IN THE

Supreme Court of the United States

October Term, 1978

No. 78-781

SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota, SUPERINTENDENT OF SCHOOLS, SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota and CHAIRPERSON, BOARD OF EDUCATION, SPECIAL SCHOOL DISTRICT NO. 1, Minneapolis, Minnesota,

Petitioners,

vs.

JEANETTE BOOKER, by CURTIS C. CHIVERS, her Grandfather and guardian ad litem; DAVID G. HAGE, by GEORGE S. HAGE, his father and guardian ad litem; and MONTEZ WILLIS, by JAMES M. WILLIS, her father and guardian ad litem, on behalf of themselves and all others similarly situated,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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1978—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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Respondents oppose the application for a writ of certiorari on two principal grounds: first, the trial court and the court of appeals properly decided the matter; and second, the petition involves no significant issue for this Court, as petitioners presented no credible evidence to support their motion to dismiss.

Questions Presented

(1) Whether the court of appeals may affirm a district court's decision not to dismiss a school integration suit, when defendants have never complied with unappealed

1972 judgment and have not eliminated the effects of their past wrongful conduct.

(2) Whether the court of appeals may affirm a district court's decision to grant nearly one-half, but not all, of the defendants' requested alternative relief, when defendants have never complied with unappealed 1972 judgment and have not eliminated the effects of their past wrongful conduct.

Statement

On May 24, 1972, the trial court entered its final, unappealed judgment requiring defendant school district to "eliminate the effects of its prior unlawful activities" (A-33 and 34). The judgment was based on findings of widespread, systematic, systemwide segregative conduct. That conduct included segregative assignment of teachers, consisting both of assigning teachers on the basis of race, with most black teachers assigned to identifiably black schools, and of assigning the least trained, lowest paid teachers to black schools (A-22-25). It also included a series of "decisions . . . as to school size over the past fifteen years . . . [that] had the effect of increasing racial segregation" (A-22), decisions as to the location of schools and portable class rooms (A-18-19), decisions as to boundary changes (A-21), a deliberate policy of allowing special transfers "in which race was a major factor" (A-21), a "general course of conduct . . . to create optional attendance zones along the perimeters of minority neighborhoods" ("[o]ften [with] the intended effect . . . to allow white students to 'escape' ") (A-22), decisions that a number of schools should be "purposefully maintained as identifiably 'Black

schools' " (A-26), and decisions to accede to "public pressure not to integrate" (A-27).

On the basis of such findings, the trial court concluded:

> As a matter of law, the *intended* and inevitable effect of a series of policy decisions made by the defendant Special School District #1, Minneapolis, Minnesota, with respect to size and location of schools, attendance zones, enrollment of various schools, transfer policies, and teacher assignments as described in the Findings of Fact set out above has been to aggravate and increase the racial segregation in its schools. (A-32-33) (emphasis supplied)

In 1972, the Minneapolis Public Schools were in the process of vast, thorough-going changes in their method of operation. They were faced with declining enrollments, increasing percentage of black and Indian enrollments, a one-time availability of tens of millions of dollars in new construction funds, the need to close tens and even scores of schools, and the new availability of state funds to pay for transportation in school pairings and clusters. The District had begun a pilot program of school clusterings, the Southeast Alternative Schools (using identifiably white schools for its model), and a pilot pairing program (using an identifiably white and an identifiably black school for the model). The integrative program was delayed due to public opposition (A-27). The danger was real that the District would continue to use neighborhood schools to serve areas that were identifiably black[1] and offer more attrac-

[1]Defendants suggest (f.n. 1, p. 4, Petition) that residential segregation in Minneapolis was a result of natural forces. The undisputed, unappealed finding in this case is, "Residential segregation [in Minneapolis] is in large part due to racial discrimination," discrimination actively practiced by realtors and municipal and federal governmental agencies (A-25-26 and Third Party Complaint).

tive options only or primarily to residents of white residential areas. It was in this context that the trial court made its undisputed, unappealed finding that the District "purposefully maintained . . . identifiably 'Black schools' " (A-26).

Having found that defendants purposefully maintained identifiably black schools, the trial court acted to erase that identification. At trial in 1972, the District's superintendent testified that in Minneapolis a school 30 percent black was an identifiably black school [Tr. (4/11/72) 162; Davis deposition (1/26/72)]. That testimony formed the principal basis for the trial court's order as to permissible levels of enrollment by race in the new schools the District would be creating and in those of its old schools the District would retain. From time to time the trial court has modified its 1972 judgment, the most significant changes for present purposes being to increase the permissable levels of minority enrollment at each school to keep pace with changes in the District's population.

