IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

No.

WILLIAM G. MILLIKEN, Governor of the State of Michigan; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate, and JOHN W. PORTER, Superintendent of Public Instruction, of the State of Michigan; ALLISON GREEN, Treasurer of the State of Michigan; ALLEN PARK PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF BERKLEY, BRANDON SCHOOLS, CENTERLINE PUBLIC SCHOOLS, CHERRY HILL SCHOOL DISTRICT, CHIPPEWA VALLEY PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF CLAWSON, CRESTWOOD SCHOOL DISTRICT, DEARBORN PUBLIC SCHOOLS, DEARBORN HEIGHTS SCHOOL DISTRICT NO. 7, EAST DETROIT PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF FERNDALE, FLAT ROCK COMMUNITY SCHOOLS,

(Continued on Inside Front Cover)

-vs-

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH

(Continued on Inside Front Cover)

APPENDIX

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Petitioners,

GOINGS: BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE: CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN: KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; DENISE MAGDOWSKI and DAVID MAGDOWSKI, by their Mother and Next Friend, JOYCE MAGDOWSKI; DAVID VIETTI, by his Mother and Next Friend, VIOLET VIETTI, and the CITIZENS COMMITTEE FOR BETTER EDUCATION OF THE DETROIT METROPOLITAN AREA, a Michigan non-profit Corporation; KERRY GREEN and COLLEEN GREEN, by their Father and Next Friend, DONALD G. GREEN, JAMES, JACK and KATHLEEN ROSEMARY, by their Mother and Next Friend, EVELYN G. ROSEMARY, TERRI DORAN, by her Mother and Next Friend, BEVERLY DORAN, SHERRILL, KEITH, JEFFREY and GREGORY COULS, by their Mother and Next Friend, SHARON COULS, EDWARD and MICHAEL ROMESBURG, by their Father and Next Friend, EDWARD M. ROMESBURG, JR., TRACEY and GREGORY ARLEDGE, by their Mother and Next Friend, AILEEN ARLEDGE, SHERYL and RUSSELL PAUL, by their Mother and Next Friend, MARY LOU PAUL, TRACY QUIGLEY, by her Mother and Next Friend, JANICE QUIGLEY, IAN, STEPHANIE KARL and JAAKO SUNI, by their Mother and Next Friend, SHIRLEY SUNI, and TRI-COUNTY CITIZENS FOR INTERVENTION IN FEDERAL SCHOOL ACTION NO. 35257; MICHIGAN EDUCATION ASSOCIATION; and PROFESSIONAL PERSONNEL OF VAN DYKE,

Respondents.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCHE GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS AND KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and Mrs. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any persons similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH,

Plaintiffs,

vs.

WILLIAM J. MILLIKEN, Governor of the State of Michigan and ex-officio member of Michigan State Board of Education; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Department of Education and ex-officio Chairman of Michigan State Board of Education; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of

CIVIL ACTION
NO. 35257

the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools,

Defendants.

COMPLAINT

I.

The jurisdication of this Court is invoked under 28 U.S.C. Sections 1331(a), 1343(3) and (4), this being a suit in equity authorized by 42 U.S.C. Sections 1983, 1988 and 2000d, to redress the deprivation under color of Michigan law, statute, custom and/or usage of rights, privileges and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States. This action is also authorized by 42 U.S.C. Section 1981 which provides that all persons within the jurisdiction of the United States shall have the same rights to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. Jurisdiction is further invoked under 28 U.S.C. Sections 2201 and 2202, this being a suit for declaratory judgment declaring certain portions of Act No. 48 of the Michigan Public Acts of 1970 (a copy of which is attached hereto as Exhibit A) unconstitutional. This is also an action for injunctive relief against the enforcement of certain portions of said Act No. 48 and to require the operation of the Detroit, Michigan public schools on a unitary basis.

II.

Plaintiffs, Ronald Bradley and Richard Bradley, by their Mother and Next Friend, Verda Bradley; Jeanne Goings, by her Mother and Next Friend, Blanche Goings; Beverly Love, Jimmy Love and Darrell Love, by their Mother and Next Friend, Clarissa Love; Camille Burden, Pierre Burden, Ava Burden, Myra Burden, Marc Burden and Steven Burden, by their Father and Next Friend,

Marcus Burden; Karen Williams and Kristy Williams, by their Father and Next Friend, C. Williams; Ray Litt and Mrs. Wilbur Blake, parents, are all parents or minor children thereof attending schools in the Detroit, Michigan public school system. All of the above-named plaintiffs are black except Ray Litt, who is white and who joins with them to bring this action each in their own behalf and on behalf of their minor children and all persons similarly situated.

Plaintiff, National Association for the Advancement of Colored People, Detroit Branch, is an unincorporated association with offices at 242 East Warren Avenue, Detroit, Michigan, which sues on behalf of its membership who are members of the plaintiff class. Plaintiff, N.A.A.C.P., has as one of its purposes the advancement of equal educational opportunities through the provision of integrated student bodies, faculty and staff.

III.

Plaintiffs, pursuant to Rule 23 of the Federal Rules of Civil Procedure, bring this action on their own behalf and on behalf of all persons in the City of Detroit similarly situated. There are common questions of law and fact affecting the rights of plaintiffs and the rights of the members of the class. The members of the class are so numerous as to make it impracticable to bring them all before the Court. A common declaratory and injunctive relief is sought and plaintiffs adequately represent the interests of the members of the class.

IV.

The defendants are:

1. William J. Milliken, Governor of the State of Michigan and ex-officio member of the State Board of Education;

2. Frank J. Kelley, Attorney General of the State of Michigan, who is responsible for enforcing the public acts and laws of the State of Michigan;

3. The Michigan State Board of Education, a constitutional body corporate, which is generally charged with the power and responsibility of administering the public school system in the State of Michigan, including the City of Detroit;

4. John W. Porter, Acting Superintendent of Public Instruction, Department of Education, in the State of Michigan, and ex-officio member of the State Board of Education;

5. The Board of Education of the City of Detroit, a school district of the first class, organized and existing in Wayne County, Michigan, under and pursuant to the laws of the State of Michigan and operating the public school system in the City of Detroit, Michigan;

6. Patrick McDonald, James Hathaway and Cornelius Golightly, all residents of Wayne County, Michigan, and elected members of the Board of Education of the City of Detroit;

7. The remaining board members of the Board of Education of the City of Detroit;

8. Norman Drachler, a resident of Wayne County, Michigan, and the appointed Superintendent of the Detroit Public Schools.

V.

Plaintiffs seek a declaratory judgment declaring the last sentence of the first paragraph of Section 2a and the entirety of Section 12 of Public Act No. 48 of the Michigan Public Acts of 1970 unconstitutional.

The challenged portion of Section 2a reads as follows:

Regions shall be as compact, contiguous and nearly equal as practicable.

Section 12 reads as follows:

The implementation of any attendance provisions for the

1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. In reviewing, confirming, establishing or modifying attendance provisions the first class school district boards established under the provisions of this amendatory act shall have a policy of open enrollment and shall enable students to attend a school of preference but providing priority acceptance, insofar as practicable, in cases of insufficient school capacity, to those students residing nearest the school and to those students desiring to attend the school for participation in vocationally oriented courses or other specialized curriculum.

Plaintiffs also seek a temporary restraining order and preliminary and permanent injunctions against the enforcement of said provisions of Act 48.

VI.

This is also a proceeding for a permanent injunction enjoining the defendant, Board of Education of the City of Detroit, its members and the Superintendent of Schools from continuing their policy, practice, custom and usage of operating the public school system in and for the City of Detroit, Michigan in a manner which has the purpose and effect of perpetuating a biracial segregated public school system, and for other relief, as hereinafter more fully appears.

VII.

On August 11, 1969, the Governor of the State of Michigan approved Act No. 244 of the Public Acts of 1969 (Mich. Stats. Ann. Section 15.2298), said Act being entitled, "AN ACT to require first class school districts to be divided into regional districts and to provide for local district school boards and to define their

powers and duties and the powers and duties of the first class district board." (A copy of Act No. 244 is attached hereto as Exhibit B). Act No. 244 applies exclusively to the Board of Education of the School District of the City of Detroit, that being the only first class school district in the State of Michigan. The essence of Act No. 244 is that it provides the mandate and means for the administrative decentralization of the Detroit school system and the extent thereof.

On March 2, 1970, the Detroit School Board's attorney rendered an opinion (attached hereto as Exhibit C) advising the Board that in effectuating decentralization under Act No. 244 the law imposed three limitations:

1. The Act itself required each district to have not less than 25,000 nor more than 50,000 pupils;

2. The United States Constitution required each district to be in compliance with the "one man, one vote" principle;

3. The United States Constitution, above all, required that the districts be established on a racially desegregated basis.

VIII.

In the 1969-70 school year, the Detroit Board of Education operated 21 high school constellations providing a public education for 281,101 school children (excluding 12,758 students not listed in high school constellations and in adult programs). 61.9% of these students were Negro, 36.4% were white, and 1.7% were of other racial-ethnic minorities. Of the 21 high school constellations operated by the Detroit School Board in 1969-70, 14 were racially identifiable as "white" or "Negro" constellations. The high school constellations contain within them 208 elementary schools, 53 junior high schools, and 21 senior high schools. Of the 208 elementary schools (enrolling 166,258 pupils), 114 (enrolling 92,225 pupils) are identifiable as "Negro" schools and 71 (enrolling 46,448 pupils) are identifiable as "white" schools. Of the 53 junior high schools (enrolling 63,476 pupils), 24 (enrolling 31,201 pupils) are identifiable as "Negro" schools and 18 (enrolling

21,507 pupils) are identifiable as "white" schools. Of the 21 senior high schools (enrolling 54,394 pupils, 11 (enrolling 25,351 pupils) are identifiable as "Negro" schools and 6 (enrolling 19,183 pupils) are identifiable as "white" schools.

IX.

On April 7, 1970, the Detroit Board of Education adopted a limited plan of desegregation (Exhibit D, attached hereto) for the senior high school level, which plan was to take effect on a stair-step basis over a period of four years so that by 1972, there would be substantially increased racial integration. This plan for high school desegregation comtemplated a change in high school boundary lines, thereby changing the junior high feeder patterns in twelve of Detroit's 21 senior high schools. The plan was designed so that by the year 1972, only three (as compared to the present 17) of Detroit's senior high schools would be racially identifiable as "Negro" or "white" high schools. The plan also provided that a student presently enrolled in a junior high school and who has a brother or sister presently enrolled in a senior high school would continue in senior high school at the school his brother or sister was presently attending. All those presently enrolled in senior high school would not, due to the stair-step feature of the plan, be affected and they would continue through graduation at the segregated senior high school they were presently attending. The April 7 plan did not involve, nor did it affect, the existing racially segregated pattern of pupil assignments in the elementary and junior high schools.

X.

On April 7, 1970, the Detroit Board of Education by a four-to-two vote (the seventh member, now deceased, expressing his approval by letter from his hospital bed) adopted a regional boundary plan (attached hereto as Exhibit D) for administrative decentralization consisting of seven regions. The seven regions as established by the Board on April 7, 1970 contained an average of 38,802 pupils per region with the smallest region containing 33,043 pupils and the largest region containing 46,592 pupils, or a range of deviation of 13,549 pupils with an average deviation of

2,892 pupils per region. The racial complexion of the pupil enrollment in the seven regions averaged 61.7% Negro with the lowest percent Negro region being 34.4% and the largest percent Negro region being 76.7%, or a range of deviation of 42.3% Negro with an average regional deviation of 10.5% Negro.

XI.

The actions of the Detroit School Board on April 7, 1970 approving a desegregation plan resulted in expressions of "community hostility". A movement to recall the four members of the Detroit School Board who voted in favor of the April 7, 1970 action was initiated by white citizens. The recall movement was resolved by the Detroit voters (of which a majority are white) at the August 4, 1970 election, which resulted in the removal of the four board members who had voted in favor of the April 7, 1970 plan. The April 7th plan created a similar reaction in the Michigan State Legislature which culminated in the passage of Public Act 48, interposing the State and voiding the partial desegregation plan, which Act was approved by the defendant, Governor Milliken, on July 7, 1970.

XII.

On July 28, 1970, the attorney for the Detroit Board of Education rendered an opinion (attached hereto as Exhibit E) that Act 48 has both the design and the effect of completely eliminating the provisions of the April 7th plan adopted by the Board. Section 2a of the Act provides that "[r]egions shall be as compact, contiguous and nearly equal in population as practicable." This provision was intended to and does eliminate the efforts of the Board on April 7, 1970 to create racially integrated regions. Section 12 of Act 48 eliminates all provisions of the Board's April 7th plan aimed at desegregation of the Detroit public schools by, first, delaying the implementation of the attendance provisions until January 1, 1971 and, second, by mandating an open enrollment ("freedom of choice") policy qualified only by a provision providing students residing nearest a school with an attendance priority over those residing farther away. Section 12 has the further effect of eliminating two policies of the Detroit Board of

Education: (1) prior to the adoption of Act 48, a student could transfer to a school other than the one to which he was initially assigned only if his transfer would have the effect of increasing desegregation in the Detroit school system; (2) prior to the adoption of Act 48, whenever pupils had to be bused to relieve overcrowding, they were transported to the first and nearest school where their entry would increase desegregation.

XIII.

Pursuant to the provisions of Section 2a of Act 48, the defendant, Governor William G. Milliken, on July 22, 1970 appointed a three-member commission known hereafter as the Detroit Boundary Line Commission to draw the boundary lines for the eight public school election regions mandated by Act 48. On August 4, 1970 the Detroit Boundary Line Commission adopted its plan and presented its boundary lines for the eight election regions as called for in Act 48. The Boundary Line Commission's August 4th plan (a copy of which is attached hereto as Exhibit F) is a complete negation of the Board's April 7th region plan. The August 4th plan creates eight regions with an average of 33,582 pupils in each region with a range of deviation of 19,942 (the largest region contains 43,025 pupils while the smallest region contains 23,083) and an average deviation for each region of 22.9%. Under the plan adopted by the Detroit Boundary Line Commission on August 4, 1970, there will be new racially segregated school regions established in the defendant school system.

XIV.

Section 12 of the Act was enacted with the express intent of preventing the desegregation of the defendant system. It applies to but one school district in the State and reestablishes a policy found by the United States Supreme Court to be an inadequate method for elimination of segregated school attendance patterns. It seeks to reverse a finding of the United States District Court for the Eastern District of Michigan in *Sherrill School Parents Committee* v. *The Board of Ed. of the School District of the City of Detroit,* Michigan, No. 22092, E.D. Mich. Sept. 18, 1964, that the "Open School" program does not appear to be achieving substan-

tial student integration in the Detroit School System presently or within the foreseeable future.

XV.

Plaintiffs allege that in the premises Public Act 48 on its face and as applied violates the Fourteenth Amendment to the Constitution of the United States; the Act pertains solely to the Detroit Board of Education and thereby deliberately prohibits the Detroit Board of Education from making pupil assignments and establishing pupil attendance zones in a manner which all other school districts in the State of Michigan are free to do. Public Act 48 thereby creates an irrational, unreasonable and arbitrary classification which contravenes the equal protection and due process clauses of the Fourteenth Amendment. The distinction made by Public Act 48 is further unconstitutional by the fact that it applies solely to the Detroit school district where the bulk of Negro school children in the State of Michigan are concentrated.

XVI.

Public Act 48 further violates the Fourteenth Amendment to the United States Constitution in that the Act impedes the legally mandated integration of the public schools; the effect of the Act is to perpetuate the segregation and racial isolation of the past and give it the stamp of legislative approval. The Act, building upon the preexisting public and private housing segregation, has the purpose, intent and effect of intensifying the present segregation and racial isolation in the Detroit public schools. The Act further violates the Fourteenth Amendment in that it constitutes a reversal by the State of Michigan of action taken by the Detroit School Board which action was consistent with and mandated by the Constitution of the United States. In addition, Public Act 48 infringes upon the Thirteenth Amendment in that its effect is to relegate Negro school children in the City of Detroit to a position of inferiority and to assert the inferiority of Negroes generally, thereby creating and perpetuating badges and incidents of slavery; and, also, in that it denies to black persons in Detroit the same rights to the full and equal benefit of all laws and proceedings as white citizens enjoy.

XVII.

The defendants, Board of Education of the City of Detroit and Michigan State Board of Education, are charged under Michigan law and the Constitution and laws of the United States with the responsibility of operating a unitary public school system in the City of Detroit, Michigan.

XVIII.

Plaintiffs allege that they are being denied equal educational opportunities by the defendants because of the segregated pattern of pupil assignments and the racial identifiability of the schools in the Detroit public school system. Plaintiffs further allege that said denials of equal educational opportunities contravene and abridge their rights as secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

XIX.

The plaintiffs allege that the defendants herein, acting under color of the laws of the State of Michigan, have pursued and are presently pursuing a policy, custom, practice and usage of operating, managing and controlling the said public school system in a manner that has the purpose and effect of perpetuating a segregated public school system. This segregated public school system is based predominantly upon the race and color of the students attending said school system; attendance at the various schools is based upon race and color; and the assignment of personnel has in the past and remains to an extent based upon the race and color of the children attending the particular school and the race and color of the personnel to be assigned.

XX.

The plaintiffs allege that the racially discriminatory policy, custom, practice and usage described in paragraph XIX has included assigning students, designing attendance zones for elementary junior and senior high schools, establishing feeder patterns to secondary schools, planning future public educational facilities,

constructing new schools, and utilizing or building upon the existing racially discriminatory patterns in both public and private housing on the basis of the race and color of the children who are eligible to attend said schools. The said discriminatory policy, custom, practice, and usage has resulted in a public school system composed of schools which are either attended solely or predominantly by black students or attended solely or predominantly by white students.

XXI.

The plaintiffs allege that the racially discriminatory policy, custom, practice and usage described in paragraph XIX has also included assigning faculty and staff members employed by defendants to the various schools in the Detroit school system on the basis of the race and color of the personnel to be assigned. Consequently, a general practice has developed whereby white faculty and staff members have been assigned on the basis of their race and color to schools attended solely or predominantly by white students and Negro faculty and staff members have been assigned on the basis of their race and color to schools attended solely or predominantly by black students.

XXII.

The defendants have failed and refused to take all necessary steps to correct the effects of their policy, practice, custom and usage of racial discrimination in the operation of said school system and to insure that such policy, custom, practice and usage for the 1970-71 school year, and thereafter, will conform to the requirements of the Thirteenth and Fourteenth Amendments.

XXIII.

Plaintiffs and those similarly situated and affected on whose behalf this action is brought are suffering irreparable injury and will continue to suffer irreparable injury by reason of the provisions of the Act complained of herein and by reason of the failure or refusal of defendants to operate a unitary school system in the City of Detroit. Plaintiffs have no plain, adequate or com-

plete remedy to redress the wrongs complained of herein other than this action for declaratory judgment and injunctive relief. Any other remedy to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits and would cause further irreparable injury. The aid of this Court is necessary in assuring the citizens of Detroit and particularly the black public school children of the City of Detroit that this is truly a nation of laws, not of men, and that the promises made by the Thirteenth and Fourteenth Amendments are and will be kept.

WHEREFORE, plaintiffs respectfully pray that upon the filing of this complaint the Court:

1. Issue, *pendente lite*, a temporary restraining order and a preliminary injunction:

a. Requiring defendants, their agents and other persons acting in concert with them to put into effect the partial plan of senior high school desegregation adopted by the defendant, Detroit Board of Education, on April 7, 1970, which plan called for its implementation at the start of the 1970-71 school term, provided, however: (1) that the plan shall not be effected on a stair-step basis, but shall, in accord with *Alexander* v. *Holmes County Board,* 396 U.S. 19 (1969), become completely and fully effective at the beginning of the coming (1970-71) school year; and (2) that those provisions which exclude a pupil who has a brother or sister presently enrolled in a senior high school from being affected by the plan shall be deleted in accord with *Ross* v. *Dyer,* 312 F.2d 191 (5th Cir. 1963);

b. Restraining defendants, their agents and other persons acting in concert with them from giving any force or effect to Sec. 12 of Act No. 48 of the Michigan Public Acts of 1970 insofar as its application would impair or delay the desegregation of the defendant system;

c. Restraining defendants from taking any steps to implement the August 4, 1970 plan, or any other plan, for

new district or regional boundaries pursuant to Act 48, or from taking any action which would prevent or impair the implementation of the regions established under the defendant Board's earlier plan which provided for non-racially identifiable regions;

d. Restraining defendants from all further school construction until such time as a constitutional plan for operation of the Detroit public schools has been approved and new construction reevaluated as a part thereof;

e. Requiring defendants to assign by the beginning of the 1970-71 school year principals, faculty, and other school personnel to each school in the system in accordance with the ratio of white and black principals, faculty and other school personnel throughout the system.

2. Advance this cause on the docket and order a speedy hearing of this action according to law and upon such hearing:

a. Enter a judgment declaring the provisions of Act No. 48 complained of herein unconstitutional on their face and as applied as violative of the Thirteenth and Fourteenth Amendments to the United States Constitution;

b. Enter preliminary and permanent decrees perpetuating the orders previously entered;

c. Enter a decree enjoining defendants, their agents, employees and successors from continuing to employ policies, customs, practices and usages which, as described hereinabove, have the purpose and effect of leaving intact racially identifiable schools;

d. Enter a decree enjoining defendants, their agents, employees and successors from assigning students and/or operating the Detroit school system in a manner which results in students attending racially identifiable public schools;

e. Enter a decree requiring defendants, their agents,

employees and successors to assign teachers, principals and other school personnel to schools to eliminate the racial identity of schools by assigning such personnel to each school in accordance with the ratio of white and black personnel throughout the system.

f. Enter a decree enjoining defendants, their agents, employees and successors from approving budgets, making available funds, approving employment and construction contracts, locating schools or school additions geographically, and approving policies, curriculum and programs, which are designed to or have the effect of maintaining, perpetuating or supporting racial segregation in the Detroit school system.

g. Enter a decree directing defendants to present a complete plan to be effective for the 1970-71 school year for the elimination of the racial identity of every school in the system and to maintain now and hereafter a unitary, nonracial school system. Such a plan should include the utilization of all methods of integration of schools including rezoning, pairing, grouping, school consolidation, use of satellite zones, and transportation.

h. Plaintiffs pray that the Court enjoin all further construction until such time as a constitutional plan has been approved and new construction reevaluated as a part thereof.

i. Plaintiffs pray that this Court will award reasonable counsel fees to their attorneys for services rendered and to be rendered them in this cause and allow them all out-of-pocket expenses of this action and such other and additional relief as may appear to the Court to be equitable and just.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al.,	)	
Plaintiffs	)	
v.	)	
WILLIAM G. MILLIKEN, et al.,	)	
Defendants	)	
DETROIT FEDERATION OF TEACHERS, LOCAL NO. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,	)	**CIVIL ACTION NO: 35257**
Defendant-Intervenor	)	
and	)	
DENISE MAGDOWSKI, et al.,	)	
Defendants-Intervenor	)	

RULING ON ISSUE OF SEGREGATION

This action was commenced August 18, 1970, by plaintiffs, the Detroit Branch of the National Association for the Advancement of Colored People* and individual parents and students, on behalf of a class later defined by order of the Court dated February 16, 1971, to include "all school children of the City of Detroit and all Detroit resident parents who have children of school age." Defendants are the Board of Education of the City of Detroit, its members and its former superintendent of schools, Dr. Norman A. Drachler, the Governor, Attorney General, State Board of Education and State Superintendent of Public Instruction of the State of Michigan. In their complaint, plaintiffs attacked a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation (known as the April 7, 1970 Plan) which had been adopted by the Detroit Board of Education to be effective beginning with the fall 1970 semester.

* The standing of the NAACP as a proper party plaintiff was not contested by the original defendants and the Court expresses no opinion on the matter.

Plaintiffs also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office.

Additional parties have intervened in the litigation since it was commenced. The Detroit Federation of Teachers (DFT) which represents a majority of Detroit Public school teachers in collective bargaining negotiations with the defendant Board of Education, has intervened as a defendant, and a group of parents has intervened as defendants.

Initially the matter was tried on plaintiffs' motion for preliminary injunction to restrain the enforcement of Act 48 so as to permit the April 7 Plan to be implemented. On that issue, this Court ruled that plaintiffs were not entitled to a preliminary injunction since there had been no proof that Detroit has a segregated school system. The Court of Appeals found that the "implementation of the April 7 Plan was thwarted by State action in the form of the Act of the Legislature of Michigan," (433 F.2d 897, 902), and that such action could not be interposed to delay, obstruct or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment.

The plaintiffs then sought to have this Court direct the defendant Detroit Board to implement the April 7 Plan by the start of the second semester (February, 1971) in order to remedy the deprivation of constitutional rights wrought by the unconstitutional statute. In response to an order of the Court, defendant Board suggested two other plans, along with the April 7 Plan, and noted priorities, with top priority assigned to the so-called "Magnet Plan." The Court acceded to the wishes of the Board and approved the Magnet Plan. Again, plaintiffs appealed but the appellate court refused to pass on the merits of the plan. Instead, the case was remanded with instructions to proceed immediately to a trial on the merits of plaintiffs' substantive allegations about the Detroit School System. 438 F. 2d 945 (6th Cir. 1971).

Trial, limited to the issue of segregation, began April 6, 1971 and concluded on July 22, 1971, consuming 41 trial days, inter-

spersed by several brief recesses necessitated by other demands upon the time of Court and counsel. Plaintiffs introduced substantial evidence in support of their contentions, including expert and factual testimony, demonstrative exhibits and school board documents. At the close of plaintiffs' case, in chief, the Court ruled that they had presented a prima facie case of state imposed segregation in the Detroit Public Schools; accordingly, the Court enjoined (with certain exceptions) all further school construction in Detroit pending the outcome of the litigation.

The State defendants urged motions to dismiss as to them. These were denied by the Court.

At the close of proofs intervening parent defendants (Denise Magdowski, et al.) filed a motion to join, as parties 85 contiguous "suburban" school districts – all within the so-called Larger Detroit Metropolitan area. This motion was taken under advisement pending the determination of the issue of segregation.

It should be noted that, in accordance with earlier rulings of the Court, proofs submitted at previous hearings in the cause, were to be and are considered as part of the proofs of the hearing on the merits.

In considering the present racial complexion of the City of Detroit and its public school system we must first look to the past and view in perspective what has happened in the last half century. In 1920 Detroit was a predominantly white city – 91% – and its population younger than in more recent times. By the year 1960 the largest segment of the city's white population was in the age range of 35 to 50 years, while its black population was younger and of childbearing age. The population of 0-15 years of age constituted 30% of the total population of which 60% were white and 40% were black. In 1970 the white population was principally aging–45 years–while the black population was younger and of childbearing age. Childbearing blacks equaled or exceeded the total white population. As older white families without children of school age leave the city they are replaced by younger black families with school age children, resulting in a doubling of enrollment in the local neighborhood school and a complete change in

student population from white to black. As black inner city residents move out of the core city they "leap-frog" the residential areas nearest their former homes and move to areas recently occupied by whites.

The population of the City of Detroit reached its highest point in 1950 and has been declining by approximately 169,500 per decade since then. In 1950, the city population constituted 61% of the total population of the standard metropolitan area and in 1970 it was but 36% of the metropolitan area population. The suburban population has increased by 1,978,000 since 1940. There has been a steady out-migration of the Detroit population since 1940. Detroit today is principally a conglomerate of poor black and white plus the aged. Of the aged, 80% are white.

If the population trends evidenced in the federal decennial census for the years 1940 through 1970 continue, the total black population in the City of Detroit in 1980 will be approximately 840,000, or 53.6% of the total. The total population of the city in 1970 is 1,511,000 and, if past trends continue, will be 1,338,000 in 1980. In school year 1960-61, there were 285,512 students in the Detroit Public Schools of which 130,765 were black. In school year 1966-67, there were 297,035 students, of which 168,299 were black. In school year 1970-71 there were 289,743 students of which 184,194 were black. The percentage of black students in the Detroit Public Schools in 1975-76 will be 72.0%, in 1980-81 will be 80.7% and in 1992 it will be virtually 100% if the present trends continue. In 1960, the non-white population, ages 0 years to 19 years, was as follows:

0 – 4 years	42%
5 – 9 years	36%
10 – 14 years	28%
15 – 19 years	18%

In 1970 the non-white population, ages 0 years to 19 years, was as follows:

0 – 4 years	48%
5 – 9 years	50%
10 – 14 years	50%
15 – 19 years	40%

The black population as a percentage of the total population in the City of Detroit was:

(a) 1900	1.4%
(b) 1910	1.2%
(c) 1920	4.1%
(d) 1930	7.7%
(e) 1940	9.2%
(f) 1950	16.2%
(g) 1960	28.9%
(h) 1970	43.9%

The black population as a percentage of total student population of the Detroit Public Schools was as follows:

(a) 1961	45.8%
(b) 1963	51.3%
(c) 1964	53.0%
(d) 1965	54.8%
(e) 1966	56.7%
(f) 1967	58.2%
(g) 1968	59.4%
(h) 1969	61.5%
(i) 1970	63.8%

For the years indicated the housing characteristics in the City of Detroit were as follows:

(a) 1960	total supply of housing units was 553,000
(b) 1970	total supply of housing units was 530,770

The percentage decline in the white students in the Detroit Public Schools during the period 1961-1970 (53.6% in 1960; 34.8% in 1970) has been greater than the percentage decline in the white population in the City of Detroit during the same period (70.8% in 1960; 55.21% in 1970), and correlatively, the percentage increase in black students in the Detroit Public Schools during the nine-year period 1961-1970 (45.8% in 1961; 63.8% in 1970) has been greater than the percentage increase in the black population of the City of Detroit during the ten-year period 1960-1970 (28.9% in 1960; 43.9% in 1970). In 1961 there were eight schools in the system without white pupils and 73 schools with no Nėgro pupils. In 1970 there were 30 schools with no white pupils and 11 schools with no Negro pupils, an increase in the number of schools without white pupils of 22 and a decrease in the number of schools without Negro pupils of 62 in this ten-year period. Between 1968 and 1970 Detroit experienced the largest increase in percentage of black students in the student population of any major northern school district. The percentage increase in Detroit was 4.7% as contrasted with –

New York	2.0%
Los Angeles	1.5%
Chicago	1.9%
Philadelphia	1.7%
Cleveland	1.7%
Milwaukee	2.6%
St. Louis	2.6%
Columbus	1.4%
Indianapolis	2.6%
Denver	1.1%
Boston	3.2%
San Francisco	1.5%
Seattle	2.4%

In 1960, there were 266 schools in the Detroit School System. In 1970, there were 319 schools in the Detroit School System.

In the Western, Northwestern, Northern, Murray, Northeastern, Kettering, King and Southeastern high school service

areas, the following conditions exist at a level significantly higher than the city average:

(a) Poverty in children
(b) Family income below poverty level
(c) Rate of homicides per population
(d) Number of households headed by females
(e) Infant mortality rate
(f) Surviving infants with neurological defects
(g) Tuberculosis cases per 1,000 population
(h) High pupil turnover in schools

The City of Detroit is a community generally divided by racial lines. Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs. While the racially unrestricted choice of black persons and economic factors may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. On the record there can be no other finding.

Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community – as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, *i.e.*, racially and economically

harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools.

Turning now to the specific and pertinent (for our purposes) history of the Detroit school system so far as it involves both the local school authorities and the state school authorities, we find the following:

During the decade beginning in 1950 the Board created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. In 1959 there were eight basic optional attendance areas affecting 21 schools. Optional attendance areas provided pupils living within certain elementary areas a choice of attendance at one of two high schools. In addition there was at least one optional area either created or existing in 1960 between two junior high schools of opposite predominant racial components. All of the high school optional areas, except two, were in neighborhoods undergoing racial transition (from white to black) during the 1950s. The two exceptions were: (1) the option between Southwestern (61.6% black in 1960) and Western (15.3% black); (2) the option between Denby (0% black) and Southeastern (30.9% black). With the exception of the Denby – Southeastern option (just noted) all of the options were between high schools of opposite predominant racial compositions. The Southwestern-Western and Denby-Southeastern optional areas are all white on the 1950, 1960 and 1970 census maps. Both Southwestern and Southeastern, however, had substantial white pupil populations, and the

option allowed whites to escape integration. The natural, probable, foreseeable and actual effect of these optional zones was to allow white youngsters to escape identifiably "black" schools. There had also been an optional zone (eliminated between 1956 and 1959) created in "an attempt. . . to separate Jews and Gentiles within the system," the effect of which was that Jewish youngsters went to Mumford High School and Gentile youngsters went to Cooley. Although many of these optional areas had served their purpose by 1960 due to the fact that most of the areas had become predominantly black, one optional area (Southwestern-Western affecting Wilson Junior High graduates) continued until the present school year (and will continue to effect 11th and 12th grade white youngsters who elected to escape from predominantly black Southwestern to predominantly white Western High School). Mr. Henrickson, the Board's general fact witness, who was employed in 1959 to, *inter alia,* eliminate optional areas, noted in 1967 that: "In operation Western appears to be still the school to which white students escape from predominantly Negro surrounding schools." The effect of eliminating this optional area (which affected only 10th graders for the 1970-71 school year) was to decrease Southwestern from 86.7% black in 1969 to 74.3% black in 1970.

The Board, in the operation of its transportation to relieve overcrowding policy, has admittedly bused black pupils past or away from closer white schools with available space to black schools. This practice has continued in several instances in recent years despite the Board's avowed policy, adopted in 1967, to utilize transportation to increase integration.

With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black.

The Board has created and altered attendance zones, maintained and altered grade structures and created and altered feeder school patterns in a manner which has had the natural,

probable and actual effect of continuing black and white pupils in racially segregated schools. The Board admits at least one instance where it purposefully and intentionally built and maintained a school and its attendance zone to contain black students. Throughout the last decade (and presently) school attendance zones of opposite racial compositions have been separated by north-south boundary lines, despite the Board's awareness (since at least 1962) that drawing boundary lines in an east-west direction would result in significant integration. The natural and actual effect of these acts and failures to act has been the creation and perpetuation of school segregation. There has never been a feeder pattern or zoning change which placed a predominantly white residential area into a predominantly black school zone or feeder pattern. Every school which was 90% or more black in 1960, and which is still in use today, remains 90% or more black. Whereas 65.8% of Detroit's black students attended 90% or more black schools in 1960, 74.9% of the black students attended 90% or more black schools during the 1970-71 school year.

The public schools operated by defendant Board are thus segregated on a racial basis. This racial segregation is in part the result of the discriminatory acts and omissions of defendant Board.

In 1966 the defendant State Board of Education and Michigan Civil Rights Commission issued a Joint Policy Statement on Equality of Educational Opportunity, requiring that

> "Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities . . . . Each of these situations presents an opportunity for integration."

Defendant State Board's "School Plant Planning Handbook" requires that

> "Care in site location must be taken if a serious transportation problem exists or if housing patterns in an area would result in a school largely segregated on racial, ethnic, or socio-

economic lines."

The defendant City Board has paid little heed to these statements and guidelines. The State defendants have similarly failed to take any action to effectuate these policies. Exhibit NN reflects construction (new or additional) at 14 schools which opened for use in 1970-71; of these 14 schools, 11 opened over 90% black and one opened less than 10% black. School construction costing $9,222,000 is opening at Northwestern High School which is 99.9% black, and new construction opens at Brooks Junior High, which is 1.5% black, at a cost of $2,500,000. The construction at Brooks Junior High plays a dual segregatory role: not only is the construction segregated, it will result in a feeder pattern change which will remove the last majority white school from the already almost all-black Mackenzie High School attendance area.

Since 1959 the Board has constructed at least 13 small primary schools with capacities of from 300 to 400 pupils. This practice negates opportunities to integrate, "contains" the black population and perpetuates and compounds school segregation.

The State and its agencies, in addition to their general responsibility for and supervision of public education, have acted directly to control and maintain the pattern of segregation in the Detroit schools. The State refused, until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned, while providing in many neighboring, mostly white, suburban districts the full range of state supported transportation. This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities.

The State, exercising what Michigan courts have held to be is "plenary power" which includes power "to use a statutory scheme, to create, alter, reorganize or even dissolve a school district, despite any desire of the school district, its board, or the inhabitants thereof," acted to reorganize the school district of the

City of Detroit.

The State acted through Act 48 to impede, delay and minimize racial integration in Detroit schools. The first sentence of Sec. 12 of the Act was directly related to the April 7, 1970 desegregation plan. The remainder of the section sought to prescribe for each school in the eight districts criterion of "free choice" (open enrollment) and "neighborhood schools" ("nearest school priority acceptance"), which had as their purpose and effect the maintenance of segregation.

In view of our findings of fact already noted we think it unnecessary to parse in detail the activities of the local board and the state authorities in the area of school construction and the furnishing of school facilities. It is our conclusion that these activities were in keeping, generally, with the discriminatory practices which advanced or perpetuated racial segregation in these schools.

It would be unfair for us not to recognize the many fine steps the Board has taken to advance the cause of quality education for all in terms of racial integration and human relations. The most obvious of these is in the field of faculty integration.

Plaintiffs urge the Court to consider alledgedly discriminatory practices of the Board with respect to the hiring, assignment and transfer of teachers and school administrators during a period reaching back more than 15 years. The short answer to that must be that black teachers and school administrative personnel were not readily available in that period. The Board and the intervening defendant union have followed a most advanced and exemplary course in adopting and carrying out what is called the "balanced staff concept" – which seeks to balance faculties in each school with respect to race, sex and experience, with primary emphasis on race. More particularly, we find:

1. With the exception of affirmative policies designed to achieve racial balance in instructional staff, no teacher in the Detroit Public Schools is hired, promoted or assigned to any school by reason of his race.

2. In 1956, the Detroit Board of Education adopted the rules and regulations of the Fair Employment Practices Act as its hiring and promotion policy and has adhered to this policy to date.

3. The Board has actively and affirmatively sought out and hired minority employees, particularly teachers and administrators, during the past decade.

4. Between 1960 and 1970, the Detroit Board of Education has increased black representation among its teachers from 23.3% to 42.1%, and among its administrators from 4.5% to 37.8%.

5. Detroit has a higher proportion of black administrators than any other city in the country.

6. Detroit ranked second to Cleveland in 1968 among the 20 largest northern city school districts in the percentage of blacks among the teaching faculty and in 1970 surpassed Cleveland by several percentage points.

7. The Detroit Board of Education currently employs black teachers in a greater percentage than the percentage of adult black persons in the City of Detroit.

8. Since 1967, more blacks than whites have been placed in high administrative posts with the Detroit Board of Education.

9. The allegation that the Board assigns black teachers to black schools is not supported by the record.

10. Teacher transfers are not granted in the Detroit Public Schools unless they conform with the balanced staff concept.

11. Between 1960 and 1970, the Detroit Board of Education reduced the percentage of schools without black faculty from 36.3% to 1.2%, and of the four schools currently without black faculty, three are specialized trade schools where minority faculty cannot easily be secured.

12. In 1968, of the 20 largest northern city school districts, Detroit ranked fourth in the percentage of schools having one or more black teachers and third in the percentage of schools having three or more black teachers.

13. In 1970, the Board held open 240 positions in schools with less than 25% black, rejecting white applicants for these positions until qualified black applicants could be found and assigned.

