No. 89-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT R. FREEMAN, *et al.*,

Petitioners,

—v.—

WILLIE EUGENE PITTS, *et al.*,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents submit this brief in opposition to the petition for *certiorari*, which seeks review of the judgment entered in this action by the United States Court of Appeals for the Eleventh Circuit on October 11, 1989.

STATEMENT OF THE CASE

This is a school desegregation case involving DeKalb County, Georgia, a suburban county that shares a boundary with the eastern edge of Atlanta. The DeKalb County School System (DCSS) has about 80,000 students in 96 schools. Pet. App. 3a, 31a.[1] 47% of the DCSS students are black. Pet. App. 3a, 31a.

The DCSS was historically segregated by law. Pet. App. 25a. This is a garden variety desegregation case in which the original plan did not work to produce the effective dismantling of the dual system envisioned in *Green v. County School Board*, 391 U.S. 430, 442 (1968) (neither black schools nor white schools but "just schools"). There is nothing remarkable about such a conclusion. *Monroe v. Board of Commissioners*, 391 U.S. 450, 454 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 7, 32 (1971). Indeed, the district court explicitly found that the DeKalb County schools today are both separate and unequal. Black students attend black schools and are taught by black teachers; white students attend white schools and are taught by

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[1] Citations to "Pet. App. ___" refer to the appendices to the petition for *certiorari*. Those appendices contain the district court's order of June 12, 1969 (Pet. App. 73a-82a), its memorandum opinion and order of June 30, 1988 (Pet. App. 25a-72a), and the Eleventh Circuit's decision of October 11, 1989 (Pet. App. 1a-24a). In addition, respondents have attached as an appendix to this brief decisions of the district court dated November 3, 1976 and May 23, 1978. References to those decisions are designated "Resp. App. ___." By agreement of the parties, the evidence in this case has been limited to the period up to and including September, 1986. Pet. App. 3a. Unless otherwise indicated, all of the facts in this brief refer to that time period.

white teachers. Black schools consistently have less experienced and credentialled teachers and significantly less money per pupil than white schools.

a. The 1969 Order

This case was filed in 1968. Pet. App. 26a. On June 12, 1969, the district court issued a prospective order requiring complete desegregation of the DCSS. Pet. App. 73a-82a. The breadth of the order reflected the wide-ranging impact of prior school policies on student and faculty assignment, the allocation of resources, and the quality of education in DeKalb County. Specifically, the order mandated the immediate redrawing of certain student attendance zones and the closing of certain segregated schools. Pet. App. 77a. In addition, the order required the implementation of certain student transfer policies, limited the school district's response to overcrowded schools, and provided that future school construction and renovation be directed toward "eradicating segregation and perpetuating desegregation." Pet. App. 78a. The order also required desegregation of faculty and staff, Pet. App. 78a-80a, as well as services, facilities, activities and programs. Pet. App. 81a-82a. It ordered remedial education programs for the victims of segregation. Pet. App. 82a. And, it required the school district to submit periodic reports of student and teacher assignments to the district court. Pet. App. 80a. Finally, the court retained jurisdiction over the decree in order to measure compliance toward complete segregation. Pet. App. 82a.

b. 1969-1981

After 1969, the parties and the court repeatedly took actions that confirmed that everyone viewed the 1969 order as only a first step toward desegregation. In August 1972, the school board sought and obtained permission from the district court to alter certain student attendance patterns. Order, August 22, 1972. In 1975,

plaintiffs returned to court alleging that DCSS never completely desegregated the schools by student assignment, or faculty and staff assignment. Pet. App. 26a n.1, 8a. Resp. App. 1a. DCSS argued then, as they do now, that the school district had become unitary with respect to student assignment in 1969-70. Resp. App. 13a. In 1976, the district court disagreed with that assessment after examining the school district's student assignment patterns under the majority to minority (M-to-M) transfer policies then in effect.[2] Indeed, the district court found that the M-to-M policy impermissibly burdened even voluntary desegregation. Resp. App. 14a. As the district court explained in its 1976 decision:

> [T]his court has never made any finding that defendants are operating a unitary system, and finds instead that the regulations imposed under the M-to-M program perpetuate the vestiges of a dual system . . . .
>
> [T]his court [further] finds that . . . revisions are constitutionally required so that the program will provide equal educational opportunities while helping to eliminate the vestiges of a dual school system in DeKalb County (citation omitted).

Resp. App. 13a, 14a.[3]

In examining the changes in student attendance boundaries between 1969 and 1975, the district court

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[2] "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." Pet. App. 39a n.7.

[3] This holding explicitly rejected DCSS' argument that it had become unitary in 1969 and that *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424 (1976), required the court to stay its hand -- the identical argument petitioners now resurrect and seek to relitigate. Resp. App. 13a.

deemed it "apparent that the redrawing of elementary school lines in southwest DeKalb had some effect upon the perpetuation of a dual system in the county." Resp. App. 19a. The court excused some of the boundary changes on the grounds that they had been dictated by a school siting decision made prior to 1969. Resp. App. 20a. For others, it found that "defendants have not adequately met the heavy burden of explaining the alternatives chosen which tended to hinder, rather than further, desegregation." Resp. App. 21a-22a. Nevertheless, the district court refused to alter the boundary changes on the grounds that it was impossible to quantify the precise effect of the DCSS actions in light of demographic changes and that any injunction so long after the fact would be "meaningless." Resp. App. 23a. The district court did, however, order that all future attendance boundary changes had to be approved by a biracial committee. Resp. App. 25a-26a. Furthermore, the court found that "defendants have not taken adequate steps to utilize reassignment of teachers to reduce the racial identifiability of faculty" and directed that further action be taken to desegregate teacher assignment. Resp. App. 15a, 25a.

The 1976 order was never appealed. To the contrary, it formed the predicate for numerous additional actions by the district court. For example, on three occasions in 1977, the court reviewed aspects of the M-to-M transfer program under the terms of its 1976 order. *See* Orders of Jan. 31, 1977; April 18, 1977; and May 6, 1977. In October 1977, the court assessed the effect of proposed student attendance boundary changes on student assignment patterns, noting that "all such zone changes must be approved by the court." Pet. App. 8a, 26a; Order October 6, 1977 at 1. And in May 1978, the court again reviewed student assignment patterns in light of proposed attendance boundary changes, a school closing, and the continuing impact of the M-to-M transfer program. Pet. App. 8a, 26a; Resp. App. 27a-36a.

One of the specific matters reviewed in May 1978 was the school board's plan to build additional classrooms at a black school, Flat Shoals. The court permitted the classrooms, but strictly limited their use to special education students. In addition, the court said:

> In the event the Flat Shoals enrollment continues to climb, and all indications are that it will, the court recommends that defendants seriously consider alternatives to further construction, such as alterations in attendance zones, and, possibly, some form of busing, in order to remedy the overcrowding which is bound to occur and to promote desegregation in the county schools. In considering additions to other predominantly black schools in the county, defendants are advised to keep this admonition in mind.

Resp. App. 32a.

By engaging in this review process throughout 1977 and 1978, the district court was implicitly holding on each of these occasions that DCSS had not yet become unitary even with respect to student assignment. This was consistent with the court's actions over the entire period in which it repeatedly held both explicitly and implicitly that the schools had never become unitary even with respect to student assignment.

c. 1981-1986

In 1981, the case was assigned to a new district court judge. Pet. App. 44a. In 1983, plaintiffs challenged certain aspects of the M-to-M transfer program and the expansion of a high school. Pet. App. 44a. Agreeing with plaintiffs in part, the district judge found that defendants had impermissibly restricted the number of black M-to-M students at Lakeside High School and

that he was "compelled to grant relief . . ." Order, September 8, 1983, at 12. However, the district court upheld the school district's plan to expand Redan High School, finding that "the defendants' actions were not motivated by discriminatory intent." *Pitts v. Freeman*, 755 F.2d 1423, 1425 (11th Cir. 1985); Pet. App. 8a. The court of appeals reversed this latter holding, observing that DCSS had never become a unitary school district and, therefore, remained under an affirmative duty to desegregate its schools. *Id.* at 1426; Pet. App. 9a. The court of appeals further explained that the school district's compliance with its constitutional duty could only be measured by the effect of its actions and not its intent. *Id.* at 1427; Pet. App. 9a. No appeal was taken.

d. The 1988 District Court Decision

In 1986, DCSS sought dismissal of this case on the grounds that the school district was unitary. Pet. App. 27a. The district court denied the motion based on a series of factual findings that the schools remained both separate and unequal. Specifically, the district court found, with respect to student assignment, that at the time of trial:

(1) 47% of the students attending DCSS were 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 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.

Pet. App. 31a (footnote omitted).

Contrary to its own previous holdings and the holdings of the court of appeals, the district court also found that the school district had become "desegregated" with respect to student assignment in 1969-1970. Pet. App. 33a. Nonetheless, the district court refused to conclude that the school district's "desegregation" was a "full eradication of the vestiges of the dual system that would entitle them [DCSS] to a declaration of unitary status" with respect to student assignment. Pet. App. 33a, 37a. Moreover, the district court found that DCSS had become "resegregated" between 1969 and 1986, Pet. App. 33a-34a, and that DCSS "might have been able to do something more to maintain desegregation." Pet. App. 44a. Despite this finding, the court excused the school district's past failures on the grounds that any remedy other than busing would have been futile in the face of demographic changes in the county. Pet. App. 46a-47a.[4] Similarly, the court found that DCSS still had not achieved "maximum practical desegregation" with respect to student assignment at the time of trial. Pet. App. 47a.

