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IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 77-2100, 77-2101

UNITED STATES OF AMERICA,

Plaintiff-Appellant-Cross-Appellee,

v.

UNIFIED SCHOOL DISTRICT NO. 500, KANSAS CITY (WYANDOTTE COUNTY), KANSAS, et al.,

Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the District of Kansas

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BRIEF FOR THE UNITED STATES AS APPELLANT

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QUESTIONS PRESENTED

1. Whether, under proper legal standards and a proper evaluation of the evidence, the district court in this school desegregation case should have concluded that the United States had proved a systemwide violation requiring a systemwide remedy?

2. Even assuming a negative answer to the foregoing question, whether the desegregation plan which the district court approved was inadequate to desegregate the elementary schools where the court found liability, and inequitable at the secondary school level?

STATEMENT[1/]

A. Introduction

It is undisputed that Kansas City, Kansas operated a formal, statutorily sanctioned, completely dual school system until the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). The district court found that, with respect to both faculty and student assignment, this dual system had never been fully disestablished. The court also found that the defendants had engaged in a pattern of purposeful racial discrimination which was continuing at the time of trial. However, the court held that the scope of the violation which requires present judicial intervention is considerably narrower than the scope of the violation which the United States contended must be remedied, and that the defendants were not legally responsible for much of the racial separation which indisputably exists today in the Kansas City schools. In addition, with respect to those elementary schools which the district court found to be de jure segregated, the court refused to require actual desegregation, and accepted a

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1/ The deferred appendix procedure is being utilized in this case. Typewritten copies of this brief utilizing original record citations are being served and filed, and will be replaced by copies including appendix citations after the deferred appendix has been filed. See Fed. R. App. P. 30(c); Clerk's letter of February 3, 1978, to counsel; counsel's letter of December 22, 1977, to Clerk. [The present copy includes appendix citations: "A. ____."]

plan relying on "freedom of choice" student transfers; and with respect to the junior high school and the senior high school which it found to be de jure segregated, the court approved a plan which places almost the entire burden of desegregation on black students.

As of the beginning of the 1977-78 school year, pursuant to the court-approved desegregation plan, 44% (4,718/10,668) of the black students in the school system are continuing to attend eight virtually all-black and two predominantly black schools.[2/]

2/ The schools referred to, and their black enrollments, are Banneker (100.0%), Douglass (98.1%), and Grant (99.7%) -- as to which the district court found liability but refused to require actual desegregation; and Northwest (98.9%), Bryant (97.5%), Chelsea (71.5%), Fairfax (95.0%), Hawthorne (98.8%), Parker (82.4%), and Quindaro (99.5%) -- as to which the court found no liability. Northeast -- as to which the court found liability -- was closed pursuant to the court-approved desegregation plan. See also page 18, infra.

The figures cited do not include the 819 black students currently assigned to the virtually all-black Sumner High School, as to which the court found liability, and which is scheduled to be desegregated pursuant to the court-approved plan in the 1978-79 school year.

The remaining 56% of the black students in the system (excluding Sumner) are, under the court-approved plan, attending schools which are less than 53% black. The district-wide pupil population is 41% black.

The information in this footnote and in the accompanying text is derived from Exhibit #3 to Defendants' Progress Report, filed November 15, 1977 (A. 556-562).

B. Procedural History: Liability Stage

The original complaint in this case, alleging racial discrimination in faculty assignment, was filed on May 18, 1973 (A. 12-18).[3/] The amended and supplemental complaint, adding allegations of racial discrimination in student assignment, was filed on February 27, 1974 (A. 21-28). These complaints, signed by the Attorney General, charged the defendants[4/] with violations of Titles IV and VII of the amended Civil Rights Act of 1964 (42 U.S.C. 2000c-6 and 42 U.S.C. 2000e, et seq.), and the Fourteenth Amendment to the United States Constitution (A. 12-15, 21-25).[5/]

Following extended discovery and pre-trial proceedings, the United States moved, on July 14, 1975, for a preliminary injunction requiring desegregation at the commencement of the 1975-76 school year of five former dual black schools which had never been desegregated (R. 1066-1070).[6/] This motion was not granted; the court set a trial date of November 4, 1975,

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3/ Unless otherwise indicated, original record citations (R. ___) are based on the page numbers indicated in the district court clerk's index to the record on appeal. Appendix citations (A. ___) have been substituted in the present final copy of this brief with respect to those items which are included in the deferred appendix.

4/ Unified School District No. 500; Orvin L. Plucker, Superintendent; and the members of the Board of Education (A. 21-22).

5/ Teachers who intervened below (R. 26-30; A. 29, 30-32) have since been dismissed from the case (A. 428-429) on their own motion (R. 2170-2171), and are not parties to the present appeal or cross-appeal.

6/ The schools in question were Sumner high school, Northeast Junior high school, and Banneker, Douglass and Grant elementary schools.

and consolidated the hearing on the motion for preliminary injunction with the trial on the merits (R. 1071; A. 35).[7/]

On October 15, 1975, the defendants filed a motion in limine seeking to restrict the evidence which could be offered at trial to matters occurring after June 21, 1973, the date of the Supreme Court's decision in Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973), or, alternatively, to matters occurring after July 9, 1963, the date of the district court's decision in Downs v. Board of Education of Kansas City, Kansas, Civ. No. KC-1443 (D. Kan., July 9, 1963), aff'd, 336 F.2d 988 (10th Cir. 1964), certiorari denied, 380 U.S. 914 (1964) (A. 72). This motion was denied on October 29, 1975. The court held that collateral estoppel was inapplicable with respect to Downs because of (inter alia) subsequent developments in school desegregation law; the lack of identity of parties and issues; and the absence in Downs of a full and fair opportunity to litigate the defendants' overall policies (A. 77-89; see also A. 252-253, 307-310).[8/]

The liability portion of the case was tried to the court from November 4, 1975, to December 18, 1975. The trial consumed 26 days, and involved the testimony of 78 witnesses and the introduction of nearly 580 exhibits (A. 254). After post-trial briefing (R. 1398-1631; 1632-1635; 1636-2018;

7/ The district court subsequently found liability with respect to (and only with respect to) the five schools which were the subject of the motion for preliminary injunction. See pages 10-11, infra.

8/ In addition, the defendants' amended answer raised the question of joinder of surrounding school districts in the Kansas City, Kansas, metropolitan area (A. 74). The court denied without prejudice the defendants' motion to join such districts or in the alternative to dismiss the case (R. 1359).

2019-2044) and argument, the court took the case under submission (R. 2045).

The court's Memorandum and Order on the question of liability was entered on Feburary 14, 1977 (A. 250-360), and its findings were incorporated into a Journal Entry of Judgment entered on March 28, 1977 (A. 361-365).[9/]

C. The District Court's Decision on Liability

In its 111-page liability decision, the district court discussed in detail, and ruled upon a number of specific factual questions; declined to rule upon a number of other specific factual questions; and reached certain major general conclusions which may be summarized for present purposes as follows.[10/]

With respect to the issue of faculty assignment, the district court found that "[v]irtually all of the significant progress [toward dismantling racially segregated professional faculties and staffs] * * * occurred since 1972 [i.e., since

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9/ This judgment was not appealable by the United States at this stage in the litigation in the absence of certification under 28 U.S.C. 1292(b), and the United States did not seek such certification.

10/ The court denied the defendants' post-trial motion (R. 1390-1397) to join the Secretary of Housing and Urban Development, and the Housing Authority of Kansas City, Kansas, as parties defendant (A. 360).

the 1972-73 school year] -- the date this action was commenced;" and that "the defendants have not yet succeeded in purging the remnants of their former dual assignment policy from the district's schools * * * " (A. 289, 294). More particularly, the court found that (a) prior to 1954, in furtherance of the district's formal, statutorily sanctioned dual system, all teaching faculties were intentionally and completely segregated (A. 282); (b) from 1954 until 1963, the policy of complete faculty segregation continued in full force and effect (ibid.); (c) the first instance of faculty desegregation occurred in 1963-64, and involved the assignment of three black teachers to a 70.3% black school (ibid.); (d) from 1963 to 1972, the manner in which the defendants made assignments of new teacners "exhibited, if not an intentionally segregative purpose, a lackadaisical attitude bordering on indifference to their constitutional duty" (A. 290); (e) the defendants' "practice of assigning predominantly white faculties to predominantly white schools (and conversely, predominantly black faculties to predominantly black or all-black schools) contributed to the racial identifiability of individual schools during this period [1963 to 1972]" (ibid.); (f) between 1963 and 1972, implementation of the district's policy of prohibiting the involuntary reassignment of teachers for the purpose of desegregation "had the undeniable effect

of obstructing the dismantlement of segregated facilities, and the defendants' retention of said policy in these circumstances may be inferred to have been purposefully segregative" (A. 289-290); and (g) the defendants' failure to achieve faculty desegregation "is telling evidence of a willingness to maintain racially identifiable schools, for the task of dismantling dual teaching faculties * * * can be accomplished with virtually no increase in financial cost or other hardship to the district, and it involves an area in which school administrators have been endowed with wide latitude of discretion" (A. 291).[11/]

With respect to student assignment, it was undisputed, and the district court found, that "[t]he Kansas City, Kansas, school district adhered to a formal policy of racial segregation at the elementary level from its inception in 1866 until 1954, and at the secondary level from 1905 until 1954" (A.

11/ Because it considered the defendants' present (post-suit) procedures for achieving faculty desegregation to be generally sufficient, the court "decline[d] to enter an order at this time as to what measures the defendants must take to discharge their constitutional duty to achieve faculty racial balance and to obliterate the racial identifiability of schools by reference to the predominant race of their respective faculties" (A. 294-295).

257).[12] The court found that at the time of its decision the district-wide student enrollment was 55% white and 39.9% black (A. 257).[13] The court found that 2,372 of the district's 14,155 secondary students, or 16.8%, attended one of the following three schools (A. 258, 278; A. 676):

School	1976-77 Black Enrollment	
Sumner High School	100.0%	(698)
Northeast Junior High School	99.9%	(690)
Northwest Junior High School	98.2%	(965)

Of the district's 14,568 elementary students, 4,359, or 29.9%, attended one of the following nine schools (A. 258, 278; A. 676-677):

School	1976-77 Black Enrollment	
Banneker	99.8%	(632)
Bryant	97.7%	(545)

12/ An 1867 Kansas state statute permitted, but did not require, segregation in elementary education. In 1905 the defendants proposed, and secured passage of, special legislation which permitted them to maintain segregated secondary school facilities. The defendants "operated the only public school district in the history of the State of Kansas * * * which was authorized to build an all-black high school" (A. 257).