Defendants had never complied with the trial court's orders as to the necessary extent of student integration. They never appealed the 1972 judgment, nor did they appeal follow-up orders in the succeeding years, including the order of July 11, 1977. That order denied defendants' 1977 motion to dissolve the injunction herein, a motion based at first on the decision of this Court in *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424 (1976) and then on *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977).

Rather than complying with the trial court's July 1977 order (to prepare for full compliance in 1978), defendants in 1978 renewed their motion to dismiss. In the al-

ternative, they asked for a revision in the injunction's racial guidelines. The trial court denied the first motion and granted the second in part, raising permissible minority enrollments by nearly one-half[2] the amount defendants requested.

In support of their motion to dismiss defendants attempted to prove that they have eliminated the incremental segregative effect of their past misconduct. Defendants' "proof" was in the form of opinion testimony in two affidavits of school officials they did not call to the witness stand, opinions constructed on hypotheses the trial court found to be contrary to the record in the case and contrary to the unappealed 1972 findings of the trial court. Petitioners inaccurately characterize those affidavits as "uncontroverted." Respondents controverted the affidavits frontally, pointing to their several defects. The trial court found they depended "upon a belated neutral justification for heretofore unexplained discriminatory events," and upon "a tendency to erase from the hypothetical not only the discriminatory act but other historical events as well, and a failure to account for the repercussions of such changes" (A-44). The trial court rejected such "evidence." Without it, there was no basis for the motion to dismiss.

When stay applications were denied, defendants complied or attempted to comply with the trial court's order. Doing so required modest effort: two elementary schools were closed one year ahead of plan; 1,400 more students are being transported than defendants had planned; three junior high schools were reorganized sooner than planned;

[2]Defendants requested an increase of eight percent; the trial court granted four percent. Defendants also asked for special, further dispensation for one school with a subsential Indian population; the trial court denied that request.

approximately 150 students were transferred because of controlled enrollment (see, Affidavit of Superintendent Raymond Arveson, June 15, 1978, pp. 11-13). There has been no significant disruption reported on account of these efforts.

Argument

A. THERE IS NO ADEQUATE FACTUAL BASIS FOR PETITIONERS' POSITION.

As indicated above, the trial court rejected defendants' motion to dismiss on both factual and legal grounds. The trial court doubted that this Court intended in *Dayton* to change the law that systemwide discrimination calls for a systemwide remedy. See Part B, *infra*. Nevertheless, the trial court examined petitioners' position carefully, to determine whether they had presented proof adequate to support dismissal if their view of *Dayton* should prove correct. Petitioners attempted to use an "alternate universe theory" (A-42), suggesting hypothetical enrollments by race for certain schools. After describing petitioners' methodology, the trial court observed:

> The Court doubts that the Supreme Court intended *Dayton* to be quantified in precisely this manner. But even assuming the validity of defendants' view, their attempted application of it is fraught with difficulties. The hypothetical figures representing what would have happened are based on numerous retrospective assumptions of *questionable soundness*. (A-43-44) (emphasis supplied)

Defendants offered two principal items of "proof" in their effort to demonstrate elimination of incremental segre-

gative effect, affidavits of two District employees. The trial court rejected that proof, indicating that the affidavits were insufficient for several reasons, including:

1. In several instances they presume that the found acts of discrimination were not discriminatory (A-44);

2. Petitioners ignore obvious facts, such as the need to close schools and transport pupils in a time of declining enrollment (see A-44) and the fact that the District had prior to 1972 embarked upon a program of school pairings and clusters; and

3. Petitioners failed to account for the repercussions of such facts known in 1972 as the need for school closings (A-44), and the availability of new transportation aid.

These deficiencies led the trial court to find that petitioners' hypotheticals as to schools purposefully maintained as identifiably black schools were "unreliable" (A-45), and to reject petitioners' evidence.

Petitioners complain that the trial court "rendered it impossible to prove the presence of, or the elimination of, incremental segregative effect . . ." (Petition, p. 13). Petitioners misread the trial court's decision. We agree that it is difficult in a systemwide case to prove elimination of incremental segregative effect; the attempt may even be futile in a case involving pervasive, systemwide segregation. However, it is unnecessary and inappropriate on the record in this case to reach that issue. What the trial court held in this case was not that proof would necessarily be impossible, but that petitioners wholly failed to prove the

elimination of incremental segregative effect. The court of appeals affirmed that holding. Neither court, of course, was obliged to accept as accurate the affidavit opinion testimony of defendants' employees. *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U.S. 290, 292 (1934); *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U.S. 620, 627 (1944); and *Solomon* v. *Renstrom,* 150 F. 2d 805, 808 (8th Cir. 1945).

