IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 76-1430
No. 76-1545

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellee,

and

NELLIE MAE WEBB, et al.,

Plaintiffs-Intervenors-Appellants
Cross-Appellees,

v.

SCHOOL DISTRICT OF OMAHA, et al.,

Defendants-Appellees-Cross-Appellants.

On Remand from the Supreme Court of the United States

BRIEF FOR THE UNITED STATES

DANIEL WHERRY
United States Attorney

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
VINCENT F. O'ROURKE, JR.
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

1. Whether the Supreme Court's decisions in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) and Dayton Board of Education v. Brinkman, ___ U.S. ___, 45 U.S.L.W. 4910 (June 27, 1977) require this Court to alter its prior decisions.

Cases:

Austin Independent School District v. United States, 429 U.S. 990 (1976)

Clark v. Board of Education of Little Rock School District, 369 F.2d 661 (8th Cir. 1966)

Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037 (10th Cir. 1970)

DAYTON BOARD OF EDUCATION v. BRINKMAN, ___ U.S. ___, 45 U.S.L.W. 4910 (June 27, 1977)

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)

Higginbotham v. Mobile Oil Corp., 545 F.2d 422 (5th Cir. 1977)

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Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973)

KEYES v. SCHOOL DISTRICT NO. 1, DENVER, COLO., 413 U.S. 189 (1973)

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Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976)

Public Service Commission of the State of New York v. Federal Power Commission, 361 U.S. 195 (1959)

S.S. Silberblatt Inc. v. Seaboard Surety Co., 417 F.2d 1043 (8th Cir. 1969)

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)

United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975)

United States v. Columbus Municipal Separate School District, No. 76-3781 (5th Cir., August 9, 1977)

Cases (continued):

United States v. School District of Omaha, 367 F. Supp. 179 (D. Neb. 1973)

United States v. School District of Omaha, 389 F. Supp. 296 (D. Neb. 1974)

United States v. School District of Omaha, 418 F. Supp. 22 (D. Neb. 1976)

United States v. School District of Omaha, 521 F.2d 530 (8th Cir. 1975), cert. denied 423 U.S. 946 (1975)

United States v. School District of Omaha, 541 F.2d 708 (8th Cir. 1976), vacated and remanded, __ U.S. __, 45 U.S.L.W. 3850 (June 29, 1977)

United States v. Texas Education Agency, 532 F.2d 380 (1976), vacated and remanded, 429 U.S. 990 (1976)

VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP., 429 U.S. 252 (1977)

Washington v. Davis, 426 U.S. 229 (1976)

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)

Statutes:

20 U.S.C. 1703(c)

STATEMENT

This school desegregation case is before this Court for the third time and the procedural history and facts of this case are well-known. Therefore, our statement will be brief.

A. The Liability Phase

On August 10, 1973, the United States instituted this suit against the defendants, the School District of Omaha, et.al., pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. The United States sought to enjoin the School District from discriminating on the basis of race or color in the operation of the Omaha Public School System and to require the School District to adopt a plan which would place it in compliance with the Fourteenth Amendment to the Constitution of the United States. __/ (A. 8-14). __/

__/ The United States filed with its complaint a motion seeking a preliminary injunction enjoining the District (a) from failing to develop and implement a plan for opening the then new Martin Luther King as a desegregated school, and (b) from continuing to operate its student transfer policy in a discriminatory manner. On August 31, 1973, the district court denied this motion. 367 F. Supp. 179. Thereafter, black parents were permitted to intervene as class plaintiffs-intervenors.

__/ For the convenience of the Court, the United States will utilize the same Appendix reference systems as employed by the School District. See School District Brief, p. 12, n. 3. The Appendix compiled for the original appeal on liability will be cited by "A," the Appendix for the appeal on remedy, by "RA," and the supplemental appendix for this remand, by "SA."

It was apparent at the time of trial that there was substantial racial disparity in the student attendance patterns of the Omaha schools. The trial thus centered around the question whether the School District had engaged in intentional racial discrimination that brought about or maintained this condition. 389 F. Supp. at 296. The district court ruled that the United States had failed to meet its burden of proving that the racial separation in Omaha schools was the result of intentional racial discrimination on the part of the School District. 389 F. Supp. at 322.

On appeal, this Court reversed, holding that the evidence concerning the School District's (1) faculty assignment practices, (2) student transfer policy, (3) establishing of optional attendance zones, (4) school construction decisions and (5) treatment of Tech High School, all established that the School District had intentionally discriminated against blacks. This Court held that the School District had failed to rebut this evidence establishing its discriminatory intent. Liability Opinion, 521 F.2d 530, 537-546 (8th Cir. 1975). Specifically addressing the School District's contention that it had consistently maintained a neighborhood school policy, this Court held (521 F.2d at 543-544, n. 28):

> [T]he school district had no such consistent policy with respect to the black schools in Omaha and the schools on the fringe of the black community. Time and again, the policy--if one existed--was discarded whenever it would have had an integrative effect: the defendants riddled it with exceptions, including a virtually automatic transfer policy, optional attendance zones in fringe communities, a shared attendance zone precluding anyone from being compelled to attend the only black high school (Tech), and geographically suspect assignment practices for predominantly black King Middle Schools [sic]. It is an understatement to say, as the Supreme Court found in Keyes v. School District No. 1, ... [413 U.S. 189, 212,] that "the 'neighborhood school' concept has not been maintained free of manipulation."

This Court then ordered the district court to institute a plan to remedy the effects of the School District's violations, ordering that faculty be fully integrated by the opening of the 1975-1976 school year and that students be reassigned no later than the 1975-1976 school year. 521 F.2d at 546. This Court also articulated a set of guidelines to aid the School District in carrying out its responsibility to develop and implement a comprehensive plan for achieving student reassignment. 521 F.2d at 546-548.

The School District filed a petition for a writ of certiorari challenging both this Court's holding that the School District had engaged in intentional discrimination and the remedial guidelines issued by this Court. The Supreme Court denied the petition. 423 U.S. 946 (1975).

B. The Remedy Phase

On remand in the district court, the School District submitted a comprehensive remedial plan. On April 27, 1976, after both the United States and the Intervening Plaintiff submitted objections and proposed modifications to the School District Plan, the district court issued an opinion adopting the School District's plan as modified by amendments proposed by the United States. 418 F. Supp. 22. On May 24, 1976, the court ordered the plan's implementation. The plan ordered by the district court with some exceptions comported with the guidelines previously issued by this Court.

On appeal, this Court sitting en banc, rejected the objections of the plaintiff-intervenors and the School District and affirmed the remedy ordered by the district court. Remedy Opinion, 541 F.2d 708 (8th Cir. 1976). This Court reviewed its earlier opinion finding intentional discrimination and establishing remedial guidelines in light of Washington v. Davis, 426 U.S. 229, (1976) and Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), and reaffirmed its earlier opinion. Upon affirmance of the district court's remedial order the cause was remanded to the district court with directions to implement the remedial plan for the Omaha School District at the beginning of the 1976-1977 school year. 541 F.2d at 709.

C. The Supreme Court Phase

After the entry of this Court's en banc remedy opinion, the School District filed a petition for a writ of certiorari presenting the following questions:

> 1. Do school districts with racially imbalanced neighborhoods violate the Fourteenth Amendment merely by adopting or maintaining policies which in fact have as one of their effects some racial separation or imbalance in the schools?
>
> 2. Does mere proof that school district actions had a foreseeably segregative effect compel a finding of segregative intent?
>
> 3. Does a federal court have the remedial authority to fully integrate racially imbalanced schools without finding the extent of the racial imbalance in fact caused by purposefully discriminatory school district policies and without finding the extent to which the effects of such purposeful discrimination would be eliminated by prohibiting the policies?

