Gorman

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14517

JAMES E. SWANN, et al.,
Plaintiffs-Appellees

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,
Defendants-Appellants

On Appeal from the United States District Court
for the Western District of North Carolina

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTORY NOTE

This memorandum is submitted in response to this Court's order of March 6, 1970, designating the United States as amicus curiae and inviting submission of a brief and participation in oral argument. The government has not previously participated in the case.

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We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

DISCUSSION

We think that the principal problems which this Court may need to address concern the adequacy of the desegregation plan proposed by the school board and rejected in part by the district court and the appropriate ways in which a district court might respond to a school board's profferring unacceptable plans and proposals over an extended period of litigation.

A. As we understand it, the school board's plan here relies wholly on unitary, contiguous zoning and would make all schools to which white students are assigned no more than 40 percent Negro, leaving nine elementary schools (enrolling over one-half of the district's Negro elementary students) and one junior high school virtually all-Negro. It appears that the zones of all but two Negro schools adjoin zones served by predominantly white schools. __/ Marie Davis Elementary School, for example, is one of the

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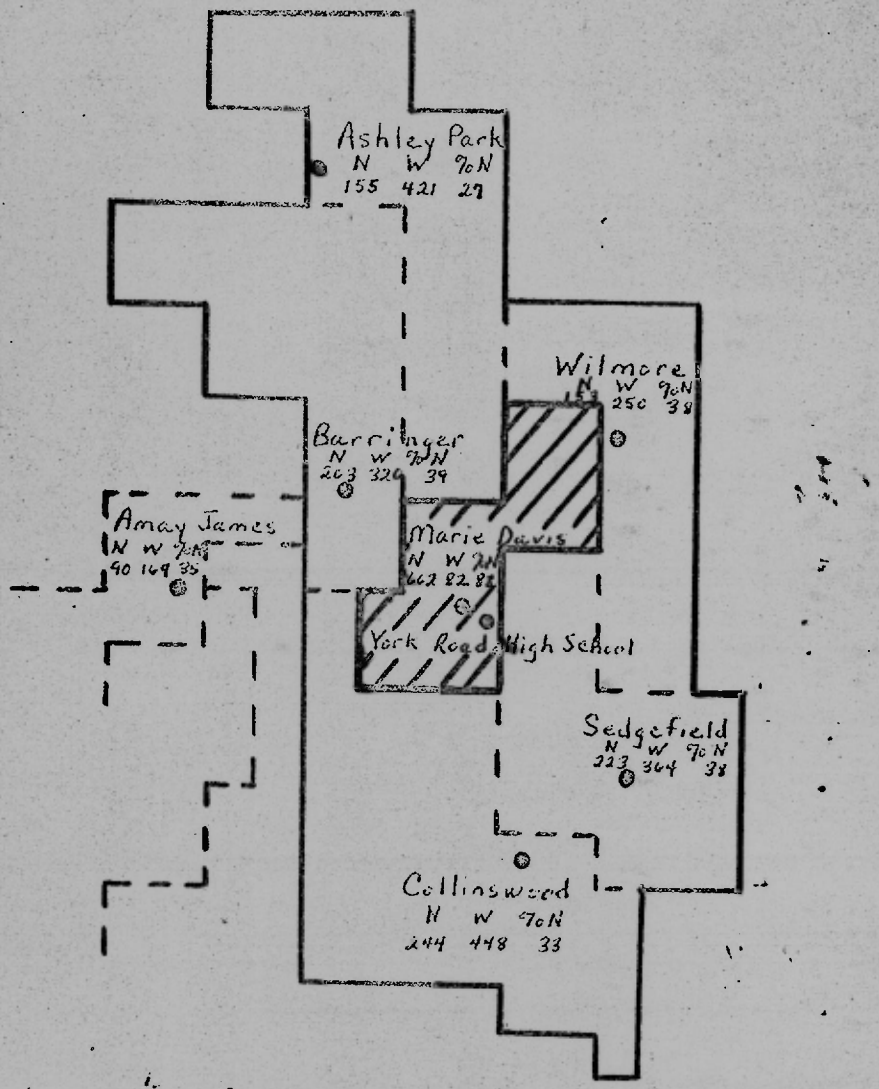
__/ See maps, infra pp. 4-5.

