CRC1.1.16

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2103 - 76-2108

BRENDA EVANS, et al.,

Plaintiffs-Appellees

v.

MADELINE BUCHANAN, et al.*

*State Board of Education	Appellant
Newark School District	Appellant
New Castle-Gunning Bedford School District	Appellant
Claymont School District and Stanton School District	Appellant
Marshallton-McKean School District	Appellant
Alexis L. duPont School District	Appellant

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DREW S. DAYS, III
Assistant Attorney General

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

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2103 - 76-2108

BRENDA EVANS, et al.,

Plaintiffs-Appellees

v.

MADELINE BUCHANAN, et al.*

*State Board of Education	Appellant
Newark School District	Appellant
New Castle-Gunning Bedford School District	Appellant
Claymont School District and Stanton School District	Appellant
Marshallton-McKean School District	Appellant
Alexis L. duPont School District	Appellant

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Was the relief ordered by the district court a proper exercise of its remedial powers in light of the extent of the constitutional violation shown.[1/]

1/ The parties to this appeal have presented other issues for this Court's consideration which the United States does not discuss.

INTEREST OF THE UNITED STATES

Although the United States did not participate in this case below, it did participate as amicus curiae in the Supreme Court. On March 3, 1977, the Clerk of this Court sent a letter on behalf of the Court inviting the United States to present its views on the matters before this Court. Moreover, the United States has substantial responsibility under Titles IV, VI, and IX of the Civil Rights Act of 1964, 78 Stat. 248, 252, 266, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and under the Equal Educational Opportunities Act of 1974, Pub. L. 93-380, 88 Stat. 514 et seq., 20 U.S.C. (Supp. V) 1701 et seq., with respect to school desegregation. The Court's resolution of some of the issues presented in this case would affect that enforcement responsibility.

JURISDICTION

This is an appeal from an order which is injunctive in nature and is properly before this Court pursuant to 28 U.S.C. 1292(a).

STATEMENT

The parties have thoroughly briefed the factual context of this appeal. Because no party seriously contests any of the district court's fact-finding, and because the United States as amicus curiae has, in the short time available, obtained only a part of the record, we will in

large part rely upon the district court's findings of fact, and set forth now only those facts most germane to the discussion following.

I. Case History

A. The Early Proceedings

Prior to 1954, Delaware operated a de jure segregated school system, requiring by law that separate schools be maintained for "whites, colored and Indians." The Delaware Supreme Court struck down this system in Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137 (Del. S. Ct. 1952) a decision which was subsequently approved in Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I), and affirmed in Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II). The present case commenced in 1956. Its early history and development are fully set forth in the opinion of the district court at 379 F. Supp. 1218, 1220-1221 (1974).

B. The 1974 Opinion

In 1971, plaintiffs filed a petition for an order directing the Delaware State Board of Education to submit a plan for desegregation of the schools in New Castle County including the City of Wilmington. Plaintiffs challenged a state law, the Educational Advancement Act of 1968 (referred to herein as the EAA), on the grounds

that it unconstitutionally excluded the predominantly black Wilmington school district from a statewide school district reorganization plan, and a three judge court was therefore convened pursuant to 28 U.S.C. 2281. On July 12, 1974, the district court held that

> it is well established that to the extent that any schools in the state are in violation of Brown and its progeny or of this Court's orders, the State Board must bear primary responsibility.

379 F. Supp. at 1222. The court further held that:

> The presence of racially identifiable schools in a formerly de jure system is always constitutionally suspect. Swann v. Charlotte-Mecklenburg, 402 U.S. at 18, 26, 91 S. Ct. 1267. It is apparent not only that all of the de jure black schools in Wilmington have remained identifiably black, but also that these schools constitute a substantial proportion of the 22 public schools in Wilmington. This Court can only conclude that the presence of these schools is a clear indication that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system. Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 200-201, 93 S. Ct. 2686, 37 L.Ed. 2d 548 (1973), United States v. Texas Education Agency, 467 F.2d 848, 888 (5th Cir. 1972). The desegregation plan for Wilmington has not been effective, and this Court must conclude that a unitary school system has never been established.

Id. at 1223 (footnote omitted).

The district court declined to consider the constitutionality of the EAA or the scope of the appropriate remedy until the parties had submitted both Wilmington-only and county-wide inter-district desegregation plans. The district court stated that

> [I]n drawing up their plans, the parties are admonished to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37, 91 S. Ct. 1289, 1292, 28 L.Ed.2d 577 (1971)

Id. at 1224.[2/]

C. The 1975 Opinion

On July 25, 1974, the Supreme Court of the United States issued its opinion in Milliken v. Bradley, 418 U.S. 717. The district court then invited the school districts of New Castle County to intervene in this action and to submit briefs concerning the impact of the Milliken opinion on the court's authority to order inter-district relief. 393 F. Supp. 428, 431. On March 27, 1975, the

---

2/ Circuit Judge Gibbons concurred in the court's findings concerning Wilmington, but dissented from the court's failure to rule that the EAA was unconstitutional and to order inter-district relief. 379 F. Supp. at 1224-1233.

district court found that in light of Milliken v. Bradley, supra, and the record it was authorized to consider inter-district remedies. 393 F. Supp. at 446. The court again ordered the parties to submit both Wilmington-only and inter-district plans. Id. at 447. The court based its finding that an inter-district plan might be an appropriate remedial measure upon the following findings:

> (a) Historic interdistrict racial dualism
>
> [D]uring the period before Brown I, there was substantial interdependence of the Wilmington and suburban school systems. For many years, the only high school in the County that accepted black students was Howard High School in Wilmington. Many black students traveled across district lines to attend Howard. Moreover, black elementary and junior high school students from suburban areas often attended Wilmington "colored" schools rather than the "colored" school nearer their homes.
>
> * * *
>
> At the same time that suburban black children attended Wilmington's "colored" schools, suburban white children crossed district lines to attend "white" schools in Wilmington, either because their home districts lacked a full twelve-grade program or because Wilmington schools were considered educationally superior.

