

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2633

ARLAM CARR, JR., et al.,

Plaintiffs-Appellants,

NATIONAL EDUCATION ASSOCIATION, INC.;
PENELOPE ANNE JENKINS, et al.,

Plaintiff-Intervenors-Appellants,

UNITED STATES OF AMERICA,

Amicus Curiae,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle
District of Alabama, Northern Division

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court **erred in failing to order de-**
fendants to make further efforts to desegregate the
virtually all-black elementary schools remaining from the
formerly de jure segregated dual school system.

INTEREST OF THE UNITED STATES

The interest of the United States in the issue presented by this appeal is founded upon its substantial involvement in the proceedings below and the enforcement responsibility conferred upon it by Congress in Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c. On May 18, 1964, within one week after this case was originally filed, District Court Judge Frank M. Johnson sua sponte named the United States amicus curiae with the rights of a party. In that status we have fully **participated in** the many phases of this litigation. More recently, the United States participated in evidentiary hearings before the district court during April 1974 as well as the negotiations and discovery conducted prior to those hearings. Pursuant to the instructions of the district court the United States submitted a post-trial brief in May 1974. We requested that the

court reject the plan submitted by the appellee school board for the desegregation of its elementary schools and require the board to either adopt one of the other desegregation plans in the record or submit alternatives which apply the remedial priorities specified by this Court in United States v. Texas Education Agency, 467 F.2d 848 (5th Cir., 1972) (en banc) and Cisneros v. Corpus Christi I.S.D., 467 F.2d 142 (5th Cir., 1972) (en banc).

STATEMENT

1. Procedural History. This action was instituted in the Middle District of Alabama by Negro parents and school children on May 11, 1964. After a hearing, the district court on July 31, 1964, found the defendants to be operating a compulsory biracial school system and ordered its termination on a gradual basis commencing with the 1964-65 school year. 232 F. Supp. 705 (1964).^{1/} From that date through

^{1/} Under this order students in grades 1, 10, 11, and 12 were allowed to apply for transfers for the 1964-65 school year. Subsequently, the board granted transfers to all-white schools to 8 out of 29 black applicants. This action which initiated the desegregation process was approved by order of September 5, 1964.

the 1969-70 school year, the Montgomery system operated under various voluntary transfer or freedom-of-choice desegregation plans. During this period the original decree was modified from time-to-time by supplemental orders further specifying minimum desegregation requirements. For the 1966-67 school year the board was directed to assign pupils in all grades except 5 and 6 on a freedom-of-choice basis. 253 F. Supp. 306. In June 1967, defendants were placed under a Jefferson-model^{2/} freedom-of-choice decree which also required that efforts to desegregate faculties be initiated with the commencement of the 1967-68 school year.

In March 1968, the district court entered an order (289 F. Supp. 647) which referred to progress in student and faculty desegregation as "token" and found that efforts had been made to perpetuate the dual system in a number of phases of school system operation including athletic programs, the transportation system, new school construction and the building of additions to existing schools. A portion of this order, requiring the system to reassign faculty so as to gradually achieve specified racial percentages at each school, was modified by this Court on

^{2/} United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir., 1967) (en banc), cert. denied, 389 U.S. 840.

appeal, ^{3/} 400 F.2d 1 (1968) rehearing denied 402 F.2d 782, but was reinstated by the Supreme Court in United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

By order dated August 19, 1969, the district court ruled out reliance on the freedom-of-choice method of achieving student desegregation after the 1969-70 school year and ordered the United States to formulate a new desegregation plan for the Montgomery system.

The 1970 Desegregation Plan. In January, 1970 the United States submitted a plan developed by the Department of Health, Education and Welfare which proposed to establish neighborhood attendance zones for each school, to reassign some previously transported rural students to city schools, and to pair several elementary schools without increasing transportation requirements. Subsequently the board filed their own plan which was

^{3/} In this phase of the litigation the United States cross-appealed the order of the district court on the grounds that the timetable to achieve faculty desegregation was too gradual. When the order was modified to eliminate the requirement that specific percentages be achieved, we moved for a rehearing en banc and thereafter successfully petitioned for a writ of certiorari.

similar to the H.E.W. plan except that it omitted the recommended elementary pairings.^{4/} In an order of February 25, 1970, the district court adopted the board's plan and found that the H.E.W. plan, to the extent it differed from the board's plan, was based upon an erroneous "theory that racial balance or student ratios is required by the law." This decision was affirmed upon an appeal filed by the original plaintiffs. 429 F.2d 382 (1970). The panel's opinion analyzed the plan according to the decision in Ellis v. Board of Public Instruction of Orange Co., 423 F.2d 203 (1970) and found insufficient reason to **interfere** with the district court's discretion.

Nevertheless, the opinion cautioned:

Once a school board has acted, however, the courts have a solemn obligation to determine whether the structure designed by the school board will house a unitary school system. This obligation is unremitting, and there can be no abdication, no matter how temporary. Accordingly, any imprimatur of judicial approval must be

^{4/} One pairing arrangement proposed by H.E.W. was accepted by the board. This involved two rural 1-12 schools in close proximity: Dunbar and Montgomery Co. High Schools. Dunbar was converted to serve grades 1-6 and Montgomery Co. became a 7-12 school. The pairings recommended by H.E.W. which the board plan omitted involved 9 city elementary schools. **Two of these nine schools, formerly black Hale and McDavid, were closed under the board's plan and their students reassigned to both formerly white and formerly black schools.**

entered with the caveat that until construction of a unitary system is completed, change orders, when appropriate, will be issued to ensure that the designed structure in fact accommodates a unitary school system and not a bifurcated one.

429 F.2d at 386.

In approving the board's 1970 plan substantial weight was given by this Court to the fact that only one school was projected to be all-black.^{5/} The plan also projected that enrollments in five formerly all-black schools would be reduced to less than 90% black.^{6/} However, when the plan was implemented in 1970-71, none of these schools met their projections.^{7/} In addition, eleven other formerly all-black

^{5/} This school apparently was Loveless which was projected to have 0 whites in attendance in grades 1-6 and was described as "deep in the heart of a predominantly Negro residential area." 429 F.2d at 386. Actually the Loveless facility served grades 1-9 and did have a small number of whites projected in grades 7-9 so that, overall, the school was projected to be 98% black. See p. 14, infra which lists projected and actual enrollments for the 1970-71 school year for each formerly black school which the system continued to operate.

^{6/} However, none of these schools were projected to enroll less than 70% black. The five schools were: Dunbar Elem., Georgia Washington Elem.-Jr. High, Hayneville Road Elem.-Jr. High, Houston Hill Jr. High and Carver Sr. High.

^{7/} For example, Carver Sr. High, the only formerly all-black high school in the city, was projected to be 72% black. However, when the plan was implemented in 1970-71, Carver's actual enrollment exceeded 92% black.

schools which were projected to remain 90% or more black,^{8/}
failed to enroll the number of white students projected to
attend.^{9/} Consequently, every formerly all-black school
operated by the system in 1970-71 remained all-black or
virtually all-black (90% or greater) upon implementation of
the 1970 plan except Dunbar Elementary which became 87.3% black.^{10/}
In an August 22, 1972 order approving minor modifications in
the 1970 plan, the district court indicated that a substantial

^{8/} These schools included: Billingslea (closed in 1973),
B. Washington, Carver, Daisy Lawrence, Fewes, Goode Street,
Madison Park and Paterson elementaries, McIntyre Elem.-Jr.
High, B. Washington Jr. High and Carver Jr. High.

