

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

BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

and

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

JAMES P. BUCHELE
United States Attorney

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
JOEL L. SELIG
Attorneys
Department of Justice
Washington, D. C. 20530

TABLE OF CONTENTS

Page

BRIEF FOR THE UNITED STATES AS
CROSS-APPELLEE

QUESTION PRESENTED BY CROSS-APPEAL -----	1
STATEMENT -----	2
ARGUMENT -----	2
THE DISTRICT COURT'S FINDING OF <u>DE JURE</u> SEGREGATION AT SUMNER, NORTHEAST, BANNEKER, DOUGLASS AND GRANT WAS CORRECT -----	2
CONCLUSION -----	10

REPLY BRIEF FOR THE UNITED STATES
AS APPELLANT

ARGUMENT -----	11
I. LIABILITY -----	11
II. REMEDY -----	22
CONCLUSION -----	26

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Arthur v. Nyquist</u> , 573 F.2d 134 (2d Cir. 1978) -----	17
<u>Austin Independent School District v. United States</u> , 429 U.S. 990 (1976) -----	16
<u>Bradley v. Richmond School Board</u> , 416 U.S. 696 (1974) -----	8
<u>Brown v. Board of Education</u> , 347 U.S. 483 (1954) ----	8
<u>Brown v. Board of Education</u> , 349 U.S. 294 (1955) ----	21
<u>Carr v. Montgomery County Board of Education</u> , 511 F.2d 1374 (5th Cir.), certiorari denied, 423 U.S. 986 (1975) -----	23
<u>Davis v. Board of School Commissioners</u> , 402 U.S. 33 (1971) -----	23
<u>Dayton Board of Education v. Brinkman</u> , 433 U.S. 406 (1977) -----	9, 11, 15, 21
<u>Downs v. Board of Education of Kansas City, Kansas</u> , 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) -----	7
<u>Furnco Construction Corp. v. Waters</u> , 46 U.S.L.W. 4966 (U.S. June 29, 1978) -----	18
<u>Green v. County School Board</u> , 391 U.S. 430 (1968) ---	22
<u>Higgins v. Board of Education of the City of Grand Rapids</u> , 508 F.2d 779 (6th Cir. 1974) -----	23
<u>James v. Stockham Valves & Fittings Co.</u> , 559 F.2d 310 (5th Cir. 1977), certiorari denied, 46 U.S.L.W. 3453 (U.S. January 16, 1978) -----	14
<u>Keyes v. School District No. 1, Denver, Colorado</u> , 413 U.S. 189 (1973) -----	11, 12, 21
<u>Keyes v. School District No. 1, Denver, Colorado</u> , 521 F.2d 465 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976) -----	11, 17

	<u>Page</u>
<u>Lee v. Demopolis City School System</u> , 557 F.2d 1053 (5th Cir. 1977), certiorari denied <u>sub nom. Demopolis City School System v. United States</u> , 46 U.S.L.W. 3436 (U.S. January 9, 1978) -----	10, 23
<u>Milliken v. Bradley</u> , 433 U.S. 267 (1977) -----	9
<u>Morgan v. Kerrigan</u> , 401 F. Supp. 216 (D. Mass. 1975), aff'd, 530 F.2d 401 (1st Cir.), certiorari denied, 426 U.S. 935 (1976) -----	26
<u>NAACP v. Lansing Board of Education</u> , 559 F.2d 1042 (6th Cir. 1977), certiorari denied, 46 U.S.L.W. 3390 (U.S. December 12, 1977) -----	17
<u>Pasadena City Board of Education v. Spangler</u> , 427 U.S. 424 (1976) -----	18
<u>Swann v. Charlotte-Mecklenburg Board of Education</u> , 402 U.S. 1 (1971) -----	4, 8, 22, 24
<u>United States v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma</u> , 429 F.2d 1253 (10th Cir. 1970) -----	14
<u>United States v. Columbus Municipal Separate School District</u> , 558 F.2d 228 (5th Cir. 1977), certiorari denied, 46 U.S.L.W. 3436 (U.S. January 9, 1978) -----	17, 23
<u>United States v. Seminole County School District</u> , 553 F.2d 992 (5th Cir. 1977) -----	23
<u>United States v. United States Gypsum Co.</u> , 333 U.S. 364 (1948) -----	14
<u>Rules:</u>	
Rule 52, Fed. R. Civ. P. -----	4, 14

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

BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

and

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

QUESTION PRESENTED BY CROSS-APPEAL

Whether the district court's finding of de jure segregation
at five all-black or virtually all-black schools was erroneous?