Petitioner's Brief for Certiorari, p. 3.[3/]

In response to the School District's petition, the United States urged that this Court had anticipated and applied the standards articulated in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and had correctly determined that racial considerations were a "motivating factor" in the School District's decisions. The United States also argued that in light of all of the evidence establishing the School

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3/ It is our understanding that the Court has sufficient copies of all Briefs filed with this court at the liability stage and the remedy stage, and therefore we are not lodging copies of those briefs at this time. For the convenience of the Court, the United States will lodge copies of the parties' certiorari briefs in School District of Omaha v. United States, No. 76-705, with the Clerk of the Court. We do not intend to lodge copies of the parties certiorari briefs at the liability phase at this time, but will be pleased to do so if requested by the Court.

District's intent to discriminate, it was proper for this Court to require the School District to come forward with evidence establishing that its actions were not racially motivated. Brief for the United States in Opposition, pp. 6-7. Finally, we urged that in light of the fact that the School District had engaged in intentionally discriminatory conduct having a substantial effect on the racial composition of many schools, it was proper for the district court to order extensive student reassignments to produce an attendance pattern closer to the one that would have existed but for the violation of the Constitution. Brief for the United States, pp. 9-11.[4/]

Plaintiff-intervenors also argued that the School District's petition should be denied. They urged, like the United States, that the evidence when analyzed in light of Washington v. Davis, 426 U.S. 229 (1976)[5/] established the School District's segregative intent and that the evidence of the widespread effect of

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4/ In response to the School District's contention that the guidelines previously issued by this Court amounted to a requirement of "complete integration of the public schools," Petitioner's Brief, p. 33, the United States demonstrated that the plan as implemented by the district court and approved by this Court allowed a substantial variance from mathematical "racial balance," and was flexibly applied so as to allow a number of schools, both majority black and majority white, to retain predominantly one-race enrollments.

5/ Plaintiff-Intervenors did not have the benefit of the Supreme Court's decision in Arlington Heights, supra, at the time they filed their brief in the Supreme Court.

the School District's violation warranted the district court's remedial order.

On June 29, 1977, the Supreme Court granted the School District's petition for certiorari, vacated this Court's judgment, and remanded for reconsideration in light of Arlington Heights, supra, and Dayton Board of Education v. Brinkman, 45 U.S.L.W. 4910 (June 27, 1977). School District of Omaha v. United States, ___ U.S. ___, 45 U.S.L.W. 3850 (June 29, 1977). In its opinion, the majority recounted the history of this litigation, noting that this Court and the district court had differed as to whether the facts established intentional segregation and as to the weight which should be placed upon school district actions whose natural and foreseeable result is to bring about or maintain segregation. The majority then reiterated its statement in Washington v. Davis, 429 U.S. 229, 239 (1976) that

> [o]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

The Court further noted that Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, "restated and amplified the implication" of Washington v. Davis, supra. Finally, the Court stated:

> Neither the Court of Appeals nor the District Court, in addressing themselves to the remedial plan mandated by the earlier decision of the Court of Appeals addressed itself to the inquiry required by our opinion in No. 76-539, Dayton

Board of Education v. Brinkman, in which we said:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." Slip op., at 12-14.

Three Justices dissented from the Supreme Court's ruling on the grounds that this Court had already properly analyzed the evidence in finding discriminatory intent and had thereafter properly approved a conprehensive order to remedy the systemwide effects of the School District's acts of intentional discrimination. Id.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court rendered its opinion vacating and remanding this Court's Remedy Opinion for reconsideration in light of Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, and Dayton Board of Education v. Brinkman, supra, after considering the conflicting versions of the legal determinations made by this Court concerning issues which the Supreme Court had addressed in two opinions subsequent to this Court's rulings. See supra, pp. 8-10. The Supreme Court found it inappropriate to consider the merits

of the controversy but found sufficient substance in the matters as they were presented to it to require further proceedings in this Court. In doing so the Supreme Court, of course, expressed no view on the merits of this Court's decisions but rather merely directed this Court to reconsider its decisions in light of the standards enunciated in its supervening opinions in Arlington Heights and Dayton. An analysis of the holdings in this Court's Liability Opinion, 521 F.2d 530, and Remedy Opinion, 541 F.2d 708, establishes that they are fully supported by Arlington Heights and Dayton even if some of the language in this Court's opinions may not have anticipated every nuance of the intervening Supreme Court Opinions. On remand, this Court should apply Arlington Heights and Dayton and reaffirm its Liability and Remedy Opinions.

ARGUMENT

I. THIS COURT'S PRIOR DECISIONS ARE CONSISTENT WITH ARLINGTON HEIGHTS AND DAYTON.

A. The Applicable Law

Keyes v. School Dist. No. 1, Denver, Colo., supra, is the starting point for analysis in any school desegregation case for it establishes that the essential element of de jure segregation is "a current condition of intentional state action." 413 U.S. at 205. Keyes also sets forth a number of evidentiary

presumptions to aid courts in making the determination of whether a school system has intentionally established racially separate schools. Finally, Keyes holds that if a neighborhood school policy is not racially neutral, but rather is maintained and manipulated so as to create or to continue racially separate schools, then the neighborhood school policy is an agent of discrimination and is constitutionally impermissible. Keyes v. School District No. 1, Denver, Colo., supra at 212; see also Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971).

Washington v. Davis, supra, and Arlington Heights, supra, rely on these principles and expand upon them by resolving one issue left open in Keyes: "whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation." Keyes, supra, 413 U.S. at 212. Washington v. Davis and Arlington Heights hold that the disproportionate racial impact of the neutral application of a long-standing neutral policy, standing alone, will only occasionally establish a constitutional violation. Washington v. Davis, supra at 242;

Arlington Heights, supra at 265. The neighborhood school system, widely used throughout the country, is analogous to the tests in Washington v. Davis, and the zoning decision in Arlington Heights. Cf. Austin Independent School District v. United States, 429 U.S. 990 (1976). Thus, these cases establish that if the decision to utilize a neighborhood school assignment policy is racially neutral and not in continuation of or in furtherance of a discriminatory intent, there would be no equal protection violation, even if the decision caused racially disproportionate attendance patterns.[6/]

Arlington Heights, supra, further enhances the analytical process by establishing non-exclusive criteria based on common sense and experience to aid in determining when official actions have been taken with discriminatory intent. Id., at 266-268.

6/ The School District argued in its Petition for Certiorari filed in the Supreme Court that under this Court's liability decision "all the plaintiff need show is that the school district employs a neighborhood school assignment policy and has racially imbalanced neighborhoods. This showing alone makes out a prima facie case, which, given the difficulty of overcoming the presumption, amounts to a demonstration that the neighborhood school policy itself violates the Fourteenth Amendment." School District Petition for Certiorari in No. 76-705, p. 16. Of course this Court made no such holding. Compare United States v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976), vacated and remanded 429 U.S. 990 (1976) discussed infra, pp. 20-21.

The Court stated that (1) a disproportionate impact of the decision on one race, (2) a historical background of official actions taken for invidious purposes, (3) a sequence of events indicating a racial purpose, (4) a departure from the normal procedural course, (5) a departure from the prior substantive decisions, and (6) the legislative or administrative purpose demonstrated in contemporary statements, reports, or minutes of the decision making body are all factors which alone or in conjunction with each other may evidence an intent to discriminate. Arlington Heights, supra, 429 U.S. at 266-268. The Court drew a distinction between "impact alone" and impact plus "other evidence" bearing on the decision-maker's intent, stating that "[t]he impact of the official action... may provide an important starting point" for analysis. Id., 429 U.S. at 266. In order for this holding that the racial impact of a decision is an "important starting point for analysis" to have meaning, Arlington Heights must be read to establish that statistics "plus" supportive historical or circumstantial evidence of intent are sufficient to establish a prima facie case of intentional discrimination shifting the burden to the defendant to show that the challenged decision was based upon racially neutral criteria. The lower courts in Arlington Heights, supra and Washington v. Davis, supra, erred in shifting the burden to defendants based upon an erroneous legal standard which considered only impact without considering the other circumstantial evidence showing that the challenged decisions were racially neutral.

