a copy on opposing counsel, showing the number of teachers actually working at each school by grade (where appropriate) and race.

B. On the same dates set forth in A. above, reports will be submitted to the court, and a copy served on opposing counsel, showing the number of students by school, grade, home room, and race expected (in June report) and actually enrolled (in fall report) at the schools in DeKalb County.

C. Within one week after the opening of each school year, defendants shall submit a report to the court and serve copies on opposing counsel, showing the number of faculty vacancies, by school, that have occurred or been filled by defendants since the order of this court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

VI. SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics or other extra-curricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to long-standing, nonracially based rules of city, county or state athletic associations dealing with the eligibility of transferred students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the County Board shall be conducted without regard to race or color. Athletic meets and competitions and other activities in which several schools participate shall be arranged so that formerly white and formerly Negro schools participate together.

VII. *School Equalization*

A. *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would

otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned.

B. *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education.

VIII. *Jurisdiction*

This court retains jurisdiction for the purpose of implementing this order.

This 12th day of June, 1969.

/s/ Newell Edenfield
NEWELL EDENFIELD
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-8687 and 88-8775

WILLIE EUGENE PITTS, *et al.*,
Plaintiffs-Appellants,
Cross-Appellees,

ANN T. JOHNSON,
Intervening Plaintiff,

versus

ROBERT FREEMAN, *et al.*,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion October 11, 1989, 11 Cir., 198 ,
—— F.2d ——).

(November 13, 1989)

Before FAY and HATCHETT, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.