

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1730 through 75-1737,
75-1765, 75-1936, 75-1964,
75-1965 and 75-2007

UNITED STATES OF AMERICA,

Plaintiff-Appellee

DONNY BRURELL BUCKLEY, et al.,

Plaintiffs-Intervenors-Appellees

v.

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

Defendants-Appellants

On Remand from the Supreme Court of the United States

STATEMENT OF POSITION FOR THE UNITED STATES

JAMES B. YOUNG
United States Attorney

DREW S. DAYS, III
Assistant Attorney General

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

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	1
STATEMENT	
1. Procedural History	2
A. Background	2
B. Proceedings Presently Before the Court	5
C. Disposition by the Supreme Court	7
2. Facts	10
INTRODUCTION AND SUMMARY	12
ARGUMENT:	
I. THIS COURT SHOULD REQUIRE THE PROMPT IMPLEMENTATION OF AN INTRA-DISTRICT PLAN PENDING FINAL DISPOSITION OF THE CASE	14
II. THE STANDARDS GOVERNING INTER-DISTRICT RELIEF IN SCHOOL DESEGREGATION CASES	17
A. Inter-District Relief May Be Ordered Only Following Proof of a Constitu- tional Violation with Inter-District Segregatory Effects	17
B. <u>Washington v. Davis</u> and <u>Village Of</u> <u>Arlington Heights</u> Establish That a Violation of Fourteenth Amendment Rights Depends on Proof -- Either Direct or Indirect -- of Invidious Racial Intent	21
III. APPLICATION OF THE ABOVE STANDARDS TO THIS CASE	23
A. The Record Shows Limited Inter- District Effects of Intentionally Segregatory Action, But There was was no Finding That the Passage of Uni-Gov or the Selection of Sites for Public Housing was Intentionally Segregatory	23

	<u>Page</u>
B. This Court Should Reconsider the Relief Ordered and Direct the Implementation of a More Equitable Remedy	30
CONCLUSION	33

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Alexander v. Holmes County Board of Education</u> , 396 U.S. 19 (1969)	16
<u>Bradley v. Milliken</u> , 540 F.2d 229 (6th Cir. 1976), cert. granted No. 76-447, 45 U.S.L.W. 3363 (November 15, 1976)	30
<u>Brown v. Board of Education</u> , 347 U.S. 483 (1954)	31
<u>Cisneros v. Corpus Christi I.S.D.</u> , 467 F.2d 142, 153 (5th Cir. 1972)	32
<u>Davis v. Board of School Comm'rs of Mobile County</u> , 402 U.S. 33 (1971)	17
<u>Evans v. Buchanan</u> , 393 F. Supp. 428 aff'd, 423 U.S. 963 (1975)	31
<u>Green v. County School Board</u> , 391 U.S. 430 (1968) ...	17
<u>Hills v. Gautreaux</u> , 425 U.S. 284 (1976)	18, 19, 20, 21
<u>Keyes v. School District No. 1, Denver, Colo.</u> , 413 U.S. 189 (1973)	17, 24
<u>Milliken v. Bradley</u> , 418 U.S. 717 (1974)	5, 6, 16, 19 20, 21, 28
<u>North Carolina State Board of Education v. Swann</u> , 402 U.S. 43 (1971)	18
<u>Spencer v. Kugler</u> , 404 U.S. 1027 (1972), aff'g 326 F. Supp. 1235 (D. N.J. 19)	18
<u>Swann v. Charlotte-Mecklenburg Board of Education</u> , 402 U.S. 1 (1971)	18, 24
<u>Village of Arlington Heights v. Metropolitan Housing Corp.</u> , _____ U.S. _____ (1977) 45 U.S.L.W. 4073	9, 21, 22, 23, 25-27, 28
<u>Washington v. Davis</u> , 426 U.S. 229 (1976)	8, 9, 12, 21, 22, 23, 25-27, 29

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1730 through 75-1737,
75-1765, 75-1936, 75-1964,
75-1965 and 75-2007

UNITED STATES OF AMERICA,

Plaintiff-Appellee

DONNY BRURELL BUCKLEY, et al.,

Plaintiffs-Intervenors-Appellees

v.

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

Defendants-Appellants

On Remand from the Supreme Court of the United States

STATEMENT OF POSITION FOR THE UNITED STATES

QUESTION PRESENTED

What disposition should this Court order under the Supreme Court decision vacating the previous decision of this Court and remanding for further consideration in light of recent Supreme Court decisions.

STATEMENT

1. Procedural History.

A. Background

This is the fourth time that the issue of desegregation of the Indianapolis Public Schools (hereafter IPS) has been brought to this Court. The most recent decision of this Court describes in some detail the history of this case, see 541 F.2d 1211, 1212-1215 (7th Cir. 1976); for that reason we will only briefly review the progress of the case to this point.

The first district court order in this case was entered following the filing on May 31, 1968, of the United States' complaint which alleged that the Indianapolis school system intentionally segregated children on account of their race. The district court agreed on August 18, 1971, 332 F. Supp. 655 (S.D. Ind. 1971), finding that within the Indianapolis school system, "segregation was imposed and enforced by operation of law." 332 F. Supp. at 678. The court delayed entry of a complete remedial order, however, suggesting that desegregation within Indianapolis alone, a city which was approaching 38% black in its elementary school population, would not work.^{1/} The court suggested that the only feasible desegregation plan would necessarily include the suburban areas of Marion County surrounding the city of Indianapolis, and directed the joinder of suburban school

^{1/} Limited relief concerning faculty reassignment, majority-to-minority transfers, and relocation of one black high school was ordered. 332 F. Supp. at 681.

districts.^{2/} 332 F. Supp. at 678-681.