Finally in Dayton Board of Education v. Brinkman, supra, the Supreme Court further clarified the duties of the lower courts in school desegregation litigation. In Dayton the Supreme vacated an order of the Sixth Circuit which had affirmed a finding of a "three part cumulative constitutional violation" as well as a remedial order requiring systemwide desegregation. The Supreme Court first addressed the question of the relative role of district courts and appellate courts, holding (45 U.S.L.W. at 4913):

> On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(b). If it decides that the District Court has miasapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

The Supreme Court next addressed the unclear standard of liability utilized by the lower courts, and reiterated its holding in Keyes, Washington v. Davis and Arlington Heights in remanding to "determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff." Dayton, supra, 45 U.S.L.W. at 4914. Finally, because the Supreme Court felt that the Court of Appeals had approved an overly broad remedy out of proportion to the uncertain constitutional violations found, 45 U.S.L.W. at 4913, the Court directed the lower courts to implement a remedy

designed to redress only the amount of incremental segregative effect which the school board's violations "had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." Dayton, supra, 45 U.S.L.W. at 4914.

B. The Liability Opinion

An analysis of this Court's Liability Opinion, 521 F.2d 530, establishes that this Court faithfully adhered to the requirements of Keyes, Washington v. Davis, Arlington Heights and Dayton. Throughout this litigation it has been clear that the decisions of the School District have had a racially disproportionate impact or effect, for there is no doubt that there is a substantial degree of racial imbalance in the schools of Omaha. 389 F. Supp. at 297; 521 F.2d at 533-534. Therefore, the parties, the district court, and this Court all properly focused upon the question of whether the School District had intentionally discriminated against blacks to cause the substantial racial isolation in the schools of Omaha. 389 F. Supp. at 296, 521 F.2d at 535. Similarly, all parties, the district court and this Court have been aware that segregative intent usually must be inferred from the actions of the school officials. 389 F. Supp. at 296; 521 F.2d at 535. However, in analyzing the proof presented on the issue of intent, the district

court compartmentalized the evidence before it and viewing that evidence in a vacuum made, in effect, a separate ruling on the intent behind each act or policy without considering how each act or policy related to other acts or policies of the School District. This mode of analysis ignored the interrelationship between the policies and actions of the School District and thus was not in accord with the analytical framework required by Arlington Heights, supra, which holds that the intent behind an official action must be inferred from an analysis of all the evidence surrounding that official conduct. Id., 429 U.S. at 266-268.

On appeal this Court adhered to Dayton's directives concerning the relative roles of district courts and appellate courts, reversing both because the district court made clearly erroneous fact findings, 521 F.2d at 538, 540, and because the district court misapprehended the applicable legal standards. 521 F.2d at 537, 545. In reversing, this court held that (521 F.2d at 535-536):

> a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation. When that presumption arises, the burden shifts to the defendants to establish that "segregative intent was not among the factors that motivated their actions." Keyes v. School District No. 1, 413 U.S. 189, 210, 93 S. Ct. 2686, 2698, 37 L. Ed. 2d 548 (1973).

This Court then made the detailed findings concerning the extent of the violation required by Dayton, holding that the School District had failed to rebut the presumption of segregative intent which arose from the defendants' foreseeably segregative conduct in five decision-making areas: faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of Tech High. Id. at 537.

The Supreme Court's remand appears to result from the conflicting characterizations the parties placed on this Court's utilization of a presumption of segregative intent arising from school district acts or omissions which had the natural and probable consequences of bringing about or maintaining segregation. The application of such a presumption to school district decisions taken pursuant to a neighborhood school assignment policy which is maintained in a racially neutral manner and not in continuation of or in furtherance of a discriminatory intent would be improper under Washington v. Davis, supra, and Arlington Heights, supra, even if the decision caused racially disproportionate attendance patterns, for the presumption of segregative intent would appear to be based solely on the fact that the decisions had a foreseeable racially disproportionate impact, a criterion not totally dispositive under Arlington Heights or Washington v. Davis.

However, as we demonstrate in Part II of this Brief, an analysis of this Court's Liability Opinion establishes that this Court did not apply the foreseeability presumption to the neighborhood school policy or to actions to maintain it. Rather, this Court's opinion carefully analyzed all of the evidence and only applied a presumption of segregative intent requiring rebuttal by the School District to those School District actions which deviated from the normal School District policy and had a foreseeable racially disproportionate impact. In doing so, this Court relied heavily on evidence of overt racial intent and on the historical context of the school board actions. In following this approach this Court apparently anticipated Arlington Heights which provides that evidence of racially disproportionate impact of School Board decisions "plus" other circumstantial evidence of intent establishes a prima facie case of intentional discrimination shifting the burden to the defendant to establish that its actions were not intentionally discriminatory. The presumption of segregative intent applied by this Court in the five decision-making areas analyzed in the Liability Opinion was reached by "a sensitive inquiry into such circumstantial and direct evidence of intent as [was] . . . available." Arlington Heights, 429 U.S. at 266.

This Court' Liability Opinion is thus unlike the Fifth Circuit's opinion in United States v. Texas Education Agency (Austin Independent School District), 532 F.2d 380 (5th Cir.

1976), vacated and remanded, 429 U.S. 990 (1976) where the Court appeared to apply an irrebuttable presumption of segregative intent to invalidate a neighborhood school policy solely because the foreseeable result of that policy was segregated schools, id. at 532 F.2d 390, without determining whether the neighborhood school assignment policy had been maintained in a racially neutral manner. In contrast to the Austin court, this Court did not question the neighborhood school system or apply an irrebuttable presumption of segregative intent to the School District's foreseeably segregative conduct. Rather this Court analyzed all of the evidence surrounding the School District's intent in making foreseeably segregative decisions, and then applied a rebuttable presumption or inference of segregative intent in those areas where the evidence taken as a whole warranted an inference that the School District had made intentionally discriminatory decisions.

C. The Remedy Opinion

When this case was last before this Court at the remedy phase, both the School District and the United States argued that the goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violation of the Constitution. Remedy Brief for the United States, p. 44; Remedy Brief for the School District, pp. 43, 57; Answering Remedy Brief for Plaintiff-Intervenor, pp. 13-23. The United States explained (Remedy Brief, pp. 44-45) that:

> [a]s the Supreme Court emphasized in Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 15, "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." To this end, there is broad equitable power "to remedy past wrongs" (id.) The task is not to produce a result merely because the result itself may be attractive. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution . . . . As with any equity case, the nature of the violation determines the scope of the remedy" (id. at 16). "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley, 418 U.S. 717, 746 (1974).

Both the Plaintiff-Intervenor and the United States argued that based upon the School District's violation of the constitutional rights of black students in (1) faculty assignment, (2) attendance zones, (3) transfer policy, (4) school construction and (5) treatment of Tech High School, a systemwide violation, with systemwide effects justifying a systemwide remedy had been shown. Although the School District has never carried its burden of proving that there were not systemwide effects of their segregative acts, Keyes, supra, 413 U.S. at 208-209, 213-214; Swann, supra, 402 U.S. at 26, the United States acknowledged that it was plausible that not all of the racial imbalance in Omaha schools was caused by the intentionally segregative acts of the School District.

The district court apparently recognized the foregoing principles, for its order provided systemwide relief, yet excluded all first grade students as well as a number of predominantly one-race schools from participation in the remedial plan. This Court,

after reviewing the Liability Opinion in light of Washington v. Davis, supra, then affirmed the district court's remedial order, approving both a systemwide remedy as well as the exclusions from that remedy, in holding that "the plan meets constitutional standards." 541 F.2d at 709.