STATEMENT ^{1/}

We respectfully refer the Court to the Statement contained in the Brief for the United States as Appellant (hereinafter cited as "U.S. Br.") (U.S. Br. 2-18).

ARGUMENT

THE DISTRICT COURT'S FINDING OF DE JURE SEGREGATION AT SUMNER, NORTHEAST, BANNEKER, DOUGLASS AND GRANT WAS CORRECT.

The five schools which are the subject of the defendants' cross-appeal had the following enrollments at the time of the district court's decision (U.S. Br. 9-10) ^{2/} :

<u>School</u>	1976-77 <u>Black Enrollment</u>	
Sumner High School	100.0%	(698)
Northeast Junior High School	99.9%	(690)
Banneker Elementary School	99.8%	(632)
Douglass Elementary School	99.0%	(491)
Grant Elementary School	100.0%	(329)

Sumner, Northeast, Douglass and Grant were statutory dual black schools under the defendants' pre-1954 system of complete segregation (A. 297). Banneker was built in 1972 as a replacement

^{1/} The deferred appendix procedure is being utilized in this case. Typewritten copies of the briefs 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. [The present copy includes appendix citations: "A. ____."]

^{2/} Record citations found at indicated pages of the Brief for the United States as Appellant are not repeated here.

for three other former statutory dual black schools, and is therefore properly considered as if it were itself a former dual black school (A. 279). Each of these five schools (and Banneker's predecessor schools) was attended exclusively by blacks when it was first opened, and has been attended exclusively or almost exclusively by blacks at all times thereafter to and including 1977 (A. 278).

The district court found that the defendants were responsible for the current condition of segregation at these five schools (A. 296-297, 348):

The history and present-day characteristics of the city, the schools, and the population in this area have been discussed in some detail above and will not be repeated here. Suffice it to say that the court has exhaustively examined this, and the great bulk of other evidence relating to this portion of the defendant district, and it is forced to conclude with regard to the former dual black schools --Sumner, Northeast, Douglass, Grant, and Banneker--that the defendants have failed to sustain their burden of proving that the "former" dual system which they maintained prior to 1954 has been effectively dismantled.

* * *

Although the racial imbalance at Sumner, Northeast, Banneker, Douglass, and Grant is not solely attributable to purposefully segregative actions by the defendants, the court cannot conscientiously conclude that the defendants did not "cause or contribute to" the perpetuation of segregation in these schools by failing to dismantle the pre-1954 dual system as it affected those schools.

This general finding by the district court was supported by a large number of specific subsidiary findings that the defendants had both continued to engage in purposeful discrimination and failed to fulfill their affirmative duty to dismantle the vestiges of statutory dualism at these five schools.^{3/} While we do not recite these findings in detail here, we rely upon them. The district court's major findings of discrimination are summarized in general terms in the Brief for the United States as Appellant (U.S. Br. 49-55). The district court reached the only conclusion possible in the face of the compelling evidence of record: the defendants did not begin to meet their burden of showing that the "racial composition [of the five one-race schools here in question] 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).

The defendants' cross-appeal fails to suggest any plausible ground for reversing this conclusion. None of the district court's extensive findings of fact is claimed by the defendants to be clearly erroneous, Fed. R. Civ. P. 52; none of the factual contentions which they advance on appeal is claimed by the defendants to have been overlooked or ignored by the district court. Nor do

^{3/} The district court considered these findings and the evidence supporting them to be so overwhelming that it declined to rule on some of the United States' contentions with respect to these five schools on the ground that such rulings, even if favorable to the government, would be "cumulative" (A. 313-314, 318, 325, 332-333, 334).

the defendants identify any respect in which they claim the district court applied incorrect legal standards or employed a legal theory unduly weighted in the government's favor. Indeed, we have argued in our appeal that the district court applied incorrect legal standards unduly weighted against the government, and the defendants argue at length (Def. Br. 12-14, 17-37) that the legal standards employed by the district court were correct.

