

Nos. 78-1800, 78-1871, 78-
78-2006, 78-2039, 79-1831 through
79-1838, 79-1874 and 79-1875

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

DONNY BRURELL BUCKLEY, et al.

Plaintiff-Intervenors-Appellees

v.

BOARD OF SCHOOL COMMISSIONERS OF THE
CITY OF INDIANAPOLIS, INDIANA, et al.

Defendants-Appellees-Cross-Appellants

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, et al.

Added Defendants-Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

VIRGINIA McCARTY
United States Attorney

DREW S. DAYS III
Assistant Attorney General

BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys
Department of Justice
Washington D.C. 20530

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QUESTIONS PRESENTED

1. Whether the housing authority's decision to place all public housing projects in Marion County only within the boundaries of the City of Indianapolis was discriminatorily motivated.

1/ Appeal No. 78-2221 was filed by the United States. We filed a protective notice of appeal from the court's July 11, 1978 order. After reviewing the record, we determined to file this brief, as appellee, and have abandoned that appeal.

2. Whether the repeated refusal of public officials to consolidate the Indianapolis Public Schools (IPS) and the suburban districts in any manner was motivated to a significant degree by racial discrimination.

3. Whether the interdistrict transfer plan promises to remedy the effects of proven discrimination, while respecting legitimate interests of local governing bodies.

STATEMENT

1. Procedural history

The brief filed by IPS adequately traces the procedural history of this case. In compliance with this court's order to avoid duplication, we incorporate by reference the procedural history described in the IPS brief.

2. Facts

A. Statistics

The racial composition of the IPS enrollment and that of the surrounding defendant suburban jurisdictions is highly disparate. When this suit began in 1968, 97% of the nearly 38,000 black school children in Marion County were enrolled in school in IPS (1978 IPS Ex. 64, App. 26). Overall, the suburban districts were less than 2% black; only one of the ten suburban school districts surrounding IPS enrolled over 150 black children, and six of them enrolled less than 20 blacks, and three of the six had no blacks at all. IPS, meanwhile, was

nearly 34% black (ibid.). Even today, the disparity continues. As of 1978, IPS schools held 89% of the over 39,000 black students in Marion County (ibid.). Overall, the ten suburban districts are 6% black, and of the ten, only three (Pike, Washington, Lawrence) have black enrollments over 2%. IPS, meanwhile, is 47% black. The overall totals are:

	<u>White</u>	<u>Black</u>	<u>Total</u>
IPS	38,703	34,962	73,665
Other Marion Co. School Districts	66,491	4,392	70,883
Total	105,194	39,354	144,548

B. Historical Discrimination

In prior opinions, the district court took judicial notice of certain historical facts concerning racial discrimination in the State of Indiana, and in the Indianapolis area, both in education and in housing. 332 F. Supp. at 658-65; 368 F. Supp. at 1199. Until 1949, state law specifically permitted racially segregated schools. 332 F. Supp. at 663-665. The court found that until this suit was filed, segregative acts were taken in Indianapolis despite the repeal of the statute.

The housing actions included both public and private discrimination against blacks discouraging and at times directly preventing them from locating in white residential

areas and schools. Ibid. At the 1973 hearing, witnesses recounted incidents of racial discrimination by realtors (1973 Tr. 249-253, 276-279), and stated that for the most part blacks could not get housing in the suburbs of Indianapolis (1973 Tr. 709). One member of the Indianapolis Real Estate Board, a private organization of realtors, stated that a Board study from 1966-1968 disclosed discrimination against blacks by real estate personnel in the Indianapolis area (1973 Tr. 2366). The first set of privately enacted standards for real estate agents which stated that agents should not discriminate on the basis of race was passed in about 1967 (1973 Tr. 2357, 2371). As late as the mid-1960s, many homes were advertised for "colored" persons. 332 F. Supp. at 663, 1973 Tr. 2377. Racially restrictive covenants were made part of deeds, and "routinely enforced until * * * 1948." 332 F. Supp. at 662. The court also took judicial notice of several governmental efforts to keep blacks out of white residential areas in the early and mid-1900s. 332 F. Supp. at 662-663.

C. Public Housing

All of the eleven public housing projects in Marion County are located in the pre-Uni-Gov boundaries of the City of Indianapolis. Ten were built between 1966 and 1970 (Table I, Answers of HACI to Interrogatories of Intervening Plaintiffs, App. 25). In all of them which now have tenants, nearly all of the tenants are blacks.

In fact, the evidence shows that seven public housing projects^{2/} are located quite near the IPS-suburban boundary line, with five^{3/} located within a few blocks, or in some instances directly on, the border. One project, Clearstream Gardens, is located on the IPS side of the street dividing IPS and Warren Township. 1975 Tr. 287-290.

On at least one occasion, the IPS-suburban boundary was specifically altered to bring one small area within the City of Indianapolis, and within IPS, in order to accomodate placement of a public housing project. Construction of the Eagle Creek Village Project was begun on January 18, 1968 (see Table I of Answers of Added Defendant, the Housing Authority of City of Indianapolis, Indiana, to Interrogatories of Intervening Plaintiffs, App. 25). The 14 acre tract on which the project was sited was annexed by the City from Wayne Township on March 22, 1967 (see Spec. Ord. 4, 1967, Exhibit A to Answers of the Board of School Commissioners of Indianapolis to Interrogatories filed by the United States, App. 20-22) IPS was aware that this area was being annexed solely for the housing project (id. at Exhibit E, IPS memorandum of January 31, 1967, App. 21) and IPS officials felt IPS could

^{2/} Concord Village, Eagle Creek Village, Laurelwood, Clearstream Gardens, Romney Terrace, Beechwood Gardens, Hawthorne Place.

^{3/} Eagle Creek, Laurelwood, Clearstream Gardens, Romney Terrace, Beechwood Gardens.

not provide school facilities for the children in the project (ibid.), and decided to so inform the City Council (id. at Exhibit F, memorandum from IPS Board meeting of January 31, 1967, App. 24). Nonetheless, the annexation was approved (Spec. Ord. 4, 1967) and the project was built on that spot, which was now inside IPS boundaries rather than in Wayne Township.

The record also shows that IPS expressed concern about the racial effect of public housing projects on its schools (see 1971 Tr. 1046-1049, 1122-1123, 1125, App. 1-8), particularly that all the housing projects were being placed in the city (App. 5-7).^{4/} In its building plans, IPS noted that the public housing projects would cause overcrowding, requiring additions to several schools located near the area of the proposed housing projects.^{5/} In spite of these difficulties, all public housing was placed inside the boundaries of IPS.

^{4/} In 1971, IPS Superintendent Campbell testified that the placement of all public housing inside IPS "results in a concentration of the poor and the black within the city" (App. 5) and detrimentally affects the schools (App. 2). This pattern of housing placements, the Superintendent stated, resulted in the city having a "white noose around the city" (Tr. 1125, App. 8).

^{5/} See 1971 United States, Ex. 49, "Study of Housing Facilities, Indianapolis Elementary Schools," for 1967, discussing schools 69, 95, 99, 112, App. 9-14; 1971 United States Ex. 50, "Recommendations on Construction of School Facilities for 1968 through 1970," discussing schools 67, 71, 999, 110, 112, and last paragraph, App. 15-19.

