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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2508

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY, et al.,
(AUSTIN INDEPENDENT SCHOOL DISTRICT)

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether the district court erred in:

- (a) Finding that the Austin Independent School District had not discriminated against Mexican-American students in any manner.
- (b) Approving the school district's plan of student assignment for the 1971-72 school year.

STATEMENT

1. Procedural History

This school desegregation case was filed by the United States pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6(a) and (b), on August 7, 1970 against the Texas Education Agency and seven independent school districts, including the Austin Independent School District (hereinafter, the defendants or the AISD), located in the Western District of Texas. The complaint alleged that these school districts had traditionally operated dual school systems based on race and that their present student and faculty assignment policies had failed to eliminate all vestiges of these dual systems. In addition, it was alleged that three of the local districts, including the AISD, were discriminatorily assigning Mexican-American students to schools identifiable as Mexican-American schools or as schools intended for only black and Mexican-American students.^{1/}

^{1/} After this complaint was filed, a motion to intervene as plaintiff and complaint in intervention were filed on behalf of Mexican-American students. This motion was denied by the court on August 24, 1970. Subsequently, in February, 1971 a separate action was brought on behalf of the Mexican-Americans against the AISD. On June 10, 1971 the court denied the motion of plaintiffs in that case for consolidation and joint hearing of that case with this action.

On August 7, 1970 the district court issued an order requiring the defendants, among others, to formulate and submit a desegregation plan to the Texas Education Agency and representatives of the Department of Health, Education and Welfare (hereinafter HEW). If no agreement was reached between the parties as to an acceptable plan, the defendant school districts and HEW were to file respective plans with the court. A hearing concerning the plans developed for the defendants was held on August 27, 1970 at which the United States submitted an interim desegregation plan prepared by HEW. After the hearing the district court orally ordered that this interim plan be implemented immediately. On September 4, 1970 the district court amended the oral order in a written order requiring immediate implementation of the standard provisions of Singleton v. Jackson Municipal Separate School System, 419 F. 2d 1211 (5th Cir. 1969) pertaining to faculty and staff, construction, transportation, majority-to-minority transfer provisions and attendance outside the system. In addition, HEW was ordered to conduct a comprehensive study of the Austin School District and prepare a plan to completely desegregate all schools in

the district. ^{2/} Following court orders of December 15, 1970, February 26, 1971, April 14, 1971 and May 7, 1971 extending the date for filing plans, the parties filed desegregation plans with the district court on May 14, 1971. ^{3/}

A six day trial on the merits was held June 14 through June 21, 1971. On June 28, 1971 the district court entered a memorandum opinion and order which found that, while Mexican-Americans constituted a separate ethnic minority in Austin, no de jure discrimination on the basis of race or ethnic origin had been practiced against Mexican-Americans in the operation of the AISD. As to blacks, the court found that vestiges of the dual school system based on race still existed. The court ordered the parties to renegotiate in an effort to reach agreement on a common plan based on these findings and upon certain guidelines contained in the order.

^{2/} Defendants' Officials were ordered to consult and cooperate with HEW in preparation of the plan; if the parties were able to agree upon a plan, it was to be submitted to the court by December 15, 1970, and if the parties failed to agree, separate plans were to be filed by the parties.

^{3/} Defendants' plan as filed on May 14, 1971 is contained in Defendants Exhibits 31, 32, 33, 35, 36, 37, 39, 40. The plan was updated and modified slightly at trial. (See Def. Ex. 77, 78 and 80; Tr. 930-933.) The HEW plan was filed in the form of a letter to Dr. Jack Davidson commenting on defendants' proposal and making further recommendations.

The parties jointly reported to the district court on July 15, 1971 that although agreement had been reached on defendants' high school plan, 4/ disagreements still existed concerning the junior high and elementary school plans. On July 19, 1971 the district court entered another memorandum opinion and order approving the defendants' desegregation plan, and notice of appeal from both the June 28 and July 19, 1971 memorandum opinions and orders was filed by the United States on August 3, 1971.

2. Decision of the Court Below on Discrimination

In its June 28, 1971, Memorandum Opinion and Order, the district court specifically found that Mexican-Americans constitute a separate ethnic group in Austin. However, the court held that there has been no de jure discrimination against Mexican-Americans, based on its findings of fact set out as follows:

4/ Agreement upon the high school plan was based upon the court's finding of June 28, 1971 and it was stated that nothing in this report was to be read to indicate agreement with those findings by both parties.

- (a) The Austin Independent School District has never adopted, published or promulgated any written or unwritten rules, regulation or policies having as their purpose the discrimination against, or segregation or isolation of, Mexican Americans.
- (b) The Austin Independent School District has never discriminated against, or attempted to discriminate against, isolate or segregate Mexican Americans in any form whatsoever, particularly in:
 - (1) site location of schools;
 - (2) school construction;
 - (3) drawing of school attendance zones;
 - (4) student assignments;
 - (5) faculty assignments;
 - (6) staff assignments;
 - (7) faculty and staff employment;
 - (8) extracurricular activities; and
 - (9) transportation.
- (c) The Zavala and West Elementary Schools were not built for the purpose of discriminating against, isolating or segregating students on the basis of Mexican American ethnic origin. 5/

The court also found that vestiges of the previous dual system with respect to black students still exist. Because of the general nature of the court's findings on the question of discrimination, we will set out the facts in this area in some detail.

5/ Memorandum Opinion and Order, June 28, 1971, p. 2 and footnote 12. Despite finding no de jure segregation against Mexican-Americans, the court stated it would "consider the effect" upon Mexican-Americans of any plan submitted by the parties. Id., p. 6.

3. Facts

A. School District Demography

The AISD encompasses the City of Austin and some territory outside the city limits, extending approximately 30 miles north and south and about 25 miles east and west, with a total area of 230 square miles. During the 1970-71 school year a total of 35,496 (65%) Anglo students, 11,194 (20%) Mexican-American students and 8,284 (15%) black students were enrolled in 74 schools in the district. (Def. Ex. 79).

The black and Mexican-American populations are concentrated largely in a region known as East Austin, an area bounded roughly by an interstate highway and downtown Austin on the west, 19th Street and the municipal airport on the north, the Colorado River (and old Colorado school district) on the south, and the school district line on the east.^{6/} The black population is generally concentrated in the northern sector of this area, while the Mexican-American population

^{6/} The vast majority of the city's low income families are among the minority 35 percent of the population and are concentrated in the eastern part of the city. (Def. Ex. 42, p. 9). ✓

resides primarily in the southern sector. (See Appendix C to Brief^{7/})
A total of eighteen schools, all of which are over 90% minority, are located in this area; eight of these schools are over 95% black, four are over 95% Mexican-American, and six are over 90% Mexican-American and black. Approximately 77% of the district's black students and 59% of the district's Mexican-American students attended these schools in 1970-71.^{8/}

Outside of East Austin the population is primarily Anglo, but there are three schools with a minority enrollment of over 70%. There is a small black community in the north central portion of the district served by the St. Johns Elementary School (98% minority in 1970-71); a concentration of Mexican-Americans south of the river and west of the interstate served by the Becker Elementary School (75% minority in 1970-71); and a predominantly minority area directly north of East Austin between the airport and the interstate, served by the Maplewood Elementary School (70% minority in 1970-71). Prior to the 1969-70 school year this was a white Anglo school.

^{7/} Defendants' Exhibits 5, 10, 12, filed in August, 1970, are pupil locator maps showing Anglo, black and Mexican-American student concentrations throughout the school district. Defendants' Exhibits 27, 28 and 29, filed in May, 1971, are similar maps, but indicate only black and "white" (Mexican-Americans being counted as whites) student concentrations.

^{8/} Enrollments for all schools for 1970-71 are shown in Def. Ex. 79.

B. Historical Student Assignment Policies

The defendants have traditionally assigned students on the basis of attendance zones, 9/ but until 1955 dual overlapping zone lines were maintained for all "white" and "black" schools. In 1953-54 nine all-black schools were maintained under this system -- one senior high school, one junior high school and seven elementary schools. 10/ The secondary schools and three of the elementary schools were located in the area of heaviest black concentration between 19th and 6th Streets. 11/

9/ Tr. p. 330.

10/ For location of these schools, see Def. Ex. 91, p. 43 and map 8). One small elementary school, Montopolis, was located in the irregularly shaped strip of land south of the river in southeast Austin. **Three other elementary schools --** Brackenridge, Clarksville and St. Johns -- were located outside of East Austin to serve small black communities. Approximately 89% of the district's black secondary students resided in East Austin (Gov. Ex. 3-B); the remaining 11% (or approximately 160) of the eligible students had to travel to East Austin for junior and senior high school.

11/ The 1947 school survey refers to this area as the "mother zone." It points out that if the survey recommendations for new schools are followed:

The population will desire to live there instead of moving elsewhere, especially the present home owners and those with children. In so doing, the School Board will have contributed a valuable service to the non-white population as well as to the people of Austin. (Def. Ex. 91, p. 45).

Although there was not rigidly-enforced separation of Mexican-American students to the degree that blacks were separated, there were some dual overlapping zones between "Mexican" and Anglo elementary schools. The earliest information concerning a "Mexican" school relates to the West Avenue school located at the corner of West Avenue and Fourth Street, five blocks south of Pease, an Anglo elementary school. Unlike all other elementary schools in Austin, the West Avenue school had no defined geographic zone (Tr. 331); instead, it shared a zone with the Pease school and enrolled a majority of the Mexican-American students in the school district.^{12/}

In 1924 the defendants built a new elementary school at Comal Street and Third Avenue, named the Comal Street School. This school was designated as a "Mexican" school, and was built to serve the "large number of non-English speaking students"

^{12/} Def't. Ex. 69 indicates that in 1916 West Avenue, a five classroom structure, enrolled 280 Mexican-Americans and no Anglos. Pease, a fourteen classroom school, enrolled 631 Anglos and 40 Mexican-Americans. In addition, there were nine other "white" elementary schools operated at this time. The scholastic census for 1915-16 indicated that there were only 316 Mexican-American students in the entire school district. (Gov't. Ex. 1) The West Avenue school continued in operation as a "Mexican" school until 1947.

who attended Palm, Bickler and Metz. ^{13/} At that time these were the only white schools (other than West Avenue) with more than 20 Mexican-American students. ^{14/} In the late 1920's, the West Avenue and Comal Street schools enrolled more than half the Mexican-American students attending school in the district. ^{15/}

By 1934 the number of Mexican-American students in the Austin elementary schools had increased, particularly in East Austin. ^{16/} In addition to West Avenue and Comal Street, which enrolled 470 or about 45% of the Mexican-American

^{13/} Gov't. Ex. 6-B, Minutes, September 5, 1924; A Statement by the Board, Nov. 26, 1923. ✓✓

^{14/} Def't. Ex. 69. ✓

^{15/} Complete enrollment data has not been provided, particularly for the early years. For preparation for trial of this case, the defendants examined microfilm of enrollment cards and counted Spanish surnames for some years. (Def't. Ex. 69, Tr. pp. 408-409; 510-14) In addition, selected minutes from 1920-1947 (Gov't. Ex. 4) show total enrollment of schools in the system, but without a breakdown of Mexican-Americans and Anglos. Since the evidence shows that Comal Street and West Avenue were virtually all Mexican-American, these minutes indicate the number of Mexican-Americans at these schools. ✓✓

^{16/} The Mexican-American scholastic population in Austin has increased steadily. From 1915 until 1950 the number of Mexican-American scholastics increased from 316 to 3,922, and from 4.6% of total district population to 20.6%. (Gov't. Ex. 1) While the number of Mexican-Americans has continued to increase since 1950, the percentage of the district scholastic population has remained constant at approximately 20%. ✓

student population,^{17/} there were significant numbers of Mexican-American students in Bickler and Metz.^{18/}

In 1935 the defendants proposed a bond issue for the construction of new schools and additions to old schools, part of which was for construction of a new "Mexican" school to meet the "desire to provide for the large group of Spanish-speaking citizens of Austin a suitable, well-equipped building as near the center of this population as possible." (Gov't. Ex. 6-C, Minutes, Aug. 8, 1935) Upon passage of this bond

17/ Gov't. Ex. 4; Def't. Ex. 69.