Having identified no legal errors and no clearly erroneous factual findings, the defendants nevertheless ask this Court to overturn the district court's conclusions and adopt their conclusions as to what the evidence showed with respect to the five schools in question. But the issue here is whether the district court's judgment reflects reversible error, not whether the defendants can hypothesize an alternative interpretation of the facts which would result in a different judgment.

Two examples are sufficient to illustrate the inadequacy of the defendants' approach. First, the defendants refer repeatedly to their contention that the post-1954 attendance zones for the five schools in question were not drawn in a purposefully segregative fashion, but reflected instead a racially neutral neighborhood school system (Def. Br. 48, 51, 52, 53, 54, 59-60). The district court, however, found that these attendance zones and their associated feeder patterns were drawn in an intentionally segregative

manner and were maintained until the time of trial for the purpose and with the effect of enforcing and perpetuating segregation (U.S. Br. 51-52). The defendants suggest no basis upon which the district court's conclusions in this regard could properly be reversed. Similarly, the defendants contend that the effects of their racially discriminatory practices with respect to the five schools in question have become attenuated, and that the present racial composition of these schools merely reflects demographic and other factors for which they are in no way responsible (Def. Br. 49-50, 52, 54, 55-58, 60-61).^{4/} The district court, however, held to the contrary, even though it accepted a similar contention

^{4/} The defendants argue that the racial separation which exists in Kansas City's schools is the fault of a wide variety of entities and factors--including the "growth and westward movement" of the black population; "housing discrimination, informal norms of segregation, and personal preferences by blacks;" the actions of white families who "were rapidly abandoning this part of the city, thereby depriving the School Board of the wherewithal to lessen the racial isolation;" site-selection decisions of "the federal government (HUD) in conjunction with the Public Housing Authority of Kansas City, Kansas;" and the existence of an area "inhabited since the early twentieth century by people of Croatian, Serbian, Slovenian, and Polish extraction * * * [which] is predominantly Catholic, and [where] parochial schools have provided the education" (Def. Br. 49, 50, 54, 57)--but that it is in no way the fault of the defendants or their racially discriminatory practices.

(erroneously, we have argued) with respect to other schools in the system. Again, the defendants offer no basis for reversing the district court's holding with respect to the five schools here at issue; they cannot and do not argue that it resulted from the application of a legal standard which is erroneously weighted in the government's favor.

The defendants attempt to find support for their position 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) (Def. Br. 2, 35, 48, 52, 53, 55, 57). But the district court, after reviewing the pleadings, the trial transcript, the record of appeal, and the decisions of Judge Stanley and of this Court in that case (A. 81-82), properly held that principles of collateral estoppel could not justly be applied in the context of the Downs case and the present litigation. The district court noted, inter alia, the lack of identity of parties and issues; the absence in Downs of a full and fair opportunity for the plaintiffs there to litigate the defendants' overall policies and practices; and the fact of subsequent developments in the law of school desegregation (A. 77-89; A. 252-253, 307-310). And the district court gave the defendants the benefit of its full consideration on the merits of the relevant holdings and evidence in Downs (A. 89; A. 253, 310).

It is too late in the day for the defendants' effort to seek solace in any past misunderstanding they may have entertained with respect to the scope of their constitutional obligations (see Def. Br. 53, 55, 57).^{5/} There is no judicially cognizable "reliance" interest (see Def. Br. 57) which the defendants can properly assert as a barrier to their school system's now being brought into compliance with the law's requirements. Nor is there any pertinent distinction between whatever problems the defendants may have faced in divining and effectuating their constitutional duty and similar problems which a host of other school systems have long since confronted and surmounted. See Swann, supra, 402 U.S. at 13-14. "The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems." Id. at 14. But it is axiomatic that, as the Supreme Court did in Swann, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice * * * ." Bradley v. Richmond School Board,

^{5/} The district court found that after Brown v. Board of Education, 347 U.S. 483 (1954), "the defendants chose to 'adopt a method [of] achieving minimal disruption of the old pattern'" (A. 315). The court further found that the defendants, in addition to failing fully to dismantle their dual system in the 1950s, also engaged in a pattern of affirmative, purposeful discrimination which continued into the 1970s.