The suburban areas did not exclude all housing for persons on governmental financial assistance. Some suburban areas did permit the construction of multi-family developments (1973 Tr. 195-201), where certain tenants were given financial assistance due to low incomes (1975 Tr. 264-265, 1973 Tr. 196-197). The income levels were not as low as those of people in public housing. These projects required the approval of zoning and building officials, and the site selection needed to be approved by the Metropolitan Planning Board or local zoning boards (1975 Tr. 263-265, 1973 Tr. 221-222). Most of these projects had few black tenants (1973 Tr. 235-236, 1978 Tr. 73-77).

The record shows that nearly 1600 acres in Marion County were zoned for multi-family housing, most of which was located outside IPS (1973 Tr. 1771-1776, 1779). The Planning Department of the Metropolitan Planning Commission mapped several sites outside the Indianapolis limits where public housing projects could be located (1975 Tr. 240).

One housing official stated that certain "criteria" required that all public housing be built within the Indianapolis, and IPS, boundaries (1975 Tr. 255). He testified that the availability of municipal services such as water, sewer, and police and fire protection; consistency with the overall county residential development plan; and availability of public

transportation, schools, parks shopping, employment, and health services, required that all public housing be located within the boundaries of the City of Indianapolis and IPS (ibid.).

The evidence indicates that these criteria could be satisfied by suburban locations. For example, the public housing official acknowledged that there were jobs in suburban areas (1975 Tr. 269-271); that public transportation services could be expected to follow the need of residents of public housing located in suburban areas (1975 Tr. 271); that sewer facilities were or would soon be available in suburban areas for multifamily units (1975 Tr. 274-278); and that fire and police protection were available (1975 Tr. 280). Health services were provided by a county-wide authority, able to provide services where needed (1975 Tr. 280-281). Welfare service centers were also located by an agency with county-wide authority (1975 Tr. 282). In addition, the housing official stated that in some instances the "residential plan" was to place public housing projects near single family homes, and many such areas were available in suburban jurisdictions (1975 Tr. 286-287).

Indianapolis housing officials stated that they could not place public housing in the suburbs during this period without a "cooperation agreement" with suburban governments

(1975 Tr. 255-256, 263). They had no such agreement, and so never looked for suburban locations (1975 Tr. 263).

After Uni-Gov was passed, the housing agency's authority became county-wide. The evidence shows that there were over 3,000 applications on file for public housing, but no new projects were built after early 1970 (App. 25; 1973 Tr. 2631-2632; 1975 Tr. 93-95).

D. Retention of IPS Boundaries

On two occasions public officials specifically rejected substantial expansion of the IPS system. In 1959, after the State legislature passed the School Corporation Reorganization Act, Ind. Code §20-4-1-1 et seq., the Marion County School Reorganization Committee unanimously recommended that all schools in Marion County be consolidated, or in the alternative that a limited restructuring plan be implemented (1973 Plaintiff-Intervenors Ex. 2. See also 368 F. Supp. at 1203, 541 F.2d at 1217-1218). After all suburban school corporations objected to any sort of reorganization, these plans were dropped (ibid.). The reorganization which resulted in 1961 retained the IPS boundaries which were coextensive with the city limits (1973 Plaintiff-Intervenors Ex. 2).

In 1969, the corporate boundaries of the City of Indianapolis were extended to include all of Marion County. This was called the Uni-Gov legislation. This Court's opinion at 573 F.2d 400, 406-407, accurately reviews the history and circumstances surrounding the passage of Uni-Gov.

School boundaries were specifically excluded from the Uni-Gov expansion. Due to suburban opposition to expansion of IPS boundaries, Uni-Gov's expansion of Indianapolis' boundaries would not have passed if schools had been included in the expansion (1975 Tr. 165. See also 541 F.2d at 1221, 419 F. Supp. at 182-183).

3. Opinions of the District Court on Remand^{6/}

In its July 11, 1978 opinion (456 F. Supp. 183), the court found discriminatory intent was involved in the site selection of public housing projects and in the State legislature's failure when passing Uni-Gov to expand the boundaries of IPS.

The court first reviewed and reiterated its findings (see 332 F. Supp. 655) concerning historical discrimination against blacks in Indiana generally and in the Indianapolis area specifically. 456 F. Supp. at 186-187. The court repeated its findings that that discrimination in housing continued through the 1960s. 456 F. Supp. at 186. The court also reviewed the history of discrimination against blacks in Indiana's schools, and the continued opposition of the suburban areas around Indianapolis to any expansion of IPS boundaries and to any placement of public housing projects within their borders. 456 F. Supp. at 187.

^{6/} In accordance with this Court's order to avoid unnecessary duplication, we refer to the brief of IPS for its summary of the evidence presented at the 1978 hearing. That hearing was directed to the scope of the effects of the proven discrimination. IPS has filed a cross-appeal on the issue from an adverse decision of the district court.

The court found that the representatives of the suburban districts opposed including schools in the Uni-Gov legislation, and would have opposed the entire legislative package had school boundary expansion been part of it. 456 F. Supp. at 187. The court cited the Indianapolis Mayor's testimony that Uni-Gov would not have been passed if schools had been included. Ibid.

The court held that the Uni-Gov legislation required the State legislature to depart from its usual rule that the boundaries of a local school district would expand with any expansion of city boundaries, 456 F. Supp. at 188, and was a departure from the legislature's recent efforts to correct the effects of past discriminatory legislation. Uni-Gov, the court said, was passed in spite of the legislature's knowledge that the desegregation of IPS required the dispersal of black children beyond IPS borders, and that confining IPS to its existing boundaries would inhibit desegregation and perpetuate the "segregated white schools in suburban Marion County." 456 F. Supp. at 188. The legislation, the court found, was the product "at least in part, [of] racially discriminatory intent." Ibid.

The court stated that the policy of the Indianapolis Housing Authority (HACI) and the Metropolitan Planning Commission to place all public housing inside the territory of IPS must also be viewed against the background of housing discrimination, and suburban opposition to blacks, found in

the court's prior opinions. 456 F. Supp. at 189. The court held that similar discriminatory intent motivated the government's public housing site selection practices. "This court * * * specifically holds that the action of such official bodies in locating such projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only." 456 F. Supp. at 189. The court found that the "natural probable, and foreseeable impact" of placing all public housing projects within IPS was "to increase or perpetuate * * * school segregation within IPS." Ibid.

The court held that none of the non-racial justifications for the site locations required that projects be placed only inside the city of Indianapolis (ibid.), and that the only real difference between placing the projects inside or outside the city was the school system into which the children in the projects would be placed. The court rejected the argument that HACI had no authority to place public housing in suburban areas, finding that HACI's authority extended, by statute, five miles outside the boundaries of IPS. 456 F. Supp. at 189.

The court sought to apply the standards of Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 406 (1977), and to determine the "incremental segregative effects" of the discriminatory practices. 456 F. Supp. at 190. It did so mathematically, finding that HACI owned 2,395 apartment units, and that there were approximately three school age children per apartment. 456 F. Supp. at 190. The court also held that had HACI placed these projects in the suburbs, that would have "indirectly" encouraged blacks to move to private housing there. Ibid. The effects of the violations, the court found, approximately equalled the number of black children (about 8,000) it proposed to transfer to suburban schools as its interdistrict remedy. Ibid.^{7/}

The court's April 24, 1979 opinion rejected IPS' contention that the record of discrimination by IPS had a "two-way" impact^{8/} (Perry App. 34). The court stated that, in its view, IPS' acts of segregation through the 1960s did not encourage whites to leave the city. Because

^{7/} These children would be transferred to each of the suburban districts in a manner to raise the overall enrollment of each district to 15% black. See the court's characterization of this formula at 419 F. Supp. at 185.