14. In recent years, the Board has come under pressure from large segments of the black community to assign male black administrators to predominantly black schools to serve as male role models for students, but such assignments have been made only where consistent with the balanced staff concept.

15. The numbers and percentages of black teachers in Detroit increased from 2,275 and 21.6%, respectively, in February, 1961, to 5,106 and 41.6%, respectively, in October, 1970.

16. The number of schools by percent black of staffs changed from October, 1963 to October, 1970 as follows:

Number of schools without black teachers – decreased from 41, to 4.

Number of schools with more than 0%, but less than 10% black teachers – decreased from 58, to 8.

Total number of schools with less than 10% black teachers – decreased from 99, to 12.

Number of schools with 50% or more black teachers – increased from 72, to 124.

17. The number of schools by percent black of staffs changed from October, 1969 to October, 1970, as follows:

Number of schools without black teachers – decreased from 6, to 4.

Number of schools with more than 0%, but less than 10% black teachers – decreased from 41, to 8.

Total number of schools with less than 10% black teachers – decreased from 47, to 12.

Number of schools with 50% or more black teachers – increased from 120, to 124.

18. The total number of transfers necessary to achieve a faculty racial quota in each school corresponding to the system-wide ratio, and ignoring all other elements is, as of 1970, 1,826.

19. If account is taken of other elements necessary to assure quality integrated education, including qualifications to teach the subject area and grade level, balance of experience, and balance of sex, and further account is taken of the uneven distribution of black teachers by subject taught and sex, the total number of transfers which would be necessary to achieve a faculty racial quota in each school corresponding to the system-wide ratio, if attainable at all, would be infinitely greater.

20. Balancing of staff by qualifications for subject and grade level, then by race, experience and sex, is educationally desirable and important.

21. It is important for students to have a successful role model, especially black students in certain schools, and at certain grade levels.

22. A quota of racial balance for faculty in each school which is equivalent to the system-wide ratio and without more is educationally undesirable and arbitrary.

23. A severe teacher shortage in the 1950s and 1960s impeded integration-of-faculty opportunities.

24. Disadvantageous teaching conditions in Detroit in the 1960s—salaries, pupil mobility and transiency, class size, building conditions, distance from teacher residence, shortage of teacher

substitutes, etc.—made teacher recruitment and placement difficult.

25. The Board did not segregate faculty by race, but rather attempted to fill vacancies with certified and qualified teachers who would take offered assignments.

26. Teacher seniority in the Detroit system, although measured by system-wide service, has been applied consistently to protect against involuntary transfers and "bumping" in given schools.

27. Involuntary transfers of teachers have occurred only because of unsatisfactory ratings or because of decrease of teacher services in a school, and then only in accordance with balanced staff concept.

28. There is no evidence in the record that Detroit teacher seniority rights had other than equitable purpose or effect.

29. Substantial racial integration of staff can be achieved, without disruption of seniority and stable teaching relationships, by application of the balanced staff concept to naturally occurring vacancies and increases and reductions of teacher services.

30. The Detroit Board of Education has entered into successive collective bargaining contracts with the Detroit Federation of Teachers, which contracts have included provisions promoting integration of staff and students.

The Detroit School Board has, in many other instances and in many other respects, undertaken to lessen the impact of the forces of segregation and attempted to advance the cause of integration. Perhaps the most obvious one was the adoption of the April 7 Plan. Among other things, it has denied the use of its facilities to groups which practice racial discrimination; it does not permit the use of its facilities for discriminatory apprentice training programs; it has opposed state legislation which would have the effect of segregating the district; it has worked to place black students in craft positions in industry and the building trades; it has brought

about a substantial increase in the percentage of black students in manufacturing and construction trade apprenticeship classes; it became the first public agency in Michigan to adopt and implement a policy requiring affirmative act of contractors with which it deals to insure equal employment opportunities in their work forces; it has been a leader in pioneering the use of multi-ethnic instructional material, and in so doing has had an impact on publishers specializing in producing school texts and intructional materials; and it has taken other noteworthy pioneering steps to advance relations between the white and black races.

In conclusion, however, we find that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit. As we assay the principles essential to a finding of de jure segregation, as outlined in rulings of the United States Supreme Court, they are:

1. The State, through its officers and agencies, and usually, the school administration, must have taken some action or actions with a purpose of segregation.

2. This action or these actions must have created or aggravated segregation in the schools in question.

3. A current condition of segregation exists. We find these tests to have been met in this case. We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation. It is, the Court believes, unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, then it should make no difference whether we classify it de jure or de facto. Our objective, logically, it seems to us, should be to remedy a condition which we believe needs correction. In the most realistic sense, if fault or blame must be found it is that of the community as a whole, including, of

course, the black components. We need not minimize the effect of the actions of federal, state and local governmental officers and agencies, and the actions of loaning institutions and real estate firms, in the establishment and maintenance of segregated residential patterns – which lead to school segregation – to observe that blacks, like ethnic groups in the past, have tended to separate from the larger group and associate together. The ghetto is at once both a place of confinement and a refuge. There is enough blame for everyone to share.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action under 28 U.S.C. 1331 (a), 1343 (3) and (4), 2201 and 2202; 42 U.S.C. 1983, 1988, and 2000d.

2. In considering the evidence and in applying legal standards it is not necessary that the Court find that the policies and practices, which it has found to be discriminatory, have as their motivating forces any evil intent or motive. *Keyes v. Sch. Dist. No. 1, Denver,* 383 F. Supp. 279. Motive, ill will and bad faith have long ago been rejected as a requirement to invoke the protection of the Fourteenth Amendment against racial discrimination. *Sims v. Georgia,* 389 U.S. 404, 407-8.

3. School districts are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, non-racial considerations. *Keyes v. Sch. Dist., supra,* and *Davis v. Sch. Dist. of Pontiac,* 309 F. Supp. 734, and 443 F.2d 573.

4. In determining whether a constitutional violation has occurred, proof that a pattern of racially segregated schools has existed for a considerable period of time amounts to a showing of racial classification by the state and its agencies, which must be justified by clear and convincing evidence. *State of Alabama v. U.S., 304* F.2d 583.

5. The Board's practice of shaping school attendance zones on a north-south rather than an east-west orientation, with the result that zone boundaries conformed to racial residential dividing lines, violated the Fourteenth Amendment. *Northcross v. Bd. of Ed., Memphis,* 333 F. 2d 661.

6. Pupil racial segregation in the Detroit Public School System and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The Board's building upon housing segregation violates the Fourteenth Amendment. See, *Davis v. Sch. Dist. of Pontiac, supra,* and authorities there noted.

7. The Board's policy of selective optional attendance zones, to the extent that it facilitated the separation of pupils on the basis of race, was in violation of the Fourteenth Amendment. *Hobson v. Hansen,* 269 F. Supp. 401, *aff'd sub nom., Smuck v. Hobson,* 408 F.2d 175.

8. The practice of the Board of transporting black students from overcrowded black schools to other identifiably black schools, while passing closer identifiably white schools, which could have accepted these pupils, amounted to an act of segregation by the school authorities. *Spangler v. Pasadena City Bd. of Ed.,* 311 F. Supp. 501.

9. The manner in which the Board formulated and modified attendance ones for elementary schools had the natural and predictable effect of perpetuating racial segregation of students. Such conduct is an act of de jure discrimination in violation of the Fourteenth Amendment. *U.S. v. School District 151,* 286 F. Supp. 786; *Brewer v. City of Norfolk,* 397 F. 2d 37.

10. A school board may not, consistent with the Fourteenth Amendment maintain segregated elementary schools or permit educational choices to be influenced by community sentiment or

the wishes of a majority of voters. *Cooper v. Aaron,* 358 U.S. 1, 12-13, 15-16.

> "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. 44th Gen'l Assembly of Colorado, 377 U.S. 713, 736-737.

11. Under the Constitution of the United States and the constitution and laws of the State of Michigan, the responsibility for providing educational opportunity to all children on constitutional terms is ultimately that of the state. *Turner v. Warren County Board of Education,* 313 F. Supp. 380; Art. VIII, § § 1 and 2, Mich. Constitution; *Dasiewicz v. Bd. of Ed. of the City of Detroit,* 3 N.W. 2d 71.

12. That a state's form of government may delegate the power of daily administration of public schools to officials with less than state-wide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the constitution. In such instances the constitutional obligation toward the individual school children is a shared one. *Bradley v. Sch. Bd., City of Richmond,* 51 F.R.D. 139, 143.

13. Leadership and general supervision over all public education is vested in the State Board of Education. Art. VIII, § 3, Mich. Constitution of 1963. The duties of the State Board and superintendent include, but are not limited to, specifying the number of hours necessary to constitute a school day; approval until 1962 of school sites; approval of school construction plans; accreditation of schools; approval of loans based on state aid funds; review of suspensions and expulsions of individual students for misconduct [Op. Atty. Gen., July 7, 1970, No. 4705]; authority over transportation routes and disbursement of transportation funds; teacher certification and the like. M.S.A. 15.1023(1). State law provides review procedures from actions of local or intermediate districts (See M.S.A. 15.3442), with authority in the State Board to ratify, reject, amend or modify the actions of these inferior state agencies. See M.S.A. 15.3467; 15.1919 (61); 15.1919(68b); 15.2299(1); 15.1961; 15.3402;

Bridgehampton School District No. 2 Fractional of Carsonville, Mich. v. Supt. of Public Instruction, 323 Mich. 615. In general, the state superintendent is given the duty "[t]o do all things necessary to promote the welfare of the public schools and public educational instructions and provide proper educational facilities for the youth of the state." M.S.A. 15.3252. See also M.S.A. 15.2299(57), providing in certain instances for reorganization of school districts.

14. State officials, including all of the defendants, are charged under the Michigan constitution with the duty of providing pupils an education without discrimination with respect to race. Art, VIII, §2, Mich. Constitution of 1963. Art. I, §2, of the constitution provides:

> "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or politicial rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin. The legislature shall implement this section by appropriate legislation."

15. The State Department of Education has recently established an Equal Educational Opportunities section having responsibility to identify racially imbalanced school districts and develop desegregation plans. M.S.A. 15.3355 provides that no *school* or department shall be kept for any person or persons on account of race or color.

16. The state further provides special funds to local districts for compensatory education which are administered on a per school basis under direct review of the State Board. All other state aid is subject to fiscal review and accounting by the state. M.S.A. 15.1919. See also M.S.A. 15.1919(68b), providing for special supplements to merged districts "for the purpose of bringing about uniformity of educational opportunity for all pupils of the district." The general consolidation law M.S.A. 15.3401 authorizes annexation for even noncontiguous school districts upon approval of the superintendent of public instruction and electors, as provided by law. Op. Atty. Gen., Feb. 5, 1964, No. 4193. Consolidation with

respect to so-called "first class" districts, *i.e.*, Detroit, is generally treated as an annexation with the first class district being the surviving entity. The law provides procedures covering all necessary considerations. M.S.A. 15.3184, 15.3186.

17. Where a pattern of violation of constitutional rights is established the affirmative obligation under the Fourteenth Amendment is imposed on not only individual school districts, but upon the State defendants in this case. *Cooper v. Aaron,* 358, U.S. 1; *Griffin v. County School Board of Prince Edward County,* 337 U.S. 218; *U.S. v. State of Georgia,* Civ. No. 12972 (N.D. Ga., December 17, 1970), *rev'd on other grounds,* 428 F.2d 377; *Godwin v. Johnston County Board of Education,* 301 F. Supp. 1337; *Lee v. Macon County Board of Education,* 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom., Wallace v. U.S.,* 389 U.S. 215; *Franklin v. Quitman County Board of Education,* 288 F. Supp. 509; *Smith v. North Carolina State Board of Education,* No. 15,072 (4th Cir., June 14, 1971).

The foregoing constitutes our findings of fact and conclusions of law on the issue of segregation in the public schools of the City of Detroit.

Having found a de jure segregated public school system in operation in the City of Detroit, our first step, in considering what judicial remedial steps must be taken, is the consideration of intervening parent defendants' motion to add as parties defendant a great number of Michigan school districts located out county in Wayne County, and in Macomb and Oakland Counties, on the principal premise or ground that effective relief cannot be achieved or ordered in their absence. Plaintiffs have opposed the motion to join the additional school districts, arguing that the presence of the State defendants is sufficient and all that is required, even if, in shaping a remedy, the affairs of these other districts will be affected.

In considering the motion to add the listed school districts we pause to note that the proposed action has to do with relief. Having determined that the circumstances of the case require judicial intervention and equitable relief, it would be improper for

us to act on this motion until the other parties to the action have had an opportunity to submit their proposals for desegregation. Accordingly, we shall not rule on the motion to add parties at this time. Considered as a plan for desegregation the motion is lacking in specifity and is framed in the broadest general terms. The moving party may wish to amend its proposal and resubmit it as a comprehensive plan of desegregation.

In order that the further proceedings in this cause may be conducted on a reasonble time schedule, and because the views of counsel respecting further proceedings cannot but be of assistance to them and to the Court, this cause will be set down for pre-trial conference on the matter of relief. The conference will be held in our Courtroom in the City of Detroit at ten o'clock in the morning, October 4, 1971.

DATED: September 27, 1971

/s/

Stephen J. Roth
United States District Judge

Proceedings had in the above-entitled matter before Honorable Stephen J. Roth, United States District Judge, at Detroit, Michigan on Monday, October 4, 1971.

***

[3] THE CLERK: Case No. 35257 Bradley versus Milliken.

THE COURT: Are all the parties represented this morning?

MR. LUCAS: Yes.

THE COURT: I take it they are.

As I indicated at the close of my opinion recently rendered, I thought it would be advisable for me to get together with counsel on this occasion so that we might chart our course from here on in these proceedings.

The Court has made its determination of things as they are, or as it found things in the public school system of the City of Detroit. Our concern now--to take a thought from Aristotle--is of things as they might be, or ought to be.

Before ordering the local and state school authorities to present desegregation plans, the Court thought it best to call this conference so that it might have the benefit of your views with respect to a timetable for further proceedings, and so that you might have the benefit of some of the thoughts of the Court.

As the Court indicated during the course of [4] the taking of proofs, it entertains serious reservations about a plan of integration, which encompasses no more than the public schools of the City of Detroit. It appears to us that perhaps only a plan which embraces all or some of the greater Detroit metropolitan area can hope to succeed in giving our children the kind of education they are entitled to constitutionally. And we note here that the metropolitan area is like a giant jig-saw puzzle, with the school districts cut into irregular pieces, but with the picture quite plainly that of racial segregation.

We need not recite the many serious problems such a plan entails, suffice it to say that a plan of such dimensions can hardly be conceived in a day, to say nothing of the time it will require for implementation. A large metropolitan area such as we have in our case can not be made the subject of instant integration. We must bear in mind that the task we are called upon to perform is a social

one, which society has been unable to accomplish. In reality, our courts are called upon, in these school cases, to attain a social goal, through the educational system, by using law as a lever.

If a metropolitan plan is our best answer to the problem, its formulation and implementation with require both time and patience. As Senior Circuit Judge O'Sullivan said in the Knoxville, Tennessee school case:

[5] "The hope, or dream, that one day we will have become a people without motivations born of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors."

I would sum up our endeavors in developing a metropolitan plan as an embarkation on an uncharted course in strange waters in an effort to rescue disadvantaged children. It behooves us to take proper soundings and proceed with care. To use the vernacular "Right on!" but steady as we go.

My comments respecting a metropolitan plan should not be understood to mean that there should be any pause in Detroit Board's efforts to affirmatively desegregate its schools. The Court envisions no real conflict between early desegregation or integration of its schools and the possible adoption later of a metropolitan plan.

Earlier in this case the Court acceded to the wish of the Board to adopt the so-called Magnet Plan. We do not presently have before us enough information or evidence on the question of its worth or value in terms of experience. In this respect the Court wishes to be better informed.

If that plan is not delivering on its promise to provide an improved integrated quality education it should be abandoned, and the Board should consider putting before [6] the Court an up-dated April 7 Plan, or such other plan as, in its judgment, will most effectively accomplish desegregation in its schools. If the Magnet Plan is proving itself then the Board might well consider whether features of the April 7 Plan, for example, the change to an east-west, rather than north-south orientation of attendance zones, can be incorporated in it in the interest of advancing integration.

What we have said are all generalities. They have to do with

possible courses of action. My remarks, however, are not intended as a limitation on the Board or on the state authorities in discharging their duties to move as rapidly as possible toward the goal of desegregation.

I want to make it plain I have no preconceived notions about the solutions or remedies which will be required here. Of course, the primary and basic and fundamental responsibility is that of the school authorities. As Chief Justice Burger said in the recent case of Davis v Board of School Commissioners:

> "—school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

Because these cases arise under different local conditions and involve a variety of local problems their [7] remedies likewise will require attention to the specific case. It is for that reason that the Court has repeatedly said, the Supreme Court, that each case must be judged by itself in its own peculiar facts.

As early as Brown II the court had this to say:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles .... At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis."

I might say in that regard, as you lawyers know the Supreme Court took a little over a year to implement Brown I and Brown II. So they themselves, with better minds than mine and to the number of nine, had difficulty in resolving the problems that those four cases presented.

I would like to hear from counsel with respect [8] to a timetable for the formulation and presentation of a plan of desegregation; first by the Board of the City of Detroit and then

by the state officials.

***

[26] THE COURT: Within thirty days the Detroit Board of Education should submit to the Court a concise report of progress on the Magnet Plan, and along with it an evaluation of its worth in helping to bring about a better and higher quality of education. Copies of both the report and also the [27] evaluation shall be made available to the other parties litigant at the same time.

Such other parties may have ten additional days in which to submit their views and evaluations of the progress under the Magnet Plan.

It is further ordered that the Detroit Board of Education submit its plan for desegregation of its schools within sixty days.

It is ordered that the State defendants submit a metropolitan plan of desegregation, perhaps in more or less skeletal form, within one hundred twenty (120) days.

Objections to each plan, city and metropolitan, may be filed by the other parties litigant not later than thirty days after the expiration of the time set. Such objections may be accompanied by alternate plans.

I want to underline something I already said and add to it a general observation to sum up. Lest there be some misunderstanding, because of the observations I made, let it be understood I had no preconceived notion about what the Board of Education should do in the way of desegregating its schools nor the outlines of a proposed metropolitan plan. The options are completely open.

With respect to matters of speed in having a plan or having plans and proceeding on them, I think you should [28] know something about my manner of working. In a case, particularly like this, I feel my way to a decision and I certainly don't propose to jump to judgment.

I would remind counsel as I keep reminding myself in this case that our objective is quality education for all of our children. I am not too concerned about the parties litigant here. Depending on what we do, the winners or losers in this case will be the school children now living, as well as those yet to be born. I am reminded

of that by Mr. Ritchie's observation that he considers his plan one that will reach into the future.

With respect to remarks you gentlemen have made about other school districts, I am not going to make any definitive ruling at this time. We haven't come to that pass yet. I don't see much disagreement, Mr. Krasicky, between you and Mr. Lucas on that point. I don't think Mr. Lucas said that they should not be heard. He is addressing himself to the matter of mechanics, how you do it, and, of course, as you well know it is overwhelming to consider joining 50, 60, or 80 other parties to this law suit, each of which is composed of superintendents and boards.

On the other hand I do not propose to stop the voice of anybody who is apt to be affected by the plan. So this is a matter of mechanics. When the time comes that [29] action has to be taken in that regard we will give it further thought and make a decision that we believe will be a fair one and yet will permit us to proceed with some dispatch in achieving some remedial effects and perhaps putting into effect some plans for desegregation.

The time table is understood, is it?

MR. BUSHNELL: Yes, sir.

MR. LUCAS: Yes.

THE COURT: I am not going to–unless you gentlemen want–to prepare an order, I am not going to prepare a formal order.

MR. BUSHNELL: I don't believe it is necessary, your Honor. We understand the timetable.

THE COURT: Anybody disagree with that?

Anything further at this time, gentlemen, with respect to the matter before us?

MR. KRASICKY: I take it if there will be further hearings we will be notified in due time?

THE COURT: Yes. I have not come back to the point brought out by Mr. Bushnell. I don't know what the report and the evaluation by the Board and the criticisms that might be offered by other parties litigant will amount to. Should it develop that I wish to have testimony on disputed points we may schedule

them. That will just have to wait until I have received [30] the report and evaluations.

Gentlemen, thank you for your attendance and your assistance.

We will be in recess.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs	)	
v.	)	
WILLIAM G. MILLIKEN, et al., Defendants	)	
DETROIT FEDERATION OF TEACHERS, LOCAL NO. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor	)	CIVIL ACTION NO. 35257
and	)	
DENISE MAGDOWSKI, et al., Defendants-Intervenor	)	

ORDER

At a session of said Court held in the Federal Building, City of Detroit, on this 4th day of OCTOBER, A.D. 1971.

PRESENT: HONORABLE STEPHEN J. ROTH
United States District Judge

The Court having entered its findings of fact and conclusions of law on the issue of segregation on September 27, 1971;

IT IS ORDERED that the Detroit Board of Education submit a report on and an evaluation of the so-called Magnet Plan within 30 days; and that other parties litigant may within 10 days thereafter file responses to such report and evaluation.

IT IS FURTHER ORDERED that the Detroit Board of Education submit a plan for the desegregation of its schools within 60 days.

IT IS FURTHER ORDERED that the State Defendants submit a metropolitan plan of desegregation within 120 days.

IT IS FURTHER ORDERED that as to both the Detroit and the State plans, other parties litigant shall have an additional 30 days in which to submit objections and/or alternate plans.

/s/ STEPHEN J. ROTH
UNITED STATES DISTRICT JUDGE

DATE: November 5, 1971.
SIGNED:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al.,	)	
Plaintiffs	)	
v.	)	
WILLIAM G. MILLIKEN, et al.,	)	
Defendants	)	
DETROIT FEDERATION OF TEACHERS, LOCAL NO. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,	)	**CIVIL ACTION NO. 35257**
Defendant-Intervenor	)	
and	)	
DENISE MAGDOWSKI, et al.,	)	
Defendants-Intervenor	)	
et al.	)	

RULING ON PROPRIETY OF CONSIDERING A METROPOLITAN REMEDY TO ACCOMPLISH DESEGREGATION OF THE PUBLIC SCHOOLS OF THE CITY OF DETROIT

In its prior ruling, "Ruling on Issue of Segregation" (September 27, 1971), the court has found that segregation exists in the public schools of the City of Detroit because of, among other causes, the acts of the State of Michigan and the Detroit Board of Education. In the language of *Swann,*[1] "a right and a violation have been shown."[2] Given the constitutional violation, judicial authority, when properly invoked, must be exercised to right the wrong. In addressing itself to this task the Supreme Court has said that the "scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are

inherent in equitable remedies."[3] And, it pointed out, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right."[4] The task is to correct the condition which offends the Constitution. Illustrative of what was meant by the Supreme Court, see the legislative and congressional reapportionment cases.[5]

Under the circumstances of this case,[6] the question presented is whether the court may consider relief in the form of a metropolitan plan, encompassing not only the City of Detroit, but the larger Detroit metropolitan area which, for the present purposes, we may define as comprising the three counties of Wayne, Oakland and Macomb. It should be noted that the court has just concluded its hearing on plans submitted by the plaintiffs and the Detroit Board of Education for the intra-city desegregation of the Detroit public schools. A ruling has not yet been made on these plans, but in accordance with the mandate of the Court of Appeals that a hearing on the merits be concluded at the earliest possible time, we consider it necessary to proceed apace with a resolution of the issue before us, *i.e.*, the propriety of weighing the legal availability of a metropolitan remedy for segregation.

The State defendants in this case take the position, as we understand it, that no "state action" has had a part in the segregation found to exist. This assertion disregards the findings already made by this court, and the decision of the Court of Appeals as well.[7] Additionally, they appear to view the

delegation of the State's powers and duties with respect to education to local governmental bodies as vesting the latter with sovereign powers which may not be disturbed by either the State or the court. This we cannot accept. Political subdivisions of the states have never been considered sovereign entities, rather "They have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist it in carrying out of state governmental functions." *Reynolds v. Sims,* 377 U.S. 533, 575. Perhaps the clearest refutation of the State's asserted lack of power to act in the field of education is Act 48 of 1970. The State cannot evade its constitutional responsibility by a delegation of powers to local units of government. The State defendants' position is in error in two other respects: 1. The local school districts are not fully autonomous bodies, for to the extent it has seen fit the State retains control and supervision; and 2. It assumes that any metropolitan plan, if one is adopted, would, of necessity, require the dismantling of school districts included in the plan.

The main thrust of the objections to the consideration of a metropolitan remedy advanced by intervening school districts is that, absent a finding of acts of segregation on their part, individually, they may not be considered in fashioning a remedy for relief of the plaintiffs. It must be conceded that the Supreme Court has not yet ruled directly on this issue; accordingly, we can only proceed by feeling our way through its past decisions with respect to the goal to be achieved in school desegregation cases. *Green v. County School Board,* 391 U.S. 430, teaches us that it is our obligation to assess the effectiveness of proposed plans of desegregation in the light of circumstances present and the available alternatives; and to choose the alternative or alternatives which promise realistically to work now and hereafter to produce the maximum actual desegregation. As Chief Justice Burger said in *Swann,* "in seeking to define the scope of remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity." Substance, not semantics, must govern.

It seems to us that *Brown*[8] is dispositive of the issue:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

* * *

"*** the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation systems, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

We conclude that it is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation.

The schedule previously established for the hearing on metropolitan plans will go forward as noticed, beginning March 28, 1972.

DATE: March 24th, 1972.

/s/

Stephen J. Roth
United States District Judge

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[1] Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1.

[2] Ibid., p. 15.

[3] Ibid., p. 15.

[4] Ibid., pp. 15, 16.

[5] Reynolds v. Sims, 377 U.S. 533.

[6] See "Ruling on Issue of Segregation," supra, indicating a black student projection for the school year 1980-81 of 80.7%.

[7] See "Ruling on Issue of Segregation," supra; Bradley v. Milliken, 433 F.2d 897.

[8] Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, at 300 and 301.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs	)	
v.	)	
WILLIAM G. MILLIKEN, et al., Defendants	)	
DETROIT FEDERATION OF TEACHERS, LOCAL NO. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor	)	CIVIL ACTION NO: 35257
and	)	
DENISE MAGDOWSKI, et al., Defendants-Intervenor	)	
et al.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DETROIT-ONLY PLANS OF DESEGREGATION

In accordance with orders of the court defendant Detroit Board of Education submitted two plans, limited to the corporate limits of the city, for desegregation of the public schools of the City of Detroit, which we will refer to as Plan A and Plan C; plaintiffs submitted a similarly limited plan, which will be referred to as the Foster Plan. Hearings were had on said plans on March 14, 15, 16, 17 and 21, 1972. In considering these plans the court does not limit itself to the proofs offered at the hearing just concluded; it considers as part of the evidence bearing on the issue (*i.e.*, City-Only Plans) all proofs submitted in the case to this point, and it specifically incorporates herein by reference the Findings and Conclusions contained in its "Ruling on Issue of Segregation," filed September 27, 1971.

The court makes the following factual findings:

PLAN A.

1. The court finds that this plan is an elaboration and extension of the so-called Magnet Plan, previously authorized for implementation as an interim plan pending hearing and determination on the issue of segregation.

2. As proposed we find, at the high school level, that it offers a greater and wider degree of specialization, but any hope that it would be effective to desegregate the public schools of the City of Detroit at that level is virtually ruled out by the failure of the current model to achieve any appreciable success.

3. We find, at the Middle School level, that the expanded model would affect, directly, about 24,000 pupils of a total of 140,000 in the grades covered; and its effect would be to set up a school system within the school system, and would intensify the segregation in schools not included in the Middle School program. In this sense, it would increase segregation.

4. As conceded by its author, Plan A is neither a desegregation nor an integration plan.

PLAN C.

1. The court finds that Plan C is a token or part-time desegregation effort.

2. We find that this plan covers only a portion of the grades and would leave the base schools no less racially identifiable.

PLAINTIFFS' PLAN.

1. The court finds that Plaintiffs' Plan would accomplish more desegregation than now obtains in the system, or would be achieved under Plan A or Plan C.

2. We find further that the racial composition of the student body is such that the plan's implementation would clearly make the entire Detroit public school system racially identifiable as Black.

3. The plan would require the development of transportation on a vast scale which, according to the evidence, could not be furnished, ready for operation, by the opening of the 1972-73 school year. The plan contemplates the transportation of 82,000 pupils and would require the acquisition of some 900 vehicles, the hiring and training of a great number of drivers, the procurement of space for storage and maintenance, the recruitment of maintenance and the not negligible task of designing a transportation system to service the schools.

4. The plan would entail an overall recasting of the Detroit school system, when there is little assurance that it would not have to undergo another reorganization if a metropolitan plan is adopted.

5. It would involve the expenditure of vast sums of money and effort which would be wasted or lost.

6. The plan does not lend itself as a building block for a metropolitan plan.

7. The plan would make the Detroit school system more identifiably Black, and leave many of its schools 75 to 90 per cent Black.

8. It would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.

9. It would subject the students and parents, faculty and administration, to the trauma of reassignments, with little likelihood that such reassignments would continue for any appreciable time.

In summary, we find that none of the three plans would result in the desegregation of the public schools of the Detroit school district.

CONCLUSIONS OF LAW

1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. See Ruling on Issue of Segregation, Sepember 27, 1971.

2. On the basis of the court's finding of illegal school segregation, the obligation of the school defendants is to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. *Green* v. *County School Board,* 391 U.S. 430; *Alexander v. Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290; *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1.

3. Detroit Board of Education Plans A and C are legally insufficient because they do not promise to effect significant desegregation. *Green* V. *County School Board, supra,* at 439-440.

4. Plaintiffs' Plan, while it would provide a racial mix more in keeping with the Black-White proportions of the student population than under either of the Board's plans or as the system now stands, would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation.

5. The conclusion, under the evidence in this case, is inescapable that relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city. The State, however, cannot escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local aurhority. As Judge Merhige pointed out in *Bradley v. Richmond,* (slip opinion p. 64):

> "The power conferred by state law on central and local officials to determine the shape of school attendance units cannot be employed, as it has been here, for the purpose and with the effect of sealing off white conclaves of a racial composition more appealing to the local electorate and obstructing the desegregation of schools. The equal protection clause has

required far greater inroads on local government structure than the relief sought here, which is attainable without deviating from state statutory forms. Compare Reynolds v. Sims, 377 U.S. 533; Gomillion v. Lightfoot, 364 U.S. 339; Serrano v. Priest, 40 U.S.L.W. 2128 (Calif. Sup. Ct. Aug. 30, 1971).

"In any case, if political boundaries amount to insuperable obstacles to desegregation because of structural reason, such obstacles are self-imposed. Political subdivision lines are creations of the state itself, after all."

School district lines are simply matters of political convenience and may not be used to deny constitutional rights. If the boundary lines of the school districts of the City of Detroit and the surrounding suburbs were drawn today few would doubt that they could not withstand constitutional challenge. In seeking for solutions to the problem of school segregation, other federal courts have not "treated as immune from intervention the administrative structure of a state's educational system, to the extent that it affects the capacity to desegregate. Geographically or administratively independent units have heen compelled to merge or to inititate or continue cooperative operation as a single system for school desegregation purposes."[1]

That the court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools is obvious; that it has the authority, nay more, the duty to (under the circumstances of this case) do so appears plainly anticipated by Brown II,[2] seventeen years ago. While other school cases have not had to deal with our exact situation, [3] the logic of their application of the command of Brown II supports our view of our duty.

Date: MARCH 28th, 1972.

/s/ _____

Stephen J. Roth
United States District Judge

FOOTNOTES

[1]
Bradley v. Richmond, supra [slip opinion p. 68].

[2]
Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, pp. 300-301.

[3]
Haney v. County Board of Education of Sevier County, 410 F.2d 920 (8th Cir. 1969);Bradley v. School Board of the City of Richmond, supra, slip opinion pp. 664-65; Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), aff'd. 287 F.2d 376 (5th Cir. 1961) and 368 U.S. 515 (1962); Lee v. Macon County Bd. of Educ., 448 F.2d 746, 752 (5th Cir. 1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th Cir. 1971); United States v. Texas 447 F.2d 551 (5th Cir. 1971); Lemon v. Bossier Parish School Board, 446 F.2d 911 (5th Cir. 1971).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., **Plaintiffs** **WILLIAM G. MILLIKEN, et al.,** **Defendants** **and** **DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,** **Defendant-Intervenor** **and** **DENISE MAGDOWSKI, et al.,** **Defendants-Intervenor** **et al.**	**CIVIL ACTION NO: 35257**

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF RULING ON DESEGREGATION AREA AND DEVELOPMENT OF PLANS

On the basis of the entire record in this action, including particularly the evidence heard by the court from March 28 through April 14, 1972, the court now makes the following Supplementary Findings of Fact and Conclusions of Law. It

should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have commited acts of de jure segregation.

INTRODUCTION

1. On September 27, 1971, this court issued its Ruling on Issue of Segregation. On October 4, 1971, this court issued from the bench guidelines to bind the parties in the submission of plans to remedy the constitutional violation found, *i.e.*, school segregation; and in particular this court noted that the primary objective before us was to deveop and implement a plan which attempts to "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The same day this court reiterated these requirements by orders "that the Detroit Board of Education submit a plan for the desegregation of its schools within 60 days" and "that the State defendants submit a metropolitan plan of desegregation within 120 days." In response to these orders hearings were held, and thereafter rulings issued, on Detroit-only plans (see Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation) and on the propriety of considering remedies which extend beyond the corporate geographic limits of the City of Detroit. (See Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit.) Between March 28, 1972 and April 14, 1972, hearings were held on metropolitan proposals for desegregation of the Detroit public schools.

2. From the initial ruling on September 27, 1971, to this day, the basis of the proceedings has been and remains the violation: de jure school segregation. Since *Brown v. Board of Education* the Supreme Court has consistently held that the remedy for such illegal segregation is desegregation. The racial history of this country is writ large by constitutional adjudication from *Dred Scott v. Sanford* to *Plessy v. Ferguson* to

Brown. The message in *Brown* was simple: The Fourteenth Amendment was to be applied full force in public schooling. The Court held that "state-imposed" school segregation immeasurably taints the education received by all children in the public schools; perpetuates racial discrimination and a history of public action attaching a badge of inferiority to the black race in a public forum which importantly shapes the minds and hearts of succeeding generations of our young people; and amounts to an invidious racial classification. Since *Brown* the Supreme Court has consistently, and with increasing force, held that the remedy upon finding de jure segregation is prompt and maximum actual desegregation of the public schools by all reasonable, feasible, and practicable means available. This court finds that there is nothing in the law, wisdom, or facts, and the particular circumstances and arguments, presented in this case which suggest anything except the affirmance of these principles in both fact and law.

3. The task before this court, therefore, is now, and, since September 27, 1971, has always been, how to desegregate the Detroit public schools. The issue, despite efforts of the intervenors to suggest a new rationale for a return to the discredited "separate but equal" policy, [1] is not whether to desegregate. That question has been foreclosed by the prior and settled commands of the Supreme Court and the Sixth Circuit. Our duty now is to "grapple with the flinty, intractable realities" [2] of implementing the constitutional commands.

4. In the most recent set of hearings, several issues were addressed generally, including appropriate methods of pupils reassignment to desegregate schools; quality and capacity of school facilities; transportation needs incident to school desegregation; the effects of new school construction, and judicially established controls thereon, on any plan of desegregation; the reassignment of faculty and restructuring of facilities incident to pupil reassignment to accomplish school desegregation; appropriate and necessary interim and final administrative and financial arrangements; appropriate community, parental, staff, and pupil involvement in the desegregation process; and attention to individual, cultural, and

ethnic values, respect, dignity and identity. But the primary question addressed by these hearings, in the absence of submission of a complete desegregation plan by the state, remains the determination of the area necessary and practicable effectively to eliminate "root and branch" the effects of state-imposed and supported segregation and to desegregate the Detroit public schools.

SUPPLEMENTARY FINDINGS OF FACT

A. The Desegregation Area

5. The State Board of Education filed six (6) "plans" without recommendation or preference; intervening defendants Magdowski, et al., filed a proposal for metropolitan desegregation which included most of the tri-county area; the defendant Detroit Board of Education filed a proposal for metropolitan desegregation which included the entire tri-county area. [3] At the hearing plaintiffs presented a modification of the three proposals which actually described areas within which pupil desegregation was to be accomplished.

6. In the consideration of metropolitan plans of desegregation of the Detroit public schools, the State defendants stand as the primary defendants. They bear the initial burden of coming forward with a proposal that promises to work. In the context of this case, they represent the "school authorities " [4] to whom equity courts traditionally have shown deference in these matters. [5] Yet in its submission without recommendation of six (6) "plans" the State Board of Education has failed to meet, or even attempt to meet, that burden and none of the other State defendants has filled the void.

7. The State Board refused to make any recommendations to the court about the appropriate area for desegregation. In State Defendant Porter's words, the State Board "didn't make a decision, period." Defendants Milliken and Kelley merely filed objections to all six (6) plans.

8. Three of the State "plans" merely proposed concepts alternative to maximum actual desegregation. The Racial Proportion Plan described a statistical method of determining the

number of transfers involved in achieving a particular racial ratio in each school once an area of desegregation had been chosen. The Equal Educational Opportunity and Quality Integration Plan was admitted to be a non-plan and described criteria for education which, in whole or part, might, or might not, be applicable to any school system.

9. Only one State "plan," the Metropolitan District Reorganization Plan, attempted to describe an area within which desegregation should occur, called the "initial operating zone" (sometimes referred to hereafter as the "State Proposal"). That "plan," however, was primarily concerned with discussing a new governance structure for the desegregation area. Pupil reassignment was mentioned only in passing and no foundation was laid by State defendants for the particular area of desegregation described. Further, it suffered from the default of the State defendants by their stubborn insistence that under their self-serving, and therefore self-limiting, view of their powers they were free to ignore the clear order of this court and abdicate their responsibility vested in them by both the Michigan and Federal Constitution for supervision of public education and equal protection for all citizens.

10. From the very limited evidence in the record in support of the area in that state proposal, the primary foundation appears to be the particular racial ratio attained in that plan, approximately 65% black, 35% white, with the provision that the area could be expanded if "white flight" ensued. In the absence of any other persuasive foundation, such area is not based on any definable or legally sustainable criteria for either inclusion or exclusion of particular areas; and the concept of an "initial operating zone" raises serious practical questions, which should be avoided if a more permanent solution is now possible. In short, the area described by the "initial operating zone" does not appear to be based primarily on relevant factors, like eliminating racially identifiable schools; accomplishing maximum actual desegregation of the Detroit public schools; or avoiding, where possible, maintaining a pattern of schools substantially disproportionate to the relevant school community's racial composition by force of deliberate action by public authority. Nor,

on the evidence in this record, is the "initial operating zone" based on any practical limitation of reasonable times and distances for transportation of pupils. These factors seem to have played little part in the creation of the "initial operating zone" and are reflected less in its result.

