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Nos. 78-1800, 78-2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

DONNY BRURELL BUCKLEY, et al.,

Plaintiffs-Intervenors-Appellees

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Did the district court err in failing to order the Indianapolis school system to adopt an intradistrict plan which, either independently or in conjunction with implementation of interdistrict relief, would fully desegregate the Indianapolis system.

JURISDICTIONAL SUMMARY

The order below of June 2, 1978 is an interlocutory order denying a request to modify an existing injunction, and also denies injunctive relief sought by the United States (see Brief

of United States in 78-1558 at 33). It is appealable to this Court under 28 U.S.C. 1292(a)(1). The United States filed a timely notice of appeal (78-2006) on July 31, 1978.

STATEMENT

1. Background

The initial complaint in this case was filed in 1968 (see United States' Appendix filed in 78-1558, to be cited as "78-1558 App." at 1). The complaint alleged that the Indianapolis public school system (IPS) was racially segregated, and asked the court to require IPS to implement a plan to desegregate the school district.

On August 18, 1971, the district court found that education in IPS was racially segregated. 332 F. Supp. 655. This Court affirmed that decision on February 1, 1973. 474 F.2d 81. On June 25, 1973, the Supreme Court denied IPS' petition for writ of certiorari. 413 U.S. 920. Since 1971, however, the district court's attention has been occupied primarily by exploration of an interdistrict remedy. See 332 F. Supp. 655, 368 F. Supp. 1191 (1973); 419 F. Supp. 180 (1975); 456 F. Supp. 185 (1978), and orders of April 24, 1979, and July 9, 1979.[1/]

During the course of this litigation, the district court has denied several requests of the United States that IPS be required to adopt a complete intradistrict desegregation plan. Following the district court's 1971 decision that IPS was racially segregated, the United States urged that an intradistrict desegre-

1/ The interdistrict orders of July 11, 1978 (456 F. Supp. 183), April 24, 1979, and July 9, 1979, are now pending before this Court.

gation plan be adopted as a final remedy.[2/] After the district court's 1973 decision in which it became clear that the district court would pursue an interdistrict remedy, the United States urged that intradistrict desegregation be implemented pending final resolution of the interdistrict issue.[3/]

The district court has, to date, ordered only limited desegregation within IPS. In 1973, the district court ordered IPS to reorganize its elementary assignment plans to assign each elementary school a student body at least 15% black. 368 F. Supp. at 1209. It also ordered the black enrollment at one high school

2/ The United States, in its proposed findings of fact filed with the district court in 1971, requested implementation of a plan to desegregate IPS by the September, 1972 opening of school. On December 22, 1972, the United States, in response to a motion by IPS for an extension of time to prepare a desegregation plan, stated that any plan should be designed to insure that IPS is fully desegregated by the start of the 1973-1974 school year (78-1558 App. 27). In May of 1973, the United States stated that the IPS desegregation plan on file did not fully desegregate IPS as required by this Court's 1973 affirmance of the finding of intradistrict desegregation (78-1558 App. 32).

3/ At the 1973 hearing, the United States argued orally that factual and legal uncertainties about interdistrict relief made prompt implementation of an interdistrict plan unlikely, and so a complete intradistrict remedy should be promptly required as an interim step (78-1558 App. 55-56). Following the district court's July 20, 1973 order, while other parties appealed the interdistrict nature of the court's orders, the United States appealed that court's refusal to order a complete intradistrict remedy (Appeal No. 73-1983). On November 7, 1973, the United States moved in district court for an injunction pending appeal, seeking implementation of intradistrict desegregation for the 1974-1975 year while the interdistrict issue was pending on appeal (78-1558 App. 74). On December 6, 1973, the district court denied the United States motion for relief pending appeal (78-1558 App. 80-86). This Court's February 20, 1974 opinion (503 F.2d 68) remanding the case did not directly address the United States' appeal, and did not direct the court to adopt a plan for the 1974-1975 year.

to be increased to 25%, and the black enrollment at another high school to be reduced to about 60%. 368 F. Supp. at 1210. Until September of 1978 (see p. 7, infra), no further desegregation of any kind occurred within IPS.

2. The Present Appeals

A. Procedural History

On July 16, 1976, this Court (541 F.2d 1211) affirmed the district court's 1975 order (419 F. Supp. 180) requiring interdistrict relief.[4/] However, on January 25, 1977, the Supreme Court (429 U.S. 1068) vacated that order, and remanded the interdistrict issue for reconsideration in light of Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977) and Washington v. Davis, 426 U.S. 229 (1976). This Court, on February 14, 1978 (573 F.2d 400), remanded the case to the district court.