18/ According to Def't. Ex. 69, the schools other than West and Comal with 20 or more Mexican-American students in 1933-1934 were:

	<u>M/A</u>	<u>A</u>
Bickler	255	202
Metz	164	490
Palm	63	527
Fulmore	49	593

The record also indicates that in at least two of the majority Anglo schools (Winn and Fulmore) separate classrooms were maintained for Mexican-American students enrolled there. (Gov't. Ex. 6-A, Minutes, Aug. 13, 1923, Jan. 11, 1932)

issue, a new elementary school, Zavala, opened in 1936 at Third and Canadian Streets, three blocks east of the Comal Street school, which was then closed. Three blocks south of this new "Mexican" school ^{19/} was the Metz school, which served the Anglo children in this area. Defendants drew one zone line encompassing the two schools, and Mexican-American students who lived in this zone were encouraged and, in some cases, directed by the principal of Metz to attend Zavala; ^{20/} Anglo children who lived across the street from Zavala nonetheless attended Metz, and Mexican-Americans living nearer to Metz traveled past Metz to go to Zavala. Under this arrangement Zavala enrolled all Mexican-Americans and Metz was virtually all Anglo. (Tr. pp. 40, 49, 319-20; Gov't. Ex. 19,

^{19/} In 1938 the planning commission approved a "Mexican" housing project located "within a block of the new Mexican school and within walking distance from the Mexican recreation and playground park." (Gov't. Ex. 16, Minutes of February 4, 1938)

^{20/} Gov't. Ex. 6-D; Tr. 29, 67-8, 319-20. With the construction of Zavala and closing of Comal in 1936, West and Zavala were the only schools in the district which were encompassed by the attendance zones of other elementary schools, i.e., Pease and Metz. (Tr. 331)

p. 12-13)^{21/} By 1940 there were approximately 1400 elementary age Mexican-American children (Gov't. Ex. 1) and 791 of these students (56%) were enrolled in the two "Mexican" schools^{22/} whose attendance zones overlapped Anglo school zones.

At the same time that Zavala was built in 1935, the defendants discontinued as a regular elementary school the Bickler school, which was the only Anglo school in which Mexican-American students had become a majority. The facility was converted into an "opportunity" school for low-achieving junior high school students, and the curriculum became vocationally oriented. (Def't. Ex. 69; Gov't. Ex. 6-C, Minutes,

^{21/} One student who attended Metz in 1941 recalled only five or six Mexican-Americans at that school. (Tr. 49) Mexican-Americans complained about this situation in 1944, requesting the Board to require Anglos to attend Zavala, but no action was taken. (Gov't. Ex. 6-H, Minutes, April 10, 1944, July 11, 1944; Gov't. Ex. 19, p. 9-10) Not until 1954-55 were zone lines established between Metz and Zavala, when this area had become predominantly Mexican-American, with a census of 329 Anglo and 1018 Mexican-American elementary students. (Tr. 429; Gov't. Ex. 3-B) The zone line was drawn along Third Street immediately adjacent to the Zavala school. (Gov't. Ex. 9-B) As a consequence, Zavala remained virtually all Mexican-American, while Metz had a predominantly Mexican-American census in its area. The Anglo enrollment at Metz has further declined since that time, leaving it virtually all Mexican-American today.

^{22/} West Avenue enrolled 65 students and Zavala enrolled 726. (Gov't. Ex. 4) While there were approximately 1400 eligible elementary students, the high dropout rate of Mexican-American students makes it unlikely that this number was enrolled in school. (See Gov't. Ex. 20)

Aug. 8, 1935)^{23/} The regular elementary students who had attended Bickler were reassigned to nearby schools by abolishing the Bickler zone and reapportioning it among the zones for Winn, Palm and Metz (Zavala). Additional classrooms were provided at Winn and Palm to accommodate these children. (Gov't. Ex. 6-C, Minutes, August 8, 1935, November 14, 1935)

In 1939, a committee from the Winn school complained to the Board about the Mexican-American pupils who had been transferred to that school from Bickler stating that they felt the Winn school "should not be asked to take all of these pupils and asked for some relief." (Gov't. Ex. 6-F,

^{23/} Bickler was located at 11th and what is now the Inter-regional. Both Zavala and Bickler (once it became an opportunity school) enrolled a large number of migrant Mexican-American students. Because many of the students at Zavala were older than regular elementary students (Gov't. Ex. 20) certain physical education and homemaking courses were offered to these students. (Tr. 323-4, 425-8, 511)

Minutes, Sept. 11, 1939) On September 25, 1939, the superintendent reported to the board:

... that all Mexican pupils, enrolled in the John B. Winn School, living south of 14th Street, had been transferred to Bickler School, except one boy who is being allowed to complete the 7A grade in John B. Winn. (Gov't. Ex. 6-F)

Apparently the upper elementary grades were subsequently reassigned, because by 1947 Bickler housed only grades one through three in addition to the junior high school special education program. There were 155 primary grade students in Bickler in 1947 when that facility was closed. It was proposed that these students be reassigned to Winn and Palm. The board was advised (Gov't. Ex. 6-F, Minutes, July 11, 1947):

... that the older children in Bickler School are sub-normal and that the primary children are all Latin-American. 24 /

24 / In 1947, before Bickler and West Avenue closed, there were 1,050 students enrolled at Bickler, Zavala and West, the three virtually all Mexican-American schools in the district. (Gov't. Ex. 4) Gov't. Ex. 1 indicates that there were 3369 Mexican-Americans in the census, and approximately 1700 of these were elementary aged students.

During the period prior to 1950 the defendants did not attempt to segregate Mexican-Americans on the secondary level. The dropout rate was very high and comparatively few Mexican-American students enrolled in the junior and senior high schools.^{25/}

C. Student Assignment Policies Since 1954

Beginning in 1955, after the Brown decision, the school board undertook a program for abolishing the dual overlapping zones for black schools. The first phase of this program dealt only with senior high schools (grades 10-12). At that time the district was served by three white high schools and one black high school. Anderson, the black school, served the entire district. The white high schools were Travis - which served the area south of the Colorado River, Austin - which served the central part of the district including the area in

^{25/} Between 1927 and 1943 less than 2% of the high school graduates from Austin were Mexican-Americans, at a time when the school census showed that 15% of the student population was Mexican-American. (Gov't. Ex. 17) See also Def't. Ex. 69 which shows that in 1933 Austin High, the only non-black high school, had only 18 Spanish surnamed students and that in 1934 Allan Junior High, in whose zone most Mexican-American students resided, had only 70 such students, while these schools enrolled a total of 2831 Anglo students. (See also Tr. pp. 53, 251.)

which Anderson was located and McCallum - which served the northern part of the district. For the 1955-56 school year and thereafter, Anderson was given a zone which traced the black residential area in East Austin. (Tr. pp. 341-42)

This zone which commenced at the eastern edge of the school district was an irregular, elongated zone approximately one mile wide from north to south and extended approximately four miles westward into the center of the Austin zone, which bordered it on three sides.^{26/} Simultaneously, the school board adopted a free transfer policy which applied only to the Anderson school. Under this policy, the students zoned into Anderson were allowed to transfer out to traditionally white schools and students living outside the zone were allowed to transfer into Anderson. (Gov't. Ex. 7-A, Board Minutes, Aug. 8, 1955) This transfer policy was not discontinued until 1969. Only one white student attended

^{26/} See map, Appendix B to this brief.

Anderson prior to the 1969-70 school year.^{27/}

Desegregation of grades below the tenth grade progressed on a grade-a-year basis starting in the 1958-59 school year. A zone line for the traditionally black Kealing Junior High was established which was identical to that for Anderson High. Black junior high school students who wished to transfer to traditionally "white" schools were limited in their options to the University Junior High or Allan Junior High depending on where in the Kealing zone the transferring student resided. By this time the enrollment at Allan was predominantly Mexican-American. Like the high school level, free transfer into

^{27/} School census figures for 1955-56 (Gov't. Ex. 3-C) show that approximately 71 Anglo and 27 Mexican-American high school age students resided in the Winn Elementary zone, which for the most part was within the Anderson zone. One hundred and four Anglo and 99 Mexican-American high school age children resided in the Govalle Elementary zone, part of which was in the Anderson zone. Yet only one white child attended Anderson between 1955 and 1969 (Gov't. Ex. 7-E, Background Information on Integration) At the same time black students from outside East Austin transferred to Anderson. For example, in 1955-56 there were 63 black high school students in the St. Johns Elementary area, located in the McCallum High School zone. (Gov't. Ex. 3-C) The first year there is any record of a Negro attending McCallum is 1969-70 when there was one Negro out of a total enrollment of 1928. (Gov't. Ex. 2)

Kealing was permitted, and this policy was not discontinued until 1969.^{28/} Kealing, like Anderson, has remained virtually all black. (Gov't. Ex. 7-E, Background Information).