This court affirmed the district court's findings on February 1, 1973, holding that the evidence demonstrated the segregative effects of gerrymandering of school boundaries, the use of optional zones, new school construction policies, and faculty assignment practices, all of which were sufficient to justify an inference that the school authorities operated with discriminatory intent. 474 F.2d 81, 88 (7th Cir. 1973). The Supreme Court denied certiorari on June 25, 1973. 413 U.S. 920 (1973).

Prior to the district court's decision concerning appropriate relief, plaintiff-intervenors Buckley, et al., were granted party status, and the State of Indiana, the State Attorney General, the State Superintendent of Public Instruction, and nineteen school districts surrounding the IPS were joined as defendants.^{3/} IPS joined two municipal housing authorities^{4/} as third-party defendants. On July 6, 1973, the district court issued its decision. 368 F. Supp. 1191 (S.D. Ind. 1973). The court found the State of Indiana has "practically unlimited" power to regulate its public school systems, and that it assumes the responsibility

2/ The court directed the joinder of suburban school districts located within the boundaries of "Uni-Gov" jurisdiction. "Uni-Gov", a consolidation of the city and suburbs for supervision of certain governmental functions, is discussed in more detail at pp. 26-27, infra.

3/ The nineteen school districts included districts located within Marion County, Indiana, in which Indianapolis is located, and outside Marion County as well.

4/ The Housing Authority of the City of Indianapolis (HACI) and the Metropolitan Development Commission of Marion County.

for the conduct of local school authorities. 368 F. Supp. at 1200-1201. The court found certain discriminatory acts of IPS to be directly imputable to the State defendants, id. at 1205, and found that the failure of the state to enforce the state law prohibiting racial segregation in public education was an omission inhibiting desegregation of IPS. 368 F. Supp. at 1203, 1205. The court also held that actions of the suburban school districts resisting the expansion of IPS had the effect of making present desegregation of IPS impossible. 368 F. Supp. at 1203-1205. The court also held that blacks had been traditionally excluded from housing within the suburban districts, which limited their location to the boundaries of IPS and which was one cause of the resulting segregation within the IPS schools. Id.

The court held that inter-district relief was necessary in order to effectively desegregate IPS, and that the State Assembly had the authority and duty to formulate such a plan. 368 F. Supp. at 1205. The court held that all nineteen named defendants should cooperate in the plan of desegregation. 368 F. Supp. at 1209. The court ordered other relief concerning inter-district transfers, which relief the court subsequently stayed by order dated December 6, 1973. The court did, however, order IPS to rearrange its enrollment pattern so that, by the beginning of the 1973-74 school year, no school would have less than 15% black enrollment. No intra-district relief was ordered concerning predominantly black schools. Id. at 1209.^{5/}

5/ Subsequent to this order, the district court found the IPS proposed plan to be insufficient, and appointed a commission to devise an interim intra-district plan, which was ultimately adopted.

This Court affirmed in part and reversed in part on August 21, 1974. 503 F.2d 68 (7th Cir. 1974). This Court affirmed the court's appointment of a commission and implementation of the interim plan it devised. 503 F.2d at 78. It held that there was evidence to support the district court's findings that the State officials have "promoted segregation and inhibited desegregation within IPS," so that the state must assist the desegregation of IPS schools "within its boundaries." 503 F.2d at 80.^{6/} Concerning the inter-district remedy, this Court held that the Supreme Court's decision in Milliken v. Bradley, 418 U.S. 717 (1974), would not permit relief to extend beyond the metropolitan area bounded by "Uni-Gov." This Court reversed that portion of the district court order requiring inter-district relief beyond the Uni-Gov boundaries, and directed the district court to reconsider its rulings concerning an inter-district remedy within the Uni-Gov boundaries in light of Milliken. 503 F.2d at 86. Certiorari was denied. 421 U.S. 929 (1975).

B. Proceedings Presently Before the Court

After holding a hearing from March 20-25, 1975, the district court entered its decision on remand on August 1, 1975. 419 F. Supp. 180 (S.D. Ind. 1975). The district court held that the location of housing projects inside the boundaries of IPS by the defendant HACI has "tended to cause and perpetuate

6/ This Court noted that "many steps had been taken to dismantle the IPS district school system within its boundaries, but more steps must be taken." 503 F.2d at 80.

the segregation of black pupils inside IPS territory."

419 F. Supp. at 182. The court also held that the suburban units of government have consistently resisted the expansion of IPS boundaries and have discouraged the movement of blacks into the suburbs. In addition, the court found that the elimination of schools from the expansion of governmental authority to county-wide boundaries effectuated by the passage of the Uni-Gov act "inhibited desegregation with IPS." 419 F. Supp. at 183. These findings, the district court held, warranted inter-district relief. Id. The court ordered IPS to transfer to suburban school districts black students in grades one through nine, to begin in 1975-76, so as to achieve an enrollment in each suburban district of approximately 15% black and to effect an acceptable desegregation plan. 419 F. Supp. at 185. The district court also enjoined HACI from locating any future public housing projects within the boundaries of IPS, or from reopening one existing project for persons other than the elderly. 419 F. Supp. at 186.