13/ The enrollment was 4.5% Spanish-surnamed, 0.4% Indian, and 0.2% Oriental (A. 257).

[School]	[1976-77 Black Enrollment]	
Chelsea	72.8%	(302)
Douglass	99.0%	(491)
Fairfax	99.5%	(562)
Grant	100.0%	(329)
Hawthorne	99.7%	(299)
Parker	76.2%	(336)
Quincaro	99.2%	(617)

The elementary and secondary schools listed above contained approximately 56% of the district's 11,523 black students (A. 676-678).

The district court held that the twelve schools listed above "exhibit degrees of racial imbalance which -- if found to be caused by the actions of the defendant district -- are constitutionally impermissible" (A. 279). After its review of the evidence, the court concluded that the defendants were responsible for the current condition of segregation at five of these twelve schools: Sumner, Northeast, Banneker, Douglass and Grant (A. 297).[14] Each of these schools (or its predecessors) was a black school under the pre-1954 dual system (ibid.). With

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14/ Banneker "was built in 1972 on the site of the dual-black Kealing school, and was intended to replace three dual-black elementary schools, Dunbar, Stowe, and Kealing" (A. 279).

respect to the remaining seven of the twelve schools -- Northwest, Bryant, Chelsea, Fairfax, Hawthorne, Parker and Quindaro -- the court concluded that "the current conditions of racial imbalance were not created or maintained by any conduct of the defendants" (A. 297). Each of these schools was a white school under the pre-1954 dual system (ibid.)

Approximately 25% of the district's black students attended the five schools with respect to which the court found liability, and approximately 31% attended the seven schools listed above with respect to which the court found no liability (A. 676-678).[15/]

15/ A map (Pl. Exh. 268 [with legend clarified and retyped]) showing the location and racial composition of each school in the district as of 1975 is included in the present brief as Appendix A. The map also shows the racial composition of areas of the district as of the 1970 census.

Photographic reduction and color xerox reproduction of the United States' copy of this exhibit was utilized to produce Appendix A. The shading of the resulting colors does not correspond perfectly to that on the original exhibit, and some bleeding or oversnading makes certain yellow areas in the middle and right portion of the map look as if they might be orange, although they are in fact yellow. We have colored the areas which are in fact orange dark orange to remove any ambiguity. The original record exhibit will be transmitted to the Court. The present Appendix A is included for the purpose of providing the Court with a convenient reference point and a general picture of school location and racial composition.

The racial composition of some schools changed significantly between 1970 and 1975 (see A. 278, 280). Chelsea was 17.2% black in 1970-71 and 66.9% black in 1975-76; Parker was 22.5% black in 1970-71 and 74.1% black in 1975-76 (A. 658, 673; A. 659, 674).

D. Procedural History: Remedy Stage

After the district court rendered its liability decision, it ordered the defendants to devise a desegregation plan and scheduled an evidentiary hearing to determine the appropriate remedy (A. 366).

The defendants filed their proposed desegregation plan on April 12, 1977 (A. 367-427). The court heard evidence on the merits of the plan on May 2, 3, and 11, 1977 (A. 480), and briefs were filed by the United States, the defendants, and a group called the Concerned Citizens of the Northeast Community (who were permitted to participate as amicus curiae) (A. 490).

On June 8, 1977, the court entered its Memorandum and Order on the remedy question (A. 479-522). A Journal Entry of Judgment incorporating the court's findings on both liability and remedy was entered on October 6, 1977 (A. 539-542).[16/]

16/ This judgment expressly incorporated by reference the March 28, 1977, Journal Entry of Judgment (which was not itself appealable by the United States, see note 9, supra). This Court has jurisdiction of the United States' appeal from the October 6, 1977, judgment as to both liability and remedy pursuant to 28 U.S.C. 1291 and/or 28 U.S.C. 1292(a)(1).

E. The District Court's Decision on Remedy

The district court adopted, with minor modifications, the defendants' plan for desegregation of the five black schools with respect to which liability was found.[17/] At the elementary level, this plan provides for limited "freedom of choice" involving three black schools found to be de jure segregated and six nearby predominantly white schools, as well as continuation of a previously existing district-wide majority-to-minority transfer option (A. 481, 520-521). At the junior high school level, the plan closes the black school found to be de jure segregated and reassigns its students to four majority-white schools (A. 481-482). At the high school level, the plan envisions converting the black school found to be de jure segregated into a selective-admissions district-wide magnet school to attract academically eligible students on a voluntary basis, and reassigning the remaining students in the Sumner zone to three majority-white schools (A. 482).

Accepting arguendo the correctness of the district court's decision as to the scope of liability, the United States had objected to certain aspects of the plan which the court adopted, including the reliance on freedom of choice at the elementary level, the closing of the black

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17/ Sumner, Northeast, Banneker, Douglass and Grant.

junior high school found to be de jure segregated, and the fact that the plan places almost the entire burden of mandatory reassignment and other actions to achieve desegregation on black students.[18/]

The district court also adopted, without modification, the defendants' plan for faculty desegregation. This plan relies upon and further clarifies the defendants' pre-existing (post-suit) policies and procedures (A. 518-519).[19/]

F. Subsequent Proceedings

After approving the defendants' desegregation plan, the district court entered orders (a) modifying and approving defendants' proposed letters to parents concerning the freedom of choice plan relating to Banneker, Douglass and Grant (A. 523-528), and (b) approving defendants' outline of transportation under the desegregation plan (A. 538). The court also entered a protective order, sought by the United States and agreed to by

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18/ In 1976-77 there were no white students attending Sumner High School, and one white student attending Northeast Junior High School (A. 676). The only other students subject to mandatory reassignment under the plan are secondary school students from the John Fiske elementary zone (A. 505). Fewer than 12% of the total students subject to mandatory reassignment are white (see A. 506).

19/ See note 11, supra.

The United States does not challenge the district court's faculty desegregation order in this appeal. The court's retention of jurisdiction provides a sufficient basis for supplemental relief in the event that the defendants' plan does not succeed in achieving compliance with constitutional requirements (A. 519, 542). See also page 17, infra.

the defendants (R. 2317-2321), which should assure that the defendants do not, in the process of the court-approved closing of Northeast Junior High School, take steps which would preclude the subsequent reopening and reutilization of that facility in the event the United States prevails in the aspect of the present appeal which challenges the closing (A. 543-546). Finally, the court issued an order to show cause why defendants' progress report and their proposed plans for the Sumner magnet school should not be approved (A. 567), and then approved these plans after the United States indicated (without prejudice to its contentions in this appeal) its lack of opposition (A. 568-569; A. 570).

The United States filed a timely notice of appeal from the district court's October 6, 1977, Journal Entry of Judgment on November 28, 1977 (A. 563), and the defendants filed a timely notice of cross-appeal on December 12, 1977 (A. 564).[20/] At the request of the district court clerk's

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20/ The form of the Journal Entry was a subject of dispute between the parties (see R. 2305-2311). The court entered the United States' proposed form of judgment, which, inter alia, made it clear that the court's determinations with respect to liability as well as remedy were appealable by the United States within 60 days of the October 6 judgment (A. 539-542). See also note 16, supra.

office, the parties formulated and agreed to a stipulation, pursuant to Fed. R. App. P. 11(f), concerning the portions of the record to be transmitted to this Court (A. 565-566).[21/] On February 3, 1978, this Court assigned this appeal to Calendar A (Clerk's letter to counsel).

G. Current Status of Desegregation

The portions of the court-approved desegregation plan relating to Northeast junior high school and Banneker, Douglass and Grant elementary schools were implemented in the 1977-78 school year and are presently in effect. No party has sought a stay of the district court's remedial order, either in that court or in this Court.

The portion of the desegregation plan relating to Sumner high school is scheduled to be implemented in the 1978-79 school year (A. 482).

21/ The portions of the record retained in the district court are, of course, still a part of the record on appeal, and will be transmitted to this Court upon its or any party's request.

Although the parties stipulated that all exhibits should be transmitted, the district court clerk retained the exhibits and indicated that they "will be sent on request" (Index to Record on Appeal, at 8). After the deferred appendix has been designated, the United States, in consultation with the defendants, will request that particular exhibits be transmitted to this Court.

Northeast junior high school has been closed pursuant to the court-approved plan, and its students have been reassigned (A. 556, 558).

The freedom of choice plan relating to Banneker, Douglass and Grant elementary schools has resulted in 122 black students' transferring out of those schools; no white students have transferred into those schools (or, pursuant to the district's general majority-to-minority transfer policy, into any of the other predominantly black schools in the system). Banneker, Douglass and Grant remain virtually all-black (A. 556-561).

The defendants met their 1977-78 goal for progress in faculty desegregation (compare A. 518 with A. 554-555).

Pursuant to the court-approved plan, 44% of the black students in the system (excluding Sumner high school) are continuing to attend the following schools (see note 2 and accompanying text, supra):

School	1977-78 Black Enrollment
[Sumner H.S.] 22/	[99.6% (819)]
[Northeast J.H.S.]	[closed]
Northwest J.H.S. 23/	98.9% (937)
Banneker	100.0% (540)
Bryant 23/	97.5% (462)
Chelsea 23/	71.5% (289)
Douglass	98.1% (418)
Fairfax 23/	95.0% (321)
Grant	99.7% (309)
Hawthorne 23/	98.8% (496)
Parker 23/	82.4% (364)
Quindaro 23/	99.5% (582)

Thus the district court's decisions and orders have left undisturbed the racial isolation at ten of the twelve predominantly black or virtually all-black schools in the Kansas City, Kansas system (compare table, supra with tables at pages 9-10, supra).

22/ Scheduled to be desegregated in 1978-79.

23/ School where district court found no liability.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO FIND A SYSTEMWIDE VIOLATION WHICH REQUIRES A SYSTEMWIDE REMEDY.

A. Introduction

The Kansas City, Kansas, school district operated a formal, statutorily sanctioned, completely dual school system until 1954. The district court found that, with respect to both faculty and student assignment, this dual system had never been fully disestablished. The court further found that since 1954 the defendants had engaged in a series of purposefully discriminatory actions, many of which were continuing in the 1970s. However, the court's analysis of the question of student assignment led it to conclude (a) that the school district should be regarded as being composed of three separate, identifiable units (A. 361); (b) that one of those units[24/] is completely untainted by any discriminatory school district actions (ibid.); (c) that the second of those units[25/] is fully integrated and the pre-1954 dual system has been completely dismantled with respect to that unit (A. 361-362); (d) that the school district's discriminatory practices with respect to five former statutory dual black schools in the third unit[26/] continued into the 1970s, and

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24/ The former Washington school district.