11. At the hearings, moreover, the State defendants did not purport to present evidence in support, or even in opposition, to the State Proposal. The State, despite prodding by the court, presented only one witness, who merely explained what appeared on the face of the various State "Plans" submitted. The State's cross examination of witnesses was of no assistance to the court in ascertaining any preference, legal or educational. Put bluntly, State defendants in this hearing deliberately chose not to assist the court in choosing an appropriate area for effective desegregation of the Detroit public schools. Their resistance and abdication of responsibility throughout has been consistent with the other failures to meet their obligations noted in the court's earlier rulings. Indeed, some of the submissions spoke as clearly in opposition to desegregation as did the legislature in Sec. 12 of Act 48 ruled unconstitutional by the Sixth Circuit.

12. In such circumstances little weight or deference can be given to the unsupported submission of the State Board of Education. In light of the available alternatives and the facts produced at the hearing bearing on the issue, the court finds that State defendants offered no basis for ruling that the "initial operating zone" is the appropriate area within which to effectively desegregate the Detroit public schools.

13. Similarly, the newly intervening, defendant school districts did not attempt at the hearing to assist the court in determining which area was appropriate to accomplish effective desegregation. They were given the opportunity, by express written order and several admonitions during the course of the hearings, to assist the court in the task at hand but chose in their best judgment instead, in the main, to suggest their view that separate schools were preferable. The failure of the group of 40 districts to even comment that the court should exclude certain districts under any number of available rationales may in

part be explained by the awkward position chosen by them and their counsel of having single representation for districts on different sides of the various suggested perimeters.

14. The plans of intervening defendants Magdowski, et al., and the defendant Detroit Board of Education are similar. With slight variations they include the entire tri-county, metropolitan Detroit area, with that area divided into several regions or clusters to make the planning for accomplishing desegregation more manageable. Although both have as their main objective desegregation, their larger area arises primarily from a heavy emphasis on such factors as white flight and an appropriate socio-economic balance in each cluster and school. [6]

15. The authors of the Detroit Board and Magdowski plans readily admit that the regions or clusters for pupil reassignment which involve Mt. Clemens and Pontiac are not directly related to desegregation of the Detroit public schools and may be disregarded without any substantial adverse effect on accomplishing our objective. No other party has expressed any disagreement with that view. And the court finds that these two regions or clusters, for purposes of pupil reassignment, need not be included at this time in the desegregation area.

16. With the elimination of these two clusters there are, then, three basic proposals to be considered for the desegregation area: the State Proposal; the Detroit Board Proposal, and the proposal of defendant-intervenors Magdowski, et al. In addition, as noted, plaintiffs filed a modification of these three proposals.

17. Each of these proposals starts from the same two premises: (1) the tri-county area [7] constitutes the relevant school community which can serve as an initial benchmark in beginning the evaluation of how to effectively eliminate the racial segregation of Detroit schools; (2) but in some instances reasonable time and distance limitations for pupil transportation, and in other instances the actual area required to eliminate the pattern of racially identifable schools, limit the area within which pupil reassignment should occur. In terms of proof, putting aside arguments of impotence by the State defendants,

there was absolutely no contradictory evidence on these two criteria. The entire tri-county area includes areas, pupils, and schools in 86 school districts; it includes approximately one million students, of whom approximately 20% are black. Based on the evidence concerning school and non-school factors, [8] and reasonable time and distance limitations for pupil transportation, the court finds that both premises are accurate.[9]

18. The State Proposal includes the areas, pupils and school in 36 school districts, approximately 550,000 students are included of whom 36% are black. The Detroit Board Proposal (excluding clusters 8 and 12) includes the areas, pupils, and schools in 69 school districts; approximately 850,000 students are included, of whom 25% are minority. [10] The CCBE Proposal includes the areas, pupils, and schools in some 62 school districts; approximately 777,000 students are included of whom 197,000 (25.4%) are black. Plaintiffs' Proposal includes the areas, pupils, and schools in 54 school districts; approximately 780,000 students are included, of whom 197,000 (25.3%) are black.

19. The State Proposal approaches what may be considered a substantial disproportion in the context of this case. It is to be remembered that within any desegregation area, the racial composition of desegregated schools will vary from the area's racial mix. Given the variations in school plant, demographic and geographic factors, limiting the desegregation area to the State Proposal would result in some schools being substantially disproportionate in their racial composition to the tri-county area, and other schools racially identifable, all without any justification in law or fact. This finding is supported by the lack of any apparent justification for the desegregation area described by the State Proposal except a desire to achieve an arbitrary racial ratio.

20. Transportation of children by school bus is a common practice throughout the nation, in the state of Michigan, and in the tri-county area. Within appropriate time limits it is a considerably safer, more reliable, healthful and efficient means of getting children to school than either car pools or walking, and this is especially true for younger children.

21. In Michigan and the tri-county area, pupils often spend upwards of one hour, and up to one and one half hours, one-way on the bus ride to school each day. Consistent with its interest in the health, welfare and safety of children and in avoiding impingement on the educational process, state educational authorities routinely fund such transportation for school children. Such transportation of school children is a long-standing, sound practice in elementary and secondary education in this state and throughout the country. And the court finds such transportation times, used by the state and recommended here, are reasonable in the circumstances here presented and will not endanger the health or safety of the child nor impinge on the educational process. For school authorities or private citizens to now object to such transportation practices raises the inference not of hostility to pupil transportation but rather racially motivated hostility to the desegregated school at the end of the ride.

22. The Plaintiffs' Proposal made reference to P.M.8, based on the TALUS regional transportation and travel times study. Although there was dispute over the meaning of the study, such studies are deemed sufficiently reliable that major governmental agencies customarily rely on their projection for a variety of planning functions. When used by the plaintiffs, P.M. 8, in conjunction with the Detroit Board's survey of maximum school to school travel times, served as a rough guideline within which the plaintiffs' modification of other proposals attempted to stay in an effort to provide maximum desegregation without any more transportation time than is required to desegregate. This court finds that the utilization of these two factors, and the lower travel time estimates which should result, is a reasonable basis for the modification in the circumstances of this case. The court's duty and objective is not to maximize transportation but to maximize desegregation and within that standard it will always be reasonable to minimize transportation. To that end the court has accepted the more conservative perimeter for the desegregation area suggested as a modification by plaintiffs because it provides no less effective desegregation.

23. Based on these criteria, the State Proposal is too narrowly drawn.

24. Based on these criteria, parts of the Detroit Board Proposal are too sweeping.

25. Based on these criteria, the CCBE Proposal and the Plaintiffs' Proposal, roughly approximate the area so described [11].

26. There is general agreement among the parties, and the court so finds, that on the west the areas, schools, and pupils in the Huron, Van Buren, Northville, Plymouth and Novi districts [12] (1) are beyond the rough 40-minute travel time line; (2) are not necessary to effectively desegregate schools involved in the regions and clusters abutting those schools; and, (3) at this writing, are not otherwise necessary, insofar as pupil assignment is concerned, to provide an effective remedy now and hereafter. (See Findings 63-69 below.)

27. In the southwest the school districts of Woodhaven, Gibralter, Flat Rock, Grosse Ile and Trenton are within reasonable time and distance criteria set forth above. These virtually all-white districts are included in the Detroit Board Proposal but excluded from the plaintiffs' modification. The areas, schools and pupils in such school districts are similarly not necessary to effectively desegregate. (Clusters 13, 14, and 15 in Plaintiffs' Proposal are 20.5%, 24.4% and 22.7% black respectively.) There is nothing in the record which suggests that these districts need be included in the desegregation area in order to disestablish the racial identifiability of the Detroit public schools. From the evidence, the primary reason for the Detroit School Board's interest in the inclusion of these school districts is not racial desegregation but to increase the average socio-economic balance of all the schools in the abutting regions and clusters. In terms of what this court views as the primary obligation established by the Constitution – racial desegregation – the court deems the proper approach is to be more conservative: the court finds it appropriate to confine the desegregation area to its smallest effective limits. This court weighs more heavily the judicially recognized concern for limiting the time and distance of pupil transportation as much as possible, consistent with the constitutional requirement to eliminate racially identifiable schools, than a concern for expanding the desegregation area to

raise somewhat the average socio-economic balance of a relatively few clusters of schools. [13]

28. To the north and northeast, the only major disagreement among the Detroit Board Proposal and plaintiffs' modification relates to the areas, schools, and pupils in the Utica School District. This district is a virtually all-white, long, relatively narrow area extending several miles in a north-south direction away from the city of Detroit. Only the southern part of the district is within the rough, TALUS 40-minute travel time line.

29. The Detroit Board argues that Utica should be included in order to raise the average socio-economic balance of the abutting clusters and schools. In this instance, however, the overall racial composition of the cluster, 27.0% black, may tend toward disproportionate black relative to the tri-county starting point.

30. Mr. Henrickson, the planner for the Board, also suggested that Cluster 3 of Plaintiffs' Proposal, because of its omission of Utica, might present some problems, which he admitted could be solved, in designing a plan of pupil reassignment for the desegregation of schools. (See Findings 34-39 below.)

31. In light of these relevant, and competing, considerations the question presented by the Utica situation is close; however, at this writing, the court determines that the areas, schools, and pupils in the Utica School District need not be included, and therefore, should not be included in the desegregation area. [14]

32. The court finds that the appropriate desegregation area is described by plaintiffs' modification of the three primary proposals. Within that area the racial identifiability of schools may be disestablished by implementation of an appropriate pupil desegregation plan. The area as a whole is substantially proportionate to the tri-county starting point. Within the area it is practicable, feasible, and sound to effectively desegregate all schools without imposing any undue transportation burden on the children or on the state's system of public schooling. The

time or distance children need be transported to desegregate schools in the area will impose no risk to the children's health and will not significantly impinge on the educational process.

B. Clusters

33. The Detroit Board Proposal makes use of 16 regions or clusters. These clusters range from 36,000 to 105,000 pupils and from 17.5% to 29.7% "minority." The clusters are arranged along major surface arteries and utilize the "skip," or non-contiguous zoning, technique to minimize the time and distance any child need spend in transit. The use of these clusters basically subdivides the planning for pupil reassignment within the desegregation area into a series of smaller, manageable and basically independent plans. Thus, although as the new intervenors suggest devising a desegregation plan for a system with some 800,000 pupils has never been attempted, the practical and manageable reality is that desegregation plans for systems with from 36,000 to 100,000 pupils has been done and such plans have been implemented.

34. Plaintiffs' Proposal uses the same cluster technique and the same clusters, modified to fit the desegregation area. The 15 clusters range from 27,000 to 93,000 pupils and from 20.5% to 30.8% black. Only three relevant objections were raised by Mr. Henrickson, to the clusters as modified.

35. First, Cluster 4 was challenged as "concealing" a "problem," namely effective desegregation of other schools resulting from the omission of Utica from plaintiffs' modification. On cross-examination Mr. Henrickson admitted that the "problem" of actual pupil desegregation for these other schools could be "solved," that all schools within Cluster 4 could be affectively desegregated, and that Cluster 4 was smaller than the Detroit Board Cluster 6. The objection was thus narrowed to the possibility that a suburban high school constellation feeder pattern might have to be split between two Detroit high school constellation feeder patterns in order to desergregate. Several of the Detroit Board's clusters, however, also contain two Detroit high school feeder patterns.

36. This objection, splitting an existing feeder pattern, was raised directly in reference to Cluster 12. In neither instance, however, did Mr. Henrickson suggest that the time or distance of transportation involved was too long or that it would present administrative difficulty in devising a pupil assignment plan for either cluster. The objection relates solely to a matter of administrative convenience, namely the use of existing feeder patterns in preparing pupil assignments. For example, Mr. Henrickson previously admitted that in drawing a pupil assignment plan, an alternative to use of existing feeder patterns would be to "wipe the slate clean," and disregard existing feeder patterns. In fact one of the State plans suggested use of census tracts as an alternative. [15] On numerous occasions in the past Mr. Henrickson himself has reassigned parts of one feeder pattern to another school in order to relieve overcrowding and/or accomplish desegregation. The objection to such practice, therefore, is admittedly insubstantial.

37. The third objection relates to the exchange of Detroit Northern for Detroit Murray in Clusters 6 and 15 requiring that the students transported, if they proceed on their entire journey by way of the expressway, encounter an interchange which tends to be rather slow-moving. Such transportation time and distance, however, is well within the rough criteria for reasonableness and is shorter than or comparable to the maximum trips required in the Detroit Board's clusters. In other instances, Mr. Henrickson admitted that pupils in the Detroit proposal might also have to travel through similar interchanges. Moreover, the objection to this particular increase in travel time must be weighed against the apparent general decrease in time which would be required in plaintiffs' modified clusters as compared with the Detroit Board's clusters. In any event the desegregation panel, based on its investigation of all aspects of pupil assignment, remains free to suggest a modification of these clusters in order to reduce the time and number of children requiring transportation.

38. With that caveat, the court finds that plaintiffs' modification of the Detroit Board's clusters provides a workable, practicable, and sound framework for the design of a plan to desegregate the Detroit public schools.

C. Pupil Assignment and Transportation.

39. Example of various methods of pupil assignment to accomplish desegregation have been brought to the attention of the court by the parties: pairing, grouping, and clustering of schools; various strip, skip, island, and non-contiguous zoning; various lotteries based on combinations of present school assignment, geographic location, name, or birthday. Judicious use of these techniques – coupled with reasonable staggering of school hours and maximizing use of existing transportation facilities – can lead to maximum actual desegregation with a minimum of additional transportation.

40. Quite apart from desegregation, under any circumstances, transportation for secondary pupils living more than 1½ miles, and elementary pupils, living more than 1 mile from school, is often demanded by parents and should be provided. Moreoever, it is essential to the effectiveness of any desegregation plan that transportation be provided free to all students requiring it under that criteria. (Brewer v. Norfolk Board of Education, ____F. 2d. ____(April 1972) (4th Cir.)

41. In the recent past more than 300,000 pupils in the tri-county area regularly rode to school on some type of bus; this figure excludes the countless children who arrive at school in car pools, which are many, many times more dangerous than riding on the school bus.

42. Throughout the state approximately 35-40% of all students arrive at school on a bus. In school districts eligible for state reimbursement of transportation costs in the three affected counties, the percent of pupils transported in 1969-70 ranged from 42 to 52%.

43. In comparison approximately 40%, or 310,000, of the 780,000 children within the desegregation area will require transportation in order to accomplish maximum actual desegregation.

44. Hence, any increase in the numbers of pupils to be transported upon implementation of a complete desegregation plan over the number presently transported, relative to the state

and the tri-county area, should be minimal. Indeed, any increase may only reflect the greater numbers of pupils who would be transported in any event but for the state practice, which affected the segregation found in this case, and which denies state reimbursement to students and districts wholly within city limits regardless of the distance of the child from the school to which assigned. [16] (Ruling on Issue of Segregation at 14.) The greatest change is the direction of the buses.

45. There is uncontradicted evidence that the actual cost of transportation for a two-way plan of desegregation should be no greater than 50 to 60 dollars per pupil transported, [17] comparable to the present costs per pupil through the state. Increases in the total costs of pupil transportation in the desegregation area, therefore, will result primarily from providing all children requiring transportation a free ride instead of imposing the costs of transportation for many on the families in districts which are ineligible for state reimbursement and which fail to provide transportation.

46. By multiple use of buses, careful routing, and economies of scale resulting from a comprehensive system of pupil transportation, it may be possible to achieve savings in per pupil costs. For example in 1969-1970 many school districts in the tri-county area which used the same bus for even two loads per day lowered their per pupil costs to $40 or less. In a coordinated, urban pupil transportation system it may be possible to raise the bus use factor to three of more. (See "First Report" State Survey and Evaluation.)

47. In the tri-county area in the recent past there were approximely 1,800 buses (and another 100 smaller vans) used for the transportation of pupils. Assuming a rough average of 50 pupils per bus carrying three loads of students per day, this transportation fleet may prove sufficient to carry some 270,000 pupils.

48. Various public transit authorities now transport an additional 60,000 pupils on their regular public runs.

49. The degree to which these plausible bus-use factors

can be realized to their maximum, and whether these public transit facilities may be fully utilized in a plan of desegregation, must be answered upon careful investigation by a panel of experts.

50. There is no disagreement among the parties, and the court so finds, that additional transportation facilities, at least to the number of 350 buses, will have to be purchased to meet the increase in the number of students who should be provided transportation for either an interim or final plan of desegregation.

51. For all the reasons stated heretofore – including time, distance, and transportation factors – desegregation within the area described in physically easier and more practicable and feasible, than desegregation efforts limited to the corporate geographic limits of the city of Detroit.

52. The issue of transportation of kindergarten children, and their inclusion in part or in full in the desegregation plan, may require further study. There was general agreement among the experts who testified that kindergarten, but for "political" considerations, should be included, if practicable, in the desegregation plan. Kindergarten, however, is generally a half-day program. Transportation of kindergarten children for upwards of 45 minutes, one-way, does not appear unreasonable, harmful, or unsafe in any way. In the absence of some compelling justification, which does not yet appear, kindergarten children should be included in the final plan of desegregation.

53. Every effort should be made to insure that transportation and reassignment of students to accomplish desegregation is "two-way" and falls as fairly as possible on both races. Although the number of black and white children transported and reassigned at the outset will be roughly equal, it is inevitable that a larger proportion of black children will be transported for a greater proportion of their school years than white children, if transportation overall is to be minimized. To mitigate this disproportion, every effort should be made at the outset to randomize the location of particular grade centers. In the short term, full utilization of vastly under-capacity inner-

city schools may also help to mitigate the disproportion for some black children; and in the long term, new school capacity, consistent with other constitutional commands and the overall needs of the desegregation area and the surrounding area, should be added in Detroit, in relative proximity to concentrations of black student residence.

D. Restructuring of Facilities and Reassignment of Teachers

54. In the reassignment of pupils to accomplish desegregation the court finds that facilities must be substantially reallocated and faculty substantially reassigned by reason of the clustering, pairing and grouping of schools.

55. In order to make the pupil desegregation process fully effective the court finds that it is essential to integrate faculty and staff and to insure that black faculty and staff representation at every school is more than token. The court has previously found and reaffirms that "a quota or racial balance in each school which is equivalent to the system-wide ratio and without more" is educationally unsound, and that the desideratum is the balance of staff by qualifications for subject and grade level, and then by race, experience and sex. It is obvious, given the racial composition of the faculty and staff in the schools in the metropolitan plan area, and the adjusted racial composition of the students, that vacancies and increases and reductions in faculty and staff cannot effectively achieve the needed racial balance in this area of the school operation. Active steps must be taken to even out the distribution of black teachers and staff throughout the system.

56. In the desegration area approximately 16% of the faculty and 12% of the principals and assistant principals are black. In this context "token" means roughly less than 10% black. Moreover, where there is more than one building administrator in any school, a bi-racial administrative team is required wherever possible.

57. Every effort should be made to hire and promote, and to increase such on-going efforts as there may be to hire and

promote, additional black faculty and staff. Because of the systematic and substantial under-employment of black administrators and teachers in the tri-county area, an affirmative program for black employment should be developed and implemented.

58. The rated capacity of classrooms in the Detroit public schools is 32; in some of the suburban districts the average rated capacity is as low as 24 or 25. Utilization should be redetermined on a uniform basis.

59. In respect to faculty and staff, school facilities, and the utilization of existing school capacity, normal administrative practice in handling the substantial reallocation and reassignment incident to pupil desegregation should produce schools substantially alike.

60. In the circumstances of this case, the pairing, grouping and clustering of schools to accomplish desegregation with minimum transportation often requires use of grade arrangements such as K-4, K-5, or even K-6. In so planning pupil reassignments, it is sometimes necessary, and often administratively practicable, to include grades K-8 or even K-9 to achieve the maximum actual desegregation with the minimum transportation. Grade structures in most elementary schools in the desegregation area is a basic K-6; however, almost all other combinations are found. They differ within and among various districts.

61. In the reassignments of pupils and teachers and the reallocation of equipment and facilities required to accomplish desegregation, the elementary grades and schools present relatively few administrative difficulties, while the high school grades and facilities present the greater difficulties, particularly with respect to scheduling and curriculum.

62. For these reasons, if it develops that interim choices must be made because of the impossibility of immediate desegregation of all grades, schools, and clusters in the desegregation area, the weight of the evidence is, and the court so finds, that desegregation should begin first at the earliest grades for entire

elementary school groupings throughout as many clusters as possible.

E. School Construction

63. Relative to suburban districts the Detroit public schools, as a whole, are considerably over-capacity. (See also Finding 58, *supra.*) To alleviate this overcrowding equalize rated capacity and minimize and equalize transportation burdens borne by black pupils in the city, needed new school capacity, consistent with other requirements of a desegregation plan, should be added on a priority basis in the city of Detroit.

64. Relevant to the court's choice of a desegregation area more limited than the Detroit Board Proposal is the testimony, elecited on cross-examination from two of the primary authors of that proposal, related to the effects of controlling new school construction. The broader area in the Detroit proposal was chosen without any real consideration of the impact of controlling school construction in an area larger than the desegregation area. Upon reflection, both Dr. Flynn and Mr. Henrickson admitted that closely scrutinizing and limiting the addition of capacity to areas outside the desegregation area might lead them to re-evaluate the need, in the context of maintaining now and hereafter a unitary system, to include an area as sweeping as recommended by the Detroit Board Proposal.

65. In our Ruling on Issue of Segregation, pp. 8-10, this court found that the "residential segregation throughout the larger metropolitan area is substantial, pervasive and of long standing" and that "governmental actions and inaction at all levels, Federal, State and local, have combined with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of associations and brokerage firms, to establish and to maintain the pattern of residential segregation through the Detroit metropolitan area." We also noted that this deliberate setting of residential patterns had an important effect not only on the racial composition of inner-city schools but the entire School District of the City of Detroit. (Ruling on Issue of Segregation at 3-10.) Just as evident is the fact that suburban

school districts in the main contain virtually all-white schools. The white population of the city declined and in the suburbs grew; the black population in the city grew, and largely was contained therein by force of public and private racial discrimination at all levels.

66. We also noted the important interaction of school and residential segregation: "Just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of schools." Ruling on Issue of Segregation at 10. *Cf. Swann v. Charlotte-Mecklenberg,* 402 U.S. 1, 20-21 (1971); "People gravitate toward school facilities, just as schools as 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."

67. Within the context of the segregatory housing market, it is obvious that the white families who left the city schools would not be as likely to leave in the absence of schools, not to mention white schools, to attract, or at least serve, their children. [18] Immigrating families were affected in their school and housing choices in a similar manner. Between 1950 and 1969 in the tri-county area, approximately 13,900 "regular classrooms," capable of serving and attracting over 400,000 pupils, [19] were added in school districts which were less than 2% black in their pupil racial composition in the 1970-71 school year. (P.M. 14; P.M. 15).

68. The precise effect of this massive school construction on the racial composition of Detroit area public schools cannot be measured. It is clear, however, that the effect has been substantial. [20] Unfortunately, the State, despite its awareness of the important impact of school construction and announced policy to control it, acted "in keeping generally, with the discriminatory practices which advanced or perpetuated racial segregation in these schools." Ruling on Issue of Segregation at 15; see also *id.*, at 13.

69. In addition to the interim re-evaluation of new school

construction required in the order, pursuant to the State Board's own requirements, the final plan will consider other appropriate provisions for future construction throughout the metropolitan area.

F. Governance, Finance and Administrative Arrangements

70. The plans submitted by the State Board, the Detroit Board, and the intervening defendants Magdowski, et al., discuss generally possible governance, finance and administrative arrangements [21] which may be appropriate for operation of an interim or final plan of desegregation. Without parsing in detail the interesting, and sometimes sensible, concepts introduced by each plan, it is sufficient to note that each contemplates overlaying some broad educational authority over the area, creating or using some regional arrangement (with continued use or eventual redrawing of existing districts), and considerable input at the individual school level. The court has made no decision in this regard and will consider the matter at a subsequent hearing.

71. Each concept needs to be "fleshed-out" in the hard prospect of implementation of a final plan of desegregation and what is necessary and essential, and only that, for the successful operation of that plan of school desegregation now on an interim basis and hereafter on a permanent footing.

72. There are now some 86 school districts in the tri-county area of varying size, numbers of pupils, shapes, and wealth.

73. In another context, the State Board of Education found each related to a "metropolitan core city" (Detroit) as "city," "town," or "urban fringe" districts.

74. The boundaries of these school districts in general bear no relationship to other municipal, county, or special district governments, needs or services.[22]

75. Some educational services are already provided to students on an interdistrict, county, intercounty, or metropolitan basis: and many support services are provided by the intermediate school districts and the State Department of

Education. For various reasons many pupils already cross school district lines to attend school or receive educational services. [23]

76. In many respects – patterns of economic life, work, play, population, planning, transportation, health services – the tri-county area constitutes a rough series of interrelated communities constituting, in the view of the United States Census Bureau, a single standard metropolitan statistical area.

77. Local units of government in the metropolitan area have in many instances joined together for the purpose of providing better solutions to problems confronting them. In such instances various units of government have either disregarded local boundaries or have concluded that the problems were such as to call for a metropolitan solution. In some cases they have created overlay organizations. SEMCOG, recreational authorities, a metropolitan sewage system, SEMTA, and the Detroit Water System are examples of these metropolitan approaches.

78. Indeed, the State defendants at this very moment are attempting in state court to strike down one irrationality, and the discriminatory effect, of the existing school district arrangement, *i.e.*, finance, apparently in the hope of moving to a virtual state-wide assumption of costs.

79. In such circumstances there has been no showing that the existing school district boundaries are rationally related to any legitimate purpose; and the court finds that the particular welter of existing boundaries for 86 school districts is not necessary to the promotion of any compelling state interest.

80. On the basis of the present record, the court is of the view that the shifts in faculty, staff, resources and equipment and the exchanges of pupils necessary to accomplish maximum actual desegregation may be made, at least on an interim basis, by contractual agreements or otherwise among and between the existing school districts. The court has serious reservations, however, whether such procedures will inevitably threaten the continuing effectiveness of a plan of desegregation over the long-term. On these issues more evidence and further hearings will be necessary before reaching a final decision.

81. The State defendants, and in particular the State Board of Education which is charged with the primary responsibility for public education in Michigan, are the primary parties to be charged with responsibility to undertake that vital inquiry and return with recommendations about those governance, financial, and administrative arrangements which are necessary and essential to the successful implementation of a plan of desegregation on an interim and continuing basis.

G. Involvement of Affected Persons and Communities and Protection Against Racial Discrimination in the Desegregation Process

82. The court has received uncontroverted evidence in the plans filed by every party and in testimony, and advice in several briefs amicus curiae, and the court finds, that the following additional factors are essential to implementation and operation of an effective plan of desegregation in the circumstances of this case:

(a) Bi-racial councils made up of the parents and staff, and, where appropriate, pupils, should be set up at each school; the persons most affected must be encouraged and given every opportunity to participate in the implementation of desegregation.

(b) Curriculum content, and all curriculum materials and student codes, must be re-evaluated and reflect the diversity of ethnic and cultural backgrounds of the children now in the schools. As far as possible, those immediately affected by these decisions at the individual school level should participate in that process.

(c) In-service training for faculty and staff for multiethnic studies and human relations should be required; we must, after all, rely primarily on our teachers and children to respect, nurture, and deal with the diversity of students present in the desegregated school.

(d) The entire grading, reporting, counselling, and testing program should be reviewed in light of desegregated

schools compared to traditional schools and to avoid imposing the effects of past discrimination on the children. Tracking, whether so labeled or by any test, which has racial effects should not be utilized; within schools a pattern of classes which are substantially disproportionate in their racial composition from the relevant school or grade mix should be closely scrutinized and maintained only if necessary to promote a compelling educational objective.

83. In making the finding above, we remind the parties that this court's task is to enforce constitutional rights not to act as a schoolmaster; the court's task is to protect the constitutional rights here found violated with as little intrusion into the education process as possible. The court's objective is to establish the minimum constitutional framework within which the system of public schools may operate now and hereafter in a racially unified, non-discriminatory fashion. Within that framework the body politic, educators, parents, and most particularly the children must be given the maximum opportunity to experiment and secure a high quality, and equal, educational opportunity. However, experience has proven that specific goals, deadlines and methods of reporting and review must be required in all desegregation cases to insure compliance.

H. Timing

84. The burden remains with State defendants to show why desegregation for all schools, grades, classrooms, and pupils in the desegregation area should not proceed now, *i.e.*, in the context of this litigation, for the 1972 fall term. The design and implementation of desegregation plans for all grades in 15 clusters – including pupil assignments, necessary reassignment of faculty and restructuring of facilities, planning and acquiring the needed transportation facilities – is conceded by all parties to be a major undertaking. Yet next fall will already be a full year, not just four or six or even eight weeks, *Cf. Carter v. West Feliciano Parish School Bd.*, 396 U.S. 290 (1970), after the initial ruling by this court of the need for maximum feasible desegregation "now." In such circumstances the burden to prove the infeasibility of implementation of complete relief is high.

85. The desegregation panel, therefore, must make every effort to plan to implement as much actual desegregation, for as many clusters, schools, grades, classrooms, and students as possible.

86. At a minimum, there is agreement among, and evidence from, the experts that desegregating several grades, and more particularly entire elementary schools, within many, if not all, clusters may be accomplished in the fall.

87. In view of Findings 60 to 62, *supra,* if hard choices must be made for the fall, any interim plan should attempt to desegregate grades K-6, K-8, or K-9 in as many entire clusters as possible; and, in the absence of some other showing, there appears no reason why a complete plan may not be implemented by fall 1973. [24]

88. A heavy burden rests with those who seek delay in any way, shape, kind, degree or extent to convince the court that maximum actual desegregation cannot proceed effectively forthwith.

89. In view of the time constraints, the need to discharge this burden forthwith, the State defendants' default in assisting this court to determine the appropriate desegregation area, and the State defendants' asserted and evident lack of available planning capacity suited to the task, the court finds that some additional entity must be charged with the task of preparing a pupil assignment plan to accomplish maximum actual desegregation and a transportation plan within the framework this day established. To that end a panel of skilled experts, broadly representative of the parties and their interests, appointed by the court and assigned that task, is required to discharge effectively and promptly these two tasks.

90. State defendants remain charged with the duty, however, of coming forward with other necessary reports and plans concerning those governance, administrative, and financial arrangements necessary and essential to the implementation of an effective plan of desegregation on an interim and on-going basis.

I. The Plan

91. Based on the entire evidence amassed in this case, the court finds that an educationally sound, administratively feasible, constitutionally adequate, practicable and effective plan of desegregation may be developed, implemented, and operated hereafter for the desegregation area as set forth in findings 1-90 above.

CONCLUSIONS OF LAW

1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. Bradley v. Milliken, Ruling on Issue of Segregation, September 27, 1971; Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, March 28, 1972.

2. A de jure segregation violation having been found, the minimum remedy is maximum actual desegregation, taking into account the practicalities of the situation. [25] *Bradley v. Milliken,* Oral Order, October 4, 1971; Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, March 28, 1972; *Brown v. Board of Education,* 347 U.S. 383 (1954), 349 U.S. 294 (1954); *Green v. County School Bd.,* 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Ed.,* 396 U.S. 19 (1969); *Carter v. West Feliciano School Bd.,* 396 U.S. 290 (1970); *Swann v. Charlotte Mecklenberg Bd. of Ed.,* 402 U.S. 1 (1971); *Davis v. Board of School Commissioners of Mobile,* 402 U.S. 33 (1971); *Davis v. School District of City of Pontiac,* 443 F. 2d 573, *cert. denied,* 925 U.S. 233 (1971).

3. The remedial obligation rests with school authorities, but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, the court has broad equity power, and the duty, to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned and finally ordered implemented as soon as possible. *Swann v. Charlotte-Mecklenberg Board of Education,* 311 F. Supp. 265 (W.D.N.C. 1970), *aff'd,* 402 U.S. 1 (1971); *Carter v. West*

Feliciano School Bd., 396 U.S. 226, 227-228 (1969), 396 U.S. 290 (1970); *Acree v. County Board of Education*, No. 72-1211 (5th Cir. March 31, 1972); Rule 53, Fed. R. Civ. P., *P.A.R.C. v. Pennsylvania*, 334 F. Supp. 1247, 1266-7 (E.D. Pa. 1971). Only then will the court in this case be apprised fully of the practicalities of the situation, and what is reasonable and feasible, in order that a final order may issue. School authorities, of course, will be given an opportunity to (1) raise relevant objections, (2) make suggestions for modifications, (3) or present an alternative plan of desegregation; and their judgment and expertise will be considered and given appropriate weight by the court.

4. Funds must either be raised or reallocated, where necessary, to remedy the deprivation of plaintiffs' constitutional rights and to insure that no such unconstitutional neglect recurs again. *Shapiro v. Thompson*, 397 U.S. 254, 265-266 (1970); *Boddie v. Connecticut*, 91 S. Ct. 780, 788 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Graham v. Richardson*, 403 U.S. 365, 374-375 (1971); *Mayer v. Chicago*, 404 U.S. 189, 197 (1971); *Griffin v. Prince Edward County*, 377 U.S. 218 (1964); *Hoosier v. Evans*, 314 F. Supp. 316, 320-321 (D. St. Croix, 1970); *United States v. School District 151*, 301 F. Supp. 201, 232 (N.D. Ill. 1969), *aff'd as modified*, 432 F. 2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *Plaquemines Parish School Board v. U.S.*, 415 F. 2d 319 (5th Cir. 1970); *Bradley v. Richmond*, _____ *F.* Supp. _____, (April 1971); *Brewer v. Norfolk*, No. 71-1900 (4th Cir., March 7, 1972) (Slip op. at pp. 7-8). It would be a cruel mockery of constitutional law if a different rule were to be applied to school desegregation cases. After all schooling is this nation's biggest industry and the most important tast of government left to the states by the Constitution. In this case, were a different rule to be applied, it would constitute a gigantic hypocrisy: After all the money which has been spent over the years creating and maintaining the segregated condition, the relatively small amounts of money required to undo that segregation can be found. The law, surely, requires at least that. And the application of the commands of *Swann* does require that in almost every school desegregation case which has been brought to this court's attention.

5. In the substantial reassignment of faculty and restructuring of facilities required by the clustering, pairing, and grouping of schools to accomplish pupil desegregation, normal administrative practice should lead to schools with substantially like facilities, faculty and staff, and equipment. *Swann, supra,* 402 U.S. at 18-20. Moreover, special care should be taken in the necessary reassignment of faculty to avoid creating or maintaining the racial identification of schools "simply by reference to the racial composition of teachers and staff." *Swann, supra,* 402 U.S. at 18. In any event, the equitable discretion of the court is broad enough to insure that those aspects of faculty desegregation and equalization of facilities which are essential to the effective operation of a desegregation plan are included in the planning and final order, *Swann, supra,* 402 U.S. at 15; *U.S. v. Montgomery County Board of Ed.,* 395 U.S. 225 (1969); *Hecht v. Bowles,* 321 U.S. 329-330 (1944); and no contract, union agreement or otherwise, or Board policy or practice may impede these Fourteenth Amendment obligations. *U.S. v. Greenwood Municipal Separate School District,* 406 F. 2d 1086, 1094 (5th Cir.), *cert. denied,* 395 U.S. 907 (1969); *Berry v. Benton Harbor,*_____F. Supp._____(W.D. Mich. 1971).

6. The Federal courts have repeatedly rejected plans exempting the lower grades from integration, relying less on educational data than upon the hard legal fact that segregation at any age is a denial of the equal protection of the law. See, *e.g., United States v. Jefferson County Bd. of Educ.,* 372 F.2d 836 (9th Cir. 1966), *aff'd on rehearing en banc,* 380 F.2d 385 (5th Cir. 1967). To leave grades K through 3 exempt from a desegregation plan is not to eliminate segregation "root and branch." *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968).

7. The consistent application of settled constitutional law invests this court with the equitable power, and the duty, to order preparation, and thereafter implementation, of a practicable and sound plan which embodies the principles set forth in these findings and conclusions and the attached memorandum and order. See, generally, Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the

Public Schools of the City of Detroit, March 24, 1972; Findings of Fact and Conclusions of Law on Detroit-Only Plans, March 24, 1972; oral ruling on offers of proof, April 13, 1972; and the cases cited therein.

8. School construction practices throughout the metropolitan area have added to and reinforced the pattern of segregation referred to. Although there were vacant seats throughout the city to which students could have been assigned at lesser cost and with the achievement of integration, continued sums were expended for construction of new schools designed to service particular areas of racial concentration, and such schools opened as and have continued to be racially identifiable in violation of the Fourteenth Amendment. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 18-20 (1971); *United States V. School Dist. 151*, 404 F.2d 1125, 1132-33 (7th Cir. 1968); *Davis v. School Dist. of Pontiac*, 309 F. Supp. 734, 741-42 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971); *Spangler v. Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 517-18 (C.D. Calif. 1970); *Johnson v. San Francisco Unified School Dist.*, Civ. No. C-70-1331 (N.D. Calif. April 28, 1971); *Brewer v. School Board of the City of Norfolk*, 397 F.2d 37, 42 (4th Cir. 1968); *Cf. Sloan v. Tenth School Dist. of Wilson County*, _____F.2d_____(6th Cir. 1970); *United States v. Board of Educ. of Polk County*, _____F. 2d____ 4th Cir. 1968); *Kelley v. Altheimer*, _____F.2d_____(8th Cir. 1967); *Bradley v. School Bd.*, _____F. Supp._____(E.D. Va. 1971); *Clark v. Board of Educ. of Little Rock*, 401 U.S. 971 (1971).

9. The legal effects of racially discriminatory confinement to a school district are not different from the effects of such containment within a district. *E.g., Lee v. Macon County Board of Education*, 558 F.2d 746 (5th Cir. 1971); *Haney v. County Board Sevier*, 410 F.2d 920 (8th Cir. 1969), 429 F.2d 364 (8th Cir. 1970).

10. Where the actions of state defendants and local school authorities throughout the metropolitan area have had the natural, foreseeable, and actual effect of building upon, taking advantage of, and encouraging racially segregated demographic patterns deliberately fixed by governmental action at all levels

with the effect of creating and maintaining racial segregation in the public schools, there is a present obligation to eliminate the continuing effects of such violation; and the District Court has the duty, upon default by school authorities, to intervene to secure compliance with the Constitution pursuant to the sound exercise of traditional equity powers consistent with the practicalities of the local situation. *Swann v. Charlotte-Mecklenberg,* 402 U.S. 1, 15-16, 20-21, 31-32 (1971). *Cf.* Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, p.5, Conclusion 4. In devising remedies where state-imposed segregation has been established, it is the responsibility of school authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the violation. *Swann, supra,* 402 U.S. at 21.

11. Moreoever, where the State, and named defendants, are substantially implicated in the segregation violation found and are ultimately responsible for public schooling throughout the state, the consistent application of constitutional principles requires that this court take all steps necessary and essential to require them to desegregate the Detroit public schools effectively and maintain, now and hereafter, a racially unified, non-discriminatory system in the absence of a showing that the judicial intervention here contemplated will frustrate the promotion of a legitimate and compelling state policy or interest. *Reynolds v. Sims,* 377 U.S. 533, 575 (1964); *Hunter v. City of Pittsburg,* 207 U.S. 161, 178-179 (1907); *Phoenix v. Kolodziejski,* 399 U.S. 204, 212-213 (1970); *Kramer v. Union Free School District,* 395 U.S. 621, 633 (1969); *Williams v. Illinois,* 399 U.S. 235, 244-45 (1970); *Shelton v. Tucker,* 364 U.S. 479, 488 (1966); *Green v. County School Bd.,* 391 U.S. 430, 439, 442; *Swann v. Charlotte-Mecklenberg,* 402 U.S. 1 (1971); *Davis v. Bd. of School Commissioners,* 402 U.S. 33 (1971); *Brown v. Board of Education,* 347 U.S. 483 (1954); *Brown v. Board of Education,* 349 U.S. 292, 300 (1955); *Monroe v. Board of Commissioners,* 391 U.S. 450, 459 (1968).