(b) Relationship between housing discrimination and school discrimination

> Nearly all of the Wilmington schools which were segregated white schools before Brown I have since become predominantly black schools. The growth of identifiably black schools mirrored population shifts in New Castle County. To a significant extent these demographic changes ... resulted not exclusively from individual residential choice and economics, but also from assistance, encouragement, and authorization by governmental policies.

Id. at 434 (footnote omitted). Specifically the district court found: (1) "[R]acial discrimination in the sale or rental of housing was widespread, was tolerated or encouraged by the real estate industry and was sanctioned by state officials." Ibid. (2) The effect of decisions by the Wilmington Housing Authority "was to concentrate poor and minority families in Wilmington." Id. at 435. (3) "To some extent then, discriminatory school policies in Wilmington may have affected the relative balance in housing and schools in Wilmington and the suburbs." Id. at 436. (4) "To the extent that the [State] subsidy [of inter-district transportation of students to private and parochial schools] has had an effect on public school enrollment, it has undoubtedly served to augment the disparity between Wilmington and suburban public school populations." Id. at 437.

(c) Educational Advancement Act

Wilmington schools were unconstitutionally excluded by the state legislature from consideration for consolidation by the State Board of Education under the Educational Advancement Act of 1968. The court held that although "the record does not demonstrate that a significant purpose of the [Act] was to foster or perpetuate discrimination through school reorganization ..., [e]ffective as well as intentional racial classifications ... require special scrutiny...." Id. at 439. The court reasoned that the Act constituted a "suspect classification" because it precluded the State Board, which had not yet satisfied its duty to eliminate vestiges of de jure segregation in Wilmington schools, from considering the "integrative opportunities" of redistricting in New Castle County. Id. at 442. This "racial exclusion from the power of governmental officials," id. at 442, n. 29, was not supported by compelling justifications and it constitutes an "inter-district violation" which "played a significant part in maintaining the racial identifiability of Wilmington and the suburban ... districts." Id. at 445.

(d) Practicalities of the situation

The court listed factual distinctions which made consideration of inter-district relief more feasible in New Castle County than it had been in the Detroit area. Id. at 446.

(1) The court noted that the total population and student population in Wilmington and New Castle County, as well as the number of school districts included in Wilmington and in New Castle County, are much less than would have been involved in a Detroit plan. Ibid.

> (2) "Because of Delaware's history and demography, inter-district arrangements short of consolidadation have been essential to education and they continue today."
>
> * * *
>
> (3) To facilitate inter-district programs, the State has employed a voucher system. All district funds are kept by the State Treasurer in a district account in a Dover bank. Transactions between districts and between the State and districts are effected by voucher between such accounts. Most educational programs in Delaware are funded by the State through the voucher system. . . ."

Id. at 446-447.

(4) "The mechanics of an inter-district remedy here would pose few administrative problems of first impression. The inter-district history of Delaware education is different from that of large geographical areas with regional populations sufficient in size to have been traditionally independent."

4/

Id. at 447.

D. The 1975 Appeal to the Supreme Court

The State Board and the intervening suburban school districts, with the exception of De La Warr, appealed the district court's order to the Supreme Court. On November 17, 1975, the Supreme Court summarily affirmed the district court, 423 U.S. 963, with Mr. Justice Rehnquist, the Chief Justice, and Mr. Justice Powell dissenting. Id. at 963-975.

E. The 1976 Opinion

On May 19, 1976, after three weeks of additional hearings, the district court reiterated its finding that "acts of the State and its subdivision ... had a substantial, not a de minimis, effect on the enrollment pattern of the separate districts." 416 F. Supp. 328, 339 (footnote omitted). The district court also held

---

4/ Judge Layton dissented from the district court's holdings that the EAA was unconstitutional and that consideration of an inter-district remedy was appropriate. Id. at 447-453.

that the suburban school districts were properly subject to any remedial order of the court. It stated that:

> The suburban districts have attempted to foreclose the application of an inter-district remedy including them by citing the prior finding of this Court that each of them was at present operating a unitary system, and urging that they had committed no constitutional violation. Such a defense is inadequate where, as here, the local boards are creatures of the State, and it was the State Legislature and the State Board of Education which acted in a fashion which is a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County. The fact that birth rates, or population shifts, or other factors also contributed to a degree will not relieve the State from its obligation to desegregate. The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for the acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities, but neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.

Id. at 339-340 (footnotes omitted).

The district court stated that in fashioning an appropriate remedy

> it is sufficient to point out, as we found in the last opinion, that despite the separate operation of the systems since the 1950's, the racial characteristics of the city and the suburbs are still interrelated, and the actions of state officials and local officials were sufficient to create an interdistrict effect under Milliken.

Id. at 341 (footnote omitted).