Elementary students first began desegregating in 1961 with the sixth grade, and by 1963 students in all six elementary grades were allowed to attend formerly all-white schools in their zone. (Gov't. Ex. 7-B, Minutes, July 10, 1961) In 1964 the defendants still maintained two sets of maps of zone lines, one for formerly white schools and one for formerly black schools. (Gov't. Ex. 9-C and 9-D) Black students from Sims could only transfer to Ortega, which by 1967-68 was 50% black, 45% Mexican-American and 5% Anglo; directly north of Sims was Pecan Springs (89% Anglo, 8% black and 3% Mexican-American in 1967-68) to which they could not transfer. Students from Blackshear could only attend Palm

^{28/} Gov't. Ex. 7-B, Minutes, July 14, 1958. Under this policy blacks from outside the Kealing zone continued to transfer to Kealing. For example, Pearce Junior High opened in 1958 with an enrollment of 295 Anglos and 3 Mexican-Americans. Black junior high students from the St. Johns community continued to transfer to Kealing under the transfer policy even though the St. Johns area was within the Pearce zone.

(96% Mexican-American in 1967-68), Metz (98% Mexican-American) or Zavala (96% Mexican-American) while Pease Elementary, directly east of Blackshear, was 85% Anglo. Students from Campbell could only attend Winn.^{29/} Nearby Maplewood to the north, to which blacks could not transfer (until the closing of Winn) remained heavily Anglo (87% in 1967-68). Students from Rosewood and Oak Springs could only attend Govalle Elementary (74% Mexican-American and 12% black in 1967-68).^{30/}

^{29/} Winn was located on 19th and the Interstate and was closed in 1969. In 1961, when blacks first began to transfer, Winn had 161 Anglo and 96 Mexican-American elementary students. By 1967-68 Winn was 63% black and 28% Mexican-American. A new Winn opened in extreme northeast Austin in 1970-71 with a 94% Anglo enrollment.

^{30/} See Gov't. Ex. 9-E. In addition between 1961 and 1965 three small black schools (approximately 60-65 students) were closed: Montopolis (1961); Brackenridge (1965); Clarksville (1965). When Montopolis was closed its students were sent across the Colorado River to the all-black Sims Elementary until all grades were allowed to integrate, when they were assigned to the predominantly Mexican-American Allison Elementary School. (Gov't. Ex. 3-D shows that in 1963-64, 455 Mexican-American and 114 Anglo elementary students resided in this area.) Brackenridge students were reassigned to Becker Elementary, also predominantly Mexican-American. (Gov't. Ex. 3-E shows 426 Mexican-Americans and 298 Anglos in this area in 1965-66.) Clarksville students were reassigned to Mathews Elementary (411 Anglos and 137 Mexican-Americans in 1965-66). (Gov't. Ex. 3-E)

Not until 1969-70 were black elementary students given free choice to attend any school in the district. (Gov't. Ex. 7-H, Minutes, July 14, 1969) Nonetheless, the elementary zone map of today shows that four of the six black schools in East Austin still have zones which overlap with one or more Mexican-American schools. (Def't. Ex. 11)^{31/}

D. Construction Policy Since 1950

After World War II the AISD was faced with a shortage of school capacity, due to the increased student population and the absence of any construction in the district since 1940. In 1950 it embarked on a continuous construction program which has resulted in the opening of 36 new elementary, 9 new junior high and 7 new high schools. (Def't. Ex. 13)^{32/}

^{31/} Campbell's zone had overlapped with Winn; with the closing of Winn in 1969, Campbell now has its own zone. Norman, which opened in 1970 east of Sims, also has its own zone.

^{32/} In 1950, 89% of the district's Mexican-American student population and 93% of the blacks lived in East Austin.

In picking the sites for these schools, the defendants consider capacity and neighborhood need, and claim that race and ethnic origin are not taken into account. (Tr. pp. 453-54) However, one of the major uses of the census material kept by the district is to study trends and projections of population concentration, growth and movement for purposes of planning a building program. (Tr. 329-330) The census has traditionally enumerated the number of black students in the district, and in 1948 and thereafter, the census figures divided the "white" students into "Anglo-American" and "Latin-American" student categories.^{33/}

Much of this construction interacted with changes in student assignment policies adopted following the Brown decision in 1954. On the high school level, only one "white" high school (Austin) was operated until 1953. In that year two high schools -- McCallum in North Austin and Travis in South Austin -- opened; Austin High then served all white students

^{33/}See Tr. 327-28; Gov't Exs. 2, 3. This was one year after the Gubbels' Report (Def. Ex. 91) was prepared for the defendants, recommending school sites and predicting population trends for a 20 year period, and predicting "white" and "non-white" population trends throughout the city and that "lower income groups" would be "induced to settle" in that area of East Austin where Johnston and Allan are located. (Def. Ex. 91, p. 15)

in the central area of the city (including East Austin). In addition, the Gubbels' Report had recommended a new junior-senior high school site in East Austin with a zone including all of East Austin and a predominantly Anglo area north of the University to 45th Street.^{34/} However, in 1955, before this school had been built, the defendants drew a zone for the traditionally black Anderson High School which encompassed the black neighborhood.^{35/} This zone line effectively cut off the possibility of zoning into a new secondary school in the Mexican-American area south of the Anderson zone Anglo residential areas north of East Austin.^{36/} In 1956 the Allan Junior

^{34/} Def. Ex. 91, pp. 23-24. The Gubbels' Report was prepared in the context of the dual school system that existed in 1947; thus, this recommended zone line overlapped the Anderson school.

^{35/} Appendix B to Brief, *supra*, p.18. In drawing this zone line the Board "kept in mind ... the considerable amount of insecurity and competition economically among the two minority groups 'Negro' and 'Latin-American' which composed the great preponderance of families in this area." (Gov't. Ex. 7-E, Background Information on Integration, June 4, 1968)

^{36/} Had the zone lines been drawn in a north-south direction for Anderson and the proposed new high school, each of these school zones would have included Anglos living north of East Austin. (Tr. 355) Reagan High School, located in this area north of the airport and East Austin, was not opened until 1965. Its zone included all the area north of East 19th Street and opened over 90% Anglo. (Def. Ex. 1, Gov't. Ex. 12) Prior to the opening this area was zoned to the Austin High School, rather than the two high schools in East Austin. (Appendix B)

High School burned and the defendants dropped plans for a junior-senior high school on this site and built a junior high school there. (Tr. 469-70; Gov't. Ex. 11-A, Minutes, March 21, 1956) Although the superintendent recommended a more centrally located site,^{37/} a new high school site was selected even further east than the original site.

When this school, named Johnston, opened in 1960 it had a 78% Mexican-American enrollment. (Gov. Ex. 12)^{38/} With the transfer of blacks from Anderson and the continued exodus of Anglos from this area, Johnston is now over 95% minority.

On the junior high level, the AISD operated four "white" junior high schools -- Allan, University, Baker and Fulmore until 1953. Although the zone lines for these schools reflect that most of East Austin was zoned into the centrally located Allan school, the Allan zone included a large portion of West Austin which was virtually all Anglo. In 1953, the

^{37/} See Gov. Ex. 11-A, Minutes, March 21, 1956.

^{38/} This area was rather sparsely populated in the late 1950's. The Gubbels' Report stated that "lower income groups" would be "induced to settle" in this area because of an anticipated development of industry, a sewage disposal plant and a large acreage of overflow land. (Def. Ex. 91, p. 15)

O'Henry Junior High opened in this West Austin area and the zone line for Allan was moved east as a result, substantially reducing the Anglo students within the zone.^{39/}

In 1957 the new Allan Junior High School opened in extreme East Austin with a 75% Mexican-American enrollment (Gov't. Ex. 12), and its zone line was moved further east; fewer Anglo students were included in its new zone. (See Appendix A-3 to this Brief)

When the new Allan Junior High opened, University Junior High remained the only centrally located junior high in the system. The zone for this school included the predominantly Mexican-American area near the Colorado River (near the Palm and Zavala Elementary Schools) and Anglo areas

^{39/} See map in Appendix A-1, A-2 to this Brief. Census figures for 1952-53 indicate that of eligible junior high aged children in this zone, approximately 50% were Mexican-Americans. (Gov. Ex. 3-B) However, because of the high drop-out rate of Mexican-Americans the school enrollment was presumably predominantly Anglo. Census figures for 1953-54 indicate that 721 Anglos and 21 Mexican-Americans lived in the new O'Henry zone, while the census data for the new Allan zone showed that it was 63% Mexican-American. Enrollment at Allan was apparently about 50% Mexican-American in 1956, reflecting the fact that Mexican-Americans continued to drop out of school during junior high school. (Tr. pp. 470, 523)

in the north and northwest part of the zone.^{40/} In 1958 a zone line was drawn for the all-black Kealing Junior High, and blacks from the northern part of the zone were allowed to transfer to University.^{41/} With its central location, and the policy of allowing blacks from the Kealing zone to transfer to this school, the school was attended by a substantial number of each of the three races. In 1966 enrollment was approximately 40% Anglo, 40% Mexican-American and 20% black. (Tr. 374)

The University Junior High School was closed^{42/} at the end of 1966-67 school year, and the following September the Martin Junior High School was opened as its replacement. This school was located in the heart of the Mexican-American community even though other more centrally located sites were

⁴⁰ / See map in Appendix A-3. In 1957-58, the census figures show that 70% of the junior high age students in the University zone were Anglo; 30% were Mexican-American.

⁴¹ / See pp. 19-20, supra. In 1958 the Pearce Junior High School, located in what was formerly the northeast section of the University zone, opened with an enrollment of 295 Anglos and 3 Mexican-Americans. With this reduction of Anglos from its zone, University had 64% Anglo and 36% Mexican-American junior high age students in its zone, according to the 1958-59 census.

⁴² / An agreement between the University of Texas, which owned the property where University Junior High School was located, and the AISD had been severed in 1963. (Tr. pp. 479-81)

considered and rejected. (Tr. 377-79)^{43/} Consequently, it opened with an enrollment of 77% Mexican-American, 20% black, and only 3% Anglo. (Gov. Ex. 12) Anglos who had attended University were rezoned to Pearce, Baker and O'Henry, all 90% Anglo junior high schools, even though in some instances they lived closer to the all-black Kealing Junior High School.^{44/} The zone for Kealing remained the same, but with the closing of University, the nearest junior high schools to which black students could transfer from Kealing were the predominantly Mexican-American Allan and Martin Junior High Schools.^{45/}

^{43/} See map in Appendix A-4 to this Brief. When asked whether any consideration was given to the ethnic makeup of the school when selecting the site, a school official testified that it would continue the integration of "white" and black students who attended University. This official was considering Mexican-Americans as "whites" for purposes of defining integration. (Tr. p. 382)

^{44/} See Appendix A-4, A-5. In addition, a small strip of territory north of 19th Street and south of Manor Road, which had become black (see Def't. Ex. 12), was given an option to attend either of the predominantly Mexican-American schools, Allan or Martin (Appendix A-5), rather than zoned to the Anglo schools. The court order of September 4, 1970 rezoned these students to the predominantly Anglo Pearce Junior High.