416 U.S. 696, 711 (1974). In the present case it is not the recent application of the law's requirements to the defendants, but rather the defendants' long-standing failure to comply with the law, which has resulted in manifest injustice.

Finally, the defendants are far wide of the mark when they suggest (Def. Br. 63) that "a change in standard," which requires that the district court's findings regarding the five former dual black schools be revisited, occurred in Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). In the first place, in Dayton the Supreme Court reaffirmed, reiterated, and then simply applied to the case before it principles of school desegregation law which had been settled by its prior decisions. See Dayton, supra, 433 U.S. at 410, 419-420; see also Milliken v. Bradley, 433 U.S. 267 (1977). Secondly, the district court in the present case considered the question of the "incremental segregative effect," Dayton, supra, 433 U.S. at 420, of the defendants' actions, and concluded that the effect was sufficient with respect to the schools here at issue to require it to find liability and impose a remedy (A. 296-297, 348, quoted at page 3, supra; A. 300-307, 323-325, 328-329, 339-340, 342-344).

Whether or not, as we have argued in our appeal, the legal standards which the district court applied on the question of incremental segregative effect were unduly favorable to the defendants

-- indeed, whether or not the concept of incremental segregative effect has any independent analytical significance with respect to the five former dual black schools at issue here, cf. Lee v. Demopolis City School System, 557 F.2d 1053, 1054 (5th Cir. 1977), certiorari denied sub nom. Demopolis City School System v. United States, 46 U.S.L.W. 3436 (U.S. January 9, 1978) -- the fact remains that the district court correctly found lingering effects of past and present discrimination at these schools. Thus, the resolution of the issues we have raised concerning the legal standards which the district court applied cannot in any event assist the defendants in their cross-appeal. And as noted above, the defendants take the position that the district court applied correct legal standards. In this context, the defendants' speculation that their racially discriminatory actions with respect to the five former dual black schools could not have any continuing effect (e.g., Def. Br. 56-59, 60-61) provides no basis for reversing the district court's judgment to the contrary.

CONCLUSION

The district court's finding of de jure segregation at Sumner, Northeast, Banneker, Douglass and Grant should be affirmed.

[REPLY BRIEF FOR THE UNITED STATES AS APPELLANT BEGINS ON NEXT PAGE]

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

ARGUMENT

I. LIABILITY

In our principal brief as appellant, we discuss in substantial detail our reasons for believing that the district court applied incorrect legal standards in this case, and that the application of proper legal standards leads inevitably to the finding of a constitutional violation of systemwide impact requiring a systemwide remedy. Dayton Board of Education v. Brinkman, 433 U.S. 406, 410, 420 (1977); Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 213-214 (1973); ibid., 521 F.2d 465, 470 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976). Because the defendants' brief tends to focus on individual threads of our legal argument rather than the fabric as a whole, we think it may be helpful to summarize our primary legal argument here.

The district court's method of analysis in this case amounted to an extreme application of the "school-by-school" approach which the Supreme Court disapproved in Keyes. The district court compartmentalized the evidence and focused myopically on the intent and the impact of each particular action of the defendants which was alleged to be discriminatory; it therefore did not properly confront the central issue in the case, i.e., the purpose and effects of the overall pattern of the defendants' actions. In absolving the defendants of responsibility for the racial identifiability of

seven virtually all-black or predominantly black schools, the court ignored the Keyes presumptions regarding impact and intent.^{6/} Attaching no overall significance to its finding of a long-standing and continuing pattern of discrimination with respect to five schools containing 25% of the district's black students, or to its finding of a systemwide faculty violation, the court placed upon the United States the burden of proving discrimination with respect to each and every school in the system.