On July 16, 1976, this Court affirmed, 541 F.2d 1211 (7th Cir. 1976), noting that its task was to determine whether the record justified inter-district relief under the principles enumerated in Milliken, supra. This Court reviewed the circumstances surrounding the passage of the Uni-Gov act, as well as history of past state actions concerning consolidation of school district boundaries, and found that the passage

of Uni-Gov created "the existing situation which confines black students within IPS," with the suburban districts making the passage of Uni-Gov in its final form "politically expedient." 541 F.2d at 1221. This Court found, on this basis, that the limited inter-district relief was proper.

This Court affirmed the lower court's finding that the location of the public housing projects within IPS boundaries tended to "cause and perpetuate the segregation of black pupils in IPS territory," and held that the record showed a "purposeful, racially discriminatory use of state housing." 541 F.2d at 1223. This Court affirmed the injunction against future location of public housing, holding that the relief was designed to correct the discriminatory effects of past HACI activity. Id. Judge Tone dissented from the decision of the majority.

C. Disposition by the Supreme Court

Petitions for certiorari were filed by the state defendants, by the Board of School Commissioners of IPS, and by HACI.^{7/} The state's petition argued that the court erred in finding the passage of Uni-Gov responsible for segregation of students within IPS, and that the evidence presented concerning the location of housing projects

7/ Appeals were filed by several other defendants. The Supreme Court took action on none of these, but its action in vacating this Court's judgment disposed of all matters before the Supreme Court in this case. See 45 USLW 3508 (January 25, 1977).

did not demonstrate a constitutional violation. The IPS petition argued that the court erred in ordering a remedy without allowing the affected parties an opportunity to develop and submit their own plan. That petition also argued that the remedy contemplated the transfer of black students residing within IPS to school districts outside IPS, without transfers of white students in the suburban districts into IPS. This "one-way" remedy, the petition suggested, was not commensurate with the inter-district violation. The petition of HACI argued that the court's decision conflicted with Washington v. Davis, 426 U.S. 229 (1976) in that the constitutional violation concerning the locations of housing projects was based on their racial impact. HACI also argued that the courts' injunction against location of new public housing projects conflicted with decisions of other circuits.

In its response to the petitions for certiorari and jurisdictional statements filed, the United States suggested that the writs of certiorari be granted. We argued that the findings did not support the mandatory, one-way inter-district relief ordered by the district court. The record did not, we suggested, demonstrate that the failure of the state to expand the IPS boundaries was an intentionally segregative act which would justify broad inter-district relief. The record did reflect proof of some inter-district effects traceable to purposeful official action, especially those actions

earmarking IPS schools as the "black" schools in the metropolitan area, which have contributed to the disparate racial population in the IPS schools as compared with the population in the schools located in the suburban area. These effects, we suggested, justified relief different from that ordered by the district court. The response of the intervening plaintiffs recommended the dismissal of appeals and denials of the writs, or the affirmance of the decisions below. That response argued that the segregation existing between IPS and the suburban districts was traceable to historical, state-imposed and approved discriminatory policies. In addition, the plaintiff-intervenors argued that even if the historical context is not sufficient, the courts below made findings that the actions with respect to the location of housing projects and the passage of Uni-Gov were carried out with invidious intent.

On January 25, 1977, the Supreme Court granted the petitions for certiorari filed by the State, by the Board of School Commissioners of IPS, and by HACI. The Court summarily vacated the judgment of this court and remanded the case "for further consideration in light of Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. ____ (1977) [45 USLW 4073 (January 11, 1977)] and Washington v. Davis, 426 U.S. 229 (1976)". 45 USLW 3508. On February 24, 1977, this Court established a schedule for the filing of statements of position by all parties to this case.

2. Facts

The Brief for the United States filed when this case was last before this Court reviews the record in this case. (Brief at pp. 6-16). For that reason, and because no additional proceedings have been held, we will not repeat that description, but merely refer the Court's attention to it.

Although there have been no new proceedings at the district court level since March of 1975, counsel for IPS have recently provided counsel for the United States with updated enrollment figures for the 1976-77 school year.^{8/} These figures include enrollments, by race, for each school within IPS, and total enrollments, by race, in each suburban jurisdiction in Marion County. The overall breakdown of the schools within IPS, by racial enrollment, is as follows:

Elementary Schools			
<u>% Black</u>	<u>No. Black Students</u>	<u>No. White Students</u>	<u>No. of Schools</u>
0 - 10.0	63	641	2
10.1 - 20.0	2301	12601	27
20.1 - 30.0	2305	7096	19
30.1 - 40.0	3228	6229	17
40.1 - 50.0	3075	3855	10
50.1 - 60.0	1026	965	3
60.1 - 70.0	891	510	2
70.1 - 80.0	21	6	1
80.1 - 90.0	905	112	2
90.1 - 100.0	11480	296	19

8/ Counsel for the United States moved to supplement the record with these statistics on March 15, 1977.