^{45/} In 1967, 87% of the black junior high students attended Kealing, Allan and Martin; 63% of the Mexican-American junior high students attended Martin or Allan. (Def't. Ex. 2)

Three of the four all-black elementary schools opened since 1954 are located in East Austin. Sims was opened in 1956 as an all-black school,^{46/} and Oak Springs opened in 1958 to house grades four through six from the all-black Rosewood school. (See Gov. Ex. 12) More recently the Norman school opened in 1970 as an all-black school. The site had originally been purchased as a site for a new junior high,^{47/} but abandoned because the Board felt it would not be desegregated; nonetheless, an elementary school was built on the same site, and, as predicted by the Board, opened all black. (See Tr. pp. 387-390)

^{46/} The Gubbels' Report (Def. Ex. 91, p. 39) had recommended this general area for a "white" school in 1947. By 1956, however, the percentage of whites in East Austin was decreasing (see Gov. Ex. 7-B) and Sims was opened as a black school with an all-black faculty and student body, at a time when elementary age students were still segregated.

^{47/} The Gubbels' Report predicted that part of Census Tract 18 "can be expected to be of the low income group, including the non-white." Because of rising property values near Airport Boulevard the report predicted that "lower income groups will not be able to acquire" property there, but "the non-white will find a more possible area for settlement in the extreme east portion of this tract." (Def. Ex. 91, p. 15) This is where the Norman school is located. Sims school is halfway between Airport Boulevard and Norman school.

A fourth all-black school, St. Johns, was opened in 1958 outside of East Austin, following a recommendation in the Gubbels' Report that a new school be built to replace the existing all-black school in this area.^{48/} It was built with a capacity for 224 students (see Def. Ex. 7), and when it opened it was surrounded by two all-Anglo school zones (Brown and Harris which had opened in 1957 and 1955 respectively); shortly thereafter another all-Anglo school (Andrews) opened with a contiguous zone. While numerous additions have subsequently been made at Harris, Brown and Andrews, St. Johns has remained a small, all-black school. (See Def. Ex. 13) In 1970-71 St. Johns housed 162 students (153 of whom were black), while Brown, Harris and Andrews each housed over 400 students and remained overwhelmingly Anglo. (See Def. Ex. 79)

Each school that has opened in East Austin since 1950 has enrolled predominantly minority race students.^{49/} One

^{48/} Def. Ex. 91. St. Johns is the only all-black school located outside of East Austin.

^{49/} Of the thirty-six elementary schools built since 1950, twenty-nine of these schools were built outside of East Austin and all but three (one opened all black and two were over 80% Anglo) of these 29 schools opened with over 90% Anglo students. Of the nine new junior high schools built, seven were located outside of East Austin, and all but Webb (87% Anglo) opened with an enrollment of over 90% Anglo. Five of the six high schools built were located outside of East Austin and all but Travis (80-90% Anglo) opened with over 90% Anglo students.

high school, two junior high and three elementary schools built in this area opened with between 66% to 84% Mexican-American students.^{50/} Furthermore, three all black elementary schools -- Sims (1956), Oak Springs (1958) and Norman (1970) -- were constructed in this area and the traditionally black Anderson High School was rebuilt on a new site and opened all black in 1953. Zone lines for these schools were confined to East Austin.

Because zone lines for the schools in East Austin have remained static, the elementary schools in this area have become increasingly crowded as school population increased. While new elementary schools have been built to relieve overcrowded conditions in north and south Austin, the predominantly Mexican-American elementary schools in East Austin have been relieved with portable classrooms.^{51/} Placing portable classrooms on these sites

^{50/} Johnston H.S. (1960), 78% Mexican-American; Allan Jr. H. (1957), 75% Mexican-American; Martin Jr. H. (1967), 77% Mexican-American and 20% black; Brooke Elem. (1954), 66% Mexican-American; Allison Elem. (1955), 69% Mexican-American; Ortega Elem. (1959), 84% Mexican-American.

^{51/} Gov. Ex. 14 indicates that the 39 predominantly Anglo schools outside of East Austin have a total of 44 portables while the seven Mexican-American schools in East Austin have 24. Moreover, two of these Anglo schools, with a total of 11 portables (Cunningham and Travis Heights) are being relieved by new schools. (See Def. Ex. 25)

has further crowded these schools, as indicated by the following table reflecting the square feet per pupil at each school:^{52/}

	<u>Number of Schools</u>	<u>Sq. Ft. Per Pupil</u>
M-A Schools	7	282
Anglo Schools	39	681

The defendants have also built additions to schools attended by students predominantly of one race which have had the effect of perpetuating segregation. For example, since 1954 three additions have been made to the all-black Campbell school, while the adjoining Maplewood school has had no construction and remained predominantly Anglo until this year.

^{52/} This chart is derived from multiplying the number of acres of a site by 43,560, and dividing by the number of students enrolled at the school. Mexican-American schools include Ortega, Govalle, Allison, Brooke, Zavala, Metz and Palm. Anglo schools include all schools outside of East Austin as of 1969-70. (Acreage obtained from Def. Ex. 13)

E. Faculty

The faculties and staff of the Austin schools remained entirely segregated until 1965. As of the 1969-70 school year, every black school, including the recently opened Norman School, had a predominantly black faculty although only 16% of teachers in the system are black. In 1967-68 71.7% of the black crossover teachers were assigned to predominantly Mexican-American schools and the remaining 28.3% assigned to the Anglo schools.^{53/} Pursuant to the district court's order of September 4, 1970, the faculties were racially balanced for the 1970-71 school year, except that 58 of 83 of the Mexican-American teachers were assigned to predominantly Mexican-American schools. (Def't. Ex. 79)

F. The Relief Ordered by the Court Below

1. Secondary Schools

On July 19, 1971 the district court approved, as modified,^{54/} the plan submitted by the AISD on May 14, 1971.

^{53/} Def't. Ex. 14. In 1969-70, 43.2% of black crossover teachers were assigned to predominantly Mexican-American schools and 56.8% to Anglo schools.

^{54/} At trial the AISD made certain modifications of their elementary school plan. (Def. Ex. 77, 78, 80; Tr. 930-33) Following the June 28, 1971 order, modifications were made to the secondary plan. See Report and Submission, July 15, 1971.

On the secondary level, both the black Anderson high school and the black Kealing junior high school will be closed in the 1971-72 school year.^{55/} Black students who attended these schools in 1970-71 have been rezoned both contiguously and non-contiguously into the remaining seven high schools and ten junior high schools in the system. (Def. Ex. 35, 36)

The percentage of blacks projected in each high school under this plan ranges from 6.8 at Travis High to 19.7 at Johnston; on the junior high level, the percentage of blacks ranges from 5.1 at O'Henry to 25.2 at Allan. Transportation of 2350 students, virtually all of whom are black, will be required under this secondary school plan, requiring 40 new buses. In order to house these additional students in the existing secondary facilities, 58 new portable classrooms are needed.^{56/} Under this plan the zones for the predominantly

^{55/} The defendants' plan to use these facilities as part of their elementary plan. See p. 36, infra.

^{56/} See Def. Ex. 37. In 1970-71, 2779 elementary and secondary students were transported to school, primarily in the rural areas in the northern and southern portions of the district. (Def. Ex. 24) The defendants owned forty-seven buses in 1970-71, 27 of which were operated on regular bus routes, 13 on special education routes, and 7 spares. (Tr. 831) The 2350 students to be transported under this plan are over and above those students transported in 1970-71.

Mexican-American Johnston High School and Allan and Martin Junior High schools remain virtually unchanged, and each of these schools will remain over 90% minority in enrollment.

Between 1971-73 three new high schools and three new junior high schools will be constructed. New zone lines for these secondary schools will be submitted to the district court for the 1973-74 school year when these new schools are scheduled to open. (Memorandum Opinion and Order, July 19, 1971, p. 11)^{57/}

2. Elementary Schools

The defendants' plan as approved by the district court assigns all students initially by the same zone lines that were maintained in 1970-71, except for the St. Johns school, and which will result in approximately the same degree of racial and ethnic separation that existed in 1970-71.^{58/} In addition, the plan has organized six clusters

^{57/} The defendants submitted projected zone lines for these schools (Def. Ex. 31, 32, 33) which would actually decrease de-segregation. Blacks who will be non-contiguously zoned to three high schools and five junior high schools are rezoned to Johnston, Allan and Martin. Under this rezoning 3 high schools and 7 junior high schools would be 97% Anglo (Def. Ex. 33); at the same time the black enrollments at the Johnston, Allan and Martin schools (which are already over 90% minority group) would be increased. (See also Tr. 906-13)

^{58/} See Def. Ex. 11. In 1970-71, 81% of the black elementary students and 60% of the Mexican-American elementary students attended schools that were over 90% minority. In 1971-72 St. Johns (94% black) will be closed and its students reassigned to Brown (78% Anglo) and Harris (93% Anglo). (Report and Submission, July 15, 1971; Order, September 4, 1970). Overlapping zone lines for black and predominantly Mexican-American schools in East Austin will apparently continue.

of schools which include 40 schools and approximately 22,000 students. Each cluster includes two or three minority schools (at least one of which is predominantly black and one predominantly Mexican-American) and four or five predominantly Mexican-American) and four or five predominantly Anglo schools. (Def. Ex. 78)

Integrated activities for the students in each cluster will be scheduled every fourth week. These activities will consist of (1) visits to "learning resource centers" which will be established at the former black secondary schools which have been closed (Anderson and Kealing) and at a closed elementary school (Baker); (2) inter-site visits in which students of grade level will meet at one of the schools in the cluster; and (3) field trips involving all students from a cluster. These integrated activities will cover four curriculum areas -- fine arts, social studies, sciences and vocational courses. During the integrated activities students will be assigned to small instructional groups of 6-8 students and will include black, Anglo and Mexican-American students. Basic subject areas such as reading and mathematics will continue to be taught only in the school of original assignment. (See Def. Ex. 78, 80; Tr. pp. 773-800)

Transportation of nearly all students in a given cluster will be required during a week of such activities. For one week of activities defendants estimate that 63 buses will be needed for the transportation of one cluster of schools (each cluster contains between 3500-4000 students). Students will be picked up at their neighborhood school after the school day has begun and return before the school day is over,^{59/} thus allowing the district to use the same buses that will transport secondary students to transport these elementary students.^{60/} A full schedule for all six clusters insuring integrated activities 25% of the school year had not been worked out at the time of trial. (Tr. 939-956, 594-604; see generally, Def. Ex. 78, 80)

^{59/} A "day" of integrated activities includes only approximately 4-1/2 out of the seven hour school day when time spent in the neighborhood schools and on buses is taken into account. (Def. Ex. 80, p. 5)

^{60/} Approximately 1/4 of the total number of students in all six clusters, or 5,500 students, would be transported on any given day. (Tr. 944)

DISCUSSION

Introduction

This case raises difficult questions which, because of their importance, we feel obliged to present to this Court. What is the relief required by Swann v. Board of Education, 402 U.S. 1 as to the eradication of Austin's old dual system of segregation of white from black? What facts establish a case of illegal discrimination in assignment of Mexican-American and Anglo students in the white part of the dual system? If there has been an illegal separation of Mexican-American from Anglo as well as black from white, what is the appropriate remedy?