The Court further found that:

> Although the local districts in Delaware have great autonomy, the violations here go directly to that autonomy. Thus, at the time when they carried on segregative acts, the local districts did so in such a way as to make clear that they were not so separate from Wilmington and its operations as now to be free from all culpability for the remaining effects of the segregatory regime which was never completely abolished. 393 F. Supp. at 437-38. The combination of their prior acts negating complete independence; and the State's actions to create boundaries which favored the existing separation of races is sufficient to show that the lines of independent authority are entitled to less weight here than in Milliken. . . . We establish here only that the remedy which we order may include suburban districts, because their existence and their actions were part of the violations which lead to the remedy.

Id. at 341, n. 43.

The district court then considered the various plans submitted by the parties. It held that a Wilmington-only plan was not acceptable because it would not remedy the

substantial remaining inter-district effects of the constitutional violation in Wilmington schools. Id. at 343. The district court held that "a Wilmington-only plan would not significantly affect the present racial identifiability of the Wilmington or suburban schools," ibid., and

> that insofar as the Wilmington-only plan is concerned, where inter-district violations have been found, it is appropriate to look at the population of the area over which the violations occurred to determine in the first instance whether the plan submitted results in actual desegregation. Where the plan would result in the maintenance of the traditional racial identity previously established by State action, and that disparity in racial enrollments remains substantial, it cannot be said that it results in the disestablishment of a dual system.

Id. at 344 (citations omitted).

The district court therefore considered inter-district remedies proposed by the parties. The district court rejected plans relying on voluntary transfer inducement because these plans did not promise "realistically to work effectively now." Id. at 346. Similarly the district court rejected several proposals to transfer students between existing districts utilizing cluster and pairing techniques because these plans were administratively infeasible, "fraught with complex problems

unsuitable for judicial determination," including placing "the Court in the ongoing position of general supervisor of education in New Castle County." Id. at 347.

The district court determined that

> [m]oreover, as noted by the state defendants, reorganization may well be peculiarly suited as the remedy in the instant case, where one of the violations which was found was the prior improper reorganization of districts including some of those now before the Court. The standard formulated by the Court is that the remedial decree should be directed toward placing the victims of the violation in the position they would have occupied had the violation not occurred. Where one of the violations was the isolation of Wilmington from the possibility of union with other districts, prima facie an appropriate remedy would be ordering of the union to take place.

Id. at 350 (footnotes omitted). The court then ordered the consolidation of all school districts within New Castle County, except the Appoquinimink district.[5/] The court held that consolidation was required because the evidence showed that "without reorganization of some kind, no plan will be able to function in an administratively feasible manner," id. at 350, and that in light of Milliken reorganization into one district was the most appropriate relief. Id. at 353.

5/ The district court excluded the Appoquinimink district because "its inclusion would be of very little impact on the existence of predominantly white or black schools in other areas of the county." Id. at 354.

The district court stated that

> some reorganization is required. The Court must at a minimum determine the districts which will be included in such a reorganization, and make provisions for the governance of the area in the event that the State officials fail to act. We note that our opinion in this regard is not a final determination of the organization of the area and of the lines to be followed in setting up such an area, as would be the case if we were to order one of the reorganization plans proposed to us. Rather, the reorganization outlined infra is effective only in absence of proper state action to change it. Of course if the state or local officials were to act in such a manner as to defeat or block desegregation under the guise of a shift in the reorganization plan, the Court would be forced to review the State's action in light of the requirements set out in Wright v. Council of City of Emporia, 407 U.S. 451, 92 S. Ct. 2196, 33 L.Ed.2d 51 (1972); and United States v. Scotland Neck Board of Education, 407 U.S. 484, 92 S. Ct. 2214, 33 L.Ed.2d 75 (1972).

Id. at 351.

The district court ordered that all of the schools within the new district must be considered in fashioning the relief. It indicated that

> [t]aking into consideration all of the factors in the present case, including those already described, the geographical proximity of the area and the transportation network available, the Court will consider that any school whose enrollments in each grade range between 10 and 35% black to be prima facie desegregated.

Id. at 356-357. However, the court recognized that:

> [s]ome schools on the far edges of the county may necessarily remain all or predominantly of one race because of transportation problems or other practical difficulties. In those instances, the assigning authority will bear the burden of showing that assignments were genuinely nondiscriminatory. See, Swann, 402 U.S. at 26, 91 S. Ct. at 1280, 28 L.Ed. 2d at 571.

Id. at 357, n. 148. The district court further emphasized that

> [t]he racial characteristics of the population of the area as a whole are the necessary starting point in determining whether a school is disproportionately of one race. See Swann, 402 U.S. at 26, 91 S.Ct. at 1280, 28 L.Ed. 2d at 571. Our figures of not less than 10% nor more than 35% black, which signal the prima facie achievement of a desegregated school, are not arbitrary figures, but are drawn from the record as described, supra, p. 356. Whether the result is commensurate with the constitutional standard established in Swann, 402 U.S. at 26, 91 S.Ct. at 1280, 28 L.Ed.2d at 571, must await the actual assignments by the proper authorities to achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Mobile County School Comm'rs., 402 U.S. at 37, 91 S.Ct. at 1292, 28 L.Ed.2d at 581.

Id. at 357, n. 150.

The district court ordered the State Board to appoint an interim board to govern the new district and to make student assignments for the fall of 1977. In making these assignments the interim board could utilize

voluntary assignment programs during the 1977 school year but "[f]ull compliance with constitutional requirements on all grade levels must be completed with the school year commencing in September, 1978." Id. at 361.

Judge Layton concurred in the court's determination that inter-district relief was required, but dissented as to the extent of the relief ordered. Id. at 366-371.