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[4] Contrary again to previous holdings in the case, which had held that at least some prior boundary changes had hindered desegregation, the district court concluded in 1988 that boundary changes made by DCSS between 1969 and 1986 had made no difference in the student attendance racial mix. Pet. App. 39a. It further found that DCSS had two programs, a M-to-M transfer program and a newly instituted magnet school program, that furthered desegregation. Pet. App. 46a.

However, the district court excused that failure as well on the grounds that busing was undesirable, Pet. App. 46a, and that DCSS' future plans for expansion of magnet schools made court supervision unnecessary to bring about "maximum practical desegregation." Pet. App. 47a.

Beyond the issue of student assignment, the district court held that DCSS had never desegregated faculty and staff despite specific orders to do so in 1969 and 1976. Pet. App. 49a. As the district court found, black teachers and principals continued to be disproportionately assigned to schools that were disproportionately black by student assignment. Pet. App. 52a-53a, 55a. In particular, the court noted that four of the five black high school principals were assigned to schools more than 95% black and only one of the five high schools over 90% black had a white principal. Pet. App. 56a. Also, "[t]hirteen of the 18 black elementary school principals were assigned to schools at which the black population exceeded 90% black" and "only four of the elementary schools with black student populations over 90% had a white principal." Pet. App. 56a. The record was similar for black administrators. For example, the court found that black elementary school administrators represented 10% of all elementary school administrators in majority white schools, but 60% of all elementary school administrators in schools over 81% black. Pet. App. 56a. "At the high school level," the court concluded, "the racial skew of administrators was equally as startling." Pet. App. 56a.

Finally, the district court found that the allocation of resources and the assignment of staff in DeKalb County schools also reflected "racial skew[ing]." Pet. App. 65a-71a. Schools that were and had been white for a decade (white schools) received $2,833 per pupil; schools that were and had been black for a decade (black schools)

received $2,492 per pupil. Pet. App. 70a.[5] White schools had teachers who were, on average, almost twice as experienced as teachers in black schools. Pet. App. 66a. Three fourths of the teachers in white schools had graduate degrees while only one half to two thirds of the teachers in black schools did. Pet. App. 66a. And teacher turnover was higher in black schools than in white schools. Pet. App. 67a.

The district court concluded its 1988 opinion by declaring DCSS unitary with respect to student assignment although maximum feasible desegregation had not been achieved.[6] At the same time, the district court ordered further relief with respect to the equal allocation of resources and the nonracial assignment of faculty and staff. Pet. App. 71a-72a.

e. The 1989 Court Of Appeals Decision

The court of appeals affirmed virtually all of the factual findings of the district court. Pet. App. 24a (DCSS not yet a unitary school district); Pet. App. 4a-5a and 17a-18a (faculty and staff still segregated); 5a-7a and 22a-23a (educational inequality based on race exists).

With respect to student assignment, the court of appeals affirmed the district court's conclusion that DCSS had not fulfilled its duty to desegregate in 1969. Pet. App. 20a. It implicitly affirmed the district court's conclusion that, at the time of trial, DCSS had still not achieved "maximum practical desegregation" even with respect to student assignment. And it reversed the district court's conclusion that no further action in student

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[5] The additional $341 for each white student amounts to a difference of 13.7%. In an elementary school with 800 children, this differential totals almost $275,000 -- enough to fund ten extra teachers.

[6] The court also declared it unitary on transportation, physical facilities, and extracurricular activities, about which there was no dispute.

assignment was necessary. Pet. App. 19a, 23a. The court emphasized that DCSS had done little to desegregate after 1969, Pet. App. 23a, and that its limited actions -- including the M-to-M transfer policy and magnet schools -- affected very few students.[7] The court also held that until DCSS was a unitary school system, it had an "affirmative duty to take whatever steps may be necessary to convert to a unitary system." Pet. App. 12a, *quoting Green v. County School Board*, 391 U.S. 430, 437-38 (1968). The district court's refusal to consider busing as a possible remedy for the continued segregation in student assignment was therefore reversed. Pet. App. 23a. More broadly, the district court was ordered to consider all remedies that might be useful in effectively desegregating the DCSS schools. *Id.*

Finally, the court of appeals addressed the two arguments that now form the basis for this petition. First, the court rejected petitioners' argument that each of the factors identified by this Court in *Green* as measures of a desegregated school system can be viewed separately and in isolation. Instead, the court commented that a school district must comply with all of the *Green* factors to achieve unitary status. Pet. App. 15a. Second, the court held that until a school district is declared unitary, it must take all steps necessary to become unitary. The court commented that this included responding to demographic changes in the district. Pet. App. 20a-21a.

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[7] The M-to-M transfer program affects about 5% of the district's students and magnet schools affect fewer than 1%. Pet. App. 4a, 24a n.16. Furthermore, since almost all the M-to-M students have been black, no black schools have been desegregated by this program in DeKalb County. Pet. App. 4a.

REASONS FOR DENYING THE WRIT

I. THE RECORD IN THIS CASE DOES NOT SUPPORT THE CLAIM THAT DCSS ACHIEVED UNITARY STATUS WITH RESPECT TO STUDENT ASSIGNMENT IN 1969 AND, WITHOUT THIS FACTUAL PREDICATE, PETITIONERS' ASSERTION THAT THE *GREEN* FACTORS MUST BE CONSIDERED IN ISOLATION WHEN REVIEWING UNITARY STATUS IS NOT PROPERLY BEFORE THE COURT

This Court has repeatedly held that the duty to desegregate a previously segregated school system is a duty to desegregate the entire system. *See e.g.*, *Brown v. Board of Education*, 349 U.S. 294, 301 (1955)(defendants must "effectuate a transition to a racially nondiscriminatory *school system*"); *Green v. County School Board*, 391 U.S. 430, 436 (1968)("The transition to a unitary, nonracial *system* of public education was and is the ultimate end to be brought about"); *Raney v. Board of Education*, 391 U.S. 443, 449 (1968)(goal is a "desegregated, nonracially operated school *system*"); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22 (1971) ("The remedy commanded was to dismantle dual school *systems*"); *Keyes v. School District*, 413 U.S. 189, 213 (1973)(". . . School Board has the affirmative duty of desegregate the entire *system* . . .")(emphases added).

Notwithstanding this Court's clear statements that a formerly dual school system must achieve complete unitary status to discharge its constitutional duty, petitioners argue that it is possible to treat the six *Green* factors as entirely separate and isolated indicia of unitariness.[8] Although petitioners do not dispute that they are

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[8] The six *Green* factors are: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. 391 U.S. at 435.

operating a separate and unequal school system today, they nonetheless contend that once a court concludes that the school system has desegregated with respect to any one of the *Green* factors at any one instant in time, it should declare the schools unitary with respect to that single factor and relinquish all future jurisdiction over that issue.[9] Because the court of appeals disagreed, Pet. App. 15a-16a, petitioners assert that the court below erred. Pet. at i, question 1.

That question need not and should not be reached in this case. The factual predicate for petitioners' legal contention rests on their assertion that DCSS was unitary with respect to student assignment in 1969.[10] Because the repeated factual findings in this case have been that DCSS was not unitary with respect to student assignment either in 1969 or at any other time, the record simply does not present the question of whether the *Green* factors should be utilized together in determining a unitary system or represent, as petitioners contend, separate and isolated violations that can be cured independently.[11]

In 1969, the district court established student attendance boundaries for one year only and ordered prospec-

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[9] Petitioners base their argument on some language in *Pasadena City Bd. of Ed v. Spangler*, 427 U.S. 424 (1976), and in *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

[10] In question 1, unlike question 2, petitioners are somewhat unclear about the date on which they assert DCSS became unitary with respect to student assignment. However, everyone agrees that student assignment patterns have become steadily and substantially more segregated since 1969. Pet. App. 18a, 38a; Pet. at 6-7 n.8. It is axiomatic that a school system cannot become more unitary as it becomes more segregated.

[11] DCSS does not seek review of the findings of the lower courts that DCSS was never unitary on faculty or staff assignment, or that it failed to provide equal educational resources to black students.

tive relief with respect to a variety of actions affecting desegregation with respect to student assignment in future years. Pet. App. 77a-78a. It retained jurisdiction to review the actions that would need to occur in future years. Pet. App. 82a.[12]

In 1972, the school board sought court approval for boundary changes. If the school system had been unitary with respect to student assignment in 1969, as petitioners urge, the district court would have had no right to approve or disapprove those changes. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 31-32. Yet it was the school board itself that sought the court's approval, implicitly conceding that it had not yet achieved unitary status with respect to student assignment.

Then, in 1976, the district court explicitly held that DCSS was not unitary with respect to student assignment in 1969 or at any time in between. Resp. App. 13a. The district court concluded that (1) there remained vestiges of segregation in student assignment, Resp. App. 14a; (2) DCSS boundary changes had "some effect on the perpetuation of a dual system," Resp. App. 19a; (3) some boundary decisions had violated the 1969 order and had "tended to hinder rather than further desegregation," Resp. App. 22a; and (4) "the regulations imposed

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[12] This approach was entirely consistent with this Court's precedents. In *Raney v. Bd. of Ed.*, 391 U.S. at 449, the Court expressly held that "the district courts 'should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved,'" *quoting Kelley v. Altheimer*, 378 F.2d 483, 489 (8th Cir. 1967). In *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 21, the Court held that "it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system."

under the M-to-M program perpetuate the vestiges of the dual system." Resp. App. 13a.