Appellate review of the case is rendered difficult by a combination of circumstances. In spite of the lengthy record and the specificity of the proof (largely based upon official records rather than witness testimony) the district court did not make specific findings of fact but instead made general recitations mixing findings of ultimate fact with conclusions of law. Because of this it is often not possible to tell what legal standards were followed in assessing

the facts or even which alleged facts were accepted as true and which were rejected as false. Second, the district court had before it remedies which it apparently judged inappropriate; therefore, it initially declined to order either the board plan or the HEW plan into effect. Ultimately the court elected to order into effect one inappropriate remedy rather than the other. It seems clear to us that a new remedy must be fashioned, but that cannot be done until the nature and extent of discrimination against Mexican-Americans has been determined.

I. MEXICAN-AMERICANS AS A RACIAL OR ETHNIC CLASS
UNDER BROWN

The district court was clearly correct in finding that Mexican-Americans are a separate ethnic minority in Austin and thus a group entitled to the equal protection guarantees of the Fourteenth Amendment. Hernandez v. Texas, 347 U.S. 475 (1954); Alvarado v. El Paso Independent School District, No. 71-1555 (5th Cir., decided June 16, 1971);

cf. Brown v. Board of Education, 347 U.S. 483 (1954); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)^{61/}. This finding was made on the basis of many of these decisions, on the defendants' appointment of a tri-ethnic committee, on testimony of the defendants' Superintendent, and "by even the most casual examination of Mexican-American culture." (Memorandum Opinion and Order, June 28, 1971, p.2) In addition, the AISD's historical maintenance of "Mexican" schools, their enumeration of Mexican-Americans in compiling

^{61/} Many earlier decisions have established this principle in school desegregation cases. Independent School District v. Salvatierra, 33 S.W. 2d 790 (Tex. Civ. App., 1930), cert. den., 284 U.S. 580 (1931); Mendez v. Westminster School District, 64 F. Supp. 544 (S.D. Calif. 1946); aff'd, 161 F.2d 774 (9th Cir. 1947); Delgado v. Bastrop Independent School District, C. A. No. 388 (W. D. Tex. June 15, 1948) (not reported); Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951); Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955); Hernandez v. Driscoll Consol. Independent School District, 2 Race Rel. L.R. 329 (S.D. Tex. 1957). Presently pending on appeal before this Court are two other cases which have made the same finding. Cisneros and United States v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Tex. 1970) (No. 71-2367 on appeal); Tasby v. Estes, C. A. No. 3-4211-C (N.D. Tex., July 16, 1971) (No. 71-2581 on appeal). And see Mr. Justice Douglas' comments in denying a stay for Chinese students of a school desegregation order in San Francisco: "Brown v. Board of Education was not written for Blacks alone ... The theme of our school desegregation cases extends to all racial minorities treated invidiously by a State or any of its agencies." Lee v. Johnson, No. A-203 (Douglas, Circuit Justice, August 25, 1971).

census statistics, and their more recent recognition of citizens' groups representing the Mexican-American community reinforce this finding.^{62/}

II. PRE-BROWN DISCRIMINATION

As the district court noted, prior to 1955 the defendants "maintained a dual school system with educational opportunities separate and inherently unequal for blacks." (Memorandum Opinion and Order, June 28, 1971, p. 3) This system was characterized by overlapping attendance zones and complete segregation of black students and black faculty at all grade levels in the system. The defendant school district thus fell squarely within the command of Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and was under an affirmative duty to eliminate "all vestiges of state-imposed segregation." Swann v. Board of Education, 402 U.S. 1, 15 (1971).

We start from the fact that neither the State of Texas nor the defendants have ever officially required the segregation of Mexican-American students in schools. There

^{62/} Gov't. Ex. 3; 6-J, 6-K.

is evidence, however, that some of the pre-Brown practices and policies with regard to Mexican-Americans in Austin were similar to the discriminatory student assignment policies traditionally applied to black students.

The district court noted the pre-Brown existence of some schools designated as "Mexican" schools, with all Mexican-American enrollments and attendance zones which overlapped with predominantly Anglo schools, but it nonetheless found that these schools were not "built for the purpose of discriminating against, isolating or segregating students on the basis of Mexican-American ethnic origin." (Memorandum Opinion and Order, June 28, 1971, fn. 12(c)) We think this finding is erroneous in view of the court's own finding, and the record in this case. The evidence shows that the defendants created and maintained, at various times prior to 1954, three such schools in the system with zones overlapping Anglo school zones.^{63/} The creation and maintenance of overlapping or "optional" attendance zones

^{63/} These were the West Avenue School, the Comal Street School, and the Zavala School, which replaced the Comal Street School when it opened in 1936. The Zavala School was built to meet the need of the Mexican-American population "as near the center of this population as possible," and parts of the school curriculum were designed for junior high age Mexican-American migrant students who were still attending elementary school. See pp. 10-14. supra.

is constitutional only if it does not encourage or preserve segregation. See Goss v. Board of Education, 373 U.S. 683, 686 (1963); Monroe v. Board of School Commissioners, 391 U.S. 450, 458-59 (1968); Hobson v. Hansen, 269 F. Supp. 401, 415-17 (D.D.C. 1967); aff'd sub nom Smuck v. Hobson, 408 F.2d 175, 183 (D.C. Cir. 1969). In addition, the court overlooked uncontroverted evidence showing the discriminatory assignment of Mexican-American elementary students to the Bickler school in 1939 after Anglo parents had objected to the assignment of these students to the predominantly Anglo Winn school.^{64/}

Finally, the court ignored uncontroverted evidence that when the dual zone for Zavala and Metz was eliminated in 1954, the new zone line was drawn on Third Street, immediately adjacent to the Zavala school, with the result that Zavala remained virtually all Mexican-American. Discrimination in the drawing of zone lines in a school system purportedly

^{64/} By 1947 all elementary age students at Bickler were Mexican-American. During this same period, the school board failed to act on a request of the Mexican consul in 1944 to eliminate the segregation situation at the Zavala and Metz schools. See pp. 15-16, supra.

following a neighborhood school policy has been held unlawful. See, e.g., Henry v. Clarksdale Municipal Separate School System, 409 F.2d 682 (5th Cir. 1969); United States v. School District 151, 404 F.2d 1125 (7th Cir. 1968); United States v. Board of Education, Tulsa, Oklahoma, 429 F.2d 1253 (10th Cir. 1970).

III. POST-BROWN DISCRIMINATION

The district court found that defendants have not discriminated against black or Mexican-American students since Brown II. As to blacks, the court ruled that relief was required to eradicate the vestiges of the pre-1955 dual system. For that reason, on appellate review the main issue is whether the district court's holding as to Mexican-Americans was correct.^{65/}

We would agree that the record might support a finding that defendants did not engage in a purposeful systematic program intended to discriminate against all

^{65/} Nonetheless, we think the record requires reversal of the finding that defendants have not discriminated against blacks since 1955. Such a finding is inconsistent with the continued maintenance of dual, overlapping zones, the building of the under-sized all-black St. Johns school surrounded by three white schools, the selection of other elementary school sites in areas where the new schools constructed would be all-black, the construction of additions to predominantly one-race schools adjacent to schools serving opposite race students, the continuation of faculty segregation, and the drawing of secondary school attendance zone lines intended to segregate.

Mexican-American students. Indeed, as to some predominantly Mexican-American schools there is no proof of discrimination. But the district court failed to find specific facts as to the cause of the undoubted isolation of minority group students in most of East Austin, in spite of a voluminous record demonstrating that defendants knew their actions would further separate Mexican-American students from Anglo students.

In the years immediately before and after Brown, defendants took the following actions which increased the segregation of Mexican-American students in East Austin:

(a) The construction of three secondary schools attended predominantly by Mexican-American students and simultaneous abandonment of two centrally-located secondary schools in which Anglo and Mexican-American students would have remained integrated.

(b) In some instances the drawing of zone lines and creation of optional zones to minimize the number of Anglo students in minority group schools and the number of minority group students in Anglo schools. The most notable example is the Martin Junior High School zone.

Such evidence would not, of itself, establish discrimination.

If the defendants lumped Anglo and Mexican-American students together for all purposes as "white" students, the evidence

would merely reflect that some white schools were built in East Austin and some in other parts of Austin. But the evidence shows that defendants considered the Mexican-Americans a separate ethnic group, and the inference therefore could be made that some construction and zone drawing were affected by the distinction. In 1948, after the Mexican-American student population had grown and the Mexican-American drop-out rate had begun its decline,^{66/} the defendants changed their student census from an enumeration of blacks and whites to an enumeration of blacks, Anglos, and Mexican-Americans.^{67/} Since school construction needs and zone line changes were projected largely on the basis of the census data, this change in

^{66/} In 1933-34 only 3% of the "white" secondary students were Mexican-American; in 1970-71 this number had increased to 20%. The number of Mexican-American secondary students likewise increased from 88 to 4286 in the same period. (See Def. Exs. 69,79)

^{67/} This change in administrative practice occurred in 1948, almost simultaneously with the completion of a twenty-year projection of school construction plans which has guided much of defendants' construction activities since 1950. See Def. Ex. 91 (The Gubbels' Report), and p. 23, supra. The enumeration of "Latin-Americans" was, according to the testimony, begun as a "research project" and continued because it was "very interesting and revealing." (Tr. pp. 327-28)

operation provided the means for considering the ethnic impact of construction and zone drawing decisions. Cf. Avery v. Georgia, 345 U.S. 559, 562 (1953); Whitus v. Georgia, 385 U.S. 545, 552 (1967). Further, defendants admittedly took race and ethnic origin into account in drawing certain of the zone lines during this period. Compare the rationale for separating blacks and Mexican-Americans on the high school level ("insecurity and competition economically among the ... 'Negro' and 'Latin-American'...")^{68/} with the rationale for gerrymandering black students into Martin [and presumably Allan] Junior High Schools instead of the nearer, predominantly Anglo Baker Junior High (integrating "white" and black students)^{69/}. And when defendants set up optional zones so blacks could transfer to "white" schools, in almost every instance the school was virtually all

^{68/} Tr. pp. 341-45; Gov. Ex. 7-E.