F. The Present Appeal

On November 29, 1976, appellants' appeal to the Supreme Court of the United States was dismissed. 45 U.S.L.W. 3394. Appellants had filed protective notice of appeal to this Court and this case is now before this Court on the merits of those appeals. On March 7, 1977, the United States received this Court's invitation to file its views on the issues presented in these appeals by March 18, 1977.

INTRODUCTION AND SUMMARY OF ARGUMENT

On October 27, 1976, the United States filed a Memorandum as Amicus Curiae to the Supreme Court of the United States concerning this appeal. We advised the Supreme Court that we believed that it lacked jurisdiction. We also advised the court that appellants' challenge to the district court's finding of an inter-district constitutional violation was substantially foreclosed by that

Court's summary affirmance of the district court's 1975 opinion. 423 U.S. 963 (1975) summarily affirming 393 F. Supp. 428. We discussed appropriate remedial standards in school desegregation cases and we indicated that we believed that the district court could properly require a substantial amount of student reassignment in New Castle County. We stated that since the district court's student reassignment plan was still tentative it was premature to discuss whether its student reassignment plan would satisfy the legally required remedial standards. Finally, we noted that language in the district court's opinion appeared to be inconsistent with proper remedial standards, in that portions of the opinion were suggestive of an attempt to achieve a desirable racial mix rather than to remedy constitutional wrongs.

We believe that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1292(a). In all other particulars our position before this Court is the same as our position before the Supreme Court. Our brief in this Court, however, develops these positions in more detail and suggests possible dispositions of the appeal on the merits.

First, we show that the district court's order enjoining the operation of the EAA, and finding an inter-district constitutional violation requiring the consideration of an inter-district remedy, 393 F. Supp. 428, is the law of this case. The appellants are foreclosed from attacking the district court's order by the Supreme Court's summary affirmance of the district court's judgment. 423 U.S. 963 (1975); cf. Hicks v. Miranda, 422 U.S. 332, 344-345 (1975).

Thus, the issue before this Court is whether the relief ordered by the district court is a proper exercise of its remedial powers in light of the extent of the constitutional violation shown. In Part II of this brief we argue that the goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the constitutional violations. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971); Milliken v. Bradley, supra, 418 U.S. at 738. The aim of a desegregation decree must be to obtain the greatest degree of required desegregation "taking into account the practicalities of the situation." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). Where "racially discriminatory acts of the state or local school districts ... have been a substantial cause of interdistrict

segregation," an interdistrict remedy is appropriate, Milliken v. Bradley, supra, 418 U.S. at 745, but no desegregation order need require "any particular racial balance," id. at 740-741, as long as the effects of constitutional violations are eliminated. Green v. County School Board, 391 U.S. 430, 438 (1968). Portions of the district court's opinion recognized these principles in a large measure. Because of the significant and continuing inter-district acts of racial discrimination in New Castle County the district court has properly ordered that plans be formulated requiring a substantial amount of student reassignment. Substantial inter-district reassignment is the only way in which the inter-district violation in this case can be effectively remedied in light of the practicalities of the situation. See Davis v. Board of School Comm'rs, supra, 402 U.S. at 37. Since the district court's plan is still tentative and only establishes a general framework for responsible authorities to operate within, it is premature to judge whether the district court's remedial order provides proper relief in this case. However, some of the district court's language concerning "extent of area" and "numbers", 416 F. Supp. at 353-357, may establish an overly stringent racial balancing requirement which is inconsistent with the applicable remedial standards. We urge this Court to correct the district court's guidelines to the extent

that they may go beyond remedying the effects of the past discrimination, and as so modified to affirm the judgment, as we understand it, see infra p. 33, of the district court. Cf. Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 88 (1943).

ARGUMENT

I. THE DISTRICT COURT'S FINDING OF AN INTER-DISTRICT CONSTITUTIONAL VIOLATION

The district court's 1975 opinion, reported at 393 F. Supp. 428, analyzed the record in this case in accordance with the principles established in 1974 in Milliken v. Bradley, 418 U.S. 717. The district court found that there had been substantial inter-district violations justifying consideration of inter-district relief (see pp. 5-11, supra), and the State Board and intervening school districts (with the exception of DeLaWarr) appealed. The only final order on appeal to the Supreme Court was the district court's order which enjoined the appellants from relying on the EAA because it was unconstitutional and ordered them to prepare both Wilmington-only and inter-district plans without relying on the EAA, based upon its finding of an inter-district violation.[6/] The Supreme Court summarily affirmed. Buchanan v.

6/ Arguably, the part of the district court's order requiring the submission of intra and inter-district plans was not properly before the court because an order to submit plans is ordinarily non-final. See Taylor v. Board of Education, 288 F.2d 600 (2nd Cir. 1961). However, it is clear that the finding of an inter-district violation was before the Supreme Court because this finding was an integral part of the district court's order enjoining the operation of the EAA. As we show in note 7, pp. 23-25, infra, the court's ruling finding the EAA unconstitutional and enjoining its application depends on the existence of other inter-district violations, since the EAA would otherwise not unconstitutionally interfere with the remedy for the past violation. Thus, the finding of an inter-district violation was a matter properly before the Court. See Deckert v. Independence Share Corp., 311 U.S. 282 (1940); McCreary Tire and Rubber Company v. CEAT, 501 F.2d 1032, 1038 (3rd Cir. 1974); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 262 (3rd Cir. 1972); 9 Moore's Federal Practice §§ 110.25[1], at 270 and 273 (2d ed. 1975).

v. Evans, 423 U.S. 963 (1975). Appellants argue that the district court's finding of an inter-district constitutional violation was based upon findings that the EAA was unconstitutional[7/] and

---

7/ The State Board urges that in light of Washington v. Davis, 426 U.S. 229 (1976), the district court's finding that the EAA was not a "purposefully racially discriminatory" act, 393 F. Supp. at 439, precluded the district court from finding that the EAA was unconstitutional and from considering the EAA in finding an inter-district violation. Brief for the State Board, pp. 12-16.