While the case was still pending before this Court, IPS, on August 19, 1977, petitioned the district court for permission to develop a broad intradistrict desegregation plan, to be implemented for the 1978-1979 school year (78-1558 App. 92-98) which would completely desegregate IPS. On January 20, 1978, IPS submitted to the court a more detailed intradistrict proposal

4/ In its 1975 order, the district court stated that it would require IPS to submit an intradistrict plan which would desegregate the schools within IPS which would be segregated even after black students were transferred into suburban school districts. 419 F. Supp. at 106. See also order of June 2, 1978 at 6, and order of July 11, 1978 (456 F. Supp. at 191).

(78-1558 App. 147-193) and on March 3, 1978, IPS provided more detail (78-1558 App. 194-256). On March 17, 1978, the United States urged the district court to permit IPS to adopt its intradistrict plan.

On April 7, 1978, the district court denied the IPS petition, stating that prior to final resolution of the interdistrict relief issue, adoption of a comprehensive intradistrict desegregation plan would be "counterproductive." (78-1558 App. 264).

The United States appealed (No. 78-1558). On May 17, 1978, this Court vacated the order of April 7 and directed the district court to fully consider the IPS proposal, and to decide (a) why the plan could not be implemented pending final resolution of the interdistrict issue, and (b) whether the plan IPS prepared is sound.

Following the remand, the district court held a hearing on the IPS intradistrict plan on May 30-31, 1978. On June 2, 1978, it again denied the IPS request to implement an intradistrict plan which would desegregate IPS completely.

B. The IPS Intradistrict Plan

The IPS plan would have created four large attendance areas within the school system. These four areas would be the bases for all assignments; students would be assigned to schools located within one of the four areas. The plan also proposed to change the IPS' present two-level (K-8, 9-12) grade structure into a three level system, containing lower elementary schools (grades K-6), upper elementary schools (7-8) and high schools (9-12).

Each of the four areas would contain nearly the same overall racial percentages. Under the plan, no high school would be over 60% black or 65% white (78-1558 App. 195).[5/] No upper elementary school would be over 65% white or black, and no lower elementary school would be over 65% white or 70% black. At the hearing it became clear that the high school plan was ready for immediate implementation. However, several elementary schools required renovation if they were to house only 7th and 8th graders. The renovation projects would have taken about eight months to complete (May, 1978 Tr. 56-57), and therefore those schools would not have been ready to operate as upper elementary schools until the 1979-1980 year. For that reason, interim assignment plans for some students would have been necessary if the overall plan were to be adopted in September 1978 (May, 1978 Tr. 70).

The designers of the "four area" plan said that it was not specifically designed to be compatible with eventual adoption of interdistrict relief (May, 1978, Tr. 110, 236-237). However, the Superintendent stated that that plan would in fact be as compatible with the court's plan as would any other assignment plan IPS would be operating (May, 1978, Tr. 237).

5/ The high school plan would reassign only 9th graders to new schools, so that full implementation of the high school plan would occur over a four-year period.

C. The June 2, 1978 Decision of the District Court

On June 2, 1978, the district court refused to permit IPS to implement the intradistrict desegregation plan. (78-1800 App. 36). It held that the lower and upper elementary plans were not ready for implementation for September, 1978, and that the high school plan should not be implemented because it would disrupt certain elementary school assignment patterns (id. at 43-44). The court also found that the plan had been insufficiently publicized, and could therefore cause disruption among both teachers and parents if implemented in September, 1978 (id. at 43-45). The court also held that the plan was a "massive 'fruit basket' scrambling of students * * * which * * * 'won't work' in the long run" (id. at 45).

The court also stated that the IPS plan "might well interfere with, and in fact prevent entirely the formulation and implementation of interdistrict remedy" (78-1800 App. 46). For all these reasons, the court deemed the IPS plan to be "'counterproductive' * * * for the year 1978-1979 (or any year)" (id. at 47).

D. Appellate Action

Both IPS (Appeal 78-1800) and the United States (Appeal 78-2006) appealed the court's decision. On July 28, 1978, this Court reversed that portion of the court's order which prevented IPS from adopting the part of the four area plan which would reassign 9th graders in September, 1978. All other portions of the appeal were retained by this Court.

E. Subsequent Action by the District Court

As stated before (see n. 4, supra), the district court, in pursuit of interdistrict relief, required IPS to draft an intradistrict plan to desegregate those schools in IPS which would remain segregated after interdistrict transfers occur.