25/ The portion of the Kansas City, Kansas, school district which lies to the south of the Kansas River.

26/ The portion of the Kansas City, Kansas, school district which lies to the north of the Kansas River.

these schools must be desegregated (A. 348-349, 362); and (e) that seven former dual white schools in the third unit are now all-black or predominantly black because of racial residential transition of the neighborhoods in which they are located, and not because of any actions by the school district (ibid.).

We show below that in reaching these conclusions, the district court applied incorrect legal standards. Initially, however, it is important to note that the court's finding of de jure segregation at the Sumner, Northeast, Banneker, Douglass and Grant schools was inescapably compelled by a process of analysis far more simple and direct than the court's lengthy opinion might suggest.

Sumner high school, Northeast junior high school, and Douglass and Grant elementary schools, were created and maintained as statutory dual black schools under the defendants' pre-1954 system. The same is true of the schools which Banneker elementary school was built in 1972 to replace. This segment of the defendants' school system consists of schools which were attended exclusively by blacks in 1954, and have been attended almost exclusively by blacks in each succeeding year to and including 1976-77, when the district court's decision was

rendered. The defendants could not and did not meet their burden to satisfy the district court that the present racial composition of these five schools "is not the result of present or past discriminatory action on their part." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26 (1971). So far as these schools are concerned, the district court was, as it said, "forced" (A. 297) to find liability on the part of the defendants -- it "[could] not conscientiously conclude" otherwise (A. 348).

That the district court reached the correct and inevitable conclusion with respect to these five schools does not, therefore, enhance the persuasiveness of the remainder of its conclusions, or otherwise support the validity of its overall mode of analysis. Indeed, the district court seemed indirectly to acknowledge the difficulty of reconciling its finding that the defendants had both failed to dismantle their former dual system and engaged in purposeful segregation with respect to five schools containing approximately 25% of the black students in the district (see page 11, supra), with its finding that the defendants were not responsible for the condition of segregation at the seven other predominantly black or virtually all-black schools in the system. Thus, in its June 8, 1977, remedy opinion the court made the following observations (A. 496-497):

> If we were to * * * decree * * * a particular preconceived racial balance at the three former dual black elementary schools, the results would be ludicrous. The court's order of February 14, 1977, found that there are four additional elementary schools in the same geographical portion of the * * *

> school district that have enrollments exceeding 97% black students. These schools are essentially identical, for our purposes, to Banneker, Douglass, and Grant -- except for the fact that their student racial imbalance has been found not to have been legally attributable to the defendants. The court could in effect destroy Banneker, Douglass, and Grant as neighborhood schools by compelling dispersal and reassignment of a large percentage of their black students in order to make room for white elementary students imported for the sole purpose of desegregating the three former dual black schools. The neighbors of students in the Banneker, Douglass, and Grant attendance areas might, in the meantime, complete their de facto segregated elementary educations at Bryant, Fairfax, Hawthorne, and Quindaro, and progress to 98.2% black Northwest Junior High School and 50.9% black Wyandotte High School -- unburdened by unwarranted interference with the neighborhood school concept at the elementary level and not disadvantaged by the inconveniences of long-distance transportation at the secondary level. Banneker, Douglass, and Grant students in this situation might justifiably take little comfort in the knowledge that this disruption of their elementary educational careers was necessary to "remedy" the constitutional violation wrought in prior years against persons who have long since matured into adults. * * * Accordingly, for all of the reasons stated above, the court holds that actual desegregation of the Banneker, Douglass, and Grant facilities is not required in order to make the proposed [desegregation] plan constitutionally valid.

We of course reach the opposite conclusion from that of the district court on the question whether actual desegregation of de jure segregated schools is constitutionally required (see Argument III(A), infra). But we share the court's perception of a fundamental inconsistency in any result which places five black schools and other directly adjacent black schools in the same geographic area in diametrically different categories.

Therefore, we would emphasize the fact that the court's findings in this case have produced just such a result. We now proceed to demonstrate that this anomalous outcome could not have been reached except by the application of incorrect legal standards.

B. The District Court Applied Incorrect Legal Standards.

In Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 200 (1973), the Supreme Court rejected the argument "that a finding of state-imposed segregation as to a substantial portion of the school system can be viewed in isolation from the rest of the district," and noted that it had "never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system." The Court went on to articulate certain presumptions and burden-shifting principles which prohibit artificial fragmentation of the evidence in school desegregation cases. "'[T]he Supreme Court regarded as error the requiring of plaintiffs * * * to offer proof that the segregation in each and every instance and in each and every school was the product of official action.'" Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 489 (10th Cir. 1975) (Barrett, J., concurring) (quoting Doyle, J.), certiorari denied, 423 U.S. 1066 (1976). Yet this is precisely what the district court did in the present case.

The basic issues before the district court were two. First, did this school district, which was operating a statutory dual system at the time of Brown v. Board of Education, 347 U.S. 483 (1954), ever fulfill its "affirmative duty 'to effectuate a transition to a racially nondiscriminatory school

system,' Brown v. Board of Education, 349 U.S. 294, 301 (1955) * * *, see also Green v. County School Board, 391 U.S. 430, 437-438 (1968), that is, to eliminate from the public schools within * * * [the] system 'all vestiges of state-imposed segregation[,]' [Swann, supra, 402 U.S. at 15]?" Keyes, supra, 413 U.S. at 200. The district court answered this question in the negative. Second, did the defendants' failure to fulfill this affirmative duty, coupled with their additional purposefully discriminatory actions since 1954, amount to a constitutional violation of "systemwide impact" necessitating a "systemwide remedy?" Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977) (citing Keyes, supra, 413 U.S. at 213). In answering this question in the negative, the district court ignored the teaching of Keyes, supra.

1. The District Court Failed to Apply the Keyes and Swann Presumptions.

At the outset of its opinion, the district court appeared to recognize the heavy burden of proof which the defendants would be required to meet in a case such as this (A. 261-262): "the existence of one-race or predominantly one-race schools within a formerly dual system of mixed racial population gives rise to a presumption that student racial imbalance is the result of present or past discriminatory action by school officials. Swann, 402 U.S. at 25-26. In these circumstances, the burden of proof shifts to the defendants, who must establish that their past segregative acts did not in any way 'create or contribute to the current

segregated condition' of the schools. Keyes, 413 U.S. [at] 211." In fact, however, the district court's method of analysis did not place this burden on the defendants. While the court correctly found that the defendants had "carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system," Keyes, supra, 413 U.S. at 201 -- a program which rendered the schools attended in 1976-77 by 25% of the black students in the district de jure segregated, and which resulted in systemwide faculty segregation continuing into the 1970s -- it attached no significance whatsoever to these findings when it evaluated whether the defendants were responsible for the racial isolation existing in other schools in the district. Thus the court never applied the Keyes presumptions with respect to impact[27/] and

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27/ "[W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. * * * In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." Keyes, supra, 413 U.S. at 201-203.

intent[28] which should have been triggered by its findings of continuing de jure segregation in a very substantial portion of the system. Instead of shifting the burden of proof to the defendants with respect to the remainder of the system, the court kept the burden squarely on the United States with respect to each remaining school and each remaining practice alleged to have been affected by unlawful discrimination.[29]

28/ "[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system * * * creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. * * * [A]t that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, * * * the school authorities cannot be heard to argue that plaintiffs have proved only 'isolated and individual' unlawfully segregative actions." Keyes, supra, 413 U.S. at 208-209.

29/ Some portions of the district court's opinion suggest that it may have anticipated a change in the law of school desegregation, and a repudiation of the principles of Keyes, supra, in connection with the Dayton case, supra, which was pending before the Supreme Court at the time the district court issued its decision (see A. 262, 263, 264, 311, 354, 357, 358-359 [citing Mr. Justice Powell's separate opinions in Keyes, supra, and Austin Independent School District v. United States, 429 U.S. 990 (1976)]; see also A. 495-496 n.12 ["the Supreme Court may be retreating from its earlier overvaluation of society's alleged interest in procuring a preconceived 'socialization' experience for public school students"]). However, no such change in the law or repudiation of Keyes occurred in the Dayton case, which reaffirmed and reiterated the principles of law which had been settled by the Supreme Court's prior decisions in school desegregation cases. See also Milliken v. Bradley, 433 U.S. 267 (1977).

Because it compartmentalized the evidence in this fashion and focused solely on the intent and impact of each particular action of the defendants which was alleged to have contributed to unlawful segregation, the district court did not confront the issue of the overall pattern of the defendants' actions viewed as a whole over a period of time. In a similar context in an antitrust case, the Supreme Court stated the principle which is also applicable here:

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "...[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 * * *."

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962). Similarly, in a school desegregation case:

> the question is whether a purposeful pattern of segregation has manifested itself over time, despite the fact that individual official actions, considered alone, may not have been taken for segregative purposes and may not have been in themselves constitutionally invalid.

Oliver v. Michigan State Board of Education, 508 F.2d 178, 183 (6th Cir. 1974), certiorari denied, 421 U.S. 963 (1975). This understanding, with which the district court's approach is at loggerheads, is a fundamental underpinning of Keyes, supra.

2. The District Court Failed to Place on the Defendants the Burden of Showing That Their Unlawful Actions Did Not Have the Presumed Effects.

The district court's erroneous failure to apply appropriate presumptions and burden-shifting principles also reflected a more general misconstruction of the process of determining the "incremental segregative effect" of the defendants' constitutional violations. Dayton, supra, 433 U.S. at 420. Because the court made a number of findings of segregative intent in this case but also held that the defendants were not responsible for much of the racial separation that exists in the Kansas City schools, the proper approach to determining the effects of the defendants' unlawful actions is of substantial importance. This issue has a bearing on the court's conclusions with respect to both liability and remedy. We therefore set forth in detail our understanding of the legal principles which should have governed this inquiry.

In any case in which racial discrimination has occurred in the operation of the schools, the court must both determine the nature and extent of the violations of the Constitution and formulate a remedy for those violations. "[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). The goal of the remedy, once discrimination has been proved, is to eliminate the violations and all of their lingering effects, "root and branch." Green, supra, 391 U.S. at 438. Those

effects are to be eliminated whatever they may be and wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." Keyes, supra, 413 U.S. at 203. As the Supreme Court observed in Swann, supra, 402 U.S. at 15, "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." That statement of the objective implies that a necessary step in every school desegregation case is to determine what those "vestiges" are.