Throughout 1977, both sides apparently conceded that DCSS had not yet become unitary with respect to student assignment since both sides repeatedly sought the court's assistance in resolving various student assignment disputes. The court willingly played that role and discussed the possible need for further relief on several occasions. Pet. App. 8a, 26a; Order, October 6, 1977, at 1; Resp. App. 27a, 32a.

In 1985, the court of appeals explicitly held that DCSS had not become unitary with respect to student assignment in 1969 or at any subsequent time. *Pitts v. Freeman*, 755 F.2d at 1426; Pet. App. 9a. This holding was reaffirmed in 1989 when the court of appeals implicitly upheld the district court's finding that DCSS had not achieved unitary status with respect to student assignment in 1969. Pet. App. 33a.

Thus, every single time the district court and the court of appeals have addressed the question of DCSS' status with respect to student assignment in 1969, they have found that it was not unitary. The district court so found implicitly in 1969, 1972, and several times in 1977, and so found explicitly in 1976 and 1988. The court of appeals so found explicitly in 1985 and implicitly in 1989.

It is true that the district court found in 1988 that "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools in DeKalb County," citing a sentence in plaintiffs' trial brief. Pet. App. 33a. However, the district court also found that this "desegregation" was not the equivalent of unitary status, even with respect to the single strand of student assignment. Pet. App. 37a. All that plaintiffs conceded

and all that the court found was that the all-black schools had been closed and black students reassigned.[13]

Had the court held otherwise, it would have been retroactively declaring that its order in 1969 with respect to other prospective aspects of student assignment, such as transfer policies and construction, had been beyond the district court's proper authority. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 31-32. It would also have been nullifying the prior, and more contemporaneous, holdings of the district court and the court of appeals in this case that the schools were not unitary with respect to student assignment in 1969. Thus, in order to be consistent with prior findings of fact and conclusions of law in this case,[14] the district court properly refused to find that defendants had achieved unitary status with respect to student assignment in 1969.

Moreover, even if the district court had found that DCSS had become unitary with respect to student assignment for one school year -- and in fact it found the opposite -- the result in this case would be the same. As the district court correctly noted, "[t]he achievement of

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[13] Indeed, plaintiffs expressly argued that the boundaries drawn in 1969 resulted in segregation of at least two schools. Pet. App. 35a-36a. That argument would have been illogical if the plaintiffs had been conceding unitary status as of 1969. The court conceded that the boundaries left two schools disproportionately black by student assignment but rejected plaintiffs' argument on the puzzling basis that those schools were black as a result of demographics, ignoring that the school board had set the boundaries and ignoring DCSS' duty to eliminate all segregation. Pet. App. 36a-37a. To hinge the outcome of whether a school system has achieved unitary status on an inadvertent phrase in a trial brief is absurd. "Substance, not semantics, must govern . . . ." *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 31.

[14] These prior findings of fact were not appealed and are thus the law of the case. Petitioners may not now retry them. *Montana v. United States*, 440 U.S. 147, 153-154 (1979); *Riddick v. School Bd.*, 784 F.2d 521, 531 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

unitary status in the area of student assignment cannot be hedged on the attainment of such status for a brief moment." Pet. App. 37a. This holding is the law of this case and is consistent with the holdings of this Court and the lower courts in this and other school desegregation cases. *Pitts v. Freeman*, 755 F.2d 1423; *Raney v. Bd. of Ed.*, 391 U.S. 443; *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1; *Youngblood v. Bd. of Ed.*, 448 F.2d 770 (5th Cir. 1971); *U.S. v. Texas Education Agency*, 647 F.2d 504 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Vaughns v. Bd. of Ed.*, 758 F.2d 983 (4th Cir. 1985).

In both *Spangler* and *Morgan*, on which petitioners rely, an effective student assignment remedy had been implemented and maintained for a sufficient period of time to justify the conclusion that it had worked. Here, the district court specifically held in 1976 that the student assignment plan had not yet worked and further relief was required. Whatever the appropriateness of the rulings in *Spangler* and *Morgan* to other cases, they are simply not relevant to this case. The underlying predicate finding, that the school system had implemented and maintained a student assignment remedy that had worked, does not exist here.

Simply stated, the consistent and repeated findings of the courts in this case are that DCSS was not unitary with respect to student assignment, or faculty and staff assignment, in 1969 or at any time thereafter. Notwithstanding the dicta by the court of appeals, therefore, the first question raised by the petition for *certiorari* is simply not presented by this record.[15]

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[15] Although the dicta by the court of appeals was unnecessary to the resolution of this case, it was nevertheless correct. It is improper to treat the *Green* factors as isolated and separate violations rather than interrelated indicia of a segregated system. If a school district labels a school as a black school or a white school by any of the *Green* factors, that will have an effect on the other factors. Why else would the

(continued...)

II. THE RECORD IN THIS CASE DOES NOT PRESENT THE FACTUAL PREDICATE FOR PETITIONERS' ARGUMENT THAT DEMOGRAPHIC FACTORS ALONE CAUSED THE PRESENT SEGREGATION IN THE DEKALB COUNTY SCHOOL SYSTEM

The second question presented by the petition for *certiorari* is "[w]hether a formerly *de jure* school district, *which achieved effective desegregation in student assignments in 1969*," must "remedy the segregative effects of massive demographic changes" that occurred after that date. Pet. at i, question 2 (emphasis added). This question, like the first question presented, rests on a factual premise that is not substantiated by the record. *See* Point I, *supra*. Under these circumstances, plenary review is both unnecessary and inappropriate.

The petition for *certiorari* is not aided, moreover, by the alternative claim that DCSS, although never achieving unitary status, did all that it could to improve student assignment patterns in the face of major demographic changes within the county. This Court has held that the "measure of the post-*Brown* conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness . . . of the actions in decreasing or increasing the segregation caused by the

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[15] (...continued)
Green factors other than student assignment be appropriate in a school desegregation case rather than a separate action? *Bradley v. School Board*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965). Indeed, in this case, certain schools consistently and unquestionably have been labeled black schools by the way DCSS assigned faculty and staff. Pet. App. 4a-5a, 17a-18a, 48a-59a. Those same schools have received fewer resources, and less experienced staff. Pet. App. 22a-23a, 60a-71a. Whites have fled those schools. Pet. App. 38a. They are black schools by student assignment as well. Pet. App. 4a, 31a. Thus, the *Green* factors in this case were strongly interrelated and cannot be viewed in isolation.

dual system." *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 538 (1979). Petitioners concede, as they must, that DCSS schools remain segregated today. Pet. at 6-7. Petitioners also admit their actions did not have the effect of decreasing segregation in DeKalb County. *Id.* The notion that petitioners can be excused, nonetheless, from their constitutional duty is contrary to every holding of this Court in the area of school desegregation. *E.g.*, *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979); *Davis v. Bd. of Ed.*, 402 U.S. 33, 37 (1971); *Green v. County School Bd.*, 391 U.S. at 438.[16]

Respondents acknowledge the district court's holding that "efforts by the DCSS would not have effectively stopped or even slowed the rapid demographic changes that brought residential segregation to the County." Pet. App. 47a. However, the court's finding was explicitly based on the exclusion of busing as one possible remedy that might have affected residential segregation by

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[16] If petitioners did not achieve unitary status, their duty to continue to take steps to achieve that status, including responding to demographic changes that occur prior to that status being achieved, is the law of this case and clearly consistent with the holdings of this and the lower courts. *Pitts v. Freeman*, 755 F.2d 1423; *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 20-21, 28 (school segregation impacts residential segregation, creating a "loaded game board" that the court must eliminate); *Keyes v. School Dist.*, 413 U.S. at 201-204 (same); *Columbus Bd. of Ed. v. Penick*, 443 U.S. at 459-461, 465 n.13 (1979)(same); *Flax v. Potts*, 464 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1007 (1972); *Lee v. Macon Co. Bd. of Ed.*, 616 F.2d 805 (5th Cir. 1980); *Kelley v. Metro. Co. Bd. of Ed.*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983); *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425 (5th Cir. 1983); *Vaughns v. Bd. of Ed.*, 758 F.2d 983; *see also U.S. v. Jefferson Co. Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966), 380 F.2d 385 (5th Cir. 1967)(*en banc*), *cert. denied*, 389 U.S. 840 (1967)(in the Fifth Circuit, school segregation increased and caused residential segregation). If petitioners had achieved unitary status (and if their argument that student assignment can been viewed in isolation from other factors were accepted -- which it should not be), then they would be under no duty to respond to demographic changes. *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 31-32.

helping to eradicate the vestiges of school segregation. Pet. App. 46a. The court of appeals reversed on the totally unremarkable grounds that the refusal to consider all remedies, including busing, was error. Pet. App. 23a. *Davis v. Bd. of Ed.*, 402 U.S. at 37. This Court has likewise held that busing is a remedy that should be considered by the district court where necessary to overcome the effects of past *de jure* segregation. *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 29-31.

Without considering the effect that schools desegregated by the use of busing would have had from 1969 to present,[17] it is impossible to say that the current school segregation -- which petitioners admit -- was caused solely by residential factors. Indeed, there is strong reason to doubt that it was. In 1976, petitioners made the same argument based on *Spangler* they now make -- that DeKalb County demographic patterns were not "caused" by school board action. The district court rejected *Spangler*, saying that "[d]ifferent considerations are relevant, however, when shifts in residential patterns are accompanied by alterations in attendance lines made by school officials." Resp. App. 18a.