High Schools

<u>% Black</u>	<u>No. Black Students</u>	<u>No. White Students</u>	<u>No. of Schools</u>
0 - 10.0	0	0	0
10.1 - 20.0	375	2010	1
20.1 - 30.0	623	1730	1
30.1 - 40.0	2127	3949	3
40.1 - 50.0	740	954	1
50.1 - 60.0	2495	2120	1
60.1 - 70.0	1955	1138	2
70.1 - 80.0	1341	510	1
80.1 - 90.0	1728	246	1
90.1 - 100.0	0	0	0

The statistics submitted by IPS show the following racial enrollments, for 1976-77, in the suburban school districts within Marion County, as well as for IPS:

<u>Jurisdiction</u>	<u>% Black</u>
Decatur	0.35
Franklin	0.50
Lawrence	5.53
Perry	0.45
Pike	16.45
Warren	1.49
Washington	16.76
Wayne	1.59
Beech Grove	0.11
Speedway	0.95
IPS	44.93

INTRODUCTION AND SUMMARY

When this case was before the Supreme Court, we noted that although the government had prevailed on the merits of this suit -- originally brought in 1968 to challenge racial discrimination by and within IPS -- full relief has been delayed for several years by the proceedings relating to inter-district relief. Supreme Court Brief for the United States, at 11. Relief for the intra-district discrimination should be delayed no longer.

Our brief argued that the district court's order requiring mandatory one-way reassignments of black children from IPS to the surrounding school districts was error, for several reasons. First, even if mandatory inter-district student assignments are warranted, singling out black students from IPS would unfairly place the impact of desegregation on one race, would disparage black parents' interest in voting for school board members who will direct the education of their children, and appears based on the erroneous assumption that there is something wrong with schools containing a majority of black children. Id. at 12. Not only is such a remedy inequitable, it also wrongly labels IPS as an undesirable place for white students. This Court should disapprove the use of mandatory one-way inter-district reassignments.

The brief suggested that it was not clear whether this Court and the district court had found the requisite discriminatory intent (see Washington v. Davis, supra) in the state legislation relating to expansion of IPS or in the action of HACI, and

that the decisions under review may have been based on housing discrimination unrelated to discrimination in the public schools. Id. at 11-14. The Supreme Court's remand order requires reconsideration of those issues. Insofar as mandatory inter-district reassignments and the injunction against HACI are at issue, that reconsideration should be done initially in the district court.

Finally, the brief acknowledged that defendants' action did have inter-district effects which might warrant relief not involving mandatory reassignments. Id. at 19-20. This court should instruct the district court to modify its inter-district injunctive order so as to provide such limited relief, pending litigation of the issues relating to mandatory reassignments.

ARGUMENT

I. THIS COURT SHOULD REQUIRE THE PROMPT IMPLEMENTATION OF AN INTRA-DISTRICT PLAN PENDING FINAL DISPOSITION OF THE CASE.

When school opens next September six years will have passed since the district court found that IPS was "a segregated school system wherein segregation was imposed and enforced by operation of law." 332 F. Supp. at 678. The attainment of complete relief within IPS has been deferred for the past 5 1/2 years while the parties have litigated an entirely different issue -- whether the law permits or requires some form of inter-district relief. While the district court did provide some intra-district relief in its order of July 20, 1973, the relief then ordered was limited to the desegregation of predominantly white schools, for the 1973-74 school year, see p. 4, supra, and made no provision for the desegregation of predominantly black schools. Id. As we discuss in Parts II and III below, the Supreme Court's remand of the inter-district aspect of this case appears to require further consideration of the inter-district issue by the district court. We urge that, whatever action this Court decides to take with respect to inter-district relief, this Court require the district court to take the steps necessary to complete by this September the process of intra-district desegregation.

At the time the July 20, 1973 order was entered, there were 19 elementary schools with racial enrollments above 80% black, with 14 of these schools being 97% black or above. Two additional schools had racial enrollments above 60% black.

368 F. Supp. at 1228. In reviewing the order of the district court in which the desegregation of the predominantly white schools was required, this court stated that in spite of this order, "more desegregative steps must be taken." On remand from this order, the district court noted that, for the 1974-75 school year there were still 19 black elementary schools, and one high school, with racial enrollments over 80% black. 419 F. Supp. at 185. The district court declined to order relief for fear of accelerating white flight. Id.

The figures cited at pp. 10-11, supra, indicate that, as of the 1976-77 school year, there were more predominantly black schools than when this court stated that more steps need be implemented. In 1976-77, there are 21 elementary schools and one high school in which the student enrollment was at least 80% black. Those schools enroll a substantial number of the black students residing within IPS; 49% of all black elementary students are enrolled in these 22 elementary schools, and 15% of the black high school students in IPS are enrolled in this one high school.^{9/}

9/ The statistics submitted to us by IPS show that there are 25,325 black elementary students within IPS, with 12,385 of those enrolled in the 21 schools with a racial enrollment of at least 80% black. There are 11,490 black high school students in IPS, with 1,728 of them enrolled in the one high school with a racial enrollment above 80% black.

The district court has failed to require any intra-district desegregation of predominantly black elementary schools within IPS, apparently based on its view that such desegregation would put some schools over a "tipping point" and accelerate white flight. This position was rejected by the Supreme Court in Milliken, supra, 418 U.S. at 747 & n. 22 and cases cited therein. In our view, further desegregation of the predominantly black schools in IPS is clearly required and long overdue; the belief that the overall racial enrollment of IPS is over what the district court refers to as a "tipping point" is not a legal barrier to the desegregation of IPS within its boundaries, either as an interim remedy or, if the record ultimately does not justify inter-district relief, as a final disposition of the case. See Alexander v. Holmes County Board of Education, 396 U.S.19 (1969).