It therefore follows that a court is not at liberty to produce a result (racial mixture in school attendance) merely because that result may be considered desirable. The remedy must operate on the violations and their continuing effects. The existence of a violation of the Constitution does not authorize a court to bring about conditions that never would have existed in the absence of official racial discrimination. Rather, the task of a remedial decree in a school desegregation case "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." Swann, supra, 402 U.S. at 16; Milliken v. Bradley,

433 U.S. 267, 279-283 (1977). It is for this reason that the remedy for a systemwide violation is "all-out desegregation," Keyes, supra, 413 U.S. at 214; Dayton, supra, 433 U.S. at 410, 420. Since "desegregation" is neither more nor less than the elimination of racial discrimination and all of its lingering effects, "root and branch," the court must seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects.

Ordinarily, however, it is unlikely that these effects can be determined with precision. Racial discrimination may be one of many motives of school officials, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-266 (1977), and the actions of 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. This is why the court's task of assessing the effects of proven racial discrimination in the operation of the schools is properly aided by the use of reasonable presumptions. Keyes, supra, 413 U.S. at 201-213; Dayton, supra, 433 U.S. at 420.

Where, as in the present case, racially discriminatory practices in the operation of the schools have been proved, "fairness" and "policy," see Keyes, supra, 413 U.S. at 209, require the 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 then shifts to the school officials to show the extent to which racial separation would have existed in the absence of the discrimination. This is true both because of the logical inference of a nexus between the defendants' intent to segregate and the existence of segregation; and because it is the school district that has the best access to the information necessary to demonstrate the effects of its racial discrimination, and is in the best position to establish what conditions would have been but for the improper consideration of race. In the case at bar, however, the district court placed this burden on the United States rather than on the defendants.

As a practical matter, if plaintiffs in school desegregation cases were required to demonstrate not only the existence of racial discrimination but also the specific effects of that discrimination, 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. 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. Accord, Love v. Pullman Co., 569 F.2d 1074, 1076-1077 (10th Cir. 1978), aff'g 13 FEP Cases 423 (D. Colo. 1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-261 (5th Cir. 1974).

Thus, once a school district has been found to have engaged in a substantial pattern of intentionally discriminatory conduct, the burden is on the defendants to show that their conduct has not reached fruition in the attendance patterns of the school district -- to show, in other words, that the observed racial

distribution of the school population does not reflect the impact of their constitutional violations. United States v. Texas Education Agency (Austin Independent School District), 564 F.2d 162, 175 (5th Cir. 1977), petition for rehearing pending, 5th Cir. No. 73-3301; Arthur v. Nyquist, 573 F.2d 134, 147 (2d Cir. 1978); see Keyes, supra, 413 U.S. at 208, 211, 211 n. 17, 213-214; Swann, supra, 402 U.S. at 25-26; United States v. Columbus Municipal Separate School District, 558 F.2d 228, 231 n. 11 (5th Cir. 1977), certiorari denied, 46 U.S.L.W. 3436 (U.S. January 9, 1978). This conclusion is no more than an application of the settled principle 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. at 270-271 n. 21; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 285-287 (1977); cf. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358-362, 359-360 n. 45 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747, 771-773 (1976). This Court articulated the pertinent standard and its theoretical underpinning in Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 470 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976):

> The presumption of system-wide impact * * * derives from the pervasive interrelationship between school policy and the community's development; it is therefore not easily rebutted. The manipulation of attendance areas, the construction of new schools and classrooms, and the assignment of faculty and staff, all for racial effect, profoundly influence subsequent housing and population patterns throughout the district. In order to rebut the presumption of district-wide segregatory effect, the Board's proofs must negate these presumed intangible influences.

The district court in the present case did not adhere to the governing legal principles which we have explained above. We now show that the court's application of incorrect legal standards accounts for the central error in its conclusions as to the scope of the defendants' liability, and, correspondingly, the scope of the necessary remedy.

C. The District Court's Incorrect Legal Standards Were the Basis for Its Conclusions Regarding Northwest, Bryant, Chelsea, Fairfax, Hawthorne, Parker, and Quindaro.

As noted above, the district court's erroneous "school-by-school" approach caused it to compartmentalize the evidence and to impose upon the United States the burden of proving that the defendants were responsible for the racial separation at each identifiably black school in the district. In finding that the defendants were not responsible for the racial separation at seven such schools, the court ignored the appropriate presumptions and burden-shifting principles, and treated its findings of de jure segregation at Sumner, Northeast, Banneker, Douglass, and Grant, and its finding of a systemwide faculty violation, as if they were irrelevant to its evaluation of the remainder of the system.

The district court's failure to shift the burden to the defendants fatally undermines its conclusions with respect to Northwest, Bryant, Chelsea, Fairfax, Hawthorne, Parker, and Quincaro. The district court's fragmented and isolated treatment of the evidence relating to these schools reduces to one controlling assumption/conclusion which it repeatedly reiterated: because of the racial residential transition of the neighborhoods in which these schools are located, they would be all-black or predominantly black today regardless of the purpose or the effects of the defendants' practices (see A. 311, 313, 315, 318, 320, 322, 326, 329-330, 331-332, 333, 334, 338, 339, 341, 345, 346, 347, 349). The fundamental difficulty with this approach is that the defendants presented no evidence that would support the conclusion that the racial residential transition which did occur was either inevitable, or unaffected by the school district's racially discriminatory acts and practices. Thus, such a conclusion could only have been based upon extra-evidentiary speculation, or upon the application of an erroneous burden of proof that required the United States to demonstrate not only the existence of racial discrimination but also the specific effects of that discrimination on each particular school in the system.[30/] As we have pointed out in Argument I(B), supra,

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30/ It should be noted that even if this burden was properly placed on the United States, it was met with respect to the effects of certain discriminatory practices on some of these particular schools. See Argument II(B), infra.

where, as here, a constitutional violation with the normal potential for a profound effect upon residential patterns has been proved, the United States is entitled to a rebuttable presumption that such an effect exists. "The burden of demonstrating that the residential concentration of minorities * * * is unrelated to the [defendants'] segregative school policies is to be shouldered by the school board." United States v. Texas Education Agency (Austin Independent School District), supra, 564 F.2d at 175; also see United States v. Columbus Municipal Separate School District, supra, 558 F.2d at 231 n. 11; Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 470 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976).

It is important to note in this connection the emphasis which the Supreme Court has placed on the fact that discrimination in the operation of the schools may have a profound effect upon residential patterns:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

Swann, supra, 402 U.S. at 20-21.

> * * * [T]he practice of building a school * * * to a certain size in a certain location, "with conscious knowledge that it would be a segregated school," * * * has a substantial reciprocal effect on the racial composition of other

> nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

Keyes, supra, 413 U.S. at 201-202.

If the district court in this case had applied the presumption that the defendants' demonstrated constitutional violations had reciprocal effects upon both school populations and residential patterns, it could not have absolved the defendants of responsibility for segregation at Northwest, Bryant, Chelsea, Fairfax, Hawthorne, Parker, and Quindaro. "[I]t would be improper to allow the Board to follow policies which constantly promote segregation and then defend on the presumption of inevitablity." United States v. Board of School Commissioners of City of Indianapolis, Indiana, 474 F.2d 81, 89 (7th Cir.), certiorari denied, 413 U.S. 920 (1973) (emphasis in original). The district court here not only denied the United States the proper benefit of a rebuttable presumption that the demonstrated constitutional violations had profound systemwide effects; instead, it gave the defendants the benefit of an irrebuttable presumption to the contrary.

That this is so -- that the court's analysis of the seven schools here in question both began and ended with the unalterable view that they would be black schools today regardless of what actions the defendants had or had not taken -- is most graphically demonstrated by the court's findings with respect to the Hawthorne school. Here the court found purposeful racial discrimination involving attendance zone and feeder pattern manipulations, unconstitutional minority-to-majority student transfers, and a change in faculty and administrative assignments which replaced an all-white faculty and staff with an all-black faculty and staff at the beginning of the 1960-61 school year. The court further found that the process of "racial transition" and "resegregation" was in fact "accelerated" and "hastened" by the defendants' discriminatory actions. Notwithstanding these findings, the court concluded -- based on no evidence whatsoever other than the fact that the school is located in an area which experienced racial transition and which is now predominantly black -- that "we firmly believe that Hawthorne would today exhibit no lesser degree of student racial imbalance if the defendants had not acted as they did" (A. 331-332, 338, 341). This conclusion demonstrates not only that the court was generally applying an erroneous presumption in the defendants' favor, but also that,

so far as schools such as Hawthorne were concerned, the court considered this presumption to be irrebuttable.[31/]

The same error is apparent in the court's discussion of the evidence regarding the use of portable classrooms at the Bryant school after 1968. The court found that the integrative alternatives which the United States showed were available in this situation were in fact feasible, and would in fact have been integrative. However, the court "decline[d] to hold that the defendants' use of portable classrooms at Bryant after 1968 -- even if this action was foreseeably segregative and intentionally so -- is responsible for any of the current racial imbalance which now exists" (A. 345-347). This determination, like that regarding Hawthorne, was based solely upon the court's unalterable view -- its irrebuttable presumption -- that because of racial residential transition, Bryant would be

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31/ The court also used the phraseology of "attenuation" in this connection (A. 338), as well as elsewhere. Cf. Keyes, supra, 413 U.S. at 211. "But * * * certainly plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation.' That is a factor which becomes relevant only after past intentional actions resulting in segregation have been established. At that stage, the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions." Keyes, supra, 413 U.S. at 211 n. 17.

a black school today regardless of the actions of the defendants (A. 297, 349).[32/]

It is quite revealing to focus upon the inconsistency between the court's analysis of the evidence relating to the five black schools where it found de jure segregation and the seven black schools where it did not. Thus, for example, the court noted that "we cannot be assured that the Sumner * * * [school, if it] had ever been integrated, would have remained so" (A. 301), but nevertheless concluded that "a lesser degree of racial imbalance might [sic] exist there today if the defendants had not acted as they did" (A. 324). On the other hand, the court "attache[d] no current constitutional significance" to the defendants' discriminatory actions with respect to Hawthorne, because it "firmly believe[d] that Hawthorne would today

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32/ Of course, the court's discussion of racial transition at Chelsea and Parker (A. 346-347) does not speak to the question of what might have happened at Bryant had the integrative rather than the segregative alternative been utilized. Moreover, while Bryant changed from 39% black to 88% black in the three years from 1967 to 1970, in 1970 Chelsea and Parker remained only 17% and 23% black respectively (A. 278).

exhibit no lesser degree of student racial imbalance if the defendants had not acted as they did" (A.332). But both Sumner and Hawthorne are located in areas that are today overwhelmingly black; Sumner is located only three blocks east and seven blocks south of Hawthorne (see Pl. Exh. 258). Indeed, the five black schools with respect to which the court found liability are more deeply imbedded within the area of heavy black residential concentration than the seven black schools with respect to which the court found no liability (see Pl. Exh. 268, reproduced as Appendix A hereto). It would seem that if the seven black schools in the Northwest area would have been black today regardless of the defendants' actions, then a fortiori the five black schools in the Northeast area would also have been black today regardless of the defendants' actions. Yet with respect to those schools, the court found liability, even while remarking that "the racial imbalance [there] is not solely attributable to purposefully segregative actions by the defendants" (A.348).