Between 1969 and the present, the black population of southern DeKalb county increased dramatically, Pet. App. 38a, while whites were moving to northern DeKalb county from the southern part of the county and elsewhere. Pet. App. 38a. At the same time, DCSS was identifying some schools in southern DeKalb County as black, and others in northern DeKalb County as white, by the assignment of faculty and staff and by the distribution of resources. Pet. App. 52a-57a, 65a-71a.

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[17] Pairing, clustering, gerrymandering of attendance zones and controlled choice are other commonly used desegregation tools. Since all may involve the use of a school bus, each of those methods is included in the catch-all term "busing." DCSS has never employed any of those methods.

Through the confluence of all these factors, southern DeKalb County schools became steadily more black while northern DeKalb County schools remained white. Pet. App. 38a.

On this record, it is impossible to know what would have happened to this pattern if busing had been implemented in 1969 or at any point thereafter. Perhaps if whites had not been guaranteed white schools in northern DeKalb, and if schools in the south had not been become black, whites would not have fled southern DeKalb schools and created the demographic changes on which petitioners now rely. What we do know from the record is that, in 1976, the district court held that school board actions had contributed to the perpetuation of segregation. Resp. App. 19a. And, in 1978, the district court suggested that busing might be a necessary and appropriate remedy. Resp. App. 32a. In *Swann*, 402 U.S. at 14, the Court said:

> The failure of local authorities to meet their constitutional obligations aggravated the massive problems of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented.

Those observations are equally as pertinent today in assessing the progress of desegregation in DeKalb County as they were in 1971 in Charlotte-Mecklenburg.

In sum, if petitioners' second question presented is, as it purports to be, premised upon the view that DCSS was unitary with respect to student assignment in 1969, it is not raised by this case because the premise is false. If petitioners' second question presented is premised on the view that the only action DCSS could have taken in the face of demographic changes was busing and that busing was not necessary, it is contrary to the express holding of this Court and presents no new issues for review. Finally, if it is premised on the view that even busing would not have counteracted the demographic changes in the county, it is not raised by this case because the district court expressly ruled out any consideration of the effect of busing on the schools and the neighborhoods in DeKalb county.

CONCLUSION

The questions petitioners seek to raise in this Court are simply not raised by this case. Both the district Court and the court of appeals found that DCSS is not a fully unitary school system today. Pet. App. 24a, 71a. It was not unitary on the basis of student assignment or faculty and staff assignment in 1969. Pet. App. 17a-18a, 37a, 49a.

Both courts found that today there is one set of schools that (1) are disproportionately black by student assignment, Pet. App. 4a, 31a; (2) are disproportionately black by teacher assignment, Pet. App. 5a, 51a-54a; (3) are disproportionately black by principal assignment, Pet. App. 4a-5a, 56a; (4) are disproportionately black by administrator assignment, Pet. App. 5a, 56a-57a; (5) have fewer resources per pupil, 6a, 70a; (6) have teachers with fewer years of experience, Pet. App. 6a, 66a; (7) have teachers with fewer graduate degrees, Pet. App. 6a, 66a; and (8) have higher than average teacher turnover, Pet. App. 67a.[18] Both courts found that there is another set of schools that (1) are disproportionately white by student assignment, Pet. App. 4a, 31a; (2) are disproportionately white by teacher assignment, Pet. App. 5a, 51a-54a; (3) are disproportionately white by principal assignment, Pet. App. 4a-5a, 56a; (4) are disproportionately white by administrator assignment, Pet. App. 5a, 56a-57a; (5) have more resources per pupil, 6a, 70a; (6) have teachers with more years of experience, Pet. App. 6a, 66a; (7) have teachers with more graduate degrees, Pet. App. 6a, 66a; and (8) have lower than average teacher turnover, Pet. App. 67a.[19] Both courts found that "maximum practical desegregation" has not yet been achieved on student

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[18] The court of appeals did not address this final factor.

[19] The court of appeals did not address this final factor.

assignment or faculty and staff assignment in DCSS at any time up to and including the time of trial. Pet. App. 23a, 47a.

Respondents have been waiting for over 25 years for a desegregated school system. The Court should deny the petition and permit the district court to finally secure that right for respondents.

Respectfully submitted,

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Dated: March 15, 1990

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM PITTS, et al.	)	CIVIL ACTION
	)	
vs.	)	
	)	NO. 11946
JIM CHERRY, et al.	)	

OPINION AND ORDER

In June 1969 this court entered an order in the above-entitled action enjoining the defendants from discriminating on the basis of race in the operation of the DeKalb County school system. The court retained jurisdiction over the case for the purpose of implementing its order. In September 1975 and August 1976[1] this court held hearings upon the complaints of a group of citizens that the DeKalb County school system was out of compliance with the court's 1969 order. Basically these citizens (movant-plaintiffs) alleged (1) that defendants were violating the order with regard to the majority-to-minority transfer program; (2) that defendants were violating the order with regard to assignment of teachers and administrative personnel to the county's schools; and (3) that changes in attendance zones were effecting resegregation. The court is now prepared to state its findings and conclusions as to these claims.

Before turning to the merits of these charges the court must first address defendants' contentions concerning the procedural posture of the parties to this action.

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[1] The delay was occasioned in part by the fact that, due to one tragic accidental death and the removal of two lawyers from the State, the plaintiffs went for several months without local counsel.

Defendants argue that the instant suit may not be maintained as a class action, and further, that the instant case has become moot. This action was originally filed on behalf of two classes: all adult Negro citizens and their minor children who reside in DeKalb County, and all adult white citizens and their minor children residing in DeKalb County. Although the court has repeatedly referred to the plaintiffs herein as a class, no "class" has ever been properly certified by this court within the meaning of Rule 23 of the Federal Rules of Civil Procedure which became effective January 1, 1974. Even though the court held in 1969 that its jurisdiction over the case would continue, defendants claim that inasmuch as the original named plaintiffs are no longer enrolled in the DeKalb school system, this action should now be dismissed as moot. Pasadena City Board of Education v. Spangler, 440 U.S.L.W. 5114, 5115 (June 29, 1976); Indianapolis School Commissioners v. Jacobs, 420 U.S. 128, 130 (1974).

It appears, however, that one of the named plaintiffs is still a student in the DeKalb County schools, and as to this student, the case is still a live controversy. Accordingly, the court will interpret the movant-plaintiffs' petition for relief under the 1969 order as a motion to intervene, joining the original named plaintiff. The Fifth Circuit has held that intervention

> "... is the proper course for parental groups seeking to question current deficiencies in the implementation of desegregation orders. ... The petition for intervention would bring to the attention of the district court the precise issues which the new group sought to represent and the ways in which the goal of a unitary system had allegedly been frustrated. The district court could then determine whether these matters had

> been previously raised and resolved and/or whether the issues sought to be presented by the new group were currently known to the court and parties in the initial suit. ... If the court felt that the new group had a significant claim which it could best represent, intervention would be allowed." Hines v. Rapides Parish School Board, 479 F.2d 762, 765 (5th Cir. 1973).

The court finds that the movant-plaintiffs, Monica Rocker, et al., satisfy the requirements for intervention under Hines and therefore ALLOWS the movant-plaintiffs to intervene in the instant action. Rule 24(b), Fed.R.Civ.P.

The court further finds that the named movant-plaintiffs represent a class of unnamed individuals capable of being certified within the meaning of Rule 23, Fed.R.Civ.P., and hereby CERTIFIES the class under Rule 23(b)(2) as consisting of all black citizens and their minor children residing in DeKalb County, cf. Pasadena City Board of Education v. Spangler, supra at 5115. Although the named plaintiffs all reside in the southern part of the county, the court finds that the named plaintiffs and their attorneys have and will adequately represent the interests of the black residents throughout the county.

Factual Background

M-to-M Program

The DeKalb County school system is currently operating a majority-to-minority (M-to-M) transfer program. Under this program any student attending a neighborhood school in which his race is in the majority may transfer to a school where his race is in the minority under the following conditions: the receiving school

must have the capacity to hold an additional student, and the M-to-M student may not transfer to a school in which the minority race comprises more than 40% of the student body. Additionally, the student may transfer only to the "next closest school" in which space is available and in which the minority race is less than 40%.

A parent wishing to have his student transferred under M-to-M must apply for such transfer through the principal of the student's neighborhood school. The parent is then told which school or schools qualify as the "next closest school" to the neighborhood school. The parent may then apply to the principal of one of these next nearest schools for a transfer. The decision as to whether the student may transfer is made by the principal of the proposed receiving school and is based solely on whether the school has the capacity and meets the 40% requirement. No exceptions to these rules are made, for example, to allow members of one family to attend the same receiving school, if to do so would increase the minority population of the school over 40%. If the proposed transfer school does not meet these requirements, the parent is advised of the next nearest school which would satisfy these standards.

At the commencement of each school term, every student is required to register at his neighborhood school. A student who has been attending another school the previous year under M-to-M must still register at his neighborhood school and reapply for an M-to-M transfer to the school he had previously attended. If over the course of the year that receiving school has become over-crowded or has passed the 40% mark, the student will not be allowed to reenter the receiving school but must either return to his neighborhood school or attend the next available nearest school.