FOOTNOTES

1. In the main such proof entirely misses the point: the violation here found has to do with school segregation caused in substantial part by force of public authority and action; yet the intervening defendants' questions and offer of proof speak mainly to educational theory and recent and sometimes contradictory research about narrowly measured educational effects, mostly on achievement test scores, of quite limited beginnings of racial, or socio-economic integration of various types and as compared with the effects of dollar or other resource inputs and continued segregation. This court does not understand, however, that such research, from the Coleman report to its many reanalyses, formed the primary bases for the Brown decision or any of its progeny. See, e.g., Brunson v. Bd. of Trustees, 429 F.2d 820, 826 (4th Cir. 1970) (J. Sobeloff, concurring). In the context similar to newly intervening defendants' objections to desegregation, the Supreme Court in Swann specifically held that such factors constitute an impermissible limit upon the duty to desegregate. 402 U.S. at 24, Fn. 8. Citation to such research, either in support or rejection of school desegregation, misses the primary point: insofar as pupil assignments are concerned, the system of public schooling in every state must be operated in a racially non-discriminatory, unified fashion; until that objective is met, the very system of public schooling constitutes an invidious racial classification. The adoption of an education theory having the effect of maintaining a pattern of de jure segregation is therefore clearly impermissible. (Whether such theories, research, or evidence on educational quality or inequality form the basis for requiring judicial intervention and relief in the absence of a finding of de jure segregation is a question this court need not face.)

In any event, the Court of Appeals for the Sixth Circuit held, on June 19, 1970, that greater, not less, desegregation is the proper manner to alleviate the problem of disparity in achievement. Monroe v. Board of Commissioners, Jackson, Tenn., 427 F.2d 1005, 1008 (C.A. 6, 1970).

2. Chief Justice Burger in Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6.

3. Defendants Magdowski, et al., originally opposed to desegregation, during the course of the taking of proofs on the issue of segregation, conceded that the public schools of the city of Detroit were in fact segregated, and took the early lead in suggesting that the only effective avenue for desegregation was a metropolitan plan. The Detroit Board of Education, while continuing to deny that it has been guilty of any act of segregation, took the position that if desegregation were to be undertaken it could be done only on a metropolitan basis. So that now the white parents of the city of Detroit and its Board of Education – the parties most directly involved with the lot of the students in the Detroit school system – see no alternative to, and, for all practical purposes seek a metropolitan solution to the basic Detroit school problem.

4. In the context of this hearing, the defendant Detroit Board of Education is not in a position to act as the usual "school authority" primarily responsible for suggesting an appropriate desegregation area simply because its authority does not extend beyond the geographic limits of the city of Detroit. The competence, knowledge of local conditions, and expertise of those schoolmen who helped prepare the Detroit Board's proposal, however, may be utilized and given appropriate weight.

5. In Oliver v. Kalamazoo Board of Education, #K88-71, Judge Fox pointed out the primary responsibility of the state: "The State of Michigan is represented by two entities, but the entity is an agent of the State . . . [T]he Constitution says something about your [the State's] responsibility." The court went on to order the State to take an active role. Pre-trial order and transcript, May 1, 1972.

6. The Detroit Board plan places heavier reliance on white flight and socio-economic factors, while the Magdowski proposal in addition places an emphasis on maintaining a minimum percentage black in each school. These considerations in no way determine the court's choice of a desegregation area necessary to meet constitutional requirements. In fairness, however, it also should be noted that the desegregation area, which the court deems to best meet constitutional requirements, also happens in the main, to meet the other concerns expressed in

these two proposals. That the Board's interest in socio-economic integration is largely met by racial desegregation is not surprising. There is uncontroverted evidence in the record, and the court so finds, that there is a high correlation between blacks and persons of a low socio-economic status, the result, in the main, of the cumulative effects of past and present racial discrimination including discrimination in education. At some point hereafter, of course, school authorities with responsibility for implementation and operation of the racially-unified non-discriminatory school system contemplated, or parts thereof, may and should include in its plan other educational goals and needs whether or not they are required by the law or any court. Swann v. Charlotte-Mecklenberg, 402 U.S. at 16.

7. If a state is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system whose effect is to maintain segregation. "There is no legally protected vested interest in segregation. If there were, then Brown v Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it." Wanner v School Bd. of Arlington County, 357 F.2d 452, (Soboloff, Cir. J.), pp. 454 and 455. The historic fact is that existing conditions are based on a design to segregate the races. To hold that segregation, once accomplished, is sacrosanct and beyond constitutional reach, is to say that the United States Constitution and its Amendments, and their provisions for equality, are mere rhetoric.

8. See Findings 70-78, infra.

9. The interplay of these two factors summarizes two other guideposts or starting points: maximum feasible desegregation and eliminating racially identifiable schools. Factors such as time and distance limitations, together with the rough definitions of substantial disproportion with the relevant school community's pupil racial composition, in turn largely determine the meaning of "eliminating racially identifiable schools" and what constitutes "maximum feasible desegregation," in the

particular circumstances here present and in the context of a prior finding of segregation.

10. The Detroit Board Proposal contemplates desegregation on a "minority"-white basis. The proof in this cause, however, has been aimed at the segregation of black children and white children; similarly the remedy has been so defined, argued, and in the main presented by parties. The court finds, therefore, that the area, and further planning, should, in the main, be confined to a black-white breakdown.

11. To the Southwest, Plaintiffs' Proposal falls on the side of less time in transit than the 40-minute guideline because inclusion of more area is not required to desegregate. (see Finding 27, infra.)

12. Moreover, in the main, the areas, schools, and pupils in these districts are not as fully members of the greater Detroit school community: many are less urban; they are the furthest in terms of time, distance, and contact from the Detroit area's economic and social acitivities [SIC]; and many are more oriented, if anything, to urban areas other than Detroit, for example, the Ann Arbor - Ypsilanti area.

13. The court notes, however, that the range of average socio-economic status for the various regions or clusters in Plaintiffs' Proposal is similar to that in the Detroit Board Proposal: based on the Michigan Assessment the range in Plaintiffs' Proposal happens to be 44.7 to 53.7, while in the Detroit Board Proposal the range is 46.3 to 53; and only three of the 15 clusters of schools in Plaintiffs' Proposal fall below 46.3.

14. Because of the closeness of the question, particularly as it relates to any problems which may arise hereafter in establishing a pupil desegregation plan, the court feels that some opportunity should be given to the expert panel to suggest a modification of this tentative resolution. See also Findings 34-38 below.

15. A common practice in other cases is the use of "pupil locator" maps. See Northcross v. School Board of City of Memphis,_____F. 2d_____(6th Cir. 1971).

16. For years these city-contained school districts, which include some suburban districts in the desegregation area, as well as the Detroit Public Schools, have demanded without success that this inequitable state practice be changed so that all districts could be reimbursed on the same basis for pupil transportation.

17. The figure almost twice that which appears in several of the State "plans" was based on the assumption that busing would be "one-way" with black children being assigned to suburban schools. Mr. Wagner, the state official in charge of pupil transportation, provided the information on which that estimate was based and also informed his superiors that a two-way plan of desegregation and transportation would cost much less per pupil. The state defendants did not bring this important fact to the court's attention in any of their submissions; it was uncovered and fully explored in the disposition of Mr. Wagner taken by plaintiffs.

18. This phenomenon was noted in Swann, 402 U.S. 1, 20-21. The principle was long known, and actively, supported by the F.H.A. For example, consider that public agency's early understanding in its 1936 manual that white subdivision developments require white schools: "if the children of people living in such area are compelled to attend school where the majority or a good number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if the condition did not exist."

19. This figure assumes 30 children/regular classroom. Although rated capacities may be lower, the figure for regular classrooms does not include several types of instructional, recreational, laboratory, and other rooms which add overall pupil capacity to schools.

20. The resulting pattern is unmistakable: "Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally found in the suburbs. While the racially

unrestricted choice of black persons and economic factors may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs or racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. Perhaps the most that can be said is that all of them [various governmental units], including school quthorities, are, in part, responsible for the segregated condition which exists." Ruling on Issue of Segregation, 8 and 10. Moreover, an examination of PX 181, 192 and 185 shows that black children often remain isolated in predominately black schools in the few suburban school districts with any numbers of black pupils. In the last several weeks the local press has reported that the United States Office of Education cut off funds for one such district.

21. Included in this set of arrangements are contract relationships of various types concerning personnel, property and debts.

22. The defendant, William G. Milliken, Governor of the State of Michigan, in his amicus brief filed in the Supreme Court of the United States, No. 71-1332, San Antonio Independent School District v. Demetrio P. Rodriquez, says, page II:

> "1. Amici, whose individual and particular interests are set forth in more detail below, are the Governors of the above-listed States. As Governors and Chief executive officers of their respective States, Amici are responsible for upholding and carrying out the commands of the Constitutions and laws of their various States, including the provisions thereof requiring the establishment of public schools and school districts and commanding the children of their States to attend school. Amici are responsible for financial decisions affecting all State operations, including those pertaining to support and financing of the public schools.
>
> "Amici are deeply concerned about the ongoing and continuing crisis in public education and the difficulties

facing public educational systems in their States and around the nation. Amici recognize that grave inequities exist because of variation in local property tax bases upon which local school districts must rely in order to support their school systems. Amici believe that these inequalities in educational resources violate the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that these inequalities must be eliminated* * * *"

The Governors' amicus brief, speaking of the State of Texas, could as well be said of the State of Michigan, when it used these words:

"It is also undisputed that the local school districts and their boundaries, and hence the aggregate value of the property they contain, are entirely the creation of and their maintenance is the responsibility of the State of Texas. Furthermore, the detailed regulation of public education financing in Texas * * * is a state not a local responsibility. Indeed, the school districts have the power to raise funds for education only as a result of delegation by the State of its own power to tax for the general welfare." (Page 8 of brief.)

"Since the State could not discriminate directly against students residing in poorer localities, it should not be permitted to accomplish the same result by dividing its responsibility for equal education with local school districts and failing to supplement the funds raised by the school districts sufficiently to eliminate discrimination." *(Page 11 of brief.)

*Compare Griffin v. County School Board, 377 U.S. 218 (1964). While a State may delegate certain of its functions to smaller subdivisions such as cities or counties, it cannot escape accountability for their actions. Such subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them * * * * The number, nature, and duration of [their] powers * * * and the territory over which they shall be exercised rests in the absolute

discretion of the State." Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907).

23. For years black children in the Carver School District were assigned to black schools in the inner city because no white suburban district (or white school in the city) would take the children.

24. These findings are made on the basis of the present record and are subject to modification based on evidence which may be developed once the specific problems of actual desegregation are faced in the planning process.

25. See, Kelley, et al. v. Metropolitan Bd. of Educ., CCA 6, Nos. 71-1778-79, page 22, slip opinion, May 30, 1972:

> "Perhaps the primary thing that the Swann case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area* and seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live."
>
> *The area referred to in this case is all of Davidson County, including the City of Nashville, which is included in the jurisdiction of defendant Metropolitan Board of Education.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs WILLIAM G. MILLIKEN, et al., Defendants and DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor and DENISE MAGDOWSKI, et al., Defendants-Intervenor et al.	CIVIL ACTION NO: 35257

RULING ON DESEGREGATION AREA AND ORDER FOR DEVELOPMENT OF PLAN OF DESEGREGATION

On September 27, 1971 the court made its Ruling on Issue of Segregation, holding that illegal segregation exists in the public schools of the City of Detroit as a result of a course of conduct on the part of the State of Michigan and the Detroit Board of Education. Having found a constitutional violation as established, on October 4, 1971 the court directed the school board defendants, City and State, to develop and submit plans of desegregation, designed to achieve the greatest possible degree of actual desegregation, taking into account the practicali-

ties of the situation. The directive called for the submission of both a "Detroit-only" and a "Metropolitan" plan.

Plans for the desegregation of the Detroit schools were submitted by the Detroit Board of Education and by the plaintiffs. Following five days of hearings the court found that while plaintiffs' plan would accomplish more desegregation than now obtains in the system, or which would be achieved under either Plan A or C of the Detroit Board of Education submissions, none of the plans would result in the desegregation of the public schools of the Detroit school district. The court, in its findings of fact and conclusions of law, concluded that "relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city," and that it had the authority and the duty to look beyond such limits for a solution to the illegal segregation in the Detroit public schools. Accordingly, the court ruled, it had to consider a metropolitan remedy for segregation.

The parties submitted a number of plans for metropolitan desegregation. The State Board of Education submitted six - without recommendation, and without indicating any preference. With the exception of one of these, none could be considered as designed to accomplish desegregation. On the other hand the proposals of intervening defendant Magdowski, et al., the Detroit Board of Education and the plaintiffs were all good faith efforts to accomplish desegregation in the Detroit metropolitan area. The three plans submitted by these parties have many similarities, and all of them propose to incorporate, geographically, most—and in one instance, all—of the three-county area of Wayne, Oakland and Macomb.

The hearing on the proposals have set the framework, and have articulated the criteria and considerations, for developing and evaluating an effective plan of metropolitan desegregation. None of the submissions represent a complete plan for the effective and equitable desegregation of the metropolitan area, capable of implementation in its present form. The court will therefore draw upon the resources of the parties to devise, pursuant to its direction, a constitutional plan of desegregation of the Detroit public schools.

Based on the entire record herein, the previous oral and written rulings and orders of this court, and the Findings of Fact and Conclusions of Law filed herewith, IT IS ORDERED:

I.

A. As a panel charged with the responsibility of preparing and submitting an effective desegregation plan in accordance with the provisions of this order, the court appoints the following:

1. A designee of the State Superintendent of Public Instruction;*
2. Harold Wagner, Supervisor of the Transportation Unit in the Safety and Traffic Education Program of the State Department of Education;
3. Merle Henrickson, Detroit Board of Education;
4. Aubrey McCutcheon, Detroit Board of Education;
5. Freeman Flynn, Detroit Board of Education;
6. Gordon Foster, expert for plaintiffs;
7. Richard Morshead, representing defendant Magdowski, et al.;
8. A designee of the newly intervening defendants;*
9. Rita Scott, of the Michigan Civil Rights Commission.

Should any designated member of this panel be unable to serve, the other members of the panel shall elect any necessary replacements, upon notice to the court and the parties. In the

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*The designees of the State Superintendent of Public Instruction and newly intervening defendants shall be communicated to the court within seven days of the entry of this order. In the event the newly intervening defendants cannot agree upon a designee, they may each submit a nominee within seven days from the entry of this order, and the court shall select one of the nominees as representative of said defendants.

absence of objections within five days of the notice, and pending a final ruling, such designated replacement shall act as a member of the panel.

B. As soon a possible, but in no event later than 45 days after the issuance of this order, the panel is to develop a plan for the assignment of pupils as set forth below in order to provide the maximum actual desegregation, and shall develop as well a plan for the transportation of pupils, for implementation for all grades, schools and clusters in the desegregation area. Insofar as required by the circumstances, which are to be detailed in particular, the panel may recommend immediate implementation of an interim desegregation plan for grades K-6, K-8 or K-9 in all or in as many clusters as practicable, with complete and final desegregation to proceed in no event later than the fall 1973 term. In its transportation plan the panel shall, to meet the needs of the proposed pupil assignment plan, make recommendations, including the shortest possible timetable, for acquiring sufficient additional transportation facilities for any interim or final plan of desegregation. Such recommendations shall be filed forthwith and in no event later than 45 days after the entry of this order. Should it develop that some additional transportation equipment is needed for an interim plan, the panel shall make recommendations for such acquisition within 20 days of this order.

C. The parties, their agents, employees, successors. [SIC] and all others having actual notice of this order shall cooperate fully with the panel in their assigned mission, including, but not limited to, the provision of data and reasonable full and part-time staff assistance as requested by the panel. The State defendants shall provide support, accreditation, funds, and otherwise take all actions necessary to insure that local officials and employees cooperate fully with the panel. All reasonable costs incurred by the panel shall be borne by the State defendants; provided, however, that staff assistance or other services provided by any school district, its employees or agents, shall be without charge, and the cost thereof shall be borne by such school district.

II.

A. Pupil reassignment to accomplish desegregation of the Detroit public schools is required within the geographical area which may be described as encompassing the following school districts (see Exhibit P.M. 12), and hereinafter referred to as the "desegregation area":

Lakeshore	Birmingham	Fairlane
Lakeview	Hazel Park	Garden City
Roseville	Highland Park	North Dearborn Heights
South Lake	Royal Oak	Cherry Hill
East Detroit	Berkley	Inkster
Grosse Pointe	Ferndale	Wayne
Centerline	Southfield	Westwood
Fitzgerald	Bloomfield Hills	Ecorse
Van Dyke	Oak Park	Romulus
Fraser	Redford Union	Taylor
Harper Woods	West Bloomfield	River Rouge
Warren	Clarenceville	Riverview
Warren Woods	Farmington	Wyandotte
Clawson	Livonia	Allen Park
Hamtramck	South Redford	Lincoln Park
Lamphere	Crestwood	Melvindale
Madison Heights	Dearborn	Southgate
Troy	Dearborn Heights	Detroit

Provided, however, that if in the actual assignment of pupils it appears necessary and feasible to achieve effective and complete racial desegregation to reassign pupils of another district or other districts, the desegregation panel may, upon notice to the parties, apply to the Court for an appropriate modification of this order.

B. Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom by substantially

disproportionate to the overall pupil racial composition. The panel may, upon notice to the parties, recommend reorganization of clusters within the desegregation area in order to minimize administrative inconvenience, or time and/or numbers of pupils requiring transportation.

C. Appropriate and safe transportation arrangements shall be made available without cost to all pupils assigned to schools deemed by the panel to be other than "walk-in" schools.

D. Consistent with the requirements of maximum actual desegregation, every effort should be made to minimize the numbers of pupils to be reassigned and requiring transportation, the time pupils spend in transit, and the number and cost of new transportation facilities to be acquired by utilizing such techniques as clustering, the "skip" technique, island zoning, reasonable staggering of school hours, and maximization of use of existing transportation facilities, including buses owned or leased by school districts and buses operated by public transit authorities and private charter companies. The panel shall develop appropriate recommendations for limiting transfers which affect the desegregation of particular schools.

E. Transportation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels. In the determination of the utilization of existing, and the construction of new, facilities, care shall be taken to randomize the location of particular grade levels.

F. Faculty and staff shall be reassigned, in keeping with pupil desegregation, so as to prevent the creation or continuation of the identification of schools by reference to past racial composition, or the continuation of substantially disproportionate racial composition of the faculty and staffs, of the schools in the desegregation area. The faculty and staffs assigned to the schools within the desegregation area shall be substantially desegregated, bearing in mind, however, that the desideratum is the

balance of faculty and staff by qualifications for subject and grade level, and then by race, experience and sex. In the context of the evidence in this case, it is appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team.

G. In the hiring, assignment, promotion, demotion, and dismissal of faculty and staff, racially non-discriminatory criteria must be developed and used; provided, however, there shall be no reduction in efforts to increase minority group representation among faculty and staff in the desegregation area. Affirmative action shall be taken to increase minority employment in all levels of teaching and administration.

H. The restructuring of school facility utilization necessitated by pupil reassignments should produce schools of substantially like quality, facilities, extra-curricular activities and staffs; and the utilization of existing school capacity through the desegregation area shall be made on the basis of uniform criteria.

I. The State Board of Education and the State Superintendent of Education shall with respect to all school construction and expansion, "consider the factor of racial balance along with other educational considerations in making decisions about new school sites, expansion of present facilities * * * "; and shall, within the desegregation area disapprove all proposals for new construction or expansion of existing facilities when "housing patterns in an area would result in a school largely segregated on racial * * * lines," all in accordance with the 1966 directive issued by the State Board of Education to local school boards and the State Board's "School Plant Planning Handbook" (see Ruling on Issue of segregation, p. 13.).

J. Pending further orders of the court, existing school district and regional boundaries and school governance arrangements will be maintained and continued, except to the extent necessary to effect pupil and faculty desegregation as set forth herein; provided, however, that existing administrative, finan-

cial, contractual, property and governance arrangements shall be examined, and recommendations for their temporary and permanent retention or modification shall be made, in light of the need to operate an effectively desegregated system of schools.

K. At each school within the desegregated area provision shall be made to insure that the curriculum, activities, and conduct standards respect the diversity of students from differing ethnic backgrounds and the dignity and safety of each individual, students, faculty, staff and parents.

L. The defendants shall, to insure the effective desegregation of the schools in the desegregation area, take immediate action including, but not limited to, the establishment or expansion of in-service training of faculty and staff, create bi-racial committees, employ black counselors, and require be-racial and non-discriminatory extra-curricular activities.

III

The State Superintendent of Public Instruction, with the assistance of the other state defendants, shall examine, and make recommendations, consistent with the principles established above, for appropriate interim and final arrangements for the (1) financial, (2) administrative and school governance, and (3) contractual arrangements for the operation of the schools within the desegregation area, including steps for unifying, or otherwise making uniform the personnel policies, procedures, contracts, and property arrangements of the various school districts.

Within 15 days of the entry of this order, the Superintendent shall advise the court and the parties of his progress in preparing such recommendations by filing a written report with the court and serving it on the parties. In not later than 45 days after the entry of this order, the Superintendent shall file with the court his recommendations for appropriate interim and final relief in these respects.

In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court,

may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary. In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation.

IV.

Each party may file appropriate plans or proposals for inclusion in any final order which may issue in this cause. The intent of this order is to permit all the parties to proceed apace with the task before us: fashioning an effective plan for the desegregation of the Detroit public schools.

Fifteen days after the filing of the reports required herein, hearings will begin on any proposal to modify any interim plan prepared by the panel and all other matters which may be incident to the adoption and implementation of any interim plan of desegregation submitted. The parties are placed on notice that they are to be prepared at that time to present their objections, alternatives and modifications. At such hearing the court will not consider objections to desegregation or proposals offered "instead" of desegregation.

Hearings on a final plan of desegregation will be set as circumstances require.

DATE: JUNE 14, 1972.

/s/

Stephen J. Roth
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al,	)	
Plaintiffs,	)	
v.	)	
WILLIAM G. MILLIKEN, et al,	)	
Defendants,	)	
and	)	
DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,	)	**Civil Action No. 35257**
Defendant-Intervenor,	)	
and	)	
DENISE MAGDOWSKI, et al,	)	
Defendants-Intervenor,	)	
et al.	)	

ORDER
FOR ACQUISITION OF TRANSPORTATION

At a session of the United States District Court, Federal Building, Detroit, Michigan, on the 11th day of July, 1972.

The Court has received a recommendation from the Panel appointed under its previous orders that 295 buses, which it had determined are available, should be acquired for the purpose of providing transportation under an interim plan. The Court also had before it the still pending motion of Plaintiffs for the purchase of 350 buses. Having heard the arguments of counsel, IT IS HEREBY ORDERED:

1. The Defendant Detroit Board of Education shall acquire by purchase, lease or other contractual arrangement at least 295 buses for use in the interim desegregation plan during the 1972-73 school year. All financial obligations incurred as the result of this Order shall be the sole financial obligation of the State Defen-

dants, including the added State Defendant State Treasurer Allison Green, as set forth below in Paragraph 2. Said order, lease, or other contract shall be entered into by negotiation and without the necessity for bids forthwith and in no event later than Thursday, July 13, 1972.

2. The State Defendants shall bear the cost of this acquisition and State Defendants, including the added State Defendant Green, shall take all necessary steps utilizing existing funds and sources of revenue, to be acquired State funds, legislatively authorized and funds directed by the State Constitution to the State School Aid Funds and by re-allocation of existing or new funds to pay for said transportation acquisition either directly or through the Defendant Detroit Board.

_____

United States District Judge

NO. 72-8002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD BRADLEY, et al, Plaintiffs-Appellants	)	
v.	)	
WILLIAM G. MILLIKEN, et al, Defendants-Appellants	)	ORDER
and	)	
DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor	)	
and	)	
DENISE MAGDOWSKI, et al, Defendants-Intervenors	)	

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

The District Court has certified that certain orders entered by him in this case involve controlling questions of law, as provided by 28 U. S. C. § 1292(b), and has made a determination of finality under Rule 54(b), Fed. R. Civ. P.

This court concludes that among the substantial questions presented there is at least one difficult issue of first impression which never has been decided by this court or the Supreme Court. In so holding we imply nothing as to our view of the merits of this appeal. We conclude that an immediate appeal may materially advance the ultimate termination of the litigation. Accordingly, it is ORDERED that the motion for leave to appeal be and hereby is granted.

It is further ORDERED that the appeal in this case be advanced on the docket of this court and scheduled for hearing Thursday, August 24, 1972, at 9 a.m. The appendix and simultaneous briefs of all parties shall be filed not later than 25 days

after the entry of this order. Reply briefs shall be filed not later than August 21, 1972. Typewritten appendix and briefs may be filed in lieu of printed briefs, together with ten legible copies produced by Xerox or similar process. An appendix must be filed. The court will not entertain a motion to hear the appeal on the original record.

The motion for stay pending appeal having been considered, it is further ORDERED that the Order for Acquisition of Transportation, entered by the District Court on July 11, 1972, and all orders of the District Court concerned with pupil and faculty reassignment within the Metropolitan Area beyond the geographical jurisdiction of the Detroit Board of Education, and all other proceedings in the District Court other than planning proceedings, be stayed pending the hearing of this appeal on its merits and the disposition of the appeal by this court, or until further order of this court. This stay order does not apply to the studies and planning of the panel which has been appointed by the District Court in its order of June 14, 1972, which panel was charged with the duty of preparing interim and final plans of desegregation. Said panel is authorized to proceed with its studies and planning during the disposition of this appeal, to the end that there will be no unnecessary delay in the implementation of the ultimate steps contemplated in the orders of the District Court in event the decision of the District Court is affirmed on appeal. Pending disposition of the appeal, the defendants and the School Districts involved shall supply administrative and staff assistance to the aforesaid panel upon its request. Until further order of this court, the reasonable costs incurred by the panel shall be paid as provided by the District Court's order of June 14, 1972.

Entered by order of the Court.

/s/ James A. Higgins

Clerk

Nos. 72-1809 – 72-1814

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD BRADLEY, ET AL.,
Plaintiffs-Appellees,

v.

WILLIAM G. MILLIKEN, Governor of Michigan, etc.; BOARD OF EDUCATION OF THE CITY OF DETROIT,
Defendants-Appellants,

and

DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
Defendant-Intervenor-Appellee,

and

ALLEN PARK PUBLIC SCHOOLS, ET AL.,
Defendants-Intervenors-Appellants

and

KERRY GREEN, ET AL.,
Defendants-Intervenors-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed June 12, 1973.

Before PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, MCCREE, MILLER, KENT and LIVELY, Circuit Judges.

Phillips, C.J., delivered the opinion of the Court, in which Edwards, Celebrezze, Peck, McCree and Lively, JJ., joined. Weick, J. (pp. 82-111) and Miller, J. (pp. 130-131) filed dissenting opinions and Kent, J., (pp. 112-129) filed a separate

opinion concurring in part and dissenting in part. Judge Kent died May 28, 1973 after the opinions were in the hands of the printer.

PHILLIPS, Chief Judge. This is a school desegregation case which, as originally filed, was directed against the school system of Detroit, Michigan, but on this appeal involves both Detroit and school districts located in the surrounding metropolitan area.

The present appeal is the fourth time that the case has been before this court since the complaint was filed August 18, 1970. The earlier decisions of this court are reported at *Bradley* v. *Milliken,* 433 F.2d 897 (1970); *Bradley* v. *Milliken,* 438 F.2d 945 (1971); and *Bradley* v. *Milliken,* 468 F.2d 902, *cert. denied,* 409 U.S. 844 (1972). (On November 27, 1972 the original panel dismissed for want of jurisdiction an "emergency motion" by the Detroit Board of Education that State officials be required to provide funds to keep the Detroit public schools operating for 180 regular days of instruction during the current school year. — F.2d —.) On February 27, 1973, the Supreme Court denied review in *Bloomfield Hills School District* v. *Roth, West Bloomfield School District* v. *Roth,* and *Birmingham School District* v. *Roth,* — U.S. —, 41 U.S.L.W. 3460. In these cases this court had denied applications for writs of mandamus or prohibition against District Judge Roth. The School Districts contended that the District Judge usurped jurisdiction by failing to convene three-judge courts and by subjecting the School Districts to his ruling and order in the school desegregation case in spite of the fact that the Districts were not parties to the desegregation proceedings and had not been found to have committed any act of de jure segregation. The action of the Supreme Court was without prejudice to the right of the School Districts to file application to intervene in the present action.)

Oral arguments were heard before a panel of this court on August 24, 1972. An opinion was announced by the panel on December 8, 1972, affirming two orders of the District Court, viz: (1) Ruling on Issue of Segregation, reported at

338 F.Supp. 582, and (2) Findings of Fact and Conclusions of Law on "Detroit only" plans of desegregation, dated March 28, 1972. The decision of the panel vacated the remaining three orders on appeal (enumerated below), but affirmed in principle the ruling of the District Court on the propriety of a metropolitan remedy to accomplish desegregation.

On January 16, 1973, this court granted rehearing in banc. Under the provisions of Rule 3(b) of the local rules of this court, the effect of granting rehearing in banc is "to vacate the previous opinion and judgment of the court, to stay the mandate and to restore the case on the docket as a pending appeal."

Oral arguments before the court in banc were heard February 8, 1973.

No specific desegregation plan has been ordered by the District Court. The procedural history of the litigation is set forth below.

Before this court at the present time are four interlocutory orders from which we have granted appeal pursuant to 28 U.S.C. § 1292(b) and one final order, viz:

1. Ruling on Issue of Segregation, dated September 27, 1971, reported at 338 F.Supp. 582;

2. Findings of fact and conclusions of law on "Detroit only" plans of desegregation, dated March 28, 1972;

3. Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972;

4. Ruling on Desegregation Area and Development of Plan, and Findings of Fact and Conclusions of Law in support thereof, dated June 14, 1972; and

5. Order dated July 11, 1972, directing Michigan State officials to purchase 295 school buses (which this court considers to be a final order).

On July 13, 1972, following oral argument, the original panel granted a motion for a temporary stay of the District Court's

order of July 11, 1972, ordering the purchase of 295 school buses.

On July 17, 1972, following oral argument, the original panel directed that its stay order remain in effect until entry by the District Court of a final desegregation order or until certification by the District Court of an appealable question as provided by 28 U.S.C. § 1292(b).

Thereafter, on July 19, 1972, the District Court certified that the orders set forth above involve controlling questions of law, as provided by 28 U.S.C. § 1292(b), and made a determination of finality under Rule 54(b), Fed. R. Civ. P.

On July 20, 1972, the original panel entered an order granting the interlocutory appeal concluding that:

> "[A]mong the substantial questions presented there is at least one difficult issue of first impression that never has been decided by this court or the Supreme Court. In so holding we imply nothing as to our view of the merits of this appeal. We conclude that an immediate appeal may materially advance the ultimate termination of the litigation."

The motion for leave to appeal was granted and the case was advanced for oral arguments on the merits on August 24, 1972.

The July 20, 1972 order of the original panel included the following stay order, which has remained in effect pending final disposition of the appeal on its merits:

> "The motion for stay pending appeal having been considered, it is further ORDERED that the Order for Acquisition of Transportation, entered by the District Court on July 11, 1972, and all orders of the District Court concerned with pupil and faculty reassignment within the Metropolitan Area beyond the geographical jurisdiction of the Detroit Board of Education, and all other proceedings in the District Court other than planning proceedings, be stayed pending the hearing of this appeal on its merits and the disposition of the appeal by this court, or until further order of this court. This stay order does not apply to

> the studies and planning of the panel which has been appointed by the District Court in its order of June 14, 1972, which panel was charged with the duty of preparing interim and final plans of desegregation. Said panel is authorized to proceed with its studies' and planning during the disposition of this appeal, to the end that there will be no unnecessary delay in the implementation of the ultimate steps contemplated in the orders of the District Court in event the decision of the District Court is affirmed on appeal. Pending disposition of the appeal, the defendants and the School Districts involved shall supply administrative and staff assistance to the aforesaid panel upon its request. Until further order of this court, the reasonable costs incurred by the panel shall be paid as provided by the District Court's order of June 14, 1972."

This court also has granted leave to appeal to various intervening parties and leave to file numerous amicus briefs. The briefs and arguments of all the parties have been considered in the disposition of this appeal.

We agree with two of the rulings of the District Court summarized above: (1) The Ruling on the Issue of Segregation and (2) the Findings of Fact and Conclusions of Law on "Detroit-only" plans of desegregation. We hold that the findings of fact of the District Court as set forth in these rulings are not clearly erroneous, Rule 52(a), Fed. R. Civ. P., but to the contrary are supported by substantial evidence.

As to the District Court's third ruling pertaining to the propriety of a Metropolitan remedy, we agree in part and reverse in part. We vacate this and the two remaining orders and remand to the District Court for further proceedings as hereinafter set forth in detail in this opinion.

I. Chronology of Proceedings

On April 7, 1970, the Detroit Board of Education adopted a plan to effect a more balanced distribution of black and white students in the senior high schools through enactment of changes in attendance zones involving some 12,000 pupils,

to become effective over a three year period. Three months later this modest effort was thwarted by the legislature of the State of Michigan through enactment of Act 48 of the Public Acts of 1970. Section 12 of the Act delayed implementation of the plan. The four members of the Board who supported the April 7 plan were removed from office through a citizen initiated recall election. The new members of the board and the incumbent members who had originally opposed the April 7 plan thereafter rescinded it.

The complaint in this case was filed by individual black and white school children and their parents, and the Detroit branch of the NAACP against the Board of Education of the City of Detroit, its members, and the then Superintendent of Schools, as well as the Governor, the Attorney General, the State Board of Education and the State Superintendent of Public Instruction of the State of Michigan. (The State of Michigan as such is not a party to this litigation. References thereto should be read as references to the public officials, State and local, through whom the State is alleged or shown to have acted.)

The complaint alleged that the Detroit public school system was and is segregated on the basis of race as the result of actions and policies of the Board of Education and of the State of Michigan. The complaint specifically challenged the constitutionality of Act 48 of the Public Acts of 1970 of the State of Michigan, which in effect repealed the April 7, 1970 high school desegregation plan formulated by the Detroit Board.

The case was heard originally on plaintiffs' motion for a preliminary injunction to restrain the enforcement of Act 48. In response to this motion the District Judge denied a preliminary injunction, did not rule on the constitutionality of Act 48, but granted the motion of the Governor and Attorney General of Michigan for dismissal of the cause as to them. On appeal this court held that § 12 of Act 48 was an unconstitutional interference with the lawful protection of Fourteenth Amendment rights, that there was no abuse of discretion in

denying a preliminary injunction, and that the Governor and Attorney General should not have been dismissed as parties defendant at that stage of the proceeding. The case was remanded to the District Court for an expedited trial on the merits. 433 F.2d 897.

On remand plaintiffs moved for immediate implementation of the April 7 plan. On December 3, 1970, following an evidentiary hearing on that plan and two updated plans, the District Court ordered implementation of the "Magnet" or "McDonald" plan effective at the beginning of the next full school year, pending ultimate disposition on the merits. Plaintiffs appealed and filed a motion for summary reversal. This court again held that the District Court had not abused its discretion in refusing to adopt the April 7 plan prior to an evidentiary hearing on the allegations of constitutional violations in the complaint. We remanded the case with instructions to proceed to trial expeditiously on the merits of plaintiffs' allegations concerning the Detroit public school system. 438 F.2d 945. The trial of the case on the issue of segregation began April 6, 1971, and continued until July 22, 1971, consuming 41 trial days. On September 27, 1971, the District Court issued its ruling on the issue of segregation, holding that the Detroit public school system was racially segregated as a result of unconstitutional practices on the part of the defendant Detroit Board of Education and the Michigan State defendants. 338 F.Supp. 582.

A decision on a motion to join a large number of suburban school districts as parties defendant was deferred on the ground that the motion was premature, in that no reasonably specific desegregation plan was before the court. The Detroit Board of Education was ordered to submit desegregation plans limited to the City, while State defendants were directed to submit plans encompassing the three-county metropolitan area. An effort was made to appeal these orders to this court. On February 23, 1972, this court held the orders to be non-appealable and dismissed the appeal. 468 F.2d 902, *cert. denied,* 409 U.S. 844 (1972).

After further proceedings concerning proposals for a Detroit only desegregation remedy and the presentation of three plans therefor, the District Judge on March 24, 1972, issued a ruling entitled "Ruling on Propriety of Considering a Metropolitan Remedy," and on March 28, 1972, he issued "Findings of Fact and Conclusions of Law on Detroit Only Plans of Desegregation." He rejected all Detroit only plans, saying in part: "Relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city."

Subsequently, the District Court issued an order on June 14, 1972, entitled "Ruling on Desegregation Area and Order for Development of Plan for Desegregation." In this ruling and order the District Court established tentative boundaries for a metropolitan remedy and provided for a panel of nine members to design plans for integration of the Detroit schools and those of 53 metropolitan school districts within certain guidelines.

The panel recommended preparatory purchases of school buses prior to implementation of an interim plan in September 1972. Following a hearing, the District Court on July 11 ordered State defendants to purchase or otherwise acquire 295 school buses.

In view of the intervening Congressional action by the enactment of the "Broomfield Amendment," certification was made to the Attorney General of the United States that the constitutionality of § 803 of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, had been called into question. The Department of Justice intervened, filed a brief and participated in the oral arguments before this court.

II. The Issues

All of the parties to this litigation in one form or another present three basic issues which we phrase as follows:

1. Are the District Court's findings of fact pertaining to constitutional violations resulting in system-wide racial segre-

gation of the Detroit Public Schools supported by substantial evidence or are they clearly erroneous?

2. Based on the record in this case, can a constitutionally adequate system of desegregated schools be established within the geographic limits of the Detroit school district?

3. On this record does the District Judge's order requiring preparation of a metropolitan plan for cross-district assignment and transportation of school children throughout the Detroit metropolitan area represent a proper exercise of the equity power of the District Court?

III. The Constitutional Violations

(A) Constitutional violations found to have been committed by the Detroit Board of Education:

(1) Segregative zoning and assignment practices.

(a) The District Judge found that the Detroit Board of Education formulated and modified attendance zones to create or perpetuate racial segregation. He also found that the feeder system for junior and senior high schools was designed to maintain rather than eliminate black or white schools at the higher levels. Its practice of shaping school attendance zones on a north-south rather than an east-west orientation resulted in attendance zone boundaries conforming to racial dividing lines.

(b) He further found that the Detroit Board of Education's policies involved a substantial number of instances of transporting black children past white schools with available school space.