^{9/} For example, Booker T. Washington Junior High was pro-
jected to enroll 40 whites (or 10%), but when the plan was
implemented it remained 100% black.

^{10/} A further group of three schools, although formerly white,
became 80% black upon implementation of the 1970 plan. These
include Chilton and Pintlala elementaries, and Montgomery Co.
High School. One further school, Davis Elementary, was pre-
dominantly white in 1970 but shifted to over 80% black since
the 1970-71 school year. Projected and actual enrollments
under the 1970 plan for each school in the system are contained
in the plan filed by the board on March 29, 1974 and subse-
quently approved by the court.

question existed as to whether that plan was **consistent** with developing constitutional standards as stated in Swann v. Board of Education, 402 U.S. 1 (1971), Davis v. Board of School Commissioners of Mobile Co., 402 U.S. 33 (1971) and other post-1970 cases, and cited the language quoted above **at pp.6-7** from this Court's 1970 decision as further authority for requiring additional desegregation. The present phase of this litigation was initiated by an order dated August 29, 1973 approving a joint motion of the parties which inter alia required the parties "to continue their study toward the elimination of such one-race schools as may be required by Swann."

1974 Proceedings and Order of May 22, 1974. Pursuant to the district court's order, the United States submitted a number of detailed suggestions for further desegregation which were adopted in part by a plan filed by the board in January, 1974. Indicating dissatisfaction with the degree of desegregation proposed by ^{11/}the board's plan, the district court ordered

^{11/} In orders of February 15, and March 13, 1974, the court noted the continued existence of one-race schools at the elementary and junior high levels and held that the board had not yet discharged its affirmative duty to come forth with a plan of desegregation that establishes a unitary school system.

the board to submit a new plan and specified what additional steps were to be taken. Also, intervention was granted to a second group of plaintiffs for the purpose of receiving further ^{12/} plans. Subsequently, the board submitted a revised plan and plaintiffs and plaintiff-intervenors submitted separate plans, both prepared by educators with substantial experience in school desegregation. These three plans were the subject of hearings during April, 1974.

In its opinion of May 22, 1974, the district court adopted the appellee school board's plan in toto, thus approving what was denominated a "neighborhood school plan." Slip. Op., p. 17. As legal support heavy reliance was again placed on the case of Ellis v. Board of Public Instruction of Orange Co., 423 F.2d 203 (5th Cir., 1970) and other cases based upon that

^{12/} The board's revised plan was filed on March 29, 1974, and minor modifications in that plan were submitted on May 8, 1974.

decision. The court emphasized that instead of focusing on individual schools, the system as a whole must be examined to determine whether it is unitary, noting that secondary schools, faculties and extracurricular activities will be substantially desegregated in Montgomery. With respect to the black elementary schools remaining under the plan it was held that these schools "are the result of the concentrations of blacks in the western area of Montgomery" - as opposed to discriminatory action by defendants. Slip Op., p. 17. As further justification for adoption of the board's elementary plan the court held that the remaining black schools "cannot be effectively desegregated in a practical and workable manner." Id. at p. 17. In rejecting the plans of plaintiffs and plaintiff-intervenors the court indicated an agreement with the board's objections to alternatives utilizing transportation and/or grade restructuring as desegregation techniques and to fears of "instability" or "white flight" which may result from efforts to do more. Finally, the opinion throughout criticizes the rejected plans for utilizing "mechanical" racial quotas or tolerances purportedly to achieve racial balance. E.g., Slip. Op., p. 26.

Notices of appeal from this decision were filed by plaintiffs and plaintiff-intervenors on May 29 and May 30, respectively. Subsequently, plaintiff-intervenors filed a motion for summary reversal with this Court. By order of July 19, 1974 this motion was denied.

2. Facts

a. The Montgomery System in 1973-74. The Montgomery County School System is a unified city-county system encompassing over 1,500 square miles. The county is roughly rectangular in shape averaging approximately 46 miles in length and 36 miles in width.^{13/} The major concentration of both black and white students reside in the city of Montgomery which is located in the northwestern part of the county. Within the city itself, there is substantial residential segregation with the major concentration of the black population residing in the western half of the city and the white population in the eastern half. The rural areas outside the city are sparsely populated and predominantly black in racial composition.^{14/}

^{13/} Total area and distance measurements are approximations derived from the standard county map used by appellees to plot county zone lines and bus routes. See Pl. Int. Ex. 3 (Ap. 19 hearing).

^{14/} The demographic patterns of the student population can be discerned from the 7th grade pupils locator maps used during the district court proceedings. Pl. Int. Exs. 1 & 2 (Ap. 19 hearing).

During the 1973-74 school year the system enrolled 36,016 students, 17,042 (47%) of whom were black and ^{15/} 18,974 (53%) of whom were white. These students attended 47 schools, all but seven of which are located within the corporate limits of the city. Although the schools are generally organized along a 1-6, 7-9, 10-12 grade structure, the number of grades housed at a particular facility varies ^{16/} to some extent throughout the system. Due to the area

^{15/} These figures represent the sums of March, 1974 enrollments as reflected on Table 2 to the district court's May 22 decision. All enrollment figures for the 1973-74 school year cited in this brief are similarly taken from this table.

^{16/} The variety of grade organizations at particular facilities is indicated as follows:

<u>Grade Structure</u>	<u>Number of Schools</u>
1-6	30
1-9	6
1-12	1*
7-9	6
7-12	1
10-12	3
	<u>47</u>

*This school, Carver, actually consists of two adjoining buildings on a single campus. The elementary school is presently housed in one building and the junior and senior high schools in the other.

which the system encompasses, transportation requirements are considerable. During 1973-74 the system transported 11,176 (31%) of its students including 5,388 elementary students 3,759 junior high students and 2,029 high school ^{17/} students

According to March, 1974 enrollment figures 8,104 (47.6%) of the system's total black student population attended 16 schools with enrollments in excess of 90% black. Another 1,683 (10%) attended 4 schools which were between 80 and 90% black. Most of these schools were operated as all-black under the dual system and all except one of them remained over 80% black after the implementation of the 1970 desegregation plan. For reference, the following chart lists each school which was more than 80% black during the 1973-74 school year and (a) whether the school was operated

^{17/} See Pl. Int. Ex. 3 (Ap. 24 hearing) which contains a school-by-school breakdown of the number of students transported. A significant portion of the students transported reside in the rural areas of the county and are presently bussed considerable distances. The largest one-way bus route is 46 miles and a number of the routes exceed 30 miles one way. See deposition of Superintendent Garrett, Pl. Int. Ex. 4, p. 88 (Ap. 24 hearing); see also county bus route map, Pl. Int. Ex. 3 (Ap. 19 hearing). Gov't Ex. 2 (Ap. 24 hearing) lists the schools and number of students transported by race, for each bus route which are identified by numbers on the city and county bus route maps.

as an all-black school prior to 1970, (b) the impact of the 1970 plan on its racial composition and (c) the projected impact of the plan approved by the court for the 1974-75 school year:

Schools in excess of 90%, 1973-74	(a) All-black prior to 1970	(b) Projected % black 1970 plan	(b) Actual % black 1970-71	(c) Projected % black 1974-75
Carver (9-12)	Yes	72%	98%	39%
McIntyre (1-9)	Yes	90%	98%	98%*
Loveless (1-9)	Yes	98%	100%	99%**
Hayneville Rd (1-9)	Yes	79%	85%	96%**
G. Washington (1-9)	Yes	87%	99%	31%*
Carver (7-9)	Yes	96%	98%	39%
B. T. Washington(7-9)	Yes	90%	100%	closed
Pintlala (1-6)	No	64%	93%	93%
Paterson (1-6)	Yes	93%	95%	94%
Madison Park (1-6)	Yes	84%	95%	closed
Goode Street (1-6)	Yes	95%	99%	closed
Fews (1-6)	Yes	95%	98%	99%
Daisy Lawrence (1-6)	Yes	95%	99%	98%
Chilton (1-6)	No	75%	82%	closed
Carver (1-6)	Yes	90%	97%	99%
B.T. Washington (1-6)	Yes	91%	98%	98%
 Schools between 80 and 90% black				
Montgomery Co. (7-12)	No	62%	88%	86%
Houston Hill (7-9)	Yes	84%	89%	31%
Dunbar (1-6)	Yes	74%	87%	87%
Davis (1-6)	No	7%	28%	87%

* Converted to grades 7-9 for 1974-75

** Converted to grades 1-6 for 1974-75

b. The Court Adopted Plan. At the high school level, the plan submitted by appellees and adopted by the District Court fully desegregates four of the system's ^{18/} five senior high schools including grades 9-12 of the previously all-black, 1-12 Carver complex. At the junior high school level, three (B.T. Washington, Hayneville Road and Loveless) of the system's seven all or virtually all-black schools are closed or converted to other uses, three others (Carver, Georgia Washington and Houston Hill) are substantially desegregated and one (McIntyre) is left virtually all-black with nearly twice the enrollment it had during the 1973-74 school year.^{19/} Additionally, the plan

^{18/} The fifth high school, Montgomery County High is a small rural school located in the extreme southern portion of the county. None of the plans before the court attempted to further desegregate this school.

^{19/} McIntyre, currently a 1-9 grade facility had 338 black and 14 white students at the junior high level last year. Under the board's plan this school is combined with Loveless, converted to a 7-9 grade facility and is projected to enroll 792 black and 14 white students. Enrollments for each school as projected by the board are contained in Table 2 to the court's May 22 decision.

results in the shifting of Baldwin Junior High from 46%
20/ black to 73% black. At both the junior and senior high
levels the court-adopted plan proposes to effectuate pro-
jected desegregation primarily through a combination of
(1) rezoning, (2) rerouting of existing transportation and
(3) providing new transportation. According to the board's
calculations, the plan requires additional transportation
21/ for 827 senior and 397 junior high students.

At the elementary level appellees' plan proposes
to close three small black schools, (Chilton, Madison Park
and Goode Street,) 22/ and convert two others (McIntyre and

20/ Under the board's plan of March 29, 1974, Baldwin was
projected to shift from 47% black to 82% black. After the
conclusion of the hearings in April, the board, on May 8,
1974, submitted a modification which attempts to reduce the
black majority at Baldwin to 73% by reassigning 126 black
students to predominantly white Goodwyn Junior High. In
addition, Baldwin is left undercapacity by over 400 students.

21/ See Pl. Int. Ex. 3 (Ap. 24 hearing) which is the
board's school-by-school transportation projection under
their plan. According to calculations prepared and sub-
mitted by the United States the plan would require new trans-
portation for 464 senior and 233 junior high students. See
Attachment C and D to Post Trial Brief of United States filed
on May 5, 1974. The court made no findings of transportation
needs under this plan.

22/ According to Table 2 to the district court's decision,
Chilton enrolled 140 students (90% black), Madison Park had
142 (100% black) and Goode Street had 280 (99% black).

Georgia Washington) to serve grades 7-9 only. Black students from Chilton, Madison Park and Georgia Washington are transported to predominantly white schools although students from Goode Street and McIntyre will continue to attend predominantly black schools.^{23/} The only additional element of the plan furthering desegregation is the reassignment of 394 black students presently transported to Carver Elementary to 4 predominantly white schools in the eastern portion of the city.^{24/} The projected result is that 8 of the remaining 33 elementary schools in the system will retain student bodies over 93% black and enroll 4,072 black students or 42% of the system's black elementary students. Eleven schools over 80% black will enroll 5,213 blacks or 57% of all black elementary students.^{25/} All of the remaining elementary schools will achieve enrollments between 20% and 40% black except two: Bellingrath (53%) and McMillan (65%). The techniques employed to remove the

^{23/} Students from Goode Street are rezoned into Fewes (99% black) and Bellinger Hills which results in an increase in black percentage from 72% to 82% at the latter. Thus, the number of schools exceeding 80% black will be reduced from fifteen to eleven although 5 black schools are closed or converted.

^{24/} In its March 29 plan appellees originally proposed to reassign from Carver, 50 blacks to each of 5 predominantly white facilities. However, pursuant to the May 8 modifications, appellees will reassign 132 blacks to Johnson, 132 to Dannelly, 66 to Crump and 64 to Southlawn.

^{25/} By comparison, as of March, 1974, elementary schools over 90% black enrolled 5,207 black students or 56% of the system's black elementary students. Schools over 80% black enrolled 6,173 blacks or 67% of all black elementary students.

racial identifiability of black schools are limited to closing^{26/} or converting them to other uses. Consequently, some black students are transferred and a lesser number will be newly transported^{27/} to predominantly white schools but no white elementary student is reassigned to what is now a predominantly black school. Overall at the elementary level the board projects a reduction in transportation requirements from 1973-74 levels by 923 students, 903 of which are white and 20 of which are black.^{28/}

^{26/} In addition to the three elementary and one junior high schools closed under the present plan the 1970 plan closed three formerly black schools (McDavid Elementary, Hale Elementary and B.T. Washington High School) and one (Billingslea Elementary) was closed in 1973 for a total of eight. This does not include schools converted to other grade levels. Since freedom-of-choice assignments were eliminated, one traditionally white school (Pike Road) has been closed.

^{27/} Of the closed or converted black elementary schools from which students are reassigned to predominantly white schools, two (Madison Park and Georgia Washington) are rural schools many of whose students are already transported as are the reassigned blacks from Carver.

^{28/} Pl. Int. Ex. 3 (Ap. 24 hearing). Under the United States' estimates, the savings at the elementary level totals 507 students. The savings appears to be largely due to the opening of two new elementary schools on the far eastern edge of the city (the Vaughn Road and Eastern Bypass Schools).

c. Plaintiffs' and Plaintiff-Intervenors' Plans.

Plaintiffs' plan was developed by Dr. Gordon Foster, a Professor of Education and Director of the University of Miami Title IV Desegregation Center^{29/} and presented to the district court through the oral testimony of Dr. Foster in a hearing on April 15, 1974. Plaintiff-intervenors' submitted two distinct plans authored principally by Dr. Herbert Larry Winecoff, an assistant professor of education at the University of South Carolina and also a former Title IV Desegregation Center director.^{30/} At a hearing on April 19, Dr. Winecoff testified that he^{31/} considered his Plan A to be educationally and administratively preferable to Plan B^{32/} and no evidence was presented concerning the latter plan. Also,

^{29/} Tr. p. 5 (Ap. 15 hearing); Vita of Dr. Foster, Pl. Ex. 1 (Ap. 15 hearing).

^{30/} Tr. pp. 3-8 (Ap. 19 hearing); Vita of Dr. Winecoff, Pl. Int. Ex. 3 (Ap. 19 hearing).