Although this Court did not explicate the "constitutional standards" which guided its remedy determination, the arguments before this Court explored the principles subsequently articulated in the Supreme Court's ruling in Dayton and this Court implicitly resolved those arguments in favor of the plaintiffs. In Part III of this Brief, we show, as we did in our initial brief on Remedy, that the scope of the relief in this case is appropriate given the extent of the impact of the constitutional violation proven, and thus that this case is unlike Dayton where the remedy ordered far exceeded the scope of the violation found. Dayton, supra, 45 U.S.L.W. at 4913. We propose that on remand, this Court make explicit what was implicit in its earlier opinion - that a systemwide remedy is appropriate in this case to remedy the systemwide effects of the school district's systemwide violations of the rights of black students. See United States v. Columbus Municipal Separate School District, No. 76-3781 (5th Cir., August 9, 1977).

II. WHEN ANALYZED IN ACCORDANCE WITH THE ARLINGTON HEIGHTS CRITERIA, THE EVIDENCE ESTABLISHES THAT THE SCHOOL DISTRICT OF OMAHA INTENTIONALLY DISCRIMINATED AGAINST BLACKS.

This Court has on two different occasions examined the evidence in this case and determined that the School District of Omaha has intentionally discriminated against blacks. The Supreme Court's decision in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), establishes that this Court's prior determinations were entirely correct. When the evidence concerning the School District's actions in the five decision-making categories analyzed in this Court's Liability Opinion, 521 F.2d 530, is again analyzed in accordance with the Arlington Heights criteria, it is clear that this Court's liability opinion was, in a large part, a precursor of Arlington Heights. Arlington Heights establishes that the factors which this Court considered probative in determining that the School District intentionally discriminated against blacks were properly relied upon and do establish intentional discrimination.

The School District has argued on this remand, as it did in the initial appeal on liability, that this Court must accord deference to the finding of the district court that the School District did not intentionally discriminate against blacks and may reverse only if the district court's findings are clearly erroneous. Arlington Heights establishes that the district court did not apply a proper legal standard in determining whether the School District had intentionally discriminated against blacks, for the district court did not evaluate all of the evidence concerning the circumstances surrounding the School District's decisions, but rather

analyzed each separate School District decision in isolation without considering how it related to other decisions and factors affecting the School District's actions. This mode of analysis infected the district court's ultimate finding that the School District did not intentionally discriminate against blacks with an erroneous legal standard, and thus, this Court's review of the ultimate facts is not governed by the "clearly erroneous" rule. See S.S. Silberblatt Inc. v. Seaboard Surety Co., 417 F.2d 1043, 1055 (8th Cir. 1969); Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 433 (5th Cir. 1977).

This Court's Liability Opinion relied in a large part upon the evidentiary facts found by the district court, but overruled the district court's ultimate findings because they were induced by an improper view of the law. In other instances this Court overruled the district court's factual findings as clearly erroneous. Under Dayton, supra, both of these actions were appropriate functions of an appellate court. The action of the Supreme Court in this case in no way calls into question the findings of fact made by the district court and affirmed by this Court or those made by this Court, and thus the factual findings in this case are the law of the case. The main effort of the School District's Brief is to reopen the question of the validity of the factual findings made by the district court and by this Court, but its Brief which

fails to address the factual analysis in this Court's Liability Opinion, is in a large part foreclosed by that opinion and by the remand in this case. The Supreme Court remanded for two very limited purposes: (1) a determination of whether this Court applied a proper legal standard in analyzing the facts before it and (2) a determination of whether this Court's remedy order is correct. A detailed review of factual matters previously considered and decided by this Court is neither necessary nor appropriate.

A. The Impact of the School District's Decisions

This Court's analysis of the School District's intent in the five decision-making categories quite properly began with the observation that "[t]he Omaha public schools are segregated." 521 F.2d at 533. The statistics developed in this Court's opinion, 521 F.2d at 533-534, "may provide an important starting point for our analysis," Arlington Heights, supra, 429 U.S. at 266, for they establish the racial impact which the decisions of the defendants have had on the attendance patterns of the School District of Omaha.

During the period of time between 1950-1973 the School District of Omaha changed from a relatively integrated school system to, as this Court found, a highly segregated school system. 521 F.2d at 533-534. Prior to 1950 only two of the District's schools were majority black (R.A. 1068-1079),

while by 1973 fourteen of its schools were majority black (P. Ex. 41). Moreover, by 1973, fifty percent of the black students attended schools which "had an 80% to 100% black enrollment, while 73% of the white students attended schools with black enrollments of less than 5%." 521 F.2d at 533 (Footnote omitted). During this period of time the School District engaged in a pattern of decisions resulting in the abandonment of Omaha's traditional neighborhood school system in the areas on the fringe of the black community "whenever it would have had an integrative effect". 521 F.2d at 543, n. 28. As a result the racial attendance patterns of the Omaha School District are far different than they would have been absent the School District's decisions, with the most glaring example of the impact of the Board's decisions being the existence of the virtually all black Tech High in a white neighborhood.

It is of course true that all school board decisions which effect enrollment patterns have a racial impact: either the racial status quo is maintained or the action effects a segregative or integrative change in the status quo. An isolated action of the School District which had an isolated segregative impact would have little probative value, rather the impact of the decision must be viewed in light of the context in which it was made. Thus in Washington v. Davis, supra, the impact of the test being challenged

had to be viewed in the context of a police force which had aggressively and successfully recruited black police officers, id., 426 U.S. at 235-236, while in Arlington Heights, the decision being challenged was the refusal to grant one variance to a zoning ordinance which had been passed at a time when the racial factors presented by the plaintiff were not an issue in the community. 429 U.S. at 258, 269-270. In neither Washington v. Davis nor Arlington Heights was there a pattern of official decisions having a disparate impact on one race. The statistical evidence developed by this Court concerning the racial impact of the School District's actions in five distinct areas shows that in the case sub judice there was such a pattern, and the pattern was caused not by adherence to neutral principles (such as might be involved in a bona fide neighborhood school assignment policy) but by manipulation around such rules. In virtually every area of school administration: faculty and student assignments, curriculum, school construction, and student transfers,

the School District made decisions which had a significant racial impact when, as this Court found, other options, less segregative and more consistent with the School District's policies and interests were available. Indeed, in many instances overt racial considerations influenced the District's actions. This Court's opinion, as the following analysis will show, thus properly relied upon statistics "plus" other evidence of intent in finding that the School District had intentionally discriminated against blacks.

B. Faculty Assignment

The evidence concerning faculty assignment established that the School District of Omaha had intentionally discriminated against blacks. Both the district court and this Court found that from 1940 until the early 1960's the District had deliberately placed black teachers only in majority black elementary schools and refused to allow qualified blacks to teach in the secondary schools. 521 F.2d at 538. This historical background of official purposefully segregative actions is a strong indicator of the District's intent to discriminate against blacks. Arlington Heights, supra, 429 U.S. at 266.

Similarly, the School District's explanation for faculty segregation, "a belief that black 'role models' should be assigned to teach black children" 521 F.2d at 538 n. 14, is as this Court found, id., a powerful indicium of the overtly racial considerations which prompted the School District's segregative actions

for it constitutes an administrative history of the racial purpose behind the District's acts. Arlington Heights, supra, 429 U.S. at 268.[7/]

Finally, the statistical evidence establishing that the District had not significantly altered its historical policy of assigning black faculty only to black majority schools, 521 F.2d at 538, establishes that the School District still intentionally discriminates against blacks. "[T]eacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems ..." Kelly v. Guinn, 456 F.2d 100, 107 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973), that these statistics are particularly probative, and establish "a clear pattern, unexplainable on gounds other than race, [which] emerges from the effect of state action." Arlington Heights, supra,

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7/ This Court's finding 521 F.2d at 539, n. 14 that the School District's response to the ACLU's request that the faculty be desegregated suggests discriminatory intent is also supported by Arlington Heights, supra, 429 U.S. at 268. The School District's response that the assignment of non-white teachers in all Omaha public schools "is currently unrealistic" although "[t]he climate of--our community has been increasingly receptive" constitutes highly probative administrative history indicating that the school district's assignment policies were based upon discriminatory criteria. Cf. United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1185 n. 3 (8th Cir. 1974); Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037, 1039 (10th Cir. 1970). Similarly, the District's adoption of a free transfer policy and optional attendance zones, see infra, in the face of this community feeling, supports the conclusion that the District adopted these policies for segregative reasons, for the District was clearly aware that many white parents would choose to have their children transfer from black schools or opt to attend white schools.