Where, as here, pervasive racially discriminatory practices have been proved and found to have occurred, the district court should have given the United States the benefit of a rebuttable presumption that the current racial distribution of the school population reflects the systemwide impact of these discriminatory practices. When a constitutional violation has the normal potential for profound systemwide effects upon racial separation in the schools (as well as for reciprocal effects upon residential patterns), a court should rebuttably presume that the violation achieved its full potential, and that the effects which are reasonably to be expected have in fact been realized. The district court in the present case not only failed to give the United States the benefit of this natural presumption; it effectively gave the defendants

^{6/} Keyes, supra, 413 U.S. at 201-203, 208-209.

the benefit of an irrebuttable presumption to the contrary. Thus the court's conclusion that certain schools would be all-black or predominantly black today regardless of the purpose or the effects of the defendants' practices was not derived from an analysis of the evidence under proper legal standards; it was instead derived from an unwarranted assumption to which the court adhered notwithstanding the evidence presented and the controlling legal principles under which the evidence should have been evaluated. The result was not only incorrect, but also highly anomalous: the conclusion, on the one hand, that the defendants had never fulfilled their duty to convert from their pre-1954 dual system to a unitary system free of discrimination and racial identifiability; and the conclusion, on the other hand, that the defendants were not responsible for much of the current racial separation in their schools. This latter conclusion was directly attributable to the court's erroneous failure to charge the defendants with the burden of showing that the observed racial separation would exist even if they had at some point established a unitary system. For the reasons stated in detail in our principal brief, the evidence in this case compels a contrary conclusion.

The defendants' response to these arguments is, in our view, largely unresponsive. We do not here discuss certain incorrect formulations or characterizations of our arguments; nor do we seek to reply to conclusory factual contentions with respect to which

the positions of the parties are already adequately drawn, and which are in any event immaterial to the extent they overstate or go beyond the district court's findings. Rather, we rely upon our principal submission, supplemented here by discussion of some points as to which a response seems likely to be of assistance to the Court.

1. Our contentions are fully consistent with the rule that findings of fact are not to be reversed on appeal unless they are clearly erroneous, Fed. R. Civ. P. 52. Our principal submission identifies explicitly and precisely those limited instances where we seek reversal of a factual finding on the basis that it is clearly erroneous. It also articulates in detail the respects in which we contend the district court applied incorrect legal standards, and the manner in which the district court's legal errors infected its conclusory findings. The clearly erroneous rule does not govern review of factual conclusions which are predicated upon and derived from incorrect legal standards, or findings of ultimate fact which are in the nature of legal conclusions. E.g., United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 314 n. 1 par. 2 and sources cited (5th Cir. 1977), certiorari denied, 46 U.S.L.W. 3453 (U.S. January 16, 1978); see United States v. Board of Education, Independent School District No. 1, Tulsa County,

Oklahoma, 429 F.2d 1253, 1255, 1258-1261 (10th Cir. 1970). In these latter categories, we contend, are the district court's findings that the defendants' actions are in no way responsible for the conditions of segregation at the seven Northwest area schools, and that these schools would be all-black or predominantly black today regardless of the defendants' discriminatory practices.

2. Because of the length and detail of the district court's opinions, it may appear on first reading that acceptance of our contentions would draw this Court into an unusually formidable exercise in appellate review. In addition, it may initially seem contradictory that we contend the district court reached the right conclusion with respect to some schools and the wrong conclusion with respect to others although the court's opinions purport to follow a consistent legal analysis. We would therefore emphasize that while this case does call for careful scrutiny of the district court's decisions, this task is both necessary and appropriate, Dayton, supra, 433 U.S. at 419-420; and that our legal analysis is internally consistent and in accord with governing precedents. More than one reading is necessary to appreciate the inconsistencies in the district court's approach and the justice of our characterization of the reasoning which the court actually followed. But we believe that this Court's review will confirm the validity of our conceptualization of the district court's errors.