^{31/} These plans were referred to as Plan A (along with Plan A, Alternate) and Plan B. These plans were originally filed on April 1, 1974 although substantial revisions were subsequently made in Plan A and its Alternate and contained in Pl. Int. Ex. 14 (Ap. 19 hearing).

^{32/} Tr. pp. 11, 62 (Ap. 19 hearing).

an alternate proposal to the elementary portion of Dr. Winecoff's Plan A ("Plan A, Alternate") was presented for consideration.

Both Drs. Foster and Winecoff testified that in formulating their plans, they made use of district-wide racial percentages as general guidelines for determining the results sought to be achieved. Dr. Foster stated that he sought to achieve a degree of desegregation in which the racial composition of a given school would be within 15% of the average racial composition of all schools at the particular grade level.^{33/} Dr. Winecoff made similar use of a 10-15% perimeter^{34/} although his finished plan actually reveals wider variations of racial percentages among individual schools than does plaintiffs' plan. Both experts testified that they sought to balance desegregation objectives with other educational and administrative considerations including the minimizing of new transportation, its time and distance.^{35/} As a result, neither plan strictly followed

^{33/} Tr. pp. 9-11 (Ap. 15 hearing).

^{34/} Tr. p. 9 (Ap. 19 hearing).

^{35/} Tr. pp. 13-14 (Ap. 15 hearing); Tr. p. 10 (Ap. 19 hearing).

the pre-established percentage guidelines. In the rural areas the Foster plan has no effect on four heavily black schools (Madison Park, Pintlala, Dunbar and Montgomery Co. High) and the Winecoff plan does not affect two (Dunbar and Montgomery Co.). Within the City of Montgomery racial percentages are projected under plaintiffs' plan to range from 24% black (Southlawn) to 66% black (Loveless).^{36/} Under Plaintiff-intervenors' Plan A, city schools range in black percentage from 84% (MacMillan) and 81% (Peterson), to 27% (Goodwyn Jr. High), although most are projected to fall within or near the guidelines established. Under Plan A, Alternate, elementary schools would range from 100% black (Loveless) to 7% black (Bear) and four city schools serving grades 1-3 would remain over 80% black.

^{36/} See Pl. Exs. 3 & 6 (Ap. 15 hearing) which contains Dr. Foster's adjustments to the enrollment projections contained in the plan as originally filed to account for racial enrollment figures broken down by grade and school. The plan's original projections were based on enrollment data broken down only by school. According to these adjustments, racial percentages will vary as much as 16 percentage points between schools within paired or clustered groups under the plan. Of course the variation is much higher when schools in different pairs or clusters are compared. Compare May 22 Decision, Slip Op., p. 7, which finds that "the exact racial balance" does not vary by more than two-tenths of one percent in any paired group.

At the high school level both plaintiffs' and plaintiff-intervenors' plans are substantially similar to the board's plan in terms of projected racial percentages and techniques used, although zone lines are redrawn somewhat differently under each plan.

At the junior high level the plaintiffs' plan starts with the basic elements of the board's plan and makes additional proposals in order to reduce black concentrations at McIntyre and Baldwin. This would be effected primarily through the use of two-way transportation and although the resulting increase in the number of junior high students requiring transportation is relatively moderate,^{37/} the plan

^{37/} The district court stated that 1,642 additional junior high students would require transportation. Slip. Op. p. 9. The transportation estimates stated by the Court for plaintiffs' plan are the same as those submitted by Dr. Foster. Pl. Exs. 4 & 5 (Ap. 15 hearing). The United States estimated that plaintiffs' plan would require new transportation for 724 junior high students. For reasons stated by Dr. Foster on cross-examination there are questions concerning the accuracy of his estimates. See Tr. pp. 53-54, 142-145 (Ap. 15, hearing).

does in some instances increase substantially the distances such students would travel.^{38/} Long distance routes are generally avoided by plaintiff-intervenors' junior high plan which proposed to desegregate^{39/} all facilities solely by contiguous zoning.^{40/} At the same time the proposal contemplates a nearly complete redrawing of attendance zone lines resulting in the reassignment to different schools of about 50-60% of all junior high students.^{41/} The estimates of

^{38/} The longest route appears to involve the reassignment of approximately 200 black students from Carver to the rural Georgia Washington School. Evidence presented by plaintiffs indicated this to be about a 19 mile drive, taking 32 minutes. Tr. pp. 153-154 (Ap. 15 hearing).

^{39/} Projected junior high enrollments range from 65% black at McIntyre to 27% black at Goodwyn.

^{40/} Thus, as compared to the board's plan, this proposal does not require the non-contiguous reassignment of a large number of black students in western Montgomery to schools in east Montgomery.

^{41/} May 22 Decision, Slip Op. p. 10. Tr. p. 95 (Ap. 19 hearing). This estimate would include students in the 9th grade who would be transferred to different schools under ordinary circumstances.

how many of these students would require transportation varied among the parties between 50 and 1,398 although the court found the number to be approximately 2,000.^{42/}

At the elementary level plaintiffs' plan utilizes a combination of contiguous pairing^{43/} of schools and clustering and pairing of non-contiguous schools to desegregate all schools in the city generally without re-drawing existing attendance zone lines. The pairs or clusters are organized on a 1-3, 4-6 grade structure with two exceptions due to the differing capacities of the schools involved.^{44/} By all estimates

^{42/} Slip. Op. p. 10. Plaintiff-intervenors estimated 50, the United States estimated 463 and the board estimated 1,398 additional junior high students would be transported. Def. Ex. 19 (Ap. 19, hearing).

^{43/} Contiguous pairing was found to be feasible in only three instances: Forest Avenue-Bellinger Hill, Capital Heights-Paterson, and B.T. Washington-Highland Avenue. While the latter two schools are not actually contiguous, the zones are close enough so that students should be able to walk to either school.

^{44/} This involves a cluster in which grades 5-6 would be assigned to Daisy Lawrence and grades 1-4 assigned to both Eastern By-Pass and Vaughn Road. The second proposal containing such a variation is the proposal to pair Goode Street (1-2) and Morningview (4-6).

this proposal would require the greatest amount of additional transportation.^{45/}

Plaintiff-intervenors' elementary Plan A involves the use of a uniform 1-3, 4-6 grade structure; the establishment of new attendance zones for each school which were drawn to maximize desegregation and are less compact than present zones; and the assignment of satellite zones to a number of 1-3 grade schools. This approach, in comparison to the non-contiguous pairing utilized under plaintiffs' plan, would reduce the amount of new transportation required^{46/} and the distances that students would travel.^{47/} However, because

^{45/} The court found that 5,204 additional students would require transportation (Slip Op. p. 9) and the United States estimated the number to be 3,502 under this plan. According to evidence presented by plaintiffs the longest distance and time between paired schools under the plan would be 10 miles and 30 minutes. Tr. pp. 151 (Ap. 15 hearing). This is between the Daisy Lawrence and Eastern By-pass schools which are located at extreme opposite ends of the city.

^{46/} The court found that "about 2000" new students would need transportation under the elementary portion of plaintiff-intervenors plan. Slip Op., p. 10. The United States estimated the number to be 2,522. One of the primary reasons for the variations in both enrollment and transportation projections among the parties was the fact that only a 7th grade pupil locator map was available. Enrollment characteristics of the 7th grade are not necessarily characteristic of other grades.