^{8/} IPS had submitted two "two-way" plans to the court. One would have transferred the same number of white students from the suburbs into IPS as the number of black students the court would transfer out. The second plan called for county-wide consolidation of all school districts, establishing 27% black enrollments in all schools. The court rejected both.

IPS kept segregated white schools, there were places within the city for whites to stay who might otherwise have left when black school enrollments rose (Perry App. 45-46).

The court said it erred in its July 11, 1978 opinion in holding that each housing unit had approximately three school age children (Perry App. 39). Each actually had about two children per unit. However, the court recalculated its figures, and held that nearly 5,000 black children from housing projects would have been enrolled in suburban schools if HACI had placed all housing projects in the suburbs (Perry App. 39). Given the "indirect effect" on private housing that would have occurred if the projects had been placed in the suburbs, the court again held that the record supported its transfer order (id. at 50-51). The court also held that despite its findings that Uni-Gov was racially motivated, it could not determine Uni-Gov's incremental segregative effects on school enrollments (Perry App. 42-43). Accordingly, the court did not rely on Uni-Gov as support for the number of students it would transfer into suburban districts.^{9/}

The court rejected arguments that its plan is unfair to blacks because only blacks will be bused (Perry App. 47).

^{9/} The court lowered the number of children to be transferred to Lawrence Township, in which the number of black children had risen since the court first set up its transfer plan in 1975. See n. 7, supra. The court also dismissed Washington and Pike Townships, where the numbers of black children exceeded the 15% figure to be achieved by the interdistrict transfers (Perry App. 51).

The court noted that it ordered IPS to devise an intradistrict plan to desegregate those schools in IPS which would otherwise be segregated after the interdistrict transfers were implemented.^{10/} Under that plan, the court found substantial numbers of white students would be transported, demonstrating that the "burden" of transportation (the court assuming arguendo it is a burden (Perry App. 49-50) would not fall solely on black students (Perry App. 48, 50).

On July 9, 1979, the court ordered IPS' plan for interdistrict transfers into effect for the 1979-80 year (Perry App. 63). The plan also required the suburban districts needing new teachers to hire those dropped by IPS due to its loss in enrollment (Perry App. 66-67), and to conduct in-service training, and required that the State pay for the training (Perry App. 67-68).^{11/} The court, however, did not order into effect the intradistrict plan which would follow the implementation of the interdistrict transfers.^{12/}

^{10/} The district court, in several opinions, ordered IPS to prepare this type of plan. See 419 F. Supp. at 186; Perry App. 33 (order of July 11, 1978).

^{11/} The suburbs had previously been ordered to apply for federal funds available to desegregating districts. Perry App. 59.

^{12/} See brief of United States in appeal Nos. 78-1800 and 78-2006. Those appeals are now under consideration along with the ones addressed in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the original plaintiff,^{13/} with the responsibility to promote "the orderly achievement of desegregation in public education" (42 U.S.C. § 2000c-6(a)), we file this brief as appellee with respect to interdistrict relief. Although we have not sought such relief, we have appeared in all proceedings concerning such relief and have provided our analysis of the facts and the law. For the reasons which follow, we suggest that the record supports the limited interdistrict order of the district court, but that the rationale for transferring only black students is open to serious question.

In order for a court to require the implementation of interdistrict relief, two prerequisites must be met: (1) intentional discrimination by the state with (2) a demonstrable and significant interdistrict impact. Milliken v. Bradley, (Milliken I), 418 U.S. 717 (1974). In its opinion (573 F.2d 400 (1978)) remanding the case to the district court, this Court made the necessary finding of interdistrict impact. This Court held that the Uni-Gov legislation curtailed the

^{13/} This case was initiated by the United States in 1968. At that time we alleged that the Indianapolis school system was unconstitutionally segregated. In 1971, the district court found (332 F. Supp. 655) that the allegation was true. That finding was affirmed by this Court (474 F.2d 81 (1973)), and certiorari was denied (413 U.S. 920 (1973)). However, since that time the district court, feeling that an intradistrict plan could not be successfully implemented if limited to the boundaries of IPS, has pursued an interdistrict remedy. We do not agree with that conclusion, and have addressed the issue in our brief filed in Nos. 78-1800 and 78-2006.

the ability of IPS to desegregate by placing its black students into suburban areas, 573 F.2d at 407, and that the housing practices could supply a basis for interdistrict relief if state-sponsored discriminatory practices contributed to racially disparate housing patterns. 573 F.2d at 409.

On remand, the district court made the findings on intentional discrimination which this Court held would support interdistrict relief. These findings we contend, are supported by the evidence, are based on a correct legal standard, and are not clearly erroneous.

The record of historical discrimination supplies a background upon which contemporary policies must be viewed. The court's finding that HACI's site selection policy--to place all public housing inside IPS' boundaries--was intentionally discriminatory is supported by a record showing that housing projects were placed very close to the IPS-suburban border; that the border was manipulated to place sites within IPS, and that the non-racial criteria used by HACI to select sites could have been satisfied by sites located outside IPS.

The district court found HACI's practices were intended not only to affect housing patterns, but school enrollments as well. It is not clear, under existing legal standards, that

such a finding was necessary in order for the evidence to provide a basis for the remedial plan. Because the finding was made, the difficult legal issue of its necessity should not be reached. In any event, public housing discrimination with an interdistrict segregative impact on the schools is an adequate predicate for requiring the suburban school system to accept black students from IPS until that impact has dissipated. The Court should not consider whether such discrimination would support the order here against an attack by black students or IPS on mandatory transfers, since neither the plaintiff-intervenor class nor IPS has mounted such an attack.

The court's holding that the State legislature's failure to expand IPS' boundaries as part of Uni-Gov was, in part, the result of racial considerations is also not clearly erroneous. More importantly, State officers were responsible in large measures for the unlawful segregation of students within IPS and for discriminatorily limiting blacks to IPS boundaries. The State therefore had an affirmative duty to disestablish the effects of its acts and, in freezing IPS' boundaries, failed to act in accord with its legal responsibility.

In attempting to comply with its understanding that Dayton I requires that courts remedy incremental segregative

effects of discriminatory practices, the district court went through a complex mathematical analysis to justify the number of students it would order transferred from IPS into suburban districts. However, Dayton Board of Education v. Brinkman (Dayton II), No. 78-627 (Supreme Court, July 2, 1979), and Columbus Board of Education v. Penick, No. 78-610 (Supreme Court, July 2, 1979), decided after the district court acted, suggest that broad violations of the law must be remedied even if their effects are not amenable to precise calibration.

The effect of the violations here has been to significantly involve the government in establishing the IPS suburban boundary line as a racial barrier, one which was used to retard, discourage, and limit the movement of blacks into suburban residences and schools. That effect can not be precisely localized but was general, discouraging movement of blacks into any suburban area.