On November 28, 1978, IPS petitioned the district court for permission to establish an upper (grades 7-8) and lower (grades K-6) elementary school method of student assignment. It sought permission to get final architectural plans for renovation projects[6/] completed and to receive bids. IPS also stated that all its plans for the intradistrict relief which would follow the interdistrict transfers (see n. 4, supra) utilized the upper-lower elementary method of assignment. IPS also stated that construction of any renovation projects would not begin until final desegregation plans were approved by the court. On January 17, 1979, the court approved the petition.

On April 24, 1979, the district court again required implementation of an interdistrict transfer plan, and ordered IPS to revise certain parts of its plans for interdistrict

6/ This petition cited most, but not all, of the renovation projects included in the complete intradistrict plan submitted by IPS in March, 1978 (see p. 6, supra).

transfers and for the intradistrict relief to follow those transfers (order of April 24, 1979 at 24, in Appendix to Brief of Perry Township at 34). IPS filed revised plans. On July 9, 1979, the court ordered IPS and the suburban school districts to implement IPS' revised interdistrict transfer plan (see Appendix to Brief of Perry Township at 63). However, the court said nothing about IPS' revised plan for intradistrict relief, which would have desegregated the schools in IPS which would still be segregated following the interdistrict transfers.

ARGUMENT

THE DISTRICT COURT ERRED IN FAILING AND REFUSING TO REQUIRE OR EVEN PERMIT IPS PROMPTLY TO TAKE ALL STEPS IN ITS POWER TO ERADICATE THE EFFECTS OF ITS PAST DISCRIMINATION

I

INTRODUCTION

The actions of the district court since finding an intradistrict violation in 1971 reflect its belief that intradistrict relief is secondary to interdistrict relief and may be delayed indefinitely while the interdistrict issues are being played out. Even after approving an interdistrict plan, which would affect only 3,960 of the approximately 11,200 black students now in de jure segregated schools,[7/] the district court

7/ Compare IPS Ex. 67 with plan A (interdistrict transfers), reprinted at 67 of Appendix to Stay Motion of Lawrence Township.

has still not granted relief for the over 7000 black students who would be left in segregated schools in IPS. The court has, to be sure, suggested an intention to grant such relief in the future (see n. 4, supra), but when, or what, relief will be granted is still unknown.

This appeal arises from the court's June 2, 1978 order refusing to permit IPS to adopt an intradistrict plan which would completely desegregate IPS pending final resolution of the interdistrict issue. Although the court has twice in the last two years required defendants to implement an interdistrict transfer plan (orders of July 11, 1978, and July 9, 1979), it has never actually ordered IPS to adopt related intradistrict relief, and has never given specific reasons for failing to do so. Although in this brief we specifically address the court's failure to permit IPS to adopt its complete intradistrict plan, the error is a continuing one and whatever the outcome of the appeals before this Court concerning the propriety and legality of the interdistrict plan ordered by the district court, this Court should direct the district court to require IPS to implement intradistrict relief next fall which will desegregate IPS fully, either independently or as part of an interdistrict plan.

II

THE CONSTITUTION DOES NOT PERMIT DELAY IN REMEDYING UNCONSTITUTIONAL SCHOOL SEGREGATION

The Indianapolis school system was found to be de jure segregated in 1971, eight years ago (332 F. Supp. 655). Since then, however, the district court has required only limited desegregation within IPS (see pp. 3-4, supra). As of the 1978-1979 school year, 47.5% (11,231 of 23,628) of all black children in grades K-8 in IPS were enrolled in schools with enrollments over 90% black (see IPS Ex. 67 from November 1978 hearing).

This segregation is undeniably a vestige of the segregated system found by the district court in 1971. Of the 21 elementary schools over 90% black in 1978-1979, 15 were over 90% black in 1972, the year just before any desegregation occurred,[8/] and three were then 80% black.[9/] See 503 F.2d at 76-77. In fact, in the June 2 order (78-1800 App. 48), the district court itself recognized the need to desegregate these schools, when it said that the "90% or more black elementary schools" were a "problem of substance" which, the court felt, would be remedied through interdistrict relief "and relatively minor adjustments thereafter." See also the district court opinion at 419 F. Supp. at 185.

8/ Schools No. 1, 41,42, 43, 44, 45, 48, 56, 60, 63, 66, 71, 76, 110, MFC.

9/ Schools No. 27, 73, 75.

The Supreme Court has declared that remedies for unconstitutional school segregation are to be implemented "at once". Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969). As stated in Swann v. Board of Education, 402 U.S. 1, 14 (1971), "the remedy must be implemented forthwith" (emphasis in original). In Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969), the Supreme Court required many school districts to adopt desegregation plans at mid-year, rather than permit segregated schools to remain unremedied until the beginning of the next school year. See also Jefferson Parish School Board v. Dandridge, 404 U.S. 1219, 1220 (1971), where, when denying a request for a stay of implementation of a desegregation plan, Justice Marshall said, "This Court has repeatedly made it clear beyond any possible doubt that, absent some extraordinary circumstances, delay in achieving desegregation will not be tolerated."