^{47/} The evidence indicated that the longest route involved in the plan within the city was 7.3 miles and 18 minutes as measured between the Loveless school and the furthest point of a satellite zone assigned to that school. Tr. pp. 205-209 (Ap. 22 hearing).

of the new and larger attendance zones established, a high number of elementary students (60-70%) would initially be transported to different schools^{48/} and many would be required to walk greater distances to and from school than they do at the present.^{49/} Plan A, Alternate is identical to Plan A except that it eliminates use of the 1-3 grade satellite zones thereby further minimizing new transportation needs.^{50/}

^{48/} Slip Op., p. 10; Tr. p. 95 (Ap. 19 hearing).

^{49/} The district's policy is to provide transportation only if a student lives beyond 2 1/2 miles from his assigned school. In many cases, portions of elongated zones under the Winecoff plan meet or exceed the 2 1/2 mile distance whereas present elementary zones are usually within 1 to 1 1/2 miles of the schools they encircle.

^{50/} Under both the United States' and Dr. Winecoff's estimates this would reduce new transportation requirements by about 900 students. It would also eliminate the use of satellite zoning as a desegregation technique, a less preferred technique according to Dr. Winecoff (Tr. pp. 65-66 (Ap. 19 hearing)); but as previously stated, Plan A Alternate would leave four identifiably black schools unaffected. Without the satellite zones transportation routes would rarely exceed 5 miles.

d. Practical Considerations. Throughout the course of these proceedings appellees relied upon a number of broad practical considerations both as grounds for objection to the plans submitted by plaintiffs and plaintiff-intervenors^{51/} and as justification for their failure to submit plans to further desegregate any of the virtually all-black elementary schools remaining in the system. The major objections related to the utilization of elementary pairing or grade restructuring, the additional transportation to achieve desegregation, and the possibility of white flight or resegregation.

In their pleadings and through the testimony of their superintendent appellees opposed the use of pairing on the grounds that it would necessitate facility renovations (including the adjustment of the height of chalk boards, fountains and sinks in some schools), that the act of transferring elementary students and teachers to different schools

^{51/} On cross-examination, the system's Superintendent Garrett declined to state any form of preference for either of these plans. Rather he stated that both are "highly undesirable." Tr. pp. 251-252, (Ap. 24 hearing).

would be educationally disruptive, and that it would deprive younger students the opportunity of attending school with older elementary students.^{52/} On the other hand, Drs. Winecoff and Foster testified that deviations from a 1-6 elementary grade structure have been widely and successfully implemented, that no administrative and logistical difficulties are involved,^{53/} and that under some circumstances there may be both educational and economic advantages to a 1-3, 4-6 structure.^{54/} The district court made no specific findings with respect to the merits or demerits of this technique.

On the subject of transportation the plans submitted to the court indicate that desegregation of most, although

^{52/} Tr. pp. 37-42 (Ap. 24 hearing).

^{53/} Both experts testified to the effect that after an initial movement of books, teacher support materials and perhaps furniture, very little remodeling is necessary primarily because elementary grades are normally taught in self-contained classrooms with fairly uniform characteristics. This was considered to be less difficult than converting junior high facilities to elementary use or vice-versa which will be done to four facilities under appellees' plan. See fn. 19, supra.

^{54/} See Tr. pp. 58-66 (Ap. 15 hearing) (Foster); Tr. pp. 35-43 (Ap. 19 hearing) (Winecoff).

perhaps not all,^{55/} of the predominantly black elementary schools would require use of this technique. The record reflects that transportation currently is widely used in the system^{56/} for purposes unassociated with desegregation.

In some instances this transportation was utilized to take students outside of their neighborhoods without a desegregation effect.^{57/} Under the court approved plan, although there is a reduction in the actual amount of transportation at the elementary level, the plan does project the use of transportation in assigning black students across the

^{55/} See fn. 43, supra. An examination of the map illustrating elementary attendance zone lines under the board's plan Def. Ex. 1 (Ap. 24 hearing) indicates that the following schools (with projected black percentages in parenthesis) have contiguous zones and are located less than 2 miles apart:

Paterson (94%).....	Highland Avenue (30%),
	Capitol Heights (38%),
	Highland Gardens (38%).
B.T. Washington (98%).....	Forest Avenue (40%),
	Highland Avenue (30%).
D. Lawrence (98%).....	Peterson (37%).
Bellinger Hill (81%).....	Floyd (32%),
	Forest Avenue (40%).
Davis (87%).....	Harrison (30%).

^{56/} See p. 14, supra.

^{57/} For example, a number of white students residing in the vicinity of the Southlawn school in the southern part of the city were transported during 1973-74 to the Peterson school although many of the systems predominantly black schools are closer. Students from the same vicinity were also transported to Pintlala, Floyd and Harrison. See Pl. Int. Ex. 3 (Ap. 19 hearing); Gov't Ex. 2 (Ap. 2 hearing); Tr. pp. 270-271 (Ap. 24 hearing).

city to schools in the eastern portion.^{58/} At its furthest extremities, the City of Montgomery is about 12 miles from west to east and 10 miles from north to south, and the plans discussed under subsection c above indicate that proposals can be developed using routes considerably less than these distances. Access within the city in all directions is facilitated by the existence of two major freeways. The evidence discloses no major natural or man-made obstacles within the city which would make it impractical for students to walk or be transported to schools other than those they presently attended.^{59/} Finally, both Drs. Foster and Winecoff testified that the district's transportation system appeared to be susceptible to the use of techniques employed by other districts in order to increase utilization of existing buses and minimize costs.^{60/}

^{58/} See p. 18, supra.

^{59/} There appear to be no natural obstacles in Montgomery and although there are thoroughfares and railroad tracks, all are routinely crossed by the present attendance zone lines in appellees plan. See Def. Ex. 1 (Ap. 24 hearing).

^{60/} Both experts commented that bus utilization rates in Montgomery appeared to be extremely low. They suggested that more buses make two runs per day rather than one and that staggered schedules and the use of shuttle buses be considered. With the use of these techniques Dr. Winecoff estimated that his plan would increase transportation costs by only \$150,000. Tr. pp. 55-58 (Ap. 15 hearing) (Foster); Tr. pp. 51-52, 78-79 (Ap. 19 hearing) (Winecoff).

With respect to what might be entitled resegregation (or "white flight" or "unstable desegregation") Dr. Foster testified that in his experience some schools and school systems with various black percentages had retained stability after desegregating while Dr. Winecoff testified that other systems shifted to a heavily black status before significant, affirmative desegregation efforts were attempted.^{61/} Both experts indicated that many factors are typically involved in determining whether or not shifts in racial composition occur.^{62/} Both were also of the opinion that a good means of discouraging resegregation is to completely desegregate a system thereby tending to remove reasons for moving and giving the impression of overall fair treatment.^{63/} In addition Dr. Winecoff was of the opinion that two other major variables may influence the equation - the degree to which members of the school system band together and convince the community that students will get a good or better education in their reassigned schools and the extent to which steps are actually taken in an effort to achieve this goal.^{64/}

^{61/} See Tr. pp. 134-136 (Ap. 15 hearing); Tr. p. 81 (Ap. 19 hearing).

^{62/} Id.

^{63/} Tr. pp. 140-142 (Ap. 15 hearing) (Foster); Tr. p. 64 (Ap. 19 hearing) (Winecoff).

^{64/} Tr. pp. 79-80 (Ap. 19 hearing).