He also found that it was the policy of the Board of Education to create optional attendance areas

which permitted white students to transfer to all white or predominately white schools located nearer the city limits.

The District Judge also found that the policies of the Detroit Board of Education (and State Board of Education) concerning school construction in some instances had the purpose of segregating students on a racial basis and in many others resulted in maintaining or increasing segregation.

The District Judge's findings of fact pertaining to alteration of zones and feeder patterns are as follows:

"The Board has created and altered attendance zones, maintained and altered grade structures and created and altered feeder school patterns in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools. The Board admits at least one instance where it purposefully and intentionally built and maintained a school and its attendance zone to contain black students. Throughout the last decade (and presently) school attendance zones of opposite racial compositions have been separated by north-south boundary lines, despite the Board's awareness (since at least 1962) that drawing boundary lines in an east-west direction would result in significant integration. The natural and actual effect of these acts and failures to act has been the creation and perpetuation of school segregation. There has never been a feeder pattern or zoning change which placed a predominantly white residential area into a predominantly black school zone or feeder pattern. Every school which was 90% or more black in 1960, and which is still in use today, remains 90% or more black." 338 F.Supp. at 588.

The legal conclusion of the District Judge is as follows:

"5. The Board's practice of shaping school attendance zones on a north-south rather than an east-west orientation, with the result that zone boundaries conformed to

racial residential dividing lines, violated the Fourteenth Amendment. Northcross v. Board of Ed. of Memphis, 6 Cir., 333 F.2d 661." 338 F.Supp. at 592-93.

* * *

"9. The manner in which the Board formulated and modified attendance zones for elementary schools had the natural and predictable effect of perpetuating racial segregation of students. Such conduct is an act of de jure discrimination in violation of the Fourteenth Amendment. United States v. School District 151, D.C., 286 F. Supp. 786; Brewer v. School Board of City of Norfolk, 4 Cir., 397 F.2d 37." 338 F.Supp. at 593.

There is, of course, other legal support for the conclusions set out above. *Davis* v. *School District of Pontiac,* 443 F.2d 573, 576 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971); *United States* v. *Board of Education, Ind. School District No. 1,* 429 F.2d 1253, 1259 (10th Cir. 1970); *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 867-68 (5th Cir. 1965), *aff'd in banc,* 380 F.2d 385 (5th Cir. 1966), *cert. denied sub nom, Caddo Parish School Board* v. *United States,* 389 U.S. 840 (1970); *Clemons* v. *Board of Education,* 228 F.2d 853, 858 (6th Cir.), *cert. denied,* 350 U.S. 1006 (1956); *Spangler* v. *Pasadena Board of Education,* 311 F. Supp. 501, 522 (C.D. Cal. 1970).

Witness Charles Wells, defendant School Board's assistant superintendent in charge of the Office of Pupil Personnel Services, read into the record and testified in support of the minutes of a meeting of the Citizens Association for Better Schools. Mr. Wells was the president of the Citizens Association at the time the meeting was conducted. His testimony includes the following:

"Q. (By Mr. Lucas) Go ahead, sir.

"A. 'November 3, 1960.

'TO: Honorable Nathan Kaufman, Chairman
Committee on Equal Education Opportunity.

'We should like to begin our presentation by reviewing with you briefly the development of our organization. We feel it is significant as it represents an attempt on the part of people who make up this organization to effectively deal with the frustrations historically inherent in attempting to provide for minority group children an adequate education within the Detroit Public School System. A majority of the people of the Negro race moved into the now Center District from other school districts within the limits of the City of Detroit. Although better housing conditions were but one of the motives for such a move, of equal importance was a desire to provide their children with a more equitable and enriched educational experience.

'They were aware of the increased population within their new geographical area, and accepted the counselling of the then new administration of the Board of Education, to the effect that additional tax monies would have to be made available if educational standards within the City of Detroit were to be improved, or even maintained. Consequently, each of them made a strong personal investment in the millage campaign of Spring 1959. In this campaign, initially, their efforts did not meet the wholehearted approval of the Negro community, since from past experience, particularly involving other millage campaigns, members of the Negro community had observed that the results of the expenditures of monies obtained from additional taxes, had little effect on the facilities, the equipment, or the curriculum available to their children.

'Despite this resistance, they were aware that there would be less justification for demanding adequate educational opportunities for their children if they did not accept their responsible share for the successful passing of the millage program. As a consequence of their efforts, their respective schools voted overwhelmingly for the millage program, and they logically expected that positive results would follow their efforts.

'Their first disillusionment occurred only a few months, but yet a few weeks after the passage of the millage — they were rewarded with the creation of the present Center District. In effect this District, with a few minor exceptions, created a segregated school system. It accomplished with a few marks of the crayon on the map, the return of the Negro child from the few instances of an integrated school exposure, to the traditional predominantly uniracial school system to which he had formerly been accustomed in the City of Detroit.

'Their attempts to meet this threat to their children's educational experience through existing school organizations met with little success. Their conferences with District and City-Wide administrators including the superintendent, Dr. Samuel Brownell, resulted in only rationalizations concerning segregated housing patterns, and denials of any attempts at segregation. When it was pointed out that regardless of motivation, that segregation was the result of their boundary changes, little compromise was effected, except in one or two instances, where opposition leadership was most vocal and aggressive.

'Concurrent with boundary changes, it was alarmingly noticeable that the school population within the Center District was rapidly increasing, and that the priority building program would have little positive effect in dealing with the problem. Attempts to discuss this problem with school and district administration gave promise of only minimal relief.

'Finally, it had been earlier noted by new residents moving into what is now the Center District that prior to and during its change from a uniracial (predominantly white) to a biracial system and again to a uniracial (predominantly Negro) school system that the quality of their children's previous educational experiences did not eqiup them to compete on an equal basis with resident children in the same grade and classifications.

'These experiences made them aware that no one organization composed of one or several schools, could ef-

fectively coordinate the mutual concern of the many parents residing within the Center District. Thus out of the several discussions of groups of people whose primary concern was the adequate and equitable education of their children, this organization was born. It is felt that no better description of its purpose, its objective, and its reason for being can be found than in the preamble to its Constitution, which is:

'PREAMBLE: Our interest is in equal educational opportunities for all persons within the City of Detroit.

'We do not believe that such opportunities are possible within a segregated school system.

'We oppose a policy of containment of minority groups within specified boundaries, an example of which is the Center District. While the above is of utmost concern to us we are also aware that there is need for improvement and enrichment of the standards within this district in practice as well as in theory.

'We believe that once standards have become reasonably adequate, that such standards should be maintained. It should be further recognized that future population shifts brought about by urban redevelopment will adversely affect the above goals in the Center District, unless there is anticipation of the impact of this population growth upon this district.

'Since the inception of our organization we have noted the following:

'The public school system of the City of Detroit is divided into nine administrative districts, one of which is the Center District.

'Yet, every day, when the children in this city leave their homes to go forth to public schools, approximately one out of every four leaves a home in the Center District. Of the 154,969 children enrolled in public elementary schools as of September 30, 1960, 36,264 or 23.4 percent of these children leave a home in the Center District.

'There are 221 elementary school buildings in the Detroit Public School System. Of these 28 are in the Center District. This means, then, that the 23.4 percent of the total elementary school population is accommodated in 12.7 percent of the buildings.

'Fifteen percent of these children sit in classes of 40 to 44 students per class. This is in comparison to:

East	.13 percent
North	.05 percent
Northeast	.04 percent
Northwest	.08 percent
South	.01 percent
Southeast	.01 percent
West	.05 percent

'Sixty-two and one-half percent of all the children in the city's elementary schools who sit in classes of 45 to 49 are children in the Center District. These schools in the Center District find their capacities short by 6,352 pupil stations. In other words, their capacities are overtaxed to the extent of 16 percent; and the future building program, as set forth by the superintendent's report of October 17, 1960, will make available only 11,189 additional pupil stations within the next ten-year period. However, this will be insufficient to meet the demands of the Center District. Therefore, it is apparent that a school bussing program will have to become a permanent part of the school housing program. Thus the manner in which the bussing program is administered becomes a matter of acute concern.

'Presently, children are being bussed by grades. Under this system a number of problems are created:

1) It makes necessary a reorganization of the bussing school, as well as the school into which the children are bussed.

2) They are not integrated into the school into which they are bussed, except in minor instances.

3) There is a possibility of the separation of the family unit.

4) Parents are unable to establish a good rapport with the teachers and administrators in the new school since there exists a time limit in which these children will be members of that school.

'It is recommended that a policy of bussing by geographical areas instead of by grades be instituted so as to eliminate the above problems.

'The emphasis on curricula objective are not comparable in the various school districts of the Detroit School System. There is a tendancy in the Center District to stereotype the educational capacity of the children. This means that children entering the schools in this district whose background enables them to comprehend an enriched educational program, are not challenged.

'For example, one student in the Hutchins Intermediate School who desired to prepare for entrance into an Eastern college found that Latin was not offered, and only after considerable effort by members of the community, along with his family, was Latin placed back in the school curriculum. Many other instances can be cited upon request.

'Conversely, children whose initial capacity is retarded by deprived socio-economic circumstances also go unchallenged. The District Administrator has admitted that no program exists to take care of these children.

'The curriculum and counselling as they now exist, do not encourage students to achieve their maximum capacities. We feel that the responsibility for any inequities in the educational experience offered to any group of children within a given school system must be assumed by those persons charged with the overall responsibility of administering that system.

'Therefore, we recommend that strong policies be adopted by the top administration to erase inequities of the

Detroit Public School System, and a policy of supervision through all levels of administration be instituted at all levels of administration to insure equal educational opportunities to all children.

'The Citizens' Association for Better Schools.'

"Q. Do you join in that statement in submission to the committee?

"A. Yes, I did."

Mr. Wells cited the example of the Center (administrative) District, where attendance boundaries were shaped in a gerrymandered fashion to conform to the racial residential pattern.

"Q. With regard to that same situation, you were expressing a problem which your committee had met in attempting to discuss this. Can you tell me how you came to be discussing this with the Board at that time?

"A. It was not with the Board of Education, I believe it was with the administration of the school system.

"Q. The administrative staff?

"A. Including the superintendent.

"Q. All right.

"A. Our initial concern about the boundaries of the center district grew out of the concern we had in 1960 about the changing of the attendance areas between the Central High School and the Mackenzie High School.

"Q. Is that the optional attendance area also set up in that?

"A. A part of that was optional. Well, let's put it that way, a part of it had been optional, the proposal was to eliminate the option. In the process of eliminating the option what it would mean would be that by and large the few black children who had been attending Mackenzie would have been pulled back into the Central area.

"Q. Mackenzie at that time was a majority white school?

"A. Predominately white.

"Q. Central by that time had become black?

"A. Predominately black.

"Q. So the cancellation of the optional area which had been there had the effect of preventing black children choosing Mackenzie, is that correct?

"A. That is right.

"Q. Were there any other schools — there is a reference made to the establishment of the center district boundaries — were there any other schools which had not previously been in certain feeder patterns that were drawn back into the center district?

"A. I am trying to remember now as I said eleven years.

"Q. I understand.

"A. If I remember correctly, the Sherrill School which also had been a part of it, that portion north of Tireman had been attending Mackenzie and they in turn, the total school then would have been returned to the Chadsey area.

"Q. What about Tappan and that area, are you familiar at all with changes that took place?

"A. Tappan was the junior high school in which Winterhalter, the elementary school in the area south of Davison just west of Ewald Circle attended. At that time the students from that area attended Tappan and all students from Tappan attended Mackenzie.

"The new change would mean that the students from Winterhalter, and I think McKerrow which is just below Winterhalter would have attended Tappan through the 9th grade, but then had been pulled back into the center district to attend Central High School.

"The other students in Tappan would have gone to Mackenzie.

"Q. The other students in Tappan, were they predominately white students?

"A. Yes. Our concern about this region really at that time was that we could draw a line which separated the black residents from the white residents and almost to the alley and that in effect was the boundary line of the center district."

There was evidence that school feeder patterns were changed so as to make particular junior high schools or senior high schools either generally white or generally black, as shown in the following testimony:

"MR. CALDWELL: Your Honor, I have copies of the Mumford High School district in 1959 which is taken from Plaintiff's Exhibit 78-A, and this makes it easier to see the schools.

"Q. Let's get back to the 1962-'63 overlay.

"Prior to the 1962-'63 – first of all, will you point out to the Court where the Vandenberg and Vernor Schools are.

"A. This triangle to the northwest corner of this area. (indicating)

"Q. Prior to 1962-63 where did the Vernor and Vanderburg youngsters go to high school?

"A. Mumford High School.

"Q. A boundary change was made in 1962-63?

"A. That's right.

"Q. Where did those youngsters go to school in that year?

"A. Ford High School.

"Q. How long did that feeder pattern continue?

"A. Until 1966-67 when they returned to Mumford.

"Q. All right.

"MR. CALDWELL: Plaintiffs' Exhibit 128-A, your Honor, reflects that in 1960 Vandenburg and Vernor were 0 percent black. Mumford was 16.1 black, Ford was .1 percent black. With regard to Vandenburg and Vernor, there was a gradual increase in the black population until 1966 when Vandenburg was 39.5 percent black and Vernor was 39.8 percent black.

"Then in 1967 the change was made taking Vandenburg and Vernor back into Mumford. Vandenburg had become 70 percent black, Vernor had become 63.2 percent black. That year the change was made and Mumford was 78.1 percent black, Ford was 4.1 percent black.

"Q. I believe that feeder pattern continued into the current school year?

"A. That is right.

"Q. Those schools now feed back into Ford High School this year?

"A. That is right."

The effect of such a policy was attested to by Dr. Gordon Foster of the University of Miami, director of the Florida School Desegregation Consulting Center:

"Q. The effect, Doctor, then, of the removal of Vandenberg and Vernor from the Ford feeder pattern into the Mumford feeder pattern, what was the effect in terms of race?

"A. The effect of this move in 1967-68 of the transfer back of the two elementary schools was to increase the segregation at Mumford, to take blacks from the Ford High School and, therefore, increase the segregated pattern there, and, in my opinion, it reinforced inevitably the perception that Ford would be kept white as a matter of basic policy and that Mumford would be a racially contained isolated high school attendance area."

Similar testimony regarding the segregative effect of altering school feeder patterns was given with respect to the Jefferson and Hutchins Junior High Schools, Garfield and Spain Junior High Schools, Burton and Irving Elementary Schools, Higginbotham Elementary School, Jackson and Foch Junior High Schools, Stellwagen, Keating and Clark Elementary Schools, Cleveland and Nolan Junior High Schools, Courville Elementary School, Ford and Brooks Junior High Schools, Osborne and Pershing High Schools, Parkman Elementary School, the Ellis, Sills, Newberry and Sampson Elementary Schools, and Northwestern and Chadsey High Schools.

The District Judge made the following findings of fact pertaining to busing black children to black schools past white schools:

> "The Board, in the operation of its transportation to relieve overcrowding policy, has admittedly bused black pupils past or away from closer white schools with available space to black schools. This practice has continued in several instances in recent years despite the Board's avowed policy, adopted in 1967, to utilize transportation to increase integration.
>
> "With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black." 338 F.Supp. at 588.

The legal conclusion of the District Judge follows:

> "8. The practice of the Board of transporting black students from overcrowded black schools to other identifiably black schools, while passing closer identifiably white schools, which could have accepted these pupils, amounted to an act of segregation by the school authorities. Spangler v. Pasadena City Bd. of Ed., D.C., 311 F.Supp. 501." 338 F.Supp. at 593.

Additional support for the District Judge's legal conclusion includes: *United States* v. *School District 151,* 286 F.Supp. 786, 798 (N.D. Ill. 1967), *aff'd,* 404 F.2d 1125, 1131 (7th Cir. 1968), *on remand,* 301 F.Supp. 201, 211, 222 (N.D. Ill. 1969), *aff'd,* 432 F.2d 1147, 1150 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *United States* v. *Board of School Commissioners, Indianapolis, Ind.,* 332 F.Supp. 655, 669 (S.D. Ind. 1971) *aff'd* 474 F.2d 81 (7th Cir. 1973).

The following testimony pertains to busing black children from overcrowded black schools past white schools with available pupil capacity to other black schools:

> "Q. I am trying to anticipate, Mr. Ritchie's question. Have you noted some examples of the bussing of black children from black schools to other black schools?

"A. I have.

"Q. Could you give us a couple illustrations?

"MR. BUSHNELL: While Dr. Foster is looking through his notes, might I make the request that we made yesterday that on conclusion of his testimony we have access to the notes made?

"MR. LUCAS: At the conclusion, yes. We have no objection to that.

"A. In 1960-61, and we don't have any record for '61-62 so I am not certain as to that year, students were transported from Angell to Greenfield Park. This has already been part of our testimony, I believe, 186 students and students from Angell to Higginbotham, 118 students. In 1969 —

"Q. Excuse me, Doctor, let me ask you if the Angell-Higginbotham — were there white schools available with space, from your examination of the records?

"A. Yes, there were.

"Q. Between Angell and Higginbotham?

"A. Yes, sir, I believe I testified to that before.

"Q. All right.

"A. In 1969 the Ruthruff Elementary School which was 99 percent black transported 143 children to Herman Elementary, 55 percent black.

* * *

"Q. (By Mr. Lucas, continuing) Dr. Foster, would you step to the map.

"I think we were talking about the Ruthruff-Herman Schools.

"A. Yes. We were testifying at recess about transportation of blacks past white schools. In 1969 we stated that Ruthruff Elementary which is here in the southeastern portion of the Mackenzie High School zone on the large 1970-71 attendance area map, in 1969 transported 143 children to Herman Elementary School which is just below the blue area on the undermap here — Herman Elementary School (indicating). Herman in 1969 was 55.6 percent black. Ruthruff was 99.1 percent black and I think it is important to note that the access

to Herman goes right past the Parkman Elementary School which at that time had 136 spaces available and according to their capacity figures —

"Q. Parkman was what percentage?

"A. Parkman I don't have the figure for '69 and '70. Parkman was 12.8 percent black."

* * *

"A. Another example was the Parker Elementary School which is in the general center of the Mackenzie High School zone. Parker in 1970 was 79.4 black; 61 children were bussed from Parker again to the Herman Elementary School which at that time was 58.5 percent black and again past the Parkman Elementary which in 1970 was 12.8 percent black.

"Q. Did Parkman have capacity at that time, Doctor?

"A. Parkman in '70, according to my data, had 121 spaces.

* * *

"Q. Excuse me, would you give us the A. L. Homes.

"MR. BUSHNELL: I thought the Court ruled on that?

"THE COURT: He says he is pursuing a non-cumulative matter here. If that be true he may go ahead.

"A. A. L. Holmes School, children were bussed from this school over to the McGraw School which is in the south end of the Northwestern District in center city. In 1970-71 the Post Junior High School, which is located —

"MR. BUSHNELL: If the Court please, Mr. Lucas just pointed out the location of Post which the witness obviously couldn't find on the map.

"THE COURT: Well, he hasn't moved it.

"A. I noted the west section of Cooley instead of the east. The Post Junior High School and Clinton Schools, which are in the east section of the Cooley High School attendance zone transported 54 students to the Jefferson School which is now in the Murray zone and it is located in the eastern section of the Murray High School attendance area. I think it is important to note that

these students who were bussed came from a considerable distance north and there were several possibilities —

"Q. Excuse me, were the Post children in a black school or white school?

"A. The Post School this year, 1970-71 was 99.3 percent black. The Clinton School from which they also came was 97 percent black.

"Q. What about Jefferson?

"A. Jefferson was 87.6 percent black. There were two or three other possibilities much closer to the Post-Clinton area. One would have been in the western portion of the Mackenzie district here (indicating).

"Q. What is the racial composition?

"A. At this time it had 35.4 percent black with a capacity of 109 stations available. Another possibility would have been the Vetal School in the Redford zone, the southern portion of the Redford High School zone, which at this time was 2 percent black with vacancies of 203 pupil stations and a third alternative could have been the Coffey School to the east of the Ford attendance area which at this time was 29 percent black with 69 pupil stations available.

"Q. Did you say to the east was part of the Ford attendance area or outside of that, Doctor?

"A. It's in the Ford attendance area.

* * *

"THE COURT: Well, to save time why don't we proceed on the assumption that that was his testimony. But if it proves otherwise we will strike it.

"MR. LUCAS: Thank you, sir.

"Q. (By Mr. Lucas) Doctor, I understand that the policy of the district is that bussing to relieve overcrowding would be done in such a manner as to improve integration at the receiving school. From your examination of the current bussing examples which you have given, do you have an opinion as to whether or not that policy has or has not been followed?

"A. Well, I think from the examples I have given so far it would give an indication that integration could

have been effected in a much better way if the children, instead of going to the schools would have been dropped off at other schools where the racial balance was quite different.

* * *

"Q. Are there any white schools from your examination of data, Doctor Foster, between Angell and Higginbotham which had capacity at that time?

"A. Yes, there were several which were a good deal closer to Angell than Higginbotham. The effect of this sort of zoning pattern was to provide segregated student ratios at all three of the elementary schools, and in terms of things that could be done or could have been done at that particular time to correct the segregated situation, it is my opinion that, first of all, the students being bussed from Angell could have been dropped off at any number of places on the way to Higginbotham, schools which had the space and had a better racial composition for this sort of input. This having been done, zone lines could have been redrawn at these three schools to have approached a racial balance situation which, in my opinion, would have helped to stabilize the situation at that time. This would have also assisted in the overcrowding at Pasteur and a couple of classrooms extra at Higginbotham.

"Q. Do you have an opinion, Doctor, as to the perception created by the maintenance of the Higginbotham School under those circumstances, including the transportation of black students from Angell into it?

"A. Well, it is obvious that if you transport black children past white schools to an all black school that the community is going to perceive this as a segregated intent, a segregated action. If you have a boundary situation which isolates and enforces black students to a particular area when the boundary lines could be changed to effectuate a better pattern racially, then it seems to me that community perception would also be that the school is not doing what it could in terms of integration and equal opportunity.

"Q. Doctor, from your examination of the data in 1960 are there any administrative reasons, any administrative problems which would indicate to you a reason why this boundary was maintained rather than drawn in some other fashion?

"A. In terms of school capacity there are none, no."

Defendant's witness (Mr. Henrickson) admitted instances of busing black students past closer white schools to black schools:

"Q. We find on the under and over capacity map in the Higginbotham area that there were three schools surrounding Higginbotham. Vernor, which is listed as being 121 over capacity; MacDowell, 103, is it? Pasteur, 90. At the same time we find that Higginbotham was 489 under capacity. Is that what the exhibit shows, sir?

"A. Yes.

"Q. We also know, do we not, that Pasteur, MacDowell and Vernor were white schools?

"A. Both Pasteur and MacDowell at that time, as I recall, had some beginning of black students as a result of the growth of the settlement of the Higginbotham area.

"Q. They were predominately white schools at that time?

"A. Yes.

"Q. Higginbotham was all or virtually all black?

"A. Yes.

"Q. Indeed, it had been the same in 1950, had it not?

"A. Yes.

"Q. At the same time that we are talking about you were transporting youngsters from Angell to Higginbotham, is that correct?

"A. Yes.

"Q. Those were black kids being transported from Angell to Higginbotham?

"A. Yes.

"Q. We also know on that exhibit that they were

transported past such schools as Fitzgerald and Clinton which had more than enough capacity to handle them?

"A. We have made no denial of that."

For some years it was a Board of Education policy to transport classrooms of black children intact to white schools where they were educated in segregated classes.

Testimony as to the intact busing practice follows:

"Q. (By Mr. Lucas, continuing) Will you go into the Detroit system, Doctor, on transportation.

"A. Answering it generally, counsellor, my answer would be that the intact bussing is the practice of transporting classrooms of children intact from one school to another and leaving them intact when they are educated at the receiving school.

"Q. Doctor, when such transportation occurs from a school which is 90 percent or more black to a school which is predominantly a white school, what effect, if any, does this have in terms of racial segregation on those children?

"A. This would lead to what we call classroom segregation or segregation within a particular school. It could be sometimes resegregation, but essentially it is a segregated situation within a school which could be segregated or not segregated generally.

"Q. Doctor, in your experience with school segregation and school desegregation plans, is this a technique which you have had to deal with in the past?

"A. On occasion, yes, sir.

"Q. Doctor, did you examine data or relevant information with respect to the transportation practices in the Detroit school system in connection with this type of bussing, intact bussing?

"A. Yes, sir.

"Q. What did your examination reveal, Doctor?

"A. It is my understanding from the data that there was intact bussing generally in the late '50's, as I said, and early '60's.

"Q. How did that intact transportation operate, Doctor?

"A. It involved transporting classrooms in whole from one school to another receiving school and at the receiving school the classrooms were kept intact for instructional purposes.

"Q. Was this policy changed at any time, Doctor, as far as you know?

"A. It is my understanding it was changed in the middle '60's but I don't remember the exact date.

"Q. What would the change be, Doctor? What type of bussing would result in terms of relieving overcrowding?

"A. You simply gather children up on a geographical basis and transport them and assign them at random to whatever grade they are in the receiving school rather than keeping them in an intact classroom."

Segregating children by race within schools has been held repeatedly to be unconstitutional. *Jackson* v. *Marvell School District No. 22,* 445 F.2d 211, 212 (8th Cir. 1970); *Johnson* v. *Jackson Parish School Board,* 423 F.2d 1055 (5th Cir. 1970).

The record indicates that in at least one instance Detroit served a suburban school district by contracting with it to educate its black high school students in a Detroit high school which was overwhelmingly black by transporting them away from nearby suburban white high schools and past Detroit high schools which were predominately white.

The District Judge found on this score that for years black children in the Carver School District were assigned to black schools in the inner city because no white suburban district (or white school in the city) would take the children.

This finding is supported by the testimony of Detroit School Superintendent Drachler, which follows:

"Q. When was the Carver District in existence as a separate entity?

"A. The Carver District? The Carver is not in Detroit.

"Q. Is it a separate school district whose students attended some Detroit high schools, in particular Northern?

"A. Oh, I see what you're referring to. I am told that back in '57, '58, at that time I was not in Central Office, there were some students from Carver District who did not have a place for adequate high school facilities. An arrangement was made with Detroit for the Carver students to come in on buses and go to Northern High School. Now, the nearest school to Carver was Mumford at the time. And they did go past Mumford towards Northern.

"Q. Is Carver a black district?

"A. Yes, black and very poor.

"Q. Has Carver District subsequently merged with Detroit?

"A. Oak Park.

"Q. With Oak Park?

"A. That's right.

"Q. And at that time the transportation was terminated?

"A. That's right. By the way, as a result of those youngsters coming, there was a rumor spread that Detroit children were being bussed, say, from the Higginbotham, which is north — Higginbotham area which is north of Mumford High School area but in Detroit, that they were being bussed to Northern, too, because they were black students, people saw black students from the Eight Mile area coming down. But to the best of my knowledge these were outside students.

"Q. There were black children being bussed to Higginbotham, weren't they?

"A. There were black children being bussed to Higginbotham.

"Q. From Angell?

"A. From Angell past some white schools. And when the issue was brought to Doctor Brownell's attention by me in about '59 or '60 — there were a series of instances

like that. There was the Angell, there was from the military fort in the southwest, they were bussing their own children up to the Noble, and Doctor Brownell, as soon as it was brought to his attention, abolished that as well as the optional areas.

"Q. Was this so-called intact bussing, that is a class being brought as a unit?

"A. Generally speaking, yes. That policy of changing to geographic bussing occurred about '62-'63 as a result of the Equal Education Opportunities Committee.

"Q. Was all of the bussing done in the City of Detroit of an intact nature until the Equal Opportunities study?

"A. To the best of my knowledge it was. I know when my children were being bussed, they were bussed intact."

(2) Optional Areas.

The record demonstrates that in many instances when neighborhoods in Detroit began to experience some inmigration of black families, it was Board of Education policy to create optional attendance zones, thereby allowing white students to change schools to all white or predominately white schools, generally located farther toward the city limits. For many years the record indicates this practice to have been pervasive. It continued in at least one instance up to the 1970-71 school year.

As to optional attendance zones, the District Judge found:

"During the decade beginning in 1950 the Board created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. In 1959 there were eight basic optional attendance areas affecting 21 schools. Optional attendance areas provided pupils living within certain elementary areas a choice of attendance at one of two high schools. In addition there was at least one optional area either created or existing in 1960 between two junior high

schools of opposite predominant racial components. All of the high school optional areas, except two, were in neighborhoods undergoing racial transition (from white to black) during the 1950s. The two exceptions were: (1) the option between Southwestern (61.6% black in 1960) and Western (15.3% black); (2) the option between Denby (0% black) and Southeastern (30.9% black). With the exception of the Denby-Southeastern option (just noted) all of the options were between high schools of opposite predominant racial compositions. The Southwestern-Western and Denby-Southeastern optional areas are all white on the 1950, 1960 and 1970 census maps. Both Southwestern and Southeastern, however, had substantial white pupil populations, and the option allowed whites to escape integration. The natural, probable, foreseeable and actual effect of these optional zones was to allow white youngsters to escape identifiably 'black' schools. There had also been an optional zone (eliminated between 1956 and 1959) created in 'an attempt . . . to separate Jews and Gentiles within the system,' the effect of which was that Jewish youngsters went to Mumford High School and Gentile youngsters went to Cooley. Although many of these optional areas had served their purpose by 1960 due to the fact that most of the areas had become predominantly black, one optional area (Southwestern-Western affecting Wilson Junior High graduates) continued until the present school year (and will continue to effect 11th and 12th grade white youngsters who elected to escape from predominantly black Southwestern to predominantly white Western High School). Mr. Henrickson, the Board's general fact witness, who was employed in 1959 to, *inter alia*, eliminate optional areas, noted in 1967 that: 'In operation Western appears to be still the school to which white students escape from predominantly Negro surrounding schools.' The effect of eliminating this optional area (which affected only 10th graders for the 1970-71 school year) was to decrease Southwestern from 86.7% black in 1969 to 74.3% black in 1970." 338 F.Supp. at 587-88.

From these facts the District Judge arrived at the following legal conclusion:

> "7. The Board's policy of selective optional attendance zones, to the extent that it facilitated the separation of pupils on the basis of race, was in violation of the Fourteenth Amendment. Hobson v. Hansen, D.C., 269 F.Supp. 401, aff'd sub nom., Smuck v. Hobson, 408 F.2d 175. [(D.C. Cir. 1969)]." 338 F.Supp. at 593.

Additional support for the District Judge's legal conclusion includes: *United States* v. *Texas Education Agency,* 467 F.2d 848 (5th Cir. 1972); *Northcross* v. *Board of Education of Memphis,* 333 F.2d 661, 665-66 (6th Cir. 1964) (different but analogous situation); *United States* v. *Board of School Commissioners of Indianapolis,* 332 F. Supp. 655, 668 (S.D. Ind. 1971) *aff'd* 474 F.2d 81 (7th Cir. 1973); *Spangler* v. *Pasadena City Board of Education,* 311 F.Supp. 501, 502 (C.D. Cal. 1970).

The effect of use of optional zones was described in Dr. Foster's testimony:

> "The first method or technique I might cite that is used to maintain segregation would be the use of optional zones.
>
> "Would it be possible for me to step to the board to illustrate?
>
> "Q. Please do.
>
> (The witness proceeded to the blackboard.)
>
> "A. Optional zones are sometimes also referred to as dual zones or dual overlapping zones. I think it will be easier for me to illustrate this briefly.
>
> (The witness drew a sketch on the board.)
>
> "A. If you have, let's say, two high school districts, District X and District Y, frequently when you set up an optional zone you carve the zone out of one district, occasionally two, but assume we carve it out of District Y and the children in this optional zone are then permitted to go to either high school X or high school Y,

this becomes in a sense an overlapping zone because if we refer to the boundaries of school District X at this point it not only includes the previous boundary but also takes in the optional zone.

"District Y in turn would include its previous boundaries, also including the optional zone. I think this may explain the origin of the connotation of the word 'overlapping'.

"Essentially optional zones are set up for two or three reasons, one is to allow white students or black students the option of attending one of the two attendance areas which make up the boundaries of the zone and another is for, occasionally for religious purposes to provide alternatives for persons of different religions. Sometimes these are set up for socio-economic reasons and I have on occasion seen them set up by boards of superintendents as political gimicks in order to help pass a bond issue or one thing or another or a school board or superintendent will set up temporary optional zones as a favor to certain constituents in return for assistance in helping the school board with one thing or another.

"I think in the frame work in which we operate they are used primarily for maintaining segregated patterns.

* * *

"Q. Dr. Foster, have you made a study and analysis of optional zones in the Detroit school system?

"A. Yes, I have."

Dr. Foster's analysis of the purpose and effect of each optional zone in existence in the Detroit School District is exemplified in his testimony on the Mackenzie-Central option.

"Q. Doctor Foster, do you have an opinion as to the administrative use of the optional attendance zone in 1960 between and prior to that in Mackenzie-Central area?

"A. Yes. I think it was used primarily — you mean as to the purpose of it?

"Q. Well, as to whether or not it had any administrative value that you know of, Doctor, aside from race?

"A. In terms of assignment I can see no advantage to it.

* * *

"Q. Do you have an opinion as to its use in terms of segregation or desegregation, Doctor Foster?

"A. In my opinion it was used as an optional zone to allow whites during the period it was in existence in the '50's and also until such time as it was done away with in 1962 to be assigned to predominantly white Mackenzie High School.

"Q. Doctor Foster, from your examination of the 1950 census and in turn the 1960 census exhibits, do you have an opinion as to the effect of such an optional zone on the community residence pattern in the community?

* * *

"A. Community people and residents in a situation such as this generally have a perception that there is something wrong with their school, that the whites need an optional zone to get out into a less black situation and, therefore, this increases their perception of racial isolation and, in fact, physical containment.

"Q. Does this have an effect, Doctor, in terms of the residence pattern? I believe you testified in 1950 the optional area was entirely white or zero to 4.9 per cent white.

* * *

"A. In my opinion this tends to increase the instability of the community because they generally feel this is an ad hoc temporary interim situation and it increases white flight in this sort of situation.

* * *

"Q. Doctor Foster, does the use of these techniques in some areas have an effect in terms of the perception of the community of schools besides the actual two schools to which the option was involved?

* * *

"A. Thank you. Yes, I think the perception is not only

> of rank and file community residents, but people of considerable influence in the community, along with School Board administration people, School Board members, School Board officials. In many cases they have substantiated this perception that I have recounted; that the optional zones did lead to greater pupil segregation and a feeling of frustration that the school authorities were not doing what was called for in terms of desegregation, and it had a generally debilitating effect on the image of the schools as far as all of these groups were concerned."

Mr. Henrickson, defendant School Board's principal witness and divisional director of planning and building studies in the School Housing Division, did not deny the discriminatory effect of at least some of these optional zones.

> "Q. In 1959 optional areas frustrated integration, did they not?
>
> "MR. BUSHNELL: Objection to the form of the question.
>
> "THE COURT: He may answer.
>
> "A. Some of these areas in 1959 had no effect whatever with movement of black or white students. They were either all black or all white. Some of them such as the Western-Southwestern area can be said to have frustrated integration and continued over the decade."

(3) Building Construction.

The District Judge found and the record contains evidence that the Detroit Board of Education practices in school construction generally tended to have segregative effect; the great majority of schools were built in either overwhelming all black or all white neighborhoods so that the new schools opened as one race schools.

The District Judge's school construction findings were as follows:

"In 1966 the defendant State Board of Education and Michigan Civil Rights Commission issued a Joint Policy Statement on Equality of Educational Opportunity, requiring that

> 'Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities . . . . Each of these situations presents an opportunity for integration.'

Defendant State Board's 'School Plant Planning Handbook' requires that

> 'Care in site locations must be taken if a serious transportation problem exists or if housing patterns in an area would result in a school largely segregated on racial, ethnic, or socio-economic lines.'

The defendant City Board has paid little heed to these statements and guidelines. The State defendants have similarly failed to take any action to effectuate these policies. Exhibit NN reflects construction (new or additional) at 14 schools which opened for use in 1970-71; of these 14 schools, 11 opened over 90% black and one opened less than 10% black. School construction costing $9,222,000 is opening at Northwestern High School which is 99.9% black, and new construction opens at Brooks Junior High, which is 1.5% black, at a cost of $2,500,000. The construction at Brooks Junior High plays a dual segregatory role: not only is the construction segregated, it will result in a feeder pattern change which will remove the last majority white school from the already almost all-black Mackenzie High School attendance area.

"Since 1959 the Board has constructed at least 13 small primary schools with capacities of from 300 to 400 pupils. This practice negates opportunities to integrate, 'contains' the black population and perpetuates and compounds school segregation." 338 F.Supp. at 588-89.

Other cases in which such findings have been held to constitute a de jure act of segregation include: *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 21 (1971); *Cisneros* v. *Corpus Christi Independent School Dist.,* 467 F.2d 142 (5th Cir. 1972), *pet. for cert. filed,* 41 U.S.L.W. 3225 (Oct. 31, 1972); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *petition for cert. filed,* 41 U.S.L.W. 3114 (U.S. Aug. 28, 1972); *Davis* v. *School District of Pontiac,* 443 F.2d 573, 576 (6th Cir.), *cert. denied* 402 U.S. 913 (1971); *Sloan* v. *Tenth School District,* 433 F.2d 587, 590 (6th Cir. 1970); *United States* v. *Board of Education of Tulsa,* 429 F.2d 1253, 1259 (10th Cir. 1970); *Brewer* v. *School Board of Norfolk,* 397 F.2d 37, 42 (4th Cir. 1968); *United States* v. *Board of Public Instruction,* 395 F.2d 66, 69 (5th Cir. 1968); *Kelley* v. *Altheimer, Arkansas Public School Dist. No. 22,* 378 F.2d 483, 496-97 (8th Cir. 1967); *Johnson* v. *San Francisco Unified School District,* 339 F.Supp. 1315, 1326, 1341 (N.D. Cal. 1971); *United States* v. *Board of School Commissioners of Indianapolis,* 332 F.Supp. 655 (S.D. Ind. 1971) *aff'd* 474 F.2d 81 (7th Cir. 1973); *Spangler* v. *Pasadena City Board of Education,* 311 F.Supp. 501, 522 (C.D. Cal. 1970); *United States* v. *School District 151,* 286 F.Supp. 786, 798 (N.D. Ill.), *aff'd,* 404 F.2d 1125 (7th Cir. 1968); *Lee* v. *Macon County Board of Education,* 267 F.Supp. 458, 472 (M.D. Ala.), *aff'd per curiam sub nom., Wallace* v. *United States,* 389 U.S. 215 (1967).

Record evidence pertaining to Detroit Board of Education building construction practices and their results include:

> "Q. Doctor Foster, I show you a document in evidence, Plaintiff's Exhibit 70. I direct your attention to page 15 of the exhibit. The exhibit is School Planning Handbook, Bulletin 412, revised, January, 1970, Michigan Department of Education. Directing your attention to Chapter 2, the School Site, and the last full paragraph in the left-hand column on page 15, Doctor, would you read that paragraph?

"A. 'Care in site location must be taken if a serious transportation problem exists or if housing patterns in an area would result in a school largely segregated on racial, ethnic or socio-economic lines.'

"Q. Doctor, would you step down to the map, please? Do you have a copy, Doctor, of Plaintiff's Exhibit 79?