No one involved in this case questions the need to desegregate the predominantly black schools which exist today in IPS. The delay in desegregation caused by the district court's refusal to require IPS to desegregate perpetuates the effects of proven unconstitutional segregation. As will be shown in pp. 13-18, infra, there was no legally sufficient basis for the district court to refuse to permit IPS to adopt a complete intradistrict remedy. Accordingly, the district court's continuing failure to

require the complete desegregation of IPS, whether achieved through a complete intradistrict plan which would serve either as an interim or final order, or through an intradistrict plan to supplement interdistrict transfers, violates constitutional standards.

III

THE DISTRICT COURT GAVE NO LEGALLY SUFFICIENT GROUNDS FOR REFUSING TO REQUIRE ADOPTION OF AN INTRADISTRICT PLAN WHICH WOULD FULLY DESEGREGATE IPS

None of the findings the district court made in its June 2, 1978 order are grounds for delaying implementation of any plan for intradistrict desegregation prepared by IPS.

The court's finding in the June 2 order that implementation of the IPS complete intradistrict plan in September, 1978 would be administratively inconvenient or disruptive is not a legally sufficient basis for delaying school desegregation. The court said that the IPS intradistrict plan should not have been implemented in September, 1978, because it had not been sufficiently publicized to parents and teachers. However, the fact that a desegregation plan may cause some disruption at the beginning of a school year does not justify perpetuating segregated schools. See Keyes v. Denver School District, 396 U.S. 1215 (1969) (Brennan, Circuit Justice). In Alexander v. Holmes County Board of Education, supra, the Supreme Court required 33 Mississippi school districts

10/ Many of the same schools would be renovated under either the intradistrict plan IPS proposed as part of its interdistrict-intradistrict plan, or as part of the complete intradistrict plan the court rejected.

to adopt desegregation plans at mid-year despite the court of appeals' finding that "time was too short and administrative problems too difficult to accomplish a complete and orderly implementation of the desegregation plans, until the next school year" (see opinion of Justice Black, Circuit Justice, in Alexander v. Board of Education, 396 U.S. 1218, 1222 (1969)). See also Jefferson Parish School Board v. Dandridge, supra.

Even if the administrative problems in implementing the IPS intradistrict plan were substantial as of June, 1978, there is plenty of time before the start of school next fall for IPS to adequately prepare for intradistrict desegregation. For example, the specific provisions of an interdistrict plan can be publicized. The district court has authorized IPS to proceed with preparations for the renovations necessary if IPS is to convert to the new upper and lower elementary school assignments (see p. 8, supra).[11/] To the extent that any renovation projects may not be completed by next September, the record shows that, contrary to the district court's findings, IPS can prepare interim assignments for the students affected (May, 1978 Tr. 57, 192). Accordingly, the record shows not only that there were no substantial impediments to implementation of intradistrict relief last year, but also that an intradistrict plan can be implemented for September, 1980.

11/ Many of the same schools would be renovated under either IPS' intradistrict plan which would follow implementation of the interdistrict transfers (see p. 8, supra), or IPS' complete intradistrict plan which the court rejected on June 2, 1978.

The district court also held that IPS' plan could not be implemented because it could interfere with later implementation of an interdistrict remedy (78-1800 App. 46-47). The court does not explain this finding. To the extent the court may have found the IPS plan to be mechanically incompatible with a later interdistrict plan, it makes a factual error. If it found that adoption of an intradistrict plan will moot the interdistrict issue, or if it is again relying on its view that a complete intradistrict plan cannot be implemented due to possible white flight or "tipping", it makes legal error.

IPS officials stated that the intradistrict plan they proposed to implement in September, 1978 was designed as a complete, intradistrict plan. It was not designed specifically to convert later into part of an interdistrict remedy. However, when asked whether the plan would be compatible with interdistrict relief, the Superintendent stated, "I don't see that [it] would be any less compatible than whatever it is we are doing now or at some future time * * *." (May, 1978 Tr. 237). Accordingly, there is no evidence to support the district court's holding that the IPS plan, or in fact any intradistrict plan, would in some way mechanically prevent implementation of the interdistrict transfer plan the district court has ordered.