It is thus apparent that the seven black Northwest area schools cannot be distinguished from the five black Northeast area schools on the basis of "inevitability." Another possible distinction, which does have a factual basis, is that the seven Northwest area schools were formerly white schools under the

pre-1954 dual system, while the five Northeast area schools were black schools under that system. But this distinction cannot justify discounting evidence of the defendants' racially discriminatory practices and assuming that such practices had no significant effect; refusing to apply the proper presumptions with regard to segregative intent and effect; or proceeding to decision on the basis that no matter what the United States proved, the defendants could not possibly be responsible for the racial identifiability of the seven Northwest area schools, simply because those schools were once white but are now black. Cf. United States v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma, 459 F.2d 720, 722-724 (10th Cir. 1972), vacated and remanded for further consideration in light of Keyes, supra, sub nom. Smith v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma, 413 U.S. 916 (1973), remanded with directions, 492 F.2d 1189 (10th Cir. 1974).[33/]

33/ It should also be noted that in Tulsa, supra, the district court had found a complete absence of discriminatory actions with respect to the schools in question. Here, as we have demonstrated, the district court considered the existence or non-existence of discriminatory actions to be essentially irrelevant with respect to the schools in question.

Nor can such a distinction be justified on another basis which the court articulated: that "[t]he defendants' duty to desegregate these seven former dual white schools was accomplished many years ago" (A. 349). The defendants' duty was never merely to desegregate those particular seven schools; it was "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," Green, supra, 391 U.S. at 437-438 (emphasis added); "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools," id. at 442; and "to eliminate from the public schools all vestiges of state-imposed segregation," Swann, supra, 402 U.S. at 15. Far from having been "accomplished many years ago," this duty -- as the district court found -- had never been accomplished. Accordingly, to speak of some lesser duty's having been accomplished with respect to some schools but not with respect to others[34/] is simply to misconceive the scope and meaning of the defendants' constitutional obligations.[35/]

34/ "[T]he court has * * * held that the defendants have dismantled their dual system as it affected the schools which were former dual white schools but which now contain disproportionate numbers of black students" (A. 336).

35/ This misconception also underlies the district court's erroneous invocation of Pasadena City Board of Education v. Spangler, 427 U.S. 424, 436-437 (1976), and Swann, supra, 402 U.S. at 31-32, which disapproved the requirement of annual readjustments of racial compositions of student bodies "once the affirmative duty to desegregate has been accomplished and racial discrimination * * * eliminated from the system" (see

(Footnote cont'd on next page)

For all of the reasons which we have discussed, the district court's conclusions with respect to the seven black Northwest area schools were a product of a fundamental misunderstanding of governing legal principles.

D. The District Court's Incorrect Method of Analysis Also Led to Other Errors.

We have shown above that the district court's extreme application of an erroneous school-by-school approach caused it to fail to evaluate properly the school system as a whole over the entire relevant period of time. This failure in analysis led to an erroneous fragmentation of the evidence. That error, combined with the application of incorrect presumptions and improper allocations of the burden of proof, resulted in the anomalous conclusion that the defendants were not responsible for much of the existing racial identifiability, despite the facts that they had never fully disestablished their former dual system, and that they were also engaged in a pattern of discriminatory actions which continued to the time of trial.

The district court's incorrect method of analysis led it into other errors in addition to its most significant error

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35/ (Footnote cont'd from preceding page)

(A. 311-312, 330, 349). Since that point had never been reached in Kansas City, which had never implemented on a systemwide basis "a racially neutral attendance pattern in order to remedy the * * * constitutional violations," Pasadena, supra, 427 U.S. at 437, the principles which the district court cited have no application in the present context. Haycraft v. Board of Education of Jefferson County, Kentucky, 560 F.2d 755, 755-756 (6th Cir. 1977).

(its conclusions with respect to Northwest, Bryant, Chelsea, Fairfax, Hawthorne, Parker, and Quindaro). These additional errors merit consideration even though they may not be of controlling importance to the question whether the United States should prevail in this appeal.

1. The district court's erroneous analytical approach led it to decline to rule on a number of allegations concerning discriminatory practices with respect to the five schools which it had already found to be de jure segregated, or with respect to schools which are not now racially imbalanced, on the ground that such rulings, even if favorable to the United States, would be "cumulative" or irrelevant (A. 313-314, 318, 325, 332-333, 333, 334-335, 344, 348, 350). This manifestation of a school-by-school approach ignored the relationship between the magnitude and persistence of the pattern of defendants' discriminatory actions and the court's overall judgment concerning intent and impact with respect to the entire school district.

2. The district court's approach did not really confront the question of the racially imbalanced predominantly white schools in Kansas City. Many of these schools are former dual white schools or replacements of former dual white schools (A. 278, 280). The fact that some black students

(or other minority students) now attend these schools obviously does not justify a conclusion that they are "fully integrated" (A. 279), or that their continued racial identifiability is unrelated to the defendants' failure fully to disestablish their pre-1954 dual system. The district court's premise in this regard seemed to be that only those schools which are identifiably black are a cause for concern in this kind of case. There is no basis in the law for such a premise.

3. The court carved two entire areas out of the school district and held them to be "separate, identifiable and unrelated units" under Keyes, supra, 413 U.S. at 203. The court's holding with respect to the first of these areas represents both a further manifestation of its fragmentation of the evidence, and a factual finding which is clearly erroneous, Fed. R. Civ. P. 52. There is no evidence to support the court's conclusion that the portion of the district lying south of the Kansas River (the Argentine-Rosedale area) "has been administered in virtual isolation from * * * the remainder of the school system" (A. 272). The defendants made no such contention. The court's own findings[36/] demonstrated

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36/ See A. 273, 298, 299 n. 45, 303, 309 n. 57, 312 n. 62, 318. See also note 38, infra.

that attendance zones have overlapped or crossed the portions of the district to the north and to the south of the Kansas River, both under the pre-1954 dual system, and from 1954 to the present.[37/]

Similarly, while the former Washington school district was not a part of the Kansas City school district prior to 1967, there is no evidence to support treating this portion of the district as a separate and unrelated unit after 1967 (cf. A. 271). This aspect of the court's analysis is also not based on any contention of the defendants. There are no natural or man-made barriers dividing the Washington area from the rest of the district; the entire school district including the Washington area has been administered as a unified entity;[38/] there is no proof that the defendants' policies after 1967 in other parts of the district did not or could not have had a

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37/ Indeed, the court-approved desegregation plan will reassign students from Northeast Junior High School and Sumner High School to Rosedale Middle School and Harmon High School, which are located in the portion of the district south of the Kansas River (A. 482; A. 280; Pl. Exh. 268, reproduced as Appendix A hereto).

38/ The Chairman of the Kansas City Board of Education stated as follows in a 1967 address to the League of Women Voters after the attachment of the Washington school district: "[T]hat attachment is a recognized fact and we are now one single school district extending from Wyandotte County Lake to the University of Kansas Medical Center and from the industrial area of Fairfax to the furthermost corner of Argentine. * * * [I]t is the objective of this Board of Education * * * to create one unified district * * * which can attack the educational problems of all of its many segments in a unified and well-organized manner" (A. 591, 595).

segregative effect on the schools in the Washington area; and "[m]any secondary school attendance areas in recent years have spanned territory included in both the former Washington district and the former Kansas City, Kansas, district" (A. 275 n. 23).[39/]

The court's erroneous holdings regarding the separability of the Argentine-Rosedale and Washington areas may not have great practical significance. Schools in these areas would probably be utilized in any event to aid in providing a student assignment remedy for violations in other parts of the school district; they are already being so used even under the district court's limited findings of liability (see notes 37, 39, supra). However, it is helpful to understand that these holdings are erroneous, because of the additional light this sheds on the deficiencies of the district court's overall mode of analysis.[40/]

39/ Again, the court-approved desegregation plan will utilize two junior high schools (Arrowhead and Eisenhower) and two high schools (Schlagle and Washington) in the Washington area as recipients of black students to be reassigned from Northeast and Sumner (A. 482; A. 352-354; Pl. Exh. 268, reproduced as Appendix A hereto).

40/ It should also be noted that racially discriminatory practices have occurred in both of these areas. For example, the district's systemwide discriminatory faculty assignment policies were in effect in both areas at least until 1972 (A. 282-294); and the Argentine-Rosedale area was fully encompassed within the former statutory dual system (A. 272-273).

II. THIS COURT SHOULD HOLD THAT A SYSTEMWIDE VIOLATION WHICH REQUIRES A SYSTEMWIDE REMEDY WAS ESTABLISHED.

A correct application of the law to the facts of record can lead only to one conclusion: the United States established an overwhelming prima facie case of a systemwide violation, and the defendants did not rebut the prima facie case. This Court should so hold.

We first discuss the acts and practices which the district court found were unlawfully discriminatory. We then discuss certain additional evidence which further implicates the black Northwest area schools where the court found no liability, and otherwise reinforces the conclusion that a systemwide violation was established.

A. The District Court's Findings of Discrimination

The court's major findings of discrimination may be summarized for present purposes as follows.

1. Prior to 1954 the defendants operated a formal, statutorily sanctioned, completely dual system, affecting both student and faculty assignment, both north and south of the Kansas River (A. 257, 272-273).

2. Complete faculty segregation continued in effect until 1963. Virtually all significant progress toward the elimination of racially discriminatory faculty assignment was made after 1972, and is not yet complete. Purposeful segregation continued to be a district-wide policy and practice until 1972 (A. 282-294).

3. This sytemwide faculty violation constitutes "telling evidence of a willingness to maintain racially identifiable schools, for the task of dismantling dual teaching faculties * * * can be accomplished with virtually no increase in financial cost or other hardship to the district, and it involves an area in which school administrators have been endowed with wide latitude of discretion" (A. 291).[41/]

4. Principals and vice-principals were assigned almost entirely on a racially discriminatory basis prior to 1963 (R. 2099). Banneker, Douglass, Grant -- and Hawthorne[42/] -- "have never had a white principal or vice-principal, and this fact has undoubtedly contributed to the racial identifiability of these schools" (A. 296).[43/]

41/ "Throughout this entire period [until 1972], the defendants have adhered to a policy which prohibits the involuntary reassignment of teachers where the sole purpose of a proposed transfer is to achieve or improve * * * racial balance * * *," and this prohibition of involuntary reassignment applied only to proposed racial balance transfers (A. 289, 289 n. 31).