429 U.S. at 266.[8/]

The School District attacks (Remand Brief, p. 44) this Court's holding that the finding that the faculty was segregated on the basis of race raised a presumption of segregative intent in all the School District's decisions, 521 F.2d at 538, but does not attack the holding that the segregated facilities identified "some schools as 'black schools.'" These holdings follow Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18, where the Supreme Court held that a finding of faculty segregation places the burden on the school district to show that it had not illegally discriminated, saying: "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff... a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." Id.;

8/ The School District argues on remand that "there is no indication in the record that the School District ever assigned black faculty to a school which was majority white in such numbers which arguably could mark it as a school 'for blacks only,' thereby encouraging white students to leave or black students to attend." School District Brief on Remand, p. 42. This argument is specious, for as both this Court and the district court found it was the policy of the School District to never assign blacks to any school but a majority black school. This policy would prevent any chance that blacks would be encouraged to attend a majority white school, but rather would serve to encourage the attendance of blacks at already majority black schools. In every instance where black faculty was assigned to a majority black school those schools either remained or became over 75% black schools. (R.A. 918-921).

see 521 F.2d at 538, n. 13. As the Ninth Circuit noted in Kelly v. Guinn, supra, 456 F.2d at 107, such a conclusion is warranted, for teacher assignment is so peculiarly subject to the control of the school district "that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. . . ."[9/]

The application of this presumption to the case herein would be controlling, for as this Court found, 521 F.2d at 538, the School District has not carried its burden of demonstrating that the segregated character of the schools of Omaha is not the result of intentionally segregative actions. Cf. Keyes, supra, 413 U.S. at 208, 213. In any event this historical background of official actions taken for racially invidious purposes in faculty assignment and the concomitant racial identifiability of the schools are factors which this Court should consider in assessing the racial impact of the School District's decisions. Similarly, this historical background should be considered in determining whether decisions of the School District in other decision making areas were made with discriminatory intent.

9/ Here the School District admits that its faculty assignment policy was racially motivated and as this Court held, 521 F.2d at 539, n. 14, the District's asserted belief that black students are better served if taught by black faculty "reinforces . . . the presumption of segregative intent with regard to students, since it would logically suggest herding black students into their own schools where they could be taught by proper black role models."

C. Student Transfers

This Court's finding that the evidence concerning the School District's student transfer program established its discriminatory intent is also in accord with Arlington Heights. See 521 F.2d at 539-540. Although the School District seeks, to exceed the scope of the remand here by reviving its argument on the Liability Appeal and the Remedy Appeal that the transfer policy did not have a racially disproportionate impact, the statistics developed in this Court's Liability Opinion belie that argument for the "effect of the transfer policy on the majority and predominantly black schools was profound," 521 F.2d at 540, and the School District has presented no evidence contradicting that conclusion. The evidence established that the District abandoned a long-standing policy limiting student transfers in favor of a policy allowing transfers on a more liberal basis. As the district court found, 389 F.2d at 315, this policy was "a deviation from the neighborhood school policy" which the School District maintains motivated its actions.[10/] Under Arlington Heights this departure from tradition is particularly relevant both because it had a segregative impact, 429 U.S. at 266, and because by allowing freer student transfers the District made a substantive departure in which "the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached." 429 U.S. at 267.

10/ Notwithstanding that finding, the School District persists in arguing that the transfer policy was "an adjunct to" rather than a deviation from the neighborhood school policy. School District Remand Brief, p. 33.

Moreover, the transfer policy has not been applied with an even hand, for it "appears that some black students were denied access to a majority white school (Lewis and Clark) for the reason that it was overcrowded, whereas at the same time some white students were allowed to transfer from majority black schools into that school." 367 F. Supp. at 193; 521 F.2d 539 n. 17.[11/] Additionally, as this Court found, 521 F.2d at 540, n. 20:

> despite the capacity limitation in the transfer policy, large numbers of white students were allowed to transfer to South High from the Tech/Central zone at a time when Tech had unused capacity of close to 1,000 and South was seriously overcrowded. [12/]

11/ The School District mistakenly asserts "the only evidence in the record of any inconsistent application of the policy regards the granting of transfer requests of white students from the Tech-Central zone to South High School at a time when South was 'overcrowded'." School District Remand Brief, p. 35. The District ignores the district court's and this Court's contrary finding.

12/ The School District's decisions on these transfer requests is particularly probative of the District's intent to discriminate in light of the fact that the evidence showed that the District was aware that many of these students transferred to South High to enroll in its vocational program, although Tech was a vocational high school. (A. 300-301). The School District, while seeking to relitigate this court's finding of overcrowding in South High School, concedes that in a year when the District granted 315 transfers from Tech to South, 389 F. Supp. at 313, South enrolled 89 students over its rated capacity. School District Brief, pp. 35-36.

Such evidence concerning the departures of the School Board from its announced transfer policy when the policy would have favored a result which would have achieved more racial integration is also highly probative of segregative intent. Arlington Heights, 429 U.S. at 267.[13/]

D. Optional Attendance Zones

This Court found that "the elaborate system of delayed conversion, optional zones, and the closing of Tech Junior High to be inexplicable unless in furtherance of a single coherent policy: the unwillingness to assign white students to schools perceived as black, the 'neighborhood school' or any other policies notwithstanding." 521 F.2d at 543, n. 25. In accord with Arlington Heights, 429 U.S. at 267, this Court analyzed the sequence of events involved in the conversion and found that the School District had intentionally:

13/ The evidence showed that the School District granted transfer requests which were premised upon the racial prejudices of the transferring student or the student's parents. 521 F.2d at 540. This administrative history of official sanctioning of racially discriminatory conduct is also probative of the School District's intent to discriminate against blacks. Arlington Heights, 429 U.S. at 268. Cf. United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1185 n. 3 (8th Cir. 1974); Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037, 1039 (10th Cir. 1970); Liability [illegible]ion, 521 F.2d at 538-539 n. 14.

A summary of the evidence concerning the transfer policy is contained in the Brief on Liability of the United States, pp. 9-14, and of Plaintiffs-Intervenors, pp. 25-29.

> minimized the necessity of assigning white seventh and eighth graders to the two identifiably black junior high schools: Mann and Tech [by utilizing] [t]wo basic techniques... (1) delaying the conversion of predominantly white K-8 schools which would be logical feeders for Mann or Tech; and (2) granting options to the seventh and eighth graders in those schools to attend more distant identifiably white junior high schools, when the conversion did take place.

521 F.2d at 541. This holding, undisturbed by the Supreme Court's remand, is precisely the kind of analysis contemplated by the Arlington Heights decision. It is based on an amalgam of impact, historical analysis, consideration of deviations from ordinary practice, and evidence of overt racial motivations.