"A. Yes, I do.

"Q. Doctor, would you examine Plaintiff's Exhibit 153, which shows new school construction, 1960 to 1970? Perhaps you had better step back here. Doctor, the black squares on here represent schools opening 80 to 100 per cent black in pupil enrollment. Would you direct your attention to the Drew Junior High School on the map and examine the exhibit and tell me when Drew was opened?

"A. According to the exhibit, the Drew Junior High School was opened in 1970.

"Q. And what was it opened as in terms of its enrollment, Doctor?

"A. 1,587 students.

"Q. And its percent black?

"A. 95 per cent black.

"Q. And the Eileen Primary School, Doctor, can you locate it on the map?

"A. The Eileen Primary is in the Cooley High School zone, I believe.

"Q. And when did it open, Doctor?

"A. 1970.

"Q. And what was its enrollment and its pupil population in terms of black?

"A. 333 students. The per cent black was 99.1.

"Q. Would you examine the map and locate the E. M. Turner Primary?

"A. Yes.

"Q. What year was that opened, Doctor?

"A. The Turner Primary was opened in 1969.

"Q. And its enrollment of pupil population?

"A. 362 pupils, 97.5 percent black.

"Q. Can you find the Stewart School on there, Doctor?

"A. The Stewart School is in the same general area as Turner, a little to the south.

"Q. What year was it opened?

"A. 1970.

"Q. Its population and percent black?

"A. 766 enrollment, 98.8 percent black.

"Q. Marxhausen Primary, Doctor, can you locate that on the map?

"A. Marxhausen is in the Finney zone.

"Q. Is that near or far away from the A. L. Holmes School, Doctor?

"A. As I remember, rather close to the Holmes School.

"Q. Can you locate the Holmes School with reference to that?

"A. The Holmes School is the next one to the northwest.

"Q. And what was its pupil population when it opened?

"A. Marxhausen was opened in 1970 with a pupil population of 302, 92.4 percent black.

"Q. Would you locate Mack Primary, Doctor?

"A. Mack Primary is also in the Finney zone.

"Q. And when did it open?

"A. Mack opened in 1970 with an enrollment of 173, 98.8 percent black.

"Q. Could you locate the Angell Primary area, Doctor?

"A. The Angell area is in the Northwestern attendance zone.

"Q. And what was its enrollment and percent black?

"A. Angell was 1,282 students when it opened in 1970. The percent black was 99.9

"Q. Is there an asterisk by that particular school, Doctor?

"A. On the exhibit?

"Q. Yes.

"A. Yes, there is.

"Q. Would you refer to the cover and tell us what that asterisk indicates?

"A. It says, 'The racial count data included in existing school with the same name.'

"Q. Can you locate the Stark School, Doctor?

"A. The Stark School is in the Southeastern zone.

"Q. And what was its enrollment?

"A. The enrollment was 822 when it opened in 1969.

"Q. And the percent black?

"A. 98.4 percent black.

"Q. Can you locate the new King Senior High School, Doctor?

"A. The new King Senior High School?

"Q. Yes.

"A. Here.

"Q. When did it open?

"A. It opened in 1968.

"Q. What was its enrollment?

"A. 1,897 pupils.

"Q. And its percent black?

"A. 98.8 percent black.

"Q. Can you locate the Field Annex, Doctor?

"A. Just to the northeast of King, the Field Annex.

"Q. And what was its enrollment?

"A. 461.

"Q. Its per cent black?

"A. 90.5 per cent black.

"Q. Can you locate the Glazer School, Doctor Foster?

"A. The Glazer School is in the Central zone.

"Q. And when did it open?

"A. In 1967.

"Q. And what was its enrollment, Doctor?

"A. 850 students.

"Q. What was its per cent black?

"A. 100 per cent black."

Similar testimony was given with respect to the Stevenson, Cortez, Beaubien, Sander, St. Clair Annex, Murray, Kettering, Krolik, Joy, Tendler, Belleville, McGraw, Knudsen, Keidan,

Jamieson, Butzel, Woodward, Tendler and Norvell Schools. White schools built to accommodate white residential areas included Fox, Lessenger, Murphy, Taft, Fleming, Earhart, Reeves, Brooks and McKenny Annex.

"Q. Thank you, Doctor.

"Doctor Foster, from your examination of the pattern of construction in this school system, 1960 to 1970, do you have an opinion as to the effect of that pattern of construction on segregation in the Detroit School System?

"A. My opinion is that construction practices were followed in such a way as to increase segregation. I say this because of the large number of schools that were opened that were either all black or all white or with a disproportionate number of one race or the other upon opening.

* * *

"Q. (By Mr. Lucas) Does the location of a school in a particular place have a long term effect on a school system?

"A. In terms of the nature of the pupils assigned to the school, do you mean?

"Q. Yes, sir.

"A. Yes, it does.

"Q. Are there alternatives in schoolhouse construction which can or should be considered by a school district in terms of affecting the racial composition of student bodies?

"A. In terms of site selection there are, yes.

"Q. What are some of the alternatives which can or should be utilized, in your opinion, Doctor?

"A. It is customary in this day and age to consider the problem of integration or segregation very carefully in selecting sites for school buildings and, well, this was pointed out, I believe, in the bit I read from the Michigan State Department.

"Q. What effect in terms of perception of the community does it have when a school is opened with an overwhelming enrollment of one race or the other?

"A. Generally the community perceives, in my opinion, that the school has been thought of as being, going to be an all white school or all black school and in either case generally that it is racially isolated."

(B) The constitutional violations found to have been committed by the State of Michigan.

(1) School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legislature. (*See* § V (A), pp. 56-62, *infra.*) Hence, the segregative actions and inactions of the Detroit Board of Education previously outlined are the actions of an agency of the State of Michigan.

(2) In 1970 the Detroit School Board undertook implementation of its April 7 desegregation plan applicable to its high schools. On meeting considerable resistance thereto, it nonetheless proceeded. At that point the State Legislature intervened by Act 48 of the Public Acts of 1970 specifically overruling the Detroit Board of Education's desegregation plan. While this statute has since been invalidated by judgment of this court, 433 F.2d 897, its contribution to preventing desegregation and to continuing and increasing segregation of the Detroit school system cannot be overlooked.

(3) Under Michigan law, M.S.A. § 15.1961, school building construction plans must be approved by the State Board of Education. Prior to 1962 the State Board also had specific statutory authority to supervise school site selection. The proofs concerning the effect of Detroit's school construction program are therefore largely applicable to show State responsibility for the segregative results.

(4) During the critical years covered by this record the School District of Detroit was denied any allocation of State funds for pupil transportation, although such funds were made generally available for students who lived over a mile and a half from their assigned schools in rural Michigan.

(5) Finally, the cross-district transportation of black high school students from the Carver School, located in Ferndale school district, to a black high school in Detroit could not have taken place without the approval, tacit or express, of the State Board of Education. (*See supra* pp. 28-30).

The District Judge's findings pertaining to constitutional violations by the State of Michigan are as follows:

> "The State and its agencies, in addition to their general responsibility for and supervision of public education, have acted directly to control and maintain the pattern of segregation in the Detroit schools. The State refused, until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned, while providing in many neighboring, mostly white, suburban districts the full range of state supported transportation. This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities.
>
> "The State, exercising what Michigan courts have held to be is 'plenary power' which includes power 'to use a statutory scheme, to create, alter, reorganize or even dissolve a school district, despite any desire of the school district, its board, or the inhabitants thereof,' acted to reorganize the school district of the City of Detroit.
>
> "The State acted through Act 48 to impede, delay and minimize racial integration in Detroit schools. The first sentence of Sec. 12 of the Act was directly related to the April 7, 1970 desegregation plan. The remainder of the section sought to prescribe for each school in the eight districts criterion of 'free choice' (open enrollment) and 'neighborhood schools' ('nearest school priority acceptance'), which had as their purpose and effect the maintenance of segregation.

"In view of our findings of fact already noted we think it unnecessary to parse in detail the activities of the local board and the state authorities in the area of school construction and the furnishing of school facilities. It is our conclusion that these activities were in keeping, generally, with the discriminatory practices which advanced or perpetuated racial segregation in these schools." 338 F. Supp. at 589.

The District Judge arrived at the following legal conclusions:

"11. Under the Constitution of the United States and the constitution and laws of the State of Michigan, the responsibility for providing educational opportunity to all children on constitutional terms is ultimately that of the state. Turner v. Warren County Board of Education, D.C., 313 F.Supp. 380; Art. VIII, §§ 1 and 2, Mich. Constitution; Daszkiewicz v. Detroit Bd. of Ed. of City of Detroit, 301 Mich. 212, 3 N.W.2d 71.

"12. That a state's form of government may delegate the power of daily administration of public schools to officials with less than state-wide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the constitution. In such instances the constitutional obligation toward the individual school children is a shared one. Bradley v. Sch. Bd. of City of Richmond, D.C., 51 F.R.D. 139, 143.

"13. Leadership and general supervision over all public education is vested in the State Board of Education. Art. VIII, § 3, Mich. Constitution of 1963. The duties of the State Board and superintendent include, but are not limited to, specifying the number of hours necessary to constitute a school day; approval until 1962 of school sites; approval of school construction plans; accreditation of schools; approval of loans based on state aid funds; review of suspensions and expulsions of individual students for misconduct [Op.Atty.Gen., July 7, 1970, No. 4705]; authority over transportation routes and disburse-

ment of transportation funds; teacher certification and the like. M.S.A. 15.1023(1), M.C.L.A. § 388.1001. State law provides review procedures from actions of local or intermediate districts (see M.S.A. 15.3442, M.C.L.A. § 340.442), with authority in the State Board to ratify, reject, amend or modify the actions of these inferior state agencies. See M.S.A. 15.3467; 15.1919(61); 15.1919(68 b); 15.2299(1); 15.1961; 15.3402, M.C.L.A. §§ 340.467, 388.621, 388.628(a), 388.681, 388.851, 340.402; Bridgehampton School District No. 2 Fractional of Carsonville, Mich. v. Supt. of Public Instruction, 323 Mich. 615, 36 N.W.2d 166. In general, the state superintendent is given the duty '[t]o do all things necessary to promote the welfare of the public schools and public educational instructions and provide proper educational facilities for the youth of the state.' M.S.A. 15.3252, M.C.L.A. § 340.252. See also M.S.A. 15.2299(57), M.C.L.A. § 388.717, providing in certain instances for reorganization of school districts.

"14. State officials, including all of the defendants, are charged under the Michigan constitution with the duty of providing pupils an education without discrimination with respect to race. Art. VIII, § 2, Mich. Constitution of 1963. Art. I, § 2, of the constitution provides:

> 'No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.'" 338 F.Supp. at 593-94

Some of the evidence in this record supporting the District Judge's findings of State acts which discriminatorily affected the Detroit Board of Education and contributed to pupil segregation follows. The State statutory scheme of support of transportation for school children directly discriminated against Detroit. Dr. John W. Porter, the State Superintendent of

Public Instruction in Michigan, testified as to the State transportation aid formula:

"Q. (By Mr. Lucas) Dr. Porter, does the State pay the cost of pupil transportation in the State of Michigan?

"A. The State pays roughly 75 percent of the cost. Last year the appropriation was $29 million.

"Q. Do you know what percent of the school children in the State of Michigan are transported to the school at public expense?

"A. Yes, I do. 40 percent of all students in Michigan are transported. That equates out to about 833,000 students last year.

"Q. Dr. Porter, is there some formula in terms of distance which makes a child eligible for transportation that would be aided by the state?

"A. Yes. It is a very complicated formula that 197 computations, and we are in the process right now of reducing this —

"Q. (Interposing) You mean the financial formula is complicated. But, in terms of distance from his home to the school —

"A. A mile and a half outside the city limits. Until this year the legislature amended the Act based upon the recommendations of the State Board of Education to allow for in-city transportation which we had never had before. The legislature did not appropriate funds for that. So, now the funds that are now used are basically for rural areas and suburban areas where the students live a mile and a half from the school.

"Q. When you say 'city,' is there some limitation? For instance, would Grosse Pointe, Harper Woods, areas like that that surround the City of Detroit, are they eligible for transportation?

"A. In the in-city. But, if the students come across the city boundary lines they live more than a mile and a half, which is quite prevalent throughout the state, then they are eligible for the funds.

"Q. Well, I think my question may have been confusing. Is there some type of city — is it just anyplace incorporated as a city that is differentiated from the rural areas, or certain cities eligible for this state aid at the present time and receive the funds —

"THE COURT: I think what Mr. Lucas is trying to get at is whether under the old practice whether any city has ceased state aid for transportation within the city.

"A. Yes, we have a number of instances where the city would be receiving aid for transportation, because the law says that if the bus in order to get the students to the school crosses outside of the city boundary, the city is then eligible for aid, and we, and we have a number of instances where that exists.

"THE COURT: In other words, where the student originates his ride outside the city limits transportation is assisted?

"A. That's right, or where the student lives in the city but the bus has to go outside of the city and come back he is also eligible. This, however, does not negate local city officials, school board officials from providing transportation. There is no prohibition against that.

"Q. (By Mr. Lucas) You said the legislature changed the law but didn't provide the money. Now, they are eligible for state aid but it is unfunded now, is that what you are saying?

"A. The law was changed last year to permit in-city bus transportation but in changing the law the legislature said our department had to disburse the funds to the eligible existing areas which meant that since they did not increase the amount of funds appropriated we could not provide for in-city transportation.

"Q. If a child lives in the city and lives more than a mile and a half from the school to which he is assigned he may not receive the state aid because it is unfunded at the present time?

"A. That is correct.

"Q. But if he lives the same distance away and lived outside the City of Detroit, for example, then he could receive state aide?

"A. That is correct, or any other area."

The clearest example of direct State participation in encouraging the segregated condition of Detroit public schools, however, is that of school construction in Detroit and the surrounding suburban areas. Until 1962 the State Board of Education had direct statutory control over site planning for new school construction. During that time, as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit Metropolitan area (*See supra* pp. 35-42). Since 1962 the State Board has continued to be involved in approval of school construction plans.

IV. Conclusion as to Constitutional Violations

The discriminatory practices on the part of the Detroit School Board and the State of Michigan revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system by the District Judge.

There is, of course, a significant distinction between this record and those school segregation cases which have flooded the courts since *Brown* v. *Topeka, supra.* This distinction is that Michigan has never enforced segregation by State laws which provided for separate black and white school systems, as was the pattern prior to 1954 in many other States. As a consequence, there always have been some instances of actual school integration in Detroit and still more instances of token school integration.

Defendants seek to insulate themselves from remedial action by federal courts by pointing to the long standing public policy of Michigan, as expressed in its statutes, of integration of public education. However, this court is not blind to the fact that governments can act only through the conduct of

their officials and employees and that unconstitutional actions of individuals can be redressed. *See, e.g., Clemons* v. *Board of Education,* 228 F.2d 853 (6th Cir.), *cert. denied,* 350 U.S. 1006 (1956).

The record in this case amply supports the findings of the District Court of unconstitutional actions by public officials at both the local and State level.

Historically de jure segregation has come about through statutory command explicitly establishing dual school systems. Michigan's declared public policy is urged as a controlling distinction. No matter how important this distinction may be, it does not in our judgment negate the de jure segregation findings entered in this case by the District Judge. As said in *United States* v. *The Board of School Commissioners of the City of Indianapolis,* 474 F.2d 81, 83 (7th Cir. 1973): "[T]he actions of the Board of School Commissioners and its duly-appointed representatives and agents may be sufficient to constitute *de jure* segregation without being based on state law, or even if they are in derogation of state law forbidding segregation."

The record contains substantial evidence to support the finding of the District Court that the segregation of the Detroit public schools, however rooted in private residential segregation, also was validated and augmented by the Detroit Board of Education and Michigan State Board action of pervasive influence through the system. Even if the segregation practices were a bit more subtle than the compulsory segregation statutes of Southern States, they were nonetheless effective.

It is our view that the findings of fact pertaining to actions of the Detroit Board of Education and the State of Michigan which caused or contributed to Detroit school segregation are not clearly erroneous and that the District Court was therefore authorized and required to take effective measures to desegregate the Detroit Public School System. *Brown* v. *Board of Education of Topeka [I],* 347 U.S. 483 (1954); *Brown* v. *Board of Education of Topeka [II],* 349 U.S. 294 (1955);

Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Davis* v. *Board of Commissioners,* 402 U.S. 33 (1971).

This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation.

V. The District Court's Ruling that no Detroit Only Desegregation Plan is Possible

Subsequent to the entry of its findings of constitutional violations on the part of the Detroit Board of Education and the State of Michigan resulting in system-wide segregation of Detroit public schools, the District Court requested plans for Detroit only desegregation. His findings of fact pertaining to these plans warrant repetition:

"FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON
DETROIT-ONLY PLANS OF DESEGREGATION

"In accordance with orders of the court defendant Detroit Board of Education submitted two plans, limited to the corporate limits of the city, for desegregation of the public schools of the City of Detroit, which we will refer to as Plan A and Plan C; plaintiffs submitted a similarly limited plan, which will be referred to as the Foster Plan. Hearings were had on said plans on March 14, 15, 16, 17 and 21, 1972. In considering these plans the court does not limit itself to the proofs offered at the hearing just concluded; it considers as part of the evidence bearing on the issue (*i.e.,* City-Only Plans) all proofs submitted in the case to this point, and it specifically incor-

porates herein by reference the Findings and Conclusions contained in its "Ruling on Issue of Segregation," filed September 27, 1971.

"The court makes the following factual findings:

"PLAN A.

"1. The court finds that this plan is an elaboration and extension of the so-called Magnet Plan, previously authorized for implementation as an interim plan pending hearing and determination on the issue of segregation.

"2. As proposed we find, at the high school level, that it offers a greater and wider degree of specialization, but any hope that it would be effective to desegregate the public schools of the City of Detroit at that level is virtually ruled out by the failure of the current model to achieve any appreciable success.

"3. We find, at the Middle School level, that the expanded model would affect, directly, about 24,000 pupils of a total of 140,000 in the grades covered; and its effect would be to set up a school system within the school system, and would intensify the segregation in schools not included in the Middle School program. In this sense, it would increase segregation.

"4. As conceded by its author, Plan A is neither a desegregation nor an integration plan.

"PLAN C.

"1. The court finds that Plan C is a token or part-time desegregation effort.

"2. We find that this plan covers only a portion of the grades and would leave the base schools no less racially identifiable.

"PLAINTIFFS' PLAN

"1. The court finds that Plaintiffs' Plan would accomplish more desegregation than now obtains in the system, or would be achieved under Plan A or Plan C.

"2. We find further that the racial composition of the student body is such that the plan's implementation would clearly make the entire Detroit public school system racially identifiable as Black.

"3. The plan would require the development of transportation on a vast scale which, according to the evidence, could not be furnished, ready for operation, by the opening of the 1972-73 school year. The plan contemplates the transportation of 82,000 pupils and would require the acquisition of some 900 vehicles, the hiring and training of a great number of drivers, the procurement of space for storage and maintenance, the recruitment of maintenance and the not negligible task of designing a transportation system to service the schools.

"4. The plan would entail an overall recasting of the Detroit school system, when there is little assurance that it would not have to undergo another reorganization if a metropolitan plan is adopted.

"5. It would involve the expenditure of vast sums of money and effort which would be wasted or lost.

"6. The plan does not lend itself as a building block for a metropolitan plan.

"7. The plan would make the Detroit school system more identifiably Black, and leave many of its schools 75 to 90 per cent Black.

"8. It would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.

"9. It would subject the students and parents, faculty and administration, to the trauma of reassignments, with little likelihood that such reassignments would continue for any appreciable time.

"In summary, we find that none of the three plans would result in the desegregation of the public schools of the Detroit school district.

"CONCLUSIONS OF LAW

"1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. See Ruling on Issue of Segregation, September 27, 1971.

"2. On the basis of the court's finding of illegal school segregation, the obligation of the school defendants is to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. *Green* v. *County School Board,* 391 U.S. 430; *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1.

"3. Detroit Board of Education Plans A and C are legally insufficient because they do not promise to effect significant desegregation. *Green* v. *County School Board, supra,* at 439-440.

"4. Plaintiffs' Plan, while it would provide a racial mix more in keeping with the Black-White proportions of the student population than under either of the Board's plans or as the system now stands, would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation.

"5. The conclusion, under the evidence in this case, is inescapable that relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city. The State, however, cannot escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local authority.

* * *

"School district lines are simply matters of political convenience and may not be used to deny constitutional rights. If the boundary lines of the school districts of the City of Detroit and the surrounding suburbs were drawn today few would doubt that they could not with-

stand constitutional challenge. In seeking for solutions to the problem of school segregation, other federal courts have not "treated as immune from intervention the administrative structure of a state's educational system, to the extent that it affects the capacity to desegregate. Geographically or administratively independent units have been compelled to merge or to initiate or continue cooperative operation as a single system for school desegregation purposes."[1]

"That the court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools is obvious; that it has the authority, nay more, the duty to (under the circumstances of this case) do so appears plainly anticipated by Brown II,[2] seventeen years ago. While other school cases have not had to deal with our exact situation,[3] the logic of their application of the command of Brown II supports our view of our duty.

"FOOTNOTES

"1 Bradley v. Richmond, supra [slip opinion p. 68].

"2 Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, pp. 300-301.

"3 Haney v. County Board of Education of Sevier County, 410 F.2d 920 (8th Cir. 1969); Bradley v. School Board of the City of Richmond, supra, slip opinion pp. 664-65; Hall v. St. Helena Parish School Board, 197 F.Supp. 649 (E.D. La. 1961), aff'd. 287 F.2d 376 (5th Cir. 1961) and 368 U.S. 515 (1962); Lee v. Macon County Bd. of Educ., 448 F.2d 746, 752 (5th Cir. 1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th Cir. 1971); United States v. Texas 447 F.2d 551 (5th Cir. 1971); Lemon v. Bossier Parish School Board, 446 F.2d 911 (5th Cir. 1971)."

The District Judge's finding that no Detroit only plan can achieve desegregation of the Detroit public school system points up another substantial distinction between this case and the classical school segregation case. This record presents a wholly new fact pattern in a school segregation case so far as this Circuit is concerned. This court never before has been confronted by a finding that any less comprehensive a solution

than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.

Relevant to and supportive of the District Judge's findings are these school census figures showing trends toward segregation in the Detroit schools during the last decade:

1960	100 of 251 schools were 90% or more white 71 of 251 schools were 90% or more black 68% of all schools were 90% or more one race.
1970	69 of 282 schools were 90% or more white 133 of 282 schools were 90% or more black 71.6% of all schools were 90% or more one race.
1960-61	65.8% of the total number of black students in regular schools were in 90% or more black schools.
1970-71	74.9% of the total number of black students in regular schools were in 90% or more black schools.

This record reflects a present and expanding pattern of all black schools in Detroit (resulting in part from State action) separated only by school district boundaries from nearby all white schools. We cannot see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district.

The boundaries of the Detroit School district are identical to the geographical boundaries of the City of Detroit. This means that the Detroit school district, like the City, contains within its boundaries two entirely separate cities (and school districts), Hamtramck and Highland Park, and surrounds a third City (and school district), Dearborn, on three sides. Immediately adjacent to the boundaries of the Detroit school district are seventeen school districts. An overwhelming majority of these districts, other than Detroit, Highland Park,

River Rouge and Hamtramck, are entirely white or contain only a token number of black students.

Like the District Judge, we see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district.

A. Status of School Districts under Michigan Law

This conclusion is supported by the status of school districts under Michigan law and by the historical control exercised over local school districts by the legislature of Michigan and by State agencies and officials, which we now discuss.

As held by the District Court, it is well established under the Constitution and laws of Michigan that the public school system is a State function and that local school districts are instrumentalities of the State created for administrative convenience.

The Northwest Ordinance of 1787 governing the Territory of Michigan provided:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

With this genesis, Michigan's four Constitutions have clearly established that the public school system in that State is solely a State function. The Constitution of 1835 in Article X, Section 3, provided, in part: "The legislature shall provide for a system of common schools . . ." The Constitution of 1850, Article XIII, Section 4, provided, in part: "The legislature shall . . . provide for and establish a system of primary schools . . ." Section 1 of the same Article provided, ". . . the Superintendent of Public Instruction shall have general supervision of public instruction . . ."

The Constitution of 1908 in Article XI, Section 2, provided that the Superintendent of Public Instruction "shall have

general supervision of public instruction in the State." Article XI, Section 9, provided, in part as follows:

> "The legislature shall continue a system of primary schools, whereby every school district in the State shall provide for the education of pupils without charge for tuition . . ."

The Constitution of 1963, the present Constitution of the State of Michigan, in Article VIII, Section 2, provides, in part, as follows:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

In interpereting the above educational provisions of the Constitution of 1850, the Michigan Supreme Court stated: "The school district is a State agency. Moreover, it is of legislative creation . . ." *Attorney General* v. *Lowrey,* 131 Mich. 639, 644, 92 N.W. 289, 290 (1902). Again, interpreting the Constitution of 1850, the Supreme Court of Michigan in *Attorney General* v. *Detroit Board of Education,* 154 Mich. 584, 590, 118 N.W. 606, 609 (1908), adopted lower court language which read:

> "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may chose to make it such. The Constitution has turned the whole subject over to the legislature . . ."

The Supreme Court of Michigan interpreted Article XI, Section 9, of the Constitution of 1908 to mean:

> "The legislature has entire control over the schools of the State subject only to the provisions above referred to. The division of the territory of the State into districts, the conduct of the school, the qualifications of teachers,

> the subjects to be taught therein are all within its control." *Child Welfare* v. *Kennedy School Dist.*, 220 Mich. 290, 296, 189 N.W. 1002, 1004 (1922).

In the leading case concerning construction of this section of the Michigan Constitution of 1963, the Michigan Supreme Court said:

> "It is the responsibility of the State board of education to supervise the system of free public schools set up by the legislature and, as a part of that responsibility, to promulgate regulations specifying the number of hours necessary to constitute a school day for elementary school students as well as for other classifications or groupings of students, to determine the curricula and, in general, to exercise leadership and supervision over the public school system." *Welling* v. *Livonia Board of Education*, 382 Mich. 620, 624, 171 N.W.2d 545, 546 (1969). See also *Governor* v. *State Treasurer*, 389 Mich. 1, 13, 203 N.W.2d 457 (1972).

Michigan has not treated its school districts as sacrosanct. To the contrary, Michigan always has regarded education as the fundamental business of the State as a whole. Local school districts are creatures of the State and act as instrumentalities of the State under State control. *Cf. Senghas* v. *L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962); *McLaughlin* v. *Board of Education*, 255 Mich. 667, 239 N.W. 374, (1931).

The record discloses a number of examples of State control over local public education in Michigan.

1. Following the holding of *Welling* v. *Livonia Board of Education, supra,* that there was no minimum length of day required under the 180-day school attendance rule absent a State Board of Education regulation, the Michigan State Board of Education, acting under its Constitutional mandate without legislative authority, established an administrative rule requiring local school boards to provide a minimum

number of hours per school year. See, *School Districts Child Account for Distribution of State Aid,* Bulletin No. 1005, Michigan State Department of Education (1970).

2. Public Act 289 of 1964 (MSA § 15.2299 (1) *et seq.*, MCLA § 388.681 *et seq.*) required Michigan school districts to operate K-12 systems. When Public Act 289 became effective, 1,438 public school districts existed in Michigan. By the beginning of 1968, this figure had been reduced to 738, meaning that 700 school districts in Michigan have disappeared since 1964 through reorganization. Annual Report, Committee on School District Reorganization, 1968 Journal of the Senate 422-423 (March 1, 1968).

3. Pursuant to Act 289 of 1964, *supra,* the State Board of Education ordered the merger of the Brownstown No. 10, Hand, Maple Grove and Carson school districts, all in Wayne County. The action is best explained by the fact that Brownstown was, at that time, the wealthiest school district in the State, indeed, with a property valuation of $340,000 backing each child, perhaps the wealthiest district in the nation, while the other three districts were extremely poor.

4. When the Sumpter School District was on the verge of bankruptcy in 1968, the State Board of Education, acting under Public Act 239 of 1967 (MSA § 15.2299(51) *et seq.*, MCLA § 388.691 *et seq.*), merged the district with four adjoining districts, including the Airport School District. Significantly, though Sumpter was in Wayne County, Airport was in Monroe County, showing that county lines are not inviolate in Michigan.

5. The Nankin Mills School District in Wayne County was beset with financial problems and had no high school. Again, pursuant to Act 239, the State Board of Education in 1969 ordered this school district to merge with the Livonia, Garden City and Wayne Community schools.

6. When the Inkster School District in Wayne County was on the verge of financial bankruptcy, the Michigan legislature

passed Public Act 32 of 1968 (MSA § 15.1916 *et seq.*, MCLA § 388.201 *et seq.*) enabling the district to borrow $705,000 but on the condition that if the district could not balance its budget, the State Board of Education could reorganize, merge or annex the district. The legislative history of Act 32 indicates at least two legislators voted against the bill in the House of Representatives because of the excessive control given to the State Board of Education:

> "I voted No on House Bill No. 3332 because in setting up the machinery to bail out distressed districts, it takes from the local communities the control over their own educational system by providing for excessive arbitrary reorganization powers in the hands of the Board of Education. . ."
>
> "This bill certainly sets up the State Board of Education to be a dictator of all school districts that run into financial problems." 1968 Journal of the House of Representatives 1965.

7. Too small and too poor to operate a high school, the all-black Carver School District in suburban Oakland County reached a crisis in 1960 when other surrounding white districts refused to accept Carver pupils on a tuition basis. The Carver district was merged with Oak Park.

8. The State Board of Education and Superintendent of Public Instruction may withhold State aid for failure to operate the minimum school year. MSA § 15.3575, MCLA § 340.575. In 1970, funds were withheld from the City of Grand Rapids School District. 17 Michigan School Board Journal 3 (March, 1970). For Attorney General Opinions holding that State aid may be withheld by the State Board of Education from school districts for hiring uncertified teachers, defaulting on State loans and for other reasons, see Op. Atty. Gen. No. 880, 1949-1950 Report of the Attorney General 104 (January 24, 1949, Roth); No. 2333, 1955 Report of the Attorney General 561 (October 20, 1955, Kavanaugh); No.

4097, 1961-1962 Report of the Attorney General 553 (October 8, 1962, Kelley).

9. The State of Michigan contributes, on the average, 34% of the operating budgets of the 54 school districts included in the proposed Metropolitan Plan of Integration. In eleven of the 54 districts, the State's contribution exceeds 50% and in eight more, it exceeds 40%. State aid is appropriated from the General Fund, revenue raised through state-wide taxation, and is distributed annually to the local school districts under a formula devised by the legislature. See, *e. g.*, Public Act 134 (1971), MSA § 15.1919(51), MCLA § 388.611.

Though the local school districts obtain funds from the assessment of local property, the ultimate authority in insuring equalized property valuations throughout the State is the State Tax Commission. MSA § 7.631, *et seq.*, MCLA § 209.101, *et seq.;* MSA § 7.206, MCLA § 211.148; MSA § 7.52, MCLA § 211.34. The State's duty to equalize is required by the Michigan Constitution, Article IX, Section 3. This "State equalized valuation" serves as the basis for calculating local revenue yields. See, *Ranking of Michigan Public High School – School Districts by Selected Financial Data, 1970,* Bulletin 1012, Michigan State Department of Education (1971).

10. The Michigan School Code reaffirms the ultimate control of the State over public education. Local school districts must observe all State laws relating to schools,[1] hold school a minimum number of days per year,[2] employ only certified teachers,[3] teach civics, health and physical education and drivers' education,[4] excuse students to attend religious instruc-

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[1] MSA § 15.3252(c), MCLA § 340.252(c).

[2] MSA § 15.3575, MCLA § 340.575.

[3] MSA §§ 15.1023(10)(a), 15.3570, MCLA §§ 388.1010(a), 340.570.

[4] MSA §§ 15.1951,15.3361, MCLA §§ 388.371, 340.361; MSA §§ 15.3781-15.3782, MCLA §§ 340.781-340.782; MSA § 9.2511(c), MCLA § 257.811 (c).

tion classes,[5] observe State requirements when teaching sex education,[6] make annual financial and other reports to the Superintendent of Public Instruction,[7] adopt only textbooks which are listed with the Superintendent of Public Instruction[8] and must follow all rules and regulations of the State Department of Education.

Local school districts, unless they have the approval of the State Board of Education or the Superintendent of Public Instruction, cannot consolidate with another school district,[9] annex territory,[10] divide or attach parts of other districts,[11] borrow monies in anticipation of State aid,[12] or construct, reconstruct or remodel school buildings or additions to them.[13]

The power to withhold State aid, of course, effects enormous leverage upon any local school district, since on the average 34 per cent of the operation budget of the 54 school districts included in the proposed Metropolitan Plan is paid for by the State.

In the instance of the City of Detroit, the State exhibited its understanding of its power over the local school district by the adoption of Act 48 of the Public Acts of 1970 which repealed a high school desegregation plan previously adopted by the Detroit Board of Education. See 433 F.2d 897.

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5 MSA § 15.3732(g), MCLA § 340.732(g).

6 MSA § 15.3789, MCLA § 340.789.

7 MSA § 15.3612, MCLA § 340.612; MSA §§ 15.3616, 15.3688, MCLA §§ 340.616, 340.688.

8 MSA § 15.3887(1), MCLA § 340.887(1).

9 MSA § 15.3402, MCLA § 340.402.

10 MSA § 15.3431, MCLA § 340.431.

11 MSA § 15.3447, MCLA § 340.447.

12 MSA § 15.3567(1), MCLA § 340.567(a).

13 MSA § 15.1961, MCLA § 388.851, Op. Atty. Gen. No. 1837, 1952-1954 Report of the Attorney General 440 (Nov. 8 1954).

B. De Jure Acts of Segregation

Thus, the record establishes that the State has committed de jure acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II*. *Brown* v. *Board of Education*, 349 U.S. 294, 300-01 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. See Section III B, pp. 42-48, *supra*. *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 489 (1972); *Wright* v. *City of Emporia*, 407 U.S. 451, 463 (1972); *United States* v. *State of Texas*, 447 F.2d 441, 443-44 (5th Cir. 1971); *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364, 368 (8th Cir. 1970). *See also Davis* v. *Board of School Commissioners*, 402 U.S. 33, 36-38 (1971).

There exists, however, an even more compelling basis for the District Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown* v. *Board of Education* which overruled *Plessy, supra*.

This court in considering this record finds it impossible to declare "clearly erroneous" the District Judge's conclusion that any Detroit only desegregation plan will lead directly

to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black.

We deal with a record which demonstrates more than ample support for the District Judge's findings of unconstitutional segregation by race resulting in major part from action and inaction of public authorities, both local and State. This segregation is found in the school system of the inner city of a metropolitan area 81% white against 19% nonwhite. Under this record a remedial order of a court of equity which left the Detroit school system overwhelmingly black (for the foreseeable future) surrounded by suburban school systems overwhelmingly white cannot correct the constitutional violations herein found.

VI. The District Judge's Order to Prepare A Metropolitan Area Desegregation Plan

The third major issue in this case pertains to the validity of the District Judge's ruling on desegregation area and order for development of a plan of desegregation dated June 14, 1972, accompanied by a statement of findings of facts and conclusions of law in support thereof.

At the outset it is obvious from what we have said pertaining to the inadequacy of any Detroit only desegregation plan that this court feels that some plan for desegregation beyond the boundaries of the Detroit School District is both within the equity powers of the District Court and essential to a solution of this problem. We reiterate this, keeping in mind the admonition from Chief Justice Marshall:

> "The government of the United States has been emphatically termed a government of laws, and not of

> men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 163 (1803).

We reject the contention that school district lines are sacrosanct and that the jurisdiction of the District Court to grant equitable relief in the present case is limited to the geographical boundaries of Detroit. We reiterate that school districts and school boards are instrumentalities of the State. *See Cooper* v. *Aaron,* 358 U.S. 1, 16 (1958). As early as *Brown II* the Supreme Court pointed out that:

> "[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, ..." 349 U.S. at 300-01.

The Supreme Court has held that school boundary lines cannot be changed or new school systems created where the result is a larger imbalance in racial ratios in school systems where all vestiges of enforced racial segregation have not been eliminated. *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484 (1972); *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). This is true regardless of "dominant purpose." *Wright* v. *City of Emporia,* 407 U.S. at 462.

If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose.

We therefore conclude that the District Court in the present case is not confined to the boundary lines of Detroit in fashioning equitable relief.

Bradley v. *School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, — U.S. — (May 21, 1973), is distinguishable in several respects. In that case the District Court ordered an actual consolidation of three separate school districts, all of which the Court of Appeals for the Fourth Circuit declared to be unitary. In the instant case the District Court has not ordered consolidation of school districts, but directed a study of plans for the reassignment of pupils in school districts comprising the metropolitan area of Detroit. In the Richmond case the court found that neither the Constitution nor statutes of Virginia, previously or presently in effect, would have permitted the State Board of Education, acting alone, to have effected a consolidation of the three school districts into a single system under the control of a single school board. The Fourth Circuit held that compulsory consolidation of political subdivisions of the State of Virginia was beyond the power of a federal court because of the Tenth Amendment to the Constitution of the United States. The decisions which now are under review did not contemplate such a restructuring.

Furthermore, the court in the Richmond case cited provisions of the Constitution and statutes of Virginia in support of its holding that —

> "The power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education." 462 F.2d at 1067

The record in the present case amply supports the finding that the State of Michigan has not been subject to such limitations in its dealings with local school boards.

VII. Rights of Other School Districts To Be Made Parties and To Be Heard

In his "Ruling on Propriety of Considering a Metropolitan Remedy" the District Court defined the metropolitan area "for the present purposes" to comprise the three counties of Wayne, Oakland and Macomb. In his "Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development Plans" the District Court noted that "the court has taken no proofs with respect to the establishment of the boundaries in the counties of Wayne, Oakland and Macomb." In his "Ruling on Desegregation Area and Order for Development of Plan of Desegregation" the District Court defined the desegregation area to include some 53 school districts. Certain of these school districts have intervened in this case, but have not yet been afforded an opportunity to offer proof. Some of the other school districts are not parties to the litigation.

In *United States* v. *Texas Education Agency,* 467 F.2d 848, 873 (5th Cir. 1972), the Court said:

> "The discriminatory acts of the school authorities infect the entire school system; they are particularly obvious in the so-called 'pockets'. Some schools may be the 'result' of state-imposed segregation even though no specific discriminatory school board action may be shown *as to* those schools. Had the school authorities not specifically segregated the minority students in certain schools, other schools may have developed as desegregated facilities. Thus, though they may not be 'pockets of discrimination', these schools are the 'results' of discrimination."

Under the authorities heretofore discussed, these school districts are arms and instrumentalities of the State of Michigan. Nevertheless, under Michigan law, they may sue and be sued. *See* M.S.A. §§ 15.3154, 15.3192.

Rule 19, Fed. R. Civ. P. provides that a person who is subject to service of process shall be joined as a party to the action if "in his absence complete relief cannot be accorded among those already parties." Under this rule joinder of necessary parties is required if jurisdiction over them can be obtained and if joinder will not defeat federal jurisdiction of the case.