In contrast the system's superintendent, Mr. Garrett, testified, in effect, that virtually all potential options designed to achieve a greater degree of desegregation than provided by the board's plan would lead to resegregation or be detrimental to the overall desegregation of the system.^{65/} However, he anticipated that formerly white schools such as Bellinger Hill and Baldwin, where black percentages were to be increased under the board's plan to 81% and 82% respectively, would remain stable.^{66/} His opinion, based primarily on the past experience of the Montgomery system, was that resegregation problems are most severe where whites are assigned to traditionally black schools, especially if transportation is involved.^{67/} With regard to overall enrollments in the system, Mr. Garrett noted that there has been a fairly steady decline since 1967, which he explained as due in part to declining birthrates.^{68/}

^{65/} See, e.g., Tr. pp. 249-250 (Ap. 24 hearing).

^{66/} Tr. pp. 250, 255-256 (Ap. 24 hearing).

^{67/} E.g., Tr. pp. 239-240, 251-252 (Ap. 24 hearing). Thus, continued racial identifiability of such schools, at least in the eyes of the community, was implicitly recognized by the system's superintendent.

^{68/} Starting with a peak enrollment of 42,767 in 1967, total enrollment has declined, according to Mr. Garrett, approximately as follows:

1968	-300
1969	-200
1970	-200
1971	-1000
1972	0
1973	-1000

Tr. pp. 188-189, 259-260 (Ap. 24 hearing).

ARGUMENT

Introduction

The decision below reflects the district court's attempt to reach, "a balance ..., one unquestionably subtle in its implications; while school system segregation must be actively disestablished, racial quotas for student population are not to be instituted." (Slip op., p. 14). Reaching such a balance would mean -- at least in theory -- that the school system has reached the condition it would have been in but for the past racial dualism. Cf. Keyes v. School District No. 1, 413 U.S. 189, 211 (1973). The Supreme Court and courts of appeals have fashioned rules to be applied in reaching for this balance -- rules which circumscribe the discretion of school boards and district courts to some extent.

We conclude -- reluctantly, because ten years as amicus curiae in this case has taught us great respect for the District Judge -- that the ruling of the court below on the elementary school plan is inconsistent with standards for decision set forth by the Supreme Court in Davis v. Board of School Commissioners, 402 U.S. 33 (1971) and Swann v. Board of Education, 402 U.S. 1 (1971) and amplified by this court in numerous subsequent decisions. Thus, the disadvantages of grade restructuring and of assignments to distant schools and the advantage of neighborhood schools were held, in Davis and Swann, to be outweighed, as a matter of law, by the requirement to "make every effort to

achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

Davis, supra at 37; see Swann, supra at 28: "all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." Similarly, the finding that the all-black schools "are the result of the concentrations of blacks in the western area of Montgomery" (slip op., p. 17), even if correct, would not warrant treating them "in isolation from the rest of the school system." Davis, supra at 38. This is not to say that the search for a rule of reason in school desegregation must be abandoned, but only that the search must be conducted within the parameters set by Swann and Davis. This court set some guidelines for reconciling competing interests in its en banc remedial decisions in United States v. Texas Education Agency, 467 F.2d 848 (1972) and Cisneros v. Corpus Christi I.S.D., 467 F.2d 142 (1972). This court has recognized that there may be cases when the various techniques for remedying de jure racial segregation will leave some one-race schools "because of segregated housing patterns." Boykins v. Fairfield Board of Education, 457 F.2d 1091, 1095 (1972).

Thus, although the court below erred in failing to apply the mandated techniques to the traditionally black elementary

schools, this court should not further limit the district court's discretion by requiring implementation of one of the appellants' plans. Instead, the decision below should be affirmed as it affects the secondary schools; it should be reversed and remanded for further exploration of the practicalities of desegregating all or some of the eight remaining black elementary schools, and the district court should be required to apply the techniques described in Cisneros, supra, at 152-53.

I. THE DISTRICT COURT APPLIED AN ERRONEOUS
LEGAL STANDARD IN APPROVING THE BOARD'S
PLAN AT THE ELEMENTARY LEVEL

The decision of the district court relies on the standard in Ellis v. Board of Public Instruction of Orange County, 423 F.2d 203 (5th Cir., 1970), (see Slip Op., pp. 17-18) whereby this Court indicated that a "neighborhood school" plan may meet legal requirements if (1) a strict proximity rule is followed, and (2) it is effective to establish a unitary system. The district court states that the Montgomery Board's plan is constitutionally proper because the methods used fit the "Ellis mold," and because it results in a greater degree of

desegregation than the Ellis plan.^{69/}

However, subsequent to Swann this Court effectively overruled the 1970 Ellis decision in a second Ellis decision. 465 F.2d 878 (5th Cir., 1972) cert. den. 410 U.S. 960 (1972).^{70/} In this latter case, the trial court approved a plan which desegregated all secondary schools but left three virtually all-black elementary schools.^{71/} This Court reversed, stating:

These schools have never been desegregated and were part of the dual school system which existed prior to our 1970 decision. We hold that plaintiffs are entitled to an order requiring that these three schools be desegregated. See Cisneros v. Corpus Christi I.S.D., 467 F.2d 142 (5th Cir., 1972) for the remedy to be applied in the desegregation process as to the three schools in question. 465 F.2d at 881.

The district court cites twelve other pre-Swann Fifth Circuit cases decided after Ellis (see Slip Op., pp. 16-19). In all but

^{69/}

The district court stated that 74% of the black elementary students in Orange County remained in 99% black schools in Ellis (Slip Op., p. 20, fn. 36) but this is erroneous because it reflects enrollment calculations for schools under the freedom of choice plan. Actually, the plan approved in Ellis in 1970 projected eight schools with enrollments in excess of 80% black and containing 62.2% of black elementary students would remain. 423 F.2d 203, 213. The Montgomery plan projects that 59% of the black elementary students will remain in 80% black (or over) elementary schools.

^{70/}

The district court did not refer to this second Ellis decision in its opinion but did cite that case in its order of March 13, 1974.

^{71/}

The other five black elementary schools (see fn. 69, supra) were effectively desegregated or closed under this plan.

two of these cases,^{72/} district court plans approving Ellis I - type rezoning plans were reversed, although in terms of the degree of desegregation attempted, some could not be distinguished from the factual situation in Montgomery.^{73/} Moreover, in each of the post-Swann cases cited by the district court,^{74/} this Court rejected desegregation plans leaving one or more one-race black elementary schools.

The demise of the Ellis I standard, was necessitated by the decision in Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971) which reached the Supreme Court in a factual posture similar to that which Montgomery presents.^{75/}

^{72/} These two cases are Hightower v. West, 430 F.2d 552 (5th Cir., 1970) and Lee v. Macon County Board of Education (Anniston and Tuscaloosa), 429 F.2d 1218 (5th Cir., 1970). Since Swann, the Fifth Circuit has approved a new district court plan in Anniston which will require the complete desegregation of all remaining all-black schools. See Lee v. Macon County (Anniston), 483 F.2d 244 (5th Cir., 1973).

^{73/} E.g., at pp. 18-19, the district court noted that in Ross v. Eckels, 434 F.2d 1140 (5th Cir., 1970) (Houston, Tex.) this Court reversed where 29% of black students were in virtually all-black schools (actually the figure would appear to be 38%, see 434 F.2d at 1146) and in Valley v. Rapides Parish School Board, 434 F.2d 144 (5th Cir., 1970) (Alexandria, La.) this Court reversed where 60% of black students were in virtually all-black schools.