They argue that "[t]he terse reversal by the Supreme Court in the Austin [United States v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976)] case makes clear that the elaborate and obscure effect test applied by the District Court in this case was invalid under the subsequent Supreme Court decision in Washington v. Davis and must be reversed by this Court." Brief for State Board, pp. 17-18. Of course, the Supreme Court did not reverse the Austin case; rather the Court vacated and remanded for reconsideration in light of Washington v. Davis. 45 U.S.L.W. 3413 (1976), and thus its action has little precedential value for this case. Nevertheless, we agree with appellants that if the district court's opinion finding the EAA unconstitutional is interpreted as being based solely on the fact that the EAA had a disproportionate racial impact it would be inconsistent with Washington v. Davis, supra. However, such an interpretation would not justify reversal of the district court's opinion, for "in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 88 (citation omitted). We think that the district court may have correctly considered the EAA in finding an inter-district violation. Moreover, many findings of the district court apart from its holding concerning the EAA fully support its finding of a continuing, unremedied inter-district violation. Therefore this Court should not find that the Supreme Court's 1975-1976 term summary affirmance of the district court's finding of an inter-district violation is inconsistent with the Supreme Court's 1975-1976 term opinion in Washington v. Davis.

(1) Under the Supreme Court's decisions in Wright v. City Council of Emporia, 407 U.S. 451 (1972) and United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972), the

(Footnote cont'd on next page)

that there was governmental responsibility for housing

7/ (Footnote cont'd from preceding page)

district court could properly consider the EAA in finding an inter-district violation. The district court found that before the passage of the EAA "de jure segregation in New Castle County was a cooperative venture involving both city and suburbs.... [A] desegregation decree could properly have considered city and suburbs together for purposes of remedy." 393 F. Supp. at 437. The State Board as well as the Wilmington and suburban school districts were thus under an affirmative obligation to remedy this inter-district violation. The EAA, by preventing the consolidation of Wilmington and the suburban school districts, impeded this remedy and under the standards enunciated in North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), Wright v. Emporia, supra, and United States v. Scotland Neck Bd. of Educ., supra, was properly declared unconstitutional and enjoined because it "contravene[d] the implicit command of Green v. County School Board, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." North Carolina State Board of Educ. v. Swann, supra, 402 U.S. at 46. See United States v. Board of School Comm'rs of City of Indianapolis, 541 F.2d 1211, 1227 (7th Cir. 1976) (Tone, J., dissenting); vacated and remanded ____ U.S. ____, 45 U.S.L.W. 3508 (January 25, 1977). Thus, the district court could properly consider the unconstitutionality of the EAA in determining the existence of a continuing and unremedied inter-district constitutional violation and in fashioning an inter-district remedy.

(2) The district court held that the EAA was not "purposefully racially discriminatory," 393 F. Supp. at 439, but that in light of its impact, the history and surrounding circumstances, and the justifications proferred for the exclusions from EAA, are unconstitutional. The court ruled on this issue without the benefit of the later decisions in Washington v. Davis, supra, and Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U.S. ____, 45 U.S.L.W. 4073, 4077-4078 (Jan. 11, 1977), and its opinion may reflect a confusion between discriminatory intent or purpose with discriminatory animus or evil motive. This court need not determine how to resolve this apparent internal inconsisting, because in addition to the EAA findings the district court bottomed its finding of inter-district effects of unconstitutional state action with respect to the schools on at least the following additional facts:

discrimination in New Castle County.[8] Aside from the factual difficulties with this argument,

---

7/ (Footnote cont'd from preceding page)

(a) a history of de jure segregation in Wilmington, 393 F. Supp. at 430; (b) a history of inter-district de jure segregation in Wilmington and New Castle County, 393 F. Supp. at 433, 437; (c) a continuing failure of appellants to dismantle Wilmington's dual school system; 393 F. Supp. at 430; (d) the continuing failure of the State to meet its its unfulfilled affirmative obligation to remedy the effects of the prior inter-district violation, 393 F. Supp. at 437.

8/ Appellants urge that the district court's finding of an inter-district constitutional violation requiring inter-district relief is erroneous because it was based on a finding of governmental responsibility for residential segregation with inter-district effects. They urge that "[t]hese meager findings, totally devoid of any proof of cause and effect and totally beyond the responsibility of the school authorities, simply cannot be the predicate for the interdistrict relief...." Brief for the State Board at p. 25. If the district court had relied on housing discrimination in isolation from other factors, appellants' point would be troublesome. But Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 21, establishes that when racial discrimination in the operation of the schools "promote[s] segregated residential patterns which, when combined with 'neighborhood zoning,' further lock[s] the school system into the mold of the separation of the races ... a district court may consider this in fashioning a remedy." For a de jure segregated school system "may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." Keyes v. School District No. 1, supra, 413 U.S. 189, 202 (1973). The district court found precisely such a relationship, quoting Swann, supra, at 20-21, noting the relationship i.e. between housing sales and "the characteristics of schools in the neighborhood," and holding that [t]he record in this case is replete with evidence that racial balance in housing is integrally related to racial balance in public schools, 393 F. Supp. at 437, and thus its order insofar as it is based upon the acts of intended racial discrimination in the operation of the schools and the inter-district housing effects of inter-district de jure school segregation is supported by Swann, and does not attempt to resolve the question left unanswered in Swann: "whether showing that school desegregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation." Swann, supra, at 23.