Some parents desire to send their children to schools other than the next nearest school under the M-to-M program, claiming that certain schools in the county are

better than others. A study of standardized achievement test results in the lower grades indicates that the average scores are generally higher in those schools which have a high predominance of white students than in those so-called "target" schools which are almost completely black in the southern part of the county. The distribution of reading and math resources, such as specialists and para-professionals, indicates that those target schools receive a higher percentage of such resources than certain predominantly white schools, although certain reading resources for advanced readers are not now present in these target schools. These latter resources, however, are capable of being moved among schools as the need for them arises. A comparison of selected aspects of the predominantly black schools in the southern part of the county with selected predominantly white schools in the county shows no apparent trend of superiority among any group of schools. These aspects included number of library books, average number of years of staff education and experience, and pupil expenditures for staff per individual school.

For the 1975-76 school term, 96 students exercised the M-to-M option; two students' requests for M-to-M transfers were rejected. As of August 16, 1976, 27 students had transferred under the M-to-M program, and three requests for such transfers were rejected for the 1976-77 term.

The school system provides bus transportation for all those students who live more than a mile from their neighborhood school and is reimbursed by the state for transportation provided to students living over a mile-and-a-half from their neighborhood school. No transportation is currently provided to students who exercise the M-to-M option and attend a school other than their neighborhood school, nor are M-to-M students reimbursed for expenditures made for self-transportation.

Faculty

Out of the total number of faculty positions in DeKalb County, approximately 15% are held by black teachers in the elementary schools and 13.6% in the high schools for the 1976-77 school year; 32.4% of the newly hired teachers are black in the elementary schools, 33.1% in the high schools. To fill a vacant position in a school that has fewer than the system-line average of black teachers, only black applicants are sent to the school for interviews.

The percentage of black teachers in individual schools in the county ranges from 6.9% to 48.3% in the elementary schools, and from 9.8% to 25% in the high schools. Those schools with the highest percentage of black teachers generally also have the greatest predominance of black students. For example, the faculty at Leslie J. Steele Elementary School is 48.3% black, while its student body is 98% black. At Terry Mill Elementary School the proportion of black teachers is 44.1%, while its student body is 98% black. Conversely, at Montgomery Elementary, where 12% of the students are black, only 6.9% of the faculty are black.

Two reasons were supplied by the Associate Superintendent for Community and Staff Relations to explain the higher concentration of black teachers in the more predominantly black schools: (1) teachers living near those schools prefer to teach in a school near their homes and (2) principals desire to have more teachers who are the same race as most of the students so that the students have someone to "relate to". Involuntary transfers are rarely used to alter the distribution of teachers in the individual schools.

Attendance Zone Changes

A number of attendance lines changes were instituted in the southwest portion of DeKalb County in 1974

and 1975. This same area has experienced an increase in the percentage of black students, due to the influx of black families and the departure of white families from the area. The general pattern of transition is for the black residential area to proceed on a circumference which has been expanding, year to year, from the Atlanta city limits into DeKalb County. The transitional area has been moving from northwest to southeast. Accompanying this transition has been an increase in the ratios of black students in the schools in this area. For example, the area served by Clifton, Meadowview, and Cedar Grove (formerly Bouldercrest) elementary schools, has changed from 7.4% black students in 1972 to 50% black students in 1975.

Major alterations in elementary school zones were implemented in 1974 and 1975 affecting the area covered by the above-mentioned schools. The primary factor motivating these changes was the closing of the Bouldercrest school which had been built on a site too small by state standards. The site for a new school (Cedar Grove) had been chosen in 1969, before this court's previous order, and at a time when the population in the entire southwest portion of the county was 98% white. There is no claim of impropriety in the choosing of the Cedar Grove site.

The building of the new school necessitated boundary line changes because the Cedar Grove site was located within the Clifton attendance zone. Prior to the change, both the Bouldercrest and Clifton school zones extended southward to the Clayton and Henry county lines. The Meadowview school zone formed an immediate circumference around that school. In January 1974, the new school zone which would be served by Cedar Grove was announced. It encompassed the predominantly white southern halves of the Bouldercrest and Clifton school zones, lying below the South River and Interstate 285. Most of the upper half of the old

Bouldercrest zone was added to Meadowview, except that portion immediately surrounding Bouldercrest school. The former Clifton zone was cut off at the South River and was pushed back into almost half of the original Meadowview zone. Since the new Cedar Grove school could not be ready as planned for the fall of 1974, students in the new Cedar Grove district attended the old Bouldercrest school for the 1974-75 term, accompanied by the students residing in the area immediately surrounding Bouldercrest.

When the zone change was made, Clifton went from 29.6% black (in June 1974) to 63.4% black (in September 1974); Meadowview went from 51.8% black to 58% black; Bouldercrest changed from 7% to 14% black. In the fall of 1975, the new Cedar Grove Elementary School was opened, and the area immediately surrounding the Bouldercrest school was zoned into the Clifton zone as originally planned. With this change Clifton's black population increased from 67% (as of June 1975) to 77% (as of September 1975); Meadowview changed from 62% to 67% black; and Bouldercrest's, now Cedar Grove's, black population decreased from 14% to 12%. The net effect of the changes meant that the two older schools would now serve the predominantly black population in the northern part of the area, and the new school would service the predominantly white students to the south. It is impossible to determine, however, to what extent changes in the racial composition of the schools was affected by changes in the racial composition of the residential areas encompassed by these school zones.

The high schools in this area were also subject to zone changes and substantial shifts in their racial ratios during the years 1971 to 1975. The area now served by Gordon, Walker, and Cedar Grove high schools has changed from 22% black students in 1971 to 70% black students in 1975. The building of a new high school,

Cedar Grove, in 1972, was again the major cause of attendance zone changes. The new school was built to relieve over-crowding in Walker and Gordon high schools which formerly served the area, and to reduce the distance traveled for students in the south part of the county. Cedar Grove was built on available land adjacent to the new elementary school, and there is no allegation of impropriety in the location of this school.

In 1971, the year before Cedar Grove High School opened, Gordon was 45% black and Walker was 3.9% black. Columbia and Southwest DeKalb, surrounding schools also affected by the building of Cedar Grove, each were 2.7% and 4.5% black, respectively. The new Cedar Grove school zone cut off the southern portions of the Walker and Gordon zones, constricting those zones to the area north of Interstate 285.

In 1974, additional zone changes were made affecting these high schools. Gordon's southern boundary was pushed further north to I-20, and the racially mixed residential area remaining went to Walker. Cedar Grove's zone, which originally extended past I-285, was constricted south of I-285. The Walker zone absorbed this area and now completely separated the Cedar Grove zone from the Gordon zone. Gordon's black population went from 89% in September 1973 to 92% in June 1974, and 97% in September 1974. Over this same period, Walker went from 35% to 43% and 60% black. Cedar Grove's black population remained at 14-16% during this period.

An additional zone change was made for the 1975-76 school term whereby part of Southwest DeKalb's attendance area (1% black), which had become overcrowded, was zoned into Cedar Grove, which was under capacity. The area rezoned was primarily white. At the time of the zone change Columbia (then just under 50% black) was also under capacity.

The court cannot determine, as to these high school boundary-line changes, to what extent shifts in residential patterns affected the rate of change in the racial compositions of the schools.

Legal Discussion

M-to-M Program

In its June 1969 order, this court held that defendants "shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system." Pitts v. Cherry, No. 11946 (N.D. Ga., June 12, 1969). For the past few years, the DeKalb school system has operated an M-to-M program, outlined above, as such an affirmative action. Although the program technically violated the 1969 order which prohibited transfers of students outside their respective attendance zones, M-to-M transfer programs were given approval by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26 (1971):

> "An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation."

The current operation of the DeKalb M-to-M program, however, imposes impermissible burdens upon those students wishing to take part in the program, discouraging widescale use of this desegregation tool. A student wishing an M-to-M transfer, for example, faces a

substantial amount of unnecessary red tape before his transfer may be effected. The student must go through the same administrative process each year, never becoming a permanent student in the transferee school.

Even greater constraints are placed on M-to-M transferees and their parents in terms of the permissible schools into which students may transfer and the lack of transportation provided to get the transferees to those schools. Defendants justify the "next nearest school" requirement for M-to-M transfers as preserving the neighborhood school concept as much as possible. As the Supreme Court stated in Swann, supra, "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation." 402 U.S. at 28. In the instant case, due to the racial distribution in DeKalb County, the next nearest school limitation may compel a student to transfer to a school whose racial composition is only marginally different from his neighborhood school, a difference perhaps not worth the transfer.

Defendants have offered to alter the present program by requiring that a student may transfer only to the next nearest school where his race comprises no more than 15% of the student body. Defendants contend that this will accommodate the preferences of many of the named movant-plaintiffs to transfer to the more predominantly white schools. However, this same limitation will inhibit students who desire to attend a school where their race is in the minority, but which is also close to their homes.

The purpose of the current 40% requirement, and presumably the proposed 15% figure, is actually to prevent those schools from "tipping", or rapidly becoming predominantly black schools. Defendants have cited no authority, nor can this court find any support, for the use

of such limitations in an M-to-M program to retard any change in the racial composition of a school in this manner. In fact, the implication from Swann is that very few restrictions should be imposed upon a student desiring to participate in an M-to-M transfer: "In order to be effective ... space must be made available in the school to which he desires to move." 402 U.S. [at] 26-27 (emphasis added). Currently, a student may transfer only to a qualifying school where space is available, and is given no priority over other students. The effect may often be to preclude a child from attending his transferee school the following year if space in that school becomes unavailable. The Fifth Circuit has held, however, that under M-to-M programs, "a transferee is to be given priority for space." Singleton v. Jackson Municipal Separate School District, 426 F.2d 1364, 1369 (5th Cir. 1970). See Lee v. Macon County Board of Education, No. 70-251 (N.D. Ala., Aug. 27, 1976), slip opinion at 26.