The court's remedy will eliminate many of the discriminatory effects of this racial barrier.^{14/} Assigning black students across

^{14/} Judgments can be affirmed for reasons different from those relied on by the district court, as long as the record supports the affirmance. California Bankers Ass'n v. Shultz, 416 U.S. 21, 71 (1974); Mims v. Board of Education of City of Chicago, 523 F.2d 711, 716 n. 2 (7th Cir. 1975); Reinstine v. Rosenfield, 111 F.2d 892 (7th Cir. 1940).

the IPS suburban line does directly counter the effects past practices had on black movement.

The remedy causes little disruption to the scheme of local government in Indianapolis. No school districts are eliminated; present responsibilities of each school board are largely unaffected. The suburban districts are merely required to accept temporarily a number of black students from IPS. Accordingly, the intrusion into legitimate local government is minimal.

However, the logic of the court's rationale for transferring blacks out of IPS would appear to support some form of relief which would bring whites into IPS--either by annexation, student transfer, or some other technique. The court disagreed, finding only that the discrimination kept blacks out of suburban areas. It appears to have ignored a reciprocal impact of those policies--one which would encourage whites to leave IPS. In ignoring this impact, the court may have failed to directly address one aspect of the proven discrimination.

ARGUMENT

I

STANDARDS FOR INTERDISTRICT SCHOOL DESEGREGATION

The aim of any remedy ordered in school desegregation litigation is to counteract, as nearly as possible, the effects of racially discriminatory governmental actions. Swann v. Board of Education, 402 U.S. 1, 15 (1971); Milliken v. Bradley (Milliken I), 418 U.S. 717, 744 (1974); Milliken v. Bradley

(Milliken II), 433 U.S. 267, 280 (1977). Accordingly, the court must make several factual inquiries. First, the court must determine whether governmental agencies have acted with a discriminatory intent, Washington v. Davis, 426 U.S. 229 (1976). Second, the court must determine the effects of the discrimination on student segregation. Third, the court must devise a remedy which approximates a pattern of student enrollment which would have evolved under a system free of governmental discrimination. Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 406 (1977).

In some cases, the effects of discrimination are such that an appropriate remedy may cross lines which heretofore separated independent school districts. In Milliken v. Bradley (Milliken I), supra, the Supreme Court set out guidelines which determine whether a trial record supports interdistrict relief. "It must * * * be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation." 418 U.S. at 744-745. The key is to find discrimination by public officials which has had a traceable impact across school district lines.

That discrimination need not be only the product of acts of state or local school officials. "Were it to be shown, for example, that state officials had contributed to the [inter-district] separation of the races * * * by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate."

Milliken v. Bradley (Milliken I), supra, 418 U.S. at 755 (Stewart, J., concurring). To the extent discriminatory "official activity of any sort," id. at 757, caused the interdistrict segregation, that segregation can be remedied by federal judicial decree. The Supreme Court has held that "the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws, whatever the agency of the State taking the action." Cooper v. Aaron, 358 U.S. 1, 17 (1958).

Accordingly, as long as segregative impact can be traced to one state agency, the state, through other agencies, can be called upon to correct those effects. "The record before us clearly establishes that the growth of the [School] Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. These difficulties * * * can also be brought under control by state action." Cooper v. Aaron, supra, 358 U.S. at 16.^{15/}

^{15/} See also Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233-234 (1964); Morrilton School District v. United States, No. 79-1293 (8th Cir. August 30, 1979) slip op. 12.

One of the bases of Milliken I was that a federal court, when ordering the equitable relief necessary to remedy the proven effects of unconstitutional conduct, should endeavor to disrupt as little as possible the scheme of local government lawfully establishment by the state. 418 U.S. at 741-744. See also Hills v. Gautreaux, 425 U.S. 284, 295 (1976). That scheme of total government is not merely an "administrative convenience", Milliken I, supra, 418 U.S. at 741, which can be casually ignored. Instead, it represents a legitimate selection by the state, and its citizens, of a form of self-government and local autonomy. Milliken I, supra, 418 U.S. at 741. Accordingly, when agencies of state government have taken actions which have discriminatory interdistrict effects, a court, when ordering a remedy which will disestablish those effects, must seek to do so with minimal intrusion into the legitimate structure of local government.

II

THE DISTRICT COURT APPLIED PROPER LEGAL STANDARDS
AND WAS NOT CLEARLY ERRONEOUS IN FINDING THAT
DEFENDANTS' ACTIONS SIGNIFICANTLY CONTRIBUTED TO
THE RACIAL BARRIER BETWEEN IPS AND THE OTHER MARION
COUNTY SCHOOL DISTRICTS

The district court has found that several actions of public officials were significantly affected by discriminatory intent. These findings are not clearly erroneous.

The rule in this circuit is that findings of discriminatory intent are essentially findings of fact. Armstrong v. Brennan,

539 F.2d 625, 634 (7th Cir. 1976), vacated on other grounds 433 U.S. 672 (1977). However, determining discriminatory intent requires a court to apply certain legal standards, see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and to rely on subsidiary findings of fact for support, see EEOC v. Datapoint Corp., 570 F.2d 1264 (5th Cir. 1978). An error in applying proper standards would permit a reviewing court to reverse findings of discriminatory intent free of the clearly erroneous rule. However, where there have been no such errors, and where the subsidiary findings are not clearly erroneous, the finding can be reversed only if clearly erroneous.

A. The court's findings of historical discrimination have not been shown to be clearly erroneous

The district court's 1971 opinion (332 F. Supp. 655) recounted the history of discrimination against blacks which is responsible, in part, for the limited access of blacks to residences in suburban areas. The court found that blacks were discouraged from buying houses in white residential areas (332 F. Supp. at 662), that realtors refused to cooperate with blacks seeking to purchase houses in white areas (ibid.), that those blacks who did purchase houses in white area were often harassed (ibid.).

The record supports these findings. The evidence (see pp. 3-4, supra) shows that historically housing was not made available for blacks in the white residential areas around

Indianapolis. This opposition was characterized by private discrimination but, at times, involved governmental practices in the racial discrimination.

These findings provide two elements to this case. First, they establish that, to an extent, governmental discrimination was one factor which helped private discriminatory practices keep blacks out of the suburban areas. Second, they provide a background of historical discrimination upon which the findings concerning the intent affecting the two more contemporary practices at issue--the site selection for public housing and the exclusion of schools from the legislative expansion of Indianapolis city lines--should be viewed.

B. The court's finding that the housing authority's policy on the selection of public housing sites was intentionally discriminatory is not clearly erroneous

The district court found that the site selection of the housing authority were discriminatorily motivated to perpetuate the racial segregation existing between city and suburban areas and schools. At 456 F. Supp. at 186 the court found that the site selection practices were "entirely motivated with the invidious purposes to keep blacks within pre-Uni-Gov Indianapolis and IPS * * *." In effect, the court found that the housing authority's discriminatory intent was directed to affect both residential areas and school enrollments.

Under the present state of the law,^{16/} it is unclear whether, in order to use the record of discrimination by HACI as a basis for a school desegregation decree, the district court had to specifically find, as it did, that HACI's intent was to affect school enrollments. This Court has yet to directly address this issue in any conclusive manner. See this Court's remand opinion, 573 F.2d at 409 and 415. In any event, we submit that the broader issue need not and should not be reached by this Court, since the district court's findings of intent to affect both housing and schools were not clearly erroneous.