42/ Black school where district court found no liability.

43/ The court made no other finding with respect to the period from 1963 to 1976, because it concluded that, as of 1976-77, the defendants were "not now engaged in racial discrimination" regarding administrative personnel, and that even if the defendants had engaged in a pattern of discrimination from 1963 to 1976, this would be irrelevant because it had no "continuing effect at the present time" (A. 295-296; contra, A. 340). However, the evidence showed that as of May 1973, when the original complaint in this case was filed,

(Footnote cont'd on next page)

5. The defendants' racially discriminatory practices with respect to faculty and staff assignments continued as of 1976-77 to contribute to racial identifiability at Sumner, Northeast, Banneker, Douglass, and Grant -- and at Northwest,[44/] Bryant,[44/] Fairfax,[44/] Hawthorne,[44/] and Quindaro[44/] (A. 323, 339-340).

6. After the Supreme Court's decision in Brown v. Board of Education, supra, the defendants implemented a "transition plan" from 1954 to 1957 which amounted to "'a method [of] achieving minimal disruption of the old pattern[,]' Monroe v. Board of Commissioners, 391 U.S. 450, 458 (1967)" (A. 315) (footnote omitted). This plan "superimposed purposefully segregative feeder patterns upon likewise segregative elementary school attendance zones and virtually foreclosed the prospect of meaningful integration" at Sumner, Northeast, Banneker (and its predecessors, Dunbar, Stowe, and Kealing), Douglass and Grant (A. 299-301, 314, 328-329).

43/ (Footnote cont'd from preceding page)

every white principal except three was assigned to a school with a predominantly white student body, and every black principal was assigned to a school with a predominantly black student body (Def. Exn. G-1). Thus in all but three of the schools in the entire system, the predominant race of the student body as of 1973 could be identified simply by reference to the race of the principal of the school. This situation constituted "a prima facie case of violation of substantive constitutional rights." Swann, supra, 402 U.S. at 18.

44/ Black school where district court found no liability.

7. Sumner, Northeast, Banneker (and its predecessors, Dunbar, Stowe, and Kealing), Douglass, and Grant were all purposefully located in black areas, purposefully zoned to serve black students, and purposefully joined together in a feeder pattern designed to serve black students. These schools, their attendance zones, and their feeder pattern were all created and maintained until the time of trial for the purpose of enforcing and perpetuating segregation (A. 299-301, 314, 326, 328-329, 334, 354-355).

8. The defendants never "at any point in time * * * [took] any steps whatsoever to * * * provide meaningful integrative educational opportunities for the students residing in the [Sumner and Northeast] attendance areas" (A. 301-302). Post-1954 building programs at Sumner have purposefully perpetuated segregation and "indelibly branded Sumner as an all-black school" (A. 324). "The defendants have at no time in the past 23 years undertaken any action -- such as alteration of attendance zones and feeder patterns, at a bare minimum -- which might have abated the continuing segregative effects of their earlier decisions regarding the size and site selection of Sumner" (A. 324; 302). "The district most recently passed up an opportunity to redefine the Sumner attendance area in 1973, when three new secondary schools -- Schlagle and Harmon high

schools and Eisenhower junior high school[45/] -- were opened," and the defendants' failure to avail themselves of this opportunity in 1973 is further evidence that they were and are engaged in "a purposefully segregative pattern of conduct which violates the Equal Protection Clause of the Fourteenth Amendment" (A. 302-307).

9. Construction and remodeling programs after Brown v. Board of Education, supra, at Banneker (and Dunbar), Douglass, and Grant were administered "if not with segregative intent, with indifference to [the defendants'] * * * constitutional duty to dismantle the attributes of dualism" (A. 342). "In undertaking these remodeling projects and construction programs [in 1954, 1955, 1962, and 1972], the defendants clearly foresaw and intended that the facilities would serve or continue to serve basically the black students who resided in nearby residential areas," and these actions "have had the clear effect of maintaining the status quo so far as the racial composition of the students who attended those schools was concerned" (A. 342-344). Banneker was purposefully built and zoned in 1972 as an all-black school to serve the attendance areas of Dunbar, Stowe, and Kealing, and it opened with and retained to the time of trial a predominantly black faculty and staff (A. 279 n. 24, 328, 339-341).

45/ Schlagle and Eisenhower are located in the former Washington school district, and Harmon is located in the portion of the district south of the Kansas River (see notes 37, 39, supra).

10. From 1954 to 1957, the defendants continued to provide bus transportation or car fare to enable and encourage black students residing in the Armourdale, Argentine, Rosedale, Quindaro, and Kensington Park areas to attend Northeast and Sumner. This practice was purposefully segregative (A. 318).

11. In 1960 the defendants altered the attendance areas and feeder patterns for Northeast and Northwest junior high schools, and Sumner and Wyandotte high schools. These actions were "clearly, foreseeably, segregative," and "must be viewed as purposefully segregative" (A. 307-310).

12. From 1956 to 1963[46/] until they were enjoined by the United States District Court, the defendants followed the policy of "allow[ing] any student to transfer from a school in which his or her race was in the minority, to a school in which his or her race was in the majority" (A. 319). This minority-to-majority transfer policy "was indistinguishable from that invalidated in Goss [v. Board of Education, 373 U.S.

46/ The court's finding that the policy discussed here was in effect from 1960 to 1963 is clearly erroneous, Fed. R. Civ. P. 52. The parties stipulated that "Kansas City, Kansas, schools operated under a minority to majority transfer policy * * * from 1956 to June, 1963. Such transfers depend solely upon the race of the student and the race of the school" (A. 92).

683 (1963)]" (A. 319 n. 71). This policy was "'a one-way ticket leading to but one destination, . . . continued segregation.' * * * [T]he purely racial purpose of such a policy was 'obvious' * * *" (ibid.).

13. Purposefully discriminatory attendance zone manipulations in 1957 and 1960, minority-to-majority transfers until 1963, and conversion from an all-white faculty and staff to an all-black faculty and staff in 1960-61, all contributed to segregation at Hawthorne[47/] (A. 331-332).

B. Other Evidence of Discrimination

1. Pursuant to their racially discriminatory faculty assignment policy, the defendants assigned increasing numbers of black faculty to certain schools as black enrollments there were increasing. At Hawthorne,[48/] a change from an all-white faculty to an all-black faculty occurred in one year (A. 332). At the following schools, less sweeping but nevertheless highly significant changes occurred:

47/ Black school where district court found no liability.

As pointed out at pages 38-39, supra, the district court erred when -- although finding purposeful discrimination which contributed to Hawthorne's conversion to a black school -- it exonerated the defendants of liability for the resulting segregation.

48/ Black school where district court found no liability.

School	Black Faculty [49] (Black Enrollment) [50]						
	1963-64	1967-68	1968-69	1969-70	1970-71	1971-72	1972-73
Bryant [51]	0.0% (3.3%)	9.1% (39.2%)	14.3% (54.2%)	23.5% (74.5%)	35.0% (88.4%)	36.7% (90.4%)	54.1% (92.5%)
Fairfax [51]	0.0% (40.0%)	17.2% (70.0%)	28.6% (79.9%)	42.9% (82.9%)	56.3% (88.4%)	56.3% (90.2%)	58.6% (96.6%)
Quindaro [51] [52]	18.8% (70.3%)	47.4% (86.4%)	57.9% (89.0%)	57.1% (90.2%)	47.6% (91.5%)	54.8% (96.8%)	63.9% (98.6%)

49/ Sources: Pl. Exhs. 279-284.

50/ Sources: A. 278; Def. Exh. F-1.

51/ Black school where district court found no liability.

52/ Sources: A. 282; Pl. Exh. 161.

The defendants' actions in this regard both contributed to the racial transition at these schools, and ratified that transition by officially earmarking these schools as being intended for black students (see A. 106-108; A. 587-590; United States v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma, 429 F.2d 1253, 1257 (10th Cir. 1970)). No comparable increases in black faculty occurred at any schools which are not identifiably black schools today. The district court correctly found that the defendants' actions with respect to the faculties at these black Northwest area schools contributed to in the past, and presently perpetuate their racial identifiability (A. 339-340). The court's findings that these same actions did not contribute to the racial transition at these schools, and that discriminatory purpose was lacking in this regard (A. 340-341), are both clearly erroneous (Fed. R. Civ. P. 52), and in conflict with the court's earlier findings (A. 282-294, 339-340).

2. The defendants contributed to and perpetuated segregation at Bryant[53/] by using portable classrooms there after 1968 despite the availability of practical integrative alternatives. Bryant was 54.2% black in 1968-69, and was 88.4% black by 1970-71 (A. 278, 345). The district court did not rule on whether

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53/ Black school where district court found no liability.

the defendants' use of portables at this school was purposefully segregative, because of its erroneous view that the defendants' actions were irrelevant to its inquiry since Bryant would be a black school today in any event (see pages 39-40, supra). However, the findings which the court did make cover all the elements which would be necessary to a finding of intentional discrimination in this situation, and this Court should make the latter finding.

3. The district court made no specific findings in support of its conclusion that the defendants' use of portable classrooms at Quindaro[54/] after 1968, thus perpetuating segregation there despite the existence of practical integrative alternatives, was not purposefully discriminatory (see A. 345-347). As in the case of Bryant, the court should have found discrimination here (see A. 201-204, 209-232, and sources cited).[55/]

Moreover, the defendants further perpetuated segregation unnecessarily when they opened the new Quindaro school in 1972-73 (see A. 204-236 and sources cited). It is unclear whether the court made no finding on this contention, or found that there was "no evidence" to support it (see A. 347-348). If the court made the latter finding, it is clearly erroneous (Fed. R. Civ. P. 52).

54/ Black school where district court found no liability.

55/ The United States' Post-Trial Brief is included in the record on appeal transmitted to this Court. We cite to this brief here and also infra.