^{74/} Weaver v. Board of Public Instruction, 467 F.2d 473 (5th Cir., 1972); United States v. Texas Education Agency, *supra*; Boykins v. Fairfield Board of Education, 457 F.2d 1091 (5th Cir., 1972).

^{75/} Besides certain similarities in the plans adopted, the Mobile case involved a city-county system (although somewhat larger than Montgomery) with a 42% black population which was heavily concentrated in a portion of the district between the east side of a highway and the Mobile River. 402 U.S. at 34, 36.

Applying Ellis I and Mannings v. Hillsborough County, 427 F.2d 874 (5th Cir., 1970) this Court had selected a plan which employed rezoning, pairing and grade restructuring at all grade levels^{76/} and projected that all secondary schools would be desegregated but that at least six elementary schools would remain with enrollments exceeding 90% black and containing about 50% of the black elementary students in the system. 430 F.2d 883 at 889 (1970), 402 U.S. at 36.^{77/} This result was grounded on the "obvious fact" that "ordinarily, it is easier to desegregate high and junior high schools than elementary schools," 430 F.2d at 887, and on the finding that it was "the result of neighborhood patterns." Id. at 888. The Supreme Court reversed, stating that neighborhood zoning is not "per se adequate" and that consideration must be given to the use of "all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones." 402 U.S. at 37.

^{76/}

Unlike the elementary school plan here, the Mobile plan did utilize pairing at the elementary level (430 F.2d at 889; Palmer/Glendale and Robbins/Hamilton pairs).

^{77/}

This plan required no transportation of students for purposes of desegregation although it had utilized some elementary pairings and had projected a fewer number of virtually all-black elementary schools than the district court's plan which had permitted twelve. However, upon implementation the projections (which had been admittedly inexact in the first place) were not met and nine black elementaries remained containing 64% of all black students. 402 U.S. at 37.

The quotation from Ellis II, p. 37 supra, is representative of the legal standard under which school districts in the Fifth Circuit have been operating since Swann and Davis. A further comparison might be made with Flax v. Potts, 464 F.2d 865 (5th Cir., 1972) (Ft. Worth, Tex.) which also involved factual circumstances similar to Montgomery. In Flax this Court ruled: (a) that since nine of the eleven remaining virtually all-black elementary schools were black schools under the dual system "the vestiges of state-imposed segregation had in no significant manner been eliminated from the assignment of elementary school students" (Id., at 868); (b) that under such circumstances contentions that continued racial isolation was due to "shifting residential patterns" since implementation of an earlier plan or due to location of a school in an "exclusive black neighborhood" were not persuasive justifications (Id., at 868-869); (c) that where "virtually all-black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used . . . or an equally effective remedy devised" (Id., p. 868); (d) that there was no justification for the non-inclusion of first grade students in the desegregation plan (Id., p. 869).

II. THE APPROVED ELEMENTARY SCHOOL PLAN DOES NOT
SATISFY THE MONTGOMERY BOARD'S DUTY TO DIS-
MANTLE THE FORMER DUAL SCHOOL SYSTEM

In reviewing the decision of the court below this court may not, as it has previously noted, "substitute [its] judgment for that of the district court." Carr v. Montgomery County Board of Education, 429 F.2d 382, 385 (1970); cf. Northcross v. Board of Education, 489 F.2d 15, 17 (6th Cir., 1973). Thus, at the secondary level, where substantial desegregation of both traditionally white and traditionally black schools is projected, "the fact that we might have handled some minor details differently had we been considering the matter in the first instance is irrelevant," ibid., especially in light of "the exemplary record of this district judge." Id. at 387. However, at the elementary level the issue is not one of "minor details," but whether -- as we believe -- the district court's erroneous reliance on Ellis I has so infected its review of the school board plan as to require reversal.

The district court applied Ellis I standards in concluding that both of the possible grounds, under Swann and Davis, for permitting schools to remain one-race exist in Montgomery. Those grounds are:

1. The "racial composition is not the result of present or past discriminatory action on" the part of the school board.
Swann, at 26.

2. The "practicalities of the situation" preclude further desegregation.
Davis, at 37.

However, the facts in the record do not support the district court's conclusion that these grounds warrant the school board's total embargo on desegregation of black elementary schools.

A. Discriminatory Action on the Part of the School Board.

As the district court noted, when this suit was filed in 1964 "the schools of Montgomery County . . . were completely segregated; one set of schools was operated exclusively for white students and staffed entirely by white teachers, and one set was operated for black students and staffed by black teachers." (Slip op., pp. 1-2). Seven of the eight elementary schools which will be virtually all-black under the school board's plan were all-black under the policy of dualism.^{78/} Yet there was no evidence before the district court to suggest that "the

^{78/}

The seven schools and their projected black percentages are: Booker Washington (98%), Carver (99%), Daisy Lawrence (98%), Fewes (99%), Hayneville Road (95%), Loveless (99%), and Paterson (94%). All of these schools are located within the City of Montgomery. The eighth school projected to remain over 90% black is Pintlala which was predominantly white prior to 1970 and is located in the southern, rural part of the country. In addition, three elementary schools will remain over 80% black.

relationship between past segregative acts and present segregation [had] become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention. 402 U.S., at 31 and 32." Keyes v. School District No. 1, 413 U.S. at 211 (1973). In any event, as the citation to 402 U.S., at 31-32 shows, that language in Keyes applies only after "the affirmative duty to desegregate has been accomplished." Swann, 402 U.S. at 32. See also Boykins v. Fairfield Board of Education, 457 F.2d 1091, 1095-96 (5th Cir., 1972).

In Montgomery the school authorities took steps even after the filing of this lawsuit to cement in de jure segregation. As the district court found in 1968:

"The manner in which the defendants have constructed new schools, the location and proposed capacity of these schools, and the manner in which the defendants have expanded Negro schools and the location of those Negro schools make it clear that the effect of these new constructions and the effects of the expansions have been designed to perpetuate, and have the effect of perpetuating the dual school system in Montgomery County schools." 289 F. Supp. 647, 652.

The only facts cited by the district court to support its conclusion "that these predominantly black schools exist and continue to exist without school board action" are "the concentration of blacks in the western are of Montgomery" (slip op., p. 17) and the "value in having elementary children attend school near their homes." (slip op. p. 21). The same factors existed, of

course, in Mobile and Orange County, but as pointed out on p.³⁹ , supra, were held not to warrant continued segregation of elementary schools.

B. Practicalities.

Even under the strictures of Davis and Swann, some cases have approved the continued existence of one-race schools, because of practical considerations. This circuit has not yet explicitly approved one-race schools,^{79/} but has acknowledged that there may be circumstances where they may exist. Boykins, supra at 1095. The leading case is Northcross v. Board of Education of Memphis, 489 F.2d 15 (6th Cir., 1973), cert. den. U.S. (1974), where the court of appeals affirmed a district court decision adopting a plan which, while requiring transportation of over 23,000 elementary school students for up to 45 minutes one way, left 19 all-black or predominantly black units. Desegregation of those units would have required bussing 9,700 children on trips which would have lasted 46-60 minutes one way. The district court explained:

The lesser degree of desegregation . . . is based primarily upon four factors pertaining to effectiveness, feasibility and pedagogical soundness. Those factors are time and distance travelled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability.