As noted in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977), because discriminatory intent is seldom openly admitted, determining whether racial factors were actually considered by, or actually affected

^{16/} Although the issue has been discussed, see Swann v. Board of Education, 402 U.S. 1 (1971); Milliken v. Bradley (Milliken I), *supra*; Bradley v. School Board of City of Richmond, 462 F.2d 1058, 1066 (4th Cir. 1972), affirmed by equally divided court, 412 U.S. 92 (1973); United States v. School District of Omaha, 521 F.2d 530, 534-535 (8th Cir. 1975), cert. denied, 423 U.S. 946 (1977); Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975), cert. denied, 423 U.S. 963 (1975); Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967), there has been no conclusive resolution.

the decisions of governmental officers requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." The pattern of site selection in this case--placing the foreseeably black public housing projects in IPS, which had nearly all of the black students in the county, and placing none of them in the suburbs, which were nearly all-white--is virtually "unexplainable on grounds other than race." Arlington Heights, supra, 429 U.S. at 266.

All of the "criteria" which the housing officials contended required them to select sites only in IPS fit sites in the suburban areas as well. Sites were selected which were merely a few blocks inside the IPS suburban lines. In the case of Eagle Creek Village, the line itself was altered to place a site within the IPS border (see pp. 5-6, supra). Suburban areas permitted the development of subsidized housing which had higher income limitations, with mostly white, rather than mostly black, tenants.

The historical record of suburban discriminatory opposition to blacks locating outside the boundaries of Indianapolis is consistent with the results of the public housing site selection practices, raising a strong inference that similar discriminatory factors governed here. Cf. Arlington Heights, supra,

at 267.^{17/} See also Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 207 (1973). The fact that sites were selected in spite of IPS' expression of concern with the racial effects of placing them all within IPS further supports the district court's finding of racial intent.^{18/} "In

^{17/} The added defendants all defend the site selections by stating that because the housing authority had no "cooperation agreement" with suburban governments, it could not place public housing outside IPS' boundaries. The district court held that HACI had authority to place projects up to five miles outside IPS (Perry App. 24-25). In any event, added defendants acknowledge that had suburban officials cooperated with HACI, it then undeniably would have had authority to locate projects outside IPS. The inference of racial discrimination would apply as well to the lack of "cooperation agreements," and the record reflects no non-racial justification for the lack of such agreements.

Accordingly, this is not a case like James v. Valtierra, 402 U.S. 137 (1971), which is cited by suburban defendants and HACI as stating that no local jurisdiction must accept low cost housing. In James v. Valtierra, supra, there was no proof of racially discriminatory motivation. In this case there is such proof, and evidence that it affected actual governmental decisions placing actual projects, with racial impact. Although local governments may not have to accept low-cost housing, when they refuse to do so for racial reasons, resulting in placement of housing elsewhere, with demonstrable racial impact, James v. Valtierra is inapposite.

The housing authority's claim that only the lack of a cooperation agreement prevented selection of sites outside IPS is placed in further doubt by the change in authority caused by Uni-Gov. Since that statute was passed, HACI and the Metropolitan Planning Commission have had county-wide authority to locate sites (1975 Tr. 71; see also Lawrence Br. 34-35). However, despite having over 3,000 applications for public housing, officials have built no new projects (1975 Tr. 2631-2632; 1975 Tr. 93-95).

^{18/} Given the importance of education in the scheme of local governments, see Brown v. Board of Education (Brown I), 347 U.S. 483, 493 (1954), one would normally expect officials deciding locations for public housing projects to consider and weigh the effect of the projects on schools. In fact, the "availability of schools" was one factor mentioned by the housing official at the 1975 hearing (1975 Tr. 255), as being considered during the site selection process.

finding discriminatory intent, the District Court could properly consider, together with other evidence, defendants' refusal to adopt integration proposals * * * even though that refusal alone would not prove the requisite intent."

Armstrong v. Brennan, supra, 539 F.2d at 636. See also United States v. Texas Education Agency (Austin I.S.D.), 564 F.2d 162, 169 n. 10 (5th Cir. 1977), reh. denied, 579 F.2d 910 (5th Cir. 1978).

The record shows that with the exception of schools, nearly all other factors were as equally available outside IPS as within; only the school district the children would attend was definitely changed as one went beyond the IPS suburban line. ^{19/}

19/ At the 1975 hearing, the court's questions to the housing official demonstrates it was well aware of the distinction and the implication of placing a project just inside IPS boundaries. The court asked the witness:

Can you tell me any practical difference between the east side and the west side of Emerson [Street] except that if they were on the west side the children went to IPS and if they were on the east side they went through Warren Township school? (Tr. 289).

and

Regardless of how this particular project was built, that is whether it was a turnkey job that your zoning board permitted or what, from the standpoint of all of these criteria you mentioned, can you tell me any difference at all between the location on the east side or the west side of Emerson Avenue. (Tr. 290).

The witness responded "I cannot specifically answer that question." (Tr. 290).

The nearly all-white enrollments of the suburban schools located beyond the boundary line, contrasted with the numbers of black children who would be living in the housing projects, goes far toward providing the "stark" pattern which the Court in Arlington Heights, supra, 429 U.S. at 266, describes as a factor suggesting the exercise of discriminatory intent.

The most telling single piece of evidence relates to the Eagle Creek Housing project. HACI planned to build the project on a plot of land located in Warren Township. The children would have gone to a Warren Township school. At the time two of the Township's 9,311 students were black (App. 26). The addition of students from the proposed project would have raised the black enrollment by about 200.^{20/} So HACI arranged--despite IPS' statement that existing facilities were inadequate--for Indianapolis to annex the project site, thus preserving the policy of confining housing projects to locations within Indianapolis and simultaneously insuring that Warren Township would not have to enroll the black children. No non-racial reason for the annexation was presented to the district court.

In all, the foreseeable effect of the site selection policy was to perpetuate and exacerbate the racial separation existing between city and suburb. Although "foreseeability"

^{20/} The project had 110 units (App. 25).

may not conclusively establish racial intent, Dayton II, supra, slip op. 8, n. 9, it is "quite relevant evidence of racially discriminatory purpose" (ibid.). Given the record in this case, we submit that the foreseeable effect of the site selections is another factor supporting the finding that the selection process was affected by racial considerations.

- C. The court's finding that the failure to expand IPS boundaries was based, in part, on the suburbs' intention to keep black students located primarily in IPS schools and out of suburban schools is not clearly erroneous

The district court found that the 1969 exclusion of school boundaries from the Uni-Gov expansion of Indianapolis boundaries to the Marion County line was "done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County." 456 Supp. at 188.

The initial suburban rejection of consolidation with IPS came in 1961 when nearly all of the over 22,000 black students in Marion County lived in the City of Indianapolis (1971 U.S. Ex. 1, 1973 Lawrence Ex. H). IPS was at that time nearly 27% black. Although the reorganization committee recommended more limited reorganization measures which did not require county-wide consolidation and retained smaller districts, the suburban districts rejected all forms of reorganization with IPS. See 541 F.2d at 1217-1218.

A 1961 law, enacted following reorganization, stated that if the City of Indianapolis expanded by annexation, school boundaries would also expand. Ind. Code. 20-3-14-1. However, under that act the losing school district, or its residents, could file a remonstrance suit, and stop annexation by IPS. During the period from 1961 to 1969, IPS was unable to annex any substantial areas due to remonstrances. 541 F.2d at 1218, 573 F.2d 406, n. 11, 1975 Tr. 168. During this period the black population of IPS increased; by 1969, IPS was 34% black, with over 36,000 black students (App. 25). The suburban areas had only 1,220 black students (ibid.).