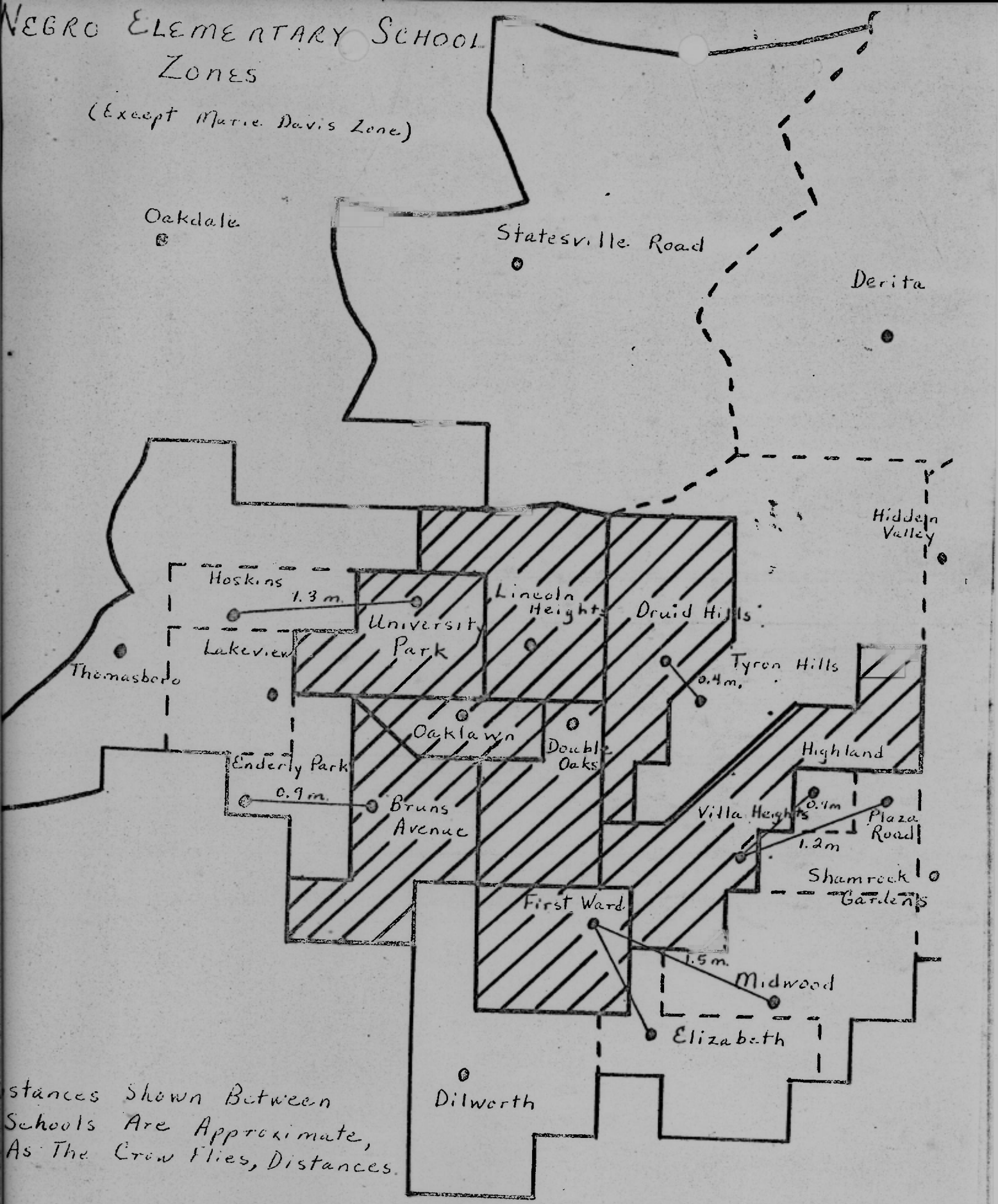
Marie Davis Zone



Distance[1] Between Marie Davis and:

Barringer - 0.7 m.
Wilmore - 1.1 m.
Sedgefield - 1.2 m
Amay James - 1.4 m.
Collinswood - 1.4 m.
Ashley Park - 2 m.
York Road High School - 0.1 m.

1. Approximate Distance, Crow-fly, Derived From Street Map Of City Of Charlotte


NEGRO ELEMENTARY SCHOOL ZONES
(Except Marie Davis Zone)
Oakdale
Statesville Road
Derita
Hidden Valley
Hoskins
1.3 m.
University Park
Lincoln Heights
Druid Hills
Lakeview
Themasboro
Tyron Hills
0.4 m.
Oaklawn
Double Oaks
Highland
Enderly Park
0.9 m.
Bruns Avenue
Villa Heights
0.4 m.
Plaza Road
1.2 m.
Shamrock Gardens
First Ward
1.5 m.
Midwood
Elizabeth
Dilworth
Distances Shown Between Schools Are Approximate, As The Crow Flies, Distances.

schools which would be nearly all-Negro (enrolling 662 Negro and 82 white students) under the school board's proposed plan. Five other elementary schools (together enrolling 978 Negroes and 1803 whites) serve zones adjacent to the Marie Davis zone. Each of those schools would be between 62 and 73 percent white. The same would be true of Piedmont Junior High School scheduled to be 90 percent Negro while no other junior high school in the system would be more than 39 percent Negro.