the holdings at issue were only part of the district court's basis for finding an inter-district violation. See pp. 6-7, supra. Not only is the summary affirmance binding on this court as the law of the case, see, e.g., Insurance Group Committee v. Denver & Rio Grande Western Railroad Co., 329 U.S. 607, 612 (1947), but under the principles announced in Hicks v. Miranda, supra, 422 U.S. at 344-345, lower courts are bound by summary decisions of the Supreme Court and should not re-examine a constitutional question necessarily decided in a summary affirmance. Thus, this court should not now reconsider the district court's finding of an inter-district constitutional violation. The issue before this Court is solely whether the district court's remedial guidelines are legally correct.[9/]

II. THE DISTRICT COURT'S REMEDIAL GUIDELINES

The principles governing the remedy in this case are well-established. The goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. Green v. County School Board, supra, 391 U.S. at 438. It is to eliminate these effects wherever they may be found in the school system, starting from the common under-

---

9/ The intervening school districts, with the exception of Marshallton-Mckean School District, have all argued that no relief involving them is appropriate since they were not involved in any inter-district violation. This argument also appears to be precluded by the Supreme Court's summary resolution of their appeal.

standing that "racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions." Keyes v. School District No. 1, supra, 413 U.S. at 203. The goal is not merely to adopt a plan to rearrange student assignments; it is, rather, to adopt a plan that promises "realistically to work" in overcoming the effects of discrimination. Green v. County School Board, supra, 391 U.S. at 439. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.... The measure of any desegregation plan is its effectiveness." Davis v. Board of School Comm'rs, supra, 402 U.S. at 37. When "racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation," an inter-district remedy is appropriate. Milliken v. Bradley, supra, 418 U.S. at 745; see also id. at 755 (Stewart, J., concurring).

A court is not at liberty to produce a result merely because it may find the result desirable. The existence of a violation of the Constitution does not authorize a court to bring about conditions that never would have existed in the absence of official racial discrimination. The remedy should not be designed to eliminate arguably undesirable states of affairs that are caused by private conduct ("de facto segregation") or state-caused conditions not related to racial

discrimination. Thus much has been settled by Milliken v. Bradley, supra. See also Spencer v. Kugler, 404 U.S. 1027 (1972), affirming 326 F. Supp. 1235 (D. N.J.); Village of Arlington Heights v. Metropolitan Housing Development Corp., No. 75-616, decided January 11, 1977, slip op. 12-13 and n. 15, 17-18 and n. 21.

The task of a remedial decree in a school desegregation case "is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 16. A remedial desegregation order may not establish "as a matter of substantive constitutional right, any particular degree of racial balance or mixing.... The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 24. As the Supreme Court held in Milliken v. Bradley, supra, "[t]he clear import of this language from Swann is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.'" 418 U.S. at 740-741 (footnote omitted).

The proper approach requires a court to seek to determine, as precisely as possible, the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. Swann v. Charlotte-Mecklenburg Bd. of Educ., supra, 402 U.S. at 15-16.[9a/] That is the way fully to satisfy the constitutional command, in a manner consistent with the proper role of the judicial branch in rectifying constitutional wrongs. It is only in this context, and for the purpose of achieving these objectives, that practicalities are properly taken into account in formulating a school desegregation remedy. However, in the event of a constitutional violation "all reasonable methods [must] be available to formulate an effective remedy." North Carolina Board of Education v. Swann, supra, 402 U.S. at 46. "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." Swann, supra, 402 U.S. at 15. No principle of equity limits the remedy to undoing, step by step, all of the acts making up the racial discrimination. Instead, courts have and must have the discretion to choose among many tools designed to bring about the elimination of the effects of the violation. Cf. Hills v. Gautreaux, 425 U.S. 284, 296-297 (1976).

9a/ Implicit in Swann is the concept that this approach is not to be applied in a mechanical fashion; instead, the contours of the remedy depend upon the facts in each case.

The question on this appeal is whether the judgment below is sustainable under the proper remedial standards, as described above. As is shown, infra, the difficulty is that portions of the opinion below comply with these principles, while in some respects the district court's remedial guidelines appear to go beyond them. To the extent that the judgment below is based on erroneous remedial standards,[10/] it should not stand in its present form, but should be conformed to rely entirely on proper standards.

The district court's order is consistent with proper standards in the following respects. Faced with a unique setting, the district court fashioned a remedy which was in large part appropriate for that setting and which remedied the effects of the constitutional violation found. Moreover, the district court's order properly leaves the school districts considerable leeway to formulate plans which they might desire to utilize to meet the local political and demographic necessities of New Castle County.