Suburban opposition to including schools as part of the 1969 Uni-Gov legislation was unanimous, to the extent that Uni-Gov would not have passed if schools had been included.

The suburban districts contend that their opposition to county-wide consolidation in both 1961 and 1969 was to the large size of the proposed district, and to lack of local control and receptiveness (see, e.g., Lawrence Br. 19). However, these contentions do not explain or justify suburban opposition to all forms of consolidation, including the alternative plan of the committee which called for limited reorganization. In 1969, suburban desire to preserve the "independence" they secured by the 1961 reorganization was a factor opposing including schools in Uni-Gov. See, e.g., 1975 Tr. 51, 58.^{21/}

^{21/} Several witnesses stated that one reason the suburbs opposed an expansion of IPS as part of Uni-Gov was that they had recently been reorganized during the 1959-1961 reorganization (1975 Tr. 51, 58).

Given the history of opposition to black movement beyond the central city, covering a period well into the 1960s (see pp. 3-4, supra), the district court could legitimately infer that the opposition of the suburban areas to expansion of IPS' boundaries in 1960 and 1969 was based, at least in part, on discriminatory motivation. See Reitman v. Mulkey, 387 U.S. 369, 373 (1967), where the historical context in which a governmental decision was made is relevant to determining whether discriminatory intent was exercised. See also Arlington Heights, supra, 429 U.S. at 267; Keyes v. School District No. 1, Denver, Colo., supra, 413 U.S. at 207. In both 1960 and 1969, when the plans to expand IPS were rejected, nearly all of the substantial number of blacks in the county lived within IPS.^{22/} During this period, when any expansion by IPS was effectively thwarted by the remonstrance procedures in the 1961 legislation, the black population in IPS was growing, but the black population in the suburbs continued to be minimal.

The record also shows, and this Court has acknowledged, that there are legitimate, non-racial reasons for the suburban opposition to a complete county-wide system. See 541 F.2d at 1217.

^{22/} As late as the 1968-1969 year, only 3% of all blacks in the county were in suburban schools (App. 1). Only the Pike and Washington Township systems were 4% black or over.

However, the exercise of racially discriminatory intent is not to be completely ignored when non-racial factors are introduced. The court must be convinced that non-racial considerations were so compelling that the same result would have occurred absent racial considerations. See Arlington Heights, supra, 429 U.S. at 270, n. 21; Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). Considerations which are not so compelling cannot excuse the governmental exercise of racial animus. Cf. Loving v. Virginia, 388 U.S. 1 (1967). In addition, when alternative methods of accomodating the non-racial factors--such as the alternative reorganization proposed in 1959--which would have less racial impact were similarly rejected, the inference that racial considerations were substantial is strengthened.

The unanimous rejection of even limited reorganization supports the district court's inference that racial factors have significantly contributed to suburban opposition to consolidation. The suburbs' reliance on their 1961 reorganization, which excluded IPS, to again oppose any consolidation with IPS in 1969 under Uni-Gov (see n. 21, supra), suggests that the 1961 racial factors significantly affected the Uni-Gov legislation. The non-racial justifications for rejecting county-wide consolidation do not explain opposition to all forms of reorganization; and the added defendants failed to show that the non-racial factors could explain rejection of all forms of consolidation

or reorganization involving the suburban school districts and IPS. The tendency and desire of the suburban areas to insulate themselves from the black population of IPS was significantly strengthened by the failure of two governmental agencies to expand the boundaries of IPS, thereby "significantly involv[ing the State] with invidious discriminations."

Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

Even if the State legislature's failure to expand the boundaries of IPS in 1969 was not intentionally discriminatory, in freezing IPS' boundaries the State totally ignored the effects of the prior discrimination by public officials which aided the development of the racial disparity between city and suburb.

Unconstitutional action of this sort raises an affirmative obligation to undo the effects of that action. Dayton Board of Education v. Brinkman (Dayton II), No. 78-627, Supreme Court, July 2, 1979, slip op. 9-13. The State's failure in 1969 to take any action to undo those effects, and its decision to leave the IPS boundaries intact, places the State in violation of that affirmative duty, supplying an alternative implication of Uni-Gov as a basis for interdistrict relief.

III

THE DISTRICT COURT DID NOT ERR IN
ORDERING THE SUBURBAN SYSTEMS TO
ACCEPT BLACK STUDENTS FROM IPS

- A. The district court's finding that the defendants' discriminatory action had the effect of confining blacks within the IPS is not clearly erroneous

The Court has already stated that with proper findings of intent, the Uni-Gov and public housing action supports interdistrict relief. See 541 F.2d 1211; 573 F.2d 400. The remand order requested that the district court determine the segregative effects in order to permit the court to determine whether the precise remedy is appropriate. 573 F.2d at 407.

The district court's reference (456 F. Supp. at 190) to Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 406 (1977), 456 F. Supp at 190, demonstrates its recognition of its obligation to devise a remedy which would erase the effects of proven unconstitutional conduct. The court attempted to find segregative effect by determining the precise number of children affected by each discriminatory practice (see pp. 13-15, supra). However, in Dayton Board of Education v. Brinkman (Dayton II), No. 78-627, Supreme Court, July 2, 1979, and Columbus Board of Education v. Penick, No. 78-610 (Supreme Court, July 2, 1979), both decided after the district court acted in this case, the Supreme Court disavowed the view that segregative impact need be determined with mathematical precision. Dayton II, supra, slip op. 13; Columbus, supra, slip op. 15-17.

The court's approach seems inappropriate to this record of complex interrelationship of private discrimination and acts of public officials occurring over many years.^{23/} Those public acts sometimes merely adhered to, or enhanced, the private exercise of discrimination. At other times, the public acts were themselves intentionally discriminatory. The effects of discriminatory actions of long standing are usually most difficult to assess, see United States v. Columbus Municipal Separate School District, 558 F.2d 228, 231 n. 11 (5th Cir. 1977), cert. denied, 434 U.S. 1013 (1978); particularly so in cases like this, where the record describes discriminatory actions in the fields of both housing and education which have an interrelated impact. Swann v. Board of Education, 402 U.S. 1, 21 (1971); Keyes v. School District No. 1, supra, 413 U.S. at 202 (1973).

The court correctly found that a certain number of black students would have been educated in white suburban schools

^{23/} In such a case, "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an impossible task." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

had HACI chosen its sites for public housing free of the influence of racial discrimination,^{24/} and that had HACI done so, there would have been a indirect effect on other housing, resulting in more blacks seeking to reside in suburban areas, in private residences.^{25/}

However, the effects of the governmental discrimination--the historical discrimination, the location of public housing, and the degree of discrimination exercised in the government's failure to expand IPS boundaries--have been to establish the IPS-suburban boundary as a racial barrier to the movement of blacks from the area contained by IPS and the original, pre-Uni-Gov City of Indianapolis into suburban residences and schools. The record does not show that the IPS-suburban city or school lines were originally drawn with discriminatory intent, but shows that various state-sponsored discriminatory practices were designed to, and did in practice, limit the blacks in Marion County to schools, and housing, in the City of Indianapolis. Accordingly, over the years the boundary

^{24/} Although we agree that the HACI's site selection practices were discriminatory, we do not agree with the court's apparent conclusion that non-discrimination would have necessarily resulted in all public housing projects being placed outside IPS.