II. THE STANDARDS GOVERNING INTER-DISTRICT
RELIEF IN SCHOOL DESEGREGATION CASES.

A. Inter-District Relief May Be Ordered Only
Following Proof of a Constitutional Viola-
tion with Inter-District Segregatory Effects

The principles governing the construction of remedial decrees in school desegregation cases are well established. The goal of the remedial decree should be to put the schools and students where they would have been had the constitutional violation not occurred; in other words, to eliminate the effects of the constitutional violation "root and branch." Green v. County School Board, 391 U.S. 430, 438 (1968). The effects of unconstitutional action may be widely felt, for "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 203 (1973).

When designing a plan to remedy segregative activities, courts must consider the practical implementation of their remedial measures and approve plans which promise "realistically to work" Green, 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 Commissioners of Mobile County, 402 U. S. 33, 37 (1971). The goal in school desegregation cases is to devise a realistic and workable plan to effectively eliminate the impact of the prohibited segregative activity.

A court may not attempt to remedy the effects of purely private action, Spencer v. Kugler, 404 U.S. 1027 (1972), aff'g 326 F. Supp. 1235 (D. N.J. 1971); nor should it, when attempting to remedy unconstitutional segregative actions devise a plan which establishes a remedy requiring district-wide racial balancing of student enrollments which is not tied to the proven discrimination. Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 16 (1971).^{10/}

The proper approach, therefore, requires a court to determine, as precisely as possible, the consequences of the illegally segregatory acts, and to eliminate their effects. That is the method by which courts should rectify constitutional violations in a manner consistent with a proper judicial role. "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. "[A]ll reasonable methods [must] be available to formulate an effective remedy." North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971). Courts have discretion to choose among many tools designed to bring about the eradication of the effects of the violation. Cf. Hills v. Gautreaux, 425 U.S. 284, 296-297 (1976).

^{10/} 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 on the facts of each case.

In Milliken v. Bradley, supra, the Supreme Court established standards governing a federal court's equitable authority to grant inter-district relief. Such a remedy, the Court concluded, could be ordered only after proof of "a constitutional violation within one district that produces a significant segregative effect in another district." Milliken, supra, 418 U.S. at 745. The segregative effect to which the Court referred must be "inter-district segregation," id., or "activity that had a cross-district effect," id. at 748. See also concurring opinion of Mr. Justice Stewart, 418 U.S. at 757. The broad inter-district relief decreed by the lower courts in Milliken, the complete merger of the city and suburban school districts, was reversed because there was no proof of any activity by school officials which had any effect beyond the boundaries of the Detroit school system; all the proof considered by the courts in Milliken solely concerned discrimination within the city schools.

The Court's decision in Hills v. Gautreaux, 425 U.S. 284 (1976), applied the Milliken decision. The Hills court stated that the basis of the reversal in

Milliken was the fact that "there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had any significant segregative effects in the suburbs." Hills, supra, 425 U.S. at 294. Hills suggests that under Milliken, supra, inter-district relief in a school desegregation case may be ordered only if the constitutional violation proved "implicated" (Hills, supra at 296) the school districts to be affected by the inter-district relief.

However, as Hills, supra, explains, relief must not be limited to the boundaries of one governmental district where there is proof of a constitutional violation with effects felt beyond those boundaries. In Hills, supra, the lower courts had found that the Department of Housing and Urban Development had chosen sites for public housing which confined their residents to segregated communities within the City of Chicago. The Supreme Court held that "the District Court has the authority to direct HUD to engage in remedial efforts in the metropolitan area outside the city limits of Chicago." Id. at 306. "The relevant geographic area for purposes of [HUD's] housing options is the Chicago housing market, not the city limits." Id. at 299.

In Indianapolis, there is no dispute, at this point, that the defendant School Commissioners of IPS have taken discriminatory action within the boundaries of IPS. This finding of the district court, see 332 F. Supp. 655, was affirmed by this Court,

484 F.2d 81, and the Supreme Court denied certiorari. 413 U.S. 920 (1973). The propriety of inter-district relief now requires a review of any actions which had the impact of causing, or contributing to the segregation and racial identifiability as between the suburban districts and IPS. The most recent opinion of this Court, focussed on the failure of the State to extend the boundaries of IPS when the Uni-Gov Act was passed, and the action of HACI in locating public housing projects within the boundaries of the IPS. See U.S. v. Bd. of Sch. Comrs. of City of Indianapolis, supra, 541 F. 2d at 1212. Accordingly, under Milliken, supra, and Hills, supra, both these actions, and any others which may have had a similar impact must have been constitutional violations with inter-district segregatory effects before broad inter-district relief may be considered.

B. Washington v. Davis and Village of Arlington Heights Establish That a Violation of Fourteenth Amendment Rights Depends on Proof -- Either Direct or Indirect -- of Invidious Racial Intent

The remand order of the Supreme Court in this case requires this Court to reconsider its affirmance of the district court's order in light of Washington v. Davis, supra and Village of Arlington Heights, supra. In these cases, the Supreme Court clarified the method by which state-imposed racial discrimination which violates the Fifth or Fourteenth Amendments may be proved. These cases held that in order to establish such a constitutional violation, the state action challenged as racially discriminatory must be shown to have been purposefully discriminatory. See Washington, supra,

426 U.S. at 239, Arlington Heights, supra, 429 U.S. at _____, 45 USLW at 4077. A constitutional violation may be found only if the action "claimed to be racially discriminatory has been traced to a racially discriminatory purpose." Washington, supra, 426 U.S. at 240. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights, supra, 429 U.S. at _____, 45 USLW at 4077.