^{69/} Tr. p. 382. See appendix A-4 and C. Where inconsistent grounds for school board action are given or stated grounds are inconsistently applied, an inference of discrimination is raised. Davis v. School District of City of Pontiac, 443 F.2d 573, 576 (6th Cir. 1971).

Mexican-American: Cf. Ross v. Eckels, 434 F.2d 1140, 1150
^{70/}
(5th Cir. 1970) (Clark, J. dissenting).

The task of this Court, then, is to assess the probative effect of these inferences on the outcome of this appeal; or, in the alternative, to remand for further hearing and findings by the district court.

In finding no de jure discrimination, the court below apparently referred only to the testimony adduced below, and ignored the voluminous documentary evidence introduced into the record. The law is well-settled that inferences of discrimination may be drawn from such documentary evidence, and they may be conclusive despite testimony of racial neutrality by responsible officials. See, e.g., Hernandez v. Texas, 347 U.S. 475, 481-82 (1954); Turner v. Fouche, 396 U.S. 346, 360-61 (1970), and cases cited therein in notes 20-22; Norris v. Alabama, 294 U.S. 587, 598 (1935); Keyes v.

^{70/} In considering possible remedies, the district court stated that the "burden" of desegregation of blacks should not be placed solely on Mexican-Americans, and announced that this should be a consideration in preparing desegregation plans. (Memorandum Opinion and Order, June 28, 1971, p. 6)

School District No. 1, 303 F. Supp. 279, 313 F. Supp. 61 (D. Colo. 1969), aff'd ___ F. 2d ___ (No. 336-70, decided June 11, 1971); Davis v. School District of City of Pontiac, supra; United States v. School District 151, supra.

The impact of these and other inferences should be considered and decided by this Court, especially should it decide to remand for further proceedings below. Some of the questions discussed herein as well as other related issues, have been considered by Circuit Courts of Appeals,^{71/} but they are generally questions of first impression for this Court. Therefore, we think it appropriate for this Court to consider the need for specific criteria of evidentiary analysis to be applied by district courts facing these situations. The need for such criteria is emphasized by a comparison of the decision of the court below in this case with the decision of the district court in Cisneros v.

Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Texas 1970), which is also on appeal to this Court.^{72/}

^{71/} See, e.g., Davis v. School Board of City of Pontiac, supra; Keyes v. School District No. 1, supra; United States v. School District 151, supra; Taylor v. Board of Education, 294 F. 2d 36 (2nd Cir. 1969).

^{72/} Appeal No. 71-2397.

Although district courts sit as courts of equity in these cases, with broad powers, some degree of detail and specificity is necessary to evaluate the evidence of discrimination, just as some guidelines are necessary for a determination of questions of relief. Cf. Swann v. Board of Education, 402 U.S. 1, 6, 26 (1971).

IV. THE RELIEF

In fashioning relief for this case, the district court had before it two desegregation plans drawn and submitted prior to the presentation of the facts at trial concerning the nature and extent of discrimination within the Austin School System. The HEW plan, which was prepared in response to the district court order of September 4, 1970 to make a comprehensive study and prepare a plan "which will completely disestablish a dual school system," was based on the assumption that de jure discrimination against both blacks and Mexican-Americans existed system-wide; consequently, it was drawn to eliminate the ethnic and racial identifiability of every school in the system. It also adopted on a full-time basis the cluster system for elementary schools which defendants had adopted on a part-time basis. The plan submitted

by the defendants apparently assumed that no de jure dis-
crimination had ever been practiced against Mexican-Americans,^{73/}
and that only vestiges of the dual school system which had
been maintained for blacks prior to 1955 remained.

The district court's June 28, 1971 opinion found that the evidence in the case supported defendants' assumption and accordingly its subsequent remedial order of July 19, 1971 approved the defendants' plan. We agree that the scope of the remedy ordered in cases of this kind ought to be consistent with the nature of the violation. But here the district court's findings as to the quantum of officially-imposed discrimination are erroneous both as to blacks and Mexican-Americans. Since it now appears that the evidence as to de jure discrimination against Mexican-Americans does not extend to all Mexican-American schools as assumed by the HEW plan, a remand to the district court to consider the extent of the relief warranted in this case appears proper. The following discussion is submitted for the Court's consideration as to the direction that such an inquiry might take.

^{73/} Defendants' plan did include Mexican-American schools in its elementary desegregation plan; it did so for educational purposes, not as a matter of constitutional duty. Tr. pp. 799-800.

A. BLACK SCHOOLS

The facts in this case establish a formerly state-imposed dual school system which was never disestablished. While the district court plan eliminates all secondary schools identifiable as black schools, the elementary school plan initially assigns black students to schools in the same manner as during 1970-71 (which still include some dual overlapping zones with predominantly Mexican-American schools). Part-time desegregation is provided for 16% of the time.^{74/}

While this may have much to commend it educationally, standing alone it does not eradicate the dual system. See Bivins v. Bibb County Board of Education, 424 F.2d 97 (5th Cir. 1970).

The district court distinguishes this case from Bibb on its facts, stating that the defendants' plan "encompasses virtually all of the system's Anglo elementary students for a much larger portion of their academic time in a far wider and more meaningful range of multi-cultural experiences." (Memorandum Opinion and Order, July 19, 1971,

^{74/} Computed by multiplying the percent of school days (25%) spent in integrated classes by the percent of each such day in such classes (4-1/2 of each 7 hours; or 64%).

p. 8) Yet, the initial discriminatory assignment of students under this plan will govern at least 84% of their learning experience. In the context of this case where each black school in the system was created and has been maintained at all times as an all-black school, such a plan can hardly be said to meet the school board's duty to take "whatever steps might be necessary to convert to a unitary system in which racial discrimination is eliminated root and branch." Green v. New Kent County, 391 U.S. 430, 437-38 (1968). On remand the district court should consider other approaches to desegregating the black elementary schools.

B. MEXICAN-AMERICAN SCHOOLS

The evidence in this case reveals that the nature of the defendants' constitutional violation with regards to Mexican-Americans does not permeate the entire school system. Therefore, the Court should decide at which schools there is proof of discrimination and should limit its relief to eradicating the effects of that discrimination.

CONCLUSION

For the above reasons, the case should be reversed
and remanded to the district court for further proceedings.

Respectfully submitted,

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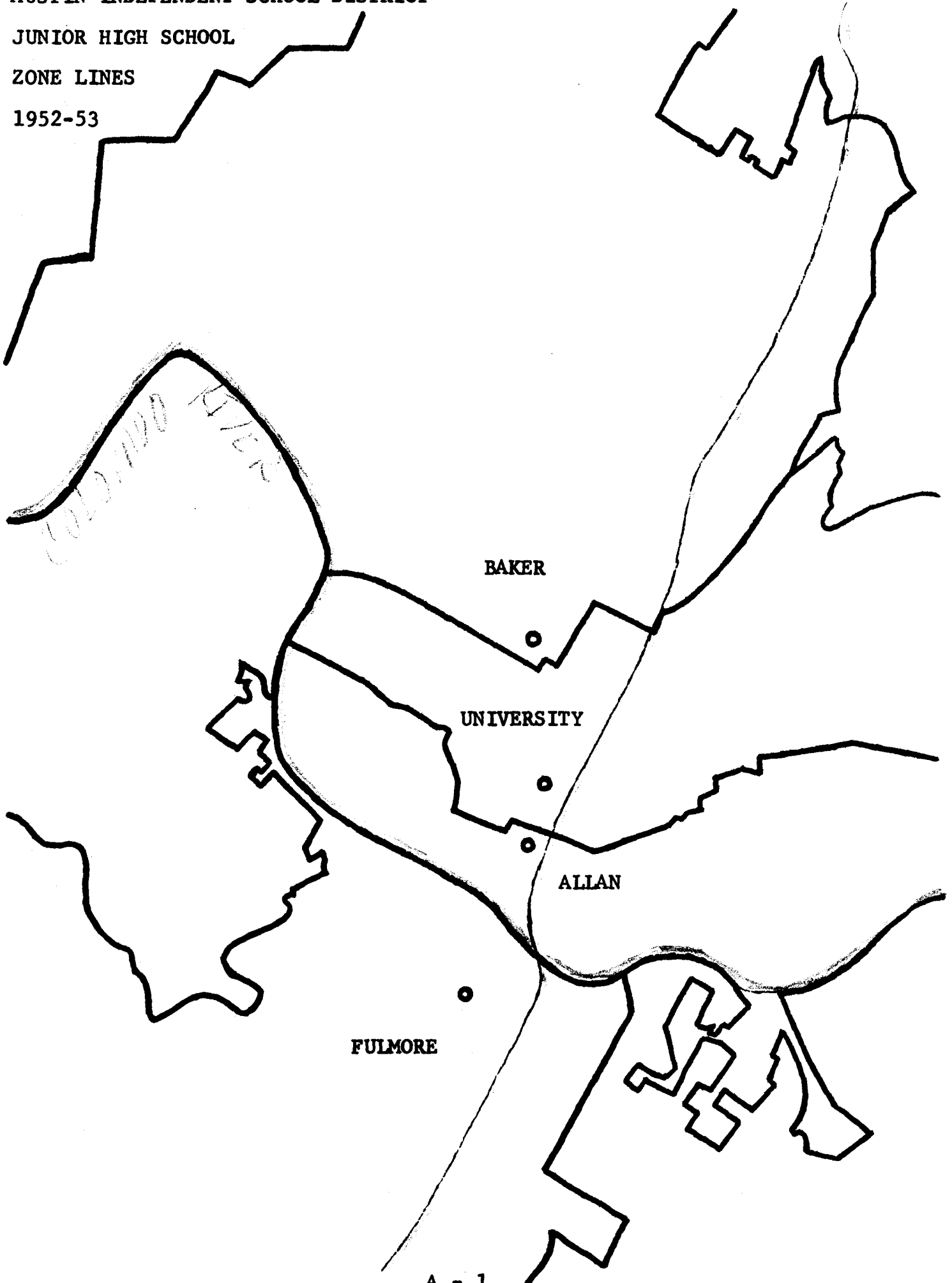
APPENDICES