We hold that school districts which are to be affected by the decree of the District Court are "necessary parties" under Rule 19. As a prerequisite to the implementation of a plan in this case affecting any school district, the affected district first must be made a party to this litigation and afforded an opportunity to be heard.

While agreeing with the District Court in its conclusion that it can consider a metropolitan remedy, we express no views as to the desegregation area set forth in the orders of the District Court.

We vacate the order of March 28, 1972, entitled "Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of Detroit."

This Court recognizes that, as set forth above, the legislature of the State of Michigan has power to provide a complete remedy for the unconstitutional segregation disclosed in this record. It, too, has responsibility for following the great mandates of the United States Constitution.

If, however, the legislature fails to act, or if it acts in a manner inconsistent with the expeditious and efficient elimination of the unconstitutional practices and conditions described in this opinion, the District Court shall proceed to fashion such a remedy, including an interim remedy if found to be necessary, as it shall determine to be appropriate within the guidelines of this opinion.

On remand, any party against whom relief is sought, including school districts which heretofore have intervened and school districts which hereafter may become parties to this

litigation, shall be afforded an opportunity to offer additional evidence, and to cross-examine available witnesses who previously have testified, on any issue raised by the pleadings, including amendments thereto, as may be relevant and admissible to such issues. The District Court may consider any evidence now on file and such additional competent evidence as may be introduced by any party. However, the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the "Detroit-only" plans of desegregation, dated March 28, 1972. We hold that the findings of fact contained in these rulings are not clearly erroneous, Rule 52(a), Fed. R. Civ. P., but to the contrary are supported by substantial evidence.

Upon remand, the plaintiffs and other parties shall be permitted to amend their pleadings to conform to the evidence (see Rule 15(b), Fed. R. Civ. P.), to add additional parties and to ask for any additional appropriate relief, the details of such amendments to be under the continuing supervision of the District Court.

We also vacate the District Court's Ruling on Desegregation Area and Development Plan, dated June 14, 1972, except those parts of the order appointing a panel charged with the duty of preparing interim and final plans of desegregation. The panel appointed by the District Court is authorized to proceed with its studies and planning under the direction of the District Court. Pending further orders of the District Court or this Court, the defendants and school districts involved will continue to supply administrative and staff assistance to the panel upon its request. Until further order of the court, the reasonable costs incurred by the panel will be paid as provided by the District Court's order of June 14, 1972.

The order of the District Court directing the purchase of school buses, dated July 11, 1972, also is vacated, subject to the

right of the District Court, in its discretion, to consider the entry of another order requiring the purchase of school buses at the appropriate time.

VIII. Equitable Relief

In this opinion we have emphasized the broad powers of a District Court to fashion equitable relief in school desegregation cases. For the guidance of the District Court on remand, we now review the decisions on this subject in further depth.

1) The Fundamental Constitutional Holding:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954).

2) The Supreme Court's Initial Description of the Equitable Remedy:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into

[4] See *Alexander* v. *Hillman*, 296 U.S. 222, 239.

[5] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330.

account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." *Brown* v. *Board of Education of Topeka [II]*, 349 U.S. 294, 300-01 (1955)

3) Delay Is No Longer Tolerable:

"In determining whether respondent School Board met that command by adopting its 'freedom-of-choice' plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.' This deliberate perpetuation of the unconstitutional dual system can only have compounded the

harm of such a system. Such delays are no longer tolerable, for 'the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.' *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, *a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable.* 'The time for mere "deliberate speed" has run out,' *Griffin* v. *County School Board,* 377 U.S. 218, 234; 'the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered.' *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. *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.*" *Green* v. *County School Board,* 391 U.S. 430, 438-39 (1968) (Emphasis added.)

4) State Imposed Segregation Must be Completely Removed at Earliest Practicable Date:

"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. *There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.* It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. *Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief.*

Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney* v. *Board of Education, post,* at 449." *Green* v. *County School Board,* 391 U.S. 430, 439 (1968) (Emphasis added.)

5) The Court Has The Power and The Duty to Eliminate Effects of Past Discrimination:

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U. S. 145, 154 (1965) (Emhasis added). Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241 (1939); *United States* v. *Crescent Amusement Co.,* 323 U. S. 173 (1944); *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). See also *Griffin* v. *County School Board,* 377 U. S. 218, 232-234 (1964). *Green* v. *County School Board,* 391 U.S. 430, n. 4 at 438 (1968) (relating to the remedial command of Brown II)

6) Resegregation is Impermissible:

"Like the transfer provisions held invalid in *Goss* v. *Board of Education,* 373 U.S. 683, 686, '[i]t is readily apparent that the transfer [provision] lends itself to perpetuation of segregation.' While we there indicated that 'free-transfer' plans under some circumstances might be valid, we explicitly stated that *'no* official transfer plan or *provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.' Id.,* at 689. So it is here; no attempt has been

made to justify the transfer provision as a device designed to meet 'legitimate local problems,' *ibid.;* rather it patently operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones. Respondent's argument in this Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' *Brown II,* at 300.

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable. See *Green* v. *County School Board, supra,* at 439-441.

"We conclude, therefore, that the Board 'must be required to formulate a new plan and, in light of other courses which appear open to the Board, . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." Id., at 442. *Monroe* v. *Board of Commissioners,* 391 U.S. 450, 459-60 (1968) (Emphasis added.)

7) The Remedial Tools:

In *Swann* v. *Board of Education,* 402 U.S. 1, 15 (1971), Chief Justice Burger, writing for a unanimous Court, said:

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

> 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-330 (1944), cited in *Brown II, supra,* at 300."

a) The Flexible Ratio:

"As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans. As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.

"We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green,* a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial

composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." *Swann* v. *Board of Education*, 402 U.S. 1, 24-25 (1971).

b) Noncontiguous School Zoning:

"The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank — and sometimes drastic — gerrymandering of school districts and attendance zones. An additional step was pairing, 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

"Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must

be recognized that there are limits. The objective is to dismantle the dual school system. 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

"In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

"*We hold that the pairing and grouping of noncontiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought.* Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion concerning the objectives to be sought. Maps do not tell the whole story since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations." *Swann* v. *Board of Education, supra,* at 27-29. (Emphasis added.)

c) Transportation of Students:

"The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines

as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. *Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.*

"The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis, supra.* The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. *The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.*

"*Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.*

"The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take 'not over 35 minutes at the most.' This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation.

Desegregation plans cannot be limited to the walk-in school.

"*An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.* District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann* v. *Board of Education, supra,* at 29-31. (Emphasis added.)

In *North Carolina* v. *Swann,* 402 U.S. 43, 46 (1971), the Chief Justice said: "As noted in *Swann, supra,* at 29, bus transportation has long been an integral part of all educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance on it."

d) Equity Power to Require Payment of Tax Funds for Integrated Schools:

In the exercise of its equity powers, a District Court may order that public funds be expended, particularly when such an expenditure is necessary to meet the minimum requirements mandated by the Constitution. *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 233 (1964); *Eaton* v. *New Hanover County Board of Education,* 459 F.2d 684 (4th Cir. 1972); *Brewer* v. *School Board of City of Norfolk,* 456 F.2d 943, 947, 948 (4th Cir.), *cert. denied,* 406 U.S. 933 (1972); *Plaquemines Parish School Board* v. *United States,* 415 F.2d 817 (5th Cir. 1969).

This opinion heretofore has emphasized that the Legislature of Michigan has an opportunity to determine the or-

ganizational and governmental structure of an enlarged desegregation area to remedy the unconstitutional segregation results set forth in this opinion. In the event the Legislature fails to act effectively and expeditiously, the foregoing and other cases cited in this opinion outline the broad scope of equitable relief that may be fashioned by the District Court in this case on remand after all school districts to be affected are afforded an opportunity to be heard as hereinabove provided.

IX. Other Issues

Numerous other issues are presented which do not require discussion.

We do not consider it necessary to construe the "Broomfield Amendment," Pub. L. No. 92-318, 86 Stat. 235, § 803, known as the Education Amendments of 1972, since no final desegregation order has been entered.

Deal v. *Cincinnati Board of Education*, 419 F.2d 1387, 1392 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971) is not controlling. There the District Court made findings of fact that there had been no unconstitutional conduct on the part of the Cincinnati Board of Education. This court held that these findings of fact were not clearly erroneous. Rule 52(a), Fed. R. Civ. P.

All other contentions presented by the parties contrary to the conclusions reached in this opinion have been considered and are found to be without merit.

X. Conclusion

1. The Ruling of the District Court on the Issue of Segregation, dated September 27, 1971, and reported at 338 F.Supp. 582, is affirmed.

2. The findings of fact and conclusions of law on "Detroit-only" plans of desegregation, dated March 28, 1972, are affirmed.

3. The Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972, is affirmed in part, but vacated for the reasons set forth above.

4. The Ruling on Desegregation Area and Development of Plan, dated June 14, 1972, is vacated except as hereinabove prescribed.

5. The order dated July 11, 1972, directing the purchase of school buses is vacated.

The case is remanded to the District Court for further proceedings not inconsistent with this opinion.

No costs are taxed. Each party will bear his own costs.

EDWARDS, CELEBREZZE, PECK, MCCREE, and LIVELY, JJ., concur.

WEICK, Circuit Judge, dissenting: Eighty-seven years before the landmark decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) was announced, the legislature of the State of Michigan, in Public Acts of Michigan, 1867, Act 34 § 28, had abolished segregation in the public school system which had prohibited Negro children from attending the same public schools as white children. This statute in relevant parts reads as follows:

> "All residents of any district shall have an equal right to attend any school therein. . . ."

The Supreme Court of Michigan, in an opinion written for the court by Chief Justice Cooley, construed the statute in 1869 and held it applicable to Detroit and that Detroit constituted one school district. In granting a writ of mandamus requiring the school board to admit a Negro child who had been denied admission, Chief Justice Cooley said:

> "It cannot be seriously urged that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all of the schools, irrespective of such distinctions, was meant to be established." *People, ex rel. Workman* v. *Board of Education of Detroit*, 18 Mich. 399, 409 (1869).

The issues in this case do not concern the right of any Negro child in Detroit to attend any school he desires in that City. They do involve the authority of a district judge to adopt a so-called metropolitan plan designed to integrate the Negro school children living in Detroit with white children living in three adjoining counties and attending public schools in fifty-two additional school districts, eighteen of which districts have never been made parties to this lawsuit. Conditions were imposed on the districts allowed to intervene which rendered their intervention ineffective.

The District Judge followed the pattern of Judge Merhige in the *Richmond* case whose decision was reversed by the Fourth Circuit in *Bradley* v. *School Board of the City of Richmond,* 462 F.2d 1068 (4th Cir. 1972), *aff'd by equally divided Court,* — U.S. — (Nos. 72-549, 72-550, May 21, 1973), 41 U.S.L.W. 4685. The fact that *Richmond* involved dismantling of a dual system was regarded as unimportant by the District Judge.

In an unprecedented opinion, a panel of this Court and now a majority of the en banc Court have upheld findings of the District Court that segregation exists in Detroit and that it cannot be dismantled with a Detroit-only plan of desegregation and the District Court may consider and adopt a metropolitan plan.[1]

Just to start such a plan involves the expenditure of about $3,000,000 for the purchase of 295 buses and untold millions of dollars to operate them and for other expenses. It will involve about 780,000 children and, if ordered by the court, will force the busing of black children, against their will and without the consent of their parents, from the inner city of Detroit to one or more of the fifty-three different school districts in four counties, and the white children of these districts will be forcibly bused to the inner city. None of these children have committed any offense for which they should be so punished. It will disrupt the lives of these children and their parents. The metropolitan plan was ill conceived and is a legal monstrosity. However, such a plan will achieve a racial balance or quota in the desegregation area, which is what plaintiffs are seeking.

The District Court made no findings that any of the fifty-two school districts outside of Detroit had practiced desegrega-

[1] While the present undefined desegregation area consists of three additional counties and 53 school districts, this could, of course, be expanded so as to include as many as the District Judge may order. The plan seeks to achieve a racial balance or quota in each public school in the system of 75% white and 25% black in a state which is 87% white and 13% black. The Plan violates Public Acts of Michigan, 1867, Act 34 § 28, by ordering children living in one district to attend school in another district.

tion tactics against Negro children in their districts or in any other district, or that they were in any wise responsible for the concentration of Negroes or their segregation in Detroit.

These fifty-two school districts have been created by the legislature as separate and independent corporate units with power to sue and be sued. They are governed by locally-elected Boards of Education. In each district, the real estate of the people living therein is taxed for the support of their public schools.

The school districts were established by neutral legislation when the cities were incorporated. There was not an iota of evidence in the record that the boundaries of the Detroit school district, or any other school district in Michigan, were established for the purpose of creating, maintaining or perpetuating segregation of the races. No such claim was ever made by the plaintiffs.

In 1910, long after the districts were created, the black population of Detroit was only 1.2% of the total population of the City. By 1970 it had increased to 43.9% of the total population of 1,511,000. It is obvious that the great influx of blacks, as well as whites, to Detroit was influenced by the favorable industrial climate existing in Michigan and the ability of its industry, principally automotive, to provide jobs.

In the school year 1970-1971, there was 285,512 students in the public school system in Detroit of which 168,200 or 63.8% were black and 117,312 or 37.2% where white. The School Board of Detroit ought not to be blamed for the heavy concentration of blacks in the inner City, for housing conditions, or for discrimination by public or private agencies or individuals and ought not be be saddled with the duty to dismantle the concentration. These same conditions exist in other cities throughout the country regardless of the type of school system in effect — whether de jure or de facto. Nor should the adjoining three counties and the fifty-two school districts be penalized because they are located near Detroit.

In his book *Negroes in Cities,* Dr. Karl Taeuber states

that residential segregation exists "regardless of the character of local laws and policies and regardless of other forms of discrimination". He said substantially the same thing in his article "Residential Segregation" in the August, 1965 issue of *Scientific American.*

In *Bradley* v. *School Board of City of Richmond,* 462 F.2d 1058 (4th Cir. 1972), *aff'd by equally divided Court,* — U.S. — (Nos. 72-549, 72-550, May 21, 1973), 41 U.S.L.W. 4685, the Court said:

> "The root causes of the concentration of blacks in the inner city are simply not known. . . ."

And:

> "Whatever the basic causes, it has not been school assignments and school assignments cannot reverse that trend."

The District Court was motivated in its decision by social considerations. In a pretrial conference on October 4, 1971 the District Court stated:

> "We need not recite the many serious problems such a plan entails, suffice it to say that a plan of such dimensions can hardly be conceived in a day, to say nothing of the time it will require for implementation. A large metropolitan area such as we have in our case can not be made the subject of instant integration. We must bear in mind that the task we are called upon to perform is a social one, which society has been unable to accomplish. In reality, our courts are called upon, in these school cases, to attain a social goal, through the educational system, by using law as a lever." App. IV, pp. 454, 455.

This is incredible!

It is submitted that the courts are not called upon to integrate the school system, using law as a lever. Nor should judges assume to act as legislators, for which they are neither

fitted nor qualified. It is enough for judges to perform their judicial function and to abide by the separation of powers doctrine provided by our Constitution.

The thesis of the panel which wrote the original opinion in this appeal is best stated in its own words in its slip opinion:

> "This court in considering this record finds it impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black. Big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law." Slip Opin. p. 65.

The majority opinion adopts all of the paragraph except the last sentence which reads as follows:

> "Big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection under the law."

In my opinion, the retained part of the paragraph expresses the same thought as the sentence which has been deleted.

No decision of the Supreme Court or any other court construing the Constitution supports this thesis and it is not our province to rewrite the Constitution.

The majority opinion sharply conflicts with *Spencer* v. *Kugler*, 326 F.Supp. 1235 (D. N.J. 1972), *affirmed*, 404 U.S. 1027 (1972). In *Spencer* the black students sued the Attorney General of the State of New Jersey, the Commissioner of Education and the State Board of Education alleging that they failed to achieve a racial balance among several districts of a state system of public schools. New Jersey, like Michigan, did not operate a dual system and the alleged imbalance was characterized as de facto segregation.

The three-judge Court which heard the case stated:

> "In none of the schools of which the plaintiffs complain is any black pupil 'segregated' from any white pupil. Indeed, complaint is made that the blacks who reside in the school district served predominate over the whites, thus affording an example of complete desegregation which was the expressed object of the court in the *Brown* case. At page 487 of the Opinion at page 688 of 74 S.Ct. in *Brown* it is stated that:
>
> > 'In each of the cases [from Kansas, South Carolina, Virginia and Delaware] minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race.'
>
> Such is not the basis upon which each of the plaintiffs in the present case seeks relief in this cause. On the contrary plaintiffs would have a substantial portion of the pupils now in attendance in their respective schools ordered by the court removed from these schools and assigned to a school in another district. Alternatively plaintiffs would have the court abolish the respective districts in which their schools are located and assign them to other districts in which the disproportion between white and black students is reduced in one direction or the other. If, as plaintiffs contend, the proportionate black attendance in their respective schools adversely affects the degree of excellence of education which they can receive there must be a point at which any excess of blacks over whites is likely to impair the quality of the education available in that school for the black pupils. Nowhere in the Appendix filed by the plaintiffs or in the facts involved in any of the judicial precedents which they cite are we informed of the specific racial proportions which

are likely to assure maximum excellence of the educational advantages available for the whites. Assuming further that efforts to achieve the ideal interracial proportion necessarily include the alteration of the population factor determinative of the redistricting, there can be no assurance that the population factor will remain static. If so, it would be necessary to successively reassign pupils to another district as the rate of births and graduations alters the racial proportions creating the demand for the educational facilities as it changes from term to term. In sum, the difficulty complained of does not amount to unconstitutional segregation." (*Id.* at 1239-1240).

Speaking of school district boundaries, the Court stated:

"It is clear that these legislative enactments prescribe school district boundaries in conformity with municipal boundaries. This designation of school district zones is therefore based on the geographic limitations of the various municipalities throughout the State. Nowhere in the drawing of school district lines are considerations of race, creed, color or national origin made. The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority. The system as provided by the various legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality-school district. Racially balanced municipalities are beyond the pale of either judicial or legislative intervention." (*Id.* at 1240).

Spencer is on "all fours" with our case.

The majority opinion conflicts with prior decisions of this Court with the unfortunate result that acts which do not violate the Constitution in Cincinnati, are held to be unconstitutional in Detroit.

The two decisions with which the majority opinion is in

irreconcilable conflict are *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387 (6th Cir. 1969), *cert. denied,* 402 U.S. 962 (1971); *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967), *affirming,* 244 F.Supp. 572. Twice the Supreme Court was afforded the opportunity to review *Deal* and as late as 1971 it refused to do so, with only one Justice dissenting.

More than eighty-two years ago Ohio, like Michigan, by statute had abolished segregation in the public schools in the State. The neighborhood school system, however, was provided by statute so that schools would be constructed at such places as will be convenient for the attendance of the largest number of children. Ohio Rev. Code § 3313.48. It was not then believed that neighborhood schools were obnoxious. Nevertheless, in Cincinnati the races were imbalanced in the public school system.

Some schools were attended entirely by Negroes and others entirely by whites, while others were attended in varying proportions by both white and Negroes. Some Negro schools were racially identified. The segregation was allegedly caused by gerrymandered school-zone lines, by housing discrimination by public and private agencies, by discrimination in job opportunities, and school construction.

We held in *Deal I* that the Board of Education had no constitutional duty to eliminate racial imbalance not caused or created by it, and upheld the neighborhood plan adopted by the State Legislature.

The District Judge had excluded evidence of discrimination in the public and private housing markets. We held this ruling was correct on the ground that the discrimination, if it existed, was caused by persons not parties to that case and the Board of Education had no power to rectify that situation. We said: "[If] appellants have any valid claim for infringing their rights by public-housing or urban-renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to dis-

criminatory practices, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission, or in the state courts, if relief is denied under the provisions of the Ohio Fair Housing Law.[2] *Deal I*, 369 F.2d at 60 fn. 4.

The majority opinion also conflicts with *Bradley* v. *School Board of Richmond, supra,* and *Swann* v. *Board of Education,* 402 U.S. 1 (1971).

Swann stated that: "[The] objective is to dismantle the dual school system." *Id.* at 28. Here there has been no dual school system to dismantle. Although not racially balanced, Detroit for many years had achieved a unitary school system in which no student was precluded from attending any school in the district. *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969). There are limits as to how far a district court can go. *Swann* at 28.

Swann also stated:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U.S. at p. 24.

The metropolitan plan violates this principle which was applicable only to dual systems. It is even worse when the District Court applies broader orders to a unitary system than have ever been applied to dismantling of a dual system.

Swann, is violated by overloading the school system with excess "baggage." *Id.* at 22.

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[2] The Supreme Court in *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968), has since held that Section 1982 of 42 U.S.C. applies to all discrimination in the sale or rental of property.

The majority distinguishes *Deal I* on the ground that the District Court made findings of fact that there had been no unconstitutional conduct on the part of the Cincinnati Board of Education. In *Bradley,* the District Judge had found similar facts to constitute a violation of the Constitution. Both District Court decisions, although inconsistent, have now been affirmed.

THE DETROIT ONLY PLAN

The finding of the District Court that a Detroit only plan could not accomplish desegregation is not supported by the evidence and are clearly erroneous. The percentage of black and white children in the public schools in 1970-1971 was 63.8% and 37.2% respectively. The racial composition of the state is 87% white and 13% black.

In Wright v. *Council of City of Emporia*, 407 U.S. 451 (1972), the Supreme Court approved a pairing plan for the City and County which had a racial composition of 34% white and 66% black. The existing ratios in Detroit are practically the same.

But the District Court in our case was concerned about its own forecast of population trends that the percentage of black students would increase from 63.8% in 1970 to 72% in 1980, and in 1992 would be all black. This forecast is wholly speculative.

Such an unsupported and speculative forecast cannot be made the basis for a metropolitan cross-district order. Even if true, which it is not, the Board of Education is not responsible for the population remaining static, or for the mobility of the races. This was made clear in *Spencer, supra, id.* at 1239, 1240, and also in *Swann, supra, id.* at 31, 32. Nor is the Board required from time to time to adopt plans to meet shifting population trends. *Spencer, supra; Swann, supra.*

Significantly, all that the plaintiffs are complaining about is the *operation* of the Detroit school system and the failure of the State defendants to properly supervise, control or finance it. Plaintiffs cannot complain about school district lines because those lines were neutrally drawn with the incorporation of the cities long before the Negroes had migrated north in large numbers. If school-zone lines in Detroit have not been properly drawn or if there are imbalances of black and white students, or imbalances on faculty or staffs in the Detroit schools, or if school buildings have been improperly located, or if plaintiffs have been discriminated against in any other

respect, these inequities can all be remedied in the Detroit school system without forcibly moving Negroes and whites against their will across district lines into other counties and districts. An order requiring the adoption of a metropolitan plan under the facts of this case, merely to dismantle the concentration of blacks in the inner city, violates constitutional rights of both races and constitutes a flagrant abuse of judicial power.[3] *Swann* recognized a limitation on the power of District Judges. *Id.* at 28. Chief Justice Vinson, in writing the opinion for the court in *Oyama* v. *California,* 332 U.S. 633, 646 (1948), stated:

> "But assuming, for the purposes of argument only, that the basic prohibition is constiutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it."

Thus, the District Court may not enter orders in school desegregation cases which impinge upon and violate the constitution rights of other persons.

Many Negroes as well as whites are opposed to integration of the races in the public school system by enforced busing.[4] A busing order directed at "benefiting" black students in Detroit (by distributiing the black student population throughout the entire metropolitan area) produces a head-on clash of constitutional principles. Blacks are given an (alleged) benefit when other citizens "similarly situated", *i.e.*, other minority-group students and even inner-city white students, are not given such benefits but are discriminated against. This result, of course, is a classic denial of the equal protection of the

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[3] Indeed, there is no finding by the District Court of any pattern of purposeful segregation by the School Board or finding of any causal relationship between any alleged segregative acts of the Board of Education and the concentration of blacks in the inner city.

[4] At the National Black Political Convention held in Gary, Indiana (March, 1972), mandatory busing and school integration were condemned as racist and as preserving a black minority structure.

laws. *Barbier* v. *Connolly,* 113 U.S. 27, 32 (1885); *Truax* v. *Corrigan,* 257 U.S. 312, 333 (1921).

In a very recent thought-provoking article, appended hereto as Appendix A and entitled "Reverse Discrimination", Dr. Morton Teicher, Dean of the School of Social Science of the University of North Carolina, discussed the problems of deprived groups and remedies for past discrimination including quota systems. Since opinions of sociologists were relied upon in *Brown I,* it is important that they not be overlooked here. See also the discussion entitled "Busing: A Review of 'The Evidence' ", *The Public Interest* No. 30 Winter 1973; "The Evidence on Busing," *The Public Interest* No. 28 Summer 1972; Ross, "Why Quotas Won't Work," *Reader's Digest,* Feb. 1973, p. 51.

The District Court's metropolitan cross-district order, an order purportedly directed at furthering the purposes of the equal protection clause, itself clashes with this constitutional principle.

The metropolitan busing remedy ordered by the Court is, however, unconstitutional on a more fundamental level. It invalidly assumes that the equal protection clause of the Fourteenth Amendment protects groups and not individuals. The entire thrust of the District Court's order is that the rights of blacks as a group must be redressed and that, in the process, the rights of individual black children (and non-black children) may be disregarded.

Consider the burden on the individual students who are bused in order to achieve a "racial balance" throughout the entire Detroit Metropolitan Area. Individual black and white students who formerly walked to a nearby school would be forced to travel substantial distances to other schools. These are not individuals who are burdened because their parents have chosen to reside far from the nearest school in the district or because they have special educational needs attended to in but a single school in the district. These are individual chil-

dren who are burdened with being bused solely because they are black or white, as the case may be.

Parenthetically, it should be noted that if there were any question that busing involves a substantial burden on the individual who cannot attend his neighborhood school, that question has been dispelled by the urgings of desegregation-case plaintiffs that black children can not be "unequally burdened" by being the only students bused, the white students being permitted to attend their neighborhood schools, See *e.g.*, *Haney* v. *County Bd. of Education of Sevier Co.*, 429 F.2d 364, 371-372 (8th Cir. 1970); *Brice* v. *Landis*, 314 F.Supp. 974, 978-979 (N.D. Calif. 1969).

Yet in proposing a remedy for black students as a group based on a head count, the District Court entirely disregards these individual black and white students and their right not be burdened solely on account of their race.

The equal protection clause of the Fourteenth Amendment states:

> ". . . nor shall any state . . . deny to any *person* within its jurisdiction the equal protection of the laws." (Emphasis added.)

The Supreme Court has recognized the individual nature of the equal protection clause on a number of occasions.[5] In

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[5] Of course, merely because equal protection is an individual right does not mean, as implied in *United States* v. *Jefferson Co. Bd. of Education*, 372 F.2d 836 (5th Cir. 1966), that a class action will not be available under Rule 23 (a) for redress of discrimination. A class action lies where a number of persons have similar individual rights infringed.

On the other hand, it does not follow that simply because a class action is available to redress discrimination individual rights can be obliterated by superimposing the "rights" of the class.

The individual plaintiffs, who charge in their Complaint the maintenance of a desegregated school system in Detroit, were all Negroes except one. Nevertheless, the District Court in determining the class held "that the plaintiffs in their action represent all school children in the City of Detroit, Michigan, and all Detroit resident

Shelley v. *Kraemer*, 334 U.S. 1, 22 (1948), the Court was explicit:

> "The rights created by the first section of the Fourteenth Amendment [the equal protection clause] are, by its terms, guaranteed to the individual. The rights established are personal rights. [Court's n.29.] *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Oyama* v. *California*, 332 U.S. 633 (1948)."

It simply defies logic to have a "constitutionally required" remedy for a group of individuals which, in turn, unconstitutionally denies equal protection to the individuals in the group as well as individuals in other groups, and which remedy unconstitutionally imposes burdens on students within and without the group solely because of their race. Yet this is precisely what the District Court has held. The Court states (correctly) that discrimination against the black race in Detroit must be remedied, but then orders massive interdistrict busing of students to achieve racial balances, denying individual blacks (and non-blacks) their right not to be substantially burdened solely on account of their race.

But the fundamental error of the District Court order was in treating the Michigan school system as a dual system when it was not, and in proposing the dismantling of concentration of blacks in Detroit and distributing them in fifty-two other school districts in three other counties. Virtually all of the cases relied upon by the plaintiffs to support the District Court's rulings involved dual school systems.

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parents who have children of school age, ..." Thus white and black children and their parents, who are not situated similarly with the plaintiffs and may violently disagree with plaintiffs' position, are arbitrarily placed in the same class. It will also be noted that the Complaint sought only the desegregation of the Detroit schools and made no claim against other counties and other school districts.

DUE PROCESS VIOLATIONS OF FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

Although, as stated by the majority, this is the fourth time that the case has been before us, the District Court has not as yet adopted any specific plan for desegregation; instead the District Court has entered a number of interlocutory orders some of which are now before us for review under 28 U.S.C. § 1292(b). These include rulings on the issue of Segregation, findings of fact and conclusions of law on Detroit Only Plan of Desegregation, propriety of a Metropolitan remedy to desegregate Detroit Schools, Desegregation Area, and Order directing Michigan State officials to purchase 295 school buses.

This procedure is unprecedented. Usually school desegregation cases are reviewed on appeal only after a plan of desegregation has been adopted. It appears to us that the District Court has placed the cart before the horse. It has entered a number of far-reaching piecemeal interlocutory orders from which no appeal could be taken without the court's permission, and which would bring about a fait accompli of a metropolitan plan without affording the defendants their right of appeal. This was in the absence of necessary and indispensable parties and to the prejudice of intervening school districts which had been denied effective participation in the proceedings.

The Complaint, which has never been amended, sought only the desegregation of the Detroit school system. There was no allegation that any other school district would be affected. As soon as it was determined that other school districts might be adversely affected, the District Court should have required the plaintiffs to make them parties defendant with a full opportunity to be heard on the merits of the case. These school districts were necessary and indispensable parties. This is the correct procedure, and was followed in *Bradley* v. *School Board of the City of Richmond,* 338 F.Supp. 67 (E.D. Va.

1971), *reversed on other grounds,* 462 F.2d 1058 (4th Cir. 1972), *aff'd by equally divided Court,* — U.S. — (Nos. 72-549, 72-550, May 21, 1973), 41 U.S.L.W. 4685.

All school districts whose borders were being invaded were entitled, as a matter of right and not of mere grace, to be made parties defendant in the case and to be accorded the same rights as any other defendants. They were entitled to be heard on all issues in the case which affected them, and were entitled to participate effectively in the proceedings. They were entitled to be heard on the issues of segregation, the "Detroit-Only plan" and the "Metropolitan plan". They had the right to offer evidence and endeavor to prove that there was no causal connection between any act or omission of the Detroit Board of Education (or of the State) and the concentration of blacks in the inner City, and that whatever constitutional violations of the rights of the plaintiffs may have occurred, such violations could be remedied within the Detroit school district without invading other districts which were not in any manner responsible for conditions in Detroit. These rights were denied to the intervenors.

While the orders of the District Court on these three issues were interlocutory, the judgment entered by the majority is final and the issues may not be relitigated on remand. Thus judgment has been entered against the absent school districts as well as those allowed to intervene, in violation of their due process rights to a fair and impartial trial. The orders affirmed are far reaching; they will require the expenditure of untold millions, and will disrupt the lives of hundreds of thousands of children and their parents.

However, in its opinion the majority did provide for amendment of pleadings on remand, making new party defendants, for intervention, and for offering additional testimony. These provisions are wholly illusory with respect to the issues of segregation, the "Detroit-Only plan" and the "Metropolitan plan", as the opinion expressly excludes these issues from reconsideration upon the remand. The only remedy available

to the intervening school districts is to petition the Supreme Court for certiorari. The eighteen school districts, as well as any additional school districts which the District Court may add to the desegregation area upon the remand, are without any remedy. Since they have never been made parties, they may not petition the Supreme Court for a writ of certiorari. They have surely been deprived of their property rights, not only without due process of law, but without any process of law.

The majority opinion, with its disapproval of the "Detroit-Only" plan and its order to the District Court to consider and adopt a so-called "Metropolitan" plan invading the borders of three counties and the boundaries of fifty-two school districts, completely destroys local control of the public school system along with all of its advantages. Local control is a traditional concept of the American public school system. Its merit and value were recognized by the Supreme Court in two very recent decisions. *San Antonio Independent School Dist.* v. *Rodriguez,* — U.S. — (No. 71-1332, 41 U.S.L.W. 4407, decided March 21, 1973); and *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972).

In *San Antonio Independent School District, supra,* Mr. Justice Powell, wrote the opinion for the Court, cited and quoted from opinions of Chief Justice Burger and Justice Potter Stewart in *Wright,* stating:

> "The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). MR JUSTICE STEWART stated there that '[d]irect control over decisions vitally affecting

the education of one's children is a need that is strongly felt in our society.' *Id.*, at 469. THE CHIEF JUSTICE, in his dissent, agreed that '[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.' *Id.*, at 478.

"The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory . . . and try novel social and economic experiments.' No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." (41 U.S.L.W. at 4422)

As we have pointed out, the facts of the present case furnish no basis whatsoever for the Court to destroy local control of our public school system.

Unreasonable and intolerable conditions, however, were imposed by the Court on the intervention by the school districts.[6]

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6 "The interventions granted this day shall be subject to the following conditions:

1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.
2. No intervenor shall reopen any question or issue which has previously been decided by the court.
3. The participation of the intervenors considered this day shall

The school districts filed objections to the conditions which were never ruled on by the Court. These conditions alone constituted a denial of due process to the intervenors who were precluded from raising questions necessary for their own protection and who were denied the right to be heard fully on the merits of the case.

The type of intervention permitted by the District Court is graphically illustrated in the brief filed by counsel for the intervenors in which he complains about the following incidents with citation of supporting record references:

> "Seven days after allowing appellants to intervene, as a matter of right but subject to oppressive conditions, [27] the trial court required the filing of written briefs on the legal propriety of a metropolitan plan of desegre-

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be subordinated to that of the original parties and previous intervenors.

4. The new intervenors shall not initiate discovery proceedings except by permission of the court upon application in writing, accompanied by a showing that no present party plans to or is willing to undertake the particular discovery sought and that the particular matter to be discovered is relevant to the current stage of the proceedings.

5. No new intervenor shall be permitted to seek a delay of any proceeding in this cause; and he shall be bound by the brief and hearing schedule established by the court's Notice to Counsel, issued March 6, 1972.

6. New intervenors will not file counterclaims or cross-complaints; nor will they be permitted to seek the joinder of additional parties or the dismissal of present parties, except upon a showing that such action will not result in delay.

7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) to review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court.

8. New intervenors shall present evidence, if any they have, through witnesses to a number to be set, and limited, if necessary, by the court, following conference.

9. With regard to the examination of witnesses, all new intervenors shall among themselves select one attorney per witness to act for them, unless one or more of the new intervenors show cause otherwise. These conditions of intervention shall remain subject to change or modification by the court in the interest of timely disposition of the case.

DATE: March 15, 1972." App. at 408-410.

> gation. (A. Ia397) The court did not require or permit oral argument. Less than 36 hours later the court issued its 'Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit' (A. Ia439) rejecting the contentions of Intervenor School Districts. Testimony regarding metropolitan plans commenced four days later (a weekend and Motion day falling between) at 10:10 A.M. Prior to the noon recess, just two hours after Intervenor School District counsel had first appeared in the District Court and before completion of testimony of a single witness, the District Judge announced that counsel could stop by his office and pick up his 'Findings of Fact and Conclusions of Law on Detroit-only Plans of Desegregation' (A. Ia456) wherein the court announced its intention to seek a more desirable racial mix by means of a Metropolitan Plan.
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> Thus, without any opportunity for oral argument, without opportunity to examine or cross-examine one witness, without opportunity to present one shred of evidence, and indeed, without opportunity to obtain copies of previous pleadings and testimony (let alone read same), the Intervenor School Districts had been effectively foreclosed from protecting their interests. [28]."

He further complains about the fact that the Court permitted him to take the deposition of Dr. David Armor, a sociologist of Harvard University, and then refused to receive it in evidence.

Dr. Armor was a well-qualified expert. He had previously written an article entitled "The Evidence on Busing" published in *The Public Interest* No. 28, Summer 1972, which exploded some of the existing theories on educational achievement resulting from busing.

In a subsequent article by Dr. Thomas F. Pettigrew and associates, they responded to Dr. Armor's article on busing and quoted from Judge Roth's ruling excluding his deposition as follows:

> "This fundamental fact was dramatically demonstrated by the judicial reaction to Armor's deposition in the Detroit school case, a deposition based on an earlier draft of 'The Evidence on Busing.' On June 12, 1972, U.S. District Court Judge Stephen H. Roth ruled the deposition inadmissible as evidence on the grounds of irrelevancy. The deposition, in Judge Roth's view, represented 'a new rationale for a return to the discredited "separate but equal policy . . . .'"[7] The Public Interest No. 30, Winter 1973.

In an article entitled "The Double Double Standard" appearing in the same issue at page 119, Dr. Armor replied to the Pettigrew article stating among other things:

> "The double standard here is obvious. One willingly applies social science findings to public policy if they are in accordance with one's values, but declares them irrelevant if they contradict one's values. . . ." *Id.* at 130.

The Supreme Court in *Brown I* relied heavily on testimony of sociologists as to the adverse effect of segregation on the educational achievement of Negro children. It is inconceivable that the District Court would hold contrary testimony of a sociologist irrelevant and exclude it. This was prejudicial error. In a court of justice not merely one side but both sides are entitled to offer evidence.

The District Court quashed a subpoena duces tecum issued by the intervenors for Charles Wells, an employee of the Detroit Board of Education, to bring with him "all records of the past two (2) years concerning incidents involving damage to property, safety of pupils or staff (whether perpetrated by other pupils, staff or outsiders) criminal activities, or fires in or on school property as regards each school in the Detroit public school system."

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[7] Judge Roth's language is not understandable in view of the 1869 decision of the Supreme Court of Michigan in *People, ex rel. Workman* v. *Board of Education of Detroit, supra,* upholding the right of Negro children to attend any school in their district.

Although the Court had previously received the testimony of Freeman Flynn, offered by plaintiffs on the subject of safety, it denied permission to the Intervenors to offer evidence on the same subject by quashing the subpoena. The Court was not that technical in admitting into evidence Exhibit 16, although it was not properly identified, stating that the Court decided to follow Justice of the Peace Cane's rule: "We will let it in for what it is worth." Indeed, he did, but did not apply Justice Cane's rule to the deposition.

Due process required an opportunity to be heard which must be granted at a meaningful time and in a meaningful manner. *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969); *In Re Gault,* 387 U.S. 1, 19-21 (1967); *Armstrong* v. *Mango,* 380 U.S. 545, 552 (1965); *In Re Oliver,* 333 U.S. 257 (1948).

As well stated in *Railroad Commisison of California* v. *Pacific Gas & Electric Co.,* 302 U.S. 388, 393 (1938):

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 304, 305."

The intervenors were entitled to the effective assistance of counsel, to have a reasonable time to examine the papers in the case and to prepare for trial, and to offer evidence in support of their contentions before the case is decided against them.