Both cases recognize that invidious intent is seldom admitted, see Washington, supra, 426 U.S. at 241, and establish that invidious intent may be proved by circumstantial evidence. Arlington Heights, supra, 429 U.S. at _____, 45 USLW at 4077. Arlington Heights, in fact, gives careful guidance concerning some types of evidence which may be introduced to prove that official action was taken with the requisite discriminatory intent, and enumerated some of the factors which could be used to prove the presence of such intent:

- (1) the racial impact of the official action,
- (2) the historical background of the official action,
- (3) the specific sequence of events leading up to the action,
- (4) a departure from the usual procedural sequence,
- (5) a departure from the usual substantive consideration guiding similar official action, and
- (6) legislative or administrative history.

Accordingly, pursuant to the Supreme Court's remand order, the official actions relied on to justify inter-district relief must be considered in light of these factors to determine whether either action was taken in violation of constitutional principles.

III. APPLICATION OF THE ABOVE STANDARDS TO THIS CASE.

- A. The Findings Show Limited Inter-District Effects of Intentionally Segregatory Action, But There was No Finding That The Passage of Uni-Gov or the Selection of Sites for Public Housing Was Intentionally Segregatory

Washington v. Davis and Village of Arlington Heights state that before a court may find a racial equal protection violation of the Fifth or Fourteenth Amendments, there must be proof of purposeful, racially discriminatory state action. See pp. 21-22, supra. In our view, the record as it presently exists discloses intentionally discriminatory state action which has tended to limit the attendance of black students within the Indianapolis metropolitan area to schools located within IPS.

Under State law up to 1949, and through state and local action until the filing of this lawsuit, most schools within IPS became identified as intended for students of one race or the other. See 332 F. Supp. at 663-672. That fact combined with private and official actions which historically discouraged blacks from residing in surrounding school systems, see 332 F. Supp. at 661-663, 368 F. Supp. at 1203-1204, and 419 F.2d at 183, to create a system whereby most blacks in the Indianapolis area would reside in Indianapolis and be educated in Indianapolis schools. The designation by IPS of schools for white or black students only, and the resistance of suburban areas to the movement of blacks into those areas, were intentionally discriminatory. Id. On the other hand, there is no finding that the suburban school systems operated racially discriminatory

school systems.^{11/} While official discrimination not directly related to the schools might not warrant school relief (see Swann, supra, 402 U.S. at 23), the mutual reinforcement and inter-relationship of school and non-school discrimination produce effects on the schools which should be remedied.

These discriminatory actions, we submit, resulted in some portion of the racial segregation presently existing between the city and suburbs, and between schools located within IPS and those located inside the suburban school districts. The "earmarking [of] schools according to their racial composition . . . 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, Denver, Colo., supra, 413 U.S. at 202 (1973). See also Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 20-21 (1971), where the Supreme Court discussed the effect of racial practices in schools on the development of racially segregated neighborhoods. Although we do not suggest that the discriminatory practices of IPS are solely responsible for the disparate racial enrollments in the city and suburban schools, see p. 23, supra, those actions have encouraged both public and private segregatory actions which have had inter-district racial effects. IPS' practice of racially "earmarking" schools, the apparent acquiescence of the State in this practice, see 368 F. Supp. at 1200-1205, and the discouragement by the suburban areas to integrated private or public housing, see 419

^{11/} The district court noted that "with a few exceptions, none of the defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none...." 368 F. Supp. at 1203.

F. Supp. at 183, have all served to continue, to the present, the designation of IPS as the school district in which blacks in the metropolitan area should attend. In turn the suburban schools have become identified as schools primarily for white students. The freezing of IPS boundary lines by State legislation, see 541 F.2d at 1217-1218, 1220-1222, has further served to insulate the suburban areas from attendance by black students in suburban schools, and to make even more permanent the racial disparity between city and suburbs built, in part, on racially discriminatory practices.

On the present state of the findings any inter-district relief in this case should be framed with the goal of eradicating the above inter-district effects. Since the discriminatory acts of IPS and of the State and suburban areas had a tendency not only to limit blacks to residential areas inside IPS and to Indianapolis schools, but also encourage the voluntary placement of white persons outside the limits of IPS, the inter-district relief should be constructed to remedy the resulting racial impaction of schools. In our view, this relief should encourage voluntary transfers of students between IPS and the surrounding jurisdictions. Mandatory inter-district reassignments such as were imposed by the district court would go beyond what is appropriate at this stage, given the nature of the inter-district effects.

The remedy imposed by the district court, and approved by this Court, was based on the placement of public housing by HACA and the passage of Uni-Gov by the State assembly. See 541 F.2d at 1218. Both Washington v. Davis, supra, and Village of Arlington Heights, supra, require that before relief is

based on these actions, proof of discriminatory intent behind such action must be established.

In our view, the findings in this case on both issues fall short of the invidious intent required by Washington, supra, and Arlington Heights, supra. The district court found resistance to annexation of suburban areas by the City of Indianapolis both in connection with Uni-Gov and otherwise, until the expansion of school district lines was eliminated from consideration. The court found that the failure of the General Assembly to include school boundaries with the expansion of the remaining local government services expanded by Uni-Gov "inhibited desegregation with IPS." 419 F. Supp. at 183. Thus the district court did not find that the General Assembly acted with invidious intent in passing Uni-Gov in its final form, but only that the impact of Uni-Gov was to inhibit the desegregation of IPS schools beyond existing IPS boundaries.^{12/} The district court and the parties focussed primarily on the impacts of Uni-Gov's passage on the desegregation of IPS, rather than on the existence of invidious intent in the exclusion of school boundaries from the Uni-Gov expansion of the city lines. See, e.g., Tr. of March 20, 1975, at p. 360.