AUSTIN INDEPENDENT SCHOOL DISTRICT

JUNIOR HIGH SCHOOL

ZONE LINES

1952-53



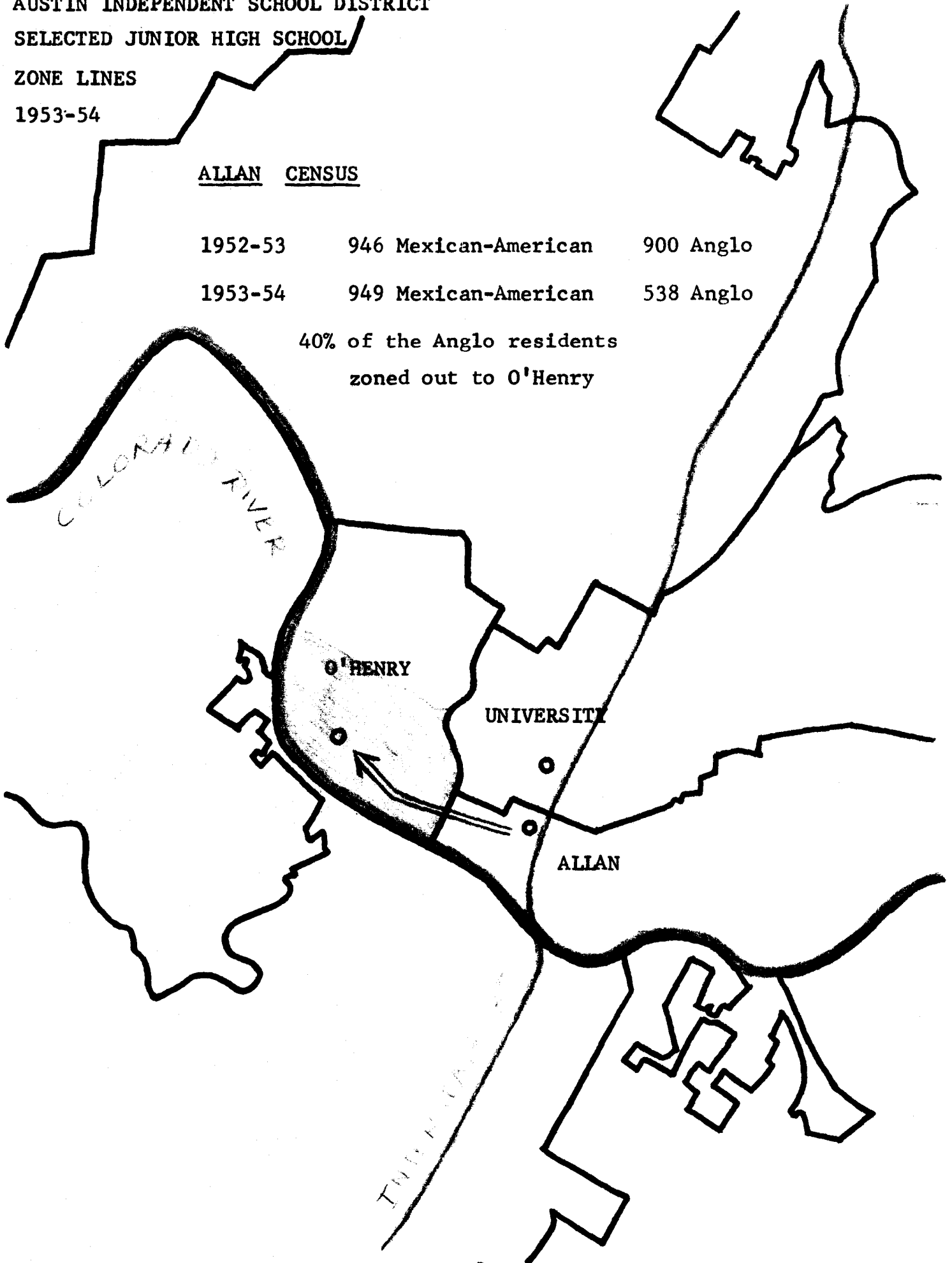
AUSTIN INDEPENDENT SCHOOL DISTRICT
SELECTED JUNIOR HIGH SCHOOL
ZONE LINES
1953-54

ALLAN CENSUS

1952-53 946 Mexican-American 900 Anglo

1953-54 949 Mexican-American 538 Anglo

40% of the Anglo residents
zoned out to O'Henry



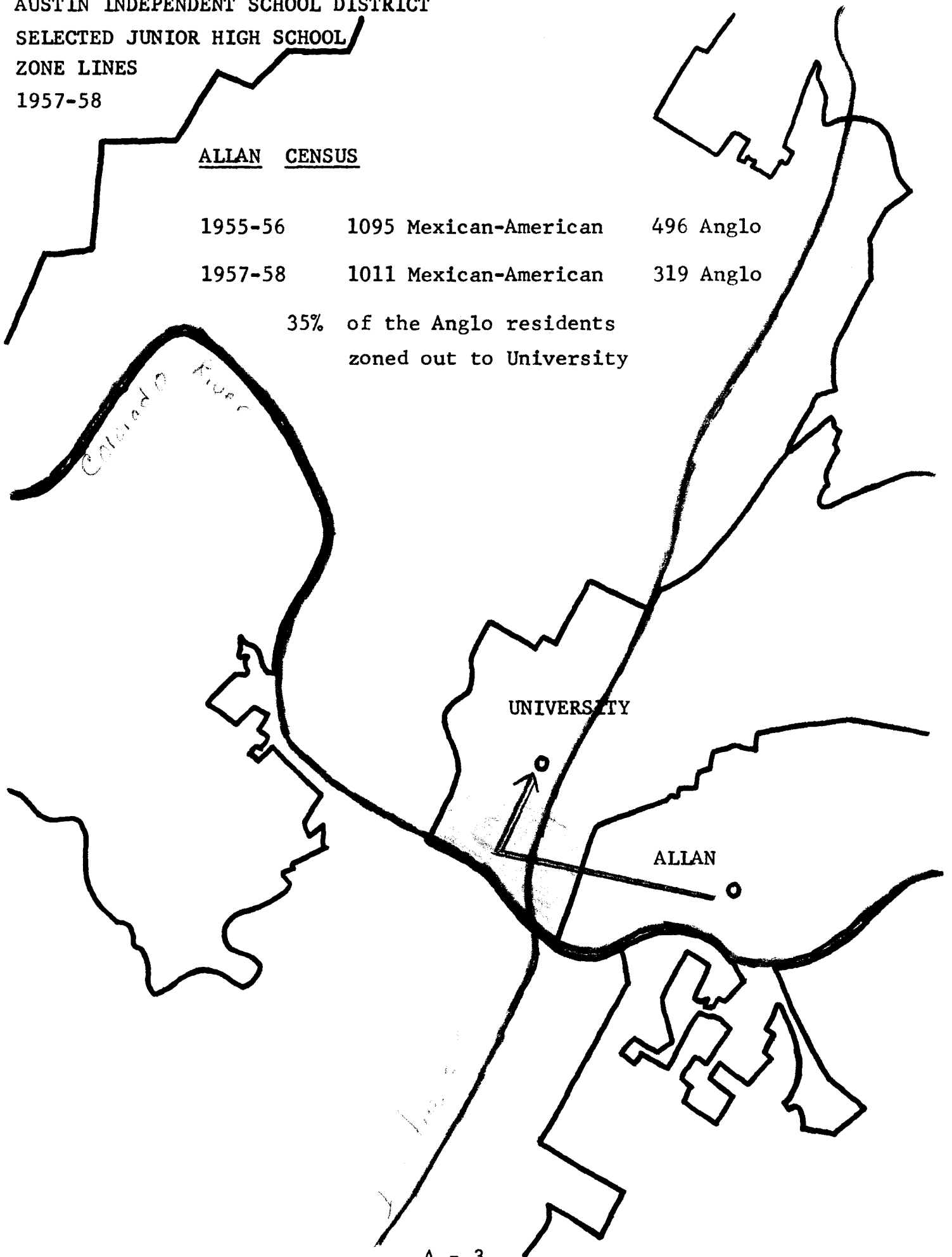
AUSTIN INDEPENDENT SCHOOL DISTRICT
SELECTED JUNIOR HIGH SCHOOL
ZONE LINES
1957-58

ALLAN CENSUS

1955-56 1095 Mexican-American 496 Anglo

1957-58 1011 Mexican-American 319 Anglo

35% of the Anglo residents
zoned out to University



AUSTIN INDEPENDENT SCHOOL DISTRICT

SELECTED JUNIOR HIGH SCHOOL

ZONE LINES

1967-68

MARTIN REPLACED UNIVERSITY 1967

UNIVERSITY 1966-67

20% Black 40% Anglo 40% Mexican-American (Tr 374)