This plan, of course, like any other desegregation plan, must be measured in terms of its effectiveness when viewed in light of such alternatives as may be available. Green v. County School Board, 391 U.S. 430, 439, 441 (1968); Raney v. Board of Education, 391 U.S. 443, 447-48 (1968); Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968). Unitary zoning in our view, does go far toward disestablishing a racially segregated, dual school system, see Ellis v. Board of Public Instruction of Orange County, No. 29,124 (5th Cir., Feb. 17, 1970), for it would eliminate dual, overlapping attendance areas, "[t]he central vice in a formerly de jure segregated public school system," United

States v. Jefferson County Board of Education, 372 F.2d 836, 867 (5th Cir. 1966), aff'd on rehearing, 380 F.2d 385 (5th Cir. 1967) (en banc) (per curiam), cert. denied sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967); see Jones v. School Board of Alexandria, 278 F.2d 72, 76 (4th Cir. 1960). Indeed, it seems apparent here that many of the school board's proposed zones were so drawn as to maximize desegregation, and that goal is consistent with our view of a school board's constitutional obligations. Felder v. Harnett County Board of Education, 409 F.2d 1070, 1074-75 (4th Cir. 1969) (en banc); United States v. Indianola Municipal Separate School District, 410 F.2d 626, 628-29 (5th Cir. 1969); Henry v. Clarksdale Municipal Separate School District, 409 F.2d 682 (5th Cir. 1969); United States v. Greenwood Municipal Separate School District, 406 F.2d 1086, 1092-93 (5th Cir. 1969); United States v. Greenwood Municipal Separate School District, No. 28,690 (5th Cir., Jan. 8, 1970) (per curiam); Valley v. Rapides Parish School Board, No. 29,237 (5th Cir., Mar. 6, 1970); cf. Brewer v. School Board of Norfolk, 397 F.2d 37 (4th Cir. 1968) (en banc).

Nevertheless, there are two aspects of the school board's plan which are not without difficulty. First, the school board categorically declined to consider altering any school's grade structure, ruling out such techniques as pairing, grouping, and clustering or using a "home-base" method of combining existing facilities. But, as a legal matter, the courts have held that pairing is a legitimate tool of accomplishing complete desegregation. See, e.g., Green v. County School Board, supra, at 442 n.6; Board of Education of Oklahoma City v. Dowell, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931 (1967); Felder v. Harnett County Board of Education, supra at 1074; Nesbit v. Statesville City Board of Education, 418 F.2d 1040, 1042 (4th Cir. 1969) (en banc) (per curiam); Hall v. St. Helena Parish School Board, 417 F.2d 801, 809 (5th Cir. 1969); United States v. Choctaw County Board of Education, 417 F.2d 838, 842 (5th Cir. 1969). Accordingly, if it appears that the racial characteristics of the remaining Negro schools can be eradicated by pairing, the decisions suggest that a school board is obligated to explore that possibility. See Nesbit v. Statesville City

Board of Education, supra; Kemp v. Beasley, No. 19,782 (8th Cir., Mar. 17, 1970); Valley v. Rapides Parish School Board, No. 29,237, at n.2 (5th Cir., Mar. 6, 1970).

The second difficulty is with the school board's use of a limitation that "[n]o school district to which white students are assigned should have less than 60 percent white student population." Amendment to Plan for Further Desegregation of Schools, Nov. 17, 1969, at 2. It seems apparent that, wherever unitary zoning would produce a school which is more than 40 percent Negro, this limitation and a prohibition on pairing inevitably require perpetuation of an all-Negro school. As the district court observed, such a use of a "60-40 ratio is a one-way street." Opinion and Order, Dec. 1, 1969, at 3. While such a ratio may be acceptable in some circumstances, we do not believe that it can be used to perpetuate segregation. See Lee v.

Macon County Board of Education, C. A. No. 604-E (M.D. Ala., April 3, 1970) (Conecuh County). __/

__/ Three cases in which the United States is an appellant are now pending before this Court and involve a similar use of racial percentages limiting desegregation: United States v. School Board of Franklin City, No. 14,276; United States v. County School Board of Southampton, No. 14,278; Beckett & United States v. School Board of Norfolk, (not yet docketed).