^{25/} When a housing project populated primarily by blacks, or even a school within IPS designated for blacks, was located in a white area, blacks moved into the area around the project or school (1973 Tr. 1573 (blacks moving into white area around Attucks school), 1978 Tr. 400-402 and IPS Ex. 98).

between city and suburbs took on an exclusionary role,^{26/} which is partially the result of governmental action.

The district court, and this Court, have relied on the Uni-Gov legislation and the public housing discrimination to establish the interdistrict effects necessary to support the court's order. Although these are obviously of primary import, the history of discrimination within IPS, combined with private discriminatory action limiting black movement outside IPS, has an interdistrict impact. The earmarking of a number of schools within IPS as suitable for blacks only, given the all-white context of the suburbs and the substantial and growing black population of IPS, is to some degree responsible for the development of the racial disparity between city and suburbs. The racial designation of schools affected residential development, Swann v. Board of Education, supra, 402 U.S. at 20; cf. United States v. Texas Education Agency (Lubbock I.S.D.), 600 F.2d 518 (5th Cir. 1979); accordingly, substantial areas of IPS were governmentally designated for blacks, and all of the suburban areas were likewise designated for whites.

The legislative and housing actions involved the government even more significantly in the racially exclusionary aspects of the IPS-suburban boundary. For

^{26/} The fact that a practice or policy was once racially neutral does not excuse the continued exercise of the policy where discriminatory intent has become a motivating factor. Armstrong v. Brennan, supra, 539 F.2d at 635.

example, by acquiescing in the racial aspects of the suburban opposition to any sort of consolidation with IPS, the local school authorities and state legislature placed their "power and prestige," Burton v. Wilmington Parking Authority, supra, 365 U.S. at 725, behind the racial barrier. See also Evans v. Buchanan, 393 F. Supp. 428, 438 (D. Del. 1975), cert. denied, 423 U.S. 963 (1975).

The housing practices have clearer and, for that reason, more nearly measurable discriminatory effects. The record described intentional use of the IPS-suburban boundary as a barrier to placement of low-income housing projects in suburban areas.^{27/} Some number of blacks were obviously kept out of suburban areas. In addition, insofar as the government's policies here honored the racial barrier aspect of the boundary line, the message could not have been lost that, in the view of public officials, blacks were not to be encouraged to settle, in large numbers, in suburban areas. Virtually identical governmental acts were taken in Evans v. Buchanan, supra, 393 F. Supp. at 438, leading the court there to conclude that "governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and the suburbs."

^{27/} In some instances, the line was changed solely to accommodate the policy. See pp. 5-6, supra.

Accordingly, the record in this case demonstrates unconstitutional action with a significant interdistrict effect. These governmental actions reinforce the proven private discrimination and have contributed to the racial disparity between IPS and the suburban school districts. The web of this discriminatory impact is seamless, and it is difficult to separately quantify^{28/} the effects of separate public and private actions. The overall pattern of these actions, however, was to retard the movement of blacks across the IPS-suburban boundary, from city to suburb.

To the extent that the IPS boundaries were frozen in 1969, the racial barrier was reinforced. IPS' ability to desegregate itself was limited and any potential dispersal of blacks was eliminated. See, e.g., Wright v. Council of City of Emporia, 407 U.S. 451 (1972). The "indirect effect" (see p. 37 and n. 25, supra) of placing of black students in white suburban areas was also eliminated by these actions. In all, the record shows that the racial disparity between city and suburb, which still exists (see p. 3, supra) was to some degree caused and perpetuated by the discriminatory governmental action.

^{28/} It is perhaps possible to quantify actions in placing public housing projects just inside the IPS border. Had the Eagle Creek project, for example been placed in Warren Township, approximately 200 black students would have gone to school in Warren Township. This type of quantification however, ignores the impact of this one action on the continuation of the overall pattern of interdistrict discrimi-

Once discriminatory action with interdistrict effects was proven, the burden shifted to the defendants to show that the discrimination contributed in no way to the racial disparity which presently exists between IPS and the suburban districts. While we do not contend that total nondiscrimination in education and housing matters in Marion County would have resulted in total county-wide racial balance, the record indicates that the aim of the discrimination was to separate whites and blacks, and that suburban whites are almost completely separated from blacks by the IPS boundary lines. The defendants failed to explain this almost total separation in non-racial terms, and therefore failed to satisfy their burden of showing that discriminatory action was without significant effect.

B. The court's plan will remedy the discriminatory exclusion of blacks from the suburban systems and does not unduly abridge existing legitimate local government authority

The court's interdistrict plan is, in fact, quite limited. It seeks only to transfer black students from IPS into suburban districts. It does not restructure any of the suburban districts.

The transfer of a significant number of blacks across the IPS-suburban line is a remedy well tied to the constitutionally impermissible involvement of state and local officials in the development of the boundary as a racial barrier. After taking action to discourage the movement of blacks across that line, the government will now be required

to affirmatively place blacks into suburban schools. This remedy is "tailor[ed]" to the "nature and extent of the * * * violation." Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 406, 420 (1977).

To the extent that the assignment of blacks erases the identification of suburban systems as for whites only, it will repair some degree of that portion of the constitutional violation which affected residential development in Marion County.^{29/} Although one case should only carry "a limited amount of baggage," Swann, supra, 402 U.S. at 22, there is no reason why a properly based remedy ordered in

^{29/} The court has already dismissed two suburban districts where the overall school enrollments are already over 15% black, and it lowered the number of transfers to one district where black residences have recently increased (see n. 9, supra). This suggests that as black residential development in suburban areas increases, thereby affecting school enrollments, the number of black transfers will decrease, and the transfer plan will eventually naturally expire.

In our post-trial brief, we suggested to the district court that an appropriate remedy would be for IPS to annex some portions of the suburban districts. In our view, this sort of action would be appropriate, given the history of manipulation of boundary lines and the present odd shape of IPS. In addition, annexation would remove the feature of the court's plan whereby some parents have no political voice in the school district where their children are educated (see p. 46, infra). Affirmance of the court's plan, however, would not preclude the parties from pursuing appropriate annexation efforts when the case returns to the district court.

a school desegregation case cannot be designed also to remedy the effects of constitutional violations on residential development.^{30/}

Under the court's remedy, no school lines are changed. No governing bodies are changed. Although all the suburban districts oppose the plan, no child or teacher now in a suburban school will be reassigned. All the suburban districts must do under the plan is to accept some black students into their schools, adopt some inservice training programs, and give first consideration to teachers displaced from IPS if the addition of the black students requires them to hire more teachers.

The suburban school districts will suffer no financial difficulties under the plan. Under the Indianapolis Court Ordered Transfer Act, Ind. Code. 20-8.1-6.5-1 et seq., the district transferring students must send tuition payments to

^{30/} Similarly, the court's injunction prohibiting HACI from building new public housing projects within IPS is supported by the findings of discriminatory intent. In addition, a court has jurisdiction to enjoin action that may interfere with effective implementation of a court-ordered remedy. Wright v. Council of City of Emporia, supra. To the extent the court found that future placement of predominantly black housing projects could exacerbate the racial disparity between city and suburb, a basis exists for the injunction.