^{79/}

But cf. Lee v. Macon County Board of Education (Troy City), 475 F.2d 748 (5th Cir., 1973), which implicitly allowed the continuance of a segregated black elementary school.

Quoted at 489 F.2d 17. In approving Montgomery's elementary school assignment plan the court below referred to none of the factors mentioned above in Northcross, except for generalized references to "cross-city bussing" which "would substantially increase the time and distance that students would have to travel...." (slip op., p. 12). The district court here approved assigning black students in the Carver Elementary zone to Dannelly and Crump Elementaries, seven miles away.^{80/} Nothing in the record or in the district court's opinion provides a reason why it should be possible to desegregate every white elementary school in Montgomery, including schools deep in the heart of all-white residential areas, and be at the same time impossible to desegregate a single black elementary school, including schools which border on white residential areas.

Under Swann the district court has the discretion to reject further desegregation based on transportation, if "the time or distance of travel is so great as to risk either the health of children or significantly impinge on the educational

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The longest route for elementary students within the city under the plaintiff-intervenors' plan here is 7.3 miles. See fn. 47, p. 26, supra.

process." 402 U.S. at 30-31.^{81/} Cf. Cisneros and United States v. Texas Education Agency, supra.

While the district court did not discuss the school board's failure to utilize pairing or grade restructuring as required by Cisneros, supra, its discussion of the appellants' proposed plans suggests that it found that such "fracturization of grade structure" (slip op., p. 7) "would be disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system." (slip op., p. 8). While experts may disagree as to whether the educational advantages of grade restructuring or pairing outweigh the disadvantages, these are desegregation techniques which have been required in numerous cases unless an equally effective alternative

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Swann affirmed a district court decree requiring the defendant school system to employ 138 more buses than it previously operated under a desegregation plan that required elementary students to be transported for an average trip of about seven miles lasting not more than 35 minutes. Compare fns. 47, 55, supra. The district court here made no findings showing the specific hardships involved. See Winston-Salem/Forsyth County Board of Education v. Scott, 404 U.S. 1221, 1226-27.

method is suggested by defendants.^{82/} Application of the pairing technique to both contiguous and non-contiguous schools is part of the priority of remedies which a system is required to apply to developing an acceptable plan under the en banc decisions in Cisneros, supra and United States v. T.E.A., supra. While it is true that conversion from a 1-6 grade structure would create certain administrative and practical difficulties, disruption of the status quo is inherent in any effective desegregation technique and defendants have not, as of yet, suggested a legally sufficient alternative method nor been required to apply the Cisneros procedures at the elementary level.

A final practicality which the school authorities relied on is that "we do not believe that white children...assigned [to be transported to black schools] would attend in any substantial numbers." (Super. Garrett, Tr. April 24-25, 1974, p. 240). This appears to be the basis for the district court's opinion that the black elementary schools could not have "any effective and realistically stable desegregation." (Slip op., pp. 12-13). But even though it may be proper to consider the promise of future stability in assessing alternative desegregation plans, these considerations may not serve for limiting a

^{82/}

See, e.g., Flax v. Potts, supra; Boykins v. Fairfield Board of Education, supra; Allen v. Board of Public Instruction of Broward County, supra; Pate v. Dade County School Board, 434 F.2d 1151 (5th Cir., 1970); Henry v. Clarksdale Municipal Separate School System, 433 F.2d 387 (5th Cir., 1970).

desegregation order.^{83/} The Supreme Court most recently stated that white flight "cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." United States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972). See also United States v. Hinds County School Board, 417 F.2d 852, 858 (5th Cir., 1969).^{84/}

Moreover, the Court has held that a plan which "refused to assign white students to any school unless the student population of that school was at least 60% white" was "an arbitrary limitation negating reasonable remedial steps." Swann, supra, 402 U.S. at

^{85/}24. The past experience of other districts as well as the Montgomery system offers an uncertain guide to future predictions. For example, while many of the whites projected to attend formerly black schools under the 1970 desegregation plan did not appear in actual enrollments, it is also true that whites were not assigned

^{83/} One reason is suggested by the concurring opinion of the late Judge Sobeloff in Brunson v. Board of Trustees, 429 F.2d 820, 827 (4th Cir., 1970): "More to be feared than white flight in Clarendon County would be any judicial contenance of the suggestion that abandoning or qualifying a desegregation program is a legally acceptable way to discourage flight. For one this tactic was sanctioned in this instance its insidious example would be followed by other school boards hostile to desegregation, with resulting widespread frustration of the unitary school principle."

^{84/} In Lee v. Macon County Board of Education (Marengo County), 465 F.2d 369, 370 (5th Cir., 1972) this Court indicated that a prospect of white flight had no bearing on whether or not a plan was "workable" although the prospect was considered to be very real in that case.

^{85/} Note that under the board's plan here, every elementary school but one is projected to be either below 40% black or above 80% black; the system as a whole is approximately 50% black.

in substantial numbers or percentages to such schools,^{86/} and that other schools retained a degree of stability after desegregation.^{87/} Predicting future population trends is speculative at best and this plus the present state of the record support the legal rationale: constitutional rights if they exist, may not be dependent on generalized fears of the future or upon obtaining substantial white majorities.

There are, of course, practicalities which may inhibit total desegregation of the Montgomery schools. Indeed, plaintiff-intervenors acknowledged as much by proposing an alternate plan under which some K-3 schools would remain all-black. This court acknowledged as much, too, in its reference to "an elementary school 'deep in the heart of a predominantly Negro residential area.'" 429 F.2d at 386. But those practicalities, under existing case law, do not warrant a blanket approach under which no black elementary schools are desegregated. An individualized approach is required. The past history of this case reflects that the school authorities and

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Except perhaps in the case of Carver High School which was projected to be 72% black in 1970.

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E.g., McMillan Elementary School has retained approximately a 65% black enrollment since 1970.

district court can best make the detailed and particularized examination of the options available to desegregate black elementary schools.

The district court's approach to a remedy may reflect a belief that extensive affirmative relief involving considerable restructuring of schools and transportation of students has not proved worth its costs. It may, moreover, reflect doubt concerning the constitutional necessity and practical wisdom of remedies that may lead to resegregation, but these are issues not open here. This Court, the district court, the school authorities and the government are bound by existing Supreme Court guidelines. In conformity with current precedent, therefore, this case should be remanded with instructions that a plan be devised in accordance with those guidelines and the guidelines previously established by this Court.

CONCLUSION

For the above-stated reasons the decision below should be affirmed as to the secondary schools. It should be reversed as to the elementary schools and remanded to the district court with directions to establish an appropriate timetable,^{88/} under

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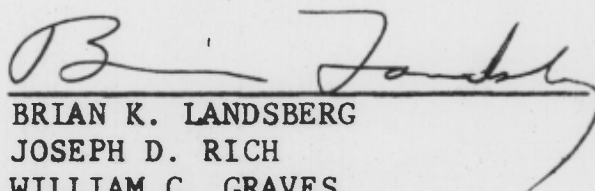
Cf. Lee v. Macon County Board of Education, 483 F.2d 244 (5th Cir., 1973).

which appellees are required to submit further plans detailing the efforts they propose to take to substantially desegregate the all or virtually all-black elementary schools.

Respectfully submitted,

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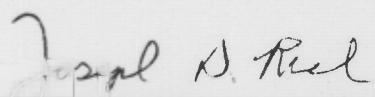
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