The district court found that prior to Brown I, "de jure segregation in New Castle County was a cooperative venture involving both city and suburbs. Although the Wilmington School District was predominantly white at that time, a desegregation decree could properly have considered city and suburbs together for purposes of remedy. At that time in other words, Wilmington and

---

10/ Paragraph 4(b) of the "Judgment" of June 15, 1976 incorporates in toto the remedial standards of the May 19, 1976 opinion relating to student assignment.

suburban districts were not meaningfully 'separate and autonomous.'" 393 F. Supp. at 437. (Citations omitted.) 11/

11/ In 1954-1955, 18.4% (191 of 1036) of the black students and 4.2% (910 of 21,608) of the white students in the suburban districts attended de jure segregated schools in Wilmington. See 393 F. Supp. at 433 and (1) below. As late as 1973, the state was paying the costs of busing approximately 30.7% (6,526 of 21,214) of Wilmington's school age children and 70.6% (6,134 of 8,681) of its white school age children to non-public schools both outside and within Wilmington. See 393 F. Supp. at 433 and T. 2666 and (2) below. The school discrimination and housing discrimination fed on one another. Wilmington became identified by a combination of official and private action as a school system for blacks, and most of the suburban school systems were identified by such actions as school systems for whites, and that identifiability could not be erased without inter-district relief. 416 F. Supp. at 344. In these circumstances a remedy requiring approximately 12% (7,515 of 62,186; see 416 F. Supp. at 369 and (3) below) of the suburban white students to be reassigned might not be disproportionate to the effects of past violations.

Note: The above statistics were derived as follows:

(1) Percentage of Suburban Students Attending Wilmington Schools. (See 393 F. Supp. at 433)

BLACK PERCENTAGE	
Number of Blacks Attending Wilmington Schools	191
Number of Blacks Attending Suburban Schools	845
TOTAL NUMBER OF SUBURBAN BLACK STUDENTS	1,036
WHITE PERCENTAGE	
Number of Whites Attending Wilmington Schools	910
Number of Whites Attending Suburban Schools [Total number of students (21, 543) minus number of black students (845)]	20,698
TOTAL NUMBER OF SUBURBAN WHITE STUDENTS	21,608

(2) Percentage of Students Bused at State Expense (See 393 F. Supp. at 433; T. 2666)

Numberof Wilmington Students Bused to Non-public Schools	6,526
Number of Wilmington Public School Students	14,688
TOTAL NUMBER OF WILMINGTON'S SCHOOL AGE CHILDREN	21,214

(Footnote continued on next page)

The district court had already found that Wilmington had not as of 1974 dismantled its de jure school system, 379 F. Supp. at 1223. The Court found that this was caused by actions of state and local officials which caused blacks to be concentrated in the City of Wilmington and prevented the School District of the City of Wilmington from being joined with any suburban school districts. 393 F. Supp. at 434. See supra, pp. 6-8. The court found that the unlawful acts "were the acts of the State and its subdivisions, and had a substantial, not a de minimis effect on the enrollment patterns of the separate districts. 416 F. Supp. at 339.

11/ (Footnote cont'd from preceding page)

94% of Total Number of Wilmington Students bused to Non-public Schools	=	(number of white (Wilmington students (bused to non- (public schools
94% of 6,526	=	6,134
Total Number of Wilmington Public School Students		14,688
Minus Number of Black Wilmington Public School Students		-12,141
Plus Number of White Wilmington Students Bused to Non-public Schools		+ 6,134
TOTAL NUMBER OF WHITE WILMINGTON SCHOOL AGE CHILDREN		8,681

(3) Percentage of White Suburban Students Potentially Reassigned (See 416 F. Supp. at 369)

Number of White Suburban Students Reassigned	7,515
Divided by Total Number of White Suburban Students [Total number of New Castle County Students 80,678 minus Wilmington white students 2,119 minus New Castle County black students 16,373]	62,186

The district court was thus required to remedy a situation in which inter-district effects of racial discrimination in the operation of the schools had never effectively been addressed or remedied, and where specific acts of the state and local authorities had exacerbated the the already existing violation and hindered the task of eliminating the effects of the racial discrimination. See United States v. Board of School Commissioners of the City of Indianapolis, supra, 541 F. 2d at 1227 (Tone, J. dissenting). Faced with this extent of violation, the district court was required to order a substantial amount of inter-district student reassignment in New Castle County.[12/]

Appellants contend that the district court's remedy exceeded its equitable authority, arguing that the district court erred in consolidating the New Castle County school districts into a "super district." Brief for Appellants State Board of Education, p. 36.

12/ As Judge Tone's dissenting opinion shows, the facts here differ considerably from those in United States v. Board of School Commissioners of the City of Indianapolis, supra. In that case there was no formal arrangement between the suburban systems and the Indianapolis Public Schools promoting inter-district dualism. I.P.S., still a majority white system, has not become identified as a system primarily intended for blacks. The UNI-GOV legislation at issue there related primarily to municipal boundaries, rther than to schools. The Indianapolis Public School System is larger than the combined school system ordered here would be. The Indianapolis Public School System took the position that it could implement a workable intra-district plan.

We agree with appellants that the district court's opinions do not show that but for the exemption of Wilmington and Newark from the EAA all of northern New Castle County would be one district. But we see two difficulties with appellants' argument. First, the district court appears to have based this arrangement in large part on the preferences expressed by the appellants. See 416 F. Supp. at 349. Second, the district court's order in this respect appears to be only a tentative outline of the remedy subject to changes which the parties may propose, rather than an absolute remedy written in stone. The district court's opinion provides that state and local officials are free to adopt any reorganization plan consistent with the goal of inter-district desegregation 416 F. Supp. at 351. The district court stated that its opinion "in this regard is not a final determination of the organization of the area and of the lines to be followed in setting up such an area.... Rather, the reorganization outlined infra is effective only in the absence of proper state action to change it." Ibid.

Thus, the district court has properly given local officials an opportunity to formulate an inter-district desegregation plan in this case. See Swann v. Charlotte-Mecklenburg Bd. of Educ., supra, 402 U.S. at 16.

Only if the state defaults in that opportunity will the district court's consolidation plan be required.