B. In reviewing district courts' remedial decisions in school-desegregation cases, appellate courts should consider the function of the district court as enunciated in Brown II:

> School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. . . .
>
> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

Brown v. Board of Education, 349 U.S. 294, 299-300 (1955). Subsequent decisions of the Supreme Court in school-desegregation cases have adhered to the principle that district courts have wide discretion in fashioning appropriate remedies. See, e.g., Green v. County School Board, 391 U.S.

430, 438 n.4, 439, 442 n.6 (1968); Griffin v. County School Board, 377 U.S. 218, 232-34 (1964); cf. Carter v. Jury Commission, 396 U.S. 320, 336-37 (1970); Turner v. Fouche, 396 U.S. 346, 355 (1970). Most recently, in United States v. Montgomery County Board of Education, 395 U.S. 225 (1969), while not holding that school boards have a constitutional duty to racially balance faculties, the Supreme Court held that it was fully within a district court's discretion to require compliance with such a standard; and in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) (per curiam), the Court authorized requiring implementation of educator-devised desegregation plans although the Court recognized that those plans were not the exclusive means of carrying out constitutional mandates.

Yet district courts are commissioned by Brown II to give weight to "public and private considerations," 349 U.S. at 300; Green v. County School Board, supra speaks in terms of plans that are "reasonally available" and "feasible," 391 U.S. 441, 439; and Mr. Justice Harlan in Carter v. West Feliciana Parish School Board, 38 U.S.L.W. 3265 (U.S., Jan. 14, 1970) refers to

the "workability" of proposed desegregation plans. Such references suggest that district courts should be appropriately guided by considerations of educational soundness administrative feasibility, and the resources available to defendant school boards.

References in the Civil Rights Act of 1964 to busing for the purpose of achieving racial balance, 42 U.S.C. §2000c-6(a), may have a similar utility. Those provisions are not, of course, prohibitions on either school boards or federal courts, for they were designed simply to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the constitutionally unsettled question of whether school boards were obligated to overcome purely adventitious, de facto segregation. See, e.g., 110 Cong. Rec. 2280 (Congressman Cramer), 13820 (Senator Humphrey), 13821 (Senator Javits); United States v. School District 151, 404 F.2d 1125, 1130 (7th Cir. 1968); United States v. Jefferson County Board of Education, 372 F.2d 836, 886 (5th Cir. 1966). The references suggest however, that courts might carefully consider whether, for the purpose of achieving a precise, system-wide racial balance, a plan would require a school board

involuntarily to make unreasonable increments in transportation expenditures, the number of students bused, distances traveled, and the like. Thus, we think that the question facing this Court is whether, in view of the district court's supplemental findings, the circumstances of the case, and the alternatives reasonably available, the court below invoked a remedy so extreme as to constitute an abuse of discretion. The difficulty in measuring the court's decree against the above considerations is the absence of any other acceptable plan in the record.

C. This Court, then, may want to consider what options are now available to the district court as a result of changes in practical considerations of timing. The district court, in its February 1970 decision, considered the mandates of the Supreme Court in Alexander v. Holmes County Board of Education, supra, and Carter v. West Feliciana Parish School Board, supra, and subsequent decisions of this Court, Nesbit v. Statesville City Board of Education, supra; Stanley v. Darlington County School District, No. 13,904 (4th Cir., Jan. 19, 1970), as requiring immediate implementation of a desegregation plan and, therefore, directed the school board to implement the available plan which, in the Court's view, was consistent with the board's constitutional obligations. As a practical matter, the stays recently granted by this Court and the district court have obviated the urgency in adopting a plan occasioned by the need for implementation during this school year. Consequently, the district court now has an opportunity to increase the options available to it.

We would suggest that the district court's earlier suggestion that the school board consult educational experts from the Office of Education of the United States Department of Health, Education and Welfare now be made a mandatory requirement. See Alexander v. Holmes County Board of Education, supra; United States v. Hinds County School Board, 417 F. 2d 852 (5th Cir. 1969) (per curiam); Whittenberg v. Greenville County School District, 298 F. Supp. 784 (D. S.C. 1969); Singleton v. Jackson Municipal Separate School District, No. 26,285 (5th Cir., Dec. 1, 1969) (en banc) (per curiam). We think that, in the event that the case is remanded for that purpose, it would be appropriate for this Court to indicate some guidelines for the formulation of a new plan, including, for example, directives to consider techniques of drawing zone lines to promote rather than frustrate desegregation and pairing, grouping, clustering, and school consolidation; any new plan should also take into account such resources as may be available to the school board to desegregate its system more fully. It would be appropriate for this Court to provide a reasonable timetable within which a

final plan is to be approved well before commencement of the 1970-1971 school year. Moreover, the district court should retain jurisdiction until such time as "it is clear that state-imposed racial segregation has been completely removed." Green v. County School Board, supra at 439.

Respectfully submitted,

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