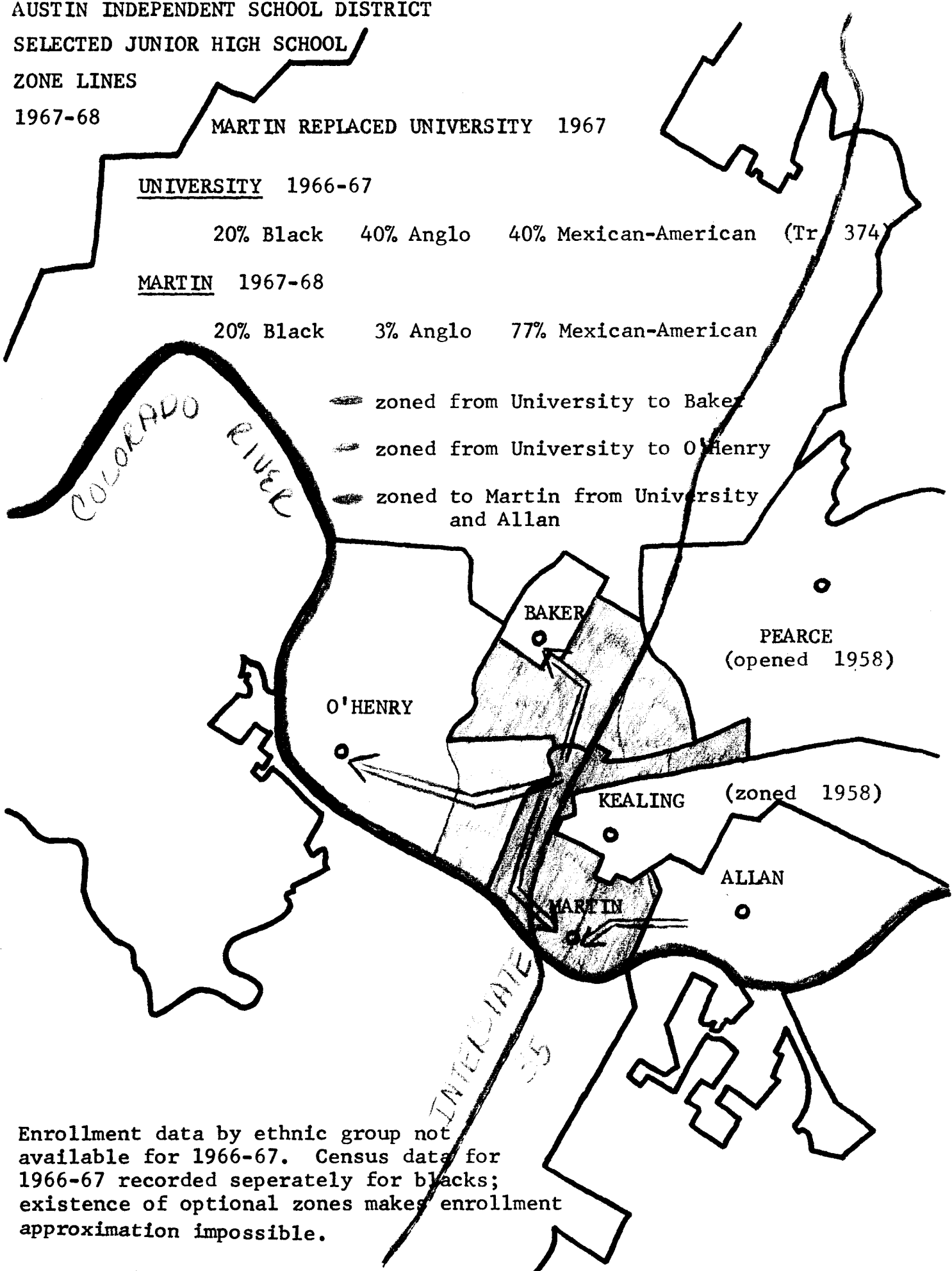
MARTIN 1967-68

20% Black 3% Anglo 77% Mexican-American

zoned from University to Baker

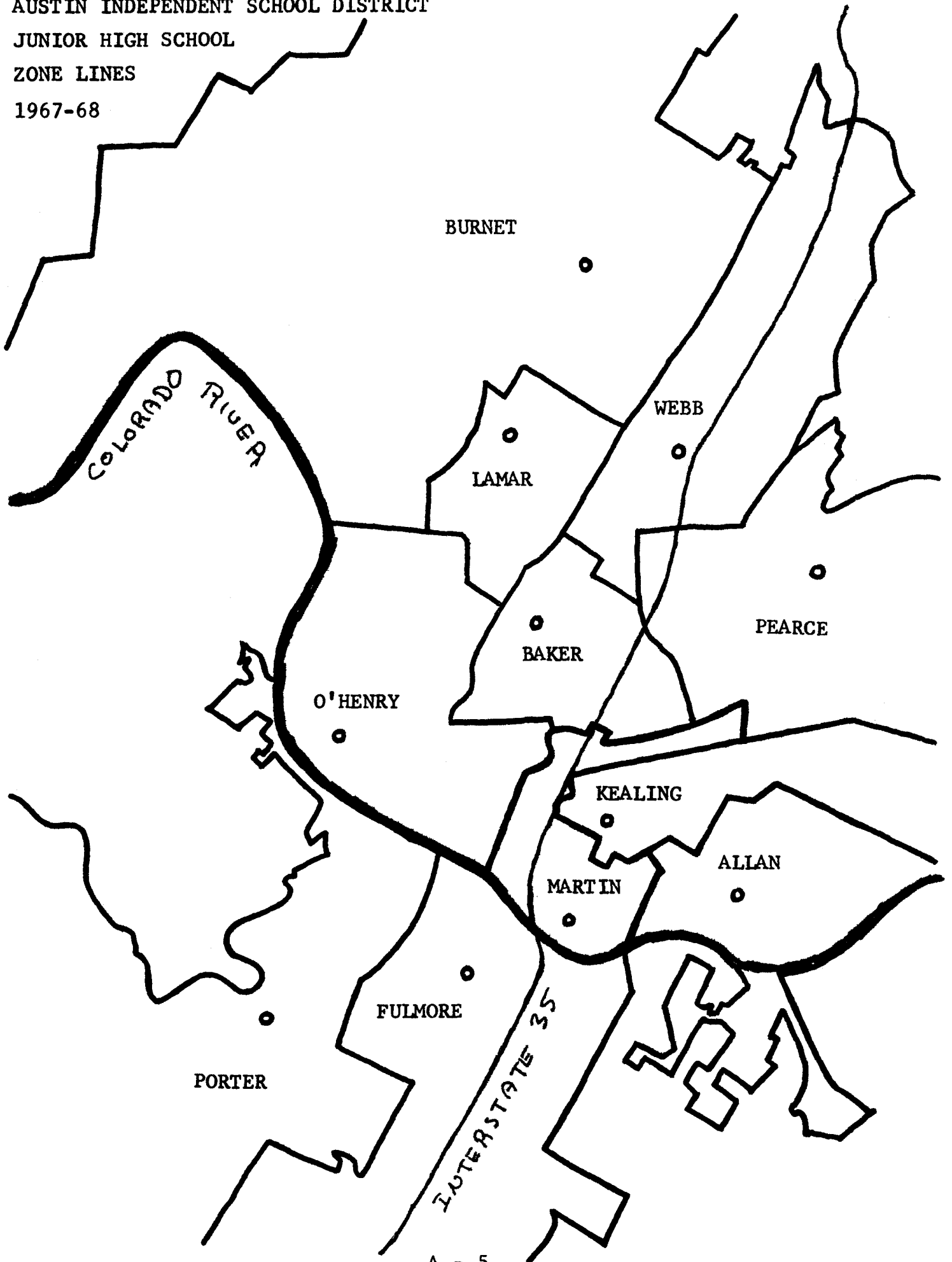
zoned from University to O'Henry

zoned to Martin from University and Allan



Enrollment data by ethnic group not available for 1966-67. Census data for 1966-67 recorded separately for blacks; existence of optional zones makes enrollment approximation impossible.

AUSTIN INDEPENDENT SCHOOL DISTRICT
JUNIOR HIGH SCHOOL
ZONE LINES
1967-68



AUSTIN INDEPENDENT SCHOOL DISTRICT
SENIOR HIGH SCHOOL
ZONE LINES
1960-61

JOHNSTON ZONE (IDENTICAL TO ALLAN JHS ZONE)
CARVED OUT OF AUSTIN ZONE IN 1960

JOHNSTON CENSUS 1960-61

893 Mexican-American 255 Anglo

78% Mexican-American

MCCALLUM

AUSTIN

ANDERSON

(zoned 1955)

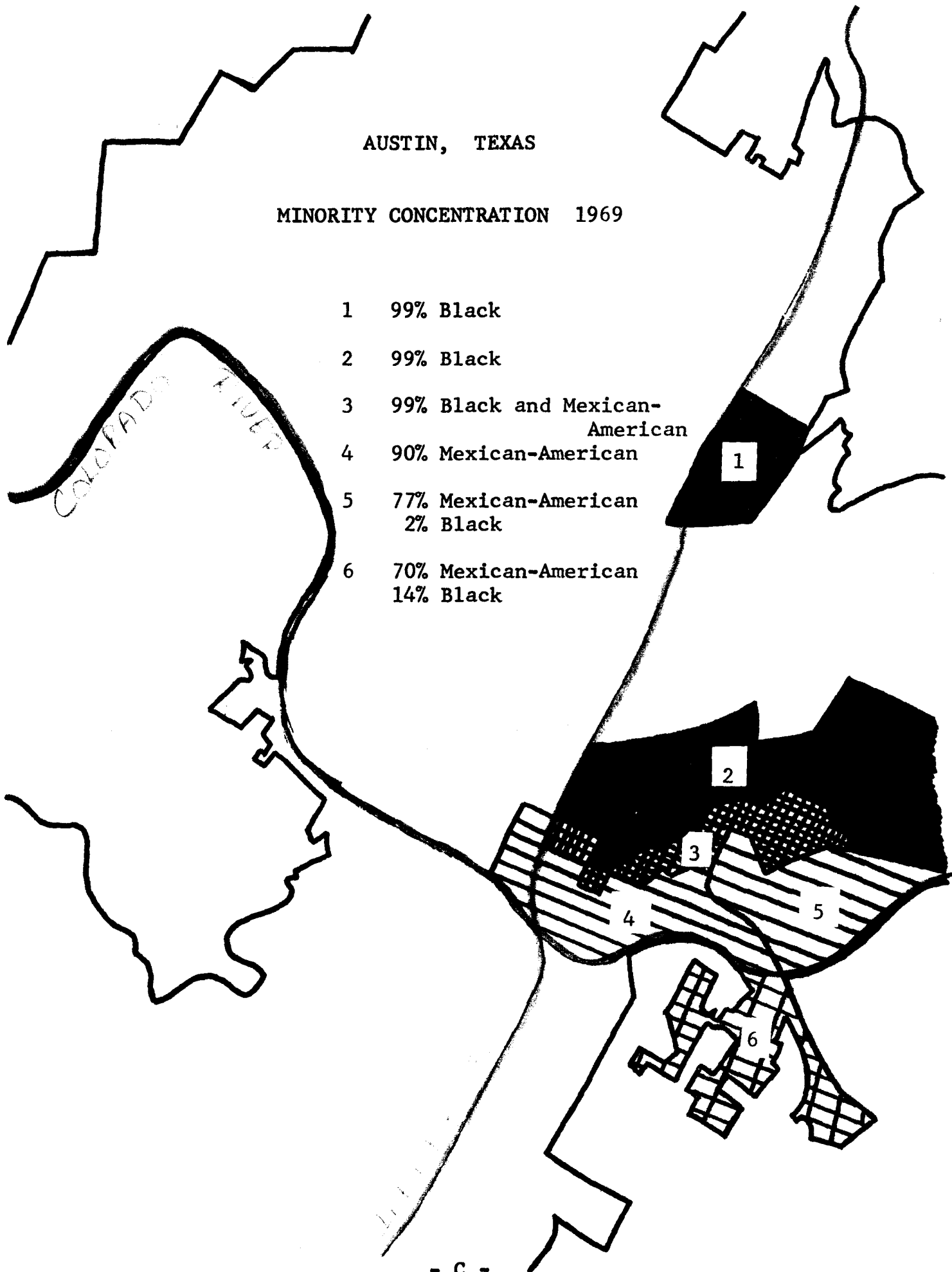
JOHNSTON

TRAVIS

AUSTIN, TEXAS

MINORITY CONCENTRATION 1969

- 1 99% Black
- 2 99% Black
- 3 99% Black and Mexican-American
- 4 90% Mexican-American
- 5 77% Mexican-American
2% Black
- 6 70% Mexican-American
14% Black



CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for the United States on each of the attorneys of record in this case by mailing two copies, postage prepaid, on this 3rd day of September 1971, to:

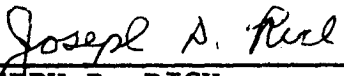
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