Although we believe that the district court was required to order a substantial amount of reassignment in New Castle County and that its order is in a large part an appropriate remedy for the extent of the constitutional violation found, see pp. 5-11, supra, some of the court's language concerning its remedial standards appears to differ significantly from the applicable law. See discussion pp. 27-29, supra. Some of the district court's language seems to embody the view that no plan for Wilmington can be "effective" without a substantial injection of whites, without considering what the lingering effects of discrimination may be. Milliken v. Bradley, supra disapproved an approach based on such statistical comparisons alone. Some of the language in the district court's order is apparently founded on the assumption that the obligation to desegregate, triggered by the constitutional violation on the part of the school district, means that the school districts must seek to achieve a racial balance in each school approximately equivalent to that in the district as a whole. Although somewhat ambiguous, the discussion of "numbers", 416 F. Supp. at 355, appears to mean, for example, that a 40% black school would be prima facie segregated under the district court's order.[13/] Beginning with this premise the district court would allow adjustments, but these adjustments could be read to be limited in most cases by the need for a "viable minority" on the one side, 416 F. Supp. at at 356, and on the other, by the need to avoid "tipping points" that might lead to "white flight." Id. at 354-356.

13/ The court does, of course, make provision for rebutting the prima facie case. See 416 F. Supp. at 357, n. 148.

Under such a reading of the district court's opinion the central point, however, is that to the extent feasible each school should have what the district court considered a desirable racial mix. Finally, the court does not articulate as a reason for the inclusion of exclusion of certain suburban school districts in its remedy any analysis of their extent to which they are implicated in the constitutional violations or its effects; it is not clear whether their inclusion or exclusion is instead based upon their contribution to a specified racial mix. See 416 F. Supp. at 353-357.

In our view, the proper task of a desegregation plan should be nothing more or less than the elimination, "root and branch," of all of the effects of official racial discrimination intended to affect the operation of the schools. The "desegregation" that courts are both empowered and obligated to accomplish is not, as one might conclude from some language in the district court's opinion, a degree of racial mixture thought socially necessary and hence constitutionally required without reference to the actual amount of separation caused by the constitutional violation. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination. A properly formulated desegregation decree should not, therefore, be based on the premise that such schools are undesirable, or that each school should have a racial mixture or balance. The practicalities of this case do demand a substantial inter-district remedy, but this remedy must be responsive to the violation, not to a preference for a statistical balance.

CONCLUSION

The judgment of the district court should be affirmed with clarifying instructions. In the alternative, the judgment should be vacated and remanded for a reconsideration of the remedial guidelines in this case.

Respectfully submitted,

DREW S. DAYS, III
Assistant Attorney General

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

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 1977, I served two copies of the foregoing Brief for the United States as Amicus Curiae by first class mail, postage pre-paid on:

Irving Morris, Esq.
Morris & Rosenthal
301 Market Tower
P.O. Box 1070
Wilmington, Delaware 19899

Samuel R. Russell, Esq.
Biggs & Battaglia
1206 Farmers Bank Bldg.
Wilmington, Delaware 19899

Louis R. Lucas, Esq.
Ratner, Sugarmon, Lucas,
Salky & Henderson
525 Commerce Title Bldg.
Memphis, Tennessee 38103

Clifford B. Hearn, Esq.
Balick and Hearn
P.O. Box 1205
1207 Farmers Bank Bldg.
Wilmington, Delaware 19801

Louis L. Redding, Esq.
1200 Farmers Bank Bldg.
Wilmington, Delaware 19801

Richard Allen Paul, Esq.
12th & Market Streets
Wilmington, Delaware 19801

Richard Hiller, Esq.
Puerto Rican Legal Defense
Education Fund Inc.
95 Madison Ave. , Rm. 1304
New York, New York 10016

James T. McKinstry, Esq.
Richards, Layton & Finger
4072 DuPont Bldg.
Wilmington, Delaware 19899

James O. Herlihy, Esq.
Continental American Bldg.
Wilmington, Delaware 19801

Edward W. Cooch, Esq.
Market Tower
Wilmington, Delaware 19801

James M. Tunnell, Jr., Esq.
Morris, Nichols, Arsht &
Tunnell
Wilmington Tower
Wilmington, Delaware 19801

Howard M. Handelman, Esquire
Bayard, Brill & Handelman
Market Tower
Wilmington, Delaware 19801

John P. Sinclair, Esq.
Potter, Anderson & Corroon
350 Delaware Trust Bldg.
Wilmington, Delaware 19899

Aida Waserstein, Esq.
Community Legal Aid Society Inc.
2203 F. Prior Road
Brandywine Hundred
Wilmington, Delaware 19809

Herbert Teitelbaum, Esq.
Puerto Rican Legal Defense
Education Fund Inc.
95 Madison Ave., Rm. 1304
New York, New York, 10016

William Prickett, Esq.
Prickett, Ward, Burt &
Sanders
1310 King Street
Wilmington, Delaware 19899

Richard Wier, Jr., Esq.
Atty. Gen. of State of Del.
Wilmington Tower
Wilmington, Delaware 19899

David F. Anderson, Esquire
Potter, Anderson & Corroon
P.O. Box 951
Wilmington, Delaware 19899

William L. Taylor, Esquire
Catholic University of America
School of Law
Washington, D.C. 20064

William Poole, Esq.
Potter, Anderson & Corroon
350 Delaware Trust Bldg.
Wilmington, Delaware 19899

BRIAN K. LANDSBERG
Attorney
Department of Justice
Washington, D.C. 20530