^{12/} In an earlier opinion, the district court held that "it is apparent that confining IPS to its existing territory had the effect" of preventing the achievement of effective desegregation. 368 F. Supp. at 1204.

This Court appears to have decided this issue under similar principles, finding that the passage of Uni-Gov justified inter-district relief. This Court found the Uni-Gov Act was a "substantial cause of inter-district segregation," 541 F.2d at 1220, but did not consider whether the act was racially motivated.^{13/} Accordingly, this Court did not find the segregative intent which both Washington v. Davis, supra, and Village of Arlington Heights, supra, require before a court may find a constitutional violation requiring relief.

Similarly, the district court's finding regarding HACI's selection of public housing sites was that the HACI action "tended to cause and to perpetuate the segregation of black pupils in IPS territory." 419 F. Supp. at 182. The court noted that the suburban areas had historically discouraged blacks from moving there, and that they resisted the placing of housing projects in suburban areas, Id. at 182-183. However, the court did not find that the actions of HACI in selecting specific locations were intentionally discriminatory, but found only that the actions of the housing authorities had contributed to inter-district segregation. Id. at 183.

^{13/} In fact, this Court stated that the considerations against the expansion of school boundaries were "apparently not racially motivated," but that they "cannot justify legislation that has an obvious racial segregative impact." 541 F.2d at 1221.

This Court found that the location of the public housing projects "contributed to the racial disparity in residential and school populations between the inner city and the suburbs." 541 F.2d at 1223. Both courts, we suggest, appear to have relied basically on the racial composition of the housing projects and of the suburbs to find that the failure of HACI to locate projects beyond the boundaries of IPS (and of the City of Indianapolis, as they then existed), had a discriminatory impact on the schools. This finding of discriminatory impact led the courts to hold that the requirements of Milliken, supra, that an inter-district effect of unlawful discrimination ^{14/} be proven, was satisfied by the housing evidence.

If, however, it were shown that the exemption in the Uni-Gov Act and related legislation and the placement of public housing projects were intentional acts of official racial discrimination in the operation of the schools, the broad segregatory effect across the city line, would, based on Milliken, supra, justify broad inter-district relief.

^{14/} This Court in its most recent opinion found that the record concerning the location of public housing sites supported the district court's findings and showed "a 'purposeful, racially discriminatory use of state housing.'" This Court then cited one portion of our brief, stating that it "supports this view." 541 F.2d at 1223.

The analysis in the Government brief, however, suggests that the location of housing projects exacerbated the existing segregation between the city and suburban schools and that the racial impact of the site selections was foreseeable. Brief of United States at 41. We did not address the question, in that brief or to the district court, whether the location of housing projects was taken with segregatory intent. The brief followed the then commonly held view that the racial impact of the site selection, coupled with the past history of housing in the area, was sufficient to further justify limited inter-district relief. Those factors are, of course relevant, but it is not clear whether, without more, the requirements of the Arlington Heights decision would be satisfied.

In our Brief to the Supreme Court, we argued, as we do here, that such segregatory intent has not been found to date. However, Village of Arlington Heights, supra, is in our view a substantial clarification of the method by which the existence of segregative intent can be circumstantially proven. In view of the district court's familiarity with the record, we suggest that the reconsideration of the record in light of recent directions from the Supreme Court be done initially by the district judge, with the parties given an opportunity to review the record and address the recent clarification of the law in the area of proof of intent.^{15/}

^{15/} If this court decides to retain the case and reach its own conclusion on the effects of Washington, supra, and Arlington Heights, supra, we suggest that a schedule for full briefing of the case be established which will allow the parties sufficient time to fully address the issues before this Court

B. This Court Should Reconsider the Relief
Ordered and Direct the Implementation of
a More Equitable Remedy

As we suggest above, the record presently discloses a limited inter-district effect which is tied to intentionally segregatory state and local action. See pp. 23-25, supra. The relief, therefore, should involve action of the State and IPS to encourage the voluntary transfer of both black and white students and teachers between IPS and the suburban districts.^{16/} Such relief is tied more directly to the type of constitutional violation proved -- the official encouragement of voluntary, private movement of whites away from IPS and state-sanctioned placement of educational facilities for blacks solely in Indianapolis. A remedial plan calling for voluntary transfers would be more administratively feasible than the substantial reassignment of black students ordered below, would be responsive to the district court's concerns relating to suspected "white flight", and in light of the large numbers of black children living near suburban schools due to the placement of several public housing projects near IPS boundaries, see 541 F. Supp. at 182 and the many white children living just outside IPS boundaries in suburban districts, is appropriately directed at the practicalities of the situation

^{16/} "In order to be effective such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." Swann, supra, at 26-27. The state may be required to share in the expense of such an arrangement. Cf. Bradley v. Milliken, 540 F.2d 229 (6th Cir. 1976), cert. granted No. 76-447, 45 U.S.L.W. 3363 (November 15, 1976).

in Indianapolis.^{17/} In addition, due to the State's involvement in encouraging the resultant disparate racial school enrollments between IPS and the suburban areas, see p. 23, supra, State participation in the preparation of a plan for voluntary student transfers and in its implementation and presentation to the community, would also be appropriate remedial action tied to the scope of the intentional segregative acts taken by the State.^{18/}

In addition to the fact that the record, to date, does not support the inter-district mandatory reassignments ordered by the district court, see pp. 25-29, supra, the relief ordered by the district court would not be appropriate even in the event

^{17/} The Indianapolis Case is not like Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975), aff'd 423 U.S. 963 (1975), in which the city and suburban areas traditionally had cooperated, before Brown v. Board of Education, 347 U.S. 483 (1954), to promote racially discriminatory inter-district assignments. The scope of the violation found to date does not justify broad inter-district relief of the type ordered by the district court. The limited inter-district remedy we propose, along with complete intra-district desegregation, see Part I, will, in our view, eradicate the lingering effects of the past discrimination which has been found in the operation of the public schools.