The effectiveness of an M-to-M program is also dependent upon the provision of free transportation. Swann v. Board of Education, 402 U.S. [at] 26-27; United States v. Greenwood Municipal Separate School District, 460 F.2d 1205 (1972). The lack of transportation for transferees under the present DeKalb plan forces the students and "their parents to shoulder the burden of eliminating these vestiges of segregated schools," United States v. Greenwood, supra, 460 F.2d at 1207, and, in fact, makes it impossible for some students to participate in the program.

Defendants complain that if the next nearest school rule is eliminated, and free transportation is required, the school system will be faced with an unreasonable and unfeasible task of transporting select students to different schools all across the county. Before it is known how many students will participate in a revised M-to-M program, however, such fears are purely speculation.

Defendants also raise a general objection to any revisions made by this court in the voluntarily-established M-to-M program. Defendants maintain that they have complied with the specific mandates of this court's 1969 order and are now operating a unitary school system. Therefore, the court is without power, defendants argue, to make any changes in the school program which accomplishes the intentions of the previous order. Pasadena City Board of Education v. Spangler, supra, 440 U.S.L.W. at 5117. However, this court has never made any finding that defendants are operating a unitary system, and finds instead that the regulations imposed under the M-to-M program perpetuate the vestiges of a dual system.

Defendants also rely upon the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701, et seq., to block the above-mentioned changes in their M-to-M program. The Act, which emphasizes that "the neighborhood is the appropriate basis for determining public school assignments," 20 U.S.C. § 1701(b), also states that

> "No court ... shall ... order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."

The Act also makes clear, however, that its provisions are "not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b). This court, therefore, retains its equitable powers to remedy past wrongs, the scope of which "is broad, for breadth and flexibility are inherent in equitable remedies." Swann, supra, 402 U.S. at 15. In analyzing the impact of the Educational

Act upon the court's equitable powers, the First Circuit stated in Morgan v. Kerrigan, 530 F.2d 401, 412-13 (1st Cir. 1976),

> "By explicitly leaving the district court the power to determine the adequacy of remedies, the Act necessarily does not restrict the breadth of discretion of that court to determine what scope of remedy is constitutionally required. Thus the Act manifests its purpose not to limit judicial power but to guide and channel its exercise. In a sense it is a statutory 'less restrictive means' guideline, endeavoring to ensure that substantial compulsory transportation be used as a last resort."

It should be noted that the revisions of the M-to-M program contemplated by this court do not involve a program of forced busing, a remedy which the Act seeks to discourage, but a program which will provide transportation for those students who volunteer to transfer to a school in which their race is in the minority. So long as the school system operates its M-to-M program, this court finds that transportation and other revisions are constitutionally required so that the program will provide equal educational opportunities while helping to eliminate the vestiges of a dual school system in DeKalb County, cf. Morgan v. Kerrigan, supra, 530 F.2d at 413.

Teacher Assignments

This court held in its 1969 order that

> "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." (Slip opinion at 7.)

The court accordingly required that "[w]herever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on the desegregated faculty." Id. The defendants have more than complied with this explicit requirement. However, the court also mandated that 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 the school .... [and] shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual system." (Slip opinion at 8.)

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 such ratio throughout the entire school system. 419 F.2d at 1218.

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, United States v. Wilcox County Board of Education, 494 F.2d 575 (5th Cir. 1974), 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. See Carter v. West Feliciana Parish School Board, 432 F.2d 875, 876 (5th Cir. 1970).

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, Lee v. Macon County Board of Education, supra, slip opinion at 23.

Attendance Zone Changes

In its previous order, this court held that

> "[T]o the extent consistent with the proper operation of the system, the County 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."

Plaintiffs contend, however, through a report prepared for the court by the Department of Health, Education and Welfare, that the "DeKalb County School System, in

its response to racial transition, ignored its responsibility to affirmatively eradicate segregation and perpetuate desegregation." HEW Report, at 11. Specifically, plaintiffs argue that the school zone changes made by defendants have resulted in racially identifiable schools.

Defendants counter by stating that the increasing number of racially identifiable schools in the southwest section of DeKalb County has been caused not by the zone changes implemented by the board, but by the natural population transition which has occurred in the residential sections of that area. Defendants further argue that having implemented the 1969 desegregation order, they cannot be held responsible for residential patterns that have developed since that order. Defendants rely upon Swann, supra, wherein the court stated

> "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies since the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Defendants also point to the recent case of Pasadena Board of Education v. Spangler, 44 U.S.L.W. 5114 (June 29, 1976), which involved the subsequent interpretation of a desegregation plan entered by a district court in

1970. The court-approved plan required that no school have a majority of minority students. Within two years of the entry of the order, changes in the residential patterns in the area caused some schools to have a black enrollment in excess of 50%. The Supreme Court found that although the school system had not yet achieved the unitary system contemplated by the above-quoted language from Swann,

> "* * * [T]hat does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the School District to rearrange the attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity." Id. at 5117.

In Pasadena, once the initial desegregation order had been implemented, changes in residential patterns and resulting shifts in the racial makeup of schools were unaffected by any actions taken by school officials, because no official action was taken. It is for this reason that the district court in Pasadena was forbidden from ordering school officials to restructure attendance lines.

Different considerations are relevant, however, when shifts in residential patterns are accomplished by alterations in attendance lines made by school officials. The Supreme Court has held that

> "* * * [A]ny attempt by state or local officials to carve out a new school

> district from an existing district that is in the process of dismantling a dual school system 'must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of a dual system, then a district court, in the exercise of its remedial discretion may enjoin it from being carried out.'" United States v. Scotland Neck Board of Education, 407 U.S. 484, 489 (1971), quoting Wright v. Council of Emporia, 407 U.S. 451, 460 (1971).

In the instant case new boundary lines were drawn with the building of Cedar Grove elementary and high schools. At the same time, schools in that area experienced substantial changes in their racial composition. This court must look to whether such boundary-line changes had the effect of impeding desegregation in these schools. Of course, such inquiry cannot ignore the racial transition occurring in this area apart from any zone changes.

The court must pursue this examination despite its finding that boundary-line changes were made for the most part to accommodate the new schools which had been built to relieve overcrowding. In determining whether a school board's action is permissible, courts have "focused upon the effect -- not the purpose or motivation" of such action on the dismantling of a dual system. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." Wright v. Council of Emporia, supra, 407 U.S. at 462.

In applying this test to the facts as found by the court, it is apparent that the redrawing of elementary school lines in southwest DeKalb had some effect upon the perpetuation of a dual system in the county. Over the course of one summer, Clifton went from 30% to

63% black. Surely the influx of black families and departure of white families accounted from some of the increase. But the redrawing of attendance lines along I-285 and the South River must have contributed somewhat to this dramatic increase. Additionally, it must be said that the total effect of the horizontal boundary lines drawn to accommodate these three elementary schools was to ensure that one predominantly white school, Cedar Grove, would remain predominantly white for a number of years.

Although the school board's actions may have had these effects, its zoning decision must also be scrutinized in the context of the circumstances existing at the time and the feasibility and practicality of available alternatives. For it is only the availability of more promising courses of action to dismantle a dual system that "places a heavy burden upon the board to explain its preference for an apparently less effective method." Green v. County School Board, 391 U.S. 430, 439 (1967), Wright v. Council of Emporia, supra, 407 U.S. at 467.

At the time these attendance zone changes were made, the Cedar Grove site had already been chosen, and the choice was made at a time when the racial composition of the area was almost completely white. As it developed, it was the location of this new school, accompanied by a transition in the residential patterns in the area, which had the effect of perpetuating a dual system, because the school site dictated to a large extent the placement of the new attendance lines. The propriety of the selection of the Cedar Grove site, however, is not in question.

Even so, plaintiffs, supported by HEW, contend that, given the location of the Cedar Grove Elementary School, attendance lines could have been drawn in such a way as not to accentuate the racial identifiability of the schools. HEW's report suggests that since blacks reside primarily north of I-285 and the South River, and most

whites are located to the south of those lines, drawing boundary lines vertically, like some of the original lines, as opposed to the horizontal lines chosen by the defendants, would have created more racially balanced zones. However, HEW's report fails to consider the exact location of families south of I-285 and the South River. For with the exception of the predominantly black County Line community, just north of Henry County, most of the population clusters towards the center of this area. The drawing of vertical lines would thus have had little effect upon the racial makeup of the school. In fact, because of the residential patterns in southwest DeKalb as of 1973-74, and because of the location of Meadowview, Clifton and Cedar Grove within those patterns, only the drawing of extremely gerrymandered lines would have resulted in more racially balanced schools. Such gerrymandering would have created large travel distances for students and would have been generally impractical. In light of the circumstances existing at the time these zone changes were made, it cannot be said that such changes were constitutionally impermissible.

The same is largely true with respect to changes in high school attendance zones. The location of the Cedar Grove High School mandated to a certain degree the establishment of a predominantly white school because of the racial composition of the population surrounding Cedar Grove, and two predominantly black schools, because of the residential transitions occurring in that area. The alternative of vertical boundary lines, suggested by HEW, was virtually impossible because Cedar Grove High School is located directly below Gordon.