4. The district court's school-by-school approach to the question of the defendants' construction and site selection practices (see A. 323-327, 342-348) failed to confront the evidence of the overall pattern of the defendants' activities. See Oliver v. Michigan State Board of Education, supra, 508 F.2d at 183 (quoted at page 27, supra). That evidence was that from 1954 to the time of trial, the defendants had constructed 39 new schools, replacement schools, and additions to schools, of which 34 opened with enrollments which were either at least 80% white, or at least 90% black (see A. 237-249 and sources cited). The latter category included construction at Bryant,[56/] Fairfax,[56/] Hawthorne,[56/] and Quindaro[56/] (see A. 246-247).

In evaluating this overall pattern to determine "whether invidious discriminatory purpose was a motivating factor," Arlington Heights, supra, 429 U.S. at 265-266, the following principle is applicable:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. This presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

Oliver v. Michigan State Board of Education, supra, 508 F.2d at 182; NAACP v. Lansing Board of Education, 559 F.2d 1042, 1046-1047

56/ Black school where district court found no liability.

(6th Cir. 1977), certiorari denied, 46 U.S.L.W. 3390 (U.S. December 12, 1977); United States v. Texas Education Agency *-*-*, supra, 564 F.2d at 168-169; United States v. School District of Omaha, 565 F.2d 127, 128 (8th Cir. 1977) (en banc), certiorari denied, 46 U.S.L.W. 3526 (U.S. February 21, 1978); Arthur v. Nyquist, supra, 573 F.2d at 140-143; see also Washington v. Davis, 426 U.S. 229, 241-242 (1976); id. at 253 (Stevens, J., concurring); Arlington Heights, supra, 429 U.S. at 264-268.

The district court made no finding with respect to the overall pattern of construction and site selection viewed as a whole over time. But it could not in any event have found "a consistent and resolute application of racially neutral policies," since it affirmatively found that certain particular construction and site selection decisions were purposefully segregative or inconsistent with the defendants' duty to dismantle their pre-1954 dual system (A. 302-307, 323-326, 342-344).

The pattern of construction and site selection which the evidence disclosed is "a factor of great weight" in this case, Swann, supra, 402 U.S. at 21, particularly since a formal dual system existed in Kansas City prior to 1954. Moreover, in these circumstances "it [was] the responsibility of local authorities * * * to see to it that future school construction and abandonment [were] not used and [did] not serve to perpetuate or re-establish the dual system." Swann, supra, 402 U.S. at 21; United States v. * * * Tulsa County, Oklahoma, supra, 429

F.2d at 1259-1260. The pattern of construction and site selection here was plainly inconsistent with this responsibility. Therefore, it was unlawful on that account even if it was not motivated by a racially discriminatory purpose.

5. Finally, the defendants' 1970 boundary changes which removed certain predominantly white territory from Northwest 57/ junior high school in the context of racially-oriented pressure from white patrons in the affected area must be viewed as purposefully discriminatory (see A. 191-200 and sources cited). We believe that the district court's conclusory finding on this issue (A. 312-313) is clearly erroneous (Fed. R. Civ. P. 52). At the least it reflects the court's erroneous failure actually to shift the burden of proof to the defendants on such issues (see pages 24-26, supra).

C. A Systemwide Violation Was Established.

It is not possible to say with assurance precisely what degree of racial separation would exist in the Kansas City school system today had the defendants fulfilled their duty to convert to a unitary system in 1954 or at any time during the 23-year period thereafter. Because the defendants never attempted to fulfill this duty, it was their burden to show, if they could, that the current racial separation would exist even if they had at some point established a unitary system. The defendants did not carry this burden.

57/ Black school where district court found no liability.

The evidence in this case "reveals a series of official actions taken for invidious purposes," Arlington Heights, supra, 429 U.S. at 267. These actions must be viewed as an unfragmented and uncompartmentalized whole, and an overall conclusion must be drawn after the application of the appropriate presumptions and burden-shifting principles. When this is done -- and when the district court's errors described in Argument I, supra, are avoided -- it becomes apparent that an unrebutted prima facie case of a systemwide violation was established. The district court itself found a systemwide faculty violation[58/] as well as a student assignment violation "affecting a substantial portion of * * * the school system," Keyes, supra, 413 U.S. at 201. These violations, described in Argument II(A), supra, are sufficient to provide "a predicate for a finding of the existence of a dual school system," id. at 201. The additional evidence discussed in Argument II(B), supra, reinforces

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58/ The relevance of the faculty violation extends well beyond its impact upon the teachers involved. "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 * * * is shown." Swann, supra, 402 U.S. at 18; Keyes, supra, 413 U.S. at 209; Kelly v. Guinn, 456 F.2d 100, 107 (9th Cir. 1972), certiorari denied, 413 U.S. 919 (1973). See also pages 50-51, 55-57, supra.

this predicate and further undermines the district court's conclusions with respect to the black Northwest area schools where it found no liability. Since the defendants did not overcome the presumption that the current racial distribution of the school population reflects the systemwide impact of their pervasive constitutional violations, this Court should so hold. The case should then be remanded with directions to implement a systemwide remedy. Dayton, supra, 433 U.S. at 420.

III. EVEN IF ONLY A LIMITED VIOLATION WAS ESTABLISHED, THE DISTRICT COURT SHOULD HAVE REQUIRED AN EFFECTIVE AND EQUITABLE REMEDY.

Even if, contrary to our submission, this Court should affirm the district court's findings as to the scope of the violation, the desegregation plan which that court approved should be modified.

A. The Freedom of Choice Plan at the Elementary Level Is Constitutionally Insufficient.

Having found that the defendants were responsible for the existing segregation at Banneker, Douglass, and Grant elementary schools, the district court in formulating its remedy was bound to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971); Hills v. Gautreaux, 425 U.S. 284, 297 (1976); Dayton, supra, 433 U.S. at 410, 419; Milliken v. Bradley, 433 U.S. 267, 281, 283 (1977). However, instead of following these binding precedents, the district court held that "actual desegregation of

the Banneker, Douglass, and Grant facilities is not required" (A. 497). "This decision and its supportive reasoning are inconsistent with current constitutional standards and gravely inapposite to the spirit of the cases in which these standards have been enunciated." United States v. Tulsa County, Oklahoma, supra, 429 F.2d at 1255 (footnote omitted).

In its first year of operation, the "freedom of choice" plan which the court accepted has, predictably,[59/] left Banneker, Douglass, and Grant each over 98% black; and not a single white student has transferred into these schools (see pages 17-18, supra). "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now. * * * Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board." Green, supra, 391 U.S. at 439, 441-442 (emphasis in original).

The district court's own discussion of its reasons for accepting the defendants' freedom of choice plan (A. 482-483, 484, 485-487, 493-500) convincingly demonstrates the error of the court's action.

59/ See A. 484 n. 5 and accompanying text. In addition, the district court had previously noted in its liability decision that the defendants' majority-to-minority transfer provision "has not dismantled the state-imposed dual system and does not promise meaningful progress toward that goal" (A. 306 n. 54).

B. The Plan at the Secondary Level Inequitably Places Most of the Burdens of Desegregation on Black Students; and Closes Northeast Junior High School Without Adequate Justification.

As at the elementary level, the court-approved plan at the secondary level places most of the burdens involved in achieving desegregation on black students. Of the more than 1000 students who are subject to mandatory reassignment from Sumner High School or Northeast Junior High School, at most one is white; not a single white student is subject to mandatory reassignment to a predominantly black school; and, even including the 175 Central Junior High School students from the John Fiske elementary zone who are subject to reassignment (to other predominantly white schools) to make room for black students who are reassigned into Central, fewer than 12% of the total students subject to mandatory reassignment are white (see A. 676; A. 280; A. 505-506; A. 386-392). In addition, the virtually all-black Northeast Junior High School is closed by the plan, and it is the only school closed.

If this plan is truly remedial -- that is, if it is not designed with a view toward imposing the minimum possible dislocation on white students without regard to the disproportionate dislocation thereby imposed on the victims of discrimination -- then the defendants have a heavy burden to justify these results. Arvizu v. Waco Independent School District, 495 F.2d 499, 504-507 (5th Cir. 1974); United States v. Texas Education Agency (Austin Independent School District), 467 F.2d

848, 871-872 (opinion of Wisdom, J.), 885 (opinion of Bell, J.) (5th Cir. 1972) (en banc); Lee v. Macon County Board of Education, 448 F.2d 746, 753-754 (5th Cir. 1971); Haney v. County Board of Education of Sevier County, 429 F.2d 364, 371-372 (8th Cir. 1970); cf. Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 479 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976); United States v. School District of Omaha, 521 F.2d 530, 546 (8th Cir.) (en banc), certiorari denied, 423 U.S. 946 (1975).

The defendants did not meet this heavy burden.

The district court's conclusions in this matter reflect an uncritical acceptance of the justifications proffered by the defendants. The court also suggested the additional justification that black patrons bear part of the "blame" for the segregated schooling which the remedy is designed to correct (A. 503 n. 19). This latter suggestion was advanced notwithstanding the court's prior finding that the defendants had engaged in a longstanding pattern of purposefully segregative actions with respect to the schools in question, and that these actions provided a predicate for the remedy at issue.

The district court ignored cogent direct evidence that the objectionable features of the defendants' plan were racially motivated. Thus the court made no mention of the following statement which was issued and concurred in the day after the court's liability opinion was filed by three of the seven defendant members of the School Board (A. 687; see also A. 450-453):

> I will be pleased to support plans which will bring [Sumner, Northeast, Banneker, Douglass, and Grant] into compliance through means by which other students may voluntarily attend there or, if necessary, by their merger with other schools or such other means as may be lawful and of real benefit to children. In no case will I support or vote for any plan that requires the transfer of any student out of a school which the Court did not find to be unconstitutionally segregated. I am unalterably opposed to any plan which would result in the involuntary bussing of any student to Sumner, Northeast, Douglass, Banneker or Grant schools who does not live in the area normally served by those schools.

Nor did the court attach any significance to Superintendent Plucker's acknowledgements that (a) there were no plans to close Northeast before the desegregation order; (b) he could not say that he would have closed Northeast absent the desegregation order; (c) the school was a valuable resource and an asset to the community; and (d) its facilities were for all practical purposes of comparable quality to those of two other junior nigh schools which remain open (A. 434-437, 440-445). Dr. Plucker further testified that one-way bussing of the required number of students is itself no less costly and involves no less travel time than two-way bussing of the same number of students would involve; but that in his view a two-way plan would increase "the social stresses within [the] community" because there would be "greater involvement of people"[60/] (A. 433, 439, 444, 446-449).

60/ In fact, the same number of people would be involved but the number of white people would be larger.