3. The defendants are incorrect in suggesting (Def. Br. 20-21, 22-25, 27-28) that our arguments concerning certain presumptions which the district court should have applied are inconsistent with currently prevailing legal standards. The Supreme Court's opinion in Dayton makes it clear beyond peradventure that Keyes and Swann remain good law (although Dayton was viewed by many, including the district court [see U.S. Br. 26 n. 29], as a case which presented an occasion for these decisions to be reconsidered and limited). Moreover, the defendants plainly err in the way in which they rely upon the per curiam decision vacating and remanding for reconsideration in Austin Independent School District v. United States, 429 U.S. 990 (1976). That per curiam decision without opinion obviously cannot be construed as announcing any new legal principles inconsistent with prior Supreme Court decisions or the analysis here advanced by the United States. To the extent that the separate concurring opinion in that case is inconsistent with our view of the law -- and, putting dicta to one side, the only arguable inconsistency is the possible suggestion (which may or may not be implicit depending on how one reads the opinion) of a greater burden of proof than our legal analysis places upon the plaintiff (see 429 U.S. at 994-995) -- it must be emphasized that that opinion was subscribed to by only three Justices, and that no

such suggestion has ever commanded a majority of the Court.^{7/}

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).

"The presumption of system-wide impact * * * derives from the pervasive interrelationship between school policy and the community's development * * * . In order to rebut the presumption of district-wide segregatory effect, the Board's proofs must negate these presumed intangible influences." Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 470 (10th Cir. 1975), certiorari denied, 423 U.S. 1066 (1976). There is no basis for any inference that the Supreme Court has retreated from these principles, or from the law which it articulated in Keyes and Swann. NAACP v. Lansing Board of Education, 559 F.2d 1042, 1046-1048 (6th Cir. 1977), certiorari denied, 46 U.S.L.W. 3390 (U.S. December 12, 1977); Arthur v. Nyquist, 573 F.2d 134, 141-143, 147 (2d Cir. 1978). Nor can it seriously be contended that the presumptions articulated as principles of constitutional law in Keyes and reaffirmed in

^{7/} Similarly, Mr. Justice Powell's separate opinion concurring in part and dissenting in part in Keyes, upon which the defendants and the district court also rely, was not and has never been subscribed to by a majority of the Court.

Dayton have somehow been overturned or vitiated by the Federal Rules of Evidence. These presumptions and burden-shifting principles are plainly within the authority and competence of the Supreme Court to articulate. See, e.g., Furnco Construction Corp. v. Waters, 46 U.S.L.W. 4966, 4969 (U.S. June 29, 1978). And they are in no way called into question by Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), which does not speak to a situation such as the present where the affirmative duty to desegregate has never been effectuated (see U.S. Br. 43-44 n. 35 and sources cited).

4. On the question of the significance of "racial residential transition" in this case, the defendants do not confine themselves to responding to our position but argue as well against propositions which we have never advanced (see Def. Br. 17-18, 19, 21). It therefore seems desirable to repeat our precise position here (U.S. Br. 35-36) (emphasis added):

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 Quindaro. 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 [citations omitted]. 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 [footnote omitted]. * * * [W]here, 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.

We stand by this position. The defendants have not cited a shred of evidence that would support the conclusion that the racial residential transition which occurred in Kansas City was either inevitable, or unaffected by the school district's racially discriminatory practices. 8/ We think that such evidence would have

8/ Indeed, the district court found, for example, that the defendants' racially discriminatory actions with respect to the Hawthorne school "accelerated" and "hastened" the process of "racial transition" and "resegregation" there (U.S. Br. 38-39).

One witness whose testimony the defendants characterize as objective and compelling (Def. Br. 4 n. 2) made the following observation (A. 119-120):

It is fairly easy to identify [racial population] (Continued on following page)

to be cited to sustain the district court's conclusion that "[t]he defendants in no way caused or contributed to residential transition or resegregation" (A. 349). Moreover, even if such evidence were cited, the court's conclusion would still be subject to the infirmity that it was, for the reasons we have explained, based upon incorrect legal standards.

We have never contended that the defendants' policies were the sole or even necessarily the predominant cause of racial residential transition; and we do not consider that the law imposes upon the plaintiff in a school desegregation case the burden of making such a demonstration. In a case such as this, where extensive discrimination in the operation of the schools has been shown, it is rather the defendants' burden to demonstrate that residential transition was unaffected by their proven discriminatory practices, and that the observed racial distribution of the school population is unrelated to their proven constitutional violations, if they wish to rely on the phenomenon of residential transition as a defense.