Plaintiffs and HEW, however, also complain about certain changes that were made after the Cedar Grove school had opened and the area had been rezoned accordingly. As to these changes, there appear to have been alternatives -- among them, to make no change at all -- and defendants have not adequately met the heavy

burden of explaining the alternatives chosen which tended to hinder, rather than further, desegregation. Specifically, the zone changes in 1974 which constricted Gordon to the area north of I-20 and moved Cedar Grove's northern boundary to I-285, with the area in between going to Walker, had the effects of (1) increasing Gordon's already predominantly black population, (2) isolating the Cedar Grove area from the path of residential transition, with Walker serving as a buffer zone, and (3) helping Walker to tip over to a predominantly black school. Defendants justify the Cedar Grove boundary change by demonstrating that 35 out of 43 students removed from Cedar Grove as a result of the rezoning were white. Yet, defendants could clearly see that this area rezoned from Cedar Grove to Walker was in the direct path of residential transition and was becoming increasingly black. Defendants have offered no further justifications for their zone changes.

Another contested boundary line change occurred in 1975 when part of Southwest DeKalb's attendance area was zoned into Cedar Grove to relieve overcrowding in Southwest DeKalb. The zone change split a subdivision down the middle and created traveling distances of up to five-and-a-half miles for some of the rezoned children. HEW points out that, like Cedar Grove, Columbia was also under capacity and a largely white area between I-20, Candler Road and I-285 could have been rezoned from Southwest DeKalb into Columbia. Such a change would have impeded Columbia's transition towards becoming another predominantly black school, and, in addition, the maximum travel distance for a rezoned child would be only two-and-a-half miles. Therefore, in an attempt to relieve overcrowding in one school, defendants failed to choose an available alternative which would have also furthered desegregation.

There are two problems with a finding by this court that the above boundary changes had the effect of hind-

ering the process of desegregation within the meaning of Wright, supra. First, because of the rapid residential transition occurring throughout this section of the county, and affecting the racial ratios of schools in which no zone changes have been made, it is impossible to determine whether the zone changes in question actually accelerated the transition at one extreme, or whether they had little effect on the process of desegregation which was in fact impeded by a natural process of residential transition. The second problem is that even were the court to find the former to be true and conclude that therefore the boundary changes were impermissible, an injunction against their imposition at this point in time would be meaningless. The percentage of blacks in this area has increased dramatically and, as the HEW report admits,

> "Because of this concentration of black students, we believe consideration of remedies would have to look beyond mere alteration of school zone lines in the area schools." HEW Report, at 11.

Whatever indeterminable effect the aforementioned zone changes have had on the process of desegregation in this portion of DeKalb County, the actions of the defendants in making these changes do not justify the ordering of a remedy which would go beyond the alteration of school zone lines. The court does wish to ensure, however, that any future zone changes as well as the purchase of any new school sites are made so as to have the effect of furthering as opposed to hindering desegregation. Accordingly, a biracial committee will be established which will, as part of its functions, approve such zone changes and school site purchases. Singleton v. Jackson Municipal Separate School District, supra, 426 F.2d at 1370; Ellis v. Board of Public Instruction, 423 F.2d 203, 207, n.4 (5th Cir. 1970).

ORDER

For the foregoing reasons, the court hereby ORDERS that:

(1) The M-to-M program be modified so that any student may transfer from a school where his race is in the majority to any other school within the county in which his race is in the minority. Space must be made available in the receiving schools for transferees who shall be given priority for space over other new students, but in no instance shall a transferee displace a student previously enrolled in the receiving schools.

(2) Such M-to-M transfers shall be effected by as simple an administrative procedure as possible. The school system will provide M-to-M transfer forms at the student's neighborhood school. The student's parent or guardian must, under usual circumstances, complete the form on or before May 1 of the school year preceding the school year for which the student desires to participate in the M-to-M program. The school system shall provide the student with a copy of the form which shall be presented to the receiving school by the student on the annual registration day.

(3) The school system shall publicize the M-to-M transfer procedure by paid advertisements in local newspapers; news releases to all media; brochures available at each school; and notices placed in school newsletters and newspapers no later than March 15 of each year. Such publicity shall be followed by notices sent to each parent or guardian no later than March 31 of each year.

(4) Any student may exercise a majority-to-minority transfer once during the student's elementary career and once during the secondary school career. One a transfer is effected, the transferee need not reapply for the trans-

fer each year. If the student's race becomes a majority in the receiving school, he may (a) remain at the receiving school; (b) return to this neighborhood school; or (c) transfer to another school in which his race does not comprise more than a majority of the student body.

(5) Transportation shall be provided at the expense of the school system to any M-to-M student who so requests and who lives more than one mile from the receiving school. Defendants may seek modification of this provision of the order if, based on the number of students electing to exercise M-to-M transfers and the receiving schools chosen, a workable plan of transportation proves impossible.

(6) These changes in the M-to-M program shall be implemented for transfers beginning with the 1977-78 school term. Students wishing to participate in the program for the remainder of the 1976-77 school term, may transfer to a school which qualifies under the provisions of this order and in which there is space available. Transferees must provide their own transportation for the balance of the 1976-77 school term.

Distribution of Faculty

(7) The ratio of black to white teachers in each school must be substantially similar to the system-wide racial ratio. Defendants are required to reassign teachers with all deliberate speed so that the racial distribution of faculty in all schools approximates the distribution of faculty in the entire school system.

Biracial Committee

(8) A biracial committee shall be established which shall oversee the operation of the M-to-M program as modified by this order. The committee's approval must

also be secured on any proposed school zone changes or school site purchases. The committee is to be constituted by this court from names submitted by parties to this suit. The number of members will be determined by this court and shall consist of no more than 20 nor less than ten members. The membership shall be equally divided between whites and blacks and the chairmanship shall alternate annually between a white and a black chairman. The committee shall make annual reports to the court concerning the functioning of the M-to-M program and any other action taken by the committee on proposed attendance zone changes or school purchase sites.

IT IS SO ORDERED.

This 3rd day of November, 1976.

/s/
NEWELL EDENFIELD
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIE EUGENE PITTS, et al.	)	
	)	CIVIL ACTION
vs.	)	
	)	
JIM CHERRY, et al.	)	NO. 11946

ORDER

This school desegregation action came before the court on May 15, 1978 for a hearing on four issues: (1) the closing of Heritage Elementary School, (2) the construction of eight additional classrooms at Flat Shoals Elementary School, (3) the continuing conflict between DeKalb County school officials and the Biracial Committee, and (4) intervenor Johnson's motion to cite defendants with contempt for failing to provide transportation pursuant to the M-to-M program.

1. Heritage is an eighteen-room elementary school, located in the northern section of DeKalb County. It has a capacity of 468 students[1] but for the past few years has had a declining student enrollment. This school year (1977-78) Heritage has a population of 269 students, not including kindergarten and special education students. Projected enrollment for the 1978-79 school year is 247.

The controversy before the court has resulted from defendants' plan to close this school as a regular elementary school and convert it to a special education center for elementary-age students residing in the northern part of the county. The county currently operates Scottdale

[1] The school system determines elementary school capacity, absent any special programs, on the basis of twenty-six students per classroom.

Center as a special education high school. This facility is old and unsatisfactory, and defendants plan to transfer the Scottdale program to Margaret Harris Center, which is now serving as a special education center for elementary-age children in the northern portion of the county. Heritage has been chosen as the recipient school for the existing Margaret Harris program.

Plaintiffs and the Biracial Committee[2] oppose the decision to close Heritage, alleging that it will adversely affect a successful majority-to-minority (M-to-M) transfer program currently in operation there.[3] Nineteen students are presently enrolled in that program, and Heritage is the only school in the northern part of the county with substantial M-to-M participation. A spokesperson for the parents of the M-to-M students indicated that she had made an extensive effort to recruit black students, that black parents had visited a number of schools before selecting Heritage, that Heritage was selected primarily for its size and special reading, math and tutoring programs, and that the Heritage community had been receptive to the M-to-M students. She also expressed concern that if Heritage is closed, these M-to-M students will again have to adapt to a new school and that for this reason some might not continue to participate in the program. Plaintiffs and the Biracial Committee assert that other elementary schools in the northern portion of the county, which do not have M-to-M programs, are

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[2] Pursuant to the court's November 3, 1976 order, defendants presented the proposed zone changes, which would result from the conversion of Heritage, to the Biracial Committee on April 3, 1978. The Committee rejected the changes stating that Heritage's current use should not be altered.

[3] Plaintiffs and the Biracial Committee oppose only the choice of Heritage as the recipient school for the special education program. They do not oppose, and in fact support, the decision to close the Scottdale Center.

operating significantly below capacity and would be appropriate choices as the recipient school for the special education center. They therefore contend that closing Heritage, which might otherwise be permissible, has an impermissible effect upon the M-to-M program.

Defendants contend that the conversion of Heritage will not have a racial impact. They note that the M-to-M students will be able to attend either Oakgrove or Hawthorne, the schools to which the Heritage students will be transferred, or any other schools they choose under the M-to-M program. They also note that the reading and math facilities are the same at the elementary schools and that although tutoring services provided by the community may not already exist at Oakgrove or Hawthorne, such assistance is always encouraged.

Defendants also explain that although certain other elementary schools in that portion of the county are severely under capacity, after examination of all factors, Heritage remains the only sensible choice for conversion to a special education facility. Heritage has eighteen classrooms and defendants have determined that approximately that number will be required in the new center. All of the other under-capacity schools which were considered have at least twenty-three rooms. Defendants contend that to convert any of these larger schools would be an uneconomic use of taxpayer money. Defendants also note that some of the other schools which appear to be underutilized actually are housing special programs which require more space per child than the county usually allots. Further, at least two of the schools which are currently under capacity appear to be destined for major changes in enrollment due to their proximity to the MARTA line and expected new housing developments or in the event of a transition from "singles" apartments to family units. Finally, defendants argue that Heritage is in an ideal location for a special education center, which relies upon volunteer services, since it is

near other elementary schools and a high school and is located in the midst of a single-family dwelling residential community.