It is not the responsibility of either the trial court or the court of appeals to supply the defendants' deficiencies of proof.[3] Two factitious affidavits grounded upon artificial, biased, inaccurate, incomplete hypotheticals are not sufficient basis for dissolving an injunction. Neither are they an adequate record for review in this Court of any issue purporting to be of Constitutional import.

B. *DAYTON* DID NOT REQUIRE COURT TO IGNORE SYSTEMWIDE IMPACT OF SYSTEMWIDE DISCRIMINATION.

This Court has made it clear that "if there has been a systemwide impact" of discrimination, then "may there be a systemwide remedy." *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977); *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 213

[3]One method for proving elimination of the incremental effects of past discrimination would be to prove compliance with the orders of the trial court. We have urged dismissal of this litigation for years, conditioned only upon defendants coming into compliance and remaining there long enough to assure that compliance is not "ephemeral" (A-51). We have suggested that, upon compliance, the case be placed on the inactive calendar with a view to seeing it dismissed within two to three years in the absence of a new need for court review. *Cf. United States* v. *Texas (San Felipe del Rio),* 509 F.2d 192 (5th Cir. 1975). All this is not to say there is no other way to prove elimination of incremental effects of past discrimination, such as through expert testimony of students of the effects of discriminatory conduct, but only to say defendants have not offered adequate proof.

(1973). To avoid having two systems of law, one for the South and one for the North, it is necessary to acknowledge that a systemwide remedy may be appropriate in a northern school system. When systemwide discrimination is proved, as in Minneapolis, it is both appropriate and necessary to fashion a systemwide remedy to eliminate all effects of that discrimination. The trial court was well aware of the need for the extent of the remedy to fit the extent of the wrong, stating:

> The remedies imposed in this case have been formulated with the understanding that remedies must be tailored to the wrong and have been proper in all respects. (A-46)

The trial court has also been extremely sensitive (perhaps overly-sensitive, as respondents perceive it) to the need to leave educational policy decisions in the hands of defendants. This sensitivity has been demonstrated from the onset of this litigation (see A-34), in giving the District three years to implement an integration plan, and at each successive stage of this litigation.

It would be particularly inappropriate to require reexamination of the remedy the trial court formulated in this case, inasmuch as the decree was entered six years ago and never appealed. Petitioners may not challenge the validity of the judgment as entered. *Cf. Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. 424, 432 (1976); see *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). Petitioners have admitted noncompliance (prior to this fall) with an unappealed injunction; they have failed to show any change in facts to justify vacating the decree; the law they point to as requiring the decree to be vacated, the

Dayton decision, expressly affirms the power of a district court to enter a decree of the type here involved. Petitioners have failed to satisfy any of the requirements of Rule 60(b)(5), Federal Rules of Civil Procedure, for vacating a judgment. To require reexamination at this late date of the 1972 injunction on the record in this case would be to invite reexamination of the final decree in virtually every school integration case in this nation.

C. PETITIONERS' ALTERNATIVE MOTION FAILS, ALSO, TO RAISE ISSUES THIS COURT SHOULD ADDRESS.

Petitioners moved, in the alternative, for modification of the injunction. As noted, the Court granted that motion in part, raising guidelines for enrollment of black and Indian students by four percent. Petitioners had requested an increase of eight percent, plus a special increase that would have affected one school with a large enrollment of Indian students. The difference between four and eight percent hardly rises to the level of Supreme Court significance. The trial court acted well within its discretion. As to the proposed variance for Indian students, the trial court acted on both factual and legal grounds. The court made a factual determination that the needs of Indian students "have been and can be met by means other than promoting segregation" (A-56). The close interrelationships among the school most affected by petitioners' proposal and those near it also justified denial of the motion (A-57). Legally, the trial court was persuaded that a compelling need for segregating Indian students would be required to justify any such action (A-57). However, it was not necessary to reach that issue as the District showed no real need for segregation at all (A-56-57).

Conclusion

For the reasons set forth above, the petition should be denied.

Dated: December 13, 1978.

Respectfully submitted,

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