At the same time, after a remedial plan is in effect, that racial disparity may be eliminated and future placement of public housing in IPS could then not have a detrimental impact on school enrollments. A basis could then exist for the court to lift its injunction, and to permit placement of new public housing within IPS.

the school district receiving students. Costs incurred by the receiving school district which are not covered by the tuition payments will be covered by state funds. Ind. Code. 20-3.1-6.5.-4. In addition, the suburban districts have been authorized to receive the federal funds the court directed them to apply for (Perry App. 59). It also appears transportation costs will be borne by IPS (see Perry App. 54).

Accordingly, the remedy does not alter the existing structure of local school governments in Marion County to any significant degree. For that reason, the court's plan is consistent with the suggestion in Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974), that the local political autonomy expressed through the citizen's establishment of local school districts is due a degree of deference by the courts.

We have, in the past, argued that the plan's "one-way" nature could impose an unfair burden of desegregation on black students and parents (see United States' brief filed March 21, 1979 at 30-32). The court states in its April 24, 1979 opinion (Perry App. 48) that substantial numbers of whites will be bused under the intradistrict plan which will follow implementation of interdistrict transfers. If that is true, it could well mitigate the "one-way" nature of the interdistrict plan.^{31/}

^{31/} In addition, the plaintiff-intervenors, representing the class composed of all black students in IPS, sought and vigorously support the mandatory one-way transfer order. Thus, while the one-way transfers are mandatory for particular individuals they are, in a sense, voluntary for the class, and no affected individual has challenged them.

However, the court has yet to actually order a specific intradistrict plan into effect.^{32/} Accordingly, it is not possible at this point to actually determine whether the overall desegregation plan will or will not be unfairly burdensome to black students. We suggest that the burden can best be determined after all necessary plans are ordered into effect; if the burden then seems unfair, the parties can suggest modifications to the district court.

It is true that only black students are removed from the school districts in which they reside and are placed in one in which they, and their parents, have no political voice. The court has stated that it will appoint a "monitoring commission" to supervise implementation of the interdistrict plan (Perry App. 57-58). This Court should suggest to the district court that this commission be directed to give black parents special consideration to insure that despite their lack of political power in the suburban districts, the parents of black students transferred to suburban districts have satisfactory access to governmental officials responsible in some manner for their children's education.

^{32/} In our brief filed in Nos. 78-1800 and 78-2006, we argued that some form of intradistrict relief, either as part of an interdistrict plan or as a complete remedy for the segregation in IPS, must be ordered into effect next fall.

C. The district court erred in finding that defendants's discriminatory action had no impact on white enrollments

IPS has appealed the court's decision that the record supports only "one-way" transfers. As we suggested above (see p. 39, supra), the impact of the violation has not only retarded the movement of blacks across the IPS line, but that the unconstitutional action has also effectively designated IPS as the school district in the county most appropriate for blacks, and the suburban districts as the ones most appropriate for whites. The court identified one effect of this action--keeping blacks in IPS and out of the suburbs.

However, as the Supreme Court said in Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973), actions that designate as one area or school for blacks reciprocally designate other areas or schools for whites. Accordingly, just as the government's action effectively designated IPS for blacks, the suburbs were "governmentally" designated for whites.^{33/} However, the district court appears to have totally ignored this reciprocal effect in devising its remedy.

^{33/} The record, to an extent, supports this. In its 1971 opinion, the district court found that some white teachers and students assigned to integrated schools "found havens in the outside schools." 332 F. Supp. at 676. See also 1971 Tr. 1198-1200.

See also, e.g., 1978 Tr. 458-475, where Dr. Karl Tauber, an IPS witness and demographic expert, testified that the segregation of IPS had a "two-way" interdistrict effect. These actions, Dr. Tauber stated, encouraged whites to avoid IPS and seek to reside in suburban areas.

There is a great range of possible relief for this arm of the "two-way" impact. The remedy which causes the most minimal intrusion into local autonomy would be the voluntary transfer of white students from suburban districts into IPS. Annexations, a two-way mandatory transfer plan, and county-wide consolidation are other, more extensive remedies directed to two-way relief.

It may be that, despite its rejection of IPS' position on two-way relief, the court may have felt that its one-way plan would have a reciprocal effect on whites in Marion County. The plan may prove, in practice, to be a method of dissolving the racial disparities between IPS and the suburbs, particularly since the City is now, for most purposes, coextensive with county boundaries and the city-suburb distinctions of past years may be now less intense.

We are hesitant, at this late stage, to suggest the case be returned for more proceedings. However, it does appear to us that the court erred in holding that the discriminatory effects in the record are only "one-way." For that reason, we suggest that the district court be directed to permit the parties to suggest modifications of the plan which would eliminate the vestiges of the discrimination which encouraged whites to leave IPS, and which designated IPS as the district in Marion County for black students. The parties should consider the possibility that the court's plan, as is, may eliminate some aspects of that designation.

The effects of its implementation will, of course, provide the best proof of that.

Given the necessity for prompt relief, however, we suggest that any remand for further consideration of the two-way impact should in no way delay implementation this fall of the court's interdistrict transfer plan, along with an intradistrict plan to desegregate the schools in IPS not desegregated by the interdistrict transfers (see pp. 14-15, supra).

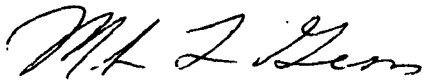
CONCLUSION

For the reasons stated herein, we suggest that the court's order of July 9, 1979, directing implementation of interdistrict transfers be affirmed, and this case be remanded with directions to the district court to order into effect an intradistrict plan to desegregate those schools in IPS not desegregated by the interdistrict transfer plan.

Respectfully submitted

VIRGINIA McCARTY
United States Attorney

DREW S. DAYS, III
Assistant Attorney General



BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I served of the foregoing
Brief for the United States on counsel of record by mailing
two copies to the following addresses:

John O. Moss, Esquire
156 East Market Street
Suite 902
Indianapolis, Indiana 46204

John Preston Ward, Esquire
Post Office Box 88392
Indianapolis, Indiana 46208

Thomas I. Atkins, Esquire
10 Post Office Square
Suite 610
Boston, Massachusetts 02109

William L. Taylor, Esquire
Center for National Policy Review
Catholic University Law School
Washington, D. C. 20064

Theodore Sendak
Attorney General
219 State House
Indianapolis, Indiana 46204

Charles W. Hunter, Esquire
810 King Cole Building
Indianapolis, Indiana 46204

Lewis C. Bose, Esquire
William M. Evans, Esquire
1100 First Federal Building
Indianapolis, Indiana 46204

William O. Schreckengast, Esquire
380 Main Street
Beech Grove, Indiana 46107

Richard L. Brown, Esquire
156 East Market Street
Indianapolis, Indiana 46107

Richard D. Wagner, Esquire
Suite 2860
Indianapolis, Indiana 46204

John Wood, Esquire
Bamberger & Feilbleman
500 Union Federal Building
Indianapolis, Indiana 46204

Richard J. Darko, Esquire
One Indiana Square
Suite 2700
Indianapolis, Indiana 46204

James T. Crawford, Jr., Esquire
2560 City-County Building
Indianapolis, Indiana 46204

Donald Schabel, Esquire
One Indiana Square
Suite 3300
Indianapolis, Indiana 46204

This 5th day of October, 1979.



MARK L. GROSS
Attorney