^{18/} Another possible remedial measure which may be available to the district court is to order IPS to exercise its annexation authority to add those areas which would, in the ordinary course, have been expected to have been annexed -- especially those which cut into the boundaries of IPS and account for its unusual shape. See 332 F. Supp. at 656. In several of these areas, white students presently assigned outside IPS travel to schools located further from their residence than schools located within IPS. The addition of such areas to IPS, and the addition of the white students residing within them, would serve to aid the desegregation of IPS schools, and would be designed to remedy the failure of IPS to expand its borders, which has helped identify the suburban schools as intended for white students, and has been a partial cause of the racial identifiability between city and suburban schools.

that a more extensive inter-district violation is ultimately found. The "one-way" reassignment of black students discriminatorily places the whole responsibility for inter-district desegregation of IPS on black students. See Cisneros v. Corpus Christi I.S.D., 467 F.2d 142, 153 (5th Cir. 1972). In fact, it serves to continue the desegregation of IPS as intended for the black students in the metropolitan area by refusing to place whites involuntarily in IPS. It suggests that there is something wrong with a school with a majority of black students, which is supported neither by fact nor by law. See p. 16, supra. Finally, it disparages the interest of black parents in participation in their child's education by involuntarily removing them from the political process by which their children's education is governed. Those black parents are effectively disenfranchised from that school board election in which they have a substantial interest, a disenfranchisement suffered by no white parents.

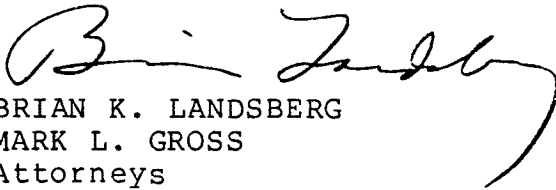
CONCLUSION

For the reasons stated herein, we recommend that this Court remand this case to the district court for prompt reconsideration of the case in light of recent Supreme Court decisions. We recommend that this Court direct the district court to order the implementation of further intra-district relief for the 1977-78 school year, and direct the district court to require IPS and the state defendants to prepare and implement a limited inter-district plan involving methods of encouraging voluntary transfers of students and teachers between IPS and the suburban school districts. In addition, this Court should disapprove the implementation of any inter-district plan which requires the transfer solely of black students, and direct the district court to implement only such plans as require an equitable distribution of efforts to desegregate between black and white residents of the metropolitan area.

Respectfully submitted,

JAMES B. YOUNG
United States Attorney

DREW S. DAYS, III
Assistant Attorney General


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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Statement of Position of the United States was served on counsel to this case by mailing two copies to the following addresses:

John Wood, Esq.
Bamberger & Feibleman
500 Union Building
Indianapolis, Indiana 46204

John O. Moss, Esq.
156 E. Market St., Suite 902
Indianapolis, Indiana 46204

John Preston Ward, Esq.
2951 North Capitol Avenue
Indianapolis, Indiana 46204

Donald P. Bogard, Esq.
Executive Assistant Attorney General
Office of the Indiana Attorney General
219 State House
Indianapolis, Indiana 46204

Harold E. Hutson, Esq.
1322 Circle Tower
Indianapolis, Indiana 46204

Richard J. Darko, Esq.
Bingham, Summers, Welsh & Spilman
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204

Donald A. Schabel, Esq.
111 Monument Circle, Suite 1200
Indianapolis, Indiana 46204

Richard D. Wagner, Esq.
Kreig, DeVault, Alexander & Capehart
2860 Indiana National Bank Tower
Indianapolis, Indiana 46204

Lewis C. Bose, Esq.
Bose, McKinney & Evans
1100 First Federal Building
Indianapolis, Indiana 46204

William O. Schreckengast, Esq.
Kitley, Schreckengast & Davis
380 Main Street
Beech Grove, Indiana 46107

Charles W. Hunter, Esq.
810 King Cole Building
7 North Meridian Street
Indianapolis, Indiana 46204

Kurt F. Pantzer, Jr., Esq.
Royse, Travis, Hendrickson & Pantzer
500 American Fletcher Building
Indianapolis, Indiana 46204

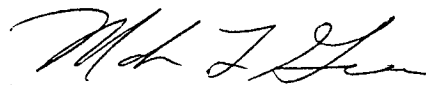
Gary Landau, Esq.
2501 City-County Building
Indianapolis, Indiana 46204

Charles G. Reeder, Esq.
600 Union Building
Indianapolis, Indiana 46204

Richard L. Brown, Esq.
Butler, Brown & Hahn
156 East Market Street
Indianapolis, Indiana 46204

H. William Irwin, Esq.
1200 Merchants Bank Building
Indianapolis, Indiana 46204

This 21st day of March, 1977.



MARK L. GROSS
Attorney
Department of Justice
Washington, D. C. 20503