One other matter is worthy of comment. The District Court appointed a nine-member panel to set up a metropolitan plan of desegregation. Three members of the panel were from Detroit. Only one member was appointed to represent the fifty-two school districts whose school population exceeds that of Detroit by more than two times. This is a plain example of unfairness.

The Detroit Board of Education, although vigorously denying the commission of any purposeful segregative acts com-

mitted against Negroes and contending that plaintiffs have not proven their case, has taken an unusual and extraordinary position. It supports the plaintiffs on the issue of a metropolitan plan contending that if a constitutional violation has been shown, only such a drastic remedy will rectify it. It is obvious that the Detroit Board was motivated by its concern that a 63.8%-black and a 37.2%-white quota was too heavily weighted with black pupils, and that it owed a constitutional duty to dilute that quota and to distribute the black-pupil population of Detroit into the other three counties and fifty-two additional school districts, in order to effectuate a quota of about 25%-black and 75%-white children in each school.

It is submitted that no such constitutional duty exists and that the District Court erred in ordering it; *Swann, supra.*

THE ELEVENTH AMENDMENT TO THE CONSTITUTION PROSCRIBES SUITS AGAINST THE STATE OF MICHIGAN, AND IT HAS SOVEREIGN IMMUNITY

The plaintiffs have attempted to sue the State of Michigan by making the Governor, the Attorney General, and the Acting Superintendent of Schools parties defendant. Later, when the District Court issued an order prior to the adoption of any plan for desegregation, to purchase 295 buses, it made the Treasurer of the State a party defendant in order to sequester funds in his hands.

It was the theory of the plaintiffs that under the doctrine of vicarious liability the state was liable for the acts and conduct of the Detroit Board of Education and of other political subdivisions, and that since the State is a party defendant it really was not necessary to make the Detroit School Board, or the school boards in the other districts, parties to the case. This theory has no legal support and is unsound. Each school district is a separate and independent corporate unit with power to sue and to be sued, and has separate taxpayers whose

property is taxed for the support of the schools as well as for the payment of the district's bond issues.

If, as plaintiffs contend, the State has been made a party defendant, then such an action against the State is proscribed by the Eleventh Amendment.

The most recent decision of the Supreme Court upholding sovereign immunity of a state is *Krause* v. *State of Ohio*, — U.S. — (1972).

To the same effect is *Ex Parte State of New York*, 256 U.S. 490 (1921), where the court made it clear that the applicability of the Eleventh Amendment "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record." *Id.* at 500.

The general rule was stated in *Dugan* v. *Rank*, 372 U.S. 609 (1963), as follows:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, supra, at 704; *Ex parte New York*, 256 U.S. 490, 502 (1921)."

The Civil Rights Act has not yet been construed as an exception to the Eleventh Amendment.

The order issued against the State defendants provided:

> "1. The Defendant Detroit Board of Education shall acquire by purchase, lease or other contractual arrangement at least 295 buses for use in the interim desegregation plan during the 1972-73 school year. All financial obligations incurred as the result of this Order shall be the sole financial obligation of the State Defendants, including the added State Defendant State Treasurer Allison Green, as set forth below in Paragraph 2. Said order,

lease, or other contract shall be entered into by negotiation and without the necessity for bids forthwith and in no event later than Thursday, July 13, 1972.

2. The State Defendants shall bear the cost of this acquisition and State Defendants, including the added State Defendant Green, shall take all necessary steps utilizing existing funds and sources of revenue, to be acquired State funds, legislatively authorized and funds directed by the State Constitution to the State School Aid Funds and by re-allocation of existing or new funds to pay for said transportation acquisition either directly or through the Defendant Detroit Board." App. at 576, 577.

This order imposed a personal liability on the State defendants and would require them, if they complied with it, to misappropriate and misapply State funds in violation of state law. If they did not comply with it they could be punished for contempt.

In addition, the State defendants were ordered to pay the cost of the nine-member panel appointed by the Court to devise the Metropolitan Plan, (1 Ba 538). This cost was estimated at $22,500. All defendants were ordered to hire black counsellors and provide in-service training for teachers in the fifty-three school district desegregation area. The initial cost of the in-training was about $3,000,000.

The District Court was without authority to impose a personal liability on the State defendants or to order them to misapply and misappropriate State funds in violation of State law.[8]

The legislature of Michigan is not likely to act on the suggestion of the majority, accompanied by a veiled threat if it fails to so act, that it change school district boundary lines

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[8] The orders entered by the District Court have certainly been expended on the public treasury, have interfered with public administration, have restrained the State from acting, and have compelled it to act, which is the test for determining whether the action is against the State, under *Dugan* v. *Rank, supra.* Such an action is clearly proscribed by the Eleventh Amendment.

to benefit a few at the expense of many, and thereby violate the constitutional rights of many. School district lines may not be changed for an unconstitutional purpose. *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484 (1972); *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). Since an adequate remedy already exists within the Detroit school district to correct any constitutional violation therein, there is no occasion for the legislature to alter the existing neutral, non-discriminatory school district boundaries.

RELIEF

Because of prejudicial errors of constitutional magnitude committed by the District Court, each of the orders from which an appeal has been taken should be reversed and a new trial granted with instructions to consider and adopt a Detroit-only desegregation plan to remedy any constitutional violations which it may find to exist in said City.

The Governor, the Attorney General and the Treasurer of the State should be dismissed, as they are unnecessary parties to a determination of the issues of the case.

APPENDIX A

REVERSE DISCRIMINATION

The development of "affirmative action" programs for minority groups is posing some intractable problems. These problems arise from the existence of conflicting, fundamentally incompatible values. On the one hand, we social workers value righting the wrongs perpetrated for too long on minority groups. On the other hand, we value the right of all persons to be treated equally.

Distributive justice requires the dissemination of benefits to all without depriving any individual or group of something it values. This is far more in keeping with fairness and equity than the idea of redistributive justice, which confers benefits on one group at the expense of others. Redistributive justice, then, leads to reverse discrimination.

Redistributive justice is advocated to atone for our failure to live up to the belief in the capacity and the dignity of each human being. This failure does not negate the soundness of that belief. Rather, it should spur us to correct the failure—not the belief. When practices fail to reflect principles, then we should change our practices, not our principles.

For social workers, the issue has come to the forefront in agency and university hiring practices and admissions policies of schools of social work. Social agencies, especially those serving ghetto populations, are giving preference to minority group members in employment. Universities, beset by pressures from the U.S. Department of Health, Education, and Welfare, are similarly giving preference to women and minority groups. Some schools of social work have adopted quota systems in dealing with candidates for admission.

These practices conflict with the fundamental social work belief in individual human dignity and the libertarian belief that each person is entitled to be judged and valued as an individual. Quota systems and preferential treatment are arti-

ficial restrictions on this right because they substitute irrelevant group characteristics such as race or religion for consideration of an individual's capacity and potential. Respect for the individual is a basic part of social work's credo and commitment. We cannot reconcile this conviction with treating people only as representatives of a racial group.

When we try to eliminate discrimination and compensate for past wrongs by quota systems, we substitute one injustice for another. We deny the inherent equality of all people and undermine the proposition that each individual should have the same opportunity to achieve and to be judged according to his merits. We pit group against group and destroy the possibility of harmonious interaction. Quotas are pernicious instruments; they represent an unacceptable means for achieving a desirable end. "Preferential quotas are condescending, divisive and detrimental to the integrity of a university."[1]

A quota system institutionalizes discrimination and must be vigorously opposed. Ultimately, it is a form of segregation. The progressive democratization of the university through the elimination of any criterion for admission other than merit has been one of the success stories of America. Now some of the benighted beneficiaries of that victory ally themselves with those antilibertarian forces that would have blocked their own access to education. They are ready to eradicate the victory of equal opportunity over discriminatory quotas, for which their forebears fought so hard. That victory has only been partially won. We cannot falter now by substituting a host of irrelevant and inappropriate considerations for merit. The test a university must apply to each candidate is merit—not inherited status.

Some advocates of quota systems believe that quotas will redress wrongs and thus produce equal opportunity, when actually they eliminate equal opportunity. Quotas have historically been used for exclusion. They were an insidious man-

[1] Editorial, "Discrimination by HEW," *New York Times*, March 2, 1972.

ifestation of institutionalized bigotry, covertly designed to exclude unwanted groups. They were wrong in the past and they are wrong now, even though they are now designed to achieve inclusion, rather than exclusion. Discriminatory practices are wrong, no matter what their intent. Whether they are for or against particular groups, quota systems are morally indefensible.

For social workers, the distinctions among people based on race, ethnic background, religion, or creed that inhere in quota systems are particularly abhorrent. Our regard for the individual and our objection to hereditary caste as a status determinant should make quota systems especially impossible for us to accept.

For schools of social work, the argument that quotas for admission will produce student bodies that represent the proportion of racial, ethnic, or religious groups in society is a curious expression of bigotry. Proportional representation on a group basis is highly discriminatory. What taxonomy shall be used to categorize the groups that should be represented? Among the characteristics that defy classification are the following: cultural, economic, ethnic, gender, geographic, linguistic, national, occupational, racial, religious, social class, and tribal.

Some minority groups include the following: the aged, American Indians, Asian-Americans, Blacks, capitalists, Catholics, Chicanos, easterners, factory workers, farmers, German-Americans, Hispanic Americans, Hungarian-Americans, immigrants, Irish-Americans, Italian-Americans, Jews, the lower class, migrants, nomads, northerners, Polish-Americans, the poor, Puerto Ricans, slum-dwellers, southerners, Swedish-Americans, the upper class, WASPS, westerners, and youths.

Who is not a member of a minority group? Who cannot find a place among this woefully incomplete list of minorities?

We are all minorities. Each of us comes from a distinctive racial, religious, or ethnic stock. Each of us is a newcomer or a descendant of newcomers. Even the native Americans—the

Indians—came to North America from across the Bering Straits 25,000 years ago. Each of us has ties to our own roots. Each of us has pride in our origins. Each minority contributes to America—to its building, its evolution, and its maintenance.

MORTON TEICHER

Morton Teicher, Ph.D., is Dean, School of Social Work, University of North Carolina, Chapel Hill, North Carolina.

KENT, Circuit Judge, concurring in part and dissenting in part:

While I cannot concur in the majority opinion in these cases I am in accord with certain of the conclusions announced in that opinion.

To narrow the scope of this dissent it should be stated at the outset that I am in complete agreement with the majority's conclusion that on the record as presented and because of the concessions made by counsel for the School District of the City of Detroit during oral argument it appears without question that the Detroit city schools were unconstitutionally segregated and that an order for integration of those schools must be fashioned by the District Court. I am further in accord with the conclusion of the majority that the District Court's order for the purchase of buses for use in effectuating a plan of integration covering the metropolitan Detroit area is premature and must be stayed until an appropriate plan has been approved by the District Court. I agree that each of the suburban school districts which may be affected by any proposed metropolitan plan is a necessary party to the litigation within the meaning of Rule 19, Federal Rules of Civil Procedure, as found by the majority and that the pleadings must be amended to join such school districts and bring all parties before the Court.

It is at this point that I separate from the majority and find myself compelled to state the reasons why I cannot join in the majority opinion. The majority opinion approves the District Court's conclusion that a Detroit only integration plan would be insufficient to cure the unconstitutional segregation found to have been imposed in the Detroit city schools. Those who join in such a conclusion appear to me to have a misapprehension of the record in this case.

As stated by the Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), at page 22:

> "The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races

> in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems."

The "state-enforced separation of races" to which reference is made in the quoted material was not found to exist in the metropolitan Detroit area. While the District Judge made comments about the segregation of the races with reference to the situation existing within the City of Detroit as related to at least some of the suburban communities within the counties of Wayne, Oakland and Macomb, which comments have been quoted with approval and adopted by the majority of this Court, we cannot escape the conclusion of the District Judge, as stated in his formal opinion, 345 F.Supp. 914 (E.D. Mich. 1972), at page 920, where the Court said:

> "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation."

With such a statement in the record it is beyond the comprehension of this writer to understand how the majority can approve the conclusion of the District Court which requires that at least some of the 86 public school districts outside the City of Detroit should be embraced within a metropolitan school district for the purpose of desegregating the Detroit city schools, the only district which has been found from the evidence to have "committed acts of de jure segregation." Without proof with regard to segregatory activities within the other school districts or in regard to district boundaries any conclusion by the District Court or by this Court that school district boundaries of other districts had the effect of maintaining or creating unconstitutionally segregated schools within the City of Detroit is obviously based on irrelevant, unsubstantial evidence or totally unsupported assumptions.

I am in accord with the application of the statement of the Court of Appeals for the Fifth Circuit (though not in the limitation to specific schools) in *United States* v. *Texas Education Agency,* 467 F.2d 848 (5th Cir. 1972), en banc, where at page 883 the majority opinion quoted the statement in *Swann* that "the nature of the violation determines the scope of the remedy," and then proceeded to conclude at page 884:

> "The power of the district court will depend first upon a finding of the proscribed discrimination in the school system. *Swann,* 402 U.S. at 16, 91 S.Ct. 1267, 28 L.Ed. 554. In determining the fact of discrimination *vel non,* whether imposed by statute or as a result of official action, the district court must identify the school or schools which are segregated as a result of such discrimination. This identification must be supported by findings of fact. The importance of such a determination will be seen in some populous school districts embracing large geographical areas. There may be segregated schools which are the result of unconstitutional statutes or of official action. There may be other one race schools which are the product of neutral, non-discriminatory forces."

If we accept the premise that "the nature of the violation determines the scope of the remedy," as announced by the United States Supreme Court, then, clearly, the remedy proposed by the District Court, and approved by a majority of this Court, goes far beyond the "nature of the violation" since the District Court has already stated as a conclusion that no evidence was taken as to any violation with regard to any suburban school district.

While the minority in the *Texas Education Agency* case disapproved of the suggestion of the majority that specific schools within a system must be found to have been segregated, and treated separately, (476 F.2d 888 where the minority speaks through Judge Wisdom), yet the minority does not find nor even suggest that it would be appropriate to expand the order for relief beyond the system found to have

committed acts which violated the constitutional rights of the plaintiffs in the action.

Through the majority's opinion runs the thread which holds it together. That thread is the unwillingness apparent in the minds of the majority to sanction a black school district within a city which it concludes will be surrounded by white suburbs. While the majority does not now state that such a demographic pattern is inherently unconstitutional, nevertheless, I am persuaded that those who subscribe to the majority opinion are convinced, as stated in the slip opinion of the original panel, "big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law." While that statement has been removed from the opinion of the majority, yet the premise upon which the statement was obviously based must necessarily form the foundation for the conclusions reached in the majority opinion. It may be that such will become the law, but such a conclusion should not receive our approval on a record such as exists in this case.

As has been pointed out in the other opinions, the boundaries of the school district of the City of Detroit have been co-terminus with the boundaries of the City of Detroit for more than 100 years. Those lines were laid out at a time when there was a minimal black population in the metropolitan area of Detroit, if there was such metropolitan area at the time the boundary lines were established.

The District Judge and the majority make much of the fact that "if the boundary lines of the school districts of the City of Detroit and the surrounding suburbs were drawn today few would doubt that they could not withstand constitutional challenge." This interesting statement provides a fertile field for speculation but certainly has no validity. A proposal to adopt an amendment to the Constitution of the United States in the same manner and with the same people voting as adopted the Constitution of the United States would be stricken immediately. I know of no one who would suggest that be-

cause of changes in the methods of electing the membership of state legislatures that the Constitution of the United States thereby becomes unconstitutional. The quoted statement is to me a complete non sequitur.

I know of no authority which would permit a Court to announce a conclusion, based upon a violation of the Constitution, absent the taking of proofs to establish such constitutional violation, which proofs the District Judge stated he did not take in this case.

Absent proofs, which clearly were not taken, to establish a violation of the constitutional rights of these plaintiffs by the suburban school district personnel and by the State of Michigan in laying out suburban school district lines it would appear that we are in complete and absolute conflict with the prior decisions of this Court. In *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967) (*Deal I*), this Court rejected the contention that the state had an affirmative obligation to balance schools racially (in that case within the City of Cincinnati) "to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child." 369 F.2d at 59.

Deal I was cited with approval by this Court in *Davis* v. *School District of City of Pontiac,* 443 F.2d 573 (6th Cir. 1971), *cert. denied* 404 U.S. 913 (1971). The Court said at page 575:

> "Appellants correctly contend that under Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967), a school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not attributable to school policies or practices and is the result of housing patterns and other forces over which the school administration had no control."

The majority, while refusing to overrule *Deal I* and *Davis,* creates without evidence an obligation to achieve a balance of the races in schools not in a school district but in a metro-

politan area, and does so while denying to the vast majority of the school districts involved in such metropolitan area the opportunity to offer evidence to establish that they had not been used for or guilty of any segregative practices. Many other appellate courts have agreed with *Deal* and *Davis*. *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988, 998 (10th Cir. 1964):

> "Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them."

Keyes v. *School District No. 1, Denver, Colorado*, 445 F.2d 990, 1005 (10th Cir. 1971), *cert. granted* 404 U.S. 1036 (1972):

> "Our reluctance to embark on such a course stems not from a desire to ignore a very serious educational and social ill, but from the firm conviction that we are without power to do so. Downs v. Board of Education, 336 F.2d at 998. Before the power of the federal courts may be invoked in this kind of case, a constitutional deprivation must be shown. Brown v. Board of Education, 347 U.S. 483, 493-495, 74 S.Ct. 686, 98 L.Ed. 873 (1954) held that when a state segregates children in public schools solely on the basis of race, the Fourteenth Amendment rights of the segregated children are violated. We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. Deal v. Cincinnati Board of Edu-

cation, 369 F.2d 55 (6th Cir. 1966); 419 F.2d 1387 (1969); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963)."

United States v. *Board of School Commissioners of City of Indianapolis, Indiana,* 474 F.2d 81, 83, 84 (7th Cir. 1973):

"Appellants first assert that there is no constitutional duty to remedy the effects of racial imbalance or to maintain any particular racial balance in the public schools. The Government does not quarrel with this assertion, and, indeed, insofar as it relates to purely *de facto* segregation, *unaided by any state action,* it is the law of this circuit, Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), aff'g 213 F.Supp. 819 (N.D.Ind. 1963)."

A similar prayer for re-districting was before the District Court in *Spencer* v. *Kugler,* 326 F.Supp. 1235 (D.N.J. 1971), and was rejected. The Supreme Court affirmed without opinion, 404 U.S. 1027 (1972) with Mr. Justice Douglas dissenting.

While the Fifth Circuit in *Cisneros* v. *Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972), en banc, sustained a finding of unconstitutional segregation resulting from a neighborhood school policy which effectively segregated Mexican-Americans *within a school district* it did so based upon competent evidence.

The majority here announces, "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose." (Pg. 65). Again it may be that this will become the law. Clearly, the cases cited have reached this conclusion as to the attendance lines existing within a specific school system. I know of no case which permits such a conclusion as to boundary lines existing between school districts, and while the conclusion that existing boundary lines cannot be frozen for an unconstitutional pur-

pose may flow logically from the premise announced it should be based upon competent evidence justifying a finding of fact that such boundary lines *have been frozen* for an unconstitutional purpose, and the District Judge in this case announced that he took no evidence on that issue.

I do not understand how the majority can reach a conclusion as to an appropriate remedy without evidence of any violation, particularly when in *Deal I* and *Deal II* a contrary conclusion has been reached. As stated at 369 F.2d, page 59:

> "If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals then there is no violation of the Constitution."

and again in *Davis* this Court framed the issues as follows:

> "Accordingly, the principal question before us is whether there is sufficient evidence in the record to support the determination of the District Judge that *appellants are responsible* for the existing racial imbalance in the Pontiac School System." 443 F.2d at 575. (Emphasis supplied).

and in responding to that issue this Court said:

> "Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years." 443 F.2d at 576.

Thus, the cases in this Court, prior to this case, appear conclusively to have been decided on the basis of discriminatory intent, and unless we specifically reverse our previous decisions we cannot reach the conclusion announced by the majority in a case where the District Court specifically stated that it did not take any evidence to establish any discriminatory intent on the part of the suburban school districts who were

not parties to the action or on the part of the State in the structure of the suburban school districts.

Other circuits have also required the establishment of a discriminatory intent. *Keyes* v. *School District No. 1, Denver, Colorado,* 445 F.2d 990 (10th Cir. 1971), *cert. granted* 404 U.S. 1036 (1972); *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (1964); *United States* v. *School District 151 Cook County,* Ill., 404 F.2d 1125 (7th Cir. 1968), *cert. denied* 402 U.S. 943 (1971); *United States* v. *Board of School Commisisoners of Indianapolis, Indiana,* 474 F.2d 81 (7th Cir. 1973); *Spencer* v. *Kugler,* 326 F.Supp. 1235 (D.N.J. 1971), *aff'd.* 400 U.S. 1027 (1972). But see: *United States* v. *Texas Education Agency,* 467 F.2d 848 (5th Cir. 1972).

The evidence in regard to building of school buildings within the City of Detroit and lack of state aid for transportation of pupils within the City of Detroit may have demonstrated that these factors contributed to racial segregation within the City of Detroit. Clearly, if the Court took no proofs with respect to the commission of acts causing segregation of the races as between the City of Detroit and the suburban school districts it would be inappropriate to include those school districts within any remedy to be adopted to eliminate segregation within the City of Detroit. The cases cited by the District Court and by the majority of this Court are inapplicable. In each case cited the school district involved and against which a remedial order was granted was found to have been guilty of segregative practices. In every instance, as we read the cases, that finding was supported by substantial evidence after an adversary proceeding in which all the interested parties were represented. Such is not the case here.

It seems obvious to me that the majority and the District Court have become confused and are unable to distinguish between violation and remedy. As stated by the District Court no evidence was taken as to any violation in the fixing

of the boundaries of the suburban school systems nor as to any violation because of the relationship between the suburban school systems and the schools of the City of Detroit.

The errors to which we have already alluded were brought about by the failure on the part of the District Court to require that *all* interested parties be brought into the case at the earliest appropriate moment. A review of this record reveals that on March 22, 1971, a group of white Detroit residents, who were parents of children enrolled in the Detroit public schools, were permitted to intervene as parties defendant. On June 24, 1971, the District Judge alluded to the *possibility* of a metropolitan school system, App. Vol. IV, pgs. 259, 260, and in that connection stated: "As I have said to several witnesses in this case: how do you desegregate a black city, or a black school system." App. Vol. IV, pg. 260. Subsequently, and on July 17, 1971, the white parents filed a motion in an effort to require the joinder of the 85 suburban school districts as parties defendant and gave the following reasons:

> "1. That said suburban school districts are agents of the State of Michigan and subject to the jurisdiction and supervision of the State Board of Education.
>
> "2. That said school districts are white segregated school districts.
>
> "3. That questions of law and fact common to the defendant, School District of the City of Detroit, and proposed additional suburban school districts have been presented to this Court.
>
> "4. In the event that this Court rules for the plaintiff, in the absence of joinder of the proposed school districts, complete relief cannot be awarded the plaintiff, and in addition would impose an unconstitutional burden on the intervening defendant, in that the resulting school district of the City of Detroit would be and will remain as established by the proofs already submitted an inferior school district." App. I at 142-3.

The trial court did not rule upon this motion, but in the course of the proceedings discussed it in September, 1971, and concluded that the motion should not be considered at that time because "in considering the motion to add the listed school districts we pause to note that the proposed action has to do with relief." App. Vol. I, pg. 215, 338 F.Supp. 582, at 595.

Between February 9 and February 17, 1972, four parties, Grosse Pointe Public Schools, Allen Park Public Schools, et al.,[1] Southfield Public Schools and the School District for the City of Royal Oak, made motions for leave to intervene. These motions were finally granted on March 15, 1972, during the second day of hearing on the plans for desegregation involving only the Detroit school system. Intervention, according to the District Judge, was permitted under Rule 24 (a), "Intervention of Right," and also under Rule 24(b), "Permissive Intervention." Before permitting such intervention and on March 6, 1972, the District Judge set up a timetable for the consideration of plans already submitted, which timetable was as follows:

> "1. Hearing on desegregation intra-city plans will proceed, beginning at 10:00 a.m., Tuesday, March 14, 1972.
>
> "2. Recommendations for 'conditions' of intervention to be submitted not later than 10:00 a.m., March 14, 1972.
>
> "3. Briefs on propriety of metropolitan remedy to be submitted not later than March 22, 1972.
>
> "4. Tentatively and unless the court rules otherwise, hearings on metropolitan remedy to commence 10:00 a.m., March 28, 1972." App. I at 397.

When intervention was granted, the District Judge placed strict limitations upon the part which the intervenors would be permitted to play. The order provides:

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[1] The others referred to included 38 additional suburban school districts.

"The interventions granted this day shall be subject to the following conditions:

1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

2. No intervenor shall reopen any question or issue which has previously been decided by the court.

3. The participation of the intervenors considered this day shall be subordinated to that of the original parties and previous intervenors.

4. The new intervenors shall not initiate discovery proceedings except by permission of the court upon application in writing, accompanied by a showing that no present party plans to or is willing to undertake the particular discovery sought and that the particular matter to be discovered is relevant to the current stage of the proceedings.

5. No new intervenor shall be permitted to seek a delay of any proceeding in this cause; and he shall be bound by the brief and hearing schedule established by the court's Notice to Counsel, issued March 6, 1972.

6. New intervenors will not file counterclaims or cross-complaints; nor will they be permitted to seek the joinder of additional parties or the dismissal of present parties, except upon a showing that such action will not result in delay.

7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court.

8. New intervenors shall present evidence, if any they have, through witnesses to a number to be set, and limited, if necessary, by the court, following conference.

9. With regard to the examination of witnesses, all new intervenors shall among themselves select one attorney per witness to act for them, unless one or more of the new intervenors show cause otherwise.

These conditions of intervention shall remain subject to change or modification by the court in the interest of timely disposition of the case." App. Ia 408-410.

We point out that the intervening school districts (42 out of 85) came into the case while the court was already considering the Detroit only plans, were permitted a total of less than one week to prepare briefs in regard to a metropolitan remedy, and found themselves faced with a ruling favorable to the consideration of such remedy within two days after the date on which their briefs were due. All of this despite the fact that an effort had been made to bring the suburban school districts into the case almost eight months prior to the rulings in regard to the Detroit only plans and the metropolitan plan. The majority finds no fault with this timetable. It affirms the conclusions of the District Court in regard to the Detroit only plan and the need for a metropolitan plan without affording to the suburban school districts any opportunity to be heard.

Those suburban school districts which are not yet parties to this action, 43 in number, have had no opportunity to be heard with respect to any alleged constitutional violation within their respective school districts or with respect to the existence of their respective school district boundaries. Of course, the pleadings do not assert any such violations but under the majority opinion a remedy will be imposed which will drastically affect the future school-

ing of their children without granting to them any opportunity to be heard with regard to any reasons which might support the adoption of such a remedy. The suburban school districts which were belatedly made parties to this action assert that because they have not been afforded the opportunity to offer evidence to demonstrate that they have not been guilty of any constitutional violation they have been denied the fundamental requirements of due process. The response of the appellee to the claimed rights of the suburban school districts is that there is no denial of "life, liberty or property" within the meaning of the Fifth Amendment. They also claim that the interests of the suburban school districts were adequately represented by "their parent state defendant."

An examination of the record in this case will effectively dispose of any claim that the interests of the suburban school districts were represented by the state defendants. Clearly, the state defendants were defending against the claims of the plaintiffs that the state had by its actions created racial segregation within the school district of the City of Detroit. As I examine the record it does not appear that *any* defendant felt compelled to offer evidence in defense of an unasserted claim that the existence of suburban school districts was without other evidence a violation of the constitutional rights of the students in the schools of the City of Detroit. Had the state defendants comprehended that the District Court intended to impose a metropolitan school district upon the schools of three counties the writer is confident that they would have joined in the earlier motion to require the suburban school districts to be named as parties defendant.

As to the first argument of the appellees it is clear from the language of the Court in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), that the segregation of schools is a denial of due process within the meaning of the Fifth Amendment. If segregation is a denial of the Fifth Amendment due process then clearly orders eliminating such segregation are a part of the due process rights. In that case the Court said:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, * * *." 347 U.S. at 499.

Even earlier, in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Supreme Court found a violation of the Fourteenth Amendment in matters relating to the liberty of parents to direct the upbringing and education of children under their control. Had we any doubt, it would have been settled in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), where the Court permitted parents to withdraw their children from the state public school system and found a constitutional right in parents to control the upbringing and religious training of their children. That the right under the Fifth Amendment applies to the states was recognized in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), where the court noted at page 482:

> "By *Pierce* v. *Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments."

Being convinced that the interest of parents in the education of their children represents a right protected by the Constitution as to all parents and not only those parents whose children are required to attend segregated schools, we then reach the question of the application of due process to that right.

As pointed out by the Court in *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965):

> "A fundamental requirement of due process is 'the opportunity to be heard.' * * * It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

and in greater detail we find the same principal in *Boddie* v. *Connecticut,* 401 U.S. 371, 377-8 (1971), where Mr. Justice Harlan, speaking for the Court, stated:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' *Windsor* v. *McVeigh,* 93 U. S. 274, 277 (1876). See *Baldwin* v. *Hale,* 1 Wall. 223 (1864); *Hovey* v. *Elliott,* 167 U. S. 409 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' *Hovey* v. *Elliott, supra,* at 417, has continually recurred in the years since *Baldwin, Windsor,* and *Hovey.* Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.,* 339 U. S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Id.,* at 313.

Thus, each party to a lawsuit should be advised as to the claims asserted by the other parties to the lawsuit and have an opportunity to be heard in respect to all such claims.

In this case no pleading has *ever* been filed suggesting any wrongdoing on the part of any suburban school district, none suggesting that the suburban schools and the schools of the City of Detroit constituted a dual school system or even intimating any possibility of a need for a metropolitan school district to eliminate the segregated conditions alleged to have existed in the schools of the City of Detroit. We can only speculate upon the timing of the first suggestion of a metropolitan district but it appears that the District Judge

seized upon the suggestion without requiring any amendments to the pleadings or the adding of any parties.

I question whether the suburban school districts have any interest in being heard as to the claim of segregation within the City of Detroit, and there can be no question as to the right of the trial court to place certain limitations upon the part which any intervening school district would be permitted to play. Had all of this, in regard to metropolitan school districts, come up at the eleventh hour as suggested by the appellees one might, although it is doubtful, accept the conditions imposed by the District Judge. Such was not the case here. The motion to require the joinder of the suburban school districts was made almost eight months before consideration was given to the Detroit only plans.

The Advisory Committee on the Rules anticipated that limitations and conditions might be placed upon intervention as a matter of right under Rule 24(a):

> "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." 3B Moore's Federal Practice ¶ 24.01[10], at 24-18 (2d Ed.).

and see also *Galbreath* v. *Metropolitan Trust Co. of California,* 134 F.2d 569, 570 (10th Cir. 1943); *Chavis* v. *Whitcomb,* 305 F.Supp. 1359, 1363 (S.D.Ind. 1969). The situation in this case is pointed up by the language found at 3B Moore's Federal Practice ¶ 24.16[4], 2d Ed.

> "It would be meaningless to give him an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary to his own protection."

What we have said in regard to intervention under Rule 24 sets forth without the necessity of repetition those matters which should be considered by any court in determining

the part which is to be played by one who is joined as a party under Rule 19, as well as one who intervenes as a party, aspects of this case which are almost completely ignored by the majority and the District Court.

In conclusion I am constrained to say that I do not suggest that a metropolitan remedy is totally beyond the realm of consideration in this case upon an appropriate record. My whole purpose in writing this opinion is to point out that the majority and the District Court have fallen into a state of confusion in failing to distinguish between violation and remedy and in failing to recognize the necessity for the finding of violation before the trial court embarks upon that broad field of equity which permits a trial judge to devise a remedy which will adequately overcome the violation previously found to be in existence. I have also written because I am satisfied that the District Judge in failing to consider the necessity for joining the suburban school districts pursuant to a motion filed more than a year before the disposition of the case was in error. The suggestion by the District Court that the suburban school districts were only involved in the remedy points up the trap into which both the District Court and the majority of this Court have fallen in failing to recognize the necessity for finding a violation before a remedy may be imposed.

I would reverse the District Court and remand the case with instructions to require the joinder of the suburban school districts of the counties of Wayne, Oakland and Macomb with permission to the representatives of those districts, with *reasonable* limitations, to participate in all aspects of this lawsuit which may affect the suburban school districts, and with particular attention to the necessity for finding a constitutional violation which would justify the imposition of a metropolitan remedy.

MILLER, Circuit Judge, dissenting.

It is my firm conviction that it is premature at this time for the Court to adjudicate any of the questions arising from the various orders of the district court from which this appeal is taken. This is true for the reason that school districts and parties to be affected by a metropolitan plan or remedy have not been afforded an opportunity to be heard or to present evidence upon all of the issues involved.

The majority opinion does indeed state:

> On remand, any party against whom relief is sought, including school districts which heretofore have intervened and school districts which hereafter may become parties to this litigation, shall be afforded an opportunity to offer additional evidence, and to cross-examine available witnesses who previously have testified, on any issue raised by the pleadings, including amendments thereto, as may be relevant and admissible to such issues. The District Court may consider any evidence now on file and such additional competent evidence as may be introduced by any party.

The effect of this conclusion is, in my opinion, vitiated by the two succeeding sentences:

> However, the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the "Detroit-only" plans of desegregation, dated March 28, 1972. We hold that the findings of fact contained in these rulings are not clearly erroneous, Rule 52(a), Fed. R. Civ. P., but to the contrary are supported by substantial evidence.

Parties to be affected and against whom relief is sought should be accorded, in compliance with basic principles of

due process, an opportunity to be heard at a meaningful time and in a meaningful manner not only with respect to the ultimate scope of the remedy to be fashioned, but also with respect to important, significant and perhaps even controlling issues, including the issue of segregation, a "Detroit only" school plan and the propriety of a metropolitan remedy. If any one of these issues is resolved in favor of parties outside the Detroit School District, the nature and scope of a remedy embracing outlying districts would not be reached. Hence the outlying districts have a vital interest in each issue separately and should be heard on each in a true adversary sense. Until this is done our expression of view on the merits of the several questions is uncalled for and ill-advised. To permit these additional parties to be heard only in the restricted sense set forth in the majority opinion is to deny them basic rights guaranteed not only by Rule 19, Federal Rules of Civil Procedure, but by the Constitution itself.

I would, therefore, vacate all orders appealed from the district court, remand the action for the joinder of all parties to be affected, and direct the district court to afford the parties a proper opportunity to be heard and to present evidence on the issues indicated above.

Nos. 72-1809
through
72-1814

JAMES A. HIGGINS
CLERK

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

June 12, 1973

Mr. Frank J. Kelley
Mr. Louis R. Lucas
Mr. George T. Roumell, Jr.
Mr. William M. Saxton
Mr. Douglas H. West
Mr. Richard P. Condit
Mr. Kenneth B. McConnell
Mr. Robert J. Lord
Mr. Robert A. Derengoski
Mr. Alexander B. Ritchie
Mr. J. Harold Flannery
Mr. Jack Greenberg
Mr. E. Winther McCroom
Mr. Nathaniel R. Jones
Mr. Bruce Miller
Mr. Ralph B. Guy, Jr.
Mr. Theodore Sachs
Mr. William T. Downs
Mr Theodore W. Swift
Mr. Irwin Ellman

Re: Ronald Bradley, et al., Plaintiffs-Appellees,
vs.
William G. Milliken, Governor of Michigan, et al.,
Defendants-Appellants.
Case Nos. 72-1809, 72-1810, 72-1811, 72-1812,
72-1813, 72-1814

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled cases.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,
James A. Higgins, Clerk

/s/ GRACE KELLER
Chief Deputy

Enclosure

Excerpt from proceedings had in the above-entitled matter before Honorable Stephen J. Roth, United States District Judge, at Detroit, Michigan on Thursday, June 24, 1971.

* * *

THE COURT: I want briefs, proposed findings and conclusions to be filed not later than July 26th. This is in no way conditioned on when we finish with the proofs, but I expect by that time we will have finished with the proofs.

Now, there will be some housekeeping matters to take care of. First of all the construction injunction which is pendente lite, so you both might want to give some consideration to that, and I will welcome any suggestions any of the parties have with respect to what if anything need be done pending my resolution of the basic issue on segregation here. And what I'm thinking about is this, so you will share my thinking: I think that those who are involved in this lawsuit ought to be preparing for eventualities, and I mean within the limits, the maximum and the minimum, so that if the time comes for judicial intervention, and Mr. Reporter, that is not interference. It may be so classified by counsel, but the word is intervention – [4003] it would be well for the parties to be prepared if that develops because I am mindful of the time pressures that I am under, and I am going to pass the pressure on. And that means that I don't want the parties to be saying: "Well, we didn't know you were going to hold this way." I want everybody to think in terms of what may happen and time accordingly. Let me be more specific. I have just indicated that I denied the motion of the State defendants to have this action dismissed against them.

I am not going to take the time at the present time to outline my reasons for it. If that becomes necessary in due course I will. I have my reasons, and I am aware of them without taking the time to put them down in a formal ruling. If the Court in this case finds that the situation calls for some other judicial action then the School Board ought to be preparing themselves to meet that eventuality. But the State defendants too. I don't think that the State defendants should hide, put their heads in the sand and avoid considering what may happen if certain developments already made plain in this case take shape.

Mr. Ritchie has made some points along that line, and I have, and to repeat mine as I have said to several witnesses in this case: "How do you desegregate a black city, or a black school system;" That is why I was [4004] interested in the projections of the student population of the city. We end up with student population of Detroit of 80 to 85 percent black. How do you integrate, or, if I find segregation, to put it another way, how do I desegregate. Now, State defendants, particularly School Board as well, ought to be thinking in these terms indeed if that's what develops.

I throw these out so that I am putting people on notice. I don't know whether Mr. Young or Mr. Krasicky – is Mr Young in town?

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Nos. 72-1809 – 72-1814

RONALD BRADLEY, et al.,

Plaintiffs-Appellees,

vs.

WILLIAM G. MILLIKEN, GOVERNOR OF MICHIGAN, ETC; BOARD OF EDUCATION OF THE CITY OF DETROIT,

Defendants-Appellants,

and

DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Defendant-Intervenor-Appellee,

and

ALLEN PARK PUBLIC SCHOOLS, et al.,

Defendants-Intervenors-Appellants,

and

KERRY GREEN, et al.,

Defendants-Intervenors-Appellees.

BEFORE: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, McCREE, MILLER, KENT and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that:

1. The Ruling of the District Court on the Issue of Segregation, dated September 27, 1971, and reported at 338 F.Supp. 582, is affirmed.

2. The findings of fact and conclusions of law on "Detroit-only" plans of desegregation, dated March 28, 1972, are affirmed.

3. The Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972, is affirmed in part, but vacated for the reasons set forth in the majority opinion of the Court.

4. The Ruling on Desegregation Area and Development of Plan, dated June 14, 1972, is vacated except as prescribed in the majority opinion of the Court.

5. The order dated July 11, 1972, directing the purchase of school buses is vacated.

The case is remanded to the District Court for further proceedings not inconsistent with this opinion.

No costs are taxed. Each party will bear his own costs.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

COSTS: NONE