In these circumstances, the defendants' attempt to justify the closing of Northeast on the basis that this action effects a cost saving which will compensate for the additional expense occasioned by the need to increase transportation for purposes of desegregation (A. 438-440), is subject to the construction that the increased costs which desegregation imposes on the School Board are a justification for its imposing disproportionate costs on the victims of its prior discrimination. The district court, however, gave prominent weight to the economic justification which the defendants advanced (A. 511, 513, 515, 516 n. 26). The court rejected the alternative of desegregating Northeast by means of a two-way transportation plan as "educationally unadvisable, politically unwise, and fiscally unjustified" (A. 515).

The district court erred in approving the defendants' desegregation plan. The plan's disproportionate distribution of the burdens of desegregation and its closing of Northeast Junior High School are inequitable and are not adequately supported by non-racial considerations. The court abused its discretion in this respect, because "[s]uch discretion * * * does not justify discrimination against minority students without clear justification." Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 479 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976).[61/]

61/ Of course, if this Court agrees with our principal submission in Arguments I-II, supra, that a systemwide remedy should have been ordered, a new desegregation plan will necessarily have to be formulated. In that event, this Court should

(Footnote cont'd on next page)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed insofar as it does not find a constitutional violation of systemwide impact, and insofar as it does not require a systemwide remedy. The case should be remanded with directions promptly to devise and implement a desegregation plan which, consistent with constitutional requirements and the principles set forth in this Court's opinion, makes every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.

In addition (see note 61, supra), even if the district court's findings as to the scope of the violation are affirmed, the judgment should be reversed insofar as it does not require actual desegregation of the Banneker, Douglass and Grant schools, and insofar as it approves the closing of Northeast Junior High School and the placing of a disproportionate share of the burdens of the desegregation plan taken as a whole on black students. In this event, the case should be remanded with directions promptly to devise and implement a desegregation plan which

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61/ (Footnote cont'd from preceding page)

still provide guidance on the issues discussed in this Argument III, because of the likelihood that they will again arise. There is no reason to suppose that the defendants would not submit, or that the district court would not approve, a systemwide plan which includes the same reliance on freedom of choice and the same inequitable features to which we object in the present limited plan.

promises realistically to work now with respect to Banneker, Douglass and Grant, which utilizes Northeast as an effectively desegregated facility, and which distributes the burdens of desegregation at all levels on a fair, equitable and racially nondiscriminatory basis.

Respectfully submitted,

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Dated: April 15, 1978.

APPENDIX A

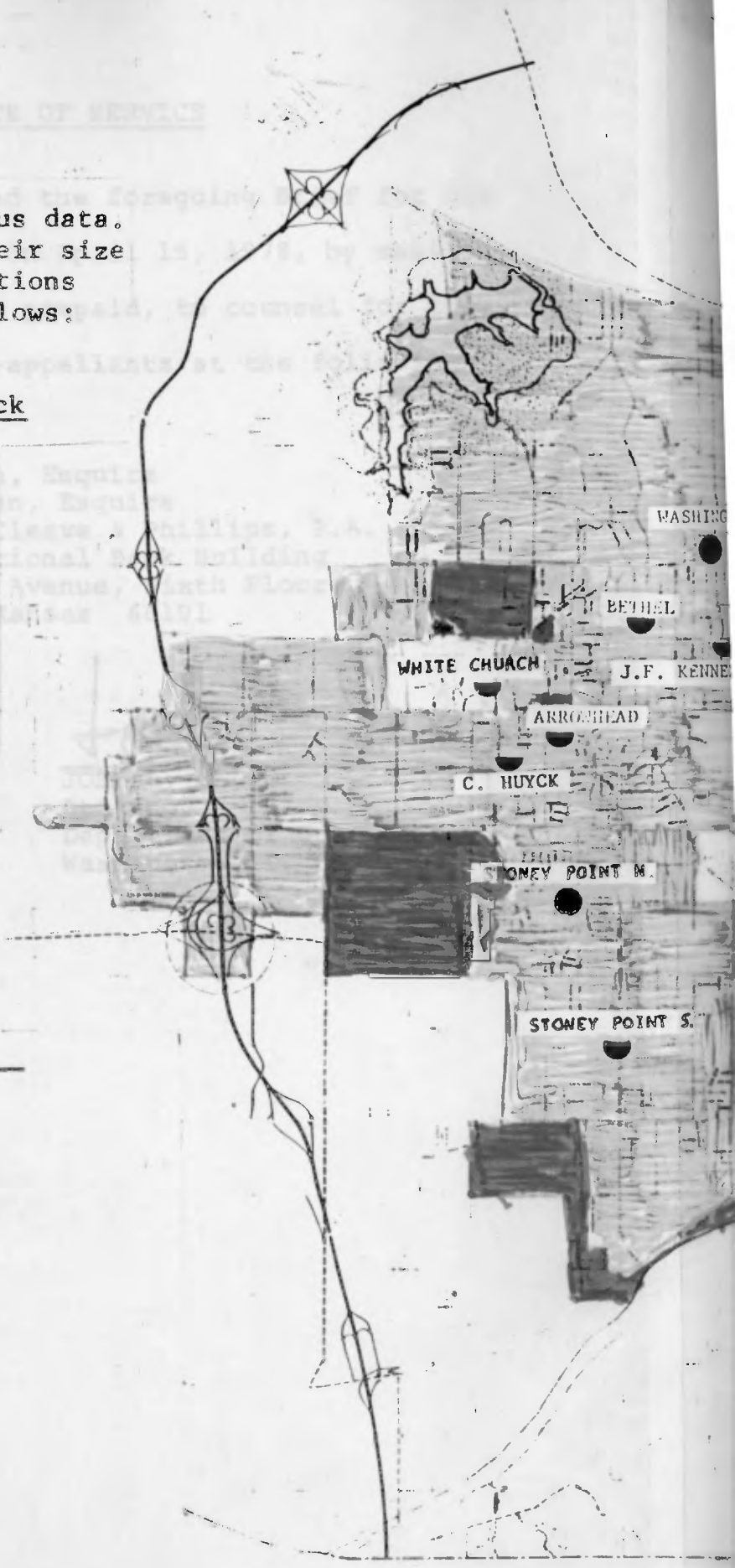
This map shows 1970 census data. The existing schools, their size and their racial compositions in 1975 are shown as follows:

Color of dot	Percent black
Red	0--10%
Black	11--50%
Orange	51--90%
Green	91-100%

Size of dot	Classroom number
1/4	0--8
1/2	9--16
3/4	17--24
1	over 25

Census key:

Color	% non-white
Brown	80-100%
Blue	60-79%
Green	40-59%
Red	20-39%
Orange [▬]	10-19%
Yellow	0-9%



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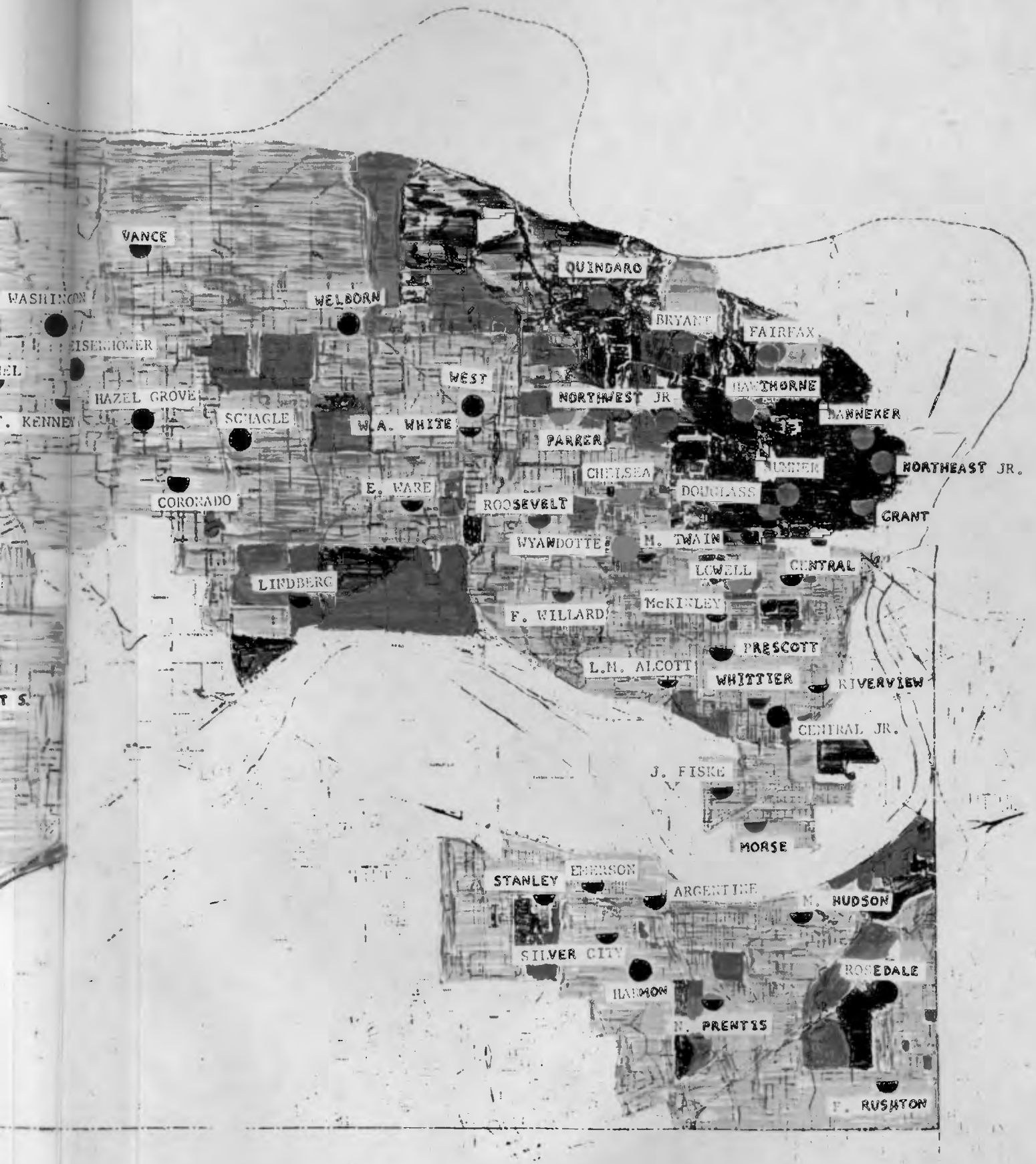
WYANDOTTE COUNTY



Index No. 0001744

CERTIFICATE OF SERVICE

I certify that I served the foregoing Brief for the United States as Appellant on April 15, 1978, by mailing two copies thereof, postage prepaid, to counsel for the defendants-appellees-cross-appellants at the following address:

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