8/ (Cont'd)

trends on the basis of historical precedent but there are almost an infinite number of factors that can enter into the rate at which that trend proceeds and there are so many changes going on in society at the moment that we find it impossible, almost, to predict most things and this is certainly one of them.

5. In the last analysis it is important to remember that residential transition, although relied upon as a defense, is not the primary focus of this litigation. This case is essentially concerned with remedying the effects of unconstitutional racial discrimination in the schools, not with assigning responsibility for, or attempting to reorder, residential patterns. Here, as in Keyes, supra, 413 U.S. at 212:

We have no occasion to consider in this case whether a "neighborhood school policy" of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation.

Nor, in fact, has mandatory segregation in the Kansas City schools "long since ceased," Dayton, supra, 433 U.S. at 420. Rigid and complete mandatory segregation was the rule in Kansas City in 1954, and the district court found that the effects of past discrimination as well as present purposeful discrimination continued to be reflected in the defendants' practices to the time of trial.

At no point did the defendants ever fulfill their affirmative duty "to effectuate a transition to a racially nondiscriminatory school system," Brown v. Board of Education, 349 U.S. 294,

301 (1955), "without a 'white' school and a 'Negro' school, but just schools," Green v. County School Board, 391 U.S. 430, 442 (1968), in which "all vestiges of state-imposed segregation" have been eliminated, Swann, supra, 402 U.S. at 15. If the defendants had done this in 1954 or at some point in the more than 20 years thereafter, and if the pronounced racial separation which currently exists in their school system had nevertheless developed despite their best efforts, they would then be justified in seeking to assign responsibility elsewhere. But this is not the situation which this case presents.

No one can say precisely what would have transpired had the facts been otherwise. The constitutional violations found by the district court establish an unrebutted prima facie case of a system-wide violation, and this showing is further reinforced by additional evidence of discrimination with respect to the seven black Northwest area schools (U.S. Br. 49-63). If the district court had applied the proper legal standards, it could not have concluded otherwise. This Court should so hold.

II. REMEDY

1. The district court approved a desegregation plan under which the elementary schools that it found to be de jure segregated remain over 98% black, reasoning that "actual desegregation * * *

is not required" (A. 497). As we have pointed out (U.S. Br. 63-64), this reasoning is plainly inconsistent with the rule that "[t]he measure of any desegregation plan is its effectiveness." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971). The defendants rely on two cases to support this aspect of the district court's judgment (Def. Br. 39-40). The first is clearly inapposite because it is premised upon a "finding that the [school] district did not engage in purposeful segregation of students." Higgins v. Board of Education of City of Grand Rapids, 508 F.2d 779, 797 (6th Cir. 1974). The second, Carr v. Montgomery County Board of Education, 511 F.2d 1374 (5th Cir.), certiorari denied, 423 U.S. 986 (1975), also does not assist the defendants. "We do not here contemplate a system including two or three essentially one-race schools resulting from geographic or demographic accidents and surviving as minor anomalies in a broadly integrated program, despite earnest planning and honest effort to eliminate them and those like them, because practical considerations of hazard, distance or expense all but forbid their elimination." Lee v. Demopolis City School System, supra (5th Cir. 1977), 557 F.2d at 1054. See also, e.g., United States v. Seminole County School District, 553 F.2d 992, 995 (5th Cir. 1977); United States v. Columbus Municipal Separate School District, supra (5th Cir. 1977), 558 F.2d at 231-232.

It is of course true that the mere existence of a small number of one-race schools does not necessarily invalidate a comprehensive desegregation plan. But in order to justify the continued existence of one-race schools "the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." Swann, supra, 402 U.S. at 26. In this case it is precisely because that burden was not satisfied that the district court found liability with respect Banneker, Douglass and Grant. The law therefore clearly requires that these schools be desegregated.