The district court also cited (78-1800 App. 46) language from Swann (402 U.S. at 31) which states that once a plan establishing a unitary system is implemented, yearly adjustments in student

assignments are not required. Apparently it was the court's view that once a plan which completely desegregated IPS was implemented, any legal basis which might presently exist for interdistrict transfers would evaporate. This is error. Interdistrict relief will be premised on findings of interdistrict effects caused by constitutionally impermissible actions; those effects must be remedied regardless of the status of IPS. Desegregation within only IPS would not remedy any discriminatory interdistrict effects and would therefore provide no basis for a decision declaring the interdistrict issue to be moot. The district court's fears that intradistrict desegregation will provide a legal basis to prevent interdistrict relief are legally incorrect.[12/]

12/ In this section of its opinion, the court seriously mischaracterizes actions the United States has taken in this suit.

First, the court said the United States "is not concerned with what will happen after a massive racial balancing plan is put into effect" (78-1800 App. 47). The United States is of course concerned with the future of desegregating systems, and believes that the intradistrict plans IPS has offered will work to desegregate IPS. We are also concerned with the continued segregated nature of IPS, which is for the most part the result of the district court's failure to require IPS to desegregate.

The district court said that the Attorney General is opposed to any plan which would involve suburban schools. To the contrary, in previous appeals of this case we have consistently argued that a limited interdistrict plan, which would require cooperation by suburban districts, was supported by the record.

The court also suggests that once an intradistrict plan is ordered, the United States "will declare IPS desegregated and get out." There is absolutely no record of actions by the United States which supports this comment. We brought this suit in

In denying IPS permission to adopt its plan, the district court also relied on its fear that white flight would occur after implementation of an intradistrict plan. The court stated (78-1800 App. 45) that one reason it would not implement the plan was that it is "'a massive 'fruit basket' scrambling of students * * *' which * * * 'won't work in the long run'." The court cited a portion of one of its earlier opinions, 332 F. Supp. at 678, in which it discussed its view that intradistrict segregation will not work due to white flight. The court has held previously that it would not order a plan into effect which would create schools with black enrollments over 40% (the "tipping point"), see 332 F. Supp. at 676; 368 F. Supp. 1198; 419 F. Supp. at 185; and has consistently denied intradistrict desegregation solely for that reason. See 368 F. Supp. at 1198, 419 F. Supp. at 184-185.

This Court has instructed the district court that white flight is not a basis on which the district court can avoid proper intradistrict desegregation. 503 F.2d at 80.

12/ (continued)
1968 to "materially further the orderly achievement of desegregation in public education." 42 U.S.C. 2000c-6(a). That is a responsibility we share with the court below and which we have faithfully attempted to execute--albeit at times our methods and the district court's did not coincide. We have participated in all trial and appellate proceedings addressing interdistrict relief, even though we successfully proved our allegation of intradistrict segregation in 1971. In addition, the United States has never abandoned school desegregation litigation once its case has been proved, but has continued to participate in proceedings in order to insure that desegregation efforts are as successful as possible. The district court's comments are uncalled for and erroneous.

This view reflects the well-established legal principle that white opposition to desegregation is not a reason to extend the segregative effects of unconstitutional conduct. See Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968); United States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972).

Similarly, there is no legal support for the district court's view that desegregated schools must be over 60% white, or even majority white. Milliken v. Bradley, 418 U.S. 717, 747, n. 22 (1974). In several cases the Supreme Court has approved remedial plans establishing unitary systems with majority black schools. Green v. County School Board, 391 U.S. 430 (1968); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck Board of Education, supra; Swann v. Board of Education, 402 U.S. 1, 24 and n. 8 (1971). Accordingly, the district court's refusal to adopt intradistrict plans which desegregate schools by assigning them student bodies over 40% black is legal error.[13/]

13/ In fact, even if the court's interdistrict transfer plan is implemented, IPS will still be 43.5% black (see p. 65 of Appendix to Stay Motion of Lawrence Township); the IPS intradistrict plan which would follow those transfers would desegregate IPS by assigning many IPS schools student enrollments between 40% and 60% black (id. at 93). To permit the district court to continue to deny desegregation based on its "tipping point" theory could well lead the district court to conclude that any intradistrict plan is unacceptable because it would create schools over 40% black, leaving segregation in IPS unremedied.

CONCLUSION

As stated above, there is still a substantial amount of de jure segregation existing within IPS, particularly at the elementary school level. The district court continues to fail to require or allow IPS to desegregate while the court considers interdistrict relief. The reasons the district court gave on June 2, 1978, for denying IPS permission to implement its plan were either legally or practically insufficient to justify extending the effects of proven unconstitutional conduct. Accordingly, this Court should direct the district court to order into effect sufficient intradistrict desegregation in September, 1980 to completely desegregate the Indianapolis school system.

Respectfully submitted,

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