The School District made substantive departures from the conversion plan on a number of occasions when "the factors usually considered important by the decision-makers strongly favor[ed] a decison contrary to the one reached." Arlington Heights, supra, 429 U.S. at 267. The creation of "optional attendance zones" allowing students from predominantly white Saunders,[14/] Walnut Hill, and Mason Elementary Schools to

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14/ The School District argues, as to Saunders, that its actions are supported by the district court's finding that in the year the options were created enrollments were up at Technical and down at Lewis and Clark. School District Remand Brief, p. 47. This Court, however, held: "The record is to the contrary. It shows that in 1964-1965, Lewis and Clark was operating with 88 students less than stated capacity and Tech was down 142 students from stated capacity. The 25 to 30 seventh and eighth graders from Saunders could easily have been absorbed at the much nearer Tech Junior High." 521 F.2d at 542-543.

opt out of attending the closest junior high school, the under-utilized, 60% black Tech Junior High, was one such departure, for it is reasonable to expect that the school district would have ordinarily been interested in fully utilizing its resources and in maintaining the neighborhood school policy - the policy it has consistently maintained guides its decisions. Similarly, the conversion of Yates and Jackson, the other two predominantly white elementary schools near Tech, was delayed despite the District's policy of converting to a junior high system. Jackson, 99.5% white, remained unconverted at the time of trial, while Yates' conversion was delayed because of the school district's admitted capitulation to the racial prejudice of neighborhood parents. 521 F.2d at 541.[15/] Finally, the action of the School District in failing to convert the two virtually all white K-8 schools located closest to the predominantly black Mann Junior High "despite the conversion policy, available space at Mann, and the fact that neither school had the enrollment or the facilities which the

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15/ The administrative history of the delay in converting Yates, is thus also "highly relevant" evidence of the school district's intent to segregate blacks, Arlington Heights, supra, 429 U.S. at 268, for it shows that the School District's decision was racially motivated. Cf. United States v. City of Black Jack, Missouri, supra, 508 F.2d 1185 n. 3; Dailey v. City of Lawton, Oklahoma, supra, 425 F.2d at 1039. See Liability Opinion, 521 F.2d at 538-539 n. 14. Moreover, the actions which the School District took when Tech Junior High was closed and the Yates attendance zone was divided further evidenced the District's intent that whites not be required to attend schools with blacks. In 1973, the Yates attendance zone was divided into two portions, the predominantly black portion north of Cuming Street was assigned to Mann while the predominantly white portion south of Cuming Street was assigned to white junior high schools. (A. 101-105; 645-648; P-37-H). The District assigned black feeder zones which had been assigned to Tech to Mann. White zones were assigned to white junior high schools (P-37-H). The result was the addition of 300 blacks and 19 whites to Mann (P-2; A. 889). See 521 F.2d at 542.

system considered appropriate for a junior high program," 521 F.2d at 542, is yet a further example of the School District making substantive departures from its previously announced policy when the factors normally relied upon by the school district favored adherence to the policy, but adherence would have increased the number of white students going to school with blacks.[16/]

As this Court found, the explanations proferred by the School District for its substantive departures do not negate the finding of intent which they establish. 521 F.2d at 542-543.[17/] These explanations similarly evidence substantive departures probative of the District's intent to discriminate against blacks, for as this Court held the District's

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16/ The fact that 47% of the black junior high school teachers in the system were assigned to Mann is yet further evidence of the School District's intent that this school be maintained as a black junior high. See 521 F.2d at 534.

17/ The School District in its Remand Brief has reasserted that students from Walnut Hill could not be assigned to Tech Junior High because to have done so would have pushed Tech Junior High over its maximum desired size of 750 pupils, in 1966-67, the year Walnut Hill was converted from K-8 to K-6. School District Remand Brief, p. 54. Similarly the School District argues that Yates could not be converted between 1960 and 1969 because to do so would have overloaded Tech Junior High in light of the projected increase in enrollment in that school. School District Remand Brief, pp. 56-58. Not only does the District ignore the district court's finding that the capacity of Tech Junior High was 795, 389 F. Supp. at 303, but these arguments are inconsistent with the School District's assertion in its Brief on Remand, p. 14 that "Greater [building] capacity utilization does not necessarily indicate excess enrollment" and its contention on p. 36 that transfers into schools operating in excess of capacity were allowed if the principal approved. Moreover these arguments do not in any way explain why Saunders could not have been assigned to Tech, why no portion of the Walnut Hill attendance zone could have been assigned to Tech, or why no portion of the Yates attendance zone could have been assigned to Tech before 1970.

explanations concerning the attendance zones for Walnut Hill and Saunders do not explain why none of these students could be assigned to Tech and evidenced a departure from the District's neighborhood school policy as well as from the effective utilization of resources. 521 F.2d at 542-543. 18/

18/ This Court's finding that the School District's utilization of optional attendance zones and the free transfer policy was unlawful is supported by reference to Section 204(c) of the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1703(c). This statute provides in pertinent part that

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by
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> * * *
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

As this Court found, 521 F.2d at 543, n. 28, the School District riddled its neighborhood school policy with exceptions through the use of optional attendance zones and the transfer policy and thus allowed students to attend schools "other than the one closest to his or her place of residence." These actions had as this Court found, 521 F.2d at 539-543, a segregative impact on the School District and thus resulted "in a greater degree of segregation of students on the basis of race . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district."

E. School Construction

> Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face.

Arlington Heights, supra, 429 U.S. at 266. The evidence concerning the School District's construction practices catalogued in this Court's Liability Opinion, 521 F.2d at 543, presents what may be a classic example of such a clear pattern. Between 1951 and 1973, 37 of 39 new schools or additions opened predominantly white or predominantly black. Of the 21 constructed since 1964, all opened predominantly of one race. Id. Although the School District defended its practices on the ground that its construction decisions are based upon a neighborhood school policy, as this Court found, see supra, p. 6, that policy was "riddled ... with exceptions," 521 F.2d 544, n. 28, and evidenced substantive departures from the neighborhood policy whenever it would have allowed blacks to attend schools with whites in greater proportions than existed. Id. For example as this Court noted, 521 F.2d at 543, the district court found (367 F. Supp. at 185) that:

> The evidence supports the view that apparently some white students live closer to King than do blacks, yet those whites are allowed to go to a predominantly white school while requiring blacks who live farther from King, to attend that institution. 19/

Additionally, the construction of King caused black Clifton High seventh graders to be transferred from majority white Monroe

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19/ This assignment pattern is also inconsistent with 20 U.S.C. 1703(c). See n. 18, supra, p. 39.

Junior High to majority black King Middle School, thus decreasing the number of white students attending school with black students and increasing the segregated character of both schools. See 367 F. Supp. at 183-186; 521 F.2d at 543.

The School District again contends that its school construction policy was governed by the neighborhood school policy and by the increased enrollment demands upon the District. But see 521 F.2d 543, n. 28. This argument misses the point. The District's need to construct new schools is not at issue, but the stark pattern of segregative construction is. It is a pattern showing unbending fidelity to segregation. Schools were built in white areas and black areas, but in the few instances where they were built in integrated or fringe areas the feeder lines were manipulated to preserve segregation and the neighborhood school policy was abandoned to allow whites to transfer out of their assigned schools or to opt to attend more distant white junior high schools. It is thus not the fact of construction of which we complain, but rather the method in which construction decisions were manipulated to preserve segregation.

F. Tech High School

This Court's holding that the School District's treatment of Tech High School, a black high school in a white neighborhood, evidenced the District's discriminatory intent is also supported by the Arlington Heights criteria. The District's decision to build additions to overcrowded predominantly white schools, while at the same time allowing Tech to be underutilized, 521 F.2d at 544, is a substantive departure which evidenced

the District's discriminatory intent. Arlington Heights, supra, 429 U.S. at 267. Similarly, though the School District professed to be maintaining Tech as an "open school," its decisions (521 F.2d at 544-545): (1) to require high school students from the black Near North Side to attend only Tech or Central, (2) to curtail extra curricula activities at Tech, (3) to transfer courses such as electronics out of Tech, (4) to offer courses which the District "felt would be more adequately suited to the needs of Tech's increasingly black enrollment," 521 F.2d at 545, (5) to operate the largest proportion of the District's special education program at Tech, and (6) to assign 47% of the black high school teachers in 1972 to Tech High,[20/] as well as (7) its failure to adequately maintain the physical plant at Tech were all substantive departures from an "open school" policy, evidencing the District's intent that Tech not be operated in such a manner as to be an "open school" attractive to an integrated cross-section of the community. Finally the testimony of Assistant Superintendent Doctor Fullerton, 521 F.2d at 544 n. 30, gave direct evidence that the School District's legislative intent in maintaining Tech as an "open school" was discriminatory, for he admitted that one of the factors which motivated the school district in not establishing a compulsory attendance zone for Tech was racial prejudice. Id.