2. We noted in our discussion of the unequal distribution of the burdens of desegregation that 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; that not a single white student is subject to mandatory reassignment to a predominantly black school; and that, 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 (U.S. Br. 65). The defendants cannot and do not dispute the accuracy of the foregoing statements. They,

however, make the following inaccurate statement which may appear to contradict the foregoing: "Approximately 580 non-black and 1,067 black students are reassigned [sic] as a direct result of the desegregation plan" (Def. Br. 41). As the defendants point out in an accompanying footnote, however, the figure of 580 non-black students "reassigned" in fact "[i]ncludes 405 non-black transfers to the Academy of Arts and Sciences" (as well as the 175 Central Junior High School students mentioned in our formulation) (Def. Br. 41 n. 29). These 405 non-black transfers cannot properly be included in the number of students subject to mandatory reassignment; they are rather students who voluntarily choose to attend the Sumner magnet school. The entire point of the Sumner magnet is that it is a selective-admissions district-wide school designed to attract academically eligible students on a voluntary basis by offering a "unique" curriculum (A. 493). Voluntary attendance at this school cannot accurately be characterized either as a burden or as a mandatory reassignment.

3. With respect to the question of the closing of Northeast Junior High School, we rest generally on our prior submission (U.S. Br. 65-68). We do think it necessary to note, however, that the defendants' citation of the United States' expert witness ^{9/} does

9/ "[Northeast] was definitely a prime candidate for closing, a fact admitted by the United States' expert witness" (Def. Br. 44).

not present an accurate picture of his testimony. Pertinent portions of that testimony are included in the appendix (A. 454-478). On the basis of a complete set of reasonable criteria and comparison with other schools that remain open, ^{10/} Dr. Gordon's conclusion was as follows (A. 464, 475):

I don't think that the plan that has been presented at this point would justify the closing of that building, looking at the plan in total. It might be, if a different plan were structured for this school system, that as a component of a total plan it might be that that recommendation might still stand, but just simply to close that school down and ship the youngsters out across the community in a one-way type of situation, it is fairly inhumane.

* * *

[T]o recommend the closing of that school * * * in isolation * * * in a plan built on voluntarism simply puts the burden of desegregation * * * in this plan onto the black community alone.

CONCLUSION

The district court's judgment should be reversed insofar as it does not find a systemwide violation and require a systemwide

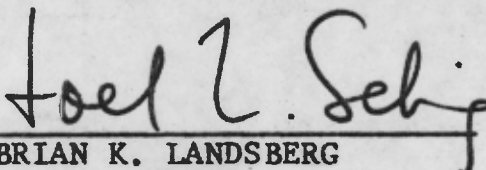
^{10/} Unlike in Morgan v. Kerrigan, 401 F. Supp. 216, 245-246 (D. Mass. 1975), aff'd, 530 F.2d 401 (1st Cir.), certiorari denied, 426 U.S. 935 (1976) (Def. Br. 44), Northeast is the only school closed by the desegregation plan adopted here.

remedy; and, in any event, the judgment should be reversed insofar as it approves desegregation measures which are ineffective or inequitable.

JAMES P. BUCHELE
United States Attorney

Respectfully submitted,

DREW S. DAYS, III
Assistant Attorney General

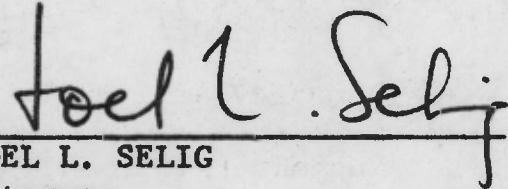

BRIAN K. LANDSBERG
JOEL L. SELIG
Attorneys
Department of Justice
Washington, D. C. 20530

Dated: July 24, 1978.

CERTIFICATE OF SERVICE

I certify that I served the foregoing Brief for the United States as Cross-Appellee and Reply Brief for the United States as Appellant on July 24, 1978, by mailing two copies thereof, postage prepaid, to counsel for the defendants-appellees-cross-appellants at the following address:

Bill E. Fabian, Esquire
James R. Goheen, Esquire
McAnany, Van Cleave & Phillips, P.A.
Commercial National Bank Building
601 Minnesota Avenue, Sixth Floor
Kansas City, Kansas 66101



JOEL L. SELIG
Attorney
Department of Justice
Washington, D. C. 20530