On the basis of the foregoing testimony, the court concludes that closing Heritage Elementary School to regular students will not have an impermissible effect on the M-to-M program, and, thus, on the process of desegregation of the county school system. The choice of Heritage over other under-capacity schools as the recipient school for the special education center, in the opinion of the court, is justified by its size and location and by the fact that to close any of the other schools would not be economical in terms of room usage or wise in view of possible future increases in student enrollment. Since the M-to-M students now attending Heritage will be able to transfer to Oak Grove or Hawthorne, along with their white classmates, and will have available to them essentially the same learning tools as they had at Heritage, the court concludes that the disruption in the program is not of legal significance. Accordingly, defendants' motion to change attendance zones is hereby GRANTED.

2. Also before the court are plaintiffs' and the Biracial Committee's contentions that the proposed construction of eight additional classrooms at the predominantly black (96%) Flat Shoals Elementary School will violate the court's June 12, 1969 order. That order states, "To the extent consistent with the proper operation of the system, the county board will, in locating and designating new schools, in expanding existing facilities, and in consolidating schools, do so with the objective of eradicating segregation and perpetuating desegregation." Plaintiffs argue that the Flat Shoals expansion is designed to contain the growing population of black students residing in the Flat Shoals district within that school zone and that such containment is contrary to the instructions of this court. Plaintiffs also allege that addi-

tional rooms are unnecessary at Flat Shoals inasmuch as three predominantly white schools located nearby have additional space.

Flat Shoals, which is located in the southern portion of DeKalb County, currently has twenty-seven regular classrooms and two mobile unit classrooms. Its enrollment is approximately 710 children, not including those enrolled in the special education and kindergarten programs.[4] Defendants have testified that the eight-room addition, which will be in the form of two pods containing four classrooms each, is not intended to confine black students to a predominantly black school but, rather, is to provide the existing student body with a better environment for learning.[5] Assistant Superintendent Joseph Renfroe testified for defendants as to the intended uses of the additional rooms. Two of the classrooms will replace the two mobile units presently operating at Flat Shoals. Another of the new rooms will be used for the kindergarten program which is being greatly expanded as the result of an increase in state funding. Three of the rooms will be used in connection with the county's special education program, another will be used as a reading and math lab and the final one will serve as a "multi-purpose" room. Defendants also note that the rooms will be fully air-conditioned and will have modern equipment and furnishings.

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[4] Defendants were before this court in September, 1977, as a result of a drastic and unexpected increase in the student enrollment of Flat Shoals which created severe overcrowding at that facility. At that time the court approved the installation of two portable classrooms and change of attendance zones which zoned approximately 130 students out of the Flat Shoals district.

[5] Defendants also make much of the fact that these eight classrooms will not be used to bring any new students into Flat Shoals who do not now reside in that school zone. Clearly the court would not permit such a change.

While the court recognizes the concerns expressed by plaintiffs and the Biracial Committee on this matter, it cannot conclude, on this set of facts, that defendants' plan to construct these additional classrooms at Flat Shoals violates the June 12, 1969 order. However, to insure that this expansion never serves to contain the black student population in the Flat Shoals school, the court DIRECTS that the additional rooms be used only for those purposes that were stated to the court. Since the court is aware of the difficulties in determining at this point the precise number of special education classrooms which will be needed at Flat Shoals, it will allow defendants a certain amount of leeway in the allocation of the use of rooms as between special education classes and special learning laboratories. In no instance, however, are any of the new rooms to be used to house, or to permit the housing of, additional sections of any grade level.[6] The court will not condone additions to Flat Shoals which are designed, or will serve, to keep the growing black school population within the existing attendance zones. In the event the Flat Shoals enrollment continues to climb, and all indications are that it will, the court recommends that defendants seriously consider alternatives to further construction, such as alterations in attendance zones, and, possible, some form of busing, in order to remedy the overcrowding which is bound to occur and to promote desegregation in the county schools. In considering additions to other predominantly black schools in the county, defendants are advised to keep this admonition in mind.

3. The next issue to be addressed is the Biracial Committee's request that the court establish certain guidelines delineating the authority of the Committee.

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[6] The three rooms being built to replace the mobile units and to house the kindergarten classes are, of course, excepted from this restriction.

Elaine Davis, testifying on behalf of the Committee, cited as points of contention between the parties the fact that defendants have failed to request the Committee's approval of their actions, failed to follow its (the Committee's) recommendations, and continued to refuse to provide it with pertinent information.

As the court explained at the hearing on this matter, the Biracial Committee has no authority to order defendants to take or to forbid them from pursuing any specific course of action. Further, the court has no power to grant the Committee such authority. On the other hand, the Biracial Committee has complete authority to inquire into all matters involving the DeKalb County school system in which there are racial overtones. The Committee should investigate any problems it pinpoints, make recommendations to defendants, and seek relief in the court if it is not satisfied with defendants' response. The court INSTRUCTS defendants to furnish the Committee with whatever information it requests in connection with matters having racial overtones,[7] and, to the extent that defendants assert that the order creating the Biracial Committee gave it authority to oversee only certain race-related matters, defendants are to consider that order modified. Finally, the parties are cautioned that the court does not want to be plagued with this problem any further.

4. The final issue before the court is intervenor's motion to cite defendants with contempt for their failure to provide transportation for her child pursuant to the M-to-M program. On November 3, 1976, this court entered an order which provided:

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[7] Defendants are advised that the court will frown upon standard refusals to provide information on the ground that the question has no racial overtones.

> (1) The M-to-M program [is to] be modified so that any student may transfer from a school where his race is in the majority to any other school within the county in which his race is in the minority. Space must be made available in the receiving schools for transferees who shall be given priority for space over other new students . . . . (5) Transportation shall be provided at the expense of the school system to any M-to-M student who so requests and who lives more than one mile from the receiving school. (6) These changes in the M-to-M program shall be implemented for transfers beginning in the 1977-78 school term. Students wishing to participate in the program for the remainder of the '76-77 school term, may transfer to a school which qualifies under the provisions of this order and in which there is space available. Transferees must provide their own transportation for the balance of the 1976-77 school term.

Intervenor is a white resident and citizen of DeKalb County and the parent of a minor child presently enrolled as an M-to-M student at Meadowview Elementary School, a predominantly black school in the county school system. Because she lives more than one mile from Meadowview, intervenor has requested that defendants provide her child with transportation to school in accordance with the court's order.

Defendants refuse to provide such transportation, however, and contend that the issue before the court does not relate to their refusal to provide transportation under the M-to-M program but "to the question of whether Intervenor can use the M-to-M program as a guise for obtaining transportation not otherwise available . . . under the special education program of the DeKalb County School System." Defendants assert that the child

in question is a student in the General Learning Disability-Educable Program ("GLD-E") operated by DeKalb County, that she was enrolled in the GLD-E class at Flat Shoals Elementary School, and that when that class was transferred to Meadowview, she chose to remain with it, although transportation to Meadowview was not available for her under the special education program. After intervenor submitted applications to defendants for transportation to Meadowview under the special education and M-to-M programs, defendants advised her that transportation was not available to Meadowview but offered to transport the child to any of three other schools in the system. Two of these schools were predominantly black, which was one of the main reasons advanced by intervenor for enrolling her child at Meadowview under the M-to-M program. Intervenor has rejected this offer and continues to enroll her child in the Meadowview program. Defendants, therefore, argue that they have not violated the court's November 3, 1976 order regarding mandatory transportation for M-to-M students.

The court disagrees. The language of the order is quite clear -- "Transportation shall be provided at the expense of the school system to any M-to-M student who so requests and who lives more than one mile from the receiving school." Intervenor's child is an M-to-M student, enrolled at predominantly black Meadowview. She lives more than one mile from the school and she has requested that defendants provide her with transportation. Although this child may not have been one of the intended beneficiaries of that provision, she is clearly within the letter of the law, and, until such time as the order is modified,[8] defendants must comply with its

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[8] The court's November 3, 1976 order provided: "Defendants may seek modification of [the provision requiring that they provide transportation] if, based on the number of students electing to exercise M-

(continued...)

terms. In view of the particular facts before it, however, the court DIRECTS only that defendants compensate intervenor for the costs of her child's transportation after May 15, 1978. Intervenor's requests, presented at the hearing on this subject, for compensation for her past transportation charges and for actual transportation for her child are DENIED at this time. The court INSTRUCTS the parties to discuss this situation further to see if some agreement can be reached and to return to the court with this problem only if they are unable to resolve it after reasonable negotiations.

In sum, plaintiff's motion for supplemental relief is DENIED, and defendant's motion to allow a change of attendance zones is GRANTED. Intervenor's motion to hold defendants in contempt is DENIED, but defendants are DIRECTED to compensate intervenor for the costs of transporting her child to Meadowview after May 15, 1978.

SO ORDERED, this 23rd day of May, 1978.

/s/
NEWELL EDENFIELD
United States District Judge

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[8] (...continued)
to-M transfers and the receiving schools chosen, a workable plan of transportation proves impossible." Defendants have not sought any modification of the transportation provision, however, and the court declines to alter or amend that order on its own motion.