20/ This factor is particularly important in light of the fact that "faculty segregation encourages pupil segregation . . . ." Clark v. Little Rock Board of Education, 369 F.2d 661, 669 (8th Cir. 1966). Such "encouragement" is clearly inconsistent with the concept of an "open" school.

The School District's argument on Remand relies in a large part on actions which the District has taken in recent years to correct the deterioration of Tech High School.[21/] These actions are commendable but actions taken subsequent to a constitutional violation do not negate the fact of the violation and are not a basis for arguing that a constitutional violation never occurred. See 521 F.2d at 539, n. 15. The evidence concerning the District's treatment of Tech High clearly warranted this Court's finding that the District intentionally discriminated against blacks in the operation of Tech High School.

III. THE REMEDY APPROVED BY THIS COURT IS IN ACCORD WITH THE PRINCIPLES ENUNCIATED IN DAYTON BOARD OF EDUCATION v. BRINKMAN.

A. The Meaning of the Remand

The Supreme Court remanded this Court's en banc Remedy Opinion, 541 F.2d 708, for reconsideration in light of Dayton Board of Education v. Brinkman, supra, a case dealing with the appropriate scope of a remedy in a school desegregation case. The School District however has argued that "the only question before this Court is whether the School District engaged in an intentional policy of separation of its students on the basis

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21/ The School District also attempts to reargue the facts listed above, which this Court held "all combined to result in a high school which was identified as 'a "colored school" just as certainly as if the words were printed across the entrance in six-inch letters.'" Compare 521 F.2d at 544-546 with School District Remand Brief, pp. 65-71.

of race," School District Remand Brief, p. 5, and that if this Court finds that its liability opinion was correct that this Court must then remand to the district court for determination of the proper scope of the remedy. The School District's argument misconceives the purpose of this remand and the purpose of the remand to the District Court in Dayton. The Supreme Court directed this Court to reconsider its remedy opinion in light of Dayton, thus inviting this Court to examine its opinion on remedy and to articulate whether this Court's earlier opinion was consistent with Dayton. Of course, if this Court were to determine that the remedy approved below was inconsistent with Dayton, it would be obliged to remand to the district court for further proceedings on remedy.

In Dayton, it was necessary for the Supreme Court to remand to the District Court because the limited liability findings were insufficient to support systemwide relief and because the lower courts had failed to address completely the other evidence as to the scope of liability. Here, of course, no such imperfection exists. The district court and this Court have both thoroughly examined the evidence of liability and a remedy has been implemented in light of the extent of the liability. We have demonstrated above that the liability finding of this Court must stand. All that remains on this remand is to examine the fit between the violation

and the remedy. Had the Supreme Court intended that the proper scope of the remedy in this case must first be reconsidered at the district court level, it would have so indicated in its remand, as it did in Dayton and as it has done in other instances where it felt that its decisions required reconsideration of a ruling by the initial fact finder. See e.g., Kelley v. Southern Pacific Co., 419 U.S. 318, 331-332 (1974); Public Service Commission of the State of New York v. Federal Power Commission, 361 U.S. 195 (1959).

B. The Applicable Law

In remanding this case to this Court the Supreme Court said that this Court should address the following inquiry required by its Dayton opinion (45 U.S.L.W. at 3850):

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when the distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." Slip. op., at 13-14.

Dayton restates the well settled equitable principle that the scope of the remedy must be commensurate with the scope of the constitutional violation, a principle which is settled law in school desegregation litigation, see Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 16; Milliken v. Bradley, 418 U.S. 717, 744, 746 (1974), and upon which this case was briefed and argued during the remedy phase.

See Remedy Brief for the United States, pp. 43-57; Remedy Brief for the School District, pp. 39-57; Answering Remedy Brief for the Plaintiff-Intervenors, pp. 13-23.

Although during the remedy stage the School District argued that "a school district is responsible for remedying only that portion of the racial separation caused by its intentionally segregatory policies," Remedy Brief of School District, p. 42, the School District never offered any evidence (beyond the evidence concerning the effect of its policies which was in the record at the liability phase) to show that there have not been systemwide effects of its segregative acts. Where, as here, there is a finding of an intentional systemwide pattern of segregative school board actions, the reasonable inference is that there are continuing systemwide effects of the School District's acts of discrimination. It is of course difficult to determine precisely what effects the School District's actions had on the racial composition of the schools of Omaha, but the School District at the first instance bears the burden of demonstrating that its conduct, which this Court has found was intentionally segregatory, did not cause the racial disparities evident in the School District. Cf. United States v. Columbus Municipal Separate School Dist., No. 76-3781, at n. 11 (5th Cir. Aug. 9, 1977). This Court's finding of intentional discrimination by the School District "shifts to those authorities the burden of proving that

other segregated schools within the system are not also the result of intentionally segregative actions." Keyes, supra, 413 U.S. at 208. See also Swann, supra, 402 U.S. at 26. Here, as in Keyes, this Court's finding that the School District engaged in systemwide discriminatory conduct, shifts to the School District the burden of showing that its discriminatory decisions "were not factors in causing the existing condition of segregation in these schools." Id., 413 U.S. at 214.

Racial discrimination may be one of many motives of school officials, and the actions of the school officials may mingle with vast numbers of actions of other public officials, and of private persons, in producing the pattern of student attendance in the schools. It should therefore be incumbent upon the School District to demonstrate occasions where its discriminatory conduct has not caused the discriminatory impact which this Court found that the School District intended. Moreover, the task of assessing the effects of proven racial discrimination in the operation of the schools would be properly aided by the use of reasonable presumptions. See Keyes, supra, 413 U.S. at 201-213; Liability Opinion, 521 F.2d at 536, n. 9.

As this Court has stated "[t]he use of presumptions in civil rights cases is not a novel one." Id. "In the context of racial segregation in public education, the courts... have recognized a variety of situations in which 'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated." Keyes, supra, 413 U.S. at 209. Once racially-discriminatory practices in the operations of the schools have been proved,

"fairness" and "policy" dictate that it is proper for this Court rebuttably to presume that those practices achieved their full potential as a contributing factor to the observed racial imbalance in student attendance patterns. The burden should then shift to the School District to show the extent to which racial separation would have existed in the absence of the discrimination. This is true not only because of the rational inference of a nexus between the board's intent to segregate and the existence of segregation but also because it is the School District that has access to the information necessary to demonstrate the effects of its racial discrimination, and which is in the best position to establish what conditions would have been but for the improper consideration of race.

As a practical matter in cases like the one sub judice, if plaintiffs were required to demonstrate not only the existence of racial discrimination but also the specific effects of that discrimination on attendance patterns, they would often face an insuperable barrier. Because attendance patterns in every school district are the product of many causes, a requirement that the plaintiffs establish which effects have been caused by racial considerations would allow the discriminators to prevail - provided only that they could suggest some plausible explanations (in addition to their discrimination) for the observed racial identifiability of the schools. Such a requirement would ignore, as well,

another effect of school board segregative actions: the identifiability of a school as officially intended for children of one race. Perpetrators of racial discrimination should not be permitted to stand silent while the victims are required to shoulder so heavy a burden.

Indeed, it is an accepted principle that a wrongdoer cannot invoke the complexity of his wrong to avoid answering for it. In antitrust law, for example, the very success of a violation may make it impossible to compute damages--for instance, when a monopolist drives a competitor out of business. But success is not a reason to allow the violator to retain the fruits of his misdeeds. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-125 (1969). The violator must accept, as part of the cost of the violation, the fact that the remedy may be imprecise and more extensive than would be necessary in a world of perfect information.[22/]

22/ Similarly, the Supreme Court has repeatedly held that the perpetrator of a constitutional wrong bears the burden of demonstrating that his violation was without, or of limited, effect. Arlington Heights, supra, 429 U.S. 270-271 and n. 21; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 285-287 (1977); cf. Franks v. Bowman Transportation Co., 424 U.S. 747, 771-773.

C. The Remedy

As Section II of this Brief demonstrates, the evidence fully supported this Court's finding that the School District intentionally discriminated against blacks in virtually every decision-making area. When this evidence of intentional discrimination is viewed in light of the "conclusion that racially inspired School Board actions have an impact beyond the particular schools that are the subject of those actions," Keyes, supra, 413 U.S. at 203, as well as in light of the existing racial separation in the student attendance patterns and the School District's failure to demonstrate that the racial identifiability and racial segregation of the Omaha Schools would have existed even in the absence of intentional discrimination, it is clear that this Court's affirmance of a systemwide remedy was entirely appropriate.

This Court has found that between 1951 and 1973 the School District intentionally constructed 37 of 39 new schools as predominantly white or predominantly black schools, and that the School District's explanation that these construction decisions were based upon adherance to a neighborhood school policy was unconvincing because "[t]ime and again, the policy - if one existed - was discarded whenever it would have an integrative effect." 521 F.2d at 543 and n. 28.[23/] Thus over 35% of all the

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23/ Despite this Court's previous ruling the School District maintains throughout its Remand Brief that its decisions are based upon a racially neutral "neighborhood school" policy.

schools in the School District were built as one race schools. Such a pattern of intentionally discriminatory school construction served not only to label 35% of the District Schools as black or white but also must of necessity have an impact on the racial composition of the other schools in the district as well as on the racial composition of the residential neighborhoods. See Swann, supra, 402 U.S. at 20-21; Keyes, supra, 413 U.S. at 202-203.

This pervasive effect of the School District discriminatory construction policies was closely interrelated with the District's other acts of intentional discrimination. The policy of the School District only to assign black teachers to majority black schools served to identify those schools with black teachers as "black" schools, 521 F.2d at 538, and conversely to identify those schools without black teachers as "white" schools. The School District's transfer policy had a "profound" effect on the majority and predominantly black schools and served to further enhance the racial identifiability of both the "white" and "black" schools for the "result of the transfer policy was to increase the segregated nature of almost all of the majority black schools in the District" and to sanction white student flight from majority black schools. 521 F.2d at 540 and n. 20.

Further, the only statistics available with regard to the effects of the student transfer policy are for the years 1970-71 and 1971-1972. The transfer policy was instituted in 1963-64, and the School District has not demonstrated that the policy had little or no effect upon the change in racial enrollments since that time. Between 1963 and 1970, the black enrollment at Clifton Hill increased from 25% to 73%; at Franklin from 22% to 86.86%; at Monmouth Park from 35% to 67.74%; at Technical Junior High from 54% to 90.30%; at Technical Senior High from 51% to 86.58%.[24/] In 1963-64, Mann Junior High School enrolled 127 white students (113 in 1962-63), largely from the Saratoga feeder zone which was 35 percent white in that year. The year following the adoption of the transfer policy, the white enrollment at Mann decreased to 35 despite the fact that Saratoga's white enrollment was 33 percent (259 white students in grades K-6) (P. Ex. 2). Thus, the evidence suggests that large numbers of whites took advantage of the transfer policy in its first year of operation to flee predominantly black schools. The District has produced no evidence to prove that these changes in enrollment were not caused, at least in part, by the transfer policy.

24/ Statistics are from School District Remedy Brief at p. 53.

In those instances where there was a danger that a School District policy might require white students to attend a "black" school, the School District adopted intentionally segregatory policies such as optional attendance zones, delayed conversions to a junior high program, and the closing of Technical Junior High School, all of which this Court found were "inexplicable unless in furtherance of a single coherent policy, the unwillingness to assign white students to schools perceived as black . . ." 521 F.2d at 543, n. 25. These policies, as this Court found, had a direct impact on the racial attendance patterns in five of the eleven existing junior high schools, as well as in those K-8 schools whose conversion was delayed to avoid requiring whites to attend school with blacks. See 521 F.2d at 540-543.[25/]

25/ The action taken by the School District in changing the Yates attendance zone after Technical Junior High School was closed similarly had a substantial racial impact on the racial attendance patterns at Mann and at surrounding white junior High Schools. In 1973-1974, the Yates zone was divided into two portions. That portion north of Cuming Street, which was predominantly black, was assigned to Mann (98 per cent black), the portion south of Cuming Street, which was predominantly white, was assigned to white junior high schools. (A. 101-105; A. 645-648; P-37-H). The District assigned black feeder zones which had been assigned to Tech to Mann. White zones were assigned to white junior high schools (P-37-H). The result was the addition of 300 blacks and 19 whites to Mann (P-2; A. 889).

Similarly, the School District's discriminatory policies with regard to Technical High School also had a district-wide impact, for the District operated Tech in such a manner that it was identified as a "black school" 521 F.2d at 546, causing whites to prefer to attend other overcrowded high schools rather than the underutilized "open" Tech. The School District's refusal to assign white student's from the neighboring, overcrowded, Benson, North and South to Tech thus had a substantial effect on the racial identifiability of Tech and, as this Court found, caused the School District "to construct additions at Benson, North and South in the late 1950's and early 1960's and to build Bryan, Burke and Northwest High schools." 521 F.2d at 544. Thus, the School District's discriminatory practices with regard to Tech affected seven of the School District's eight high schools.

It is clear from the foregoing that this Court has properly approved a system-wide remedy, for when "there has been a system-wide impact. . . there [may] be a system-wide remedy. Keyes, supra at 213." Dayton, supra, 45 U.S.L.W. at 4914. United States v. Columbus Municipal Separate School Dist., supra. Unlike the situation in Dayton, where

the Supreme Court found that the remedy imposed was "entirely out of proportion to the constitutional violation found by the District Court," 45 U.S.L.W. at 4913, here the remedy ordered by the district court, and approved by this Court, is supported by detailed findings concerning the systemwide impact of the School District's violations. Although the School District has never shown that all of the segregation existing in Omaha is not the result of its intentional conduct, the Remedial Order herein has taken into account the small amount of segregation which arguably would have occurred even if the School District had not engaged in intentionally segregative acts over a period of many years by excluding the first grade from mandatory reassignment. Thus the systemwide remedy is appropriately tailored to the extent of the violation. Therefore, this Court should reaffirm its approval of the remedy which properly requires the School District to "take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' [Swann, supra,] 402 U.S. at 15." Milliken v. Bradley, ____ U.S. ____, 45 U.S.L.W. 4873, 4879 (June 27, 1977).

CONCLUSION

For the foregoing reasons, the remedy decision of the district court should again be affirmed.

Respectfully submitted,

DANIEL WHERRY
United States Attorney

DREW S. DAYS, III
Assistant Attorney General

Vincent F. O'Rourke, Jr.

BRIAN K. LANDSBERG
VINCENT F. O'ROURKE, JR.
Attorneys
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 1977, I served two copies of the foregoing Brief of the United States by first class mail, postage prepaid on:

David M. Pedersen, Esquire
1500 Woodmen Tower
Omaha, Nebraska 68102

Robert V. Broom, Esquire
Legal Aid Society of Omaha
Council Bluffs, Inc.
700 Farnam Building
1613 Farnam Street
Omaha, Nebraska 68102

Vincent F. O'Rourke, Jr.

VINCENT F. O'ROURKE, JR.
Attorney
Department of Justice
